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INDEPENDENCE THROUGH JUDICIALIZATION: THE POLITICS SURROUNDING ADMINISTRATIVE ADJUDICATORS, 1929-1949

Lawrence J. Liu[*]

One front in today's battle to define the scope of the administrative state concerns the authority, status, and future of its 10,000-plus administrative adjudicators. Decisions by federal courts and the executive branch to increase the dependence of administrative adjudicators on the executive have sparked strong reactions from observers, with many advocating for measures to increase adjudicator "independence." But who should administrative adjudicators be independent of, which ought to be independent, and why?

Calls for administrative adjudicator independence are not new. This Article draws on primary documents produced by private actors, congressional decisionmakers, and federal executive agents to present a political legal history of legislative proposals between 1929 and 1949 to understand whether, how, and why different actors sought to insulate administrative adjudicators from their agencies or the President. Leading up to and following the enactment of the Administrative Procedure Act in 1946, politicians and interested citizens advanced proposals to increase the independence of the individuals who conducted hearings and served as factfinders in administrative agencies. Then, like now, observers debated administrative adjudicator independence in the context of discussions about the power of administrative agencies. The loudest supporters of independence were anti-New Dealers trying to halt and reverse the growth of administrative power, who were joined by a subset of legal professionals interested in using law to check its operation. These critics attempted to "judicialize" administrative adjudication by increasing the resemblance of administrative adjudicators to the federal judiciary.

What does this history teach? First, it illustrates how actors past and present deploy seemingly apolitical terms like judicial values, independence, or administrative procedure to obtain substantive political ends. Indeed, such terms can take on different meanings at different times, perhaps varying with views of the

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federal judiciary and active government, the policies and political strength of the President, the issues decided by administrative agencies, or the types of claimants subject to adjudication. Second, it highlights how early supporters of administrative agencies emphasized the diversity among administrative adjudicators, while opponents grouped them together to collectively limit their authority. Today, rather than pursuing one-size-fits-all reforms, I suggest that different rules should apply to different administrative adjudicators depending on the questions and claimants involved. Decisions about ratemaking or regulatory enforcement differ from individualized determinations whether citizens qualify for government benefits or licenses. Claims by business interests might be treated differently from those by more vulnerable groups, such as disability-benefits recipients or noncitizens at risk of removal. In any event, when making policy recommendations, reformers should begin by understanding who administrative adjudicators are and the functions they perform, an understanding that also underscores whether and how politics should animate arguments about adjudicator independence.

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INTRODUCTION

Administrative agencies face increasing challenges to their authority and reach, the likes of which have not been seen since opposition to the New Deal.[1] The Supreme Court has issued decisions enhancing executive control over agency personnel while also reducing the scope of their authority,[2] Congress has proposed legislation to impose more requirements on agency actions,[3] and presidents from both parties have sought to increase control over agency officials in the name of executive management.[4] One front in this battle to constrain the administrative state concerns the powers, status, and future of its 10,000-plus administrative adjudicators.[5]

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1. *See, e.g.*, Gillian Metzger, *The Supreme Court, 2016 Term—Foreward: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718 (2016) (book review); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI L. REV. 393 (2015); PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

2. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 564 U.S. 477 (2010); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Lucia v. SEC, 138 S. Ct. 2044 (2018); Loper Bright Enters. v. Raimondo, No. 22-451 (June 28, 2024) (overruling the *Chevron* doctrine); SEC v. Jarkesy, No. 22-859 (June 27, 2024) (entitling a defendant to a jury trial rather than an administrative proceeding when the SEC seeks civil penalties for securities fraud).

3. *See, e.g.*, Regulations from the Executive In Need of Scrutiny Act, S. 68, 117th Cong. (2021); Regulatory Accountability Act, S. 951, 115th Cong. (2017); Preventing Overreach Within the Executive Rulemaking System Act, H.R. 395, 116th Cong. (2019); Separation of Powers Restoration Act, H.R. 4317, 117th Cong. (2021); *see also* DANIEL J. SHEFFNER, CONG. RSCH SERV., LSB10523, ADMINISTRATIVE LAW REFORM IN THE 116th CONGRESS (2020).

4. For discussion of efforts during the Trump Administration, *see* Lisa Rein, *Trump's 11th-hour Assault on the Civil Service by Stripping Job Protections Runs Out of Time*, WASH. POST (Jan. 18, 2021, 7:42 PM), https://www.washingtonpost.com/politics/trump-civil-service-biden/2021/01/18/5daf34c4-59b3-11eb-b8bd-ee36b1cd18bf_story.html; *see also* Jim Eisenmann, *Trump's Plan to Gut the Civil Service*, LAWFARE (Dec. 8, 2020, 10:28 AM), https://www.lawfareblog.com/trumps-plan-gut-civil-service. *See also* Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 40 n.3 (2020); Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformations of Constitutional Politics*, 101 B.U. L. REV. 619 (2021).

On Biden administration efforts, *see* Noam Scheiber, *The Biden Administration Fired a Trump Labor Appointee*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/20/us/politics/peter-robb-nlrb-fired.html; *see also* Jim Tankersley, *Biden Fires Trump Appointee as Head of Social Security Administration*, N.Y. TIMES (Oct. 13, 2021), https://www.nytimes.com/2021/07/09/business/biden-social-security-administration.html.

5. This term encompasses the 1,900-plus administrative law judges (ALJs) formally defined in the Administrative Procedure Act, as well as the 10,000-plus non-ALJ adjudicators that are employed by agencies to conduct evidentiary hearings. Although the distinctions among various adjudicators are important, for purposes of this Article, I refer to them generally as "administrative adjudicators," with the functional link being that these adjudicators' conduct agency hearings and fact-finding. For those interested in the distinctions, see, for example, MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2019); KENT BARNETT, MALIA REDDICK, LOGAN CORNETT & RUSSELL WHEELER, NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES (2018).

Although administrative adjudicators have maintained a low profile outside academic circles,[6] the Supreme Court's 2018 decision in *Lucia v. SEC*[7] trained broader attention on this "hidden judiciary."[8] The Court in *Lucia* held that administrative law judges (ALJs) serving in the Securities and Exchange Commission (SEC) were inferior officers subject to the Appointments Clause of the Constitution.[9] In response to the decision, then-President Trump issued Executive Order 13843, which removed ALJ hiring authority from the Office of Personnel Management (OPM), devolved hiring authority to agency heads, and removed ALJs from the competitive civil service.[10] The Office of the Solicitor General then sent a memorandum to agency general counsels, stating that it would read *Lucia* to apply to *all* administrative adjudicators and seek to limit the "good cause" removal provided for in the Administrative Procedure Act (APA)[11] to adjudicators who were "suitably deferential" to agency heads.[12] To date, litigation challenging the legitimacy of administrative adjudicators and their role in administrative schemes continues.[13]

Lucia and subsequent moves to increase the dependence of administrative adjudicators on the executive branch have sparked strong reactions from observers, with many calling for measures to increase adjudicator independence.[14] Various congresspeople (led mostly by Democrats) have proposed new statutes, such as the

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6. One exception was the controversy surrounding President George W. Bush and his administration's selection process for immigration judges, adjudicators housed in the Executive Office for Immigration Review and not subject to the APA. *See* Emma Schawrtz, *Politically Connected Immigration Judges Unlikely to Face Consequences*, ABC NEWS (July 30, 2008, 12:27 PM), https://abcnews.go.com/Blotter/story?id=5480673.

7. 138 S. Ct. 2044 (2018).

8. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477 (2009).

9. 138 S. Ct. at 2047.

10. Exec. Order No. 13,843, 3 C.F.R. § 844 (2019).

11. Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521.

12. Memorandum from Solic. Gen. to Agency Gen. Couns. (2018), https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf.

13. *See, e.g.*, SEC v. Jarkesy, No. 22-859 (June 27, 2024) (holding that the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties for securities fraud but not addressing whether SEC adjudicators' removal protections are unconstitutional); Axon Enter., Inc. v. FTC, 143 S. Ct. 890 (2023) (holding that special statutory review schemes do not displace a district court's federal-question jurisdiction over constitutional challenges to the appointment of FTC and SEC ALJs).

14. *See, e.g.*, Editorial Board, *Trump Is Politicizing the Federal Government Even Further. Step in, Congress.*, WASH. POST (July 22, 2018, 7:07 PM), https://www.washingtonpost.com/opinions/trump-is-politicizing-the-federal-government-even-further-step-in-congress/2018/07/22/eb4ce8ee-8ac1-11e8-8aea-86e88ae760d8_story.html; Chris Mills Rodrigo, *Trump Moving to Dismantle OPM: Report*, HILL (Apr. 10, 2019), https://thehill.com/homenews/administration/438240-trump-moving-to-dismantle- opm-report.

Administrative Law Judges Competitive Service Restoration Act.[15] Scholars have tried to revive proposals for an independent ALJ corps,[16] an administrative court,[17] or additional internal regulatory protections.[18] But who should administrative adjudicators be independent of, which ought to be independent, and why?

These questions and the desire to increase the "independence" of administrative adjudicators are not new. Leading up to and following the enactment of the APA in 1946, politicians and interested citizens advanced proposals to increase the independence of what were then known as hearing examiners, trial examiners, or hearing officers—individuals who conducted hearings and served as factfinders in agency adjudications. Then, like now, politicians, academics, and practitioners debated the independence of administrative adjudicators in the context of discussions about expanding or curtailing administrative power.

This Article presents a political legal history of legislative proposals between 1929 and 1949 to understand whether, how, and why different actors constructed and advanced arguments to insulate administrative adjudicators from their agencies or the President. Throughout this period, the loudest proponents of increasing adjudicator independence were anti-New Dealers trying to halt the growth and reduce the scope of administrative power, who were joined by a subset of legal professionals interested in using law to check its operation. These critics grouped administrative adjudicators together and attempted to increase their resemblance to the federal judiciary, a process I describe as "judicializing" administrative adjudication.

In the early to mid–1930s, this resulted in legislative proposals to establish a specialized administrative court. More moderate proposals sought to strengthen appellate review of agency decisions. Others went further by attempting to remove all adjudicatory functions from agencies and to place them in the new administrative court, thereby limiting and slowing administrative decisionmaking.[19]

By the late 1930s, unable to generate enough political capital for an administrative court, critics of administrative adjudication accepted that agencies were to perform judicial functions but began advocating for administrative *procedures* that could constrain how such functions were exercised. These proposals kept administrative adjudicators in their respective agencies but increased their similarity to federal judges. In considering how to make administrative adjudicators more judge-like, "independence," "impartiality," and "bias" became buzzwords for efforts to insulate examiners from agency staff, increase adjudicators' prestige and

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15. S. 2348, 116th Cong. (2019); H.R. 4448, 117th Cong. (2021).

16. *E.g.*, Levy & Glicksman, *supra* note 4, at 92-110.

17. *E.g.*, Michael B. Rappaport, *Replacing Agency Adjudication with Independent Administrative Courts*, 26 GEO. MASON L. REV. 811 (2019).

18. *E.g.*, Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1728-47 (2020).

19. *See infra* Part II.

standing within their agencies, and reduce agency control over hiring and firing. These changes sought to distance administrative adjudicators from the views of their agencies, constrain their ability to engage in discretionary policymaking, and make their decisions more resistant to change.

This Article's historical account draws on primary documents produced by proponents and opponents of legislative proposals, decisionmakers in Congress, and federal executive branches. In addition to relevant statutes, collected materials include congressional hearings and reports; reports and investigations by the Attorney General; as well as articles, statements, and proposals by stakeholders such as the American Bar Association (ABA) or the National Lawyers Guild (NLG). Additionally, I rely on contemporaneous accounts of the functions and processes of pre-APA administrative adjudication.

Why 1929 to 1949? Following the 1929 stock market crash, the United States witnessed a dramatic growth in regulatory activity that prompted debates about the metes and bounds of government.[20] I end in 1949, as disagreements about administrative adjudicators continued even after the enactment of the APA. Although calls for increasing adjudicator independence have persisted beyond 1949, such calls have echoed the vocabulary, arguments, and policy suggestions introduced in the 1930s and 1940s.

This political-history understanding of administrative adjudicators and their authority differs from most accounts, which have focused on mapping and describing the landscape of administrative adjudicators,[21] discussing the legitimacy of their quasi-judicial status,[22] or considering the quality of their decisionmaking.[23] Instead, I build on scholarship that highlights how administrative adjudication was a flashpoint of New Deal politics.[24] This politics-centered approach hones in on

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20. *See* Metzger, *supra* note 1, at 51-52; K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 33-35, 38-39 (2017); Jessica Wang, *Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism*, 17 J. POL'Y HIST. 257, 263-65 (2005).

21. *See, e.g.*, BARNETT ET AL., *supra* note 5; Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341 (1992); Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L. REV. 65 (1996) [hereinafter Lubbers, *Quest for Uniformity*]; Jeffrey S. Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266 (1981) [hereinafter Lubbers, *Unified Corps*]; Paul R. Verkuil, Daniel J. Gifford, Charles H. Koch, Jr., Richard J. Pierce, Jr. & Jeffrey S. Lubbers, *The Federal Administrative Judiciary*, 2 ACUS 771 (1992).

22. *See, e.g.*, Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797 (2013) [hereinafter Barnett, *ALJ Quandary*]; Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016).

23. *See, e.g.*, David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication*, 72 STAN. L. REV. 1 (2020); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

24. *See, e.g.*, Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE (2012); Ralph F. Fuchs, *The Hearing Examiner Fiasco Under the Administrative*

"political actors, including elected officials, members of their staffs, and representatives of key interest groups" and on "action in the elected branches and in the broader public domain."[25]

What does this history teach? First, it illustrates the tight connection between partisan politics and seemingly apolitical[26] tools like administrative procedure.[27] In historical and contemporary debates about administrative adjudicator independence, actors have deployed terms like judicial values, independence, or procedure to obtain substantive political ends.[28] Though abstract, these normative terms are animated by context-specific understandings of legal institutions and accompanying beliefs about legitimacy and fairness. These political contexts are shaped by several factors, including views of the federal judiciary and of active government, the policies and political strength of the president, the types of questions being adjudicated by administrative agencies, and the types of claimants subject to adjudication. An era with a politically conservative federal judiciary, an entrenched liberal president, and administrative agencies actively regulating economic life is distinct from an era with a liberal, rights-protecting judiciary, predictable electoral swings, and weaker administrative agencies. The invocation of normative buzzwords in debates about administrative adjudication thus serves as a stand-in for broader beliefs about administrative agencies, the government, and their role in American life.

