

## ADMINISTRATIVE ADJUDICATION AND ADJUDICATORS

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### INTRODUCTION

The appointment, removal, supervision, and allocation of cases to Administrative Law Judges (“ALJs”) and other non–Article III adjudicators in the United States federal government continues to create vexing legal issues for courts and commentators. This Article addresses all of these issues together, to facilitate a holistic understanding of where non–Article III adjudicators are situated within the federal government. This is a broad project, and thus it will be impossible to go into the depth that each of the areas covered may warrant. The hope is that this Article will present a useful framework for advancing collective understanding of the issues. This project is largely descriptive, with some prescriptive elements that grow out of an accurate description of the institutions and underlying principles involved.

Issues surrounding the appointment, removal, and supervision of non–Article III adjudicators are doctrinally distinct from questions concerning the allocation of cases to non–Article III adjudication. The appointment question, which was most recently addressed by the Supreme Court’s decision in *Lucia v. SEC*,<sup>1</sup> revolves around whether the particular adjudicator is an officer of the United States, and thus must be appointed pursuant to the Constitution’s Appointments Clause. If the Appointments Clause applies, then the adjudicator must be appointed either by the President, with the advice and consent of the Senate, or if Congress so specifies, and the adjudicator is an inferior officer, by the President alone, a department head, or a court of law.<sup>2</sup> If the adjudicator is a government employee and not an officer, then the Constitution places virtually no constraint on the method of appointment.<sup>3</sup>

There are two issues surrounding the removal of non–Article III adjudicators. First, for due process-related reasons and concerns over potential political meddling in individual adjudications, ALJs and some other non–Article III adjudicators are granted a degree of independence manifested in protection from at-will removal,<sup>4</sup> but it is unclear whether this insulation is

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<sup>1</sup> 138 S. Ct. 2044 (2018).

<sup>2</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>3</sup> *See id.*

<sup>4</sup> 5 U.S.C. § 7521 (2012).

actually constitutionally required. Second, the protection of adjudicators from at-will removal has come under recent scrutiny because the Supreme Court has determined that two levels of for-cause protection from discharge for other officers of the United States unduly impedes the President from exercising the functions of the presidency.<sup>5</sup> This throws into doubt the protections from discharge enjoyed by non–Article III adjudicators in independent agencies, since most independent agency heads are themselves protected from discharge without cause.<sup>6</sup> It is not yet clear, however, whether the prohibition on two levels of for-cause protection applies to non–Article III adjudicators.

The issues surrounding the supervision of non–Article III adjudicators are similar to those concerning their removal. First, due process issues may arise if non–Article III adjudicators are rewarded or punished based on the substance of their decisions or if they are subject to direction in their handling of particular matters.<sup>7</sup> Second, in some tension with the prior concern, if non–Article III adjudicators are not subject to reward, punishment, or direction in their adjudicative functions, the question arises whether this impermissibly hampers the President’s ability to fulfill the functions of the presidency.

These issues surrounding removal and supervision of non–Article III adjudicators obviously point in different directions. Due process counsels insulation of adjudicators from outside influence while insulation of executive branch officials of any kind raises the issue of presidential power over that branch. This issue also arises in some controversies over allocation of cases to non–Article III adjudicators. Many regulatory statutes allow agency heads to assign cases to themselves to maintain control over agency policy.<sup>8</sup> This power is rarely exercised, but when it is, it raises the same tension between due process and presidential power.

In general, the allocation of cases to non–Article III adjudicators raises concerns that grow out of Article III’s vesting of the judicial power in the federal courts, although due process issues sometimes also arise. Conventionally, analysis of the proper allocation of cases to non–Article III adjudicators begins with the sorting of cases into two categories: public rights disputes and private rights disputes.<sup>9</sup> The thought is that public rights disputes are, for a variety of reasons, much more constitutionally amenable to non–Article III adjudication than are private rights disputes. However, as Congress has assigned more cases to non–Article III tribunals, the Supreme Court

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<sup>5</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010).

<sup>6</sup> See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 771 (2013).

<sup>7</sup> The strength of this possible due process norm should not be overstated since agency heads review the adjudicatory decisions within their agencies and sometimes even conduct adjudications themselves. This means that politics have not been banished from non–Article III adjudications, and adjudication by political appointees has never been found, on its own, to violate due process.

<sup>8</sup> See, e.g., 7 U.S.C. § 211 (granting the Secretary of Agriculture the authority to determine rates and charges on his own initiative).

<sup>9</sup> See, e.g., *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

has struggled to provide guidance on when the assignment is proper and when it is not. The line between public rights and private rights has become blurred, and the doctrine has become messy.

Sorting the cases more finely into distinct categories of public and private rights would go a long way toward providing greater clarity concerning when assignment of cases to non–Article III adjudicators is constitutionally permissible. Further, the process of categorization will be helpful in understanding the constitutional limits to assignment of cases to non–Article III tribunals.

It is also important to bear in mind that judicial review in federal court may be sought in many, if not most, of the cases assigned by Congress to non–Article III adjudicators. In some circumstances, this is vital to the constitutionality of the initial assignment of the case to a non–Article III tribunal. However, there are cases in which, by precluding judicial review, Congress may make the tribunal’s decision final and other cases in which Congress instructs reviewing courts to defer to the tribunal’s determinations.<sup>10</sup> Because the degree to which federal courts conducting judicial review should defer to the conclusions of non–Article III adjudicators on matters of law, fact, and policy may determine the constitutionality of the assignment, one of the goals of this article is to demonstrate how the categorization of cases helps understand the importance of deference.

It is vitally important to evaluate the role of non–Article III adjudicators pragmatically, with the primary considerations being the effectiveness of the regulatory schemes involved and the fairness of the adjudications performed. The volume of agency adjudications means that it would be impossible to abolish non–Article III adjudication and simply reallocate the caseload to Article III courts. Further, the success of important federal benefits and regulatory schemes depends on the availability of expert adjudicators who can resolve a high number of disputes efficiently. And the appointment, supervision, and removal of these adjudicators should be performed in ways that advance and preserve the quality and fairness of the adjudicatory systems involved. Of course, clear constitutional lines may not be crossed, but general principles of separation of powers, without clear evidence of abuse, should rarely, if ever, be employed to frustrate efforts by Congress and the Executive Branch to accomplish important federal policies.

This Article proceeds as follows. Part I addresses the appointment, removal, and supervision of non–Article III adjudicators. Part II addresses the assignment of cases to non–Article III adjudicators in public and private rights cases. After providing background in Section II.A, Section II.B includes a detailed examination of the different types of public rights, and Section II.C includes a detailed examination of different types of private rights.

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<sup>10</sup> See, e.g., 20 U.S.C. § 1234g(c)–(d) (requiring courts to accept an agency’s determinations of fact while not precluding judicial review); *Am. Disabled for Attendant Programs Today v. U.S. Dep’t of Hous. & Urban Dev.*, 170 F.3d 381, 390–91 (3d Cir. 1999) (holding that a HUD determination is not subject to judicial review under the Administrative Procedure Act when an alternative legal remedy exists).

Sections B and C analyze the constitutional concerns over assignment of cases within each category to non–Article III adjudicators.

#### I. APPOINTMENT, REMOVAL, AND SUPERVISION OF NON–ARTICLE III ADJUDICATORS

This Part analyzes current U.S. constitutional law and statutes relevant to the appointment, removal, and supervision of non–Article III adjudicators. As a purely normative matter, unless there is a clear transgression of a provision of the Constitution, the goal of administrative adjudication should be to employ neutral, competent adjudicators who approach each case with an open mind and treat the parties appearing before them fairly and with respect. Adjudicators should not be subject to political pressure regarding their decisions, but they must understand that they cannot reject the law as laid down by agency heads, Congress, or the federal courts. Biased or incompetent adjudicators ought to be subject to removal or discipline, but it may be difficult or impossible to construct a system for doing so that is not overly infected with politics, thus risking even greater harm. Even if an ideal system cannot be achieved, the system should be constructed to get as close as possible. Our understanding of the Appointments Clause, general separation of powers principles, and the Due Process Clauses should be informed by these principles and should not be construed to hinder the utility, fairness, and competence of administrative adjudication.

##### A. *Appointment*

The Appointments Clause specifies the following method for appointing officers of the United States:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>11</sup>

This provision applies to non–Article III adjudicators unless it is determined that they are “employees” rather than “officers.” As discussed below, most if not all non–Article III adjudicators are likely to be considered officers.

There are two broad categories of non–Article III adjudicators in the federal government: those who function as adjuncts to the federal courts and

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<sup>11</sup> U.S. CONST. art. II, § 2, cl. 2.

those who work in federal agencies, both Executive Branch and independent.<sup>12</sup> The two largest categories of federal court adjuncts are Magistrate Judges and Bankruptcy Judges.<sup>13</sup> By statute, federal Magistrate Judges are appointed for a term of years by majority vote of the District Judges in the district in which the Magistrate Judge is assigned to sit.<sup>14</sup> Congress has authorized the Judicial Conference of the United States to determine how many Magistrate Judges shall be appointed in each district.<sup>15</sup> This method of appointment satisfies the requirements of the Appointments Clause because the Magistrate Judges are inferior officers and Congress has authorized their appointment by a court of law: the district court.

Congress has specified that the appointment of Bankruptcy Judges is made by the judges of the court of appeals for the circuit in which the Bankruptcy Judge will sit.<sup>16</sup> The number of Bankruptcy Judges for each Circuit is statutorily specified by Congress, as is the length of their appointment.<sup>17</sup> Like Magistrate Judges, this method of appointment complies with the Appointments Clause because the Bankruptcy Judges are inferior officers, and Congress has authorized their appointment by a court of law: the court of appeals.

Both Magistrate Judges and Bankruptcy Judges may be removed by the appointing authority during their terms but only for “incompetence, misconduct, neglect of duty, or physical or mental disability.”<sup>18</sup> Because neither Magistrate Judges nor Bankruptcy Judges are Article III judges, their jurisdiction and authority is constitutionally constrained.

There are also numerous nonadjudicatory officials within the Judicial Branch, and adjudicatory officials who also fulfill nonadjudicatory (administrative) roles with various methods of appointment. Because they are not adjudicators, they are not discussed in this article, except to note that Congress has specified that many such officials are appointed by the Chief Justice of the United States, which is controversial since the Chief Justice alone is not generally considered a department head or court of law.<sup>19</sup>

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<sup>12</sup> See ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43746, CONGRESSIONAL POWER TO CREATE FEDERAL COURTS: A LEGAL OVERVIEW 12–13 (2014).

<sup>13</sup> See Benjamin P.D. Mejia, *Magistrates After Arkison & Wellness: The Outer Limits of Consent*, 71 N.Y.U. ANN. SURV. AM. L. 509, 510 (2016).

<sup>14</sup> 28 U.S.C. § 631(a), (e).

<sup>15</sup> *Id.* § 631(a).

<sup>16</sup> *Id.* § 152(a)(1).

<sup>17</sup> See *id.* § 152.

