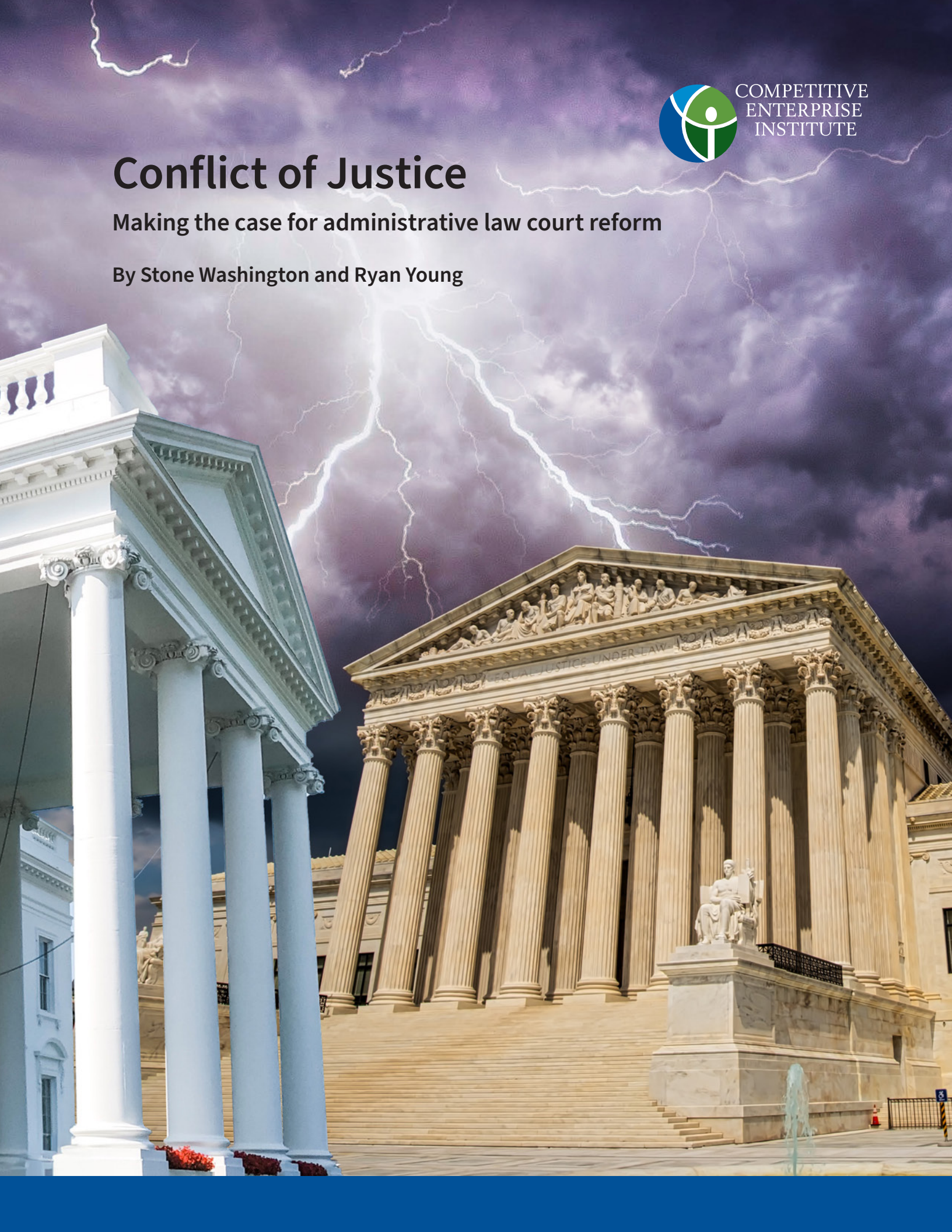

Conflict of Justice

Making the case for administrative law court reform

By Stone Washington and Ryan Young

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Introduction

Imagine that a federal agency has charged you with violating a law or regulation, and you have to defend yourself in court. But you are not able to stand trial in regular court. You must go to a special court housed within the same agency that charged you. The agency is not only the prosecutor, it also appoints the judge that will hear your case. It pays the judge's salary. It sets the procedural rules your attorney must follow. It decides what types of evidence you may discuss. Many agencies also appeal their own decisions in-house. That means if you win your case at the lower stage, you will likely face the agency again before a separate judge, or even the head of the agency, who has essentially appealed to himself. There is no jury of your peers.

If this sounds unfair, that's because it is. No wonder the government wins nearly every dispute in these special in-house agency courts, which are called administrative law courts (ALCs). Thirty-four federal agencies possess ALCs, and these courts decide hundreds of thousands of cases per year. Since ALCs are not part of the independent judicial branch outlined in Article III of the United States Constitution, ALC defendants are often denied some constitutionally-guaranteed protections, including the right to request a jury trial in civil affairs.[1]

Many people are unaware that this submerged judicial system exists. We provide a roadmap for administrative reform demonstrating that these ALCs must be abolished, given how they circumvent our constitutional guarantees of blind justice. This paper provides an overview of ALC injustice for policymakers, journalists, and the general public. Foremost among our proposed changes is moving ALCs out of regulatory agencies and into the regular judicial branch, where people have a better chance of getting a fair trial.

ALCs and Parkinson's Law

Administrative law courts are courts that exist inside regulatory agencies, completely separate from the independent judicial branch of the federal government.[2] ALCs in their modern form go back to 1946 when Congress passed the Administrative Procedure Act (APA).[3] These quasi-judicial courts serve two important functions. ALCs are intended to relieve an overburdened court system by minimizing the administrative caseload. They also can manage policy-specific cases that require specialized technical knowledge that regular judges are unlikely to have. For Congress, the existence of ALCs satisfy the Parkinson's Law dynamic by outsourcing a segment of the judicial workload to the burgeoning executive branch[4]. Parkinson's Law says that when a government (i.e. Article III courts) faces greater work burden, the limitless bureaucracy will simply expand to meet the allotted time requirements, regardless of how much work must be done[5].

Thirty-four federal agencies have ALCs, collectively reviewing hundreds of thousands of cases per year. Removing the Social Security Administration (SSA) as an outlier, and nine agencies with insufficient data, the 24 remaining ALCs each processed an average of 752 cases per year. Agencies hiding their ALC activity from the public include the Department of Interior (DOI) and the Department of Transportation (DOT) as well as independent agencies like the International Trade Commission and national Transportation Safety Board (NTSB).

Presently there are a total of 13,840 administrative law judges, adjudicators, and hearing officers across the US.[6] By contrast, there are 870 judgeships across Article III courts, with an unspecified number of judicial branch officers.[7] The federal executive branch houses roughly 3,010 administrative law employees, with an estimated 5,100 employees across all federal executive and independent agencies.

Most agency ALCs employ only a few dozen

1 US Const., amend. VII.

2 Stone Washington, "What Are Administrative Law Courts? Why Do They Matter?," Competitive Enterprise Institute, OpenMarket blog, March 10, 2023, https://cei.org/blog/what-are-administrative-law-courts-why-do-they-matter/.

3 Administrative Procedure Act of 1946, 5 USC. §§ 551–559, https://www.law.cornell.edu/wex/administrative_procedure_act.

4 Stefanie Haeffele and Anne Hobson, "Alternatives to a Burgeoning Bureaucracy: Lessons from Ludwig von Mises's *Bureaucracy*", Econlib, February 21, 2021, https://www.econlib.org/library/Columns/y2021/HaeffeleHobsonalternatives.html.

5 Cyril Norcote Parkinson, "Parkinson's Law", Buccaneer Books, 1942, https://www.goodreads.com/book/show/1448236.Parkinson_s_Law?from_search=true&from_srp=true&qid=nI5zYUQX6x&rank=1.

6 US Bureau of Labor Statistics, "Occupational Employment and Wage Statistics", May 2022, https://www.bls.gov/oes/current/oes231021.htm.

7 Administrative Office of the US Courts, "Authorized Judgeships", https://www.uscourts.gov/sites/default/files/allauth.pdf.

administrative law judges (ALJs). The Social Security Administration (SSA), houses by far the largest number of ALJs, having employed over 1,500 judges at its peak that regularly adjudicate over 700,000 cases annually, mostly about eligibility for benefits. The SSA is distinct from most other ALCs in that they are strictly functional courts that determine eligibility for retirement benefits. As such, they deal much less with the legal abstraction and substantive litigatory disputes raised in traditional ALCs. With this distinction, we still recommend that the SSA's court system be outsourced to the judicial branch, where they can occupy exclusive jurisdiction over retiree benefit claims. This is similar to how the US Constitution confers special jurisdiction to bankruptcy courts, housed as a subsidiary unit within the federal district courts.[8]

Backlogs and knowledge problems

There are two arguments in favor of ALCs. One is that they relieve overburdened Article III courts. The other is that they possess policy-specific, bureaucratic knowledge that Article III judges typically lack. Neither argument holds up under scrutiny.[9]

Relieving overburdened courts. Many federal appellate courts still grapple with lengthy backlogs, even with ALCs handling cases. The legal costs of adjudication for private litigants before ALCs are no cheaper or less time-consuming than federal court cases. The system would be better served if administrative agencies outsourced their caseloads back to the Article III courts while simultaneously providing their expert staff to bolster ranks.

ALCs sometimes have trouble with their own backlogs. The SSA's unusually heavy caseload was established by a controversial quota requiring each judge to process 500-700 cases a year.[10] This has failed to address SSA's case backlogs. While these claims are best handled by SSA judges with specialized knowledge, claimants wait an average of 373 days just to receive a disability hearing date. Some large agencies like the Food and Drug Administration (FDA) lack their own case database, instead mixing their ALJ decisions with their parent agency Health and Human Services (HHS). Most federal administrative law courts claim to fully adjudicate matters in 350 days or less, which itself is not exactly swift justice.

In 2022, the SEC had 13 cases in its backlog from previous years, with the average pending case being more than six years old.[11] Backlogs can be problematic because the longer a case is held in limbo, the more expensive it becomes for defendants. Oftentimes, extended cases prove too costly for private litigants to manage, enabling the government to win by default.

Since nongovernmental parties before an ALC typically lose, those who can afford to appeal a final order, and aren't prohibited from doing so by the agency, often present their cases before the D.C. Circuit Court anyway.[12]

This brings up another fairness problem for ALCs. Only well-to-do ALC defendants can gain access to the independent judicial system. Defendants without the resources or time needed to navigate a case twice through two different court systems might be denied justice.

An overburdened court system is a real problem. ALCs are not a solution. They are both ineffective and inappropriate alternatives. There are two remedies that would work better. One is to move ALCs out of agencies and into the independent judicial branch. This would retain ALCs' useful characteristics while making them less regressive and giving defendants a fairer chance.

The second remedy is to enlarge the judicial branch. The US Constitution provides no fixed size on the court system. As the country's population grows, and as laws and regulations grow, it is natural for more cases to be litigated. The court system should grow in

[8] US Const. art. I, sec. 8. The US Constitution grants Congress the authority to enact laws governing bankruptcies. Like ALCs, bankruptcy judges are not Article III judges. A notable difference from ALCs is that bankruptcy judges are not appointed by the President, but are selected by a majority vote from Circuit Court judges to serve 14-year terms within that circuit. See also, "Judges and Judicial Administration – Journalist's Guide | United States Courts," n.d. www.uscourts.gov. https://www.uscourts.gov/statistics-reports/judges-and-judicial-administration-journalists-guide#:~:text=Bankruptcy%20judges%20are%20judicial%20officers.

[9] Stone Washington, "Are Administrative Law Courts More Trouble Than They're Worth?" Open Market (blog), Competitive Enterprise Institute, March 27, 2023, https://cei.org/blog/are-administrative-law-courts-more-trouble-than-theyre-worth/.

[10] https://www.thekleinlawgroup.com/articles/judges-file-lawsuit-against-ssa-claim-case-quota-is-unjust/.

[11] William Yeatman and Jennifer Schulp, "Efficiency is not a reason to keep the SEC's unconstitutional in-house courts," *The Hill*, December 12, 2022, https://thehill.com/opinion/finance/3768033-efficiency-is-not-a-reason-to-keep-the-secs-unconstitutional-in-house-courts/.

[12] District of Columbia Office of Administrative Hearings Resource Center, "Understanding a Final Order," https://oah.dc.gov/sites/default/files/dc/sites/oah/publication/attachments/Understanding_a_Final_Order-Booklet.pdf.

proportion so that people retain access to a prompt and fair legal system. A third solution is to simplify federal laws and regulations, though that is beyond the scope of this paper.[13]

Specialized technical knowledge. Where most judges are legal generalists who know a little about a lot, administrative law judges (ALJs) are often specialists who know a lot about a little. Since ALCs only hear cases involving their host agency, it makes intuitive sense to hire ALJs with expertise in that agency's regulatory affairs.

Cases like *Lucia v. SEC (2018)* and *SEC v. Cochran (2023)* have shown that many administrative law judges are unequipped and legally incapable of properly managing select matters entirely in-house.[14] Both cases presented challenges to questionable agency actions and the constitutionality of the SEC's in-house court system. These were deemed by Article III courts to go beyond the jurisdictional scope and expertise of the agency. This weakens the specialized knowledge argument.

So does the routine use of expert witnesses in trials. Expert witnesses often cost less than judges or other ALC employees, because witnesses are paid on an as-needed basis, rather than a permanent salary. Expert witnesses also possess more diverse bases of knowledge, with a better reliability since there are thousands of them. Each witness carries a varied set of skills appropriate for addressing the specific issue at play. This compares to a relative handful of ALJs harboring a limited batch of specialties constrained to managing matters that arise only within their respective ALC.

Are ALCs rigged?

ALCs favor their home agencies at every stage of the judicial process. Federal agencies nearly always win their cases when handled exclusively in-house since they serve as both prosecutor and judge over their own matters.[15] Compared this to Article III courts, where the federal government only enjoys a slight advantage in winning appeals, having won 58 percent of its cases in 2022.[16] The government traditionally serves as a respondent in the bulk of its cases, and wins mostly by the superior legal strategies, repeat player status, and institutional prestige of the Office of the US Solicitor General.

This margin of victory in Article III courts was far less pronounced than in most ALCs. Between FY 2011-2014, the SEC won an average of 90 percent of its cases when handled in-house.[17] Part of this stems from the SEC having its own appeals court, requiring litigants who lose an initial ALC decision to have their case heard by another agency judge. Only after their case had been exhausted in the ALC can one appeal their case to an Article III court. This was later reformed in part by the Court's decision in *Axon v. FTC*.

The FTC enjoyed 25 years between losses in its ALC. In that loss, its commissioners voted to overrule their judge, so the FTC still won the case.[18] The defendants were able to appeal to an Article III court, where the case is being relitigated.

Agencies appoint their own administrative law judges (ALJs). They are not subject to a Senate vote, which means the legislative branch cannot strike down objectionable nominations, as they can with Article III judicial appointments.

At the same time, ALJs are further insulated from executive branch firing. Presidents are mostly unable to remove ALJs unless unless it is for cause, since many are dually insulated by a statutory protection.

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[13] Clyde Wayne Crews, Jr., *Ten Thousand Commandments 2022: An Annual Snapshot of the Regulatory State*, Competitive Enterprise Institute, October 26, 2022, https://cei.org/studies/ten-thousand-commandments-2022/. Ryan Young, "How to Make Sure Reformed #NeverNeeded Regulations Stay That Way," WebMemo No, 57, Competitive Enterprise Institute, July 9, 2020, https://cei.org/studies/how-to-make-sure-reformed-neverneeded-regulations-stay-that-way/.

[14] *Lucia, et al v. Securities and Exchange Commission*, 585 US (2018), https://www.supremecourt.gov/opinions/17pdf/17-130_4f14.pdf. See also, *Securities and Exchange Commission et al. v. Cochran*, No. 21–1239 (5th Cir. 2023), https://www.supremecourt.gov/opinions/22pdf/21-86_l5gm.pdf.

[15] John Kerkhoff, "Upside-Down Courts: Agency Adjudication and the Rule of Law," Discourse, January 12, 2023, https://www.discoursemagazine.com/politics/2023/01/12/upside-down-courts-agency-adjudication-and-the-rule-of-law/.

[16] Marcia Coyle, "US Solicitor General Scored Well Overall Last Term, but Lost Most of the Biggest Cases", The National Law Journal, July 28, 2022, https://www.law.com/nationallawjournal/2022/07/28/us-solicitor-general-scored-well-overall-last-term-but-lost-most-of-the-biggest-cases/?slreturn=20230919112610#:~:text=What%20You%20Need%20to%20Know,it%20was%20an%20amicus%20party.

[17] John Eaglesham, "SEC Wins With In-House Judges," *The Wall Street Journal*, May 6, 2015, https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803.

[18] Ryan Young, "The FTC vs. the Right to a Fair Trial," OpenMarket (blog), Competitive Enterprise Institute, July 1, 2022, https://cei.org/blog/the-ftc-vs-the-right-to-a-fair-trial/.

This protection varies across agencies, as the Supreme Court's decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board* found that Congress could not restrict the president's removal power for officers "who exercise significant executive power."[19] It is unclear if ALJs wield significant executive power in this sense, even though they are agency employees. This insulation underscores the lack of legislative oversight and administrative accountability enjoyed by these courts.

Presidents rightfully do not possess any removal powers over Article III judges. But this is a separate question when it comes to employees in the executive branch, who may be removed if certain statutory conditions are met.[20]

Agencies pay ALJs' salaries. Because agencies exert such control, judges are more incentivized to adjudicate in a manner most advantageous to the agency's interests. While Article III judges typically enjoy lifetime appointments precisely to protect their independence, agencies may fire ALJs in accordance with their governing statue. This gives ALJs further incentive to keep their job security in mind when deciding cases, and not just the merits.

Agencies also set their ALCs' procedural rules, which makes it easy for them to further bias ALC proceedings in the government's favor. One of these is the permissibility of hearsay evidence, which is otherwise impermissible within Article III courts. One witness can provide testimony based on second-hand information, even if two or three steps removed from the actual incident in question. This severely undermines the ability to cross-examine a witness when assessing accuracy. Agencies also have varying recusal standards for ALJs who may have conflicts of interest in a given case.

Since there are relatively few ