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Some Kind of Hearing Officer

Kent H. Barnett

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SOME KIND OF HEARING OFFICER

Kent H. Barnett*

Abstract: In his prominent 1975 law-review article, “Some Kind of Hearing,” Second Circuit Judge Henry Friendly explored how courts and agencies should respond when the Due Process Clause required—in the U.S. Supreme Court’s exceedingly vague words—“some kind of hearing.” That phrase led to the familiar *Mathews v. Eldridge* balancing test, under which courts weigh three factors to determine how much process or formality is due. But the U.S. Supreme Court has never applied *Mathews* to another, often ignored, facet of due process: the requirement for impartial adjudicators. As it turns out, Congress and agencies have broad discretion to fashion not only “some kind of hearing” but also some kind of hearing officer.

Scholars, Congress, and even federal agencies have largely ignored so-called “informal” agency hearings and the hearing officers who preside over them, despite their large number and significance. Unlike well-known administrative law judges, the lack of uniform treatment of and data on these federal hearing officers renders it difficult to monitor, compare, and improve the systemic design and fairness of informal hearings. To better understand this “hidden judiciary,” this Article first reports, based on rare access to agencies, the most comprehensive empirical data assembled on those adjudicators’ independence. The data confirm the significant variety of federal hearing officers and the lack of uniform impartiality protections. To improve data collection, transparency, and salience of these hearing officers, this Article proposes a disclosure framework—appropriated from consumer contexts—to detect, compare, and improve prophylaxes to protect hearing officers from improper agency influence.

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INTRODUCTION

Agency adjudication gets little attention. But when it does, the alleged unfairness of the proceedings is usually at issue. Take the Securities and Exchange Commission (SEC) as an initial example. Encouraged by statistical findings reported in the *New York Times* and the *Wall Street Journal*, parties in SEC proceedings criticized the SEC's adjudicators for favoring their agency during "in house" proceedings.¹ This criticism of

1. See, e.g., Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 PM), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803> (last visited Apr. 2, 2019); Gretchen Morgenson, *At the S.E.C., A Question of Home-Court Edge*, N.Y. TIMES (Oct. 5, 2013), <https://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html> [<https://perma.cc/B98D-7WAT>] (contrasting SEC's 88% win rate in administrative law judge (ALJ) hearings to 63% win rate in district courts). That said, Urska Velikonja has argued that a proper interpretation of the data, including summary dispositions, indicates that the SEC ALJs were not biased. See generally Urska Velikonja, *Are the SEC's Administrative Law Judges Biased?*

the SEC led prominent U.S. District Judge (and SEC detractor) Jed Rakoff to take note, remarking that the SEC had won 100% of its administrative actions in 2014 as compared to 61% in court.² Moreover, a former SEC administrative law judge stated that the agency had “questioned [her] loyalty to the SEC” because she ruled against the agency.³

As another example, Department of Justice officials in the George W. Bush Administration were accused of unlawfully hiring and firing immigration judges based on their political views.⁴ And indeed, a later investigation confirmed the politicized hiring.⁵ Around this time, federal judges criticized immigration judges for their lack of professionalism and impartiality.⁶ Although the Justice Department has reformed its hiring practices,⁷ immigration judges have recently made news again when the Trump Administration sought to impose aggressive case-processing goals and affirmance rates, which judges must meet or face

An Empirical Investigation, 92 WASH. L. REV. 315 (2017). Velikonja could not say how strong the SEC’s cases were in either forum. *See id.* at 363–64. Another empirical study concluded that “the SEC [is] shifting more marginal cases from court to administrative proceedings or bringing actions as administrative proceedings that would not have been brought at all pre-Dodd-Frank.” Stephen J. Choi & A.C. Pritchard, *The SEC’s Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1, 32 (2017).

2. Nate Raymond, *U.S. Judge Criticizes SEC Use of In-House Court for Fraud Cases*, REUTERS (Nov. 5, 2014, 10:47 AM), <https://www.reuters.com/article/us-sec-fraud-rakoff/u-s-judge-criticizes-sec-use-of-in-house-court-for-fraud-cases-idUSKBN0IP2EG20141105> [<https://perma.cc/MQ33-KKVD>]; *see* Amended Complaint at 19–20, *Hill v. SEC*, No. 1:15-cv-01801-LMM (N.D. Ga. May 29, 2015), 2015 WL 4307088.

3. Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 PM), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803> (last visited Apr. 20, 2019). Other ALJs at other agencies have made similar complaints. *See* Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL’Y REV. 184, 213 (2012) (collecting cases).

4. *See, e.g.*, Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL’Y 362, 380–81 (2008) (citing Carol Marin, *Patronage “Crime” Does Pay — for Justice Dept.*, CHI. SUN-TIMES, Mar. 25, 2007, at B6); Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST (June 11, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/10/AR2007061001229.html> [<https://perma.cc/5D4H-S8R6>].

5. *See* U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (July 28, 2008), <https://oig.justice.gov/special/s0807/final.pdf> [<https://perma.cc/59D7-M3J6>] [hereinafter ALLEGATIONS OF POLITICIZED HIRING].

6. *See* Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005) (collecting cases from other circuits).

7. *See* ALLEGATIONS OF POLITICIZED HIRING, *supra* note 5, at 65.

firing.⁸ For those judges with dockets that include numerous time-consuming immigration claims,⁹ they will be incentivized to have limited hearings and to deny claims. Recently, President Trump, annoyed by the immigration court backlog, went so far as to argue that immigrants who arrive at the border and seek admission or asylum should receive no hearings,¹⁰ perhaps in contravention of due process.¹¹ Quickly denying claims is, in fact, the Trump Administration's preference.¹²

As a final example, the Patent and Trademark Office (PTO) has angered patent holders with its unique control over decisions by its Appellate Board (PTAB). The Director of the PTO does not have direct decisionmaking authority,¹³ but the director can require rehearings for decisions from three-judge PTAB panels.¹⁴ On rehearing, the Director

8. Tal Kopan, *Justice Department Rolls Out Case Quotas for Immigration Judges*, CNN (Apr. 2, 2018, 8:55 PM), <https://www.cnn.com/2018/04/02/politics/immigration-judges-quota/index.html> [<https://perma.cc/RU8G-727B>]; see also EOIR PERFORMANCE PLAN: ADJUDICATIVE EMPLOYEES, <http://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf> [<https://perma.cc/J7CU-CLWE>].

9. See Russell Wheeler, *Amid Turmoil on the Border, New DOJ Policy Encourages Immigration Judges to Cut Corners*, BROOKINGS (June 18, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/18/amid-turmoil-on-the-border-new-doj-policy-encourages-immigration-judges-to-cut-corners/> [<https://perma.cc/S5WK-ABEQ>] (discussing differences in dockets and realistic case-processing dockets for judges with different kinds of claims).

10. See Donald J. Trump (@POTUS), TWITTER (June 25, 2018, 5:43 AM), <https://twitter.com/realdonaldtrump/status/1011228265003077632> [<https://perma.cc/X6W5-7GQ8>] (“Hiring manythousands [sic] of judges, and going through a long and complicated legal process, is not the way to go - will always be disfunctional [sic]. People must simply be stopped at the Border and told they cannot come into the U.S. illegally.”); Donald J. Trump (@POTUS), TWITTER (June 25, 2018, 5:45 AM), <https://twitter.com/realdonaldtrump/status/1011231137233080321> [<https://perma.cc/G3TT-L24T>] (“If this is done, illegal immigration will be stopped in it’s [sic] tracks - and at very little, by comparison, cost. This is the only real answer - and we must continue to BUILD THE WALL!”).

11. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

12. See Kopan, *supra* note 8 (quoting former immigration judge Paul Schmidt saying, “[e]valuating somebody’s performance on the number of cases they close is obviously going to have some effect on the substance of the decisions. . . . [T]he boss wants removal orders, not grants—all those things have to have some sort of effect.”).

13. See generally Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141 (2019) (discussing the PTAB’s unique structure and its place within the traditional models of federal agency adjudication).

14. *Id.* at 178 (citing 35 U.S.C. § 6(c) (2018)).

can add additional judges of his or her choosing and require additional rehearings until he or she gets the sought-after result.¹⁵

What may come as a surprise is that the fairness of these proceedings—the matter at issue in each example—is largely left to Congress and the agencies to which Congress delegates. In a prominent 1975 law review article, Second Circuit Judge Henry Friendly explored how courts and agencies should proceed when, in the U.S. Supreme Court’s words, the Due Process Clause mandates “some kind of hearing.”¹⁶ That phrase led to the familiar *Mathews v. Eldridge*¹⁷ balancing test, in which courts consider three factors to determine how much process is due.¹⁸

But the Court has never applied *Mathews* to another, often ignored, facet of due process that is at issue in the introductory examples: the requirement for impartial adjudicators.¹⁹ Due process, the Court has made clear, forbids an adjudicator from deciding cases in which the adjudicator has actual bias.²⁰ Yet, because actual bias is difficult to detect, due process mostly considers the unconstitutional risks of partiality based on the adjudicator’s selection, professional and

15. See, e.g., Gene Quinn, *USPTO Admits to Stacking PTAB Panels to Achieve Desired Outcomes*, IPWATCHDOG (Aug. 23, 2017), <http://www.ipwatchdog.com/2017/08/23/uspto-admits-stacking-ptab-panels-achieve-desired-outcomes/id=87206/> [https://perma.cc/95H8-ND4S] (discussing government’s concessions at oral argument in *Yissum Research Dev. Co. v. Sony Corp.*, 626 F. App’x 1006 (Fed. Cir. 2015)). Former immigration judges and members of the Board of Immigration Appeals have recently claimed that the Department of Justice’s Executive Office of Immigration Review has taken a particular case from a local immigration judge and turned the case over to an Assistant Chief Immigration Judge to alter its outcome. After the local judge sought briefing on a particular issue, the matter was reassigned to the Assistant Chief Immigration Judge, who had the immigrant removed in absentia without briefing. STEVEN ABRAMS ET AL., AM. IMMIGRATION LAWYERS ASS’N, RETIRED IMMIGRATION JUDGES AND FORMER MEMBERS OF THE BOARD OF IMMIGRATION APPEALS STATEMENT IN RESPONSE TO LATEST ATTACK ON JUDICIAL INDEPENDENCE (2018), <https://www.aila.org/infonet/retired-ij-s-former-bia-mems-attack-on-jud-independ> [https://perma.cc/EJ8M-QMHX].

16. Henry J. Friendly, “*Some Kind of Hearing*”, 123 U. PA. L. REV. 1267, 1267 (1975) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974)) (“The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests.”).

17. 424 U.S. 319 (1976).

18. *Id.* at 334–35.

19. In one of its impartiality decisions, the Court applied the *Mathews* framework, as one would expect, to a separate question of whether “additional administrative or judicial review” was necessary. *Schweiker v. McClure*, 456 U.S. 188, 198 (1982). But it did not apply those factors to the impartiality questions. See *id.* at 195–97.

20. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) (“The judge’s own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief.”).

pecuniary interests, and other relationships to the parties.²¹ The Court's few cases on partiality—especially in the federal administrative context²²—leave the boundaries of due process opaque, even as the Court has expressed increased concern over adjudicators' risk of partiality in various contexts.²³ As a result, Congress and federal agencies have significant discretion to create not only “some kind of hearing” but also some kind of hearing officer.

Federal administrative law judges (ALJs) are Congress's best-known attempt to construct a cadre of adjudicators with optimal protections concerning impartiality—referred to as “impartiality protections” throughout this Article. ALJs number more than 1,900²⁴ and oversee “on the record” (or, colloquially, “formal”) hearings.²⁵ Drafted in 1946 largely in response to concerns over unprofessional and partial federal agency adjudicators in the early twentieth century,²⁶ the Administrative Procedure Act (APA) assigns responsibility for hiring ALJs to an independent agency, the Office of Personnel Management (OPM).²⁷ The APA also applies impartiality protections—reminiscent of those that due process has considered, such as oversight, pay, and removal—to all

21. *See id.* at 883–84.

22. The two most relevant decisions are *McClure*, 456 U.S. 188, and *Marcello v. Bonds*, 349 U.S. 302 (1955). *McClure* held that the hiring of hearing officers by insurance companies to decide certain reimbursement claims did not create an unconstitutional risk of partiality because the government, not the employing insurers, paid any claims. *McClure*, 456 U.S. at 196. In *Marcello*, the Court rejected the partiality challenge against immigration hearing officers based on “the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and . . . the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters.” *Marcello*, 349 U.S. at 311.

23. *See, e.g., Caperton*, 556 U.S. at 873 (holding that state supreme court justice had to recuse after one party to the appeal provided disproportionate donations to justice's campaign); *Williams-Yulee v. Fla. Bar*, 575 U.S. ___, 135 S. Ct. 1656, 1668 (2015) (recognizing state's significant interest in preserving judicial appearance of impartiality when upholding Florida's banning of judges from personally soliciting campaign donations); *Williams v. Pennsylvania*, 579 U.S. ___, 136 S. Ct. 1899, 1910 (2016) (holding that unconstitutional risk of partiality exists when judge had earlier significant involvement in prosecution of defendant's case).

24. *See Administrative Law Judges: ALJs By Agency*, OPM.GOV, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> [https://perma.cc/8FFU-D5JG] (listing 1931 ALJs by their agencies, as of March 2017).

25. 5 U.S.C. § 554 (2018); *see also id.* §§ 556, 3105.

26. *See Daniel J. Gifford, Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 ADMIN. L. REV. 1, 3–9, 43–45 (1997).

27. *See* 5 U.S.C. §§ 554, 556, 3105.

ALJs.²⁸ As the earlier-mentioned loyalty check on a former SEC ALJ demonstrates, these protections may provide a necessary buffer from agency pressure. Notably, however, the Trump Administration has recently weakened them. For decades, OPM independently rated attorneys and required agencies to choose ALJs from a list of three candidates.²⁹ The Administration, with OPM's blessing, has now given agencies nearly complete discretion in choosing which lawyers to hire as ALJs.³⁰ And the Administration has advocated for an expansive interpretation of "good cause" for ALJs' removal.³¹

But ALJs comprise only a fraction of administrative adjudicators. When it enacted the APA, Congress intended ALJs to preside over most federal agency evidentiary hearings.³² But doctrinal changes in the past decades, among other things, have permitted agencies to instead use non-ALJ hearing officers ("non-ALJs" or "hearing officers," for short),³³ for whom Congress almost never provides guidance.³⁴ Agencies are left in charge of protecting their hearing officers' impartiality and their hearings' fairness, even when the agency itself is a party to the dispute.

Since at least the early 1990s, non-ALJs have outnumbered federal ALJs.³⁵ But because these adjudicators go by numerous titles, oversee

28. See *id.* § 554(d) (providing limitations on certain ex parte contacts and supervision by certain agency officials); *id.* § 556(b) (requiring impartiality); *id.* § 3105 (providing ALJs separation of functions); *id.* § 7521 (limiting removal of ALJs).

29. See VANESSA K. BURROWS, CONG. RESEARCH SERV., ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 2–3 (2010).

30. See Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) [hereinafter Exec. Order]. The new process moves ALJs to the excepted service (thus not part of a competitive hiring process) and gives agency heads direct and nearly limitless discretion in hiring, subject to other statutory constraints. See *infra* Section I.C.1.

31. See Memorandum from The Solicitor Gen. on Guidance on Admin. Law Judges after *Lucia v. SEC* (S. Ct.) to Agency Gen. Counsels 9 (on file with author).

32. S. REP. NO. 752, at 207 (1946), *reprinted in* COMM. ON THE JUDICIARY, 79TH CONG., LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, at 268 (1947); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 41–43 (1947) (arguing that formal adjudication applied to nearly all hearings required by statute).

33. See Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1662–65 (2016).

34. The most important exception is for certain Board of Contracts Appeals Judges, who have some or all of ALJs' protections. All of those judges must be appointed like ALJs from a register by the hiring agency (although without OPM involvement). See 41 U.S.C. § 7105(a)(1), (b)(2), (d)(2) (2018). One group of these judges has the same protection from at-will removal that ALJs have. *Id.* § 7105(b)(3) (same protection as ALJs from at-will removal for Civilian Board of Contract Appeals Judges); *id.* § 7105(a) (no protection for Armed Services Board Judges); *id.* § 7105(c) (no protection for Tennessee Valley Authority Board Judges); *id.* § 7105(d) (no protection for Postal Service Board Judges).

35. See *infra* Section II.B (discussing prior studies of non-ALJs).

various types of hearings for agencies across the federal administrative state, and lack uniform characteristics and protections, they toil away largely unnoticed. Their invisible nature leads to a vicious cycle: the government, aside from occasional scholarly projects,³⁶ does not collect information on them, and without much information, they largely escape scholars', policymakers', and even regulated parties' attention. Accordingly, non-ALJs, as Professor Paul Verkuil has said, are the federal government's "hidden judiciary."³⁷

This Article seeks to turn the vicious cycle into a virtuous one. In Part I, it first considers the need for impartiality protections. Fortunately, the Court's due process jurisprudence and the APA identify important impartiality protections.

From there, Part II presents a subset of empirical findings to determine whether non-ALJs (via statute or agency action) share similar impartiality protections with ALJs. Along with three co-authors (including two political scientists), I conducted research based on surveys of agencies and prepared and presented a report for the Administrative Conference of the United States (ACUS), the independent federal agency charged with providing research and recommendations to Congress and agencies to improve the federal bureaucracy.³⁸

Our findings, in brief, demonstrate that non-ALJs' prominence within the federal bureaucracy has grown significantly. First, agencies reported 10,831 non-ALJs who go by twenty-three different titles. Non-ALJs outnumber the 1931 reported ALJs by more than 5:1.³⁹ These non-ALJs hear a variety of matters, including hearings for regulatory enforcement, government-benefits, disputes between private parties, government contracts, licensing, and federal employment disputes.⁴⁰

36. See *infra* note 142 (referring to the studies by Raymond Limon and John Frye). ACUS also sponsored the project from which the data reported in this article derives.

37. Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1345 (1992).

38. See *About, ADMIN. CONF. U.S.*, <https://www.acus.gov/#node-7> [<https://perma.cc/2HYX-7XNM>] ("ACUS is an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure.").

39. See *infra* Section II.B.2 (discussing how the "Limon Study" reported 3,370 non-ALJs and discussing the significant increase in patent examiners, the largest group of non-ALJs by a wide margin); *infra* tbl.1.

40. For a thorough and thoughtful examination of administrative adjudication between two private parties, see Michael Sant'Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425 (2019).