<sup>18</sup> *Id.* § 152(e) (Bankruptcy Judges); *id.* § 631(i) (Magistrate Judges). The two provisions are identical except that the provision regarding Magistrate Judges uses the word “incompetency” rather than “incompetence.” Although I am certain that there is some deep significance to this difference, I have been unable to unearth it. My best guess is that both refer to the status of a person who could be adjudicated unable to manage his or her affairs, not simply being a low-quality judge. The meaning of “incompetency” shades more in that direction than mere “incompetence” but that’s my instinctive sense of the meaning of those words.

<sup>19</sup> See James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 Nw. U. L. REV. 1125, 1171 (2013). It is not entirely certain that the Chief Justice

The focus of this article is largely on the much more controversial status of non–Article III adjudicators connected to federal agencies with no direct institutional connection to the federal courts, although some attention to Bankruptcy Judges is necessary for a complete analysis. Both executive branch and independent agencies employ numerous ALJs and other officials whose primary role is to adjudicate cases. In recent decades, most of these adjudicators have been hired in a nonpolitical, merit based process.<sup>20</sup> Within the executive branch, until recently ALJ applicants are screened by the Office of Personnel Management (“OPM”), which administers a written exam, conducts a competitive merit selection process, and provides a list of qualified applicants to agencies who must hire exclusively from the list.<sup>21</sup>

The Supreme Court has held on more than one occasion that ALJs are “Officers of the United States” who must be appointed pursuant to the Appointments Clause.<sup>22</sup> Although some have argued that only ALJs with final decision-making authority are “Officers,”<sup>23</sup> the black letter law is to the contrary—as exemplified by the Supreme Court’s most recent pronouncement on the matter in its much-anticipated *Lucia* decision that the power and discretion that ALJs exercise when presiding over adjudicatory hearings is sufficient to confer officer status.<sup>24</sup> Because decisions by ALJs are normally reviewable by agency heads, ALJs are inferior officers, not principal officers.<sup>25</sup> As a matter of constitutional law, the final decision of who to appoint as an ALJ must be made in compliance with the Appointments Clause, which usually means the head of the ALJ’s department, whether that is a Cabinet Secretary or the individual or group leading an independent agency.

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should not be considered a Court of Law or Department Head for Appointments Clause purposes, but investigation of those issues is beyond the scope of this article.

<sup>20</sup> VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 2 (2010).

<sup>21</sup> 5 U.S.C. § 1104(a)(2). This system of appointment of ALJs was abandoned pursuant to a recent Executive Order exempting ALJs from the competitive service. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018).

<sup>22</sup> *See, e.g.*, *Freytag v. Comm’r*, 501 U.S. 868, 882 (1991).

<sup>23</sup> *See, e.g.*, *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1132 (D.C. Cir. 2000).

<sup>24</sup> Professor Jennifer Mascott has demonstrated quite persuasively that the Supreme Court’s test for officer status—that the official exercises significant authority pursuant to the laws of the United States—is substantially narrower than the original meaning of the phrase “Officer of the United States” in the Constitution. *See* Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 507–08 (2018). In my view, in light of the massive growth of the federal government, it would be pointless to extend officer status as far as Professor Mascott would. In short, no Department Head would have the time to do anything other than rubber stamp the appointment of the vast number of officials who would qualify as officers of the United States under Mascott’s analysis. It seems to me that holding agency heads directly responsible for the actions of those with significant authority is sufficient to create clear lines of accountability. It is unnecessary to go through the empty ritual of affixing the signature of the agency head onto the appointment papers of thousands, or hundreds of thousands, of officials without such authority.

<sup>25</sup> *Lucia v. SEC*, 138 S. Ct. 2044, 2051 n.3 (2018).

There is a plausible, but unpersuasive, argument that limiting the choice to a list provided by an entity such as the OPM violates the Appointments Clause because it eliminates the appointing authority's absolute power over appointments.<sup>26</sup> Because nothing in the Constitution specifically addresses this issue, the constitutional question would be whether the process unduly impedes the President's authority over the execution of the law. Perhaps if evidence established that OPM's involvement has impeded agencies' ability to select the most competent candidates, or has slowed down the process inordinately, there might be cause for constitutional concern. Otherwise, as long as the appointing authority can reject the whole list and ask for another, and adjudicators' decisions are reviewable by agency heads, confining the choice to a list provided through a merit-selection process should be constitutionally permissible. The contrary view would have far-reaching consequences, potentially hindering Congress's ability to prescribe the required expertise and representation of important interests on numerous agencies.

Although formal selection by the agency head may be sufficient to cure any constitutional problem with the appointment of ALJs across the government, the Trump administration has gone further. On July 10, 2018, President Trump issued an Executive Order<sup>27</sup> eliminating the written exam and merit selection process for ALJs.<sup>28</sup> While the Order does not expressly provide a rationale, it specifically refers to *Lucia*'s affirmation that ALJs are officers of the United States.<sup>29</sup> Presumably the intent is to empower agency heads by not only specifying that they make the actual appointments, but also freeing them to abandon the merit-based process.<sup>30</sup> However, if no statute empowers the agency head alone to make the appointment, the Appointments Clause would require the appointment to be made by the President, with the advice and consent of the Senate.<sup>31</sup>

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<sup>26</sup> See, e.g., Mascott, *supra* note 24, at 548; Thomas C. Rossidis, *Article II Complications Surrounding SEC-Employed Administrative Law Judges*, 90 ST. JOHN'S L. REV. 773, 775 (2016).

<sup>27</sup> Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018).

<sup>28</sup> *Id.* at 32,755; see generally 5 U.S.C. § 3302(1) (2012) (granting the President the authority to exempt appointments from the competitive service).

<sup>29</sup> Exec. Order No. 13,843, 83 Fed. Reg. at 32,755.

<sup>30</sup> As noted, the *Lucia* decision does not preclude requiring agency heads to appoint ALJs from a list provided through a merit-based process. For example, after the President's Order concerning the appointment of ALJs, the Secretary of Labor issued his own order instituting a merit-based selection process for ALJs within the Department of Labor. See Department of Labor, Procedures for Appointment of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44,307, 44,307 (Aug. 30, 2018). The order specifies that the Secretary may reject the recommended candidate and order a new search, implying that the Secretary will not stray beyond the merit selection process in choosing ALJs. *Id.* However, because political appointees are included in the process, there is no guarantee that the process will not be merit-based in name only. See *id.*

<sup>31</sup> Title 5 U.S.C. § 3105 may grant blanket authority to agency heads to appoint ALJs. See 5 U.S.C. § 3105 ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.")

There is a small chance that this Executive Order will politicize appointments enough to endanger the objectivity or appearance of objectivity of ALJs. Small because, for the most part, the appointment of ALJs is unlikely to be of much concern to political appointees within most agencies. However, the appointment of ALJs should not become politicized in a similar manner to the selection and appointment of federal judges where, in controversial cases, party affiliation of the judge and the nominating President has become a reliable predictor for judges' voting patterns. This would surely erode confidence in the fairness of administrative adjudication with little or no gain in accountability.

One way to avoid politicization, proposed by Professor Kent Barnett,<sup>32</sup> would be for Congress to assign the appointment of ALJs to a court of law, for example, a special panel of the D.C. Circuit similar to the court that appointed Independent Counsels under the Ethics in Government Act of 1978.<sup>33</sup> Putting aside the question of whether federal courts are truly apolitical, this approach likely would still be consistent with the Appointments Clause. The adjudicatory functions performed by ALJs are far removed from functions that the Court has concluded must be subject to direct presidential control, and the text of the Appointments Clause does not limit appointments by "courts of law" to officials working within the judicial branch.<sup>34</sup> The Supreme Court approved the appointment of Independent Counsels (prosecutors) by a special panel of the D.C. Circuit,<sup>35</sup> which took the appointment of an official exercising quintessentially executive powers out of the President's hands. The Court did recognize an "incongruity" limitation on interbranch

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<sup>32</sup> See Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 802 (2013). Professor Barnett applies a three-part test to determine that judicial appointment of ALJs would be constitutionally appropriate: (1) That Congress has a "significant justification" for the interbranch appointment; (2) That the appointment does not "impede the appointing branch's central functioning;" and (3) The interbranch appointment does not "impede the competing branch's central functioning." *Id.* I agree with Barnett that these are sensible considerations for evaluating the wisdom of an interbranch appointment. But, in my view they are too restrictive of Congress's authority under the Appointments Clause, especially the requirement that Congress have a significant justification. This sounds like intermediate constitutional scrutiny, which is not the traditional standard for evaluating Congress's decisions regarding the structure of the government. I would stick with Barnett's second and third criteria, understood as iterations of the general separation of powers standard that the Court has applied for at least the last thirty years, under which structural arrangements are constitutional unless they violate a particular procedural or structural provision or "unduly interfer[e]" with a branch of government's ability to perform its constitutional function. See *Morrison v. Olson*, 487 U.S. 654, 693 (1988).

<sup>33</sup> See Title VI of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. § 591 *et seq.* (2012)).

<sup>34</sup> Jerry Mashaw has pointed out that in an 1838 statute, Congress provided for appointment of steamboat inspectors by the local federal district court, indicating that the early understanding of the Appointments Clause was not to confine the appointment of inferior officers by courts to officers working within the judicial branch. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 189 (2012).

<sup>35</sup> *Morrison*, 487 U.S. at 676.

appointments.<sup>36</sup> But, if appointment of a prosecutor by a court does not transgress that limitation, it is unlikely that appointment of an agency adjudicator by a court would do so.

Professor Jennifer Mascott, relying heavily on work by Professor Akhil Amar,<sup>37</sup> disagrees with Barnett, and has argued that Congress may not assign appointment of ALJs to a court of law.<sup>38</sup> In her and Amar's view, the best reading of the Appointments Clause is that each department head may be empowered by Congress to appoint inferior officers within their own department, but that Congress may not empower anyone to appoint inferior officers in another department.<sup>39</sup> Amar's analysis is an odd combination of textualist and pragmatic arguments that he denominates "intratextualism" because he employs the familiar interpretive devices of discerning the meaning of words in light of the use of those same words elsewhere in the text and presuming perfection in drafting.<sup>40</sup> But his analysis is not entirely convincing.

As a textual matter, Amar first states that the words of the Appointments Clause "seem an apt way of conferring on appointing authorities the simple power to pick their own respective subordinates, without the bother of Senate confirmation."<sup>41</sup> That is obviously true, but the words do not contain any language ruling out interbranch appointments. Amar then states that "there is no alternative wording of the clause that would have expressed this purpose more clearly with the same compactness of language."<sup>42</sup> If by "the same compactness of language" he simply means the same number of words, he is correct, but when Rhode Island adopted its Appointments Clause in 2004, it added five words to the federal version to make the point: "or within their respective departments."<sup>43</sup> It would not have been difficult for the Framers to draft a clause prohibiting interbranch appointments, which begs the question why they did not.

Amar buttresses his argument against allowing judges to appoint Executive Branch officials with some rather weak policy arguments. He says that judges should "never be in the business of picking prosecutors" because "this blurring of adjudicatory and prosecutorial roles ill fits the general liberty-enhancing architecture of separation of powers."<sup>44</sup> He also insists that "[j]udges will not be good at picking prosecutors because they have

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<sup>36</sup> *Id.*

<sup>37</sup> See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

<sup>38</sup> Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOY. U. CHI. J. REG. COMPLIANCE 22, 29–30 (2017), [http://www.compliancelawjournal.com/compliancelawjournal/issue\\_ii?pg=27#pg27](http://www.compliancelawjournal.com/compliancelawjournal/issue_ii?pg=27#pg27).

<sup>39</sup> See Amar, *supra* note 37, at 805; Mascott, *supra* note 38, at 30.

<sup>40</sup> Amar, *supra* note 37, at 748.

<sup>41</sup> *Id.* at 807.

<sup>42</sup> *Id.*

<sup>43</sup> R.I. CONST. art. IX, § 5.

<sup>44</sup> Amar, *supra* note 37, at 809.

inadequate information and weak incentives.”<sup>45</sup> In Amar’s view, judges will not know who would make a good prosecutor and their incentive to choose only quality candidates is reduced because they are picking someone else’s assistants, not their own. Finally, Amar argues, more persuasively, that a blanket prohibition on interbranch appointments is much easier to administer than the vague standard of “incongruity” that the Supreme Court announced in *Morrison v. Olson*.<sup>46</sup> Mascott relies primarily on one of Amar’s policy points, that courts would not “have as much incentive to pick highly qualified executive ‘officers’ who are not in any way subject to that court’s direction or responsible for helping the judicial branch carry out its duties”<sup>47</sup> and a separate normative accountability argument, that “[t]o ensure there is some direct chain . . . between adjudicators and the President, . . . an executive actor should have a say in the adjudicators’ appointment.”<sup>48</sup>

These are weak bases for a constitutional prohibition on Congress assigning the appointment of ALJs (and other Executive Branch inferior officers) to a court of law. Amar’s textual argument is simply wrong, since it would have been quite easy for the Framers to limit nonpresidential appointment of inferior officers to officials within their respective departments. The policy arguments are stunningly weak as bases for judicial rejection of a possible contrary judgment by Congress, that the best way to ensure the professionalism and fairness of ALJs, whose decisions are, after all, reviewed by the federal courts, is to have them appointed by a court of law that is not subject to political pressure. In the absence of clear constitutional text, courts have been rightly deferential to Congress’s views on the proper structure of government.<sup>49</sup> Although both Mascott and Amar argue their positions well, adopting their view on this matter would be a major change in separation of powers jurisprudence at potentially great cost without clear gain.

One question that may arise is whether an adjudicator with final decision-making authority on behalf of an agency might be considered a principal officer who must be appointed by the President with the advice and consent of the Senate. Many agency adjudicators are principal officers simply because they are also agency heads, like Federal Trade Commissioners (“FTC”), members of the National Labor Relations Board (“NLRB”), International Trade Commissioners, and even Cabinet Secretaries who are statutorily authorized to hear appeals from the decisions of agency ALJs.<sup>50</sup> The FTC and NLRB were originally envisioned as primarily adjudicatory

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<sup>45</sup> *Id.* Note that Congress has specified that, under certain circumstances, the United States district court has the power to appoint an interim United States Attorney. See 28 U.S.C. § 546(d) (2012).

<sup>46</sup> 487 U.S. 654, 676 (1988); Amar, *supra* note 37, at 810.

<sup>47</sup> Mascott, *supra* note 38, at 35.

<sup>48</sup> *Id.* at 34 (footnote omitted).

<sup>49</sup> See Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 469–70 (2011).

<sup>50</sup> See Tracey A. Hardin, *Rethinking Independence: The Lack of an Effective Remedy for Improper For-Cause Removals*, 50 VAND. L. REV. 197, 214–15 (1997).

agencies that would implement federal law and policy via a process of case-by-case adjudication.<sup>51</sup> The heads of these agencies also have broad policy and administrative responsibilities which ensures their status as principal officers,<sup>52</sup> but what about pure adjudicators with no other executive or policy-making authority within agencies whose decisions on important matters are legally final?

Because the vast majority of administrative adjudicators have no policy discretion and make decisions subject to review by superiors within their agencies, they are unlikely to be considered principal officers whose appointment must be made by the President with the advice and consent of the Senate. Professor Gary Lawson argues that members of the Patent Trial and Appeal Board (“PTAB”), an adjudicatory body within the Commerce Department’s Patent and Trademark Office, should be considered principal officers because their decisions are final within the Executive Branch, subject only to appeal to the Court of Appeals for the Federal Circuit.<sup>53</sup> Lawson may be correct, but he recognizes that there are arguments to the contrary—PTAB’s jurisdiction is narrow, and PTAB members cannot make policy for the Department of Commerce beyond the scope of the patent adjudications they conduct. Whether this line of attack on PTAB, and potentially other non–Article III tribunals with final decision-making authority succeeds remains to be seen.

In sum, ALJs and most if not all other agency adjudicators are inferior officers of the United States who must be appointed in a process consistent with the requirements of the Appointments Clause. This means presidential appointment with Senate confirmation or, if Congress statutorily provides, appointment by the President alone, an agency head, or a court of law. The Supreme Court’s recent application of this black letter law to Securities and Exchange Commission (“SEC”) ALJs may require adjustments in some agencies, but it does not threaten the fundamental structure of agency adjudication.

## B. *Removal*

Under current law, ALJs are protected from discharge without cause while many non-ALJ administrative adjudicators are not, although some of the latter category may fall under general civil service provisions protecting

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<sup>51</sup> See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 615–16 (1984).

<sup>52</sup> See Hardin, *supra* note 50, at 214.

<sup>53</sup> Gary Lawson, *Appointments and Illegal Adjudication: The America Invents Act Through a Constitutional Lens*, 26 GEO. MASON L. REV. 26, 53–54, 58–59 (2018).

federal employees from discharge without cause.<sup>54</sup> Whether removal protections for ALJs are consistent with the Constitution's separation of powers principle is currently unclear, especially with regard to ALJs in independent agencies. In 2010, the Supreme Court created a bright line rule prohibiting two layers of for-cause removal protection for officers of the United States.<sup>55</sup> Because all or virtually all independent agency heads have for-cause removal protection, inferior officers within independent agencies must be removable at will, except that the Court reserved judgment on whether this rule applies to ALJs and other officials engaged primarily in adjudicatory functions.<sup>56</sup> In *Lucia*, the Trump administration urged the Supreme Court to extend this rule to ALJs, but the Court declined to reach the issue since it was not really presented by the case and had not been ruled on by the lower court.<sup>57</sup>

Assuming that the bright-line rule against two layers of for-cause removal protection does not apply to ALJs, the constitutional issue becomes whether the protection of ALJs from removal without cause impermissibly or unduly hinders the President's ability to exercise the powers of the presidency. An adherent to the unitary executive theory who believes that the President has all executive power would likely find the insulation of ALJs from removal to be intolerable, but this theorist would also find the insulation of the heads of independent agencies (and any other official with executive powers) to be similarly unconstitutional. The *Humphrey's Executor v. United States*<sup>58</sup> answer, that the President's need to supervise ALJs is diminished because they exercise "quasi-judicial power," is not dispositive. It is now understood that what the *Humphrey's Executor* Court called "quasi-judicial" and "quasi-legislative" powers are actually executive powers exercised in an adjudicatory and legislative form.<sup>59</sup>

To non-adherents, the answer to this question derives from a very impressionistic analysis that involves an imprecise evaluation of the extent to which the President's power is diminished, the amenability of the official to other methods of centralized supervision, and the nature and importance of the official's function. While there is no clear standard for evaluating how much diminution of complete presidential control over agency adjudication is permissible, there are compelling reasons, discussed below, to find that

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<sup>54</sup> See KENT BARNETT ET AL., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL, 4 (draft report) (Feb. 14, 2018), <https://www.acus.gov/sites/default/files/documents/Non-ALJ%20Draft%20Report.pdf>.

<sup>55</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010).

<sup>56</sup> *Id.* at 507 (clarifying that the use of the civil service system within independent agencies is not implicated by the Court's holding).

<sup>57</sup> *Lucia v. SEC*, 138 S. Ct. 2044, 2050–51 n.1 (2018).

<sup>58</sup> 295 U.S. 602 (1935).

<sup>59</sup> *Id.* at 617, 624; see *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1378 (2018) ("The fact that an agency uses court-like procedures does not necessarily mean it is exercising the judicial power.").

protecting ALJs in both Executive Branch and independent agencies from removal without cause is constitutional.

For several reasons, the insulation of ALJs and other adjudicators from removal without cause does not unconstitutionally threaten the ability of the President to exercise the powers of the presidency. The relevant powers of the presidency are the ability to implement executive policy and live up to the duty to “faithfully execute[]” the laws.<sup>60</sup> Decisions by agency adjudicators are governed by procedural and substantive rules established by Congress and agency heads. Agency adjudicators virtually never question the legality of the rules prescribed by their agency and they cannot make policy for the agency, although clearly they have sufficient discretion to subvert agency policy to some extent. The case is easiest to make concerning agency adjudicators within Executive Branch agencies because their decisions are subject to at least one level of appeal within the agency, often to the Cabinet Secretary, who may delegate that adjudicatory authority to a subordinate. As if that is not enough, in some agencies the agency head, including a Cabinet Secretary, can take jurisdiction of a case on his or her own initiative.<sup>61</sup> These devices help ensure that adjudicatory decisions within Executive Branch agencies are subject to ample supervision by officials directly answerable to the President and to minimize the costs of ALJ independence. Thus, even adherents to the unitary executive theory should accept the insulation of Executive Branch adjudicators from discharge without cause.

Agency adjudicators employed in independent agencies, including ALJs, should not be governed by the *Free Enterprise Fund v. Public Co. Accounting Oversight Board*<sup>62</sup> rule preventing two layers of for-cause protection—insulating ALJs from removal without cause by superiors who are also protected from removal without cause.<sup>63</sup> The power of independent agency adjudicators is a far cry from the broad regulatory and policymaking powers of the members of the Public Company Accounting Oversight Board that prompted the Supreme Court to create the rule against two levels of insulation from presidential removal.<sup>64</sup> Just like adjudicatory decisions in Executive Branch agencies, adjudicatory decisions within independent agencies are subject to procedural and substantive rules established by agency heads and are also subject to review by agency heads.<sup>65</sup> And just like adjudicators within Executive Branch agencies, independent agency adjudicators cannot make policy for the agency. While of course there may be instances in which agency heads fail to sufficiently supervise their ALJs, by and large ALJ decisions reflect the policies of the agencies themselves. Thus, the double layer of for-cause protection from removal of independent agency ALJs does not

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<sup>60</sup> U.S. CONST. art. II, § 3.

<sup>61</sup> See, e.g., 7 C.F.R. § 2.35(a) (2019); 8 C.F.R. § 1003.1(h) (2019).

<sup>62</sup> 561 U.S. 477 (2010).

<sup>63</sup> See *id.* at 508–09.

<sup>64</sup> See *id.* at 506–07.

<sup>65</sup> See Strauss, *supra* note 51, at 585 & n.41.

add significantly to the insulation of independent agency adjudicatory decisions from presidential control. If independent agencies have the power to make and enforce policies that conflict with those of the President, insulating agency adjudicators from removal without cause is not problematic.

Further, the costs of subjecting agency adjudicators to removal without cause would be substantial, threatening the fairness of agency adjudicatory hearings and raising the possibility of serious due process violations. This threat is greatest in Executive Branch agencies, where ALJs would be subject to removal by a single political appointee, although in the independent agencies a bare majority of political appointees would also have that power. In cases involving government benefits, agency heads' budgetary concerns may lead to bias against claimants where the law may create an entitlement not expressly limited by available funding. In licensing and permitting proceedings, fear of discharge may lead adjudicators to shade factual decisions in favor of politically favored applicants and against those without the inside track. In private rights cases, where administrative adjudication is supposed to be voluntary, parties may be unwilling to submit their disputes to agency adjudication if they fear that they will not receive a neutral hearing. In sum, eliminating security of tenure for administrative adjudicators would likely result in much more harm than good.

The primary countervailing argument is that insulation of agency adjudicators from removal without cause makes it difficult, if not impossible, for agencies to remove incompetent, corrupt, lazy, and biased adjudicators. This, alas, is true whenever government officials have security of tenure and actually may not be as serious a problem regarding adjudicators as it is with other officials. The reason for this is that adjudicatory decisions are routinely subject to review by higher-level officials and also in court, whereas the actions of other bureaucrats may be more difficult to bring before a higher-level official. And statistics on the number of cases processed by agency adjudicators are relatively simple to keep, while the output of other officials may be more difficult to measure. This is, of course, not perfect since delay and cost may allow agency adjudicators to get away with misconduct when parties decide not to appeal. And it may be difficult for agency heads to walk the fine line between training for greater competence and improper pressure on adjudicatory decisions.<sup>66</sup> But for-cause removal and routine appealability of agency adjudicatory decisions should in most situations suffice to ensure quality decision-making while safeguarding the due process rights of those involved in administrative adjudication.

### C. *Supervision of Agency Adjudicators*

Most of the analysis of removal protections applies to agency supervision of administrative adjudicators. By and large, due process considerations

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<sup>66</sup> See *Ass'n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1142 (D.D.C. 1984).

militate against direct agency supervision of the adjudicatory activities of ALJs and other agency adjudicators. The Administrative Procedure Act (“APA”) recognizes this when it prohibits the supervision of ALJs by “an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”<sup>67</sup> When agencies attempt to change the behavior of their adjudicators, they walk a fine line between proper supervision and improper influence.<sup>68</sup> As the Supreme Court said long ago in an opinion generally affirming presidential supervisory power over the Executive Branch:

[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions . . . affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised.<sup>69</sup>

In other words, in adjudicatory matters, agency heads (or the President) may not supervise the actual conduct of the proceeding.

The APA further recognizes the inconsistency of direct supervision of agency adjudicators with due process norms by prohibiting ALJs and agency heads from engaging in *ex parte* communications regarding matters before them in formal adjudicatory proceedings.<sup>70</sup> The Ninth Circuit has determined that the ban on *ex parte* communications includes the President and White House staff.<sup>71</sup> The APA bans *ex parte* communications with “any interested person outside the agency,” which means that it does not explicitly bar contact with agency supervisors, but the APA anticipates that decisions in formal adjudicatory matters will be based on the record adduced at the hearing and not off-the-record communications with other agency officials.<sup>72</sup> Due process implies the same general restriction on what a decisionmaker may consider in an adjudicatory hearing.

There is no question that agencies may require ALJs and other agency adjudicators to be trained in the procedure and substance relevant to the proceedings over which they will preside. Problems arise when agencies require extra training in reaction to adjudicatory decisions, especially when the

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<sup>67</sup> 5 U.S.C. § 554(d)(2) (2012).

<sup>68</sup> See *Ass’n of Admin. Law Judges, Inc.*, 594 F. Supp. at 1143 (finding defendants’ focus on the allowance rates of individual ALJs to have “created an untenable atmosphere of tension and unfairness which violated the spirit of the APA”).

<sup>69</sup> *Myers v. United States*, 272 U.S. 52, 135 (1926). While this may seem inconsistent with the existence of removal protections discussed above, note that the Court did not say that removal had to be without restraint. Rather, removal of an adjudicator would depend on proof that the official had not acted “intelligently or wisely”; that is, there would have to be cause for that adjudicating official’s discharge.

<sup>70</sup> 5 U.S.C. § 557(d)(1)(A)–(B).

<sup>71</sup> *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1539 (9th Cir. 1993).

<sup>72</sup> 5 U.S.C. § 557(d)(1)(B)–(C).

agency is a party-in-interest in the outcome. In one case involving training directed at ALJs with higher-than-normal rates of allowing benefits claims, a federal court observed that

defendants' unremitting focus on allowance rates in the individual ALJ portion of the . . . Review Program created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof. Defendants' insensitivity to that degree of decisional independence the APA affords to administrative law judges and the injudicious use of phrases such as "targeting", "goals" and "behavior modification" could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide.<sup>73</sup>

The "sweet spot" may turn out to be protection of agency adjudicators from supervision that would tend to influence their decisions in particular cases except when the focus of the supervision clearly involves ensuring that adjudicators adhere to the law, maintain high performance standards, and process a sufficient, but not excessive, number of cases. Beyond that, agencies may need to rely on the appeals process to exert greater influence over the outcome of proceedings.

There is one supervisory tool available to some agencies that requires a brief, separate discussion: the statutory authority of agency heads to reassign matters to themselves. Former Attorney General Jeff Sessions used this authority in immigration cases where it appeared that he sought to overturn applications of immigration laws that had been favorable to potential immigrants.<sup>74</sup> While this may be politically controversial given the hot-button immigration issues involved, it is an appropriate and potentially effective method of agency supervision of administrative adjudication. For example, although the record is sealed, it appears that one of the cases the Attorney General took for himself involved the issue of whether fear of private criminal activity such as gang violence was a sufficient legal basis for a claim of asylum.<sup>75</sup> Putting aside one's views of the merits of the legal issue, it seems appropriate for the Attorney General to have final say within the Department of Justice on the proper interpretation of the statutes the department administers. Assuming no procedural bar, such as a late-filed petition, a serious criminal record, or an expedited removal proceeding, the Attorney General's

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<sup>73</sup> *Ass'n of Admin. Law Judges, Inc.*, 594 F. Supp. at 1143.

<sup>74</sup> See *In re E-F-H-L-*, 27 I. & N. Dec. 226, 226 (A.G. 2018), <https://www.justice.gov/coir/page/file/1040936/download>. In this case, the Bureau of Immigration Appeals had stayed removal proceedings while an alien petitioned for relief based on a relative's legal status in the United States. The alien had previously been granted an evidentiary hearing by the Board of Appeals on a petition for asylum, but then withdrew that petition. The Attorney General overruled the Board of Appeals' decision to grant a second stay of removal.

<sup>75</sup> *In re A-B-*, 27 I. & N. Dec. 227, 227 (A.G. 2018); see also Tal Kopan, *Sessions Tests Limits of Immigration Powers with Asylum Moves*, CNN POLITICS (Mar. 10, 2018, 8:01 AM), <https://www.cnn.com/2018/03/10/politics/sessions-immigration-appeals-decision/index.html>.

decision will be subject to judicial review, thus ensuring that the Department's interpretation is within its statutory authority.

Mid-case reassignment of a case directly to an agency head or a subordinate can raise due process concerns. In one case, the Sixth Circuit found that a litigant's due process rights were violated when the Secretary of Agriculture reassigned a case to a high-ranking non-lawyer after the judicial officer (a high-ranking official to whom the Secretary had delegated review authority) issued an initial decision finding that a meat packer had not bribed agency inspectors. This holding was contrary to a finding by the ALJ who originally heard the case.<sup>76</sup> Even though there was no evidence of actual bias on the part of the new adjudicator and he had not participated in any prior stage of the proceedings, the Sixth Circuit found the appearance of bias was sufficient to violate due process:

There is no guarantee of fairness when the one who appoints a judge has the power to remove the judge before the end of proceedings for rendering a decision which displeases the appointer. . . . The officials who made the revocation and redelegation decision chose a non-career employee with no background in law or adjudication to replace [the Judicial Officer]. They assigned a legal advisor to the new Judicial Officer who worked under an official who was directly involved in prosecution of the . . . case. Such manipulation of a judicial, or quasi-judicial, system cannot be permitted. The due process clause guarantees as much.<sup>77</sup>

Whether Attorney General Sessions' efforts, if carried on by his successor, will be found to be similarly problematic remains to be seen. The situations may be sufficiently different to lead to a favorable result for the Department of Justice. The Sixth Circuit's case involved a disagreement on the facts, while General Sessions was asserting authority to interpret law and establish agency policy. However, reassignment in the middle of a case is certain to raise eyebrows. If reassignment violates due process, it will no longer be a viable tool of agency supervision of administrative adjudicators.

In sum, most non-Article III adjudicators are likely to be considered inferior officers of the United States who must be appointed in a procedure consistent with the Constitution's Appointments Clause. Although due to recent decisions it has become more controversial, it is likely permissible to protect those adjudicators from discharge without cause, and in fact such protection may be necessary to safeguard the due process rights of parties that appear before them. While decisions by non-Article III adjudicators are typically subject to review both within agencies and in court, direct supervision of non-Article III adjudicators is similarly constrained by due process concerns. It is perfectly appropriate for agencies to insist that their adjudicators follow the law and apply prescribed procedures, but agency intervention into ongoing adjudicatory proceedings may be inconsistent with due process.

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<sup>76</sup> *Utica Packing Co. v. Block*, 781 F.2d 71, 78–79 (6th Cir. 1986).

<sup>77</sup> *Id.* at 78.

## II. THE ASSIGNMENT OF CASES TO NON-ARTICLE III ADJUDICATORS

### A. *Background*

This Part of the Article addresses the other main issue concerning administrative adjudicators: what cases within the universe of relatively formal adjudication of claims may be assigned to them. Administrative adjudication dates back to the earliest days of the government under the Constitution of 1789, mainly in cases involving government benefits such as pensions<sup>78</sup> and government exactions such as customs duties and taxation as well as cases involving land grants and patents.<sup>79</sup> In his comprehensive study of early administrative law, Professor Jerry Mashaw notes that in 1903, Bruce Wyman's study of administrative adjudication revealed that administrative tribunals at that time "were deciding tens of thousands of cases every year, many of them with complete finality."<sup>80</sup>

While administrative adjudication has always been part of the fabric of the government of the United States, doctrinal justification for this well-established institutional practice was slow to develop. In the 1970s, the issue crystallized into two competing approaches: (1) a categorical approach under which administrative and other non-Article III adjudication would be allowed only in three clearly defined categories of cases; and (2) a balancing approach, under which the issue would be approached in the same manner as other separation of powers issues that are not governed by a specific procedural or structural provision of the Constitution.<sup>81</sup> Under the balancing approach, the question would be whether the allocation of a particular class of disputes intolerably threatens the domain of the Article III courts or usurps powers reserved exclusively to those courts.

Under the categorical approach, non-Article III adjudication is permissible only in three categories: (1) cases in territorial courts; (2) cases in

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<sup>78</sup> See Kristin A. Collins, "Petitions Without Number": *Widows' Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements*, 31 L. & HIST. REV. 1, 12 (2013).

<sup>79</sup> See MASHAW, *supra* note 34, at 5, 19. Mashaw's book grew out of a series of articles. See Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568 (2008); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010) [hereinafter *Gilded Age*]; Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636 (2007).

<sup>80</sup> Mashaw, *Gilded Age*, *supra* note 79, at 1415.

<sup>81</sup> Compare *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70-71 (1982) (plurality opinion) (identifying the three categorical exceptions to the Article III bar on legislative courts and concluding that this case does not fit within any of those exceptions), *and id.* at 91 (Rehnquist, J., concurring) (distinguishing the approaches taken by the plurality and dissenting opinions), *with id.* at 113 (White, J., dissenting) (emphasizing the need to balance Article III with "competing constitutional values and legislative responsibilities").

military courts; and (3) public rights disputes between the government and a private party.<sup>82</sup> Territorial courts are non–Article III courts established in areas not part of any state where, after statehood, the need for federal judges would be greatly diminished. Military courts, often called “courts martial,” are permissible because of the long tradition of a separate set of non–Article III military tribunals.<sup>83</sup> Administrative adjudication of public rights disputes in a non–Article III tribunal is considered an allowable condition on the waiver of sovereign immunity and is also viewed as permissible because Article III jurisdiction over these disputes historically has been uncertain.<sup>84</sup>

Historically, the Supreme Court appeared to embrace a categorical approach, noting in dicta in an early case that Congress may not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”<sup>85</sup> However, in the early twentieth century, the Court changed course, allowing in *Crowell v. Benson*<sup>86</sup> the assignment of workers’ compensation claims created by federal law to an administrative tribunal, even though the claims involved private rights (i.e., claims between workers in interstate commerce and their private employers).<sup>87</sup> The Court’s approval of the administrative worker’s compensation scheme in *Crowell* was somewhat narrow, premised on the reservation of questions of law for a federal court and on the implicit availability of de novo judicial reexamination of the facts upon which the jurisdiction of the administrative tribunal depended. These jurisdictional facts include whether the injury occurred in an area subject to the federal government’s maritime jurisdiction and whether the claimant was actually an employee of the defendant.<sup>88</sup> (These factual matters have been characterized as “jurisdictional” or “constitutional” facts.) In fact, the claimant had lost his case after the federal court conducted a trial de novo and determined that the claimant was not an employee.<sup>89</sup> The Court also noted that Congress may not “sap the judicial power” by assigning all factual determinations to administrative tribunals.<sup>90</sup> Nevertheless, for the first time, the Court explicitly approved of federal administrative adjudication of private disputes.<sup>91</sup>

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<sup>82</sup> *Id.* at 64–71 (plurality opinion).

<sup>83</sup> *Id.* at 66.

<sup>84</sup> *See id.* at 67, 69.

<sup>85</sup> *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

<sup>86</sup> 285 U.S. 22 (1932).

<sup>87</sup> *Id.* at 51. Justice Brandeis dissented on the ground that Congress did not authorize a trial de novo and the agency’s determination that the claimant was an employee should have been final. *Id.* at 66 (Brandeis, J., dissenting). In other words, Brandeis would have approved the statutory scheme without the condition that jurisdictional facts be subject to de novo reexamination in court.

<sup>88</sup> *Id.* at 37–38 (majority opinion).

<sup>89</sup> *Id.* at 37.

<sup>90</sup> *Id.* at 57.

<sup>91</sup> *See id.* at 65.

In the last several decades, numerous disputes have arisen over the assignment of cases to non–Article III tribunals, mainly administrative agencies and federal Bankruptcy Courts. The Court has rejected the categorical approach, but beyond that the Court’s opinions in the cases have provided little clarity on the limits of Congress’s power to assign cases to non–Article III adjudicators.<sup>92</sup> Part of the problem is that the Court has sometimes attempted to explain its decisions as based on the distinction between public rights and private rights without recognizing that there are distinct categories of private rights that it treats differently.<sup>93</sup> Another problem is that the Court has not been willing to explicitly weigh the competing considerations that apply to the acceptability of assigning jurisdiction over different types of private rights disputes to non–Article III tribunals. This part of the Article attempts to provide clarity based on these considerations.<sup>94</sup>

### B. *Public Rights Cases*

Public rights cases are cases between a private party and the government involving a dispute over something under governmental control such as a benefit, public funds, or a license or permit.<sup>95</sup> It has long been understood that Congress may freely assign the adjudication of public rights disputes to non–Article III adjudicators, largely because most public rights cases implicate sovereign immunity.<sup>96</sup> When the federal government chooses to waive its immunity from suit, it is generally believed that the waiver may be conditioned on presentation of claims to an administrative tribunal rather than an Article III court.<sup>97</sup> (For cases not implicating sovereign immunity, there are some categories of public rights that present difficult issues.) In most of these cases, the non–Article III adjudication decision can be final, although

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<sup>92</sup> See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847–48 (1986).

<sup>93</sup> See, e.g., *Stern v. Marshall*, 564 U.S. 462, 489 (2011); *Commodity Futures Trading Comm’n*, 478 U.S. at 853.

<sup>94</sup> I will not, in this Article, discuss the status of territorial or military courts. In brief, the Supreme Court has recognized that Article III does not apply to cases properly within the jurisdiction of those courts. Recently, the Court rejected the argument that it could not constitutionally exercise appellate jurisdiction over decisions by non–Article III military courts, concluding that “the judicial character and constitutional pedigree of the court-martial system enable this Court, in exercising appellate jurisdiction, to review the decisions of the court sitting at its apex.” *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018).

<sup>95</sup> See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011). In *Stern v. Marshall*, Chief Justice Roberts created, or at least exacerbated, confusion by defining “public rights” more broadly to encompass rights that are “integrally related to particular Federal Government action.” 564 U.S. at 490–91. Relying on this definition, he recharacterized cases in which non–Article III adjudication of private rights cases has been deemed permissible as public rights. This is discussed more fully below.

<sup>96</sup> See, e.g., *Stern*, 564 U.S. at 489 (citing *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283–84 (1856)).

<sup>97</sup> See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982) (plurality opinion).

Congress has the discretion to provide for judicial review of the non–Article III decision in a federal court.

There are six categories of public rights cases, each of which present slightly different issues concerning the propriety of this assignment.

- \* Claims brought by private parties against the federal government for wrongful conduct;

- \* Cases involving government benefits;

- \* Cases in which the government seeks to recover misappropriated public funds or public property from a private party;

- \* Cases involving federal grants, permits, or licenses that are themselves sources of wealth;

- \* Civil complaints brought by the federal government against persons or entities alleged to be in violation of a federal regulatory requirement; and

- \* Cases in which the federal government seeks to revoke a license or permit that it granted to a private party.

The first category comprises claims brought by private parties against the federal government seeking to impose liability on the government for wrongful conduct such as a tort or breach of contract. This is the simplest case for allowing non–Article III adjudication, based on the reasoning that since the claims could have been barred altogether by sovereign immunity, it is constitutionally permissible to resolve them administratively.<sup>98</sup> These claims are not within the traditional jurisdiction of the Article III courts and may be resolved in any manner specified by Congress including determination by Congress itself through a private bill for compensation and assignment to an administrative tribunal with or without judicial review or a requirement of confirmation in Congress.<sup>99</sup>

The second category comprises cases involving government benefits such as social insurance, welfare, and the like. Like the previous category, it has long been understood that these cases may also be assigned to non–

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<sup>98</sup> See *N. Pipeline*, 458 U.S. at 67–68; See generally Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 551–52 (2003).

<sup>99</sup> I will not explore the difficult question of whether Congress may, if it chooses, assign non–Article III matters such as these to Article III courts. Mercifully, that issue is beyond the scope of this Article, which looks only at what cases Congress may assign to non–Article III tribunals.

Article III adjudicators; although in the past half-century, the Supreme Court has required that the tribunals provide basic due process on the ground that entitlements in this category are property.<sup>100</sup> Despite the musings of some recent critics,<sup>101</sup> it has long been recognized that administrative tribunals are capable of providing due process.<sup>102</sup> Thus, although government benefits are considered property, they are not subject to the same level of protection as traditional property where deprivation may require a hearing in court rather than before an administrative tribunal.

The third category of public rights involves cases in which the government seeks to recover misappropriated public funds or public property from a private party. This category dates back to the first case recognizing the category of public rights, an 1855 Supreme Court decision that allowed the Treasury Department to recover, without any judicial process, federal funds that a customs collector had allegedly misappropriated.<sup>103</sup> The Court, relying primarily on a long history of similar processes in England and in the early American states, found that an internal Treasury Department process was permissible and also satisfied due process.<sup>104</sup> The Court also allowed for the possibility that Congress could allow appeal to the Article III courts.<sup>105</sup> This category is interesting because it appears to allow seizure of private property without judicial process, but only when the basis of the claim is that the property actually belongs to the federal government.<sup>106</sup> The opinion also contains some discussion of claims between private parties involving public rights that will be important to the discussion of the fourth category of public rights.

The fourth category of public rights involves federal grants, permits, or licenses that are themselves sources of wealth, such as land grants, permits to use federal property, broadcast licenses, and patents, which the Supreme Court characterized as “public franchises” in a recent case.<sup>107</sup> These have traditionally been treated the same as the third category because the wealth they

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<sup>100</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 339–43 (1976) (finding procedural due process had been satisfied because respondent was not in as dire of a position as that of a typical welfare recipient and because of the myriad procedural safeguards of the process, including an evidentiary hearing before the denial of the claim became final); *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) (holding that due process requires that welfare recipients be afforded an evidentiary hearing prior to termination of benefits).

<sup>101</sup> PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 143–48 (2014) (arguing that only real judges are capable of providing due process).

<sup>102</sup> *Crowell v. Benson*, 285 U.S. 22, 47 (1932).

<sup>103</sup> *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 275–76 (1856).

<sup>104</sup> *Id.* at 280–81.

<sup>105</sup> *Id.* at 282–84.

<sup>106</sup> Professor Caleb Nelson also observes that the relevant statute allowed for a judicial challenge to the administrative warrant, and notes that the tax collector in the case did not bring one, perhaps indicating acquiescence to the accuracy of the audit underlying the warrant. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 587 (2007). However, as Nelson recognizes, the Court appeared to conclude that the non-Article III procedure would have been proper even without the opportunity to bring a judicial challenge. *Id.* at 588.

<sup>107</sup> *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018).

create uniquely depends on a federal government scheme. They differ from category two in that they involve property exploited economically by businesses, rather than property consisting of government benefits. Patents are the best example of this category. Without federal patent law, the legal right to monopolize inventions would simply not exist.<sup>108</sup> Inventors could freely invent things and exploit them commercially, but others would be free to copy those inventions and use them however they wanted. Federal land grants are similar: The private party is awarded federal property, which is distinct from a regulatory scheme that would, for instance, restrict the ability to appropriate unowned property. In this category, non–Article III adjudication is freely allowed, and judicial review may be unnecessary.

The fifth and sixth categories of public rights present more difficult problems, and Congress may not have the power to grant final decision-making authority to non–Article III tribunals, although it can certainly provide for preliminary decision-making in such tribunals, subject to judicial review in an Article III court. In both of these categories, the private parties are entitled to substantial due process protections.

The fifth category of public rights comprises civil complaints brought by the federal government against persons or entities alleged to be in violation of a federal regulatory requirement. Examples include penalties sought by the SEC for violations of federal securities law and remedies sought by the NLRB for violations of federal labor law. In the former set of cases, judicial review of SEC penalties is available in federal court.<sup>109</sup> In the latter set, the NLRB must itself petition for enforcement of its order if the subject of the order refuses to accept it voluntarily.<sup>110</sup> (This is probably also true in the former category—if the subject of an agency penalty refuses to pay, the agency most likely must go to court to enforce its order.)<sup>111</sup>

The sixth category of public rights is very similar to the fifth and comprises cases in which the federal government seeks to revoke a license or permit that it had granted to a private party to engage in an activity such as conducting a business or practicing a profession, trade, or occupation.

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<sup>108</sup> Professors Richard Epstein and Adam Mossoff disagree and argue that patents have been and should continue to be treated like traditional property rights. See Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 456 (2010); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 1011–12 (2007).

<sup>109</sup> See 15 U.S.C. § 78y (2012).

<sup>110</sup> 29 U.S.C. § 160(e); see also 7 U.S.C. § 216 (authorizing government to bring action in federal court to enforce orders issued by the Department of Agriculture under the Packers and Stockyards Act).

<sup>111</sup> Professor Michael Sant’Ambrogio has pointed out that there are hybrid adjudications before non–Article III adjudicators, in which both the government and private parties seek remedies against alleged violators of federal law. See Michael Sant’Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 450–52 (2019). Professor Sant’Ambrogio’s article does not address the issue of non–Article III adjudication, but it does advocate for judicial review to safeguard against “over-zealous enforcement.” *Id.* at 471.

Typically, this category involves non–Article III adjudication with judicial review available in an Article III court and may include fines or penalties within the fifth category. Examples include suspension or revocation of a permit to operate a stockyard under the Packers and Stockyards Act (administered by the Department of Agriculture)<sup>112</sup> and suspension or revocation of a broker’s license under the securities laws administered by the SEC.<sup>113</sup> These cases differ from cases that involve fines or other penalties, which deprive individuals of property, because they directly infringe on the subject’s liberty to engage in a business or practice a profession, and they differ from the category-four “public franchises” because the government did not create the wealth involved but rather is imposing a licensing or permitting system on a wealth-creating activity that does not depend on government involvement. However, this Article concludes that in important respects, cases in categories five and six should be treated similar to private rights disputes.

Because they involve deprivations of traditional liberty and property, non–Article III adjudication of disputes in public rights categories five and six should be subject to the same conditions required to allow non–Article III adjudication of private rights,<sup>114</sup> especially the requirement of relatively non-deferential judicial review. There should be judicial enforcement of any orders seizing property, requiring the payment of fines, or remedial action such as a cleanup or an order barring a person or entity from engaging in a business or profession. These are cases in which government seeks to deprive private parties of traditional property and liberty interests.<sup>115</sup> These cases are substantially different from categories one and two because in both of those categories, the government undoubtedly has the power to assert sovereign immunity and reject the claim altogether and they lack the historical bases for non–Article III finality in cases falling in categories three and four. The federal government should not be allowed to penalize private parties or take away their right to engage in a business or profession without providing adequate process, without genuine substantive reasons,<sup>116</sup> and without an opportunity for substantial review in an Article III court.

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<sup>112</sup> See 7 U.S.C. §§ 203–205 (requiring operators of stockyards to register).

<sup>113</sup> See 15 U.S.C. § 78o(4), (11) (requiring securities brokers and dealers to register with the SEC).

<sup>114</sup> As a purely normative matter, it is difficult to distinguish many of these cases from cases in category three, and perhaps today categories three, four, and five would be understood together. The problem in all three categories is that the adjudicator is best understood as part of the enforcement process, not as a completely neutral adjudicator.

<sup>115</sup> Although licenses and permits may be understood as “new property,” the right to engage in a business or practice a profession is a traditional liberty interest that should be protected from arbitrary infringement.

<sup>116</sup> This is also a context in which the “class of one” equal protection cases make sense. The government must follow generally applicable reasons before it penalizes private parties or prevents them from exercising liberty or property rights. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (*per curiam*).

In addition, critics have long attacked the civil characterization of many of these processes as a device to deprive parties of the protections of the criminal justice system, such as proof beyond a reasonable doubt, application of the exclusionary rule, and application of the ban on double jeopardy.<sup>117</sup> While it is beyond the scope of this Article to attempt to delineate the boundary between civil and criminal proceedings or determine the precise procedural safeguards required in civil penalty proceedings, it is important to recognize the colorable appearance of unfairness when an agency imposes civil penalties on a party in an adjudicatory forum staffed by agency employees. The ALJs or other non–Article III adjudicators in these cases may be technically independent and provide a fair hearing, but they are employees of the agency and cannot question agency policy and legal understandings. Thus, even if the hearings themselves meet minimum due process requirements, the decisionmakers might appear to be part of the agency’s enforcement mechanism instead of neutral arbiters.<sup>118</sup> Most significantly, this would mean abandoning strong forms of deference on both law and fact including *Chevron* deference, *Auer* deference, and even the substantial-evidence test in formal agency adjudications imposing civil penalties, given that no courts defer on legal or factual matters to a prosecutor in a criminal case, and courts rarely defer to one litigant’s views in a civil case unless government is involved.

Despite the apparent strength of these arguments, for several reasons Article III should not be read to preclude civil enforcement actions from originating in administrative tribunals nor to preclude some limited deference to the conclusions of non–Article III adjudicators on judicial review.<sup>119</sup> Civil enforcement actions exist somewhere in between public rights and private rights. They are not in what the Supreme Court has termed the “core” of Article III jurisdiction because they are created by Acts of Congress or federal agencies and thus were not traditionally the subject of adjudication only in the common law courts.<sup>120</sup> As far as deference is concerned, the requirement

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<sup>117</sup> HAMBURGER, *supra* note 101, at 242; Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 482 (1974).

<sup>118</sup> In recent years, agency movement away from enforcement actions in federal court to actions brought before agency ALJs has been attacked as depriving a subject of enforcement of a fair process. It appears that agencies are motivated to make this shift by a perception, and perhaps a reality, that they are likely to achieve greater success before ALJs than before federal judges. See Jean Eaglesham, *In-House Judges Help SEC Rack Up Wins—Success Rate for Agency Is 90%, and if It Loses, It Can Appeal to Its Commissioners*, WALL ST. J. (May 7, 2015), <https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>.

<sup>119</sup> I am not addressing due process concerns in this Article, except to say that determining that non–Article III adjudicators are incapable of providing due process in controversies between the government and private parties regardless of the procedures they follow would be a major upheaval of settled due-process principles. Further, nonpolitical appointment and insulation from improper agency influence, as specified in the APA, substantially reduce the potential for due process problems in non–Article III adjudication.

<sup>120</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70–71 n.25 (1982) (plurality opinion).

of relatively nondeferential judicial review has generally been applied only to core private rights actions arising under state law between two private parties,<sup>121</sup> although the degree of permissible deference is something of an open question. Perhaps judicial review under traditional administrative law standards is appropriate in agency enforcement actions. Courts should be careful, of course, not to defer to agency legal interpretations that appear to have been made solely for the purposes of the litigation and without much consideration or care.<sup>122</sup> And courts should scrutinize the factual record to be certain that an agency's factual conclusions are reasonable. But given the volume of agency enforcement litigation and its importance to achieving the goals of federal regulatory law and policy, without more definitive constitutional guidance, Congress's judgment that civil enforcement actions may be heard in non-Article III tribunals should likely be respected.

Separate discussion of patent rights is appropriate at this point because of a recent controversy concerning non-Article III adjudication involving patent validity. Patents are public rights—they do not exist but for governmental creation and thus have traditionally been included in the public rights category.<sup>123</sup> In 1999, Congress created a new administrative mechanism for challenging the validity of patents called “inter partes review”<sup>124</sup> and assigned the cases to a newly constituted administrative body, the PTAB.<sup>125</sup> PTAB conducts adjudicatory hearings in cases brought by private parties against other private parties (patent holders) challenging patents, subject to judicial review in the Court of Appeals for the Federal Circuit.<sup>126</sup> This new process was challenged as non-Article III adjudication of a matter between two private parties in violation of Article III, but the Supreme Court rejected the challenge, holding that “[i]nter partes review falls squarely within the public-rights doctrine.”<sup>127</sup>

The fundamental basis for the Court's decision was its view that although the cases heard by PTAB are between two private parties, the subject matter of the litigation is the patent right, which the Court characterized as a

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<sup>121</sup> See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853–54 (1986).

<sup>122</sup> This may seem more like *Skidmore* deference than *Chevron* deference, but in my view, there is no definitive methodology in *Chevron* deference cases and considerations such as these are often present in cases applying *Chevron* deference. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 817–22 (2010).

<sup>123</sup> See *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (quoting *United States v. Duell*, 172 U.S. 576, 582–83 (1899)).

<sup>124</sup> 35 U.S.C. § 311 (2012).

<sup>125</sup> *Id.* § 6.

<sup>126</sup> *Id.* §§ 141, 319.

<sup>127</sup> *Oil States Energy Servs.*, 138 S. Ct. at 1373. Because PTAB decisions are subject to judicial review in the Federal Circuit, the Court found it unnecessary to decide whether PTAB's decisions could constitutionally be made final and not subject to judicial review. If patents are truly public rights, it seems to me that Congress could make PTAB's decisions absolutely final.

public right in the public franchise category.<sup>128</sup> The challenge to PTAB's jurisdiction was based in part on the argument that once a patent is granted, it becomes a species of private property and thus a case between two private parties involving the validity of a previously issued patent is a private rights case.<sup>129</sup> The Court's rejection of this argument is worth focusing on because it has implications for numerous privileges granted by government such as broadcast licenses and other governmentally granted permits. The Court observed that while patents are property, they are "a specific form of property right—a public franchise."<sup>130</sup> As such, they are subject to the conditions contained in the statute that creates them, including the possibility of administrative reconsideration of the initial grant.<sup>131</sup> This reasoning applies to numerous government licenses and franchises such as broadcast licenses, export licenses and public utility licenses. If the statutes under which they are created so specify, they may be revoked administratively.<sup>132</sup>

It may be that the Supreme Court's conclusion—that patents have historically been treated as public franchises—is incorrect. Scholars Richard Epstein and Adam Mossoff have both argued that once granted, patents have been, and should continue to be, treated like traditional property,<sup>133</sup> meaning that non–Article III adjudication between private parties over patent validity would be unconstitutional. They have powerful policy arguments on their side—the potential for an administrative declaration of patent invalidity could have enormous financial consequences to the patent holder and could undercut the incentive to innovate that underlies and motivates the patent system. In a recent paper, Professor Mossoff argued that the Supreme Court's historical basis for characterizing patents as "public franchises" is incorrect.<sup>134</sup> His main historical point was that property rights in patents were created and shaped in a process similar to traditional property interests in land, through a system of statutory grant and common law elaboration, which

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1375.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1374. This does not mean that decreasing patent holders' or broadcast licensees' security is good policy. Greater security in patent ownership might increase scientific progress and greater security in the ownership of broadcast licenses might increase investment in quality programming. Constitutionally speaking, however, bad policy does not automatically translate into unconstitutionality.

<sup>132</sup> Caleb Nelson recognizes that new property and traditional property may be treated differently regarding the permissibility of non–Article III adjudication, but he does not discuss the special status of public franchises, which embody private wealth but are not related to benefits programs. *See* Nelson, *supra* note 106, at 621–24.