Second, my account illustrates how early supporters of administrative agencies valued the diversity among administrative adjudicators, while their opponents grouped adjudicators together to make them more judge-like and to collectively limit their authority. Many contemporary reform efforts take this latter view for granted, assuming that independence of all administrative adjudicators is necessary to justify administrative power. Instead, reformers should consider how differences between administrative agencies affect which adjudicators should be made more or less independent.

Third, I suggest that different rules should apply to different administrative adjudicators depending on the types of questions presented and claimants involved. Adjudicators that make decisions about ratemaking or regulatory enforcement differ from those that determine whether individuals qualify for government benefits or licenses. The adjudication of claims by business

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Procedure Act, 63 HARV. L. REV. 737 (1950); Morgan Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L.J. 431 (1950); Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979).

25. Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 479 (2022).

26. By "apolitical," I mean that administrative procedure is a tool that ostensibly affects both political parties equally.

27. *See infra* Part V.

28. Elinson & Gould, *supra* note 25, at 484; *see also* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 346 (2019) (discussing how procedural rules are "political priorities").

interests might be treated differently from those by more vulnerable groups, such as disability-benefits recipients or noncitizens at risk of deportation. In any event, when making policy recommendations, reformers should first understand what different administrative adjudicators do and recognize the role of politics in animating competing arguments. Rather than obscure the politics inevitably at play in debates about administrative adjudicator independence, this approach brings these ideas about who gets what, when, and how to the foreground.

Part I provides an overview of pre-APA administrative adjudicators and discusses their selection and qualifications, functions and responsibilities, status vis-à-vis their employing agencies, and the statutory provisions that created them. Part II examines the origins, actors, and arguments underlying proposals to create administrative courts in the 1930s. Part III describes the shift in focus to administrative procedure in the late 1930s, which placed attention squarely on adjudicators and their independence from their agencies. The battle over administrative adjudicators did not end with the enactment of the APA in 1946, however, and Part IV examines controversies surrounding how to evaluate incumbent examiners. Part V considers what this history teaches about the relationship between sociopolitical contexts and terms like "adjudicator independence," as well as its implications for contemporary concerns about ALJ independence.

I. PRE-APA ADMINISTRATIVE ADJUDICATORS: FUNCTIONS, PROCEDURES, AND SOURCES OF AUTHORITY

Part I describes a cross-section of administrative adjudicators (often referred to as "examiners") who conducted agency fact-finding hearings between the creation of the Interstate Commerce Commission (ICC) in 1887 and the enactment of the APA.[29] As discussed below, these examiners and the legitimacy of their work were the subject of intense debate leading up to the APA, and they performed functions analogous to today's administrative adjudicators.[30] From one perspective, examiners were agency employees tasked with preserving order in hearings, collecting and summarizing information, writing reports that may not have influenced final agency decisions, and serving in non-adjudicatory roles as

29. Although administrative adjudication existed prior to the creation of the ICC, I focus on post-ICC agencies given the ICC's status as a model for subsequent pre-APA administrative adjudicators, as well as their functional similarities to administrative adjudicators today. For a discussion of earlier forms and practices of administrative adjudication, *see* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION (2012) (discussing mass adjudication in chapter 14); *see also* LLOYD D. MUSOLF, FEDERAL EXAMINERS AND THE CONFLICT OF LAW AND ADMINISTRATION 49-51 (1953).

30. Although the precise functions of today's administrative adjudicators vary by agency, *see* Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 475 (2011), they generally serve as trial-level examiners in administrative adjudications—hearing evidence, deciding factual issues, and applying legal principles. Barnett, *ALJ Quandary*, *supra* note 22, at 798-99; *see also* 5 U.S.C. §§ 554-557 (describing the requirements of formal APA administrative adjudication).

needed. On this account, examiners were tethered to their agencies' needs and policies. From another perspective, examiners were better analogized to trial judges—frontline adjudicators interfacing with the parties, ruling on motions, finding facts, applying law, and issuing preliminary decisions. On that account, it was important for examiners to be, or at least appear to be, independent of the agencies employing them.

I focus on pre-APA administrative adjudicators from seven agencies to highlight similarities and differences across (1) sources of legal authority, (2) decisionmaking procedures, (3) duties and powers, and (4) status within their agencies. The seven agencies are the ICC, the Federal Power Commission (FPC),[31] the Federal Trade Commission (FTC), the Federal Communications Commission (FCC), the Securities and Exchange Commission (SEC), the National Labor Relations Board (NLRB), and the Social Security Board (SSB).[32] These bodies are representative of the types of agencies created between the Progressive Era and the New Deal. They include administrative adjudicators tasked with adjudicating a range of possible claims (e.g., ratemaking,[33] licensing,[34] disciplinary/enforcement actions,[35] and benefits[36]) brought by different claimants (e.g., agencies, businesses, and individual citizens). Their authority was often the subject of public attention and political debate, and their work still generates litigation and political disagreement today.[37] These agencies also employed a significant number of administrative adjudicators.[38] Table 1 summarizes the number of examiners present in these agencies in 1940, as well as the types of questions adjudicated.[39]

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31. The FPC became the Federal Energy Regulatory Commission in 1977.

32. The SSB is now known as the Social Security Administration.

33. Ratemaking cases generally involved hearings that challenged or sought to alter rates established by the agency.

34. Licensing cases generally involved hearings to determine whether a party ought to receive a license from the agency to authorize a certain form of behavior, such as operating a power plant or conducting radio broadcasts.

35. Disciplinary and enforcement cases generally involved hearings to discipline license-holders, revoke licenses, issue cease-and-desist orders, or impose civil monetary penalties.

36. Benefits cases generally involved hearings to determine whether a party qualified to receive certain public benefits.

37. In *SEC v. Lucia*, litigants challenged the authority and legitimacy of the SEC's ALJs. 138 S. Ct. 2044 (2018). In *Eldeco, Inc. v. NLRB*, the claimant argued that the ALJ was biased because almost 89 percent of his decisions in the preceding twenty years had favored labor unions. 132 F.3d 1007, 1010 (4th Cir. 1997). In *Grant v. Sullivan*, a Social Security disability claimant argued that ALJ Rowell was biased against the claimant in his credibility determinations. Jason D. Vendel, Note, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 777-81 (2005).

38. By one count, in 1947, of the 196 active hearing examiners then reclassified as ALJs, 132 were housed in these 7 agencies. The ICC had 47, the NLRB 33, the FTC 20, the SSB 13, the FCC 11, the FPC 8, and the SEC 6. Thomas C. Mans, *Selecting the "Hidden Judiciary"* (pt. 1), 63 JUDICATURE 60, 64 tbl.1 (1979).

39. Counts are derived from U.S. ATT'Y GEN.'S COMM. ON ADMIN. PROC., ADMINISTRATIVE

Table 1
Seven New Deal Agencies of Interest: Count and Principal Questions Adjudicated

Agency	Count in 1940	Ratemaking	Licensing	Disciplinary / Enforcement Actions	Benefits
ICC	222[40]	X	X	X	
FCC	14	X	X	X	
FPC	8	X	X		
SEC	11		X	X	
NLRB	38[41]			X	
FTC	20			X	
SSB	12				X

A. Statutory Authority

Many of the statutes creating administrative agencies provided for the hiring and use of administrative adjudicators to conduct adjudicatory hearings. The origin of contemporary administrative adjudicators can be traced to the passage of the Hepburn Act in 1906, which expanded the ICC's jurisdiction and empowered it to set maximum railroad rates.[42] Prior to the Hepburn Act, ICC commissioners presided over formal hearings. However, as hearings grew more numerous and complex, the commissioners complained about the difficulty of conducting hearings, taking testimony, and examining witnesses in addition to their other responsibilities.[43]

PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 77-8, app. H at 375 (1941) [hereinafter AG'S COMMITTEE REPORT]. The types of questions adjudicated are drawn from the Final Report as well as from agency-specific monographs published by the AG's Committee in 1940 and 1941.

40. This number is inflated because "examiners" in the ICC also referred to those who did not preside at hearings, such as employees who wrote reports, reviewed others' reports, or were detailed to specific Commissioners. AG'S COMMITTEE REPORT, *supra* note 39, app. H at 390.

41. The NLRB also employed four part-time trial examiners. AG'S COMMITTEE REPORT, *supra* note 39, app. H at 382.

42. Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584 (1906). Some might argue that the ancestors to today's administrative adjudicators predated the Hepburn Act. Notably, law professor Jerry Mashaw has described the adjudicatory work performed by administrators in the U.S. Post Office and the Bureau of Pensions during the late-19th century. MASHAW, *supra* note 29, at 251-82. Similarly, Musolf discusses General Land Office Registers who helped settle disputes involving the sale of public lands, or local boards of inspectors who were tasked with supervising merchant marine personnel under the Seaman's Slaughter Statute. MUSOLF, *supra* note 29, at 49-50. Like Musolf, however, I begin my discussion in 1906. Most pre-1906 administrative adjudicators juggled numerous responsibilities, and conducting adjudicatory hearings was often only a minor piece. Additionally, later statutes and legislative histories did not refer to pre-1906 adjudicators and closely emulated the later ICC and FTC models.

43. MUSOLF, *supra* note 29, at 48.

In light of the increasing responsibilities of ICC commissioners, Section 7 of the Hepburn Act authorized the Commission to "to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence."[44] Seven years later, Congress further expanded the powers of the ICC in the Valuation Act, enabling the Commission to "appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony" in order to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act."[45]

When the FTC was formed in 1914, Congress authorized the Commission to "employ and fix the compensation of . . . examiners . . . necessary for the proper performance of its duties."[46] Congress copied language from the Hepburn Act in describing the functions of these examiners, also empowering them to "administer oaths and affirmations, examine witnesses, and receive evidence."[47]

The ICC and FTC statutes served as models for future legislation creating independent regulatory agencies.[48] In the Federal Water Power Act of 1920,[49] the Communications Act of 1934,[50] the Securities Exchange Act of 1934,[51] and the National Labor Relations Act of 1935,[52] Congress granted agency examiners the power to administer oaths and affirmations, examine witnesses, and receive evidence. The legislative history of the Communications Act of 1934 and the National Labor Relations Act of 1935 indicated that the FCC and the NLRB ought to follow procedures established for the ICC and FTC, respectively.[53] Sometimes, Congress even made express reference to ICC and FTC procedures in the statutory text.[54]

Congress did not, however, always choose to establish hearing examiners in administrative agencies. The Social Security Act of 1935, for example, did not authorize the creation of hearing examiners or officers.[55] But in 1939 amendments to the Act, Congress granted the power to "administer oaths and affirmations,

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44. Hepburn Act of 1906, Pub. L. No. 59-337, § 7, 34 Stat. 584, 595.

45. Valuation Act of 1913, Pub. L. No. 62-400, § 19a, 37 Stat. 701, 701.

46. Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 2, 38 Stat. 717, 718.

47. *Id.* § 9, 38 Stat. at 722.

48. MUSOLF, *supra* note 29, at 52 tbl. 1.

49. Federal Water Power Act of 1920, Pub. L. No. 66-280, § 4(g), 41 Stat. 1063, 1067.

50. Communications Act of 1934, Pub. L. No. 73-416, § 409(a), 48 Stat. 1064, 1096.

51. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 21(b), 48 Stat. 881, 900.

52. National Labor Relations Act of 1935, Pub. L. No. 74-198, § 11(1), 49 Stat. 449, 456.

53. MUSOLF, *supra* note 29, at 52.

54. The Agricultural Adjustment Act of 1933, for instance, included procedures from the FTC Act in its text. In a subsection authorizing the Secretary of Agriculture or "such officer or employee of the Department as he may designate" to conduct hearings, the Act states that "sections 8, 9, and 10 of the Federal Trade Commission Act . . . are made applicable to the jurisdiction, powers, and duties of the Secretary." Pub. L. No. 73-10, § 10(h), 48 Stat. 31, 38 (1933).

55. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620.

examine witnesses, and receive evidence" to the Social Security *Board*, rather than to individual examiners.[56] Though the Board ultimately decided to employ examiners to facilitate their work under the Act (called "referees"), the lack of authorizing statutory language is distinctive compared to statutes that expressly empowered such adjudicators.

The authorization of hearing examiners aside, most statutes lacked detail on examiners' appointments, status, or responsibilities—a sharp contrast to the detailed provisions of the APA. Although examiners were federal employees subject to the Classification Act of 1923,[57] that Act did not impose requirements on how agencies could select and compensate their examiners. Instead, agencies gave examiners a rating for federal employee classification, which determined their compensation and promotion.[58] By and large, statutes did not discuss how examiners were to be selected or compensated.[59] Also unlike the APA, pre-1946 statutes did not discuss examiners' powers and responsibilities, such as the powers to conduct pre-hearing conferences, rule on motions, write reports that summarize the proceedings, or recommend decisions.

B. Powers and Practices

The lack of specificity in pre-APA statutes did not mean that examiners operated without legal constraint, however. Rather, vague statutory language created space for agencies to develop their own policies and practices, what legal scholar Jerry Mashaw has elsewhere called "internal administrative law."[60] The following section focuses on examiners' selection and qualifications, their powers and tasks, their interactions with other agency employees during the hearing process, and their role in post-hearing procedures.

1. Employment Status and Salaries

What kinds of individuals served as administrative adjudicators before the APA, and how were such adjudicators classified and compensated? Across the seven surveyed agencies, most examiners had law degrees and practiced law, but prior work experiences varied.[61] Some had worked with or in the industries being

56. Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 205(b), 53 Stat. 1360, 1368-69.

57. Classification Act of 1923, Pub. L. No. 67-516, 42 Stat. 1488.

58. See discussion in *Ramspeck v. Fed. Trial Exam'rs Conf.*, 345 U.S. 128 (1953).

59. One exception among these seven agencies is the Communications Act of 1934. Even there, however, the Act merely indicated that examiners were among the FCC employees that ought to be appointed according to the provisions of the civil-service laws and the Classification Act of 1923. Pub. L. No. 73-416, § 4(f), 48 Stat. 1064, 1067 (1934).

60. *See* MASHAW, *supra* note 29; JERRY MASHAW, BUREAUCRATIC JUSTICE (1983).

61. *See* AG'S COMMITTEE REPORT, *supra* note 39, app. H. One exception were "referees" at

regulated. Many ICC examiners, for example, had worked for railroads, trucking companies, other federal agencies like the Railroad Administration or Railroad Retirement Board, or on State public-service commissions.[62] In other agencies, examiners had general public-service experience, with previous work as judges, elected officials, or examiners in other agencies.[63] But not all agencies employed examiners with agency-relevant experiences. At the NLRB circa 1940, examiners' experiences ranged from serving as a lieutenant in the Philippine constabulary to serving as a county judge.[64] Referees at the SSB had held jobs such as professional consultant, news reporter, teacher, and Y.M.C.A secretary.[65] This variation highlights the diversity among and within agencies, as well as the discretion administrators had in selecting their adjudicators.

Agencies also exercised flexibility with regards to classifying their adjudicators. Examiners in the ICC and FCC, for instance, held "civil-service status," which meant that general civil-service rules surrounding tenure and management applied. In the other agencies surveyed here, examiners were only classified as members of the "professional service" under the Classification Act.[66] Despite variation in classification and civil-service protections, the Classification Act ensured consistency in examiner salaries. Among the seven agencies of interest, average salaries for non-chief examiners ranged from approximately $4,300 to $5,600 in 1940, depending on years of experience.[67] Federal district judges at the time, in comparison, earned $10,000 a year.[68]

2. Range of Hearing-Related Tasks and Responsibilities

Vague statutory language and differing needs among agencies also resulted in varying tasks and responsibilities. Some pre-APA examiners resembled trial judges, with the power to issue subpoenas,[69] rule on evidentiary motions,[70] and examine witnesses.[71] Others took on an inquisitorial posture, actively working with parties to flesh out cases. SSB referees, for example, were even involved in

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the Social Security Board, where only three of twelve had law degrees in 1940. *Id.* app. H at 384-85.

62. *Id.* app. H at 391.

63. Such examples included the FCC, the FTC, the FPC, and the SEC. *See id.* app. H. at 376, 378, 395.

64. *Id.* app. H at 383.

65. *Id.* app. H at 385.

66. *Id.* app. H.

67. For a discussion of salaries in the surveyed agencies, see *id.* app. H at 375, 378, 382, 384, 391, 395.

68. Act of Dec. 13, 1926, ch. 6, 44 Stat. 919.

69. AG'S COMMITTEE REPORT, *supra* note 39, app. H at 376, 383, 391, 395, 396 (discussing the subpoena powers of examiners in the FCC, NLRB, ICC, FPC, and SEC, respectively).

70. *Id.* app. H at 376, 378, 391, 395 (discussing the FCC, FTC, the ICC, and SEC, respectively).

71. *Id.* app. H at 391, 395 (discussing the ICC and FPC).

developing evidence for or against claimants during the hearing,[72] which one commentator described as a "paternalistic role."[73]

In addition to managing the hearing process, examiners wrote reports that summarized facts and legal issues. Among the seven agencies of interest, reports varied from formal and fulsome, as in the NLRB,[74] to informal or narrow in scope, as in the FPC.[75] In some agencies, reports included recommended agency decisions.[76] Elsewhere, such as at the SSB, examiners made initial dispositions themselves and communicated them to the parties.[77]

Report publication practices also differed. Agencies that kept their reports secret, like the FPC, garnered complaints from parties.[78] Most of these seven agencies, however, shared copies of their reports with the parties, who could then note "exceptions" to be included in the report when passed on to agency decisionmakers. This practice began at the ICC in 1917,[79] and agencies such as the FTC and the NLRB later adopted it.[80] As indicated in these agencies' annual reports, the report-and-exception policy helped to focus agency decisions, [81] and parties expressed general satisfaction with the practice.[82]

3. Status within Agencies

Another flashpoint in historical debates concerned the position of examiners with respect to other agency employees, especially their organizational superiors.[83] Among the seven agencies studied here, examiners' organizational positions again varied. At the FCC, examiners were often the same attorneys who prepared the case, and they usually served as Commission counsel during hearings.[84] At the ICC, though examiners never concurrently served as advocates before the Commission, they did not comprise a separate division and were called upon to also perform non-adjudicatory work.[85] Others recognized a need to isolate examiners from other agency divisions. At the FTC, the NLRB, the SSB, the FPC,

72. *Id.* app. H at 385.

73. MUSOLF, *supra* note 29, at 63.

74. AG'S COMMITTEE REPORT, *supra* note 39, app. H at 383.

75. *Id.* app. H at 395.

76. *Id.* app. H at 383, 395 (discussing the NLRB and FPC).

77. *Id.* app. H at 385.

78. MUSOLF, *supra* note 29, at 67, 118.

79. *Id.* at 65-66.

80. AG'S COMMITTEE REPORT, *supra* note 39, app. H at 378, 383.

81. 1 N.L.R.B. 24 (1936).

82. 33 I.C.C. 22 (1919).

83. *See infra* Part III.

84. AG'S COMMITTEE REPORT, *supra* note 39, app. H at 376; MUSOLF, *supra* note 29, at 63.

85. *See* AG'S COMMITTEE REPORT, *supra* note 39, app. H at 391.

and the SEC, examiners had no other duties and were responsible to no agency units besides the Commission or Board.[86]

Understanding how agency superiors treated examiner reports sheds additional insight into examiners' status at their agencies. At one end of the spectrum, SSB examiners issued initial agency dispositions.[87] At the other end, examiner reports carried little to no weight. In its discussion of the FCC, for example, the AG's Committee in 1940 reported that "[e]xaminers' reports are not used by the Communications Commission. Instead, memoranda are prepared by the Engineering, Accounting, and Law Departments, and proposed findings are submitted by the parties."[88] Similarly, SEC examiner reports were given "little weight" and treated as "advisory only."[89] Other agency practices fell somewhere in between. NLRB examiners, for instance, were empowered to recommend decisions and make legal conclusions, but the Board reviewed such determinations de novo unless an examiner recommended dismissal or the employer complied with the examiner's recommendations.[90] At the FTC, examiners summarized facts but did not make formal findings, conclusions of law, or recommendations.[91]

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The preceding discussion highlights the diversity among administrative agencies and their adjudicators before the enactment of the APA. This mapping of who administrative adjudicators were, the questions they heard, and their powers and responsibilities enables an understanding of the context of subsequent reform efforts. It also raises questions about the wisdom of harmonizing agency practices and wholesale reform, which is often the starting point for contemporary discussions. Below, I describe the politics behind legislative efforts to homogenize administrative adjudicators, despite this diversity, between 1929 and 1949.

II. CALLS FOR AN ADMINISTRATIVE COURT (1929-1939)

In Part II, I examine the debates surrounding legislative proposals for an administrative court between 1929 and 1939. The earliest bills sought to specialize appellate review over agency decisions without affecting the work of agencies and their examiners. By the mid-1930s, the American Bar Association (ABA) and its Special Committee on Administrative Law drafted and advanced legislation that

86. *Id.* app. H at 378, 383, 385, 395. In at least the FPC and the SEC, examiners even made up an independent unit on the agency's organizational chart. *Id.* app. H at 395.

87. *Id.* app. H at 385.

88. *Id.* app. H at 376.

89. *Id.* app. H at 396.

90. *Id.* app. H at 383.

91. *Id.* app. H at 378 ("By [FTC] Rule XIII it is provided that 'The trial examiner's report upon the evidence is not a decision, finding or ruling of the Commission. It is not a part of the record in the proceeding, and is not to be included in a transcript of the record.'").

excised judicial functions from administrative agencies. These proposals would have rendered administrative examiners effectively obsolete by transferring their responsibilities to the federal courts. By the end of the decade, proposals for an administrative court returned to the appellate-review models of the late 1920s and early 1930s, around the same time that the ABA Special Committee and other non-governmental critics of administrative agencies shifted attention to administrative procedure. I address these bills' provisions, the people who proposed and supported them, the arguments surrounding them, and why administrative court proposals eventually faded in favor of increasing administrative procedures.

A. Proposals in the Early 1930s: Centralizing and Specializing Appellate Review

Republican Senator George Norris first proposed the establishment of an administrative court in January 1929.[92] At that time, administrative decisions were reviewed by various generalist and specialized federal appellate courts. The Norris Bill aimed to establish a single court with appellate jurisdiction, similar to other Article III courts. This new "Court of Administrative Justice" would comprise a chief justice and twelve associate justices, appointed by the President with Senate approval.[93] Justices would hold office during good behavior and earn salaries comparable to federal appellate judges.[94] Like Article III courts, cases would be heard by three-judge panels.[95] The proposed administrative court would have jurisdiction over all claims against the United States, as well as petitions for writs of mandamus or bills of injunction against U.S. officers and employees, thereby replacing the Court of Claims, the Court of Customs Appeals, and the Board of Tax Appeals.[96] The bill proposed four years later by Democratic Senator Marvel Mills Logan contained substantially similar provisions.[97]

Rather than directly change how administrative agencies or their employees functioned, the bills merely sought to streamline challenges of administrative decisions. In addition to possibly slowing down administrative activity, centralizing the jurisdiction of different courts into one court had the potential to facilitate doctrinal consistency. However, any impact on the behavior of administrative agencies would have depended on their responses to the mere existence of a more specialized appellate tribunal.

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92. S. 5154, 70th Cong. (1929).

93. *Id.* § 1.

94. *See id.*; Act of Dec. 13, 1926, ch. 6, 44 Stat. 919.

95. S. 5154, 70th Cong. § 6 (1929).

96. *Id.* §§ 2-3.

97. S. 1835, 73d Cong. (1933). Two noteworthy differences in the Logan bill were that the administrative court justices were to be transferred directly from the eliminated courts to the new administrative court and that the administrative court was to absorb some of the jurisdiction that had previously been granted to the U.S. Courts of Appeals. *See id.* §§ 1-2.

Neither bill garnered much attention from Congress nor the public. Nonetheless, the politics producing the two bills point to the effects of executive-legislative relations and professional socialization. The 1929 bill was introduced by a Republican senator during the Hoover administration and before the stock market crash of 1929. In contrast, the 1933 bill was introduced by a Democratic senator near the beginning of the Franklin D. Roosevelt administration. Senator Norris was a liberal Republican opposed to President Hoover's administrative programs.[98] Although Senator Norris's administrative-court proposal can be attributed to his disagreements with the executive branch, Senator Logan arguably had more sociological motivations. Senator Logan was not an ardent opponent of President Roosevelt's New Deal initiatives.[99] However, as an elite lawyer who had served as a Kentucky state supreme court justice and as a member of the Senate's Judiciary Committee, he had a keen interest in administrative procedure.[100] This commitment to judicialization pitted Senator Logan against President Roosevelt at various points throughout the 1930s, aligning him with more conservative interests on these issues.[101]

B. Proposals in the Mid-1930s: Removing Judicial Functions from Administrative Agencies

Although Congress took no action on the Norris or Logan bills, stakeholders continued working towards the creation of an administrative court. The most prominent and influential stakeholder was the ABA and its Special Committee on Administrative Law, which was established in 1933 to address perceived deficiencies in administrative law and procedures.[102] The ABA of the 1930s represented conservative business interests and the elite corporate bar,[103] in contrast to the more liberal Bar Association of the City of New York or the more progressive National Lawyers Guild (NLG). Given the ABA's corporate clientele, the Special Committee on Administrative Law worried about the growth of administrative agencies and regulation,[104] as well as the challenges faced by

98. Shepherd, *supra* note 24, at 1567.

99. *Id.* at 1568.

100. *Id.*

101. *Id.* at 1568-69.

102. *Id.* at 1569-70. Membership on the Special Committee in 1933 consisted of Louis G. Caldwell (jaded former general counsel of the Federal Radio Commission and partner at Kirkland & Ellis), Pierce Butler, Jr. (the son of conservative Supreme Court Justice Pierce Butler), Walter F. Dodd (a political science professor at Johns Hopkins who supported administrative governance), O.R. McGuire (counsel to the Comptroller General and a vocal critic of administrative agencies), and Melvin G. Sperry. Membership varied in future years, but one significant future member was Roscoe Pound, Dean of Harvard Law School and staunch opponent of President Roosevelt.

103. *See* Joanna L. Grisinger, *The Hearing Examiners and the Administrative Procedure Act, 1937-1960*, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 8 (2014); Shepherd, *supra* note 24, at 1613.

104. *See* RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW

attorneys seeking to practice in front of agencies, a practice area then dominated by non-lawyers.[105]

In its first annual report in 1933, the ABA Special Committee called for placing an agency's judicial functions in an administrative court and for studying Senator Logan's 1933 proposal.[106] Its 1934 report recommended that the ABA adopt a resolution granting the Special Committee the power "to confer with the appropriate government officials and to appear before the appropriate committees of Congress and to draft and urge the enactment of legislation in furtherance of the Special Committee's conclusions."[107] The first conclusion was to separate agency judicial functions from their legislative and executive functions, to place those judicial functions "preferably in a federal administrative court," and to limit future congressional delegations of judicial power to any non-judicial tribunals.[108] The Special Committee's proposed administrative court had the power to adjudicate issues of *fact* as well as of law in the first instance.[109]

In making these recommendations, the Special Committee explained that administrative agencies had "gone too far in dispensing with basic safe-guards, particularly on the quasi-judicial side of their operations."[110] "Administrative tribunals with judicial power are courts in fact; without adequate judicial review of their decisions they are, potentially at least, courts controlled by the Executive or by the Legislature," which meant that "the principle of judicial independence[] has been sacrificed."[111] The Special Committee also felt that agencies' combination of executive, legislative, and judicial functions violated the separation of powers.[112]

The Special Committee created a bill outline that was submitted to the ABA's Executive Committee for consideration in January 1935.[113] The Executive Committee then authorized the Special Committee to draft the bill and to take the

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DEAL 99-106 (1995); Grisinger, *supra* note 103, at 8; Jeffrey S. Lubbers, *The ABA Section of Administrative Law and Regulatory Practice—From Objector to Protector of the APA*, 50 ADMIN. L. REV. 157, 157 (1998).