Non-ALJs' impartiality protections were similarly heterogeneous. We asked agencies about, among other things, their hiring qualifications, limitations on non-adjudicatory duties, reporting relationships with the agency (a.k.a. "separation of functions"), limitations on *ex parte* communications, the non-ALJs' physical separation within the agency, performance appraisals and eligibility for bonuses, and protection from at-will removal. We learned that agencies give some hearing officers significant forms of independence and others very little. Moreover, they often do so in ways, such as through custom or internal documents, which lack the transparency, clarity, and permanence of statutes or rulemaking.⁴¹ Indeed, certain responses to our survey indicated that current impartiality protections are for some agencies so opaque that the agency's non-ALJs themselves are unaware of their precise contours.

To obtain more useful data and assessments of other hearing officers, Part III proposes a uniform, one-page agency impartiality disclosure like those used in consumer transactions. As indicated in the draft disclosure in Appendix A, this uniform impartiality disclosure would be a single page with a table that identifies the existence (or not) of each protection, a brief description of and citation for each, and an opportunity to justify the absence of any factor. Agencies would send the disclosure to nonagency parties at the initiation of a hearing, post the disclosure online with their other hearing-related materials, and submit the original and revised forms to a clearinghouse—such as ACUS, which provides research and recommendations to agencies and Congress for synthesis and analysis.

These disclosures will further numerous ends for Congress, the Executive Branch, and litigants in agency proceedings. First, disclosure will provide a synopsis of non-ALJs' impartiality protections, information which might be dispersed throughout various authorities. Second, disclosure can alert agencies and litigants that the hearing officer lacks important protections and suffers an "impartiality gap," i.e., a gap between existing and model impartiality protections. By identifying impartiality gaps, disclosure can help nudge agencies across the federal government to think more about their programs and turn to substantive recommendations.⁴² Third, the proposed disclosure form's identified criteria help Congress oversee how agencies across the administrative state use their delegated discretion. Fourth, disclosure can provide interest groups a means to focus agency and congressional

41. See *infra* Part II.

42. See *infra* note 274.

attention on so-called informal adjudication. Finally, disclosure has the virtue of recognizing litigants' dignitary interests by helping them understand the process to which they are subject.

Of course, disclosure is often a second-best regulatory response—and perhaps a cynical one that seeks only to calm political impulses to ineffectively address underlying substantive problems.⁴³ Congress could more directly regulate hearing officers' protections (and likely should).⁴⁴ Yet, it has refrained from doing so, perhaps because of ideological preferences, concerns over hindering agency flexibility, its inability to find agreement as to details, apathy, or the lack of information on non-ALJs' current status. The proposed disclosures, however, are at the very least a useful start in providing interested parties and Congress more data to assess whether broader and more uniform changes to non-ALJs' impartiality protections are necessary or appropriate. As in the consumer space, disclosure likely provides the most workable way of protecting impartiality.

I. TOWARD OPTIMAL IMPARTIALITY PROTECTIONS

Optimal process is a means of reducing decisionmaking errors. Because due process only guarantees minimal process for certain kinds of bureaucratic decisionmaking, optimal process for agencies requires congressional codification or congressional delegation to agencies for promulgation. This Part considers optimal impartiality protections for

43. See Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1596–97 (2014) (arguing that “choice-limiting” forms of regulations may often prove optimal, but behavioral law and economics’ choice-enhancing regulation will further political consensus); Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1090, 1093 (2007) (noting that disclosure can function as “regulation-lite” to appease those who would “ordinarily oppose regulation”); William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400, 436 (1973).

44. I am skeptical that non-ALJ impartiality protections, unlike hearing procedures, should be tailored to specific non-ALJs or programs; instead, impartiality concerns are very likely the same in all contexts. After all, the Court has not engaged in *Mathews* balancing for impartiality as it has for other procedures. Accordingly, I am inclined to support statutory impartiality protections for all or, at least, most non-ALJ hearings. But because agencies and scholars often worry that useful differences across agencies and regulatory programs belie uniform treatment, see, for example, Emily S. Bremer, *Designing the Decider*, 16 GEO. J.L. & PUB. POL’Y 67, 81 (2017) (“The principal—and most frequently invoked—benefit of agency procedural discretion is that it enables an agency to design its processes in a manner best suited to meet the unique needs of that agency and the regulatory program at issue.”). I am taking a more conservative approach here by seeking to increase data on non-ALJs (and allowing agencies to explain when they choose not to impose certain impartiality protections) before considering the suitability of uniform provisions.

non-ALJs and helps identify the benefits of a model impartiality disclosure in Section III.A.

A. *Nature and Purpose of Optimal Protections for Impartiality*

Optimal decisionmaking is not perfect decisionmaking. It is, instead, a process that seeks to achieve net benefits “up until the point at which . . . marginal benefits and costs are . . . roughly equal as far as we can tell.”⁴⁵ Evaluating optimal (or even minimally required) process is famously and necessarily context-specific⁴⁶ and requires the designer to identify the benefits sought (such as legitimacy, transparency, dignitary acknowledgment, or correct outcomes) and the costs incurred (such as pecuniary expense, diversion of resources from more meaningful problems, or bureaucratic lethargy).⁴⁷ Despite the economic patina of cost-benefit optimal process, optimal process is as much art and educated intuition as science.⁴⁸

One of the main goals of optimal process is, or should be, to temper improper motivations. Public-choice theory views administrative decisionmaking as a contested settlement between various interest groups,⁴⁹ including agency officials, regulated parties, putative regulatory beneficiaries, and congressional and presidential principals. Each group has its own interests that it seeks to advance despite their potential inconsistency with the public welfare or governing legal standards. By permitting the airing of evidence, allowing the challenging of evidence, and requiring reasoned decisionmaking, procedure can neutralize improper self-interested motivations of agency officials in particular.

45. Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 693 (2015).

46. Friendly, *supra* note 16, at 1270 (stating that Professor Kenneth Culp Davis “was undoubtedly right when he observed in 1970, ‘[t]he best answer to the overall question of whether we want more judicialization or less is probably that we need more in some contexts and less in other contexts’” (quoting KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE: 1970 SUPPLEMENT* § 1.04-9, at 34 (1971))).

47. *See id.* at 1276, 1303–04. For instance, Friendly wrote that he “would draw a distinction between cases in which government is seeking to take action against the citizen from those in which it is simply denying a citizen’s request.” *Id.* at 1295.

48. *See* Vermeule, *supra* note 45, at 693 (discussing JON ELSTER, *SECURITIES AGAINST MISRULE: JURIES, ASSEMBLIES, ELECTIONS* 13 (2013)). Indeed, these uncertainties will likely render it impossible to determine when process has become optimal, and the competition between different values (for example, expertise, accountability, and impartiality) can render the normative goal highly debatable. *See id.* at 677, 693–94.

49. *See* Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 551 (2002) (describing public-choice theory).

Aside from tempering improper motivation, optimal process can also mitigate cognitive errors and thereby improve decisionmaking.⁵⁰ People rely on various mental shortcuts (or, in psychological jargon, heuristics) and organizing schema to process complex stimuli and information.⁵¹ Both can be useful. Take, for instance, relying on political parties as a heuristic to choose between policy options when lacking the time or inclination to research. Relatedly, schema can help recognize and process familiar stimuli and provide signals, such as that the woman in a black robe in the front of a courtroom is the judge. But they can also lead to errors.⁵² Heuristics can lead to incorrect conclusions, such as that noteworthy events, like airplane crashes, happen more than they do.⁵³ And over-reliance on schema based on racial, gender, or socio-economic stereotypes can prevent the use of information gathered from actual encounters.⁵⁴ Imposing a process for decisionmaking, such as requiring reason giving or limitations on evidence that one may consider, can mitigate these errors.

One key element of optimal process is the presence of an impartial decisionmaker. Impartiality can further both goals of optimal process. It can significantly limit conscious or unconscious motivated reasoning. For instance, a decisionmaker whose job or pay are controlled by one of the parties has reason to favor that party. It can also mitigate cognitive errors that may arise when the adjudicator has professional or personal relationships with a party or a person whose interests the decision may significantly affect.

But process has costs. In the impartiality context, one could advocate for all adjudicators to have the same protections as Article III judges—with offices that last during “good [b]ehaviour” and salaries that do not diminish.⁵⁵ Obviously, however, this kind of protection is very financially costly, and it ties Congress’s hands in structuring the government. Other protections for adjudicatory independence may provide sufficient comfort, such as requiring good cause for removal or limiting an employing agency’s ability (as opposed to Congress) to reduce or increase the hearing officer’s pay. Relatedly, agency adjudicators may present different concerns than judicial officers

50. *See id.* at 553–54 (“[P]oor decisions are often the result of fallibility rather than culpability.”).

51. *Id.* at 555–56.

52. *See id.* at 558.

53. *Id.* at 556 (discussing the “availability heuristic”).

54. *See* SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 132–33 (2d ed. 1991).

55. U.S. CONST. art. III, § 1.

because they work for agencies that combine executive, quasi-judicial, and quasi-legislative functions.

B. Due Process's Limitations

Despite some similarities, due process is minimal—not optimal. Due process has a grand provenance and important place within American notions of justice.⁵⁶ But, whether under the Fifth or Fourteenth Amendments, its domain is limited in numerous ways, and its indeterminate requirements set a procedural floor. This Section briefly discusses the limitations and requirements as most relevant to the non-ALJs in Part II and the proposed disclosure in Part III.

Due process does not apply to all agency adjudications. It applies only to deprivations of “life, liberty, or property.”⁵⁷ In the administrative context, deprivations of property are most germane. Due process applies to the government’s efforts to take away an individual’s “legitimate claim of entitlement” based on mutual expectations from state law or some other source of law outside of the Due Process Clause itself.⁵⁸ This inquiry does not capture certain agency action, such as most adjudications that deny applications for benefits⁵⁹ or that concern the refusal to rehire an individual with only a unilateral hope of reemployment.⁶⁰ Once due process applies, it requires fairly little.⁶¹ At its core, due process mandates only “some kind of hearing”⁶² before the government deprives one of a protected interest. That hearing must provide the affected party sufficient notice and opportunity to be heard

56. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1681–1703 (2012).

57. U.S. CONST. amend. V.

58. See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

59. See 2 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 9.4, at 758–59, 780–83 (5th ed. 2010). Pierce notes that the authority that bestows property interests, such as state legislatures or Congress, can and have prevented property interests from forming in awarded benefits by expressly stating that the benefit at issue does not create an individual entitlement, thereby undermining any contrary mutual expectation. See *id.* at 758–59.

60. See *Roth*, 408 U.S. at 578.

61. See Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee’s White Space*, 32 J. LAND USE 523, 531–32 (2017) (describing due process’s minimal role in agency-designed procedures).

62. See *Roth*, 408 U.S. at 570 n.7.

before an impartial decisionmaker.⁶³ The decisionmaker must provide a brief statement of reasons for the decision.⁶⁴

As to the impartiality requirement, the U.S. Supreme Court has directed courts to look for either actual bias or risk of bias. The former is extremely rare because judges often are not aware of their own biases and the direct proof or strong inferential evidence of a judge's predisposition against a party is extremely difficult to establish.⁶⁵ Accordingly, almost all impartiality claims concern the unconstitutional risk of bias. In that context, courts consider whether the decisionmaker has a financial interest in the decision (either personally⁶⁶ or for a program that the decisionmaker administers⁶⁷); institutional loyalty, psychological pressure, or compulsion;⁶⁸ a party's influence in the decisionmaker's selection;⁶⁹ and other relationships between the decisionmaker and the litigating parties.⁷⁰ Yet even with these factors, courts have generally been forgiving in the administrative context.⁷¹ Some, in fact, have criticized the Court's case law on impartiality in the administrative state as "poorly reasoned . . . [and] feebly attempting to distinguish between the due process limits imposed on judicial and administrative adjudication."⁷²

63. Friendly, *supra* note 16, at 1279–91.

64. *Id.*; see also *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (noting that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" (citation omitted)).

65. See Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 967.

66. See *Tumey v. Ohio*, 273 U.S. 510, 520, 535 (1927).

67. See *Ward v. Monroeville*, 409 U.S. 57, 60–62 (1972).

68. See *Schweiker v. McClure*, 456 U.S. 188, 196 n.10 (1982). The Court has suggested in the separation of powers context that an official's ability to remove a subordinate official at-will may implicate impartiality. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493, 507 n.10 (2010).

69. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884–86 (2009).

70. For instance, the U.S. Supreme Court suggested that the relationship between a judge and a former law associate or partner could be problematic. See *McClure*, 456 U.S. at 197 n.11.

71. See, e.g., *id.* at 196–97 (holding that hearing officers employed by insurance carriers were not partial because the government paid their salaries and ultimately the claims at issue); *Marcello v. Bonds*, 349 U.S. 302, 311 (1955) (holding that the decisionmaker's reporting to officials in the agency with investigative or prosecutorial functions did not present impartiality concerns "when considered against the long-standing practice in deportation proceedings, judicial approved in numerous decision in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters").

72. Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 NOTRE DAME L. REV. 297, 299 (2018).

Even assuming the Court would apply due process's impartiality norms with gusto in the administrative context, due process would have little bearing on the perceived failings in the introductory examples. High SEC-win rates in agency hearings over a few years, by themselves, do not indicate that the decisionmakers are biased or suggest why they might have a risk of bias. The internal pressure on a former SEC ALJ is more troubling, but given her statutory protections from the agency's retaliation,⁷³ the pressure is unlikely to be sufficient to raise due process's hackles. For immigration judges, due process likely has nothing to say about political hiring by itself; the Appointments Clause permits political consideration in hiring officers,⁷⁴ employees,⁷⁵ and even Article III judges.⁷⁶ The fact that the Department of Justice is not a party in the immigration-removal litigation (the Department of Homeland Security is) further mitigates concerns over the appointment alone.⁷⁷ And the PTAB rehearings, although unorthodox, are not obviously of constitutional concern. As a matter of black-letter law, agency heads can reverse adjudicator decisions without deferring at all to the initial decision.⁷⁸ The fact that PTAB permits the same end through a clunky process does not change the fact that an agency superior retains decisionmaking authority.

C. *Devising Optimal Process*

The Due Process Clause, accordingly, leaves optimal process to policymakers. Whether public or private, these policymakers—Congress, agencies, or private organizations—must consider various values at stake, balance them against their costs, and consider how comprehensive procedural schemes should be. As relevant to agency adjudication, Congress has attempted to do so for so-called formal adjudication, but it has largely delegated the duty to agencies for informal adjudication.

73. These statutory protections are discussed in detail *infra* at Section I.C.1.

74. See U.S. CONST. art. II, § 2.

75. See *Lucia v. SEC*, 585 U.S. ___, 138 S. Ct. 2044, 2051 (2018) (citing *United States v. Germaine*, 99 U.S. 508, 510 (1879)) (noting that Appointments Clause does not apply to employees).

76. See U.S. CONST. art. II, § 2.

77. See KENT BARNETT ET AL., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL 46 n.137 (2018).

78. See 5 U.S.C. § 557(b) (2018).

1. *Procedural Code*

A single code that governs all agency proceedings is beneficial because it simplifies design choices across the bureaucracy for common procedural matters, aids individuals in interacting with different agencies across the bureaucracy, and—if well designed—elevates the overall quality of agency process by displacing lesser agency procedures. But comprehensive statutes can be counterproductive if they reach matters that are too diverse to ensure that the procedures' benefits overcome their costs.⁷⁹ Thus, comprehensive procedure may work for only certain kinds of decisionmaking, and policymakers must consider when additional categorization is necessary or when additional process must be unique to a particular agency's action.

The APA is an attempt to provide government-wide process for three of four forms of agency decisionmaking.⁸⁰ The APA divides all administrative action into not just adjudication and rulemaking, but a so-called formal and informal version of each kind of action. Only one of the four forms of agency decisionmaking—informal adjudication—lacks significant statutory requirements.

For formal adjudication that an agency must make “on the record,”⁸¹ the APA generally requires an ALJ to preside over what is usually a trial-like evidentiary hearing.⁸² Parties are usually entitled to receive notice of hearing and grounds for the asserted issues,⁸³ present oral or written evidence, cross-examine witnesses,⁸⁴ propose findings of fact

79. See Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 305 (1986).

80. See Vermeule, *supra* note 45, at 682 (stating that it is “unlikely that the [APA’s] compromise [over separation-of-functions for certain kinds of adjudication] is optimal in any strong sense, but historically it was designed to protect multiple values, each to some degree but none fully, and in that weaker sense has an optimizing character”). Aside from these transsubstantial procedural requirements, Congress often provides additional or different procedural requirements for particular agency decisionmaking. See, e.g., 1 PIERCE, *supra* note 59, § 7.7 (discussing hybrid rulemaking that requires more than informal rulemaking but less than formal rulemaking). These hybrid requirements can further optimal procedure. See Friendly, *supra* note 16, at 1268.

81. 5 U.S.C. § 554(a).

82. *Id.* The APA probably allows inquisitorial hearings in which the ALJ helps develop the record. The Social Security Administration uses inquisitorial hearings, which are governed by a separate statute that served as the basis for the APA’s formal-adjudication provisions. See Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 704 n.103 (2002); Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment in Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203, 209 (2002).

83. 5 U.S.C. § 554(b). The APA has a specific notice provision for notice when the agency seeks to revoke or suspend a granted license. *Id.* § 558(c)(1).

84. *Id.* § 556(d).

and conclusions of law,⁸⁵ and obtain a decision from the agency based on the exclusive hearing record.⁸⁶

Of formal proceedings' characteristics, perhaps the most significant is the use of ALJs. Unlike almost all other federal administrative adjudicators, ALJs' oversight and removal are governed by statute and OPM regulations. They are prohibited from engaging in prosecutorial or investigative duties or reporting to an agency official who does.⁸⁷ They are generally prohibited from having ex parte communications with agency officials, parties, or others about a fact in issue.⁸⁸ ALJs are exempt from civil-service performance reviews, and they cannot receive bonuses from their agencies.⁸⁹ Agencies can discipline or remove ALJs only for "good cause" as determined by the Merit Systems Protection Board (MSPB), another independent agency, after an on-the-record hearing.⁹⁰

In crafting these protections for ALJs, the drafters of the APA intended to address the most pressing criticisms concerning the appearance of partiality in agency adjudications,⁹¹ and they expected ALJs to oversee nearly all statutorily required hearings.⁹²

Notably, ALJs' relationship with their agencies has recently changed. Congress delegated authority over the ALJ-hiring process to OPM when it created ALJs,⁹³ and OPM's method of hiring, with some adjustments, had been in place since immediately after the APA's enactment.⁹⁴ Under

85. *Id.* § 557(c).

86. *Id.* § 557(b) (initial and recommended decisions); § 556(e) (requiring exclusive record). The same goes for on-the-record rulemaking. § 553(b) (requiring notice of the rulemaking hearings); § 556(a) (establishing that its requirements apply to formal adjudication and rulemaking), except that the ALJ need only create a record and not issue a decision, *id.* § 557(b) (not requiring initial or recommended decisions in rulemakings).

87. *See id.* § 554(d)(2).

88. *See id.* § 554(d)(1).

89. *See* Barnett, *supra* note 33, at 1655–56.

90. 5 U.S.C. § 7521(a).

91. *See* Gifford, *supra* note 26, at 3–9, 43–45.

92. S. REP. NO. 752, at 207 (1946), *reprinted in* COMM. ON THE JUDICIARY, *supra* note 32 (arguing that formal adjudication applied to nearly all hearings required by statute).

93. *See* 5 U.S.C. § 1305 (delegating authority for OPM to enact regulations, among other things, for ALJ hiring under 5 U.S.C. § 3105).

94. *See* Paul R. Verkuil et al., *The Federal Administrative Judiciary*, in 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 771, 931 (1992) (“[T]hen-professor Antonin Scalia [noted] ‘it was evidently contemplated that the Civil Service Commission [OPM’s predecessor agency] would establish qualifying requirements by general rule, and that the agencies would then select from among all individuals who met those requirements.’”). Since it issued its first regulations in 1947, immediately after the APA’s enactment, OPM’s

the old system, ALJs were hired via a merit-based system—with a written exam, interviews, and rankings—led by OPM for decades.⁹⁵ After ranking the candidates, OPM would send the appointing agency the top three scoring candidates.⁹⁶ OPM's process had long been criticized for its scoring formula, its refusal to consider subject-matter expertise, and its slow or limited hiring process.⁹⁷ These criticisms suggest that OPM hiring was not operating optimally, even if it did provide some useful separation between the agency and hiring decisions.

The hiring process recently changed when OPM, despite its status as an independent agency⁹⁸ with statutory authority over the ALJ-hiring process,⁹⁹ agreed to follow President Trump's July 2018 Executive Order on ALJ hiring.¹⁰⁰ That order, in short, called for removing OPM from the hiring process, permitting agencies to hire ALJs directly, and allowing agencies (with one minor limitation) to set hiring qualifications.¹⁰¹ The key changes are that ALJs are no longer hired under a competitive process and that no intermediary screens applicants. Whether by design or by accident, the new appointment method addresses some of the concerns over the OPM process by giving agencies nearly complete control over the process. Yet, instead of addressing specific concerns (such as those concerning the scoring formula or speed), it simply cut the intermediary and merit selection out of the process altogether. In contrast to the OPM procedure that was inefficient, the Executive Order may be too efficient.¹⁰² The area of ALJ

predecessor used a merit ranking system and limited agencies' ability to select new ALJs from only the top three candidates. *See id.*

95. *See* Verkuil et al., *supra* note 94, at 830–35 (discussing original manners of ALJ hiring by OPM's predecessor agency, the Civil Service Commission). *See generally* BURROWS, *supra* note 29 (outlining ALJ-hiring process as of 2010).

96. *See* BURROWS, *supra* note 29, at 2–3; *infra* note 154 (discussing problems with the ALJ-hiring process).

97. *See* Verkuil et al., *supra* note 94, at 954–55; BURROWS, *supra* note 29, at 3–6.

98. 5 U.S.C. § 1101 (“The Office of Personnel Management is an independent establishment in the executive branch.”). Notably, however, the Director of OPM does not appear to have protection from at-will removal. *See id.* § 1102(a) (addressing only appointment, not removal).

99. *See supra* note 93.

100. *See generally* Office of Personnel Management, Memorandum re: Executive Order—Excepting Administrative Law Judges from the Competitive Service (July 10, 2018), <https://chcoc.gov/content/executive-order—excepting-administrative-law-judges-competitive-service> [<https://perma.cc/97FF-SBW4>] [hereinafter OPM Memo].

101. *See* Exec. Order, *supra* note 30; OPM Memo, *supra* note 100. The one requirement that ALJs must have is a law license. *See* Exec. Order, *supra* 30, § 3(a)(ii), at 32756.

102. For a more thorough discussion of the recent changes to ALJ hiring, see Kent Barnett, *Raiding the OPM Den: The New Method of ALJ Hiring*, 36 YALE J. ON REG.: NOTICE & COMMENT

hiring, accordingly, is a developing area that is still looking for optimal design.

Regardless of the optimal nature of the ALJs' former or current hiring process, the APA's impartiality provisions for ALJs and its specific consideration of ALJ hiring are especially good candidates for optimal process because they track due process variables related to impartiality and provide concrete protections in the administrative context that have proven workable over decades. First, for instance, the U.S. Supreme Court has demonstrated its concern over a party's role—such as, perhaps, an agency's—in appointing an adjudicator.¹⁰³ Second, the APA includes prohibitions on an agency reviewing or giving bonuses to adjudicators.¹⁰⁴ The Court has recognized that the power of a party or case outcome to affect the pay an agency official receives affects that official's independence.¹⁰⁵ Third, the APA prohibits the agency from removing ALJs without cause,¹⁰⁶ and the Court has noted repeatedly that superiors' at-will removal permits them to have subordinate officials do their bidding.¹⁰⁷ Fourth, and related to removal, the APA requires a separation of functions, for which ALJs cannot investigate or prosecute or report to an agency official who does.¹⁰⁸ Although the Court has indicated that combined functions generally cause no constitutional concern,¹⁰⁹ the separation of functions was a significant addition to the APA to address concerns over pro-agency adjudicators who would

(July 11, 2018), <http://yalejreg.com/nc/raiding-the-opm-den-the-new-method-of-alj-hiring-by-kent-barnett/> [<https://perma.cc/GUY5-JBKZ>].

103. *See* *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884–86 (2009) (holding that a party's substantial and disproportionate participation in donating to and supporting judicial candidate required the elected justice's recusal).

104. *See* *Barnett*, *supra* note 33, at 1655–56.

105. *See* *Schweiker v. McClure*, 456 U.S. 188, 197 (1982) (noting that hiring entity had no interest in the case outcome); *Ward v. Monroeville*, 409 U.S. 57, 60–62 (1972) (holding that due process did not permit adjudicator to decide matters whose outcome affected a budget for which he was responsible); *Tumey v. Ohio*, 273 U.S. 510, 520–22, 535 (1927) (holding that due process did not permit adjudicator to adjudicate matters whose outcome affected his pay).

106. 5 U.S.C. § 7521(a) (2018).

107. *See* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010) (“[O]ne who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.” (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935))).

108. 5 U.S.C. § 554(d)(2).

109. *See* *Withrow v. Larkin*, 421 U.S. 35, 58 (1975) (“That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.”).

manipulate factual findings to reach the agency's policy objectives.¹¹⁰ Finally, the APA limits ALJs' *ex parte* communications with those inside (to some extent) and outside of the agency.¹¹¹ The D.C. Circuit has indicated that *ex parte* communications as part of adjudication can present due process concerns.¹¹²

2. *Delegation of Authority to Craft Procedure*

Outside of the APA's requirements, such as with "informal adjudication," Congress has largely delegated the creation of optimal process to agencies by giving them the authority to provide process beyond the APA's requirements.¹¹³ The U.S. Supreme Court has recognized that courts have an extremely limited place in requiring agencies to provide process beyond any statutory requirement.¹¹⁴ Agencies have the substantive expertise, and thus the institutional advantage, in determining which processes are worth the costs.¹¹⁵ States often provide state agencies similar or even greater flexibility.¹¹⁶

Moreover, due to doctrinal changes in recent decades, agencies have gained more delegated space. The APA drafters in 1946 thought that the APA provisions for formal adjudication would apply to nearly all evidentiary or adversarial hearings.¹¹⁷ Yet, agencies obtained significantly more discretion to choose whether to use ALJs or non-ALJs after the Court's well-known 1984 decision in *Chevron U.S.A., Inc. v. NRDC, Inc.*¹¹⁸ That decision permits agencies to resolve ambiguous

110. See Gifford, *supra* note 26, at 6–8.

111. 5 U.S.C. §§ 554(d), 557(d)(1).

112. *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981); see also *U.S. Lines, Inc. v. Fed. Maritime Comm'n*, 584 F.2d 519, 539 (D.C. Cir. 1978) ("The inconsistency of secret *ex parte* contacts with the notion of a fair hearing and with the principles of fairness implicit in due process has long been recognized."); *Appeal of Pub. Serv. Co.*, 454 A.2d 435, 441–43 (N.H. 1982) (holding that even in the absence of procedures by the legislature, due process requires commission members to refrain from *ex parte* communications when they act in an adjudicative capacity).

113. 5 U.S.C. § 559.

114. See *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523 (1978) (stating that "such circumstances [i.e., when courts may appropriately require agencies to impose procedures beyond statutory requirements], if they exist, are extremely rare").

115. See Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1895, 1920–21 (2016).

116. See Bonfield, *supra* note 79, at 313 (discussing how the 1981 Model State Administrative Procedure Act permits agencies to grant additional procedural rights, as long as other parties are not substantially prejudiced, and to use a mix of rulemaking and adjudication as part of the same decisionmaking proceeding).

117. See *supra* notes 91–92.

118. 467 U.S. 837 (1984).

language in statutes that they administer,¹¹⁹ including whether the statute requires “on the record” hearings.¹²⁰ With this discretion in hand, agencies have turned to non-ALJ adjudication en masse.¹²¹

As agencies go about fashioning adjudication and adjudicators, systems design—including adjudicatory or rulemaking procedure and impartiality protections—can promote or hinder over-enforcement.¹²² Sometimes bureaucracies have incentives to provide more process than due process or the APA requires. For example, process can further agency missions by promoting accurate decisionmaking, which achieves objectives in a more efficient manner than an error-ridden process.¹²³ Agencies may also permit additional process to satisfy particular stakeholders.¹²⁴ For example, the SEC recently provided regulated parties significantly more discovery rights in formal adjudication than the APA requires after regulated parties in enforcement proceedings expressed significant fairness concerns.¹²⁵ Agencies, too, may adopt additional procedures to render administrative and judicial review more efficient.¹²⁶

But agencies, as agents of Congress and the President, may have an interest in achieving certain policy goals to please those who comprise the agency, their different overseers (the President, the current Congress, and congressional committees), or interest groups. Agencies may view their missions as tilting towards certain outcomes to please any or all of these groups, despite contrary statutory design or fairness concerns.

119. *See id.* at 842–43.

120. *See* Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 13–14, 17–18 (1st Cir. 2006) (recognizing that *Chevron* requires courts, contrary to earlier practice, to defer to agencies’ reasonable interpretation of their statutes as to whether hearings must be “on the record”). The Ninth Circuit is the only circuit that retains a presumption in favor of formal adjudication when the statute requires a hearing. *See* JOHN M. ROGERS ET AL., ADMINISTRATIVE LAW 122 (3d ed. 2012).

121. *See* Barnett, *supra* note 33, at 1662–66.

122. *See* Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1143–50 (2016) (considering how systems design affects over- or under-enforcement, especially in context of criminal and immigration enforcement, and how the APA has attempted to address some of these issues by using impartial ALJs).

123. *See* Vermeule, *supra* note 115, at 1905.

124. *See id.* at 1925.

125. Press Release, SEC, SEC Proposes to Amend Rules Governing Administrative Proceedings (Sept. 24, 2015), <http://www.sec.gov/news/pressrelease/2015-209.html> [<https://perma.cc/CNA3-L3AM>]. The final rule is available at SEC, AMENDMENTS TO THE COMMISSION’S RULES OF PRACTICE (2016), <https://www.sec.gov/rules/final/2016/34-78319.pdf> [<https://perma.cc/798S-TUR7>].

126. *See* Vermeule, *supra* note 115, at 1905. Notably, if an agency has not assembled an administrative record or explained its decision before judicial review, courts can require agencies to assemble an administrative record and compel agency officials to testify concerning their decisions. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

Take two examples, including one in the introduction. The Trump Administration has made it clear that it wants to limit legal and illegal immigration, including asylum claims. Former Attorney General Jeff Sessions first did so by issuing a decision that limited the grounds upon which an asylum applicant could obtain relief.¹²⁷ He then went further in seeking to alter how immigration judges are evaluated—by assessing their case-processing speed and their reversal rates by the department or federal courts.¹²⁸ Negative evaluations could lead to discipline or removal.¹²⁹ As another example, the Obama Administration's Department of Education issued a controversial "Dear Colleague" letter to schools that receive federal funding that called for certain procedural requirements in sexual-harassment or sexual-assault hearings.¹³⁰ Some questioned whether the agency was designing a system for over-enforcement of certain statutory mandates at the expense of accused individuals' due process rights.¹³¹

Because agencies' preferences may diverge from those of the Congress that enacted the regulatory framework and because agencies can use systems design to further their preferences, procedural delegation presents a classic case of Congress incurring principal-agency costs in needing to oversee a potentially disloyal or errant agent.¹³² Agency procedures, given their number and oblique effect on substantive outcomes, often lack salience, rendering oversight difficult-to-impossible. And agencies' use of internal guidance and even custom to establish procedural norms can impede transparency for even the vigilant overseer. In short, Congress must have accessible information to monitor agencies.

Even absent preference divergence, agencies may have epistemological problems in designing optimal procedure. Depending on

127. See *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (limiting grounds upon which victims of private criminal activity can seek asylum).

128. See *supra* note 8 and accompanying text.

129. See *id.*

130. See Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Dep't of Educ. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/M9CB-EV77>].

131. See, e.g., Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 489 n.9 (2012) (collecting sources). Perhaps some procedure, such as ample reason-giving requirements, can reveal faulty agency motivations or decisionmaking, but it is hardly a panacea. See Vermeule, *supra* note 115, at 1928. After all, reason giving can only do so much when, as with many immigration and sexual-assault hearings, the decision maker's findings on credibility are often determinative and difficult to review.

132. See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 18 (1982).

the frequency of agencies' use of adjudication and their officials' familiarity with designing procedure, agency officials may have little expertise in designing process, even if they are experts in the underlying substantive area. Indeed, their substantive expertise may lead them to conclude, incorrectly, that they are also procedural experts.¹³³ The same problems with procedure's salience and transparency that hobbles congressional oversight also inhibits agencies, whether creating or improving procedural design, from easily learning about other agencies' procedural schema. Likewise, the hidden nature of procedural schema renders it more difficult for outside groups—whether affected interest groups, academics, or good-government watchdogs—to identify problems and propose improvements.

II. IMPARTIALITY PROTECTIONS FOR NON-ALJS

Outside of the APA's relatively generous process for on-the-record adjudications, agency adjudication is varied and, because of its seemingly endless variety, easy to ignore. This Part seeks to focus attention on non-ALJs' impartiality. The empirical data presented here confirm that agencies have provided neither uniform nor optimal impartiality protections, as measured by ALJs' protections, to non-ALJs.

A. *Optimal Impartiality for Non-ALJ Hearings*

As indicated in Section I.A, identifying optimal process is frequently difficult because of problems measuring the costs and benefits of process and because of the necessity in recalibrating process over time. But the APA provides a useful guide for optimal impartiality protections because its provisions track many due process considerations in the administrative adjudicatory context.¹³⁴

These provisions are optimal beyond ALJ proceedings. As noted earlier, the APA drafters thought that the APA provisions for formal adjudication would apply to most all evidentiary or adversarial hearings, but case law has given agencies more discretion in fashioning their

133. See Rachlinski & Farina, *supra* note 49, at 560 (“[E]xperts may myopically focus on issues within their area of expertise and thereby fail to recognize that a decision would benefit from accessing other bodies of knowledge or ways of thinking.”).

134. The APA also provides guidance on optimal process concerning the hearings themselves, which agencies have largely incorporated into many “informal” adjudications. I focus here on the APA impartiality protections, which agencies have treated much more divergently. See *infra* note 139 and accompanying text.

hearings.¹³⁵ As I have argued elsewhere, agencies have chosen non-ALJs largely to have more control over them and their hiring.¹³⁶ But, notably, the growing adoption of non-ALJs does not indicate that the APA's impartiality protections for ALJs are suboptimal or that Congress intended to deviate from the APA model. ACUS (in consultation with working groups comprised of agency officials and outside administrative-law lawyers) has applied many of them in its Model Adjudication Rules, which are intended to apply to both formal and informal agency hearings.¹³⁷ And ACUS has suggested best practices for a large subset of non-ALJ hearings that largely mirror practices in ALJ hearings.¹³⁸ Accordingly, even if these impartiality factors need some tweaking, they provide a useful, well-known, and oft-used guide for assessing non-ALJ hearings.

B. Empirical Data on Non-ALJ Hearings and Impartiality

The findings discussed in this Section are limited to data regarding informal adjudications that permit oral evidentiary hearings. The process during the hearings (pleadings, burdens of proof, discovery, cross-examination, reasoned decision) has come to resemble formal adjudication.¹³⁹ The important difference between these kinds of proceedings is the presiding official. In the hearings that are the subject of this study, non-ALJ adjudicators preside.

To gather more data on non-ALJ proceedings and especially non-ALJ impartiality, the Institute for the Advancement of the American Legal System and I recently administered a government-wide survey to agencies as academic consultants for ACUS, the independent federal

135. See *supra* notes 117–120 and accompanying text.

136. See Barnett, *supra* note 33, at 1667–71. The Social Security Administration had expressed its displeasure at OPM's hiring process and refusal to engage in ALJ hiring more frequently. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-14, RESULTS ORIENTED CULTURES: OFFICE OF PERSONNEL MANAGEMENT SHOULD REVIEW ADMINISTRATIVE LAW JUDGE PROGRAM TO IMPROVE HIRING AND PERFORMANCE MANAGEMENT (2010).

137. See MODEL ADJUDICATION RULE 100(A) (ADMIN. CONF. OF THE U.S. 2018) (defining "adjudication" to include hearings over which ALJs and others preside). The MARs do not address appointment, which would require congressional action if all adjudicators were selected like ALJs under the auspices of OPM.

138. See ADMIN. CONF. OF THE U.S., RECOMMENDATION 2016-4: EVIDENTIARY HEARINGS NOT REQUIRED BY THE ADMINISTRATIVE PROCEDURE ACT, 2–9 (2016) (recommending practices concerning adjudicator impartiality and hearing process for "Type B" adjudicatory hearings, which are those required hearings to which the APA does not apply, over which ALJs do not preside, and which must have an exclusive record).

139. See Barnett, *supra* note 33, at 1698–99. A 1992 ACUS report noted that informal hearings "contain most of the ingredients of an APA formal hearing." Verkuil et al., *supra* note 94, at 1053–54.

agency charged with providing research and recommendations on improving the federal administrative state.¹⁴⁰ With ACUS's unparalleled access to federal agencies, we were able to report findings on the current state of the impartiality protections that agencies have provided non-ALJs (or the lack thereof). These findings served as the basis of our report to ACUS, which ACUS has transmitted to federal agencies. That report provided our full findings and guidance on how agencies should fashion impartiality protections. This Part, relying on the report and recommendations to ACUS, summarizes our research design and the portion of our findings that are germane to my disclosure proposal in Part III.

Because of the variety of agency adjudications, it is frequently difficult to identify and define various terms related to non-ALJ hearings. Moreover, including complicated, nuanced definitions could have dissuaded agencies from completing the survey. Thus, we provided as descriptive a definition as we thought prudent to capture the kinds of non-ALJ hearings that we sought to consider (referred to as "oral hearings" in the survey itself and as "non-ALJ hearings" in this Article):

One of the parties to the adjudication can—by statute, regulation, or other law—obtain an oral hearing over which an agency official presides to present evidence, even if most matters are handled through written submissions without an oral hearing, and the presiding agency official is *not* a member or commissioner of the agency, and is *not* an "Administrative Law Judge." Instead, the agency official goes by another title, such as Administrative Judge, Administrative Appeals Judge, Administrative Patent Judge, Board of Contract Appeals Judge, Veterans Law Judge, Immigration Judge, Presiding Officer, Hearing Officer, etc. The relevant "oral hearings" do not include "public hearings" in which members of the public are invited to make statements or an initial "front-line" agency decision when that initial decision is followed by an evidentiary hearing before an agency or court.¹⁴¹

We sent a detailed survey to 64 federal departments, agencies, or subcomponents within them.¹⁴² We received 61 responses from 53

140. See generally BARNETT ET AL., *supra* note 77.

141. See *id.* at 13. Notably, initial decisions from an agency that include the right to an oral hearing would not qualify under our definition as "front-line" determinations.

142. See *id.* at app. A. For comparison's sake, Raymond Limon (head of the now-defunct OPM Office of ALJs) surveyed 80 agencies in 2002, and former ALJ John Frye surveyed 48 agencies in 1992. Compare RAYMOND LIMON, OFFICE OF ADMIN. LAW JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY: THEN AND NOW—A DECADE OF CHANGE 1992–2002, at 2 (2002)

entities, whether identified as an “agency” or at least one subcomponent within a larger entity.¹⁴³ One agency, accordingly, may have had more than one subcomponent respond. Based on replies from 53 of the 64 federal entities to which we sent surveys, we had a response rate of 82.8%.¹⁴⁴ While 31 agencies or their subcomponents reported that they do not conduct non-ALJ hearings, the analyses that follow are based on responses (which we did not independently confirm) from 30 agencies or their subcomponents that conduct non-ALJ hearings.¹⁴⁵ For ease of reference, I shall refer to all responding entities as “agencies.”

Agencies reported having 47 different *kinds of non-ALJ hearings*, 15 of which may consist of only appellate non-ALJ hearings. These 47 types fell into the following categories (with some kinds of hearings fitting into more than one category): government benefits (11), enforcement (10), disputes between private parties (9), federal employment disputes (6), miscellaneous/other (6), licensing (5), government contracts (4), and disputes between different governmental agencies (0). No category commanded even 25% of the reported hearing

(“[W]e eventually contacted over 80 Federal agencies and offices . . .”), with John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, app. A (1992) (listing agencies to which surveys were sent). Depending on how one counts, there are approximately 110 federal agencies. See ADMIN. CONF. OF THE U.S., SOURCEBOOK OF THE UNITED STATES EXECUTIVE AGENCIES, app. A-1 (2012) (listing agencies). But many of those are highly unlikely to have relevant hearings because of their narrow missions. With guidance from ACUS, the entity that has created the most comprehensive listing of agencies, we created a list of all agencies that, in our judgment, we thought were likely to have relevant hearings.

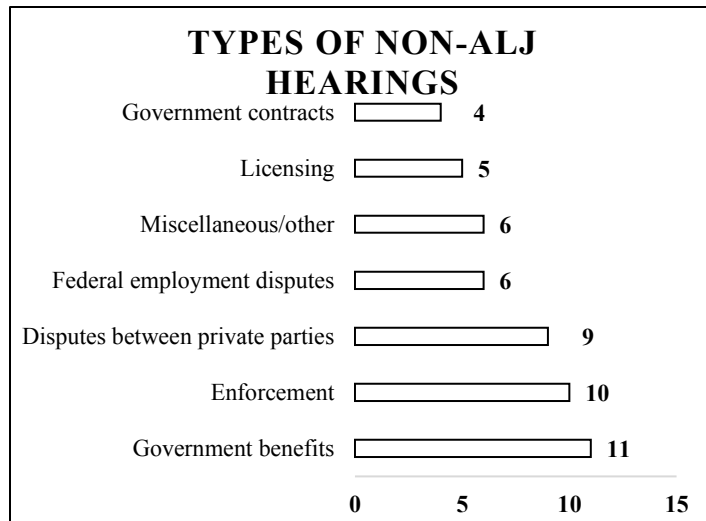
143. See BARNETT ET AL., *supra* note 77, app. B (listing which agencies did and did not respond to our surveys and listing whether a responding agency reported having “non-ALJ hearings”). 65 agencies responded to the Limon Study and 47 responded to the Frye Study. Compare LIMON, *supra* note 142, app. C, with Frye, *supra* note 142, app. A.

144. The agencies that did not respond include the Board for Correction for Military Records (for the Air Force), Board of Correction of Military Records (for the Army), the Central Intelligence Agency (CIA), the Civilian Board of Contract Appeals, the Office of Hearings and Appeals and the Legal Services Office for Civilian Health within the Department of Defense, the Food and Drug Administration within the Department of Health and Human Sciences, Citizenship-Immigration Services within the Department of Homeland Security, the Federal Administration Agency, the Office of Hearings and Appeals within the Department of Interior, the Federal Housing Administration within the Department of Housing and Urban Development, the Board of Immigration Appeals within the Department of Justice, the Department of the Navy, the Department of Transportation, the Federal Housing Finance Agency, the National Endowment for the Arts, the National Science Foundation, the SEC, and the Small Business Administration. See BARNETT ET AL., *supra* note 77, app. B.

145. See *id.* at app. B (listing agencies that responded to our survey and listing the responding agencies that reported providing “non-ALJ hearings”); *id.* at app. C (listing the reported kinds of non-ALJ hearings and types of non-ALJs).

types, revealing the variety of non-ALJ hearings across the federal government.¹⁴⁶

Figure 1:
Types of Non-ALJ Hearings (n=47)



Aside from reporting *kinds of hearings*, agencies also reported different *types of non-ALJs*. Non-ALJs significantly outnumber ALJs. The federal government has 1,931 ALJs¹⁴⁷ and, as Table 1 indicates, at least 10,831 non-ALJ presiding officials, meaning that there are approximately five times as many non-ALJs as ALJs. Only 39 of the 10,831 non-ALJs are part-time agency employees.

146. Unlike earlier studies, we did not collect responses concerning the caseloads for different non-ALJ hearings because our study focuses more on the non-ALJs themselves and because of what we perceived as the difficulty in obtaining reliable data from agencies. See Frye, *supra* note 142, at 264 (reporting estimated caseloads and noting lack of consistent agency reporting).

147. See *supra* note 24.

Table 1:
Number of Reported Non-ALJs

Agency	Subcomponent	Full-time	Part-time
Administrative Office of the U.S. Courts	Fair Employment Practices Office		1
Commodity Futures Trading Commission (CFTC)	Office of Proceedings	15	
U.S. Department of Agriculture (USDA)	Agricultural Marketing Service, Specialty Crops Program	3	
Department of Commerce	Patent Trial and Appeal Board (PTAB)	265	10
	U.S. Patent and Trademark Office (PTO)	7856	
Department of Defense (DOD)	Armed Services Board of Contract Appeals	22	
Department of Education (DOE)	Office of Hearings and Appeals	2	
Department of Health and Human Services (HHS)	Office of Secretary, Departmental Appeals Board	5	
Department of Homeland Security (DHS)	Coast Guard	3	
Department of Justice (DOJ)	Executive Office for Immigration Review (EOIR)	326	
Department of Labor (DOL)	Benefits Review Board (BRB)	5	
Department of Treasury	Alcohol and Tobacco Tax and Trade Bureau		Contract
	Internal Review Service (IRS)	714	
Veterans Affairs (VA)		630	

Agency	Subcomponent	Full-time	Part-time
Equal Employment Opportunity Commission (EEOC)		87	5
Environmental Protection Agency (EPA)	Regional Offices	10	
	Office of Administration & Resources	2	
Federal Deposit Insurance Corporation (FDIC)			Ad hoc
Federal Maritime Commission (FMC)		2 ¹⁴⁸	
Federal Labor Relations Authority (FLRA)	Office of General Counsel	40	
Government Accountability Office (GAO)		43	2
Library of Congress		3	
Merit Systems Protection Board (MSPB)		68	2
National Aeronautics and Space Administration (NASA)		1	
National Labor Relations Board (NLRB)		600	
Nuclear Regulatory Commission (NRC)		11	19
Peace Corps		6	

148. The official who responded for the FMC reported that one non-ALJ is appointed as necessary.

Agency	Subcomponent	Full-time	Part-time
Pension Benefit Guaranty Corp. (PBGC)		6	
Railroad Retirement Bd. (RRB)	Bureau of Hearings and Appeals	6	
Social Security Administration (SSA)	Office of Appellate Operations	61	
		10,792	39
		10,831 (Total Reported Non-ALJs)	

Of note, nearly 7,900 of the reported approximately 10,800 non-ALJs are patent examiners for PTO.¹⁴⁹ To provide more useful reporting of the data and to limit the large number of patent examiners from obfuscating our findings, I often discuss the data in terms of the number of non-ALJ *types*, as opposed to the total number of non-ALJs. Moreover, one should be cautious in placing too much importance on any particular non-ALJ type. Some types, despite being able to preside over our relevant oral hearings, may only do so occasionally.¹⁵⁰

The more than 10,000 non-ALJs go by numerous titles, including Administrative Appeals Judge (and similar variations), Administrative Judge, Attorney-Examiner, Copyright Royalty Judge, Hearing Officer, Immigration Judge, Judgment Officer, Patent Examiner, Presiding Officer, Regional Director, Regional Judicial Officer, and Settlement Officer. Of these, 964 have the word “judge” in their titles.

Most importantly for our research, we sought information from agencies about the impartiality of their non-ALJs. In particular, we were curious whether agencies gave non-ALJs similar impartiality protections that ALJs have by statute. As indicated below, agencies have nothing near a uniform approach.

149. As we discussed in our report, PTO expanded their patent-examiner ranks significantly since 2000. *See* BARNETT ET AL., *supra* note 77, at 19–20.

150. To mitigate the concern that impartiality protections may be impracticable for agency officials who rarely preside over hearings, our report recommended that, whenever possible, agencies should consolidate hearing-officer duties in as few officials as possible. *See id.* at 64.

1. *Hiring Requirements*

Before President Trump's Executive Order on ALJ hiring, OPM required that ALJs meet certain requirements. They must have been licensed lawyers with at least seven years litigation or administrative-law practice.¹⁵¹ They must have participated in hearings at least as formal as those over which ALJs preside under the APA.¹⁵² Finally, they must have passed an examination that considers skills, such as writing ability, that are relevant to adjudicatory duties.¹⁵³ To agencies' vocalized chagrin, OPM did not consider subject-matter expertise.¹⁵⁴ Under the new process, agencies themselves can set the qualifications for their ALJ candidates, save that the candidate must have a law license.¹⁵⁵

As has proven incredibly timely in light of the changes to ALJ hiring, we asked agencies about their hiring qualifications for non-ALJs.¹⁵⁶ Agencies reported that 31 of the 37 reported non-ALJ types must meet minimum qualifications. We asked about qualifications for (1) outside candidates whom agencies consider hiring initially as non-ALJs, and (2) agency employees whom agencies move from another position within the agency to serve as non-ALJs. Of the 31 non-ALJ types for which agencies responded with qualifications information, 23 of those types are hired both initially from outside the agency and from within, while four are hired only from within and four are hired only from outside.¹⁵⁷

151. See *Qualification Standard for Administrative Law Judge Positions*, OPM, <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/> [https://perma.cc/D4FS-8WP7].

152. See *id.*

153. *Id.*

154. See Barnett, *supra* note 33, at 1704. Despite heavy and longstanding criticism, OPM also provided veterans and disabled veterans a significant preference in the scoring of candidates. See Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 115–16 (1981). The preference, as a practical matter, moved veterans to the top of the potential candidates list and limits gender diversity. *Id.*

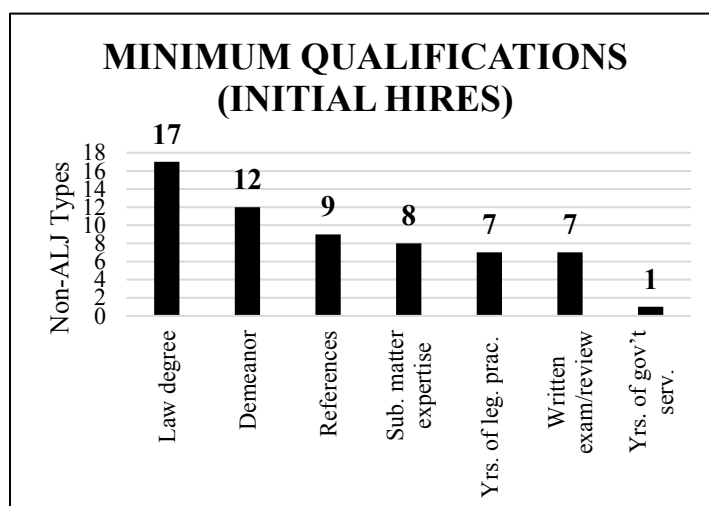
155. See Exec. Order, *supra* note 30, § 3.

156. We did not ask agencies about the hiring process. After consultation with ACUS staff, we concluded that hiring practices are so disparate that attempting to glean useful responses would require narrative answers, which would hinder our ability to compare hiring practices. A better research model for hiring practices would likely be an interview method.

157. Agencies did not report any minimum qualifications for six of the non-ALJ types. Most of those agencies—such as the Administrative Office of the Courts or the Treasury (for Labor Arbitrators), the FDIC, or the Peace Corps—likely did not report any information because of the short-term contractual (or temporary and rare) nature of the individual's adjudication duties. These agencies likely do not have formalized requirements. The responding official for the FMC's two types of non-ALJs did not know of any qualifications.

Agencies reported hiring agency employees initially for of the reported 37 non-ALJ types. We specifically asked agencies about certain potential qualifications and asked them to mark all qualifications that applied. We asked for them, if applicable, to identify other qualifications. As indicated in Figure , they reported the following minimum qualifications for initial hires:

Figure 2:
Minimum Qualifications (Initial Hires) (n=27)



Agencies require that nearly two-thirds of the 27 initially-hired non-ALJ types (63%) have law degrees,¹⁵⁸ and some impose related requirements, such as expertise in general administrative law (CFTC), bar membership (EEOC), a mix of litigation and/or subject-matter expertise (EPA and Library of Congress), and dispute-resolution experience (NASA). Applicants could meet agencies' years-of-legal-practice requirements with between five and ten years of experience. Only two other qualifications were common to more than one-third of the types: consideration of demeanor and references. Agencies reported "other" qualifications, such as scientific degrees (PTO) and certain military rank (U.S. Coast Guard).

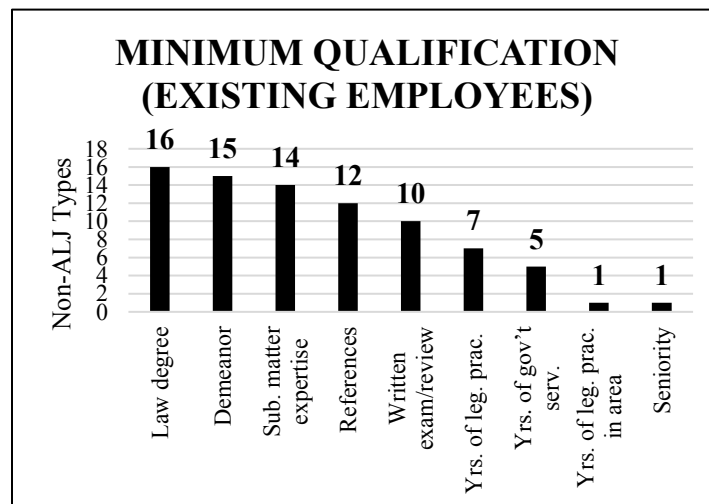
Perhaps the most interesting takeaway is that agencies reported only considering subject-matter expertise when initially hiring non-ALJs for eight non-ALJ types (or 12 types, if including an expansive

158. The NLRB noted that it hires some hearing officers with a law degree and others without.

understanding of the qualifications with the “other” answers)—not even half of the 27 types initially hired. Before the recent changes to ALJ hiring, agencies had often lamented OPM’s refusal to consider subject-matter expertise for ALJs,¹⁵⁹ but our findings suggest that agencies themselves do not usually consider such expertise. That said, agencies consider, without exception, expertise for scientific areas.¹⁶⁰

Agencies reported moving existing employees into non-ALJ roles for, coincidentally, 27 non-ALJ types, too (and thus indicating that some agencies select non-ALJs from inside and outside of the agency). Similar to initial hires, agencies require a law degree for 59% of the non-ALJ types hired from within the agency. And agencies that require years of legal practice impose from seven to ten years of experience. Interestingly, as indicated in Figure , agencies reported more types of minimum qualifications for internal hires. With these internal hires, agencies were more likely than with outside hires to consider subject-matter expertise, writing ability, demeanor, and—perhaps most surprising—references. Agencies reported similar qualifications under “other” as they did for initial hires.

Figure 3:
Minimum Qualifications (Existing Employees) (n=27)



159. See Barnett, *supra* note 33, at 1704.

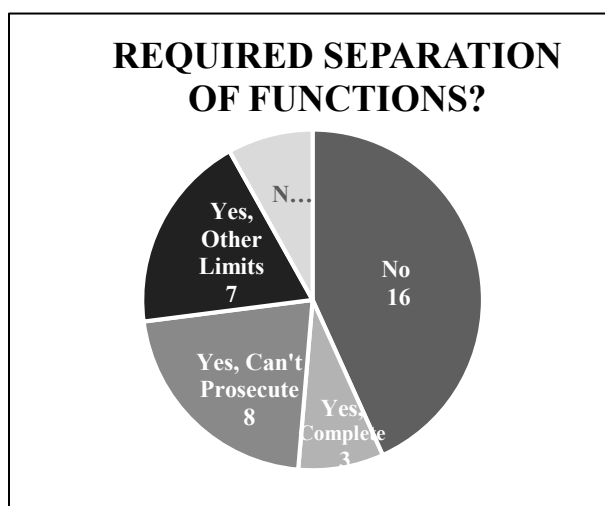
160. PTO and NRC reported requiring expertise or scientific degrees.

2. *Separation of Functions*

To protect ALJs' independence in proceedings in which the agency is often a party, ALJs are prohibited under the APA from performing investigative or prosecutorial functions or reporting to one with those functions and can only engage in adjudicatory functions.¹⁶¹

Figure reports our results. Agencies indicated that 16 (or 43.2%) of the 37 non-ALJ types—our largest group—had no required separation of functions. Three types worked for agencies that only adjudicate and thus have no functions to separate. Three types could perform only adjudicative duties and thus had complete separation of functions, like ALJs. For the remaining 15 non-ALJ types, 8 were prohibited from engaging in investigative or prosecutorial functions, but they could engage in other kinds of agency functions. The remaining types reported “other” limits. For instance, Treasury’s Settlement Officers cannot prosecute or investigate the cases that they decided, Copyright Royalty Judges are limited by general ethics and conflicts rules, and Presiding Officers for the CFTC cannot report to an employee who prosecutes or investigates.

Figure 4:
Required Separation of Functions (n=37)



The lack of separation of functions may be more troubling in certain kinds of hearings, such as those in which the agency is a party and

161. See 5 U.S.C. §§ 554(d)(2), 3105 (2018).

enforcement proceedings, where the agency is particularly interested in the outcome of the proceeding. For non-ALJ types that preside over hearings in which their agencies are parties, they have no separation of functions more than one-third of the time (35.3%). The same percentage (35.3%) of those non-ALJ types that preside over hearings in which the agency is a party are prohibited from performing investigative or prosecutorial functions. The remaining non-ALJ types either need no separation of functions because the agency has no other functions (5.9%), are prohibited from performing any function other than adjudication (11.8%), or have some other limitation (11.8%). Agencies appear more sensitive to the need for separation of functions in enforcement proceedings specifically.

3. *Ex Parte Communications*

Several APA provisions prohibit various kinds of *ex parte* communications with ALJs. ALJs may generally not have *ex parte* communications concerning facts at issue with anyone, but ALJs may discuss legal issues with others inside the agency, except employees who investigate or prosecute the case at issue or one factually related.¹⁶² The members of the agency, ALJs, and other employees reasonably expected to participate in the decisional process may not have *ex parte* communications with “interested person[s] outside the agency” concerning legal or factual issues in dispute.¹⁶³ But they can discuss these issues with those inside the agency.¹⁶⁴

Figure indicates that 21 of the 37 non-ALJ types (56.8%) reported that all *ex parte* communications are prohibited, 5 (13.5%) reported no *ex parte* communications are prohibited, and 11 (29.7%) reported that some *ex parte* communications are prohibited. Notably, the prohibition on all *ex parte* communications (as to both matters of fact and law) is stricter than even the APA standard for ALJs because the prohibition for non-ALJs extends to more than factual matters.¹⁶⁵ This stricter prohibition is consistent with ACUS’s Model Adjudication Rule on prohibiting *ex parte* communications.¹⁶⁶

162. *Id.* § 554(d).

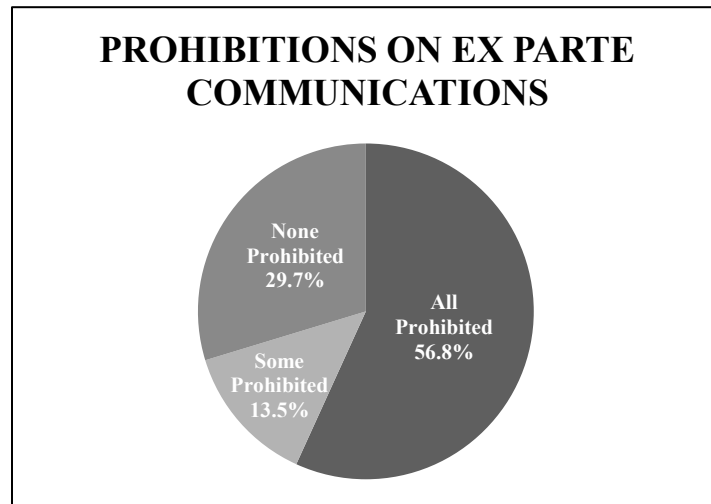
163. *Id.* § 557(d)(1).

164. *Id.*

165. *Id.* § 554(d)(2).

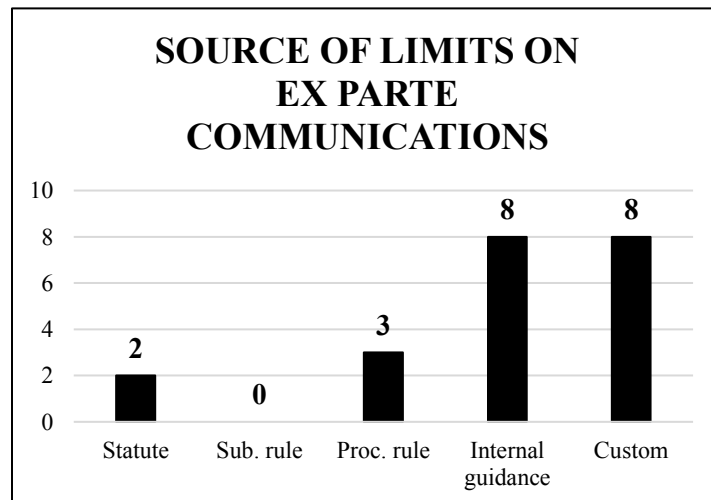
166. *See* MODEL ADJUDICATION RULE 120(A) (ADMIN. CONFERENCE OF THE U.S. 2018) (“Except as required for the disposition of *ex parte* matters authorized by law, the Adjudicator may not consult a person or party on any matter relevant to the merits of the adjudication . . .”).

Figure 5:
Prohibitions on Ex Parte Communications (n=37)



As indicated in Figure , agencies identified the sources of these prohibitions on ex parte communications—whether in statute, substantive rule (such as a notice-and-comment rule), procedural rule, internal agency guidance, or custom—for 12 non-ALJ types (with some having more than one source).

Figure 6:
Sources of Limitations on Ex Parte Communications (n=12)



Notably, 76.2% of the agencies that answered this question indicated that the prohibitions come in the least accessible and transparent formats: internal guidance and custom. Agencies' substantial reliance on custom is problematic because it is likely to be unwritten, opaque, and construed differently by individual non-ALJs.

4. *Physical Separation*

Relatedly, physical separation between adjudicators and other agency officials can help provide actual and psychological distance. It can lead to fewer causal interactions between the adjudicators and the other staff and bolster the impression of adjudicators' independence. Nearly forty years ago, Professor Paul Verkuil reported that the Department of Interior's physical separation and new titles for its non-ALJs led some to assert that the "resulting decisions on informal appeals are less intuitionally oriented, more objective and ultimately more fair."¹⁶⁷ He lauded the agency for its "internal agency reform that . . . substantially increased the impartiality of informal decision making at a low cost to the system."¹⁶⁸

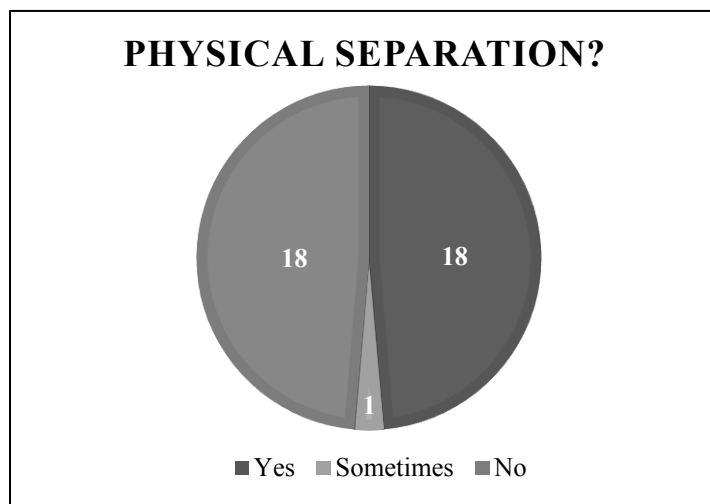
Figure indicates our results concerning physical separation for non-ALJs across the administrative state. Of the 37 non-ALJ types, only approximately half (18 of 37) are physically separated. One type (Hearing Officers for the FMC) is sometimes physically separated, while the remaining 18 types are not. The most troubling finding is that non-ALJs in enforcement and government-contract proceedings are not always physically separated, despite the government's heightened interest in these matters.¹⁶⁹

167. Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 787 (1976).

168. *Id.*

169. Similarly, agencies reported that 47.1% of the non-ALJ types who hear matters in which the non-ALJs' agency is a party (regardless of the nature of the hearing) is physically separated, and the same percentage is not physically separated. One type (or approximately 5.9%) is sometimes physically separated.

Figure 7:
Physical Separation (n=37)



5. *Performance Appraisals and Bonus Eligibility*

To increase ALJ independence from their agencies, ALJs are exempt from civil-service performance reviews and cannot receive bonuses from their agencies.¹⁷⁰ We sought to ascertain whether non-ALJs had similar protections from agency oversight.

First, we asked agencies whether the 37 types of non-ALJs were subject to performance reviews. If so, we asked about the nature of those reviews. Second, we asked whether the agency awarded bonuses to non-ALJs. Finally, we asked whether the agency had set up any means of preventing the reviews from impacting the non-ALJs' impartiality.

A large proportion of non-ALJs by type and an even larger proportion by number are subject to performance reviews. Of the 37 types of non-ALJs, 28 (or approximately 76%) are subject to performance reviews (Figure).¹⁷¹ Of the 10,831 total non-ALJs, all but 68 are subject to performance reviews.¹⁷² Thus, an overwhelming 99.3% of all non-ALJs are subject to performance reviews (

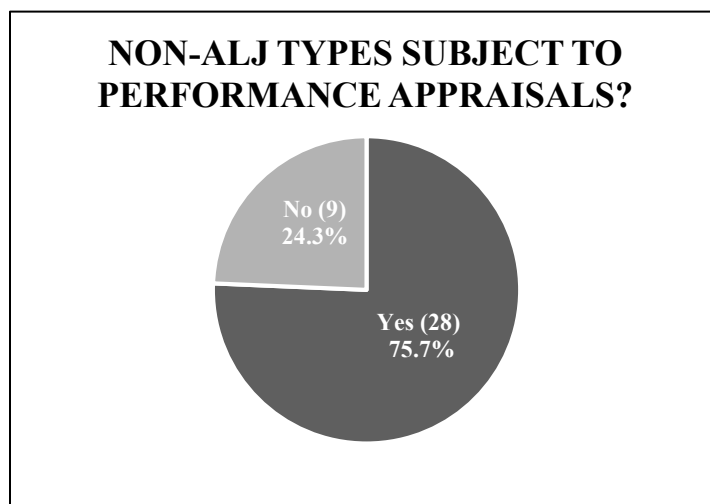
170. See Barnett, *supra* note 33, at 1655–56.

171. The nine non-ALJ types without performance reviews were the Administrative Office of the Courts, DOD, Treasury (Labor Arbitrators), FDIC, GAO (five Personnel Appeals Board Members), the Library of Congress, NASA, NRC, and the Peace Corps.

172. The number is so high because the more than 7,500 PTO adjudicators are subject to performance reviews. The agencies and the number of non-ALJs not subject to performance reviews

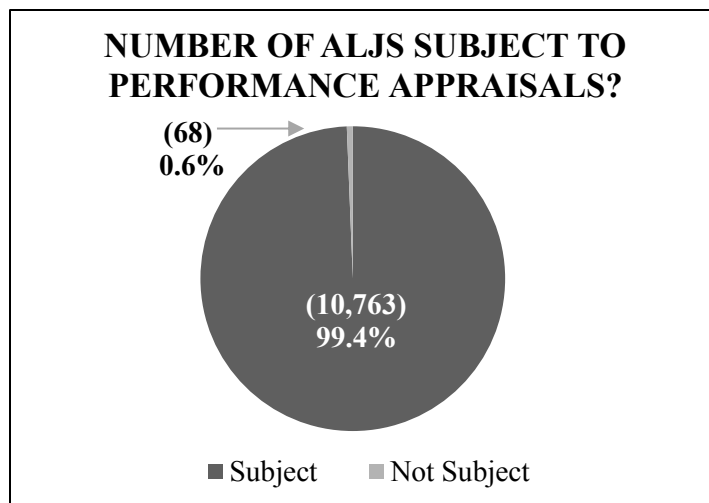
Figure 9). Of the 10 agencies, not including the Department of Commerce, with more than 25 non-ALJs (see Table 1), 9 of them have performance reviews for their non-ALJs.

Figure 8:
Types Subject to Performance Reviews (n=37)



are as follows: Administrative Office of the Courts (1), DOD (22), GAO (5 Personnel Appeals Board Members), the Library of Congress (3), NASA (1), NRC (30), and the Peace Corps (6). The FDIC and Treasury Labor Arbitrators are hired only on an ad hoc basis.

Figure 9:
Number of ALJs & Performance Reviews (n=10,831)



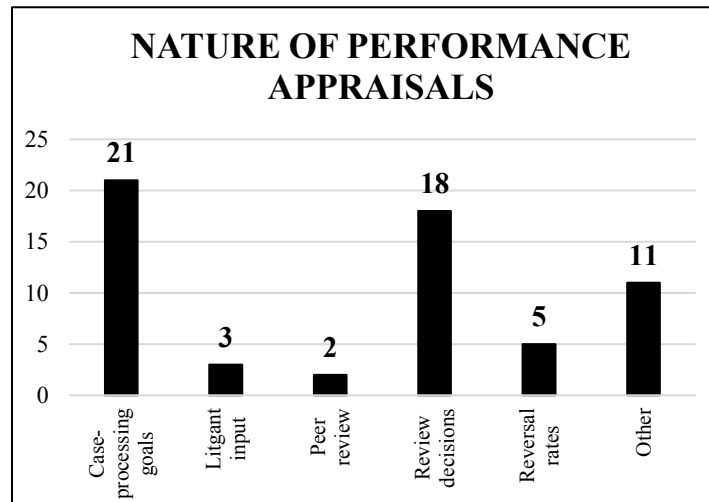
As with several other factors that concern non-ALJ independence, we considered how frequently agencies conducted performance appraisals for non-ALJ types who preside over hearings in which the agency is a party. The appraisals could serve as a subtle (or not-so-subtle) method of influencing non-ALJ decisionmaking. Given the significant percentage of non-ALJ types and total number of non-ALJs who are subject to performance appraisals, we were not surprised to find that agencies conduct appraisals on 70.6% of non-ALJ types that hear proceedings in which agencies are a party (and for 89% of non-ALJ types that hear enforcement matters).¹⁷³ This percentage, slightly smaller than the overall percentage of non-ALJ types subject to appraisals (75.7%), suggests some agency sensitivity to non-ALJ hearings in which the agency is a party. But the percentage is still substantial and indicates that agencies are using a suspect tool that may impugn non-ALJ independence in the proceedings where it is most sensitive.

To understand the nature of the non-ALJs' performance appraisals, we asked agencies to identify whether the appraisals included consideration of (1) case-processing goals, (2) input from litigants, (3) peer review, (4) review of the non-ALJs' decisions themselves,

173. The use of performance appraisals for different kinds of non-ALJ hearings was fairly consistent. Agencies conduct appraisals for 100% of non-ALJ types that hear benefits matters, 76.9% for federal employment disputes, 75.0% for licensing and for disputes between private parties, 71.4% for enforcement, and 66.7% for government contracts.

(5) reversal rates of the non-ALJs' decisions, or (6) other factors. We asked them to identify all that apply, and agencies reported information on the performance appraisals for 26 of the 28 non-ALJ types that are subject to performance appraisals.¹⁷⁴

Figure 10:
Nature of Performance Appraisals (n=26)



As Figure 10 indicates, the two most popular factors in non-ALJs' performance appraisals are case-processing goals (for 80.8% of non-ALJ types for which we received responses) and review of non-ALJs' decisions (69.2%). Litigant input, peer review, and reversal rates are relatively rare.

The 11 "other" responses provided more, and sometimes concerning, detail. For example, agencies for certain non-ALJ types—such as the Department of Education's AJs and HHS's Departmental Appeals Board Members—also consider administrative responsibilities. The Coast Guard considers the non-ALJ's adherence to agency guidance on "impartiality, fairness, and achieving the remedial goals of the civil-penalty process." Other agencies, such as the VA, echoed the Coast Guard by indicating that they consider compliance with statutes and regulations or "job knowledge." The MSPB considered "government-

174. The FMC did not report information for its two non-ALJ types.

wide performance standards.” SSA and Treasury reported considering vague (and potentially troubling) “business results.”¹⁷⁵

Unlike the uniform prohibition against agencies paying bonuses to their ALJs, agencies can generally pay their non-ALJs bonuses. We sought to determine how widespread the paying of bonuses was to non-ALJs, and the size of these bonuses. Of the 28 non-ALJ types that are subject to performance appraisals, as Figure indicates, 20 (or approximately 71.4%) of them are eligible for bonuses (and the responding official for two non-ALJ types for the FMC was unsure). Of the 10,831 reported non-ALJs, 9,799 (or approximately 90%) are eligible for bonuses (see

Figure).¹⁷⁶ Of those types, all received bonuses last year (even if not every non-ALJ within a type received a bonus).

175. “Business results” is a vague phrase. Whose business does the criterion concern? If it is the Treasury’s business, what are the results that it seeks to obtain from the adjudications? If the agency seeks revenue generation, this would appear to reward adjudicators who favor the agency’s preferred outcome. Regardless of the phrase’s exact meaning, the lack of clarity does not provide helpful guidance to adjudicators or the public on the relevant criteria for non-ALJs’ performance evaluation.

176. The following non-ALJs are eligible for bonuses (totaling 9,799): CFTC (15), PTAB (275), PTO (7,856), DOE (2), HHS (5), DOL/BRB (5), Treasury (714), EEOC (92), EPA (12), FLRA (40), FAO (40 Senior Attorneys), MSPB (70), NLRB (600), PBGC (6), RRB (6), and SSA (61). The largest groups of non-ALJs who are not eligible for bonuses are those that work for the VA (630) and DOJ/EOIR (326).

Figure 11:
Bonus Eligibility, by Types of Non-ALJs Subject to Performance Appraisals (n=28)

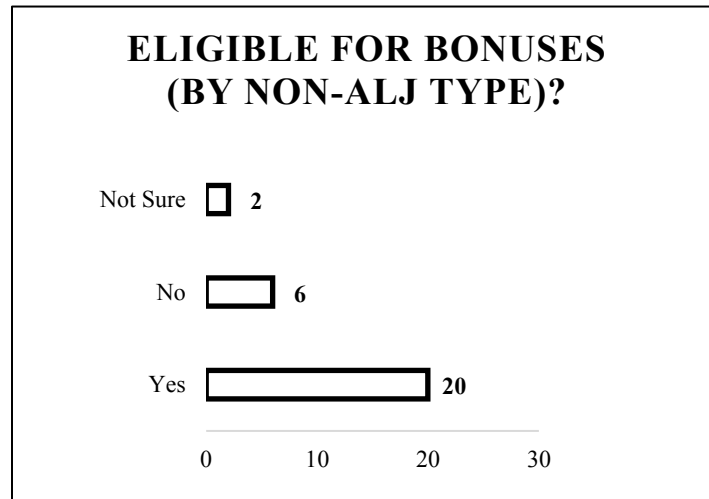
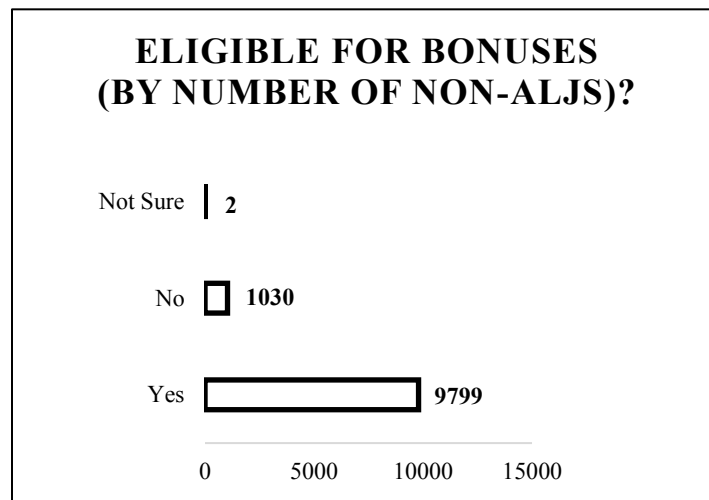


Figure 12:
Bonus Eligibility, by Number of Non-ALJs (n=10,831)

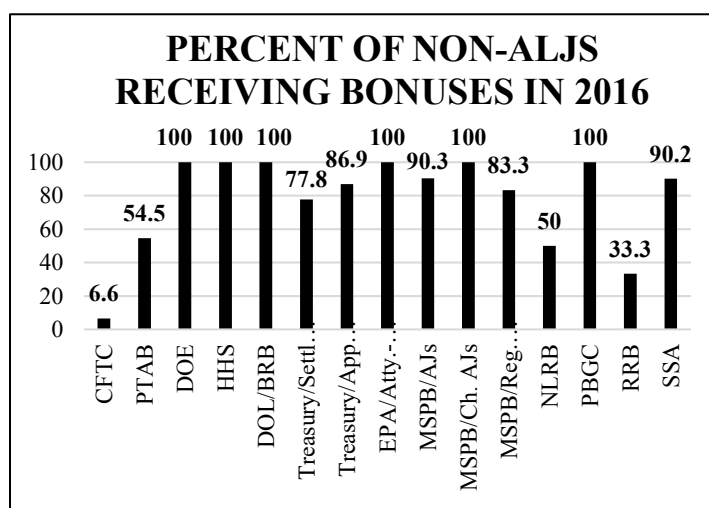


Of the 17 non-ALJ types who preside over matters in which their agencies are parties, more than 70% of those types are subject to performance appraisals, and 58.8% of them are eligible for bonuses. Although not all of the non-ALJ types who preside over matters in

which their agencies are parties may receive bonuses, a majority of them have annual performance appraisals that can affect their income.

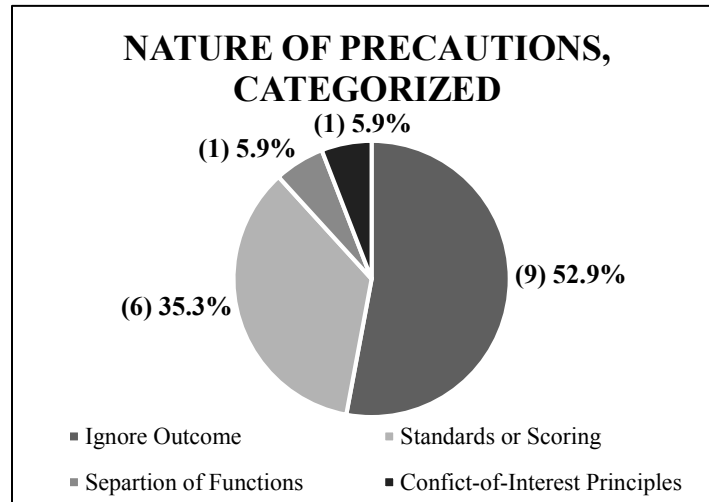
In response to our question asking how many non-ALJs received bonuses, some of the agencies reported how many non-ALJs within each type received bonuses in 2016. Figure indicates the percentage of non-ALJs who received bonuses for each of the 15 types that reported the information:

Figure 13:
Percentage of Non-ALJs Who Received Bonuses in 2017 (n=15)



We concluded our inquiry on performance appraisals and bonuses by asking whether agencies that used performance appraisals took precautions to ensure that the appraisals did not interfere with non-ALJs' impartiality. Contrary to the bonus ranges, we were able to categorize agency efforts to mitigate performance appraisals' effects on impartiality. We categorized the reported precautions in Figure as (1) ignoring case outcomes, (2) crafting review standards or scoring to protect impartiality (likely very similar to "ignoring case outcomes"), (3) using some form of separation of functions and reporting relationships to insulate non-ALJs, and (4) relying upon conflict-of-interest principles.

Figure 14:
Nature of Precautions, Categorized (n=17)



As indicated, approximately half of the reported precautions preclude consideration of case outcomes in performance appraisals, while approximately 35% consider the standards or scoring to limit discretion. Only one non-ALJ type has separation-of-functions-based protections, and only one has conflicts-of-interest principles to mitigate concerns.

6. *For-Cause Removal*

Agencies can remove ALJs for only “good cause established and determined by the [MSPB]” after a formal administrative hearing.¹⁷⁷ This limit on agencies’ ability to remove ALJs seeks to promote their impartiality. As the U.S. Supreme Court has repeatedly stated in the context of the president’s and principal officers’ power to remove other officials, “one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.”¹⁷⁸ Although we were aware of a handful of non-ALJs with similar protection from at-will removal,¹⁷⁹ we surveyed agencies to see if other non-ALJs had similar protections, whether

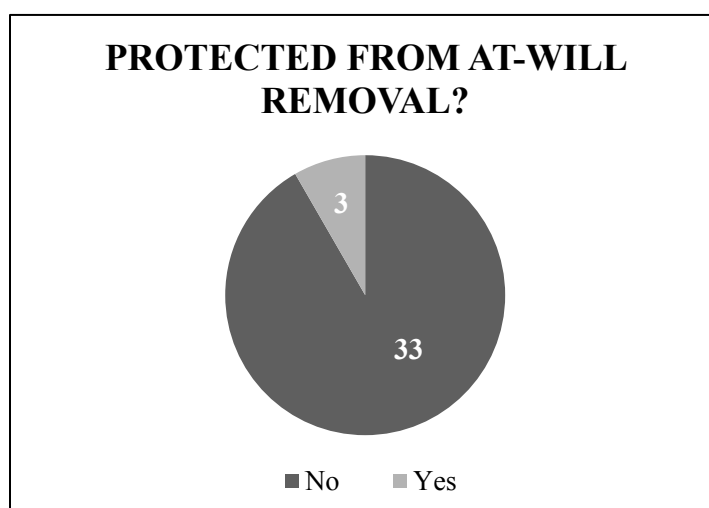
177. 5 U.S.C. § 7521(a) (2018).

178. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935)).

179. *See Barnett*, *supra* note 33, at 1648 n.21 (discussing protections for certain Board of Contracts Appeals Judges).

pursuant to statute, regulation, or other source of law. Agencies responded for 36 of the 37 non-ALJ types.

Figure 15:
Protection from At-Will Removal (n=36)



Of the 36 non-ALJs types, only three have reported protections from at-will removal (Figure). EEOC Administrative Judges and NLRB Hearing Officers have protection from removal under their collective-bargaining agreement.¹⁸⁰ The GAO's AJs, as members of the GAO's Personnel Appeals Board, can be removed only for good cause by a majority of the board (not including the member subject to removal) per statute.¹⁸¹

The absence of protection from at-will removal, however, should not be given undue weight. Despite the lack of specific protection from at-will removal, non-ALJs typically have civil-service protections that provide some insulation from possible improper agency retaliation in the performance-appraisal process.¹⁸² Their civil-service protection, however, is slightly different than that of ALJs. For ALJs, the MSPB

180. In their survey response, the EEOC further indicated that these protections come from "statute, regulation, [an] internal guidance document, and custom."

181. See 31 U.S.C. § 751(d) (2018).

182. See Kellie Lunney, *Wielding the Ax*, GOVEXEC, <http://www.govexec.com/magazine/briefing/2012/07/wielding-ax/56558/> [<https://perma.cc/SMD9-4FQL>].

itself decides whether good cause exists for removal.¹⁸³ But for most of the civil service,¹⁸⁴ an employing agency initially decides whether removal or discipline is appropriate either to “promote the efficiency of the service”¹⁸⁵ or respond to “unacceptable performance.”¹⁸⁶ That decision is subject to deferential administrative review by the MSPB.¹⁸⁷ Because merely providing a redundant good cause protection for non-ALJs would not affect the MSPB’s role in the review, agencies’ efforts would likely be better spent providing guidance on defining how the relevant statutory terms (i.e., “efficiency of the service” and “unacceptable performance”) apply to agency adjudicators.¹⁸⁸

C. *Problems with Achieving Optimal Impartiality*

Our data, along with data from Professor Michael Asimow’s earlier ACUS project concerning certain oral hearings,¹⁸⁹ indicate that many agencies have at least some impartiality protections. But these data also indicate that non-ALJ adjudication is not uniform and that numerous non-ALJ types lack optimal impartiality provisions. Non-ALJs’ status is problematic for three reasons.

First, non-ALJs’ impartiality provisions lack the stability of ALJs’. Custom and numerous forms of internal guidance require little effort to change, and any change will lack the salience of more formal action. For example, notice-and-comment rulemaking or even policy statements require publication in the Federal Register.¹⁹⁰ (Indeed, as part of the co-authored report to ACUS from which the reported data comes, we

183. 5 U.S.C. § 7521(a) (2018) (permitting adverse action against ALJs “only for good cause established and determined by the [MSPB] on the record after opportunity for hearing before the Board” (emphasis added)).

184. Slightly different procedures apply to the “Senior Executive Service.” See 5 U.S.C. § 3592(a) (requiring a hearing before an official whom the MSPB designates, but not permitting appeal to the MSPB itself).

185. See 5 U.S.C. § 7513(a).

186. BARNETT ET AL., *supra* note 77, at 69; see 5 U.S.C. § 7521(a).

187. See 5 U.S.C. § 7701(c)(1) (reviewing under substantial evidence standard for “unacceptable performance” adverse actions and under “preponderance of the evidence” standard for efficiency-based actions).

188. BARNETT ET AL., *supra* note 77, at 69–70.

189. See MICHAEL ASIMOW, SOURCEBOOK FOR FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 31 tbl.3 (draft on file with author) (indicating whether particular studied agency-adjudication schemes adopt certain criteria related to “integrity of process”).

190. See, e.g., 5 U.S.C. § 552(a)(1)(D) (requiring publication for interpretive rules and statements of policy).

recommended that agencies use notice-and-comment rulemaking for their impartiality provisions to increase those provisions' transparency and salience.¹⁹¹)

Second and relatedly, the hodgepodge of non-ALJ impartiality provisions undermines transparency because the provisions are often scattered among various authorities. Our data (not all of which is presented here) indicate that impartiality protections rest in a host of forms: notice-and-comment regulations, procedural rules, guidance documents, and custom. This variety of mechanisms for providing protections renders the protections less transparent.

Indeed, our survey unexpectedly confirmed this intuition. In administering our survey, the EEOC at first sent the survey by mistake to numerous of its non-ALJs, instead of providing a single institutional answer. Numerous times, the responses were inconsistent. For instance, the responding non-ALJs provided disparate responses on hiring qualifications, the permissibility of *ex parte* communications (and sources of any limitations), eligibility for bonuses, the existence of case-processing goals, limitations on other duties, and even the nature of administrative appellate review. Strikingly, some of the responding non-ALJs indicated that the agency often relied upon custom for various limitations, the existence of which was apparently unknown to some of their colleagues. As these responses suggest, transparency benefits not only the public, but the agency and the non-ALJs, too. One agency's transparency also benefits other agencies, which can more easily assess other agencies' practices and consider those practices in fashioning their own procedural schemes.

Finally, agencies do not appear to have considered norms for non-ALJ independence in a holistic way. Any particular agency likely creates adjudicatory procedure infrequently, and the addition of new and expanded programs presumably arises more organically. Any focus on process is probably on the nature of the proceedings because that process is necessary for the first adjudication to begin and because that process must function as a relatively coherent scheme. Moreover, these procedural schemes can be borrowed from other adjudications and tailored in relatively short order. In contrast, impartiality protections are not as salient, especially because they are often prophylactic measures to mitigate any risk of partiality.

191. See BARNETT ET AL., *supra* note 77, at 71–72.

III. IMPARTIALITY DISCLOSURES

Federal hearing officers' impartiality protections are far from uniform or optimal, as measured against ALJs' impartiality protections. Because of the problems in gathering information on them, it is difficult to discuss their status and, if necessary, ensure optimal impartiality. As a remedy, this Part proposes that agencies should use uniform disclosures like those primarily used in consumer-commercial contexts. Disclosure regimes provide a mechanism for improving hearing officers' salience and indicia of impartiality. With improved salience, Congress will be in a better position as principal to determine whether government-wide legislation—perhaps via an “impartiality code”—is suitable.

To be sure, Congress has used various reporting requirements to oversee agencies, and some literature discusses the history and concerns over the utility and costs of those reports.¹⁹² But the literature on consumer disclosure is a better guide for three reasons. First, the consumer-based literature is extremely well-developed theoretically and practically,¹⁹³ while the congressional-reporting literature tends to concentrate on congressional reporting within a specific subject-matter area or statutory scheme,¹⁹⁴ or, as especially true in the political-science literature, as part of a mix of congressional-oversight mechanisms.¹⁹⁵ Second, the impartiality disclosures are not only for Congress. Instead, they are for Congress, agencies, litigants, and scholars; in fact, my proposal does not call for direct reporting to Congress. Finally, unlike annual reports to Congress, which are often criticized for their cost and ineffectiveness, the proposed disclosure is an extremely concise document that does not require annual filing.

192. See, e.g., Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 66–67, 106 (2006) (discussing congressional reporting requirements). See generally Jonathan G. Pray, Comment, *Congressional Reporting Requirements: Testing the Limits of the Oversight Power*, 76 U. COLO. L. REV. 297 (2005) (discussing history and criticism of congressional reporting requirements).

193. See *infra* Section III.A.

194. See generally Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355 (1991); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311 (1991); Joseph Carlton Elliott, Comment, *Sleeping with One Eye Open: The Result of Non-Transparent Oversight by the Office of Refugee Resettlement on Facilities Sheltering Unaccompanied Alien Children*, 68 ADMIN. L. REV. 153 (2016).

195. See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 128 (1999) (discussing broader relationship between Congress and Executive in policymaking); Beermann, *supra* note 192, at 66–67 (citing and discussing the political science literature on congressional monitoring).

A. Purposes of Impartiality Disclosures

Consumer law has long relied upon disclosure models to further various related objectives in numerous areas, including rent-to-own,¹⁹⁶ credit,¹⁹⁷ automobile-sales¹⁹⁸ and automobile-lease,¹⁹⁹ door-to-door,²⁰⁰ securities,²⁰¹ and banking transactions.²⁰² Disclosures also have a prominent place in consumer privacy as to internet,²⁰³ financial,²⁰⁴ and health matters.²⁰⁵ The same objectives in the commercial context can, as discussed in this Section, also apply to the impartiality context.

Consumer disclosure in a commercial context may not come to mind as a useful tool for improving adjudicatory procedure because consumer disclosure has a different primary purpose. In the consumer context, disclosure primarily promotes comparison shopping.²⁰⁶ Or, in the absence of comparison shopping, disclosure can serve a market function, providing information to a sufficient number of well-informed consumers to lead the market, through competing suppliers, to offer consumers better terms.²⁰⁷ These interrelated objectives are a primary animating feature of, among others, Truth in Lending (TILA)

196. See, e.g., N.Y. PERS. PROP. LAW § 501 (McKinney 2018) (requiring specific notice and particular terms of rental agreement).

197. Truth in Lending Act, 15 U.S.C. §§ 1601–1602 (2018) (requiring specific disclosures for credit transactions).

198. See, e.g., Motor Vehicle Information & Cost Savings Act, 49 U.S.C. §§ 32701–32705 (2018) (requiring disclosure of odometer readings); 16 C.F.R. § 455 (2018) (requiring disclosures on window of cars for used-car sales); *id.* § 600 (requiring disclosures concerning fuel economy for new cars).

199. Consumer Leasing Act, 15 U.S.C. § 1667(a)–(f).

200. See, e.g., 16 C.F.R. § 429.1 (requiring disclosure of consumer rights in a door-to-door sale, including right to cancel).

201. See, e.g., Securities Exchange Act of 1934, 15 U.S.C. § 78l(b)(1) (requiring disclosure of numerous corporate details for securities registered on a national stock exchange for secondary trading); Securities Act of 1933, 15 U.S.C. §§ 77g, 77j (requiring disclosures for initial registration with the SEC).

202. See, e.g., Truth in Savings Act, 12 U.S.C. §§ 4301–4303 (2018); Electric Fund Transfers, 12 C.F.R. § 1005.7 (2018) (disclosures related to debit transactions).

203. See, e.g., CAL. BUS. & PROF. CODE § 22575 (West 2018) (requiring disclosure of online privacy policies).

204. See, e.g., Graham-Leach-Bliley Act, 15 U.S.C. §§ 6801–6802 (requiring disclosures concerning financial privacy by financial institutions).

205. See, e.g., 45 C.F.R. § 164.520 (2018) (requiring privacy notices to patients concerning health information).

206. See Jonathan M. Landers & Ralph Rohner, *A Functional Analysis of Truth in Lending*, 26 UCLA L. REV. 711, 713 (1979).

207. See Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 668–69 (1979).

disclosures, which apply to numerous credit transactions.²⁰⁸ Importantly for my purposes, this comparison-shopping purpose has only a tangential role for impartiality disclosure because agencies or Article I courts rarely compete with other tribunals for cases.²⁰⁹

But subsidiary purposes for consumer disclosure can be key for impartiality disclosure. First, disclosure can provide a synopsis of critical contractual provisions.²¹⁰ Indeed, this is one function of rent-to-own disclosures, which must set out monthly payments, purchase price, various fees, and additional information on the nature of the rental transaction.²¹¹ For adjudicatory procedure, a disclosure regime can help assemble relevant terms and provide a synopsis of impartiality provisions. As indicated in Part II, the various indicia are not often transparently available, collected in one spot, or based on more than custom. The disclosures seek to cull the relevant criteria and provide a transparent mechanism for agencies, parties, interest groups, and Congress to understand and, if necessary, improve the protections for various kinds of hearing officers. For instance, just as securities disclosures can expose largely hidden underwriter or executive compensation,²¹² impartiality disclosure can bring, say, problematic *ex parte* practices to light.

Second, consumer disclosures can provide a warning function to consumers that a particular term is far from ordinary. For instance, if a consumer determines that most credit for a particular purpose has an Annual Percentage Rate (APR) of 8%, a disclosed APR of 88% by one competitor will alert the consumer that something is amiss with the transaction.²¹³ Similarly, disclosure can reveal (to lawyers, if not parties) outlier adjudications that, say, do not have limitations on *ex parte*

208. See 15 U.S.C. § 1601(a) (“It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . .”). Nonetheless, many argue that disclosure largely fails at achieving these purposes because of consumers’ inability or disinterest in using disclosed information. See, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 183–84 (2014).

209. The most prominent exceptions are certain commodities-related disputes at issue in *CFTC v. Schor*, 478 U.S. 833, 836–37 (1986), or certain tax disputes. See David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW. 629, 629 (1996) (discussing competition between the Tax Court, federal district courts, and the U.S. Court of Federal Claims).

210. See JOHN A. SPANOGLE ET AL., *CONSUMER LAW: CASES AND MATERIALS* 266 (4th ed. 2013).

211. See, e.g., CAL. CIV. CODE § 1812.621 (West 2018) (describing purpose of disclosures and other provisions as “ensuring that consumers are adequately informed of all relevant terms” and “protected from misrepresentations and unfair dealings”).

212. See Dalley, *supra* note 43, at 1096.

213. See Landers & Rohner, *supra* note 206, at 737.

communications or recusal requirements. It may be that a critical characteristic of independence is justifiably absent for a set of hearing officers. But the disclosures can ensure that the indicium's absence is not merely the result of agency or congressional carelessness. To further this warning function, the disclosures must be relatively uniform to permit comparison of similar transactions or forms of agency action, and they must present important information in a salient way.²¹⁴

Relatedly, if concerns arise over particular adjudications, the disclosures can help identify missing impartiality protections that may help mitigate those concerns. This divergence between optimal impartiality protections and those that the adjudicator has can reveal an "impartiality gap." Recall, for instance, two of our introductory examples.

The SEC ALJs have APA impartiality protections, and thus they have optimal impartiality protections as measured against the APA's provisions. But concerns over internal pressure at the SEC to rule for the agency suggests that the APA's provisions do not guarantee impartiality or freedom from agency pressure. To mitigate concerns over interagency pressure, the SEC could provide additional physical separation for its ALJs from the rest of the agency.

Immigration judges, as a second example, have many of the recommended protections including hiring qualifications, prohibitions on other functions and ex parte communications, physical separation, and the lack of eligibility for bonuses. But they are subject to performance reviews, and they lack special protection from removal.²¹⁵ The current concern is that these performance reviews are not crafted to divorce substantive outcomes in decided cases from the performance review and any discipline that may follow.²¹⁶

Impartiality gaps may seem obvious for high-profile adjudications like those for the SEC or for immigration matters. But even with high-profile examples, the identification of impartiality gaps can help focus attention on the specific nature of the problem, such as the nature of performance appraisals and the lack of defined protection from at-will removal, within the larger context of administrative adjudication. For less salient adjudications, these disclosures may be the only way in which the absence of impartiality protections comes to light. For instance, the 535 Decision Review Officers for the VA have no

214. *See id.* at 738.

215. ACUS Response Spreadsheet, Types of Non-ALJs (on file with author).

216. *See id.*

prohibitions on ex parte communications, no separations of functions, no physical separation, performance appraisals, and no especial protection from at-will removal.²¹⁷ These missing protections suggest a significant impartiality gap that may otherwise go unnoticed.

Third, consumer disclosure creates trust between parties to an agreement. This practice furthers dignitary interests by allowing consumers the opportunity to read and understand the nature of the transactions.²¹⁸ This value may be more pronounced in the impartiality context.²¹⁹ With process, the regulated individuals may have no choice about the process or tribunal. But disclosure can ensure that the government recognizes the individual's interest in understanding the nature of the adjudication, and it can improve the individual's and public's trust in agency action by removing concern over inadvertently or purposefully opaque procedure. The clarity that disclosure provides may be especially useful in a context in which the hearing officers often have the title "judge" but lack protections that laypeople and even lawyers would presuppose. That said, as discussed in Section III.C, disclosure will improve litigants' satisfaction with negative outcomes and thereby create public trust only if a disclosure reveals well-conceived impartiality protections or if disclosure of lackluster impartiality provisions nudges the agency towards adopting them.

Fourth, consumer disclosure can guide consumers towards certain normative preferences. For instance, Congress determined that its longstanding required word-based warnings on tobacco products were not effectively countering consumers' biases or miscalculation of tobacco's health risks.²²⁰ To account for consumers' insufficient appreciation of health risks, Congress replaced those warnings with graphic pictures of lung disease to invoke an emotional response in potential tobacco users.²²¹ In the procedural context, the agency may not

217. *Id.*

218. See, e.g., Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 734–35 (2011) (discussing asserted dignitary value to disclosure and related authorities); cf. Richard W. Bourne, *Medical Malpractice: Should Courts Force Doctors to Confess Their Own Negligence to Their Patients*, 61 ARK. L. REV. 621, 623 (2009) (considering the disclosure of professional errors to affected patients).

219. See David Aaron, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005, 3015 (1999) (noting government's responsibility to protect dignitary interests in criminal law because of the government's role as representing society).

220. *Id.*

221. Ryan Bubb, *TMI? Why the Optimal Architecture of Disclosure Remains TBD*, 113 MICH. L. REV. 1021, 1028–36 (2015) (discussing the Family Smoking Prevention and Tobacco Control Act of 2009, 21 U.S.C. § 387 (2018)).

need to ascertain risks in the same ways as a potential smoker might. But the APA and the Court's due process jurisprudence suggest that agencies provide optimal independence for hearing officers when they address hearing officers' hiring, pay, removal, and decisionmaking process. Disclosures can encourage agencies to adopt optimal process by creating a mechanism for public shame if their hearing officers' structured independence deviates from optimal and—if the disclosure is effective—more standardized design. Even without shame, disclosure can help channel “herd behavior”—getting agencies to follow what they perceive others to be doing.²²² This herding can mitigate some concerns over agencies lacking expertise in designing impartiality protections without significant guidance.

Fifth, impartiality disclosures can reduce principal-agency costs, a purpose that is less often germane to consumer transactions.²²³ By having agencies disclose key procedural provisions in a transparent and understandable fashion, Congress can better monitor agencies to ascertain how agencies are using their delegated authority. A meaningful disclosure regime that creates a synopsis of important terms and permits easy comparison of similar agency action is much more useful to a principal than a disclosure regime in which the information is found in numerous materials and requires the principal to synthesize and analyze the information. Indeed, Congress requires something similar in other spheres. For instance, it requires agencies to file impact statements for government actions with major environmental effects. Congress also requires under the Community Reinvestment Act²²⁴ that banks (with all of the benefits that national banking laws provide them²²⁵) disclose their outreach to various disadvantaged communities when seeking regulators' approval of pending mergers.²²⁶ In both of these examples,

222. Dalley, *supra* note 43, at 1115.

223. See Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1048 (1995) (“[T]he principal purpose of mandatory disclosure [in securities markets, as opposed to other consumer transactions] is to address certain agency problems that arise between corporate promoters and investors, and between corporate managers and shareholders. Disclosure can help reduce the cost of monitoring promoters' and managers' use of corporate assets for self-interested purposes.”).

224. 12 U.S.C. §§ 2901–2908 (2018).

225. See generally Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283 (2014) (describing how banking charters are intended to inure to the public's benefit).

226. See, e.g., Dalley, *supra* note 43, at 1122–23 (noting that Community Reinvestment Act disclosure, as part of banking mergers, has led to changes in lending practices); Cheryl Lee, *Amalgamation of the Southern California Banking Industry: San Diego a Microcosm*, 35 CAL. W. L. REV. 41, 116 (1998) (“Along with federal and state antitrust laws that apply to interstate banking,

Congress uses disclosure regimes to influence agent actors or regulated parties' behavior and to render their action more salient to interested parties, which, in turn, can alert congressional monitors.

Finally, consumer disclosures can also have a law-reform function by revealing what were once unfair, hidden terms.²²⁷ Disclosure may be a tool for centering public attention on a particular issue.²²⁸ For instance, the complexity and incomprehensibility of disclosed provisions led to a movement in the states for "simple English forms"²²⁹ in consumer contracts and in certain federal privacy disclosures.²³⁰ In the impartiality context, disclosure can help reveal problematic non-ALJ regimes in one adjudication, in one agency, or across the administrative state.²³¹ A disclosure would become a tool of numerous constituencies—agencies themselves, Congress, and interest groups—to improve the status quo.²³² Importantly, disclosure in general is useful for reform objectives even if some constituencies or litigants ignore the disclosures. As in the consumer context, only some actors need to understand and use disclosures for them to have a meaningful impact on a disclosing party's practice.²³³

B. Key Considerations for Impartiality Disclosure

Despite disclosure's utility, it can prove unhelpful or even backfire. As Professor Daniel E. Ho has demonstrated, unthoughtful disclosures can fail to further their underlying goals. For instance, he notes that disclosures can be too complicated for consumers' use, as with Safe Drinking Water Act disclosures²³⁴ or credit disclosures.²³⁵ Or disclosures

the Federal Reserve Board must also consider Community Reinvestment Act compliance in connection with any merger or acquisition application.").

227. See Landers & Rohner, *supra* note 206, at 741.

228. See Dalley, *supra* note 43, at 1112.

229. See Landers & Rohner, *supra* note 206, at 741 n.101.

230. 16 C.F.R. § 313.3 (2018) (requiring that the certain privacy notices under the Gramm-Leach-Bliley Act be "reasonably understandable" and defining the concept in great detail).

231. See Dalley, *supra* note 43, at 1110–11 (noting that disclosure of securities information can be useful to the government itself in determining how to better regulate).

232. See Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1379 (2015) (noting how disclosure that consumers understand can lead consumers to think more deeply about the matter at issue and create a bridge to substantive regulation).

233. See, e.g., SPANOGLE ET AL., *supra* note 210, at 266 (discussing the market-function of consumer disclosure and the need for some consumers to pay attention to the disclosures).

234. See Daniel E. Ho, *Designing Information Disclosure*, 38 ADMIN. & REG. L. NEWS 13, 13 (2012).

235. The comprehensibility problem with TILA disclosures is a longstanding one. See Jeffrey Davis, *Revamping Consumer-Credit Contract Law*, 68 VA. L. REV. 1333, 1345–46 (1982) (pointing

can be so inaccessible—such as privacy disclosures in obscure locations²³⁶ or provided with other abundant information²³⁷—that they are unlikely to prove effective.²³⁸ Even restaurant health disclosures—“widely considered a paragon of disclosure regulation”²³⁹ due to their easy-to-understand and prominent letter grades based on an inspector’s underlying rubric—can do little to signal degrees of sanitation if the grading lacks consistency among inspectors, suffers from grade inflation, or has so many detailed grading objectives that they hinder reliability among different inspectors.²⁴⁰ Perhaps even worse, disclosures can have unintended consequences that exacerbate harms that the disclosure seek to mitigate. For instance, calorie disclosures can lead restaurant patrons to increase their calorie consumption by purchasing several lower-calorie foods that in the aggregate have more calories than a single high-calorie item.²⁴¹

This Section considers the main issues in the design of impartiality disclosures. After determining which values the disclosures seek to further, one must consider which criteria are germane to those underlying values, how to communicate the information in the disclosure, and how to distribute the disclosure to ensure that the relevant audiences can easily find the disclosed information. And, of course, the disclosure design must ensure that the costs of the disclosure are less than its benefits.

to studies indicating that TILA has had no market impact and stating that “[t]he resulting [TILA] disclosure statement is nearly incomprehensible to the average consumer; the information essential to making good credit-use decisions lies buried under mounds of superfluous data”).

236. Although California is one of the few states to require disclosure of privacy policies, *see* SPANOGLE ET AL., *supra* note 210, at 532, those policies need not be posted on the company’s webpage; they may instead be posted as a hyperlink on the “first significant page after entering the Web site.” *See* CAL. BUS. & PROF. CODE §§ 22575(a), 22577(b)(1) (West 2018).

237. Regulations to Gramm-Leach-Bliley financial disclosures permit sellers to “combine [the required disclosures] with other information,” creating an incentive for sellers to bury the disclosures in other consumer correspondence. Regulation P, 12 C.F.R. § 1016.3(b)(2)(ii)(E) (2018).

238. *See* Dalley, *supra* note 43, at 1091. If consumers notice privacy-policy disclosures, they are likely to misunderstand their import. “[I]nstead of reading the policies, consumers assume that a firm with a ‘privacy policy’ has a policy of keeping consumer data private”—though a privacy policy may indicate that the firm will widely share the consumer’s information. Willis, *supra* note 232, at 1326.

239. Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 582 (2012).

240. *See id.* at 611–14, 640–41.

241. *See* Ho, *supra* note 234, at 13.

1. *Designing the Disclosure*

Ascertaining the appropriate criteria concerning hearing-officer impartiality is the relatively easy part because the germane factors for optimal hearing-officer independence are the familiar ones from the APA, the Court's due process jurisprudence, and my recent survey:

- Hiring process (including who hires and established criteria, if any, for hiring);
- Separation of functions;
- Supervisory relationship within the agency;
- Ex parte communications;
- Physical separation;
- Performance appraisals;
- Eligibility for performance bonuses; and
- Protection from at-will removal

The more difficult questions concern the design of the disclosure.

The disclosure must also be a concise document. The longer the document, the less likely that it will be read and the more likely that the information will be obscured.²⁴² If it is not read, the document cannot prove a meaningful warning, shame sufficiently to push agencies in a better direction, or clearly identify concerns for congressional consideration. Relatedly, brevity permits the disclosure to provide a synopsis, as opposed to an exposition, of the hearing-officer's status. By limiting the disclosure to the eight criteria listed above with a limited agency response for each criterion, the disclosure will better achieve its purposes. Because comparison among agencies and adjudications is necessary to further nearly all of these goals, the disclosures must also be uniform.²⁴³

The concise disclosure must also be readable for lay litigants and attorneys who do not delve into adjudicatory structure frequently. The disclosure should be written in a readable font that seeks to ensure, in as

242. See Bubbs, *supra* note 221, at 1026; Dalley, *supra* note 43, at 1115. Moreover, firms are aware that psychological forces (such as a line of people waiting impatiently behind a customer with disclosures in hand at a car-rental counter) can dissuade consumers from reading disclosures. See Willis, *supra* note 232, at 1325.

243. The use of uniformity to permit comparison is a feature of numerous disclosure regimes. See, e.g., 12 U.S.C. § 4301(a) (2018) (stating that Congress requires uniform disclosures to improve competition and consumer decisionmaking under the Truth in Savings Act); Rule Notice, Truth in Lending, 65 Fed. Reg. 17,129 (Sept. 27, 2000) (codified at 12 C.F.R. § 226 (2018)) (stating that “[u]niformity in creditors’ disclosures [under the Truth in Lending Act] is intended to assist consumers in comparison shopping”).

plain of language as possible, that the recipient can understand the nature and import of the terms.²⁴⁴ For instance, the Consumer Financial Protection Bureau, when revising its disclosure forms for certain residential mortgages not only used statutorily-mandated terms, such as “finance charge” and “Annual Percentage Rate (APR),” but also explanations of what the terms meant (and did not mean).²⁴⁵ As one example, with APR, the agency briefly defined it as “[y]our costs over the loan term expressed as a rate. This is not your interest rate.”²⁴⁶ The agency did so to mitigate consumer confusion, uncovered in its testing, between the APR (which includes interest, fees, and other costs of the loan) and interest rates.²⁴⁷

Disclosures often follow one of two models—what I refer to as either a “presentation model” or a “synthesis model.” Under the former, the disclosure simply presents the required criteria without attempting to synthesize or analyze it for recipients. Forms for TILA, the Truth in Savings Act, and Rent-to-Own transactions, among others, follow this model by mandating the disclosure of information like costs and fees without assessing the desirability of the particular transaction. The synthesis model, in contrast, takes the applicable criteria and analyzes it to provide the recipient with a conclusion as to this subject of the disclosure. Perhaps the most well-known example of the synthesis model is the earlier mentioned letter-grade-based disclosure system for restaurants. Similarly, based on their algorithms, publications rank universities and colleges to help students and schools evaluate the “best” schools.

The benefit of the presentation model is that it does not require an intermediary to administer or a reliable rubric to ensure consistency among numerous intermediaries. But its downside is that it leaves the disclosure recipient to make sense of the presented information. The

244. Matters like font and placement are ubiquitous factors in disclosure design. See Willis, *supra* note 232, at 1349–50. The FTC has indicated that these are “important considerations,” but they are not sufficient to ensure effective disclosure. FTC, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING 1 (2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> [<http://perma.cc/N6BQ-JJTV>].

245. CONSUMER FIN. PROT. BUREAU, TILA–RESPA INTEGRATED DISCLOSURE: GUIDE TO THE LOAN ESTIMATE AND CLOSING DISCLOSURE FORMS 108 (May 2018), https://files.consumerfinance.gov/f/documents/cfpb_kbyo_guide-loan-estimate-and-closing-disclosure-forms_v2.0.pdf [<https://perma.cc/VSD2-9QGU>].

246. *Id.*

247. Rule Notice, Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79,730, 79,979 (Dec. 31, 2013) (codified at 12 C.F.R. §§ 1024, 1026 (2018)).

synthesis model's beneficial feature, in contrast, is that it can provide an understandable compilation of the tested variables in a format that is very familiar to those outside the targeted industry. The downside is that it requires an intermediary to provide the synthesis. The presence of more than an evaluator or grader requires checks for consistency and reliability in grading; the use of an algorithm requires validity testing and attention to whether subject parties can "game" the algorithm.²⁴⁸ The simplicity of the letter grade or ranking also may obscure the complexity in the grading variables and application.

For impartiality disclosures, the presentation model is preferable. By limiting the disclosed criteria, the disclosure can effectively provide information that furthers the purposes of the disclosure (synopsis, warning, etc.), especially for lawyers, Congress, and the agencies themselves. To be sure, less sophisticated litigants may appreciate a synthesis model with, say, a letter grade that evaluates the hearing officer's independence. But that model would create significant costs: deciding who evaluates, assuring reliability in creating a grading rubric, determining how to ensure valid rubrics after accounting for legitimate reasons for certain hearing officers to deviate from the norm, and preventing the inadvertent masking of potential impartiality failings within the grading calculus. By calling for an explanation only when agencies answer a certain way, the presentation-model disclosure can subtly indicate when agencies are deviating from the optimal course.