<sup>133</sup> *See* Epstein, *supra* note 108, at 461–62; Mossoff, *supra* note 108, at 1010. I do not mean to disagree with this economic analysis—it may be that more security for patents and other property rights that might be characterized as "public franchises" would be superior as a matter of policy. My point is that such increased security is not constitutionally required.

<sup>134</sup> *See* Adam Mossoff, *Statutes, Common Law Rights, and the Mistaken Classification of Patents as Public Rights*, 104 IOWA L. REV. 2591, 2593–94 (2019).

means that there is no historical basis for treating patents differently from property rights in land.<sup>135</sup>

Two additional aspects of the *Oil States* Court's opinion upholding administrative review of patent validity are worth mentioning. First, the Court reiterated that the fact that PTAB's procedures are adjudicatory in form does not mean that PTAB exercises judicial power.<sup>136</sup> As the Court stated, "[t]he fact that an agency uses court-like procedures does not necessarily mean it is exercising the judicial power."<sup>137</sup> Rather, this determination depends on the substance involved in the case, and public rights are not among those matters that must be adjudicated, if at all, in an Article III court. Second, the Court rejected the argument that the inter partes system violates the rule against "withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."<sup>138</sup> The Court acknowledged that in pre-constitutional England, patent validity was often determined in court cases between private parties, but it noted that there was also a parallel administrative system under which private parties could petition the Privy Council, which it characterized, perhaps erroneously,<sup>139</sup> as a nonjudicial body, to declare patents invalid and that the actual review of the patent was conducted by the Attorney General, whose decision was implemented by the Privy Council.<sup>140</sup>

As noted, my colleague Professor Gary Lawson argued, before the decision upholding PTAB's jurisdiction and authority, that this scheme was unconstitutional on two separate grounds, first because only a federal judge can "deprive a person of his or her vested property right" and second because members of PTAB are principal officers who must be appointed by the President with the advice and consent of the Senate.<sup>141</sup> (PTAB members are appointed by the Secretary of Commerce, which is appropriate only for inferior officers.) Professor Lawson admits that the text of the Constitution does not prohibit administrative cancellation of patents, but he reads the Due Process Clause as incorporating a principle that prohibits "unilateral executive action that effects a deprivation of life, liberty, or property."<sup>142</sup> In his view, non-

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<sup>135</sup> *Id.* at 2608–09.

<sup>136</sup> *Oil States Energy Servs.*, 138 S. Ct. at 1378.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1376 (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856))).

<sup>139</sup> In a comment on a draft of this article, my colleague Professor David Seipp characterized the Court's conclusion that the Privy Council was not a judicial body as ridiculous. See Mary Sarah Bilder, *The Relevance of Colonial Appeals to the Privy Council*, in *TEXTS AND CONTEXTS IN LEGAL HISTORY: ESSAYS IN HONOR OF CHARLES DONAHUE* 413, 415–16 (John Witte et al. eds., 2016); Sharon Hamby O'Connor & Mary Sarah Bilder, *Appeals to the Privy Council Before American Independence: An Annotated Digital Catalogue*, 104 L. LIBR. J. 83, 85 (2012).

<sup>140</sup> *Oil States Energy Servs.*, 138 S. Ct. at 1377.

<sup>141</sup> Lawson, *supra* note 53, at 28–29.

<sup>142</sup> *Id.* at 37.

Article III adjudicators cannot provide due process because “that is just what terms like legislative, executive and judicial power meant in 1788.”<sup>143</sup> Professor Lawson acknowledged that his view is contrary to current due process jurisprudence,<sup>144</sup> but what likely surprised him is the Supreme Court’s view that patents are a species of “public rights” called “public franchises” and thus are unlike other vested property interests that may require judicial action to extinguish.

### C. *Private Rights Cases*

Private rights are cases between two private parties in which the federal government serves merely as the adjudicating body. Traditionally, the Supreme Court has been much more reluctant to allow the assignment of private rights to non–Article III tribunals, but in recent decades it has relaxed what may at one time have been viewed as a near-prohibition on the adjudication of private rights in a non–Article III federal tribunal.<sup>145</sup>

There are three categories of private rights, each of which presents different considerations concerning the propriety of allocating them to a non–Article III tribunal.

The first category of private rights, best termed “traditional private rights,” encompasses cases between private parties that arise under state common law or state statutory law. This category includes tort cases, contract claims, property disputes, and state statutory claims such as cases arising under state consumer protection statutes. These are claims without any substantive relation to a federal statutory or regulatory scheme, and they typically arrive at a non–Article III federal tribunal only as part of a bankruptcy case, when the debtor either sues or is sued on a claim in this category. This category is considered to be at the core of Article III jurisdiction, and in general, Congress may not assign adjudication of these claims to a non–Article III tribunal such as a federal bankruptcy court<sup>146</sup> without the consent of the parties.<sup>147</sup> While non–Article III courts may adjudicate matters arising under federal bankruptcy law, state claims involving a party in bankruptcy proceedings are not related closely enough to a federal statutory or regulatory scheme to justify non–Article III adjudication.

The second category of private rights comprises federal statutory claims between private parties. While Congress has assigned the adjudication of

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<sup>143</sup> *Id.* at 40.

<sup>144</sup> *See id.* at 50–51.

<sup>145</sup> *See* *Crowell v. Benson*, 285 U.S. 22, 51–52 (1932).

<sup>146</sup> *See* *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion).

<sup>147</sup> *See* *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1942 (2015) (explaining that Supreme Court “precedents make clear that litigants may validly consent” to presentation of private rights claims to a non–Article III tribunal); *Peretz v. United States*, 501 U.S. 923, 933 (1991) (allowing a non–Article III Magistrate Judge, with defendant’s consent, to preside over jury selection in a criminal case).

many federal statutory claims to Article III courts, such as antitrust claims and civil rights cases brought against state and local officials, Congress has provided for initial adjudication of some federal statutory cases in non–Article III tribunals.<sup>148</sup> The constitutionality of initial assignment of these cases to a non–Article III tribunal has not been seriously questioned for decades, although it is not entirely clear why not. For example, in one of the leading cases concerning Article III restrictions on administrative adjudication, it seemed to go without saying that it was permissible for Congress to assign a statutory claim brought by one private party against another to an agency—the controversial aspect of the case was whether the agency could constitutionally adjudicate a state common law counterclaim brought in response to the federal statutory claim.<sup>149</sup> However, the reasons for its permissibility are not altogether clear. In another case, the Court seemed to credit the idea that when Congress creates a new right, it has more freedom to decide whether to assign it to a non–Article III tribunal than when it merely establishes jurisdiction over controversies involving pre-existing rights.<sup>150</sup> Perhaps adjudication of federal statutory private rights claims is viewed as permissible because judicial review in federal court is always available in these cases. Congress probably cannot assign final decision-making authority over this category to a non–Article III tribunal, and there may also be limits on the degree to which Congress may instruct the federal courts to defer to the tribunal’s conclusions of law and fact. This is discussed in further detail below.

The final category of private rights comprises private rights cases that are closely connected to federal regulatory schemes like the state law counterclaim to the federal statutory claim discussed above. This category includes common law counterclaims to federal statutory claims, such as a breach of contract claim brought in response to a claim that the defendant violated the plaintiff’s rights under a federal regulatory statute, and may also include claims related to the federal regulatory scheme brought by a plaintiff in a manner akin to the supplemental jurisdiction of the federal courts. These claims would be in the first category of traditional private rights but for their close connection to a federal regulatory scheme established by Congress.

The Court has been careful to set conditions on administrative adjudication of claims in this category so it does not threaten the domain of the Article III courts or deprive people of their right to an Article III tribunal.<sup>151</sup> In deciding whether a statute or regulation allowing initial adjudication of these private rights claims in a non–Article III tribunal is constitutional, the

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<sup>148</sup> See, e.g., Commodity Exchange Act § 14, 7 U.S.C. § 18 (2012) (providing for adjudication of statutory “reparation[s]” claims brought by customers against commodities brokers within CFTC); Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 844 (1986).

<sup>149</sup> *Schor*, 478 U.S. at 854. The Court characterized the plaintiff’s statutory claims as “the CFTC’s primary, and unchallenged, adjudicative function.” *Id.*

<sup>150</sup> See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985).

<sup>151</sup> See *Schor*, 478 U.S. at 850–51.

Supreme Court has required consideration of numerous factors that result in severe restrictions on the cases that may be assigned to non–Article III tribunals.<sup>152</sup> These conditions include examination of Congress’s reasons for the assignment, the scope of the substantive issues involved (including mainly assuring that they are very closely related to the federal scheme and necessary to make that scheme workable), the availability of judicial review and the degree of deference afforded the tribunal’s determinations, the existence of a choice between Article III and non–Article III adjudication, and the preservation of the essential attributes of the judicial process in the Article III courts, such as the power to issue final judgments, preside over jury trials, and punish contempt.<sup>153</sup>

The consideration of the reasons for assignment of the claims to non–Article III adjudicators includes two factors that are potentially distinct: Congress’s political motivation and Congress’s policy reasoning. It would be a red flag if Congress was politically motivated by disagreement with the substance of judicial decisions—that is, by a desire to remove a category of cases from judicial cognizance for substantive reasons. Policy motivation refers to whether Congress was primarily seeking to create a workable and effective regulatory regime rather than move the substance of decisions in a particular direction. As Justice Sotomayor put it, the questions is whether Congress assigned cases to non–Article III claims “in an effort to aggrandize itself or humble the Judiciary.”<sup>154</sup> Of course, Congress’s motivations might be difficult to discern, and there may be instances in which Congress’s publicly stated reasons conceal inappropriate concerns. But in general, the Supreme Court is more open to non–Article III adjudication of private rights cases when there is no suggestion that Congress meant to attack the federal courts for substantive reasons.

It is appropriate to pause and consider a somewhat puzzling aspect of this, namely that the law seems more concerned with Congress’s assignment of state law claims to non–Article III adjudicators than Congress’s assignment of federal claims to non–Article III adjudicators. Intuitively, it would seem that Congress would have little substantive concern over the outcome of private disputes arising under state law and that therefore the reasons it might assign some of those claims to non–Article III tribunals would be benign, for example to make sure that the federal bankruptcy system runs

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<sup>152</sup> See *id.* at 851.

<sup>153</sup> See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944–46 (2015); *Schor*, 478 U.S. at 850–56. These factors are a particularized instance of the balancing test that governs separation of powers disputes that do not implicate a particular procedural or structural provision of the Constitution. As I have explained elsewhere, by necessary implication this means that the vesting clauses, including Article III’s vesting clause, are not among the procedural or structural constitutional provisions that tend to be strictly enforced. See Beermann, *supra* note 49, at 470, 491–94. As the Court has stated, “the separation of powers question . . . is whether Congress impermissibly undermined, without appreciable expansion of its own power, the role of the Judicial Branch.” *Schor*, 478 U.S. at 856–57.