105. SHAMIR, *supra* note 104, at 93-94.

106. REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW, 56 ANN. REP. A.B.A. 407, 426-27 (1933) [hereinafter 1933 ABA REPORT].

107. REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW, 57 ANN. REP. A.B.A. 539, 539 (1934) [hereinafter 1934 ABA REPORT].

108. *Id.* at 539-40.

109. *Id.* at 550.

110. 1933 ABA REPORT, *supra* note 106, at 411.

111. 1934 ABA REPORT, *supra* note 107, at 563.

112. *See also* Arthur T. Vanderbilt, *The Place of the Administrative Tribunal in our Legal System*, 24 AM. BAR. ASS'N J. 267, 271 (1938) ("The courts did not delegate judicial powers to these administrative bodies, and, they cannot take it away. It is the legislature, that assumes to grant away these judicial powers, and whatever the inevitable necessity of the situation may be, *prima facie* it constitutes an invasion of the judicial province.").

113. REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW, 59 ANN. REP. A.B.A. 720, 755 (1936) [hereinafter 1936 ABA REPORT].

proper steps to secure its enactment.[114] In spring 1935, the Special Committee completed the first draft. Opposition from other segments of the ABA emerged, and the Special Committee neither introduced the bill to Congress nor issued an annual report.[115]

Following this setback, the Special Committee began work on a new bill. By the end of 1935, despite having not received approval from the ABA, the Executive Committee, nor even all members of the Special Committee, Special Committee Chairman O.R. McGuire nonetheless submitted the draft bill for introduction in Congress in January 1936.[116] This bill was introduced by Senator Logan and Representative Celler as S. 3787 and H.R. 12297.[117]

Unlike earlier administrative court bills, S. 3787 and H.R. 12297 sought to create a larger court, one comprised of forty associate justices and one chief justice and consisting of both an appellate and trial division.[118] Like the earlier bills, the President would appoint these administrative justices upon advice and consent of the Senate, and justices would hold office during good behavior. The 1936 bills similarly proposed to dissolve the Court of Claims, the Court of Customs Appeals, and the Board of Tax Appeals, and move their judges into the new administrative court. Given the increased size and functions of the proposed administrative court, it would be further divided into specialty divisions mimicking the divisions between the three eliminated courts.

Second, the bills removed adjudications from administrative agencies and placed them in the new court.[119] The bill mentioned some of the administrative agencies that would be subject to this provision, including the FCC, the FPC, and the ICC. Moreover, the powers to "administer oaths, examine witnesses, subpoena the attendance and testimony of witnesses and the production of documents and other papers" would be transferred from agency examiners to trial judges or commissioners on the new administrative court.[120]

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114. *Id.* at 756.

115. *Id.* at 757. Opponents included Washington, D.C. legal specialists involved in the work of existing agencies, as well as those who preferred adjudication by generalist over specialist judges. *See* Dan Ernst, *The Special Committee on Administrative Law*, LEGAL HIST. BLOG (Sept. 27, 2008, 12:38 PM), http://legalhistoryblog.blogspot.com/2008/09/special-committee-on-administrative-law.html.

116. 1936 ABA REPORT, *supra* note 113, at 758. On the difficulties faced by Special Committee members in working with Chairman McGuire, see Ernst, *supra* note 115.

117. S. 3787, 74th Cong. (1936); H.R. 12297, 74th Cong. (1936).

118. *Id.* §§ 2(a)-(b), 3.

119. *Id.* § 6 ("The jurisdiction and authority now vested in the several departments, commissions, administrations, and other executive agencies of the Government over the revocation of licenses, permits, registrations, or other grants for regulatory purposes . . . are hereby transferred and vested in the trial division of the court . . . .").

120. *Id.* § 15.

Notably, the two bills would have required Congress to continue monitoring the relationship between the new court and administrative agencies. As described in Section 17:

> Within two years . . . the court shall investigate and report to Congress a complete list of the classes of cases concerning which the departments or establishments of Government are invested with or exercise judicial or quasi-judicial functions, together with the provisions for judicial review in each case, if any, and the court shall submit its recommendation as to which of such classes of cases should be divorced from the executive branch of the Government and transferred to the jurisdiction of this court.[121]

Far-reaching aspirations of these bills aside, none received sufficient attention from Congress to move forward in the legislative process.[122]

C. Proposals in the Late 1930s: Returning to Appellate Review

By 1937, congressional and ABA Special Committee interest in a federal administrative court began to wane. Although Congressman Celler introduced the same administrative-court bill during the next two Congresses,[123] Senator Logan altered the text and scope of his bill to gain more political support.[124] The bills introduced by Senator Logan in 1938 and 1939[125] continued to propose the establishment of a federal administrative court but limited it to an appellate-review function. The bills eliminated the proposed trial division, limited review to final agency decisions, and restricted de novo review to questions of law, while questions of fact were conclusive if supported by substantial evidence. These watered-down bills were not drafted by the ABA's Special Committee on Administrative Law but were instead co-drafted by Board of Tax Appeals lawyer Emmett Sebree and Frederick Blachly, a political scientist affiliated with the Brookings Institute.[126]

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121. *Id.* § 17.

122. Although S. 3787 and H.R. 12297 died in committee, the ABA Special Committee continued to advocate for its robust administrative court in its 1936 report. Features of this proposed administrative court continued to include: the ability to review issues of both law and fact; a trial division and an appellate division; judges appointed by the President, confirmed by the Senate, and in office during good behavior; and a jurisdiction that could be expanded over time as new administrative controversies emerged. 1936 ABA REPORT, *supra* note 113, at 720. The proposed administrative court still sought to address the "evils" in the existing system, which included: "(a) the combination of judicial with executive or legislative functions; (b) the fact that the tenure of office of administrative judges is insecure; and (c) the lack of effective independent review or judicial control of administrative decisions." *Id.* at 724.

123. H.R. 2240, 75th Cong. (1937); H.R. 234, 76th Cong. (1939).

124. *See* Shepherd, *supra* note 24, at 1589.

125. S. 3676, 75th Cong. (1938); S. 916, 76th Cong. (1939).

126. *See* Shepherd, *supra* note 24, at 1589 & n.135.

Around the time that Senator Logan began reducing the scope and depth of his administrative-court proposals, the ABA Special Committee also became less supportive of a federal administrative court. In 1937, its annual report decided to "drop the phrase 'Administrative Court' along with any further attempts at this time to consolidate the legislative courts."[127] In 1938, the Special Committee reiterated its opposition to the establishment of a federal administrative court and began shifting its attention towards procedural reforms.[128] The ABA's journal later published views from its membership that echoed similar concerns.[129]

The pared-down ambitions of Senator Logan's 1938 bill nonetheless gained enough legislative interest within the judiciary subcommittee to warrant hearings. Recognizing growing strength among conservatives in favor of more dramatic administrative reform, the Roosevelt administration backed the 1938 bill, with representatives of the Department of Justice and the SEC testifying in support.[130] Meanwhile, ABA Special Committee members opposed it. O.R. McGuire continued to push for a more powerful administrative court like that in his 1936 bill.[131] Committee member Monte Appel felt that centralizing and specializing the judicial review process in the proposed administrative court was unnecessary and even harmful.[132] New Committee Chairman and Harvard Law School Dean Roscoe Pound testified that new courts were unnecessary and failed to confront the deeper problems he associated with administrative agencies.[133]

The ABA Special Committee's shift away from proposals for an administrative court might be explained by changes in personnel. The 1938 annual report, for example, was written under the chairmanship of Roscoe Pound, a vocal conservative critic of President Roosevelt and the New Deal. It argued that an administrative court was insufficient to deal with the "administrative absolutism" Pound and other conservatives associated with the New Deal state.[134] The late 1930s also presented new opportunities for conservative critics to pursue more ambitious reforms, in light of perceptions of "the administration's new political weakness and

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127. REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW, 62 ANN. REP. A.B.A. 789, 805 (1937) [hereinafter 1937 ABA REPORT].

128. *See* REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW, 63 ANN. REP. A.B.A. 331, 355 (1938) [hereinafter 1938 ABA REPORT].

129. *See, e.g.*, Walter F. Dodd, *Administrative Agencies as Legislators and Judges*, 25 A.B.A. J. 923, 976 (1939) (arguing that centralization of appellate review would mean that "some degree of sympathy with the point of view of the administrative bodies could not be avoided, and judicial review would of necessity cease to possess the impartiality necessary for the protection of private rights").

130. Shepherd, *supra* note 24, at 1588-89; Dodd, *supra* note 129, at 976.

131. *See United States Court of Appeals for Administration: Hearings Before a Subcomm. of the S. Comm. on the Judiciary*, 75th Cong. 20 (1938) [hereinafter *Hearings on S. 3676*] (statement of O.R. McGuire, Member, Comm. on Administrative Law, ABA).

132. *See id.* at 113 (statement of Monte Appel, Member, Comm. on Administrative Law, ABA).

133. *See id.* at 169 (statement of Roscoe Pound, Dean, Harvard Law School).

134. *See* 1938 ABA REPORT, *supra* note 128, at 342-46, 355-56; *see also Hearings on S. 3676*, *supra* note 131, at 169, 172-73.

conservatives' new strength" following Democratic congressional losses in the 1938 election.[135]

Another potential reason was the difficulty involved in attaining broad support from within the ABA. As alluded to in the 1936 annual report, the Special Committee struggled to achieve buy-in from other ABA members, especially those with practice specialties in the three courts that would have been eliminated by the proposed bill.[136] Another line of division within the ABA could be drawn between what sociolegal scholar Ronen Shamir has identified as "Main Street" and "Wall Street" lawyers. Although "Wall Street" lawyers were well-acquainted with the federal courts and were interested in establishing a new administrative court to extend the reach of the federal judiciary, "Main Street" lawyers were confident that they could successfully expand their practices into administrative agencies.[137]

In any event, political interest in establishing an administrative court dissipated in the late 1930s. That interest was quickly replaced by attempts at reallocating power within administrative agencies through procedure. As discussed below, these procedures focused less on making agency examiners obsolete and more on increasing the independence of examiners without removing them from their agency homes.

III. EMBEDDED, YET INDEPENDENT? THE EFFECT OF ADMINISTRATIVE PROCEDURES ON ADMINISTRATIVE ADJUDICATORS (1937-1946)

Whereas proposals from the early to mid–1930s focused on establishing an administrative court, proposals that took shape around 1937 focused on dictating how agencies ought to conduct their adjudications and promulgate rules. This shift from administrative courts to administrative procedure reflected a theoretical shift from debates about where the "judicial power" should rest to how and by whom that power should be exercised, even if outside the federal courts. By directing attention inside agencies, critics set their sights on the hundreds of examiners conducting agency fact-finding hearings.

Part III looks at how private actors, members of Congress, and the President approached administrative procedural reforms between 1937 and the enactment of the APA in 1946. In addition to documenting efforts by conservative congressmen to expose ostensibly partisan examiners in the NLRB and efforts by President Roosevelt to exercise greater control over administrative personnel, I discuss legislation that included provisions to (1) increase the separation of functions between examiners and their agencies, (2) raise the status and prestige of

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135. Shepherd, *supra* note 24, at 1590; *see also* James E. Brazier, *An Anti-New Dealer Legacy: The Administrative Procedure Act*, 8 J. POL'Y HIST. 206, 210 (1996) (discussing the opportunity for conservatives to shift to offense after the 1938 elections).

136. *See* 1936 ABA REPORT, *supra* 113, at 757-60; SHAMIR, *supra* note 104, at 110-11.

137. *See* SHAMIR, *supra* note 104, at 112.

examiners, and (3) weaken agency influence in hiring and firing their examiners. These efforts culminated in the APA, a compromise that kept examiners inside their agencies but imposed procedures meant to make these examiners more "judge-like" and "independent."

A. ABA Attention Pivots to Administrative Reform

In fall 1936, the ABA Special Committee and the Federal Bar Association's Committee on Administrative Law began discussing a draft bill that imposed stricter administrative procedures and increased the scope of judicial review.[138] The ABA Special Committee presented this draft in its 1937 annual report. In its provisions on adjudication, the bill allowed any person who felt "aggrieved by a decision, act or failure to act by any officer or employee of a department" to receive a "full and fair hearing" by an intra-agency board.[139] The proposed boards would consist of three agency employees, one of whom was to be a lawyer; those boards would issue findings of fact and a decision subject to modification by the department head.[140] For independent agencies run by multi-member commissions, agencies could designate a trial examiner to hear the appeal and provide written findings of facts and a preliminary decision.[141] The Special Committee pushed this bill to Congress, and the bill morphed into the controversial Walter-Logan Bill, which is discussed in more detail below.

In addition to the Special Committee's involvement in drafting procedure-focused bills, other ABA leaders and members highlighted the perceived connection between procedure and judicialization of administrative adjudication. As Assembly Delegate to the House of Delegates E. Smythe Gambrell stated, "we may take comfort in remembering that administrative procedure is usually quasi-judicial in form and that quasi-judicial processes in time become judicial in spirit."[142] Then-ABA President Arthur Vanderbilt similarly drew on the language of "judges" and "judging" in his reflections on the need for administrative reforms:

> [I]t is so evident that the administrative officer exercising judicial powers is so generally many things that a judge is not, and is not many things that a judge is . . .
> . . .
> [W]hen our administrative agencies act as judges they should have the attributes, the working conditions and the professional

138. O.R. McGuire, *Administrative Procedure Reform Moves Forward*, 27 A.B.A. J. 150, 150 (1941).

139. 1937 ABA REPORT, *supra* note 127, app. at 847-48.

140. *Id.*

141. *Id.* app. at 848.

142. E. Smythe Gambrell, *The Improvement of Administrative Law: An Opportunity for the Legal Profession*, 23 A.B.A. J. 92, 94 (1937).

> environment of judges—the safeguards that centuries of experience have demonstrated to be essential to the maintenance and administration of what Blackstone calls common justice. This can either be accomplished within the administrative agency by a separate and distinct body of men acting as judges, or by permitting an appeal to a court on the same basis as an appeal in equity or in admiralty, or by both processes.[143]

What are the "things that a judge is"? For Vanderbilt, these included being independent of outside control (especially of executive control), being free from political influence, having secure tenure, having and being selected according to the requisite qualifications, having professional ethics, engaging in reason-giving, and understanding that one's decisions would be reviewed.[144]

Sometimes, calls for reform emphasized the need for examiners to be more independent of their agency employers. Again, this need was analogized to the judicial branch. As articulated by the Chairman of the Chicago Bar Association's Committee on Administrative Law Laird Bell in a 1940 issue of the *American Bar Association Journal*:

> [I]t is mere common sense to recognize that under the present scheme of trial examiners no man can wholly rid his mind of a consciousness of where his pay-check comes from . . . . No great dignity now attaches to the office of an examiner, and there is little about the nature of the work to attract a high degree of ability and independence to the job. If an examiner were given something of the standing of a branch of the judiciary, his dignity and independence would be enhanced and able men would be attracted. . . . [At present] [e]xaminers are just plain folk working in the same office as the prosecutor. . . . [There] are not such taboos as those which keep an advocate from consulting a judge during the course of a case.[145]

B. FDR's Attempt to Consolidate Control Over Administrative Personnel

Around the time that the ABA began to set its sights on procedural reform in 1936, President Roosevelt offered a different vision for control over administrative adjudicators. Rather than judicializing agencies via procedures, he sought to make agencies and their employees more responsive to the political branches through executive reorganization, efforts with contemporary resonance.[146]

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143. Vanderbilt, *supra* note 112, at 271, 273.

144. *Id.* at 271-72.

145 Laird Bell, *"Let Me Find the Facts . . .,"* 26 A.B.A. J. 552, 554 (1940).

146. See, for instance, the debates about executive control over administrative personnel in *Free*

President Roosevelt established the President's Committee on Administrative Management, which issued what came to be known as the Brownlow Report in early 1937.[147] The Report emphasized the power and representativeness of the President[148] as well as the lack of accountability of the "headless 'fourth branch,'"[149] and so pushed for consolidating executive control over administrative agencies. The Report recommended expanding the White House staff, strengthening managerial agencies dealing with budgeting or personnel, and reorganizing the hundred-plus existing agencies into a small number of major executive departments.[150]

President Roosevelt transmitted the Report to Congress along with proposed legislation incorporating its recommendations. In an accompanying message, President Roosevelt identified difficulties in managing an unwieldy administrative state.[151] Anticipating pushback, the President emphasized that his recommendations were not a "request . . . for more power, but for the tools of management and the authority to distribute the work so that the President can effectively discharge those powers which the Constitution now places upon him."[152]

Despite President Roosevelt's attempts to head off criticism, his opponents promptly attacked the proposal. Conservative actors ranging from the National Committee to Uphold Constitutional Government to radio pastor Charles Coughlin mobilized public opposition to the proposals for attempting to aggrandize presidential power.[153] Criticism intensified after President Roosevelt submitted his infamous court-packing plan to Congress a few weeks later.[154] Even many supporters of the New Deal and the President opposed the reorganization bill. Then-SEC Chairman James Landis, for example, disliked the bill's fetishization of executive power, and instead stressed legitimizing the administrative state through

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Enterprise Fund v. Public Co. Accounting Oversight Board, 561 U.S. 477 (2010), *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2021).

147. PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT (1937) [hereinafter BROWNLOW COMMITTEE]. Louis Brownlow was a political science professor at the University of Chicago and had extensive experience in local government administration. Charles Merriam was a colleague of Louis Brownlow at the University of Chicago and was a prominent Progressive intellectual. Luther Gulick was another academic expert on public administration and taught at Columbia University. For more on the Brownlow Committee, see Metzger, *supra* note 1, at 72-77.

148. *See* BROWNLOW COMMITTEE, *supra* note 147, at 1-2.

149. *Id.* at 32.

150. *Id.* at 52.

151. *Message to Congress Recommending Reorganization of the Executive Branch*, AM. PRESIDENCY PROJECT (Jan. 12, 1937), https://www.presidency.ucsb.edu/node/209079.

152. *Id.*

153. Alasdair Roberts, *Why the Brownlow Committee Failed*, 28 ADMIN. & SOC.'Y. 3, 4 (1996); *see also* Shepherd, *supra* note 24, at 1585 (noting that opponents argued that the plan "suggested Roosevelt's dictatorial designs").

154. *See* Metzger, *supra* note 1, at 74.

expertise, specialization, and good policy.[155] After narrowly passing in the Senate, the bill failed to pass the House in 1938.[156]

Although a less ambitious executive reorganization bill was enacted in 1939, President Roosevelt's 1938 loss opened the door to future political challenges.[157] In addition to intimating that even the President felt the need to corral administrative agencies, President Roosevelt's efforts presented a competing model of how to control administrative agencies. Rather than increasing the independence of administrative personnel from their agencies and politics, President Roosevelt sought to increase their dependence on the political branches.

C. The Smith Committee and Attacks on NLRB Examiners

The NLRB withstood constant conservative attack throughout the New Deal era. Although Congressional crafters of the NLRB intended for the Board to be a "'strictly nonpartisan' body that would cater to the public interest,"[158] New Deal critics attacked the Board for its supposedly pro-labor biases. Among these attacks, NLRB hearing examiners were accused of being biased factfinders who tainted the legitimacy of administrative adjudication.[159]

One of the harshest congressional critics was conservative Virginia Democrat Howard W. Smith. Along with four other anti-New Dealers, Representative Smith launched a special investigation into the NLRB in early 1939.[160] The Smith Committee held hearings between 1939 and 1940, during which the Committee "called out NLRB officials for incompetence, unethical behavior, and radical political beliefs."[161]

The Smith Committee especially harped on the "incompetency," "partiality," and "mismanagement" of NLRB personnel, including NLRB trial examiners.[162] For example, the Committee criticized the NLRB's hiring of J. Raymond Walsh as a trial examiner despite evidence suggesting that the NLRB knew that Mr. Walsh had written a book on the Congress of Industrial Organizations (CIO) and had considered working for the CIO.[163] In another instance, it criticized Cincinnati regional director Philip G. Phillips for

155. *Id.*

156. Shepherd, *supra* note 24, at 1585.

157. *Id.* at 1585-86; Roberts, *supra* note 153, at 4.

158. Amy Semet, *Political Decision-Making at the National Labor Relations Board*, 37 BERKELEY J. EMP. & LAB. L. 223, 230-31 (2016) (footnotes omitted).

159. *See* Grisinger, *supra* note 103, at 10 & n.21 (collecting and summarizing historical scholarship articulating these critiques).

160. MUSOLF, *supra* note 29, at 18; Grisinger, *supra* note 103, at 10.

161. Grisinger, *supra* note 103, at 10.

162. H. SPECIAL COMM. TO INVESTIGATE THE NLRB, REPORT ON THE INVESTIGATION OF THE NATIONAL LABOR RELATIONS BOARD, H.R. DOC. NO. 76-1902, at 18 (3d Sess. 1940).

163. *Id.* at 19-20.

communicating with the chief trial examiner and advocating for "phony" hearing dates that encouraged the respondents to move for adjournment.[164]

The Committee questioned NLRB trial examiners' qualifications, accusing them of an "absence of a properly judicial frame of mind."[165] Despite recognition that the overwhelming majority of NLRB trial examiners had legal training, the Committee highlighted the three examiners that lacked it.[166] For example, it picked on one examiner for his background in publishing and writing, and for learning the rules of evidence via textbook.[167] The Committee also berated NLRB trial examiners for unbecoming demeanor during and outside of hearings, including describing counsel as "making a fool of himself," characterizing counsel's argument as an "idiotic discussion," publishing articles criticizing the Department of Justice, or calling for a "bourgeois revolution."[168]

The Committee also took issue with NLRB practices that allowed examiners to confer with other Board employees before, during, and after hearings.[169] In response to these and related issues, one of the Committee's recommendations was to amend the National Labor Relations Act to require the complete separation of the Board's administrative and judicial functions. Under the proposed scheme, an "Administrator" would be charged with carrying out all investigative and prosecuting functions. Meanwhile, a three-person Board would be restricted to exercising the judicial function and conducting elections to determine collective-bargaining representatives.[170]

Criticisms of NLRB trial examiners were not limited to the Smith Committee. Although less inflammatory, articles published in the *American Bar Association Journal* pointed to the "favoritism based on honest prejudice or political or other considerations" because of interactions among NLRB field examiners, trial examiners, and attorneys,[171] as well as to concerns about "emotional bias" associated with labor relations.[172] Thus, "the impartiality of the fact-finding agency bec[ame] a matter of real moment."[173]

164. *Id.* at 21-22.

165. *Id.* at 40.

166. *Id.* at 37.

167. *Id.*

168. *Id.* at 38-39.

169. *Id.* at 45.

170. *Id.* at 89, app. C at 103.

171. Dodd, *supra* note 129, at 929.

172. Bell, *supra* note 145, at 552.

173. *Id.*

D. The Walter-Logan Bill and FDR's Veto

The late 1930s thus saw two competing visions for how to regulate administrative adjudicators. The first emphasized procedures and practices that made agency examiners more judge-like, raised their status, and increased their independence vis-à-vis their agencies and the political branches. The second emphasized making agencies and their personnel more dependent on the political branches—especially the President. The latter resulted in a 1937 reorganization bill that failed to clear the House. The former led to the Walter-Logan Bill, which became a legislature-executive flashpoint between 1939 and 1941.

The Walter-Logan Bill emerged from two bills introduced in early 1939 by Senator Logan and Democratic Representative Francis Walter.[174] The bills stemmed from a draft produced by the ABA's Special Committee on Administrative Law in January 1939.[175] Like the ABA's draft 1937 administrative procedure bill, the Walter-Logan Bill's sections on adjudication allowed parties to contest an administrative decision in front of a triple-headed hearing board (in single-headed agencies) or a single trial examiner (in multi-headed agencies).[176] It also stipulated that any decision reached by the intra-agency board or the trial examiner that was unfavorable to the agency must "stand, however inconsistent with the interpretation of the law in other cases."[177]

The Walter-Logan Bill quickly gained traction, and Congress held hearings in April 1939. Five main groups testified.[178] Unsurprisingly, the ABA supported the bill and emphasized its superiority to the administrative court bill. Many representatives of trade associations, especially those with members subject to regulation by the NLRB or the SEC, also supported the bill. Opponents of the bill included the coauthor and supporters of administrative court bills, representatives of bar associations whose members frequently practiced in front of federal agencies,[179] and most federal agency representatives.

Most testimony focused on the merits of one-size-fits-all procedures vs. administrative diversity and the need for flexible administration, though representatives sometimes commented on general problems with judicializing the administrative process and agency employees. In a memorandum submitted to the House Committee on the Judiciary, FTC Chief Counsel W.T. Kelley complained

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174. In the Senate, Logan introduced bill S. 915, 76th Cong. (1939). In the House, Walter introduced bill H.R. 6324, 76th Cong. (1939).

175. *See* REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW, 64 ANN. REP. A.B.A. 281 (1939). Although Representative Walter's bill made slight modifications to the ABA's draft, it contained substantially similar provisions. H.R. 6324.

176. 86 CONG. REC. 13945 (1940) (Letter of Att'y Gen. Robert Jackson).

177. *Id.*

178. Shepherd, *supra* note 24, at 1598-99.

179. *Id.* These bar associations included the NLG, the Federal Bar Association, and the Bar Association of the City of New York.

about the potential delay and waste of resources if parties to a hearing could object to certain procedural decisions (e.g., an evidentiary ruling) by a first trial examiner, have the appeal heard by a second trial examiner, and then continue appealing to the Commission and then a federal court of appeals.[180] For single-headed agencies, provisions allowing parties to appeal to an intra-agency board were seen as similarly wasteful.[181]

Contrasting views about the merits of the bill's administrative adjudication reform efforts were voiced outside of Congress as well. The Committee on Administrative Law of the Chicago Bar Association sought to add language that afforded greater independence for trial examiners. The Chicago Committee proposed that all administrative agencies create a panel of trial examiners with general competence, adequate salary, and tenure protections, and who would be appointed and assigned to cases by a non-prosecuting agency. These trial examiners could then be assigned to multiple agencies rather than confined to any single agency.[182]

In contrast, the NLG—a progressive organization of lawyers formed as an alternative to the ABA—was a vocal critic of the bill. The group criticized the bill's adjudicatory appeal procedures, which would "inaugurate[] in the whole field of administration the system of advisory opinions."[183] Unlike anti-New Dealers' interest in making administrative adjudication more court-like, the NLG Committee was skeptical of the federal courts and of court involvement in administrative procedure. "What is most alarming in the proposal is the enormous grant of power to the courts. . . . The absence of any provision for review of the decisions of the Court of Appeals for the District of Columbia may testify to the deep and abiding faith which the sponsors of the bill have in the wisdom, justice, and efficiency of the judicial process!"[184]

The Walter-Logan Bill cleared both houses but was vetoed by President Roosevelt in December 1940. The President attacked the ABA and its allies for supporting a bill trying to prioritize "technical legalism" over "substantial justice," as well as for preferring "the stately ritual of the courts, in which lawyers play all the speaking parts" and "that decisions be influenced by a shrewd play upon

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180. *Administrative Law: Hearings on H.R. 4236, H.R. 6198, and H.R. 6324 Before H. Subcomm. No. 4 of the H. Comm. on the Judiciary*, 76th Cong. 67 (1939) (statement of W.T. Kelley, Chief Counsel, FTC).