Finally, the agencies must consider for which of their hearing officers they should provide a disclosure. Defining non-ALJ hearings is notoriously difficult because of their varied characteristics. The agencies could choose to use our definition (i.e., hearings in which the parties can seek an oral, evidentiary hearing).²⁴⁹ Or they may choose to use a similar, although perhaps narrower definition from another ACUS project. In an earlier project, ACUS adopted a definition of "Type B" hearings: mandatory evidentiary hearings (whether written or oral) that have an exclusive record and are not heard by ALJs.²⁵⁰ For ease of

248. See Dalley, *supra* note 43, at 1128 (discussing "gaming" by law schools for the *U.S. News and World Report* survey and bypass-surgery report cards).

249. For the full definition, see *supra* note 141 and accompanying text.

250. See MICHAEL ASIMOW, ADMIN. CONFERENCE OF THE U.S., ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 5, 10 (2016) (defining "evidentiary hearing" and distinguishing "Type B" hearings from "Type C" hearings), <https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-draft-report.pdf> [<https://perma.cc/D6H5-X8F6>]; Adoption of Recommendations, 81 Fed. Reg. 94,314 (Dec. 13, 2016). The main difference between the definitions is that the one in our report only includes oral hearings, and it did not require an exclusive record or that the hearing be mandatory (as opposed to those that the agency had to hold upon a party's request).

categorization, agencies may prefer limiting the relevant non-ALJ hearings to those with exclusive records, those that permit oral proceedings, or those that are mandatory. Regardless of how different definitions alter the domain of the disclosures, the disclosures can prove useful for numerous agencies and proceedings.

Appendix A provides a model form based on these considerations.²⁵¹

2. *Distribution*

A successful disclosure requires appropriate distribution to render it more likely that recipients will use disclosure to achieve its purposes. To that end, the agency should include it with other materials that it provides at the initiation of a hearing and in the same format as those other materials, whether as a separate document, conspicuous link, or conspicuous attachment.²⁵² By ensuring that the party receives it at the beginning of the hearing, it renders it more likely that the party can take any actions necessary to preserve issues concerning the hearing officer's independence.²⁵³

The agency should also place the disclosure with other materials (such as rules, docket pages, and other guidance) on its website. Not only are some regulated parties likely to find the disclosure online, conspicuous posting makes it easier for other agencies, congressional staffs, and other interested parties to find the document for particular proceedings. Indeed, ACUS has recently adopted a recommendation for agencies to make their adjudicatory materials more conspicuously available on their websites.²⁵⁴

Agencies should also send their disclosures to a clearinghouse only as they create or revise them. Collecting all disclosures will better enable scholars or government actors to synthesize government-wide practice and consider any appropriate uniform reforms. Annual disclosure to the clearinghouse would likely prove too burdensome and, if the impartiality

251. *See infra* Appendix A.

252. If the agency chooses to provide paper copies, the costs of disclosure will increase. To mitigate these costs, the agency could choose to print the disclosure on the back of another document, as long as the front of the document clearly puts the recipient on notice of the disclosure's existence on the back of the page.

253. Some disclosure regimes require certain recurring disclosures. *See* DEE PRIDGEN & RICHARD ALDERMAN, CONSUMER CREDIT AND THE LAW § 8:4 (2018) (discussing timing of open-end-credit TILA disclosures); *id.* § 13:17 (discussing annual Gramm-Leach-Bliley financial-information disclosures). Disclosures concerning hearing officers do not need to occur more than once. It is difficult to see what benefit repeated disclosure would provide, especially if the disclosures are available online with the hearing's other materials.

254. *See* Adoption of Recommendations, 82 Fed. Reg. 31,039 (June 16, 2017).

provisions are static after their creation, unnecessary. But the downside is that agencies may simply not remember to submit revised disclosures, and they may largely forget, without the nudge of an annual reporting requirement, to think about whether to update their disclosures. On balance, other constituencies may be able to help nudge the agency into reconsidering the disclosures and impartiality protections if necessary, and an annual (or biannual) reminder by the clearinghouse may help assuage fears of agencies overlooking the disclosures once they have drafted them. Agencies should send the disclosures in a format to the clearinghouse that allows machine-based reading and analysis,²⁵⁵ so that the clearinghouse can easily identify outliers and analyze trends or characteristics across all federal agency adjudication.

ACUS is one possible clearinghouse because its mission is “to promote improvements in the efficiency, adequacy, and fairness of the procedures by which federal agencies conduct regulatory programs . . . through scholarly research” and recommendations to Congress and agencies.²⁵⁶ Indeed, ACUS not only commissioned the underlying empirical project discussed here on hearing officers’ independence, but they have recently focused on agency adjudication and created an online database of information on agency adjudications of all stripes.²⁵⁷ To be sure, serving as a clearinghouse would be a new duty for ACUS. Yet, unlike regimes with annual disclosures or disclosures that potentially apply to all recurring substantive agency decisions (such as certain rulemakings),²⁵⁸ the impartiality disclosures would require only initial and revised disclosures for any relevant non-ALJ adjudication. Of course, to assess a suitable government clearinghouse (whether ACUS or another entity), one would have to consider the agency’s budget, other duties, and staffing—considerations that are outside the scope of this Article.

Finally, if necessary, these disclosures should be mandatory. Based on agencies’ high response rate to our survey, I am hopeful that agencies

255. See Ho, *supra* note 234, at 580–81 (discussing guidance from the Obama Administration’s Office of Information and Regulatory Affairs on machine-readable disclosures).

256. David M. Pritzker, *ACUS in a Nutshell*, ADMIN. CONF. U.S. (July 17, 2013), <https://www.acus.gov/newsroom/administrative-fix-blog/acus-nutshell> [<https://perma.cc/C263-L5G8>].

257. For a collection of ACUS reports concerning adjudication, see *Adjudication*, ADMIN. CONF. U.S., <https://www.acus.gov/past-projects/adjudication> [<https://perma.cc/E9KY-SFJN>]; *Ongoing Projects*, ADMIN. CONF. U.S., <https://www.acus.gov/current-projects> [<https://perma.cc/9MFK-3A8T>].

258. See, e.g., Beermann, *supra* note 192, at 83–84 (discussing the Congressional Review Act); Doris S. Freedman et al., *The Regulatory Flexibility Act: Orienting Federal Regulation to Small Business*, 93 DICK. L. REV. 439, 442 (1989) (discussing annual reporting by the Small Business Administration under the Regulatory Flexibility Act).

will voluntarily disclose. Voluntary disclosure is a good starting point, and an agency's mere refusal to disclose voluntarily may provide sufficient signaling to Congress to inquire further. But given agencies' practice of turning away from ALJs and failing to provide non-ALJs similar protections, I am skeptical that a sufficient number of agencies will voluntarily disclose non-ALJ protections. After all, as I have argued elsewhere, agencies have largely (though wrongly) determined that the current system of using non-ALJs with lesser independence benefits them.²⁵⁹ The mandate, if necessary, can come from two sources. As a helpful start, the White House (likely through OMB) could mandate disclosure for executive agencies in the manner proposed here. The downsides are that OMB's relationship with independent agencies is fraught and that OMB (through its Office of Information and Regulatory Affairs) focuses primarily on agency rulemaking, not adjudication.²⁶⁰ The other option is for Congress to mandate the disclosures via statute. The benefit is that agencies will be required to comply. But, as proposed revisions to the APA have demonstrated over the decades,²⁶¹ statutory change to administrative process comes slowly, if at all. The lack of political valence as to impartial agency adjudicators gives one more hope for these disclosures, however. After all, progressives want impartial non-ALJs who preside over hearings with vulnerable populations (say, immigrants),²⁶² while conservatives seek to ensure a fair administrative process for corporate regulated entities.²⁶³

C. *Possible Objections*

Disclosure is no panacea. There are legitimate concerns about its use and effectiveness. But these objections do not undermine disclosure's utility in the impartiality context.

First, congressional action, especially if providing uniform treatment to hearing officers, would be a more efficient and effective way of regulating impartiality. Moreover, the concerns over substantive

259. See generally Barnett, *supra* note 33, at 1670–1708.

260. See KEITH WERHAN, *PRINCIPLES OF ADMINISTRATIVE LAW* 101–09 (2d ed. 2014).

261. See generally Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 (2017) (discussing earlier attempted reforms of the APA and current pending ones).

262. See generally Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99 (2017).

263. See generally Jean Eaglesham, *U.S. Chamber of Commerce Criticizes SEC's In-House Court*, WALL ST. J. (July 15, 2015), <https://www.wsj.com/articles/u-s-chamber-of-commerce-criticizes-secs-in-house-court-1436932861> [<https://perma.cc/LCL3-Y49G>] (discussing concern over the partiality of SEC ALJs by industry and its interest group, the U.S. Chamber of Commerce).

regulation in the consumer context—that it stifles innovation and can lead to inefficiencies in the market²⁶⁴—do not apply here assuming that the impartiality criteria are optimal and fixed for all hearing officers. But, as indicated earlier, the lack of information up to this point on hearing officers—both as to their significant place in the bureaucracy and their protections—has rendered substantive regulation by congressional oversight difficult. Of course, the data presented here, as well as from other sources, provide Congress a basis to begin its oversight. But agency-provided disclosures can provide updated data, citations, and explanations for all relevant non-ALJ hearings (not just the ones that voluntarily respond). In short, impartiality disclosure is a first step in helping bring about improvement—whether from agencies in the first instance or from congressional oversight.

Second, disclosure regimes have largely been deemed failures and thus their efficacy here may be in doubt.²⁶⁵ But the aims of consumer disclosure and impartiality disclosure differ. The most trenchant criticism of disclosure regimes concerns their inability to alter consumer behavior.²⁶⁶ Here, it is not the consumers' behavior that we seek to change. Instead, we seek to change the provider's behavior (the agency) or the overseer's (Congress).

But, relatedly, might the disclosures normalize lackluster impartiality protections if it turns out that most agencies have not sufficiently protected their adjudicators' impartiality? This is a possibility, but there are good reasons to think that result would not materialize. If an agency's more ample protections have worked well, the agency has little incentive to race to the bottom. Were an agency, however, to justify its minimal protections by pointing to other agencies' minimal practices, other constituencies—litigants, Congress, or interest groups—could pressure the agency to change. In short, once information permits numerous constituencies to identify problems, the chance for mitigation or resolution is higher than if the problem remains shrouded.

In fact, well-designed process can inure to an agency's benefit by increasing the chances that losing litigants accept the proceedings as

264. See Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 715 (2006).

265. See Willis, *supra* note 232, at 1321–22.

266. See Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 148–49 (2006) (discussing the problems with disclosure-regimes as regulation). See generally BEN-SHAHAR & SCHNEIDER, *supra* note 208 (discussing the various ways in which consumer disclosure has failed to inform or alter consumer behavior).

generally fair. Social psychologists' work on procedural justice have demonstrated that procedural fairness affects how parties perceive the fairness of a decision's outcome.²⁶⁷ Although they did not consider the effect of impartiality itself, some studies have demonstrated that effects of procedural fairness or the lack thereof are strongest when parties suffer a negative outcome under the process.²⁶⁸ The wrinkle here is that impartiality disclosures may exacerbate losing parties' dissatisfaction with agency adjudications by calling litigants' attention to impartiality gaps. Yet, filling those gaps or disclosing well-designed impartiality provisions can improve losing litigants' satisfaction with agency adjudication. Impartiality disclosures, accordingly, may increase dissatisfaction in the short-term but serve as a catalyst for decreasing that dissatisfaction in the long run.

Third, it is unclear whether any of the relevant constituencies will use the disclosure.²⁶⁹ Consumers, for instance, are overwhelmed with disclosed information, rendering it easy to tune out, click through, or use in incorrect ways.²⁷⁰ In fact, regulated entities in the consumer context often intentionally present their disclosures in ways that ensure that they are not read.²⁷¹ Moreover, the cost of additional disclosure is often miniscule, or at least appears so, exacerbating hyper-disclosure and consumers' negative reactions to it.²⁷² In contrast, there is a dearth of impartiality disclosure, and the model form is intended to address the concern over hyper-disclosure by limiting the variables that are addressed on the one-page disclosure. Unlike consumer disclosures, which are often provided shortly before a transaction is consummated,²⁷³ these impartiality disclosures are intended to be a starting point for agencies and Congress to focus their attention on important criteria as

267. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 67 (1988).

268. *See id.* at 67–69.

269. *See* Bubb, *supra* note 221, at 1021.

270. *See id.* at 1026 (discussing phenomenon of “decision aversion” in which consumers invest as little time as possible in decisionmaking and thus ignore disclosures).

271. *See* Willis, *supra* note 232, at 1322–23.

272. *See* Bubb, *supra* note 221, at 1021; Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 434–47 (2003) (discussing problems with understanding and processing ever-increasing disclosure in securities markets).

273. *See, e.g.,* *Nash v. First Fin. Sav. & Loan Ass’n*, 703 F.2d 233, 238 (7th Cir. 1983) (“There is abundant authority for the proposition that a violation of [the Truth in Lending] Act occurs when the new credit transaction is ‘consummated’, or when credit is extended, without the requisite disclosure having been made.”).

working groups, committees, and managers think about how to provide optimal impartiality. These groups can turn to ACUS recommendations and reports and scholarship that provide agencies' guidance on non-ALJ impartiality.²⁷⁴ After using the disclosures to focus on problematic hearing-officer regimes, agencies and Congress can seek more information as necessary to address specific problems.

Fourth, agency disclosure is not costless. But the costs of disclosure—especially as minimal as this one-page disclosure is when compared to pages and pages of various consumer disclosures for one transaction or reports to Congress—are largely ones that Congress has accepted in numerous other areas. And the costs should be compared to the benefits, which, as discussed in Section III.A., are likely more significant in this context than in the consumer one. Moreover, the costs for impartiality disclosures are largely upfront costs, where the agency (re)considers its non-ALJ hearings and completes the disclosure. The transmission costs of posting to the internet and transmitting it to a clearinghouse are slight. More significant costs, however, arise from routine distribution to litigants (if the agency does not simply provide a website link to its disclosure), the clearinghouse's duties, and any agency's duties in enforcing a mandatory-disclosure regime. This Article is not the place to attempt to quantify those costs but, given the numerous other disclosure regimes that Congress requires, the costs here are likely similar in kind to, yet much smaller in degree than, those for other programs. Congressional budgeting professionals can very likely assess these costs in short order.

Finally, the use of disclosures would not encourage transparency for what Professor David Pozen has recently suggested are nefarious ends. Pozen contends that transparency suffers from ideological drift.²⁷⁵ Transparency was originally a tool by progressives to further goals such as professionalizing government, fairness, and mitigating agency capture.²⁷⁶ But transparency has morphed into a tool to obstruct government, whether by inundating agencies with requests under the Freedom of Information Act (FOIA); demanding open meetings that perversely push lobbyists into private meetings with regulators;

274. See Barnett, *supra* note 33 (recommending that agencies use ALJs because of their statutory protections); Adoption of Recommendations, 81 Fed. Reg. 94,312 (Dec. 13, 2016) (recommending, among other things, the adoption of certain impartiality provisions). See generally Bremer, *supra* note 44; BARNETT ET AL., *supra* note 77, at 60–71 (recommending the adoption of numerous impartiality provisions).

275. David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018).

276. *Id.* at 113.

providing lobbyists with better oversight of legislators' behavior; or offering transparency as a sufficient, yet unobtrusive, regulatory device in the place of meaningful substantive regulation.²⁷⁷ For my purposes here, I assume that Pozen is correct in categorizing the nature of transparency's drift and uses.

Impartiality disclosures, however, would further beneficial goals. Impartiality disclosures' *raison d'être* is to encourage a professional adjudicator corps and provide an impartial tribunal for all parties. The disclosures would not easily become tools to undermine agency action (except to the extent that a badly designed adjudicatory process should not function). Regulated parties would not be able to use numerous burdensome requests for disclosure to hamper an agency (as under FOIA) because the proposed impartiality disclosure only requires agencies to disclose the nature of their hearing officers initially and revise them if necessary. Finally, aside from policymaking that incidentally adheres in designing agency hearings, these disclosures do not concern the substance of any particular decision or seek to replace any kind of substantive regulatory policy. Accordingly, problems associated with legislator oversight, open meetings, and consumer disclosure regimes do not exist here as to specific, substantive regulation.

CONCLUSION

Impartiality disclosures are a relatively low-cost way of providing significant information to scholars, litigants, Congress, and agencies themselves about the current state of administrative adjudication. They provide a mechanism for obtaining complete and updated data for proceedings that are often forgotten or confused with others. As the findings reported here demonstrate, agency practice is extremely diverse and likely far from optimal. Disclosures may prove sufficient by themselves to alter agency behavior and bring us closer to optimal impartiality in administrative adjudication. Or they may serve as a tool for considering whether and to what extent Congress should promulgate government-wide impartiality protections for non-ALJs. After all, ACUS and scholars have already provided significant theoretical guidance on how agencies should think about adjudicatory impartiality.²⁷⁸ What is needed now is action. The time has come to

277. *See id.* at 123–40.

278. *See supra* note 274.

move away from some kind of hearing officer and toward an optimal one, using impartiality disclosures as a first step.

Today's political climate presents a prime opportunity for using impartiality disclosures. The Trump Administration has begun altering ALJs' protections as to hiring and, if the courts agree, to removal. In short, ALJs are beginning to look more like non-ALJs. And the Administration has proposed altering the performance review of one group of non-ALJs—immigration judges—by permitting more agency oversight and rendering removal of those judges easier. As the Administration begins altering non-ALJ's impartiality protections, it is imperative that transparent, up-to-date information exist so that litigants in agency proceedings and Congress know of the changes and are able to place those changes in context. As administrative adjudication gains public attention, impartiality disclosures can, for once, help the public focus not only on its foibles—but also its ability to provide fair, efficient proceedings.

APPENDIX A

How independent is the official presiding over your hearing?

Agency: Hearing Program(s):

Title of Presiding Official:

*This chart provides information on characteristics concerning the independence of officials who preside over agency hearings.
Use this information to understand your proceeding and the presiding official's relationship to the agency.*

	YES OR NO	DESCRIPTION (IF ANY)	SOURCE/CITATION	(IF NO) OPTIONAL AGENCY EXPLANATION
Do standard hiring qualifications exist for the presiding official?				
Is the official prohibited from performing agency duties other than presiding at hearings?				
Is the official prohibited from reporting to an official with enforcement duties?				
Is the official prohibited from discussing the case to people outside of the hearing or one party alone?				
Is the official (and the official's staff) physically separated from other agency officials?				
Does the agency prohibit annual performance reviews of the official?				
Does the agency prohibit paying the official performance bonuses?				
Does the agency prohibit removing the official for any reason?				