<sup>154</sup> *Wellness*, 135 S. Ct. at 1945.

smoothly. Congress is more likely to be highly interested in the substantive outcome of federal claims than state law claims and might assign the adjudication of federal claims to non–Article III tribunals with substantive goals in mind. Substantive goals might also be central to how Congress designs and staffs the non–Article III tribunals. For historical reasons, however, the Supreme Court is much stricter about assignment of state-law private rights disputes to non–Article III tribunals than about assigning private rights claims arising under federal law to those same tribunals.<sup>155</sup>

The factor involving the scope of the substantive rights involves whether the non–Article III tribunal has jurisdiction across a broad range of substantive areas or narrow jurisdiction in areas closely related to a federal regulatory program. Broad jurisdiction, such as that possessed by federal bankruptcy courts, is more suspect than the narrow jurisdiction of most federal agencies, whose jurisdiction involves private rights arising out of federal statutory and regulatory provisions and state private rights only when they are closely related to a federal program and then only when resolution in the federal forum is necessary to make the federal scheme workable.

The Supreme Court has also stated that parties to private rights disputes must be able to choose between Article III and non–Article III tribunals.<sup>156</sup> When the choice between administrative and judicial adjudication is voluntary, Congress has not “withdraw[n]” the claims “from judicial cognizance,” but rather has provided an additional choice of forum.<sup>157</sup> The choice must be real—that is, Congress cannot make it extremely unattractive to forgo the administrative remedy in favor of a judicial tribunal.<sup>158</sup>

The importance of judicial review to the constitutionality of assignment of private rights disputes to administrative adjudicators cannot be overstated, because it is also related to the preservation of the essential attributes of the judicial power in the Article III courts. The keys to the preservation of the domain of the Article III courts are the ability of those courts to review the determinations of non–Article III adjudicators and their reservation of certain powers, including the power to enforce orders and subpoenas and to preside over jury trials. While the Court has not established a firm rule on judicial review, in approving one instance of administrative adjudication, the Court found it important that the agency’s factual decisions were reviewable under a relatively nondeferential standard and its legal decisions were reviewed *de novo*.<sup>159</sup> It seems fairly certain that the Court would not approve of agency enforcement of judgments in private rights cases or judicial enforcement without substantial scrutiny of the record and the law.

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<sup>155</sup> See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71–72, 87 (1982) (plurality opinion).

<sup>156</sup> See *Schor*, 478 U.S. at 854–55.

<sup>157</sup> *Id.* at 854 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

<sup>158</sup> See *id.*

<sup>159</sup> See *id.* at 852–53.

The preservation of the essential attributes of Article III courts is an area in which the vesting clause of Article III provides significant guidance. The essential attributes of the judicial power are those functions that may be performed only by courts (i.e., those functions that are part of the judicial power of the United States as vested by Article III in the federal courts). These include presiding over jury trials, issuing judicial writs such as habeas corpus, and enforcing judgments against private parties in claims not involving the restitution of government property. These are judicial functions that, in the federal system, may be exercised only by the federal courts.

Even with these safeguards, including judicial review, there are some cases that may not be assigned to non–Article III federal adjudicators. This is the lesson of the line of cases that, beginning in the 1970s, prohibits federal bankruptcy courts, which are staffed by non–Article III judges, from hearing state common law cases and other private rights claims.<sup>160</sup> A recent, and important, case in this line is *Stern v. Marshall*.<sup>161</sup> In *Stern*, after Vickie Lynn Marshall filed a bankruptcy petition, mainly to secure a new forum for ongoing litigation, Pierce Marshall, Vickie’s late husband’s son, filed a defamation claim against her in the bankruptcy court.<sup>162</sup> Vickie counterclaimed, alleging that Pierce had fraudulently prevented her husband from including her as a beneficiary in a living trust under which she would have received half of his property upon his death.<sup>163</sup> The bankruptcy court ruled in Vickie’s favor on both claims, dismissing Pierce’s defamation claim on summary judgment and awarding Vickie more than \$400 million in damages on her counterclaim.<sup>164</sup>

Both Pierce’s claim and Vickie’s counterclaim were quintessential private rights claims but were subject to bankruptcy court jurisdiction as core proceedings related to the bankrupt estate.<sup>165</sup> The Supreme Court agreed with Vickie that Pierce’s counterclaim was within the bankruptcy court’s statutory jurisdiction but held that the counterclaim could not be heard in a non–Article III tribunal, despite the claim’s direct connection to the bankruptcy estate.<sup>166</sup>

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<sup>160</sup> See *N. Pipeline Constr. Co.*, 458 U.S. at 87 & n.40.

<sup>161</sup> 564 U.S. 462 (2011).

<sup>162</sup> *Id.* at 469–70.

<sup>163</sup> *Id.* at 470.

<sup>164</sup> *Id.* at 470–71.

<sup>165</sup> See 28 U.S.C. § 157(b)(2)(C) (2012); *Stern*, 564 U.S. at 475. Under this statutory provision, in which bankruptcy court jurisdiction was realigned in reaction to previous Supreme Court rulings, some claims, such as personal injury tort and wrongful death claims, may be tried only in the federal district court. Other private rights claims are subject to initial trial in the bankruptcy court, but unless the parties consent otherwise, that court is limited to issuing “proposed findings of fact and conclusions of law to the district court” which are subject to de novo review in the district court. 28 U.S.C. § 157(c)(1). The district court has exclusive authority to issue any final judgment. In *Stern*, the bankruptcy court issued a final judgment on both claims on the ground that they were core proceedings and not personal injury or wrongful death claims. See *Stern*, 564 U.S. at 470–71, 475.

<sup>166</sup> See *Stern*, 564 U.S. at 475, 503.

The Court found that as a private state tort claim not derived from any federal statute or regulatory scheme, Vickie's counterclaim was a private right, not a public right, and there was no basis for allowing it to be tried in a non-Article III federal tribunal.<sup>167</sup>

While this conclusion seems to follow easily from previously announced constitutional principles, Chief Justice Roberts sowed confusion by recharacterizing prior cases in which agencies were allowed to adjudicate federal statutory or regulatory private rights cases as actually involving public rights.<sup>168</sup> Roberts noted that the Court has "rejected the limitation of the public rights exception to actions involving the Government as a party" and stated that "what makes a right 'public' rather than private is that the right is *integrally related to particular Federal Government action*."<sup>169</sup> While the first half of this statement is undoubtedly true, as we saw recently in the Court's approval of the PTAB's adjudication of inter partes review of patents and in *Thomas v. Union Carbide Agricultural Products Co.*,<sup>170</sup> the second half of the statement is seriously misleading.<sup>171</sup> It is a relation to federal government action of a particular kind that makes a right public, such as a federal land grant, patent grant, or license to use federal property such as the

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<sup>167</sup> See *id.* at 499.

<sup>168</sup> See *id.* at 491–92 (discussing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) and *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986)).

<sup>169</sup> *Id.* at 490–91 (emphasis added).

<sup>170</sup> 473 U.S. 568 (1985). In *Union Carbide*, the Court stated the following: "In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Id.* at 589 (citations omitted). This passage may be read as expanding the traditional "public rights" category to include more cases in which a dispute between two private parties is governed by federal statutory law, but the expansion would be quite small. Since the case concerned compensation owed to pesticide registrants from follow-on registrants who used trade-secret information the original registrant had provided to the federal government, the Court posited that Congress could have required follow-on registrants to pay a set fee which would then be paid over to the original registrant. In other words, the compensation scheme could have been handled wholly within a federal agency. Therefore, it did not violate Article III for Congress to provide a more particularized compensation system administered through non-Article III adjudication, in that instance an arbitrator with an extremely limited scope of judicial review.

<sup>171</sup> Chief Justice Roberts continues to insist on a categorical approach to the jurisdiction of non-Article III tribunals. In his dissent in the *Wellness* case, Roberts argued that,

With narrow exceptions, Congress may not confer power to decide federal cases and controversies upon judges who do not comply with the structural safeguards of Article III. Those narrow exceptions permit Congress to establish non-Article III courts to exercise general jurisdiction in the territories and the District of Columbia, to serve as military tribunals, and to adjudicate disputes over "public rights" such as veterans' benefits.

*Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting) (citations omitted). However, he then appears to advocate an alternative approach under which non-Article III tribunals could decide categories of cases that historically had been resolved outside of the courts, including cases in which "nonjudicial bankruptcy 'commissioners'" were authorized by law "to collect a debtor's property, resolve claims by creditors, order the distribution of assets in the estate, and ultimately discharge the debts." *Id.*

airwaves, namely what the Court termed a “public franchise.” Although *Union Carbide* was unclear about this, simple derivation from a federal statute has never been thought to transform all federal statutory claims into public rights. Rather, federal statutory or regulatory provenance is a factor that militates in favor of allowing initial adjudication of a *private* dispute in a non–Article III federal tribunal.<sup>172</sup>

In sum, federal adjudication of private rights is presumptively reserved to the Article III courts. The simplest category of private rights cases reserved to Article III courts encompasses claims arising under state law with no relation to a federal statutory or regulatory scheme. There are, however, exceptions to the general rule precluding non–Article III jurisdiction over private rights claims. Initial adjudication of federal statutory and regulatory claims may be allowed, but only with significant restrictions such as relatively non-deferential judicial review and the reservation of the essential attributes of the judicial process to Article III courts. Initial adjudication of state-law private rights claims closely related to federal statutory private rights claims may also be allowed, but with further restrictions such as preserving the choice of an Article III forum and a determination by Congress that the underlying federal scheme would be unworkable unless the state-law claims could be heard by the non–Article III adjudicator. In either case, only a federal court can issue a binding, final judgment in any private rights case, which means that resorting to federal court will be required if the losing party does not voluntarily comply with the non–Article III adjudicator’s determination.

## CONCLUSION

Adjudication in non–Article III tribunals is a well-established feature of the federal government, with a long history and wide footprint. Most, if not all, federal adjudicators are “Officers of the United States” within the meaning of the Constitution’s Appointments Clause and thus must be appointed in a manner specified in that provision. This includes appointment by the President, by agency heads, or by courts of law, if Congress so specifies. Agencies should have supervisory tools, including removal, adequate to ensure that non–Article III adjudicators are competent without sacrificing the neutrality that is vital to maintaining the fairness of the adjudicatory process.

Congress has the power to assign the adjudication of a broad range of cases to non–Article III adjudicators without violating Article III’s assignment of the judicial power to the federal courts. The traditional divide between public rights cases, which may be adjudicated in non–Article III tribunals, and private rights cases, which may not, is not an accurate portrait of the law governing the area. Rather, a more nuanced understanding establishes that while most public rights cases may be determined by non–Article III adjudicators, sometimes without judicial review if Congress so chooses,

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<sup>172</sup> See *Schor*, 478 U.S. at 856.

there are categories of private rights cases that may also be assigned to non–Article III tribunals. The assignment of private rights cases arising under state law to non–Article III tribunals is generally not allowed, except where necessary to make a closely-connected federal regulatory scheme workable, and then only by litigants’ choice and where judicial review is available. In all cases, the essential attributes of the judicial power must be reserved to the Article III courts.

Discomfort with the growth of non–Article III adjudication has led some commentators, and even some judges, to attack much of it as a blatant violation of the assignment of the judicial power to the Article III courts. The Supreme Court, however, has made clear that as long as non–Article III adjudication remains within traditional bounds and is subject to judicial review when appropriate, the Constitution does not require that only Article III judges conduct federal adjudication. The Court’s clear message remains that the choice of adjudicatory venue in many categories is Congress’s to make.