181. *See, e.g.*, *id.* at 88 (statement of Ashley Sellers, Head Attorney, Department of Agriculture) ("While the bill does not positively prohibit the current widespread departmental practice of employing single trial examiners . . . it would accomplish the result by rendering the proceeding before such examiners to no avail" by "requir[ing] a new and independent proceeding before the Board, thereby necessitating three members of the Board and a reporter devoting time to rehearing a matter which has already been heard by an examiner . . . .").

182. Bell, *supra* note 145, at 553-54.

183. COMM. ON ADMIN. L., *The American Bar Association Administrative Law Bill*, 2 NAT'L LAWS. GUILD Q. 49, 53 (1939).

184. *Id.* at 53-54.

technical rules of evidence in which the lawyers are the only experts."[185] Roscoe Pound called the veto message "a lecture to the organized lawyers of America," criticized its "Marxian" overtones, and argued that the message "deserves to be made the text for a discussion of the place of the judiciary in our democracy."[186]

E. The Attorney General's Committee on Administrative Procedure and the Path to the APA

Recognizing that some sort of administrative reform was necessary to avoid a dismantling of the administrative state,[187] President Roosevelt formed the Attorney General's Committee on Administrative Procedure (AG's Committee) in February 1939. As the Walter-Logan Bill gathered steam in Congress, the AG's Committee developed its own set of administrative reforms, many of which served as the groundwork for the APA. Agency examiners—and their selection, status, and independence—took center stage in the AG's Committee discussions.

Although many observers believed the Committee was formed to serve as a counterweight to the Walter-Logan Bill,[188] two main reasons for its formation were a recognition of the diversity among agency hearing officers[189] and the perceived procedural unfairness of agency adjudication.[190] Under the direction of Attorney General Frank Murphy, the Committee was tasked with studying administrative procedure as it was being practiced in federal administrative agencies. Only after understanding the details and nuances could the Committee propose reforms.

Murphy assigned a mix of federal employees, legal practitioners, and academics to staff the all-white, all-male Committee. It included Department of Justice representatives Robert Jackson, James Morris, Carl McFarland, and Gordon Bell, as well as former Treasury Undersecretary Dean Acheson.[191] Outside practitioners included former ABA president Arthur Vanderbilt and chief judge of

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185. *Logan-Walter Bill Fails*, 27 A.B.A. J. 52, 52 (1941) (publishing the text of President Roosevelt's veto message).

186. Roscoe Pound, *The Place of the Judiciary in a Democratic Polity*, 27 A.B.A. J. 133, 133 (1941).

187. *See* Shepherd, *supra* note 24, at 1594.

188. Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 35 J. POL'Y HIST. 379, 389 (2008).

189. *See supra* Part I.

190. Lubbers, *Quest for Uniformity*, *supra* note 21, at 65; AG COMMITTEE'S REPORT, *supra* note 39, at 44-45.

191. *See* Grisinger, *supra* note 188, at 388. By the time the AG's Committee released its Final Report in 1941, Frank Murphy, James Morris, and Gordon Bell were no longer on the Committee. Murphy and Morris had both joined the federal bench. Bell became High Commissioner to the Philippines. Francis Biddle joined the Committee after Robert Jackson became the new Attorney General. *Id.* at 389 n.31.

the D.C. Circuit D. Lawrence Groner. Academics included Lloyd K. Garrison, E. Blythe Stason, Henry Hart, Harry Shulman, Ralph Fuchs, and Walter Gellhorn.[192]

Rather than enter the Walter-Logan fray, the AG's Committee focused on developing a comprehensive portrait of administrative agencies and actors. During its first two years, these efforts produced twenty-seven monographs that described individual agency's formal rules, procedures, operations, workload, organization, and common criticisms of the agency.[193] In January 1941, the AG's Committee released its final report and recommendations. In its 450 pages, the report traced the history of the administrative process from 1789, documented methods and procedures of adjudication and rulemaking, described the scope of judicial review, and made both general recommendations and ones targeted at individual agencies.[194]

The Committee failed, however, to reach consensus. Instead, the majority included a draft bill in the report,[195] while a minority consisting of McFarland, Stason, and Vanderbilt proposed an alternative that provided more constraints on administrative action.[196] Chief Judge Groner offered his own views and recommendations but did not draft proposed legislation.[197]

One extensively researched question that distinguished the majority was its approach to agency examiners. In contrast to the claims by critics who were concerned about incompetent and biased examiners, the AG's Committee found little evidence of widespread lawlessness.[198] Nonetheless, the Committee agreed that *perceptions* of examiners as dependent, partial, or unprofessional were difficult to change. In response, the majority endorsed proposals to change examiners' names to "hearing commissioners."[199] It also recommended the further separation of administrative adjudicators from their employing agencies, raising their status and prestige, and increasing non-agency influence over their appointment and removal.[200]

As to separation of functions, the majority's approach kept commissioners within their agencies, but "insulated [them] from all phases of a case other than

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192. *Id.* at 389.

193. *Id.* at 391; Emily Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 397-402 (2021).

194. AG'S COMMITTEE REPORT, *supra* note 39.

195. *Id.* exhibit 1 at 191-202.

196. *Id.* at 203-12, app. at 213-47.

197. *Id.* at 248-50.

198. Grisinger, *supra* note 103, at 16.

199. *See* AG'S COMMITTEE REPORT, *supra* note 39, exhibit 1 at 191-202; *see also* MUSOLF, *supra* note 29, at 43.

200. For a concise summary of the majority's views on hearing commissioners, see Dean Acheson's account in a 1941 issue of the *American Bar Association Journal*. *Summary of Attorney General's Committee Report by Dean Acheson, Chairman*, 27 A.B.A. J. 143, 144 (1941).

hearing and deciding."[201] The majority advocated for a "tenure and salary which will give assurance of independence of judgment,"[202] recommending salaries up to $7,500 and subjecting commissioners to for-cause removal following a hearing in front of an independent trial board.[203] Commissioners would be nominated by the agency and appointed to seven-year terms by a newly created Office of Federal Administrative Procedure if the Office "finds him to be qualified by training, experience, and character to discharge the responsibilities of the position."[204] The majority sought to standardize commissioners' powers and suggested granting them the power to preside at hearings, issue subpoenas, administer oaths, rule on motions, carry out additional duties incident to conducting hearings, make findings of fact and conclusions of law, and issue dispositions on matters before them.[205] These dispositions would be final and binding unless a party appealed or agency heads decided to review the decision.[206]

McFarland, Stason, and Vanderbilt's minority views shared many similarities to the majority's. One major difference concerned the location of hearing commissioners vis-à-vis their agencies. McFarland, Stason, and Vanderbilt believed that keeping hearing commissioners inside of agencies did not sufficiently insulate an agency's prosecuting function from a commissioner's judicial function. The minority contended that "[h]earing and deciding officers cannot be wholly independent so long as their appointments, assignments, personnel records, and reputations are subject to control by an authority which is also engaged in investigating and prosecuting" and that "such dependents cannot be eliminated by measures short of complete segregation into independent agencies."[207] Despite this desire to fully separate hearing commissioners from their agencies, the minority's proposed bill did not actually include this complete separation.[208] And the proposed bill's provisions on hearing commissioners mostly resembled the majority's. For example, the minority's bill also granted commissioners enhanced and standardized powers[209] and provided for a substantially similar appointment and removal process.[210] As to salary and term of office, the bill set commissioner salaries at a

201. AG'S COMMITTEE REPORT, *supra* note 39, at 56.

202. *Id.* at 46.

203. *Id.* exhibit 1 at 196-97.

204. *Id.* exhibit 1 at 196. Nominations and appointments would be based on "merit and efficiency alone," and did not include a veteran's preference. *Id.*

205. *Id.* at 50.

206. *Id.* at 51.

207. *Id.* at 209.

208. Rather, the minority bill only would have internally separated the functions of agency hearing commissioners from its prosecutors, and only in formal adjudications. *Id.* app. at 236. This did go one step further than the majority bill, however, which recognized "the basic need for segregation of functions" but made "ma[de] no express provisions for segregation of functions." *Id.*

209. *Id.* app. at 240.

210. *See id.* exhibit 1 at 196-97, app. at 237-39.

range between $3,600 and $9,000 per year, and commissioners were to serve twelve-year terms.[211]

The separate views and recommendations of Chief Judge Groner went even further in stressing the independence of agency examiners.[212] Like McFarland, Stason, and Vanderbilt, he supported a complete separation between examiners and agencies.[213] Recognizing that this form of separation was unlikely, Chief Judge Groner pushed for "the greatest possible independence for the new office of hearing commissioner, for without it the present evil continues and the attempted remedy is in vain."[214] Chief Judge Groner emphasized that hearing commissioners should have "freedom from factional bias or partisan views" and the "ability to weigh the opposing arguments both on factual issues and on the meaning of the public policy which Congress may have expressed," without which there could not be "impartial judgment in controversies involving the Government and the citizen."[215] Administrative agencies should not be involved in nominating hearing commissioners or assigning them to cases. Instead, the Office of Federal Administrative Procedure should handle all appointments and assignments.[216] When an agency rejected a commissioner's findings of fact, the decision ought to be subject to a strict standard of judicial review.[217]

The AG's Committee report led to the joint introduction of three bills in early 1941 by Carl Hatch and Frederick Van Nuys. The majority's bill was introduced as S. 675 and the minority's as S. 674. A third bill, S. 918, seemingly combined the most restrictive sections of the Walter-Logan Bill and the AG's Committee minority bill, and was submitted by Chief Judge Groner.[218]

Under S. 918, "presiding officers" had similar powers and duties to those outlined in S. 675 and S. 674.[219] These presiding officers were not necessarily employed by administrative agencies, however. Given S. 918's stipulation that formal hearings be held at or near the private party's residence, for formal hearings outside of D.C., the "district judge for the district in which the person involved in the controversy resides . . . shall . . . designate and appoint by order a lawyer learned in the law and agreeable to the lawyers for all parties concerned, to act as presiding

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211. *Id.* app. at 238.

212. The views of Chief Judge Groner are consistent with Professor Judith Resnik's discussion of how Article III judges came to support increasing the status and professionalization of non-Article III adjudicators. *See id.* at 248-50; Judith Resnik, *"Uncle Sam Modernizes His Justice,"* 90 GEO. L.J. 607, 683 (2002).

213. AG'S COMMITTEE REPORT, *supra* note 39, at 250.

214. *Id.*

215. *Id.* at 249.

216. *Id.* at 250.

217. *Id.*

218. Shepherd, *supra* note 24, at 1636 & n.393.

219. S. 918, 77th Cong. § 708(f) (1941).

officer in any case."[220] All presiding officers, regardless of location, had to "take an oath or affirmation that he will act impartially with respect to all matters coming before him without regard to the position of the agency."[221] Unlike S. 675 and S. 674, S. 918 had no provisions on tenure or salary.

In the spring and summer of 1941, the Senate Judiciary Committee held hearings on all three bills. Among administrative agency representatives, reactions to proposals varied across topic and agency. However, these representatives consistently emphasized the unique circumstances of each agency to highlight the futility of a transsubstantive administrative procedure law or to earn an exception to potential legislation. Agency representatives also shared concerns about examiners' increased power and authority, which might generate increased costs on the agency, devolve too much policymaking authority to the examiners, or grant examiner decisions too much weight in the agency's final decision.[222] In the words of Oswald Ryan, a representative of the Civil Aeronautics Board (CAB):

> [T]he Board views with some concern those . . . provisions . . . which appear to work a transformation in the legal character and status of the trial examiner . . . [The provisions] create[] a reasonable fear that . . . the hearing commissioner will in practice be acting as a trial court and the agency as an appellate body . . . . Other provisions also imply a limitation upon the power of the agency with respect to the scope of review. . . . [T]he total result . . . will unquestionably be to limit the powers of the agency to those of an appellate character and to deprive the agency itself of full control over the process of decision.[223]

On the internal separation of functions between examiners and agencies, some were fiercely opposed and stressed the importance of allowing trial examiners to consult with an agency's technical experts.[224] Others, like the FTC and the SEC, were indifferent to these proposals given that their trial examiners already comprised independent units within the agencies.[225] With respect to appointments

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220. *Id.* § 708(a). This proposal resonates with Professor Barnett's more recent recommendation to have the D.C. Circuit make an interbranch appointment of ALJs. *See* Barnett, *ALJ Quandary*, *supra* note 22, at 802-03.

221. S. 918 § 708(d).

222. *Administrative Procedure: Hearings on S. 674, S. 675 and S. 918 Before the S. Subcomm. on S. 674, S. 675 and S. 918 of the H. Comm. of the Judiciary*, 77th Cong. 303-04, 359, 499, 642-44 (statements of representatives from the FTC, SEC, FPC, and the Civil Aeronautics Board).

223. *Id.* at 643-44 (statement of Oswald Ryan, Member, Civil Aeronautics Board, Department of Commerce).

224. *See id.* at 646, 1533 (statements of representatives from the CAB and Bureau of Internal Revenue).

225. *See id.* at 401, 410 (supplementary statement of Robert E. Healey, Member, SEC; additional statement of W.T. Kelley, Chief Counsel, FTC).

by the Office of Federal Administrative Procedure, some agency representatives opposed the appointments process for allowing agency employees to be selected by those outside the agency while others expressed no views.[226]

The reception from private parties seemed to vary based on how comfortable a group was with the agencies regulating them. For trade associations involved with the ICC, most seemed to oppose the bills' hearing commissioner provisions, indicating that they were pleased with how the ICC hearing process had been functioning.[227] In contrast, the National Association of Manufacturers wanted a "separate pool of independent hearing commissioners upon which all agency tribunals would be required to draw for the conduct of hearings in specific cases," pointing to the recommendations made by Chief Judge Groner.[228] For at least one representative of labor interests, the CIO opposed the bills' "nonsensical" proposals for the separation of functions.[229]

Among bar association representatives, those in favor of constraining administrative activity saw some commissioner independence as better than none, and those opposed failed to see the utility of partial measures. Testimony by then-ABA President Jacob Lashly stated:

> We do feel that the more thoroughgoing the separation can be arranged, within practical limitations, the better, and the more independence can be established on the part of the hearing commissioner who is going to decide the case in the first instance the better. Now, whether it can be effected within the agency, I have some doubt.[230]

John Foster Dulles, member of the Bar Association of New York's Committee on Administrative Law, shared a similar view about the efficacy of the bills' provisions on hearing commissioners but came to a different conclusion on whether that meant the bills should be supported:

> Because these bills try to deal with the matter in some blanket way, it is proposed . . . to have hearing commissioners who have a certain degree of independence but also have a certain degree

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226. *Compare id.* at 247, 446 (statement of Paul V. McNutt, Administrator, Federal Security Agency; statement of Clyde B. Aitchison, Comm'r, Interstate Commerce Commission, opposing the provisions), *with id.* at 353 (statement of Robert E. Healey, Member, SEC, expressing no view).

227. *See id.* at 879-93, 912 (statement of Milton P. Bauman, Secretary, Association of Interstate Commerce Commission Practitioners; statement of Carter Fort, Solicitor, Association of American Railroads).

228. *Id.* at 1250-51 (statement of Raymond S. Smethurst, Associate Counsel, National Association of Manufacturers).

229. *Id.* at 1588-89 (statement of Lee Pressman, General Counsel, Congress of Industrial Organizations).

230. *Id.* at 932 (statement of Jacob M. Lashly, President, ABA).

> of dependence upon the Commission, and they are neither fish, flesh, nor fowl. They do not quite enjoy the confidence and expert knowledge and expert discretion that the administrative agency is supposed to apply to the solution of truly administrative issues, nor do they have the complete independence which ought to be available to someone who is exercising essentially the judicial capacity. So that while we think the suggestion of hearing commissioners may be a good, practical compromise of a difficult situation, it ought not to be accepted as a final solution. . . .[231]

With the beginning of U.S. involvement in World War II, attention to these bills dwindled, and Congress took no further action. Discussions of administrative reform persisted, however, and in June 1944, Senator McCarran and Congressman Sumners introduced a new administrative procedure bill.[232] Like many prior bills, the McCarran-Sumners bill was drafted by the ABA's Special Committee on Administrative Law, chaired at that time by former AG's Committee minority member Carl McFarland.[233] Over the next two years, these two bills became the APA, which was passed and enacted in 1946.[234]

Some of the APA's most significant reforms involved hearing examiners. The APA codified an internal separation of functions between examiners and other agency employees, and prohibited examiners from consulting other technical staff unless all parties were allowed to be present.[235] When presiding over a hearing, examiners were given the powers to administer oaths and affirmations, issue subpoenas, make evidentiary rulings, take or cause depositions, manage the hearing process, hold conferences, dispose of procedural requests, and make decisions or recommendations.[236] Although examiner decisions were to be final barring an appeal by the parties, the agency maintained complete control over the case and could review any examiner decisions de novo.[237] As to appointments, examiners were to be appointed by agencies in consultation with the Civil Service Commission (CSC), compensated according to the CSC, and subject to removal only for good cause and after a hearing in front of the CSC.[238]

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231. *Id.* at 1152-54 (statement of John Foster Dulles, Chairman, Committee on Administrative Law, Bar Association of the City of New York).

232. Senator McCarran's bill was introduced as S. 2030, 78th Cong. (1944). Representative Sumners bill was introduced as H.R. 5081, 78th Cong. (1944).

233. Shepherd, *supra* note 24, at 1649.

234. *Id.*

235. Administrative Procedure Act, Pub. L. No. 79-404, § 5(c), 60 Stat. 237, 240 (1946).

236. *Id.* § 7(b).

237. *See id.* §§ 8(a), 10.

238. *Id.* § 11.

IV. THE POLITICS OF SELECTING ADMINISTRATIVE ADJUDICATORS AFTER THE APA (1946-1949)

In Part IV, I provide a brief account of the years immediately following the passage of the APA. This discussion highlights how disagreements about the status and independence of administrative adjudicators were neither settled nor even tempered by the APA. Instead, debates that had primarily occurred within Congress moved into the agencies themselves. The most salient flashpoints surrounded the writing and implementation of new rules to select agency hearing commissioners and decisions about how to handle incumbents.

A. Developing Rules of Selection

First, the CSC had to promulgate rules for the selection of hearing examiners. The CSC thus appointed an advisory committee to aid in developing rules for the selection, classification, promotion, and removal of hearing examiners.[239] Immediately, the politics surrounding who was qualified to serve as an examiner were on display. The ABA continued its critiques of administrative adjudicators and administrative agencies, and its publications served as a forum for political debates. Consider the following letter from Republican Senator Alexander Wiley to CSC Commissioner Arthur S. Flemming, published in the *American Bar Association Journal*:

> [I]t is feared that these hearing[] examiners will be appointed on a narrow partisan and ideological basis, with the selection largely limited to present examiners and agency staffs, with all members of other parties largely excluded irrespective of their possibly superior qualifications. . . . I am determined that this condition which is feared shall not come about; that the men who fill these administrative examiner posts shall not, as has been well said by the [*American Bar Association Journal*], be "men of bias, of ideological pre-conceptions, of partisan fealty, of subservience to pressure groups, of habits of unfairness, of disregard of the true values and weight of evidence."[240]

Along similar lines, the *American Bar Association Journal* editors emphasized the importance of hearing examiners who were "qualified by experience and temperament, shall be of tested impartiality and independence, shall be factual-minded and open-minded, and shall be free from preconceptions and political

239. Thomas, *supra* note 24, at 433-34; *see also Administrative Procedure: Selection of 350 Hearing Examiners Studied*, 33 A.B.A. J. 1 (1947).

240. Alexander Wiley, *The 350 Hearing Examiners: Chairman Wiley Asks Open Choices for Fitness*, 33 A.B.A. J. 421, 421-22 (1947).

motivations or ideologies, which might create bias in their discharge of their duties."[241]

Why were the rules governing the selection of hearing examiners so important? For one, there was a concern—like that expressed by the Smith Committee in the late 1930s—that hearing examiners would adopt the views of their progressive New-Deal agencies. In the same letter to Commissioner Flemming quoted above, Senator Wiley communicated his desire that:

> [APA examiners would] not be men of leftist thinking, men who don't have complete loyalty to our constitutional system of checks and balances, men who are not devoted to our system of private enterprise; but rather men of outstanding judicial temperament, who are unalterably dedicated to the preservation of the American Way.[242]

Observers also believed that hearing examiners would make consequential decisions. Again, according to Senator Wiley:

> I need not impress upon you the fact that these Examiners will determine the course of justice in cases which will actually be *equal to or of greater consequence* than those which come up before federal trial Courts. If these Examiners measure up to the high standards which we hope they will, they will impart an improved tone to the whole administrative process.[243]

B. Incumbents and the "Hearing Examiner Fiasco"

In addition to managing pressures from Congress and the ABA about how to select new hearing commissioners, the CSC had to decide how to handle incumbent hearing examiners. Rather than reappointing or replacing all incumbents, the CSC organized a group of outside lawyers to serve as a Board of Examiners, which was tasked with determining which incumbents were qualified to continue serving as APA hearing commissioners.[244] Because the APA's description of "qualified and competent" was undefined,[245] the Board of Examiners had significant discretion in establishing its evaluation criteria. In doing so, the Board seemed to emphasize (1) legal expertise over administrative expertise and (2) an

241. ED. OFF., *Editorials*, 33 A.B.A. J. 148, 148 (1947).

242. Wiley, *supra* note 240, at 421.

243. Alexander Wiley, *Further Improvements in Administrative Procedure*, 34 A.B.A. J. 877, 879 (1948).

244. Grisinger, *supra* note 103, at 28.

245. Administrative Procedure Act, Pub. L. No. 79-404, § 11, 60 Stat. 237, 244 (1946).

examiner's ability to act independently and objectively regardless of the views of his or her employing agency.[246]

These decisions led to what has become known as the "hearing examiner fiasco," underscoring the tension between independence and efficient administration that animated post-APA debates. Shortly after the CSC issued its final regulations in September 1947, it administered an Examination for Hearing Examiners. All incumbents were rated and evaluated according to the open competitive standards established by the Board of Examiners and a record of opinions about the incumbents.[247] Of the 212 incumbents rated, 54 were disqualified for either "overall characteristics" or "lack of sufficient specialized expertise."[248] This set off a series of individual appeals and agency responses.

Opponents of incumbent hearing examiners again drew on grammars of partiality and bias, with an emphasis on concerns about commissioners' independence from their employing agencies and their assumed policy views. Senator Wiley, for example, "shared the intense concern of the American Bar Association that the Hearing examiners ultimately confirmed for the new posts might consist largely or exclusively of an entrenched 'palace guard' of former Examiners . . . ."[249] Incumbents and their supporters countered that longevity and expertise justified retention. In an appeal letter filed by the NLRB, for example, the Board emphasized that many of those who had been disqualified had "been with the Board for over a decade" and comprised "the agency's old and experienced staff."[250] Former First Lady Eleanor Roosevelt similarly criticized the Board of Examiners for being a group of government outsiders who "cannot possibly have the experience or the knowledge that long training in government would give them."[251] By 1949, and in response to the pushback from agencies and individual examiners, the CSC retreated from its original position, rebuked the Board of Examiners for its stringent criteria, reinstated almost all incumbents, and began to redraft the hiring and firing regulations.[252]

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246. Grisinger, *supra* note 103, at 29-30.

247. Thomas, *supra* note 24, at 440.

248. *Id.* at 442-43. Respectively, three of five incumbents at the U.S. Maritime Commission, three of five at the Department of Agriculture, fourteen of forty-one at the NLRB, ten of thirty at the Civil Aeronautics Board, twelve of forty-eight incumbents in the ICC, and four of seventeen at Treasury, were disqualified. *Id.*

249. *Id.* at 435 (quoting Alexander Wiley, *Hearing Examiners: Undecided Questions as to Their Selections*, 33 A.B.A. J. 688, 689 (1947)).

250. *Id.* at 444 (quoting Notice of Agency Request for Reconsideration and Appeal issued on March 24, 1949).

251. *Id.* at 456 (quoting Eleanor Roosevelt, *My Day* (May 28, 1949)).

252. *Id.* at 450 tbl.IV, 452-72; *see also* Scalia, *supra* note 24, at 58; Grisinger, *supra* note 103, at 33.

Although the politics of selection and removal died down temporarily, similar debates reemerged as soon as 1951.[253] More contemporary discussions since *Lucia* and the potential for weakening ALJ removal protections following *Free Enterprise Fund* and *Seila Law* indicate how the hearing examiner fiasco and its political backdrop have continued salience today. These and other normative issues are taken up in Part V.

V. LESSONS AND IMPLICATIONS

A. Linking Law and Politics

My political history of administrative adjudicators in the New-Deal Era illustrates the tight connection between regulatory politics and administrative law. Debates about the "independence" of administrative adjudicators are not only about the division of functions or appropriate salaries, but also about what independence means for the power of administrative agencies. Recognizing this link between adjudicator independence and administrative power helps explain why seemingly technical discussions about agency adjudicators have and continue to generate fierce political disagreement. Moreover, the voices involved in these debates, and the types of arguments they deploy, depend on historically specific political contexts.[254] Outside of some political histories described below, most existing scholarship in law and political science has missed the nature and strength of the connection between politics and judicialization of administrative agencies.

Legal scholarship often discusses administrative law (and procedures, in particular) as a means of ensuring fairness and legitimacy in administrative decisions.[255] Framing the puzzle as how can external actors check the discretion of administrative agencies, these accounts argue that judicializing administration through procedures and appellate review justifies the delegation of power to administrative agencies.[256] Under one paradigm, procedures help agencies serve as "transmission belt[s] for implementing legislative directives in particular cases" by promoting accurate and impartial application of those directives.[257] When the

253. Grisinger, *supra* note 103, at 33.

254. I discuss the variables that can affect this backdrop later, in Section V.B.

255. Recently, Professor Nicholas Bagley has challenged the dominant paradigm of procedures as legitimating, especially in the context of administrative rulemaking. Bagley, *supra* note 28.

256. *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343 (2009); Daniel B. Rodriguez & Barry R. Weingast, *The "Reformation of Administrative Law" Revisited*, 31 J.L. ECON. & ORG. 782 (2015). *But see also* Emily S. Bremer, *Power Corrupts*, 41 YALE J. REG. (forthcoming 2024) (criticizing the field's focus on "the highest institutions of the federal government and the struggles among them to control the ultimate levers of federal policymaking" rather than "the day-to-day details of administration and the people it affects").

257. Stewart, *supra* note 256, at 1675; *see also* Nina A. Mendelson, *Agency Burrowing*, 78 N.Y.U.

connection between principals and agents is unclear, procedures help to recreate the political process within agencies or to increase political control over agencies, thereby making agencies more majoritarian.[258] Or, under a trustee paradigm, procedures "promote agencies' adherence to their fiduciary duties of obedience to the law, care, and loyalty."[259]

Political scientists, on the other hand, view administrative procedures as a political tool to exercise control over unelected bureaucrats. Often from the perspective of Congress and with a focus on administrative rulemaking rather than on adjudication—perhaps due to a mistaken belief that the latter is inherently less political—procedures and oversight mechanisms are conceptualized as distinct tools in the congressional toolbox.[260] Whereas congressional oversight includes mechanisms like monitoring, rewarding, and punishing behavior, procedures help elected politicians retain control of policymaking by limiting an agency's range of potential actions.[261] Political scientists have recently built on this model by demonstrating how procedure can be a form of ex-post congressional oversight, through mechanisms such as providing in-person briefings, asking agencies to produce documents, or holding additional hearings.[262]

What these two literatures tend to miss, however, is how a desire to exert political control by actors on both sides of the aisle can be made persuasive by arguing in terms of legitimacy, fairness, or independence. Proposed administrative-reform legislation during the New Deal certainly sought to increase political control over administrative agencies. But for procedural legislation to pass through Congress, reformists deployed words and arguments that resonated with fellow partisans, while also bringing others into the fold. To anti-New Dealers, administrative procedures did not only mean constraining administrative power, but also invoked images of a conservative federal judiciary that could halt its growth. For New Dealers with certain legal training and experiences, making administrative agencies more judge-like did not necessarily mean turning them into partisan institutions, but instead into institutions with more legitimacy and prestige.[263]

L. REV. 557, 580 (2003) (describing the "transmission belt" model as a "principal-agent problem" that has been largely abandoned by the literature due to "the breadth and vagueness of congressional delegations of authority to administrative agencies").

258. Mantel, *supra* note 256, at 360-61.

259. *Id.* at 364.

260. Michael D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987).

261. *Id.* (noting that procedures can dictate the importance of certain issues and certain constituents).

262. Kenneth Lowande & Rachel Augustine Potter, *Congressional Oversight Revisited: Politics and Procedure in Agency Rulemaking*, 83 J. POL. 401, 402 (2021).

263. Consider, for example, the different views among members of the legal profession towards the administrative state during the New Deal. *See* SHAMIR, *supra* note 104, at 99-113.

Understanding how and why different political arguments are constructed and deployed requires a detailed tracing of the actors involved and the dynamics at play, a task often best achieved through a political-historical approach. This Article thus aligns itself with a set of scholars who have adopted similar tacks. Most closely related are the political histories of George Shepherd,[264] Joanna Grisinger,[265] and Daniel Ernst,[266] who have examined the relationship between procedural reform and politics leading up to and following the enactment of the APA from the perspectives of different actors and sources. Others writing on administrative law more generally have discussed the changing politics of *Chevron* deference,[267] the effects of doctrinal developments on regulatory outcomes,[268] and the New Deal foundations of today's conservative opposition to administrative agencies.[269] Together, our accounts demonstrate how public-law developments are entangled with partisan politics, interest groups, and social movements, and resonate with extant literatures about the relationship between politics and constitutional law.[270]

B. Possible Explanations for the Link

If the nature of debates surrounding administrative adjudicator independence depends on political contexts, when and why do we see certain views and voices emerge? I present four possible explanations informed by my historical account and contemporary debates. Although my approach does not lend itself to proving causal links, I present them as hypotheses to inspire and guide future hypothesis-testing.

First, political debates about administrative adjudicator independence can depend on liberal and conservative views of the federal judiciary. As illustrated, discussions about administrative adjudicator independence during the New Deal drew on models, values, and processes associated with federal judges. This interest in analogizing administrative adjudication to adjudication by the federal courts carries continued resonance. However, who supports judicializing administrative adjudicators depends on context-specific views of the federal courts and their role in checking public power. During the New Deal, federal courts were associated with conservative business interests,[271] while newly emerging independent regulatory

264. Shepherd, *supra* note 24.

265. GRISINGER, *supra* note 24; Grisinger, *supra* note 103; Grisinger, *supra* note 188.

266. DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014).

267. Elinson & Gould, *supra* note 25; Green, *supra* note 4.

268. Sunstein & Vermuile, *supra* note 1; Bagley, *supra* note 28.

269. Metzger, *supra* note 1.

270. *See* Elinson & Gould, *supra* note 25, at 485 (discussing how scholars of the politics of constitutional law have long recognized the intimate connection between law and politics).

271. *See, e.g.*, Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, *in* CIVIL PROCEDURE STORIES 21, 23-32 (Kevin M. Clermont

agencies were seen as key checks on private power.[272] Political conservatives were therefore keen on judicializing administrative adjudication through the creation of administrative courts or by making administrative adjudicators look more like federal judges than policymakers. In contrast, in the decades following the Rights Revolution of the 1960s,[273] federal courts came to be seen as more reliable guardians of individual rights than federal agencies ostensibly susceptible to capture. In this context, political liberals have called for more judge-like administrative adjudicators to insulate them from partisan swings and policymakers. As more and more commentators note the rightward shift of today's federal judiciary,[274] it will be interesting to track whether political conservatives' views of administrative adjudicators shift as well.

Second, the politics of administrative adjudicator independence can be affected by executive-legislative relations and the relative political strength of the President. In general, presidents from both sides of the aisle have taken steps to increase their control over administrative personnel. Desires for more presidential control were expressed by President Roosevelt during the New Deal,[275] by President Reagan during the Reagan Revolution,[276] and by subsequent Republican *and* Democratic administrations.[277] When Democrats control the executive branch, Republicans are more likely to support isolating administrative adjudicators from their agencies, and vice versa. The issue of administrative adjudicator independence is likely more politically salient, however, when it appears that one side's political power is or is becoming entrenched. During the New Deal, for example, President Roosevelt and New-Deal Democrats dominated American political life. Given this political reality, New-Deal conservatives understandably sought to decouple administrative adjudicators from their agencies. When control over the executive branch switches frequently between Democrats and Republicans, however,

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ed., 2d ed. 2008); Barry Friedman, *The Story of* Ex parte Young*: Once Controversial, Now Canon*, *in* FEDERAL COURTS STORIES 247, 252 (Vicki C. Jackson & Judith Resnik, eds., 2010) ("The refuge of these business interests, and particularly the railroad lawyers, was the federal courts.").

272. *See* RAHMAN, *supra* note 20, 33-35, 38-39; William J. Novak, *The Progressive Idea of Democratic Administration,* 167 U. PA. L. REV. 1823 (2019).

273. *See generally* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).

274. *See* Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html; Elena Mejía & Amelia Thomson-DeVeaux, *It Will Be Tough for Biden to Reverse Trump's Legacy of a Whiter, More Conservative Judiciary*, FIVETHIRTYEIGHT (Jan. 21, 2021), https://fivethirtyeight.com/features/trump-made-the-federal-courts-whiter-and-more-conservative-and-that-will-be-tough-for-biden-to-reverse.

275. *See supra* Section III.B.

276. *See* Elinson & Gould, *supra* note 25, at 508-13; PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 150-51 (2009).

277. *See* SHANE, *supra* note 276, at 151-58.

increased administrative adjudicator independence does not obviously benefit one side more than the other.

Third, views of administrative adjudicator independence can depend on the types of questions being adjudicated by agencies. Although administrative adjudicators have always heard questions about ratemaking, licensing, regulatory enforcement, and benefits, the relative volume of these questions has changed over time. During the New Deal, most administrative adjudicators were housed in economic regulatory agencies involved in adjudicating the first three types of questions.[278] Making determinations in these cases more closely resembled policymaking, enabling administrative adjudicators to act more like policymakers than judges. Political conservatives at the time were understandably more interested in isolating administrative adjudicators from their agencies than political liberals given President Roosevelt's policy initiatives. Today, however, administrative adjudicators are primarily located in benefits- or relief-granting agencies like the Social Security Administration or immigration courts,[279] adjudications that arguably resemble judicial decisionmaking more than policymaking.

Fourth, competing political perspectives on administrative adjudicator independence can vary based on *who* is being regulated and the political power of those groups. During the New Deal, administrative adjudicators mostly decided questions that affected business interests. Decisions about economic regulation were hotly contested political issues, as illustrated by the Smith Committee's investigation of the NLRB or Senator Wiley's comments following the enactment of the APA.[280] Given that economic regulations tend to be left-leaning, political conservatives were more interested in isolating administrative adjudicators from their agencies than political liberals. Even now, it is perhaps unsurprising that cases like *Lucia*[281] or *Jarkesy*[282] were respectively brought by a financial advisor and a hedge-fund manager against an economic regulatory agency.[283] In contrast, political liberals have been more vocal about ensuring the independence of Social Security Administration ALJs or immigration judges[284] in adjudications that often involve claimants who are more vulnerable to deficiencies in due process.

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278. *See* Lubbers, *Unified Corps*, *supra* note 21, at 268 tbl.1.

279. *See Administrative Law Judges*, U.S. OFF. OF PERS. MGMT., https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=By-Agency (last visited Apr. 30, 2024).

280. *See supra* Section III.C., Part IV.

281. 138 S. Ct. 2044 (2018).

282. SEC v. Jarkesy, No. 22-859 (June 27, 2024).

283. The prominent role of businesses in challenging the legitimacy of administrative agencies can also be seen in high-profile Appointments Clause cases. *See* Ganesh Sitaraman, *The Supreme Court, 2019 Term—Comments: The Political Economy of the Removal Power*, 134 HARV. L. REV. 352 (2020).

284. *See, e.g.*, Letter from Richard E. Neal, Chairman, H. Comm. on Ways and Means, et al. to Andrew Saul, Comm'r, Soc. Sec. Admin (Feb. 18, 2020), https://democrats-waysandmeans.house.gov/sites/evo-subsites/democrats-waysandmeans.house.gov/files/documents/AAJ%20NPRM%20Comment

C. Implications for Contemporary Debates

This Article also has implications for contemporary debates about the independence of ALJs and other administrative judges. Conversations about the future of administrative adjudicators and potential reforms should glean at least two lessons from historical debates. First, contemporary conversations should recognize that these discussions take place against a broader political backdrop. Administrative adjudicator independence is not simply about creating an insulated, professionalized cadre of in-house adjudicators. It also involves signaling and engaging in political discussions about where public power ought to lie, as well as about the relationship between the political branches, the courts, and administrative agencies. The meaning of adjudicator independence both depends on and affects that ultimately political relationship.

Second, in light of these political dynamics, reform proposals ought to begin not by assuming that more adjudicator independence or judicialization is necessary, but by obtaining a detailed sense of who administrative adjudicators are and the work they perform.[285] Doing so changes the question from *whether* administrative adjudicators ought to be more independent to *which, if any*, should be? Although the APA and subsequent reforms have sought to standardize procedures, historical debates indicate that the harmonization that is taken for granted today was imposed and contested. They illustrate the potential merits of diversity and how the development of agency-specific practices over time does not necessarily lead to lawless or unprofessional administrative adjudication. Rather than treating all administrative adjudicators alike, different arrangements can make sense for different agencies.

Indeed, the APA itself already recognizes this diversity among agencies and the types of decisions they make. The *ex parte* and separation-of-functions provisions outlined in 5 U.S.C. § 554(d) do not apply to rulemaking; informal adjudications; applications for initial licenses; or matters concerning rates, facilities, or practices of public utilities or carriers.[286] Agencies can decide whether their ALJs issue an initial decision, a recommendation, or merely certify a record to the agency.[287] Nor does the APA expressly prevent adjudicators from discussing the

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%20Letter.pdf; Amy Goldstein & Dan Eggen, *Immigration Judges Picked for Political Ties*, NBC NEWS (June 10, 2007, 10:05 PM), https://www.nbcnews.com/id/wbna19159173.

285. *See* Bremer, *supra* note 193, at 423 (noting that "administrative law and scholarship is dominated by the courts' top-down judicial perspective, which is more accessible and salient than the lived reality of administrative procedure as it is experienced within the federal government's various agencies"); Bremer, *supra* note 256 (emphasizing that salvaging the APA's ALJ regime requires "an internal perspective that understands deeply the demands of administration in an adjudicatory context, as well as the logic of the APA's hearing structure").

286. *See* 5 U.S.C. § 554(d).

287. *See id.* § 557(b).

merits of a case with all other agency employees, except as prohibited by § 554(d).[288] And in areas where the APA is relatively silent, such as informal adjudication, agencies have broad discretion to develop agency-specific procedures.[289]

With this potential for flexibility in mind, I suggest that the level of administrative adjudicator independence should vary based on the types of questions being adjudicated, as well as the types of claimants involved. For example, resolving rate disputes at the Federal Energy Regulatory Commission or issuing regulatory enforcement decisions at the FTC or the NLRB are more similar to policymaking and would benefit from adjudicators who are more tethered to their agencies. Flexibility and discretion can enhance, rather than hinder, the quality of adjudication. Consistent with this view, the FTC recently announced proposed revisions to its Rules of Practice that will change ALJ decisions into recommendations rather than initial agency decisions.[290] In contrast, adjudicators in benefits-granting agencies like the Social Security Administration or those involved in licensing decisions ought to be more judge-like. Unlike ratemaking or regulatory enforcement, government-benefits or licensing cases involve decisions about whether claimants fit into and qualify for benefits conferred by regulatory schemes—determinations that are more analogous to judicial decisionmaking. For these cases, administrative adjudicators should be impartial decisionmakers constrained by procedures and enhanced due process.

The level of independence might also depend on the types of claimants involved in administrative adjudication. Independent administrative adjudicators are arguably more important when claimants are less capable of influencing public policy. In these cases, having adjudicators who are more insulated from partisan politics and their agencies helps to ensure that claimants are less susceptible to arbitrary decisions by "policymakers" whom they have little to no control over. Disability-benefits petitioners or noncitizens subject to removal proceedings, for instance, are likely less able to craft the social security or immigration policies they are being subjected to during administrative adjudication. In contrast, businesses and industry are more capable of affecting government policy and challenging adverse decisions. Given their outsized involvement in producing policy, we might be less concerned whether their administrative adjudicators are more like policymakers than judges.

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However one views the merits of these specific proposals, a shift towards thinking about administrative adjudicator independence in terms of diversity rather

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288. *See id.* § 557(d) (prohibiting unreported, *ex parte* communications with interested parties *outside* the agency); 5 U.S.C. § 554(d) (prohibiting, with some exceptions, agency employees engaged in investigation or prosecution from participating in ALJ decisions).

289. Bremer, *supra* note 193, at 392.

290. *See* FTC Rules of Practice, 88 Fed. Reg. 42,872 (July 5, 2023) (to be codified at 16 C.F.R. pts. 0, 1, 2, 3, 4).

than uniformity provides a grounded—and more fruitful—way forward. Rather than try to craft an aspirationally apolitical transsubstantive rule, reformers can instead ask questions such as whether certain adjudicators operate more like policymakers or whether some claimants actually influence the political process more than others. Such an approach encourages us to understand who administrative adjudicators are and the functions they perform, while also foregrounding the politics that inevitably underlie discussions about administrative adjudicator independence. This is where historical debates about administrative adjudicators began, and it is where today's debates should begin as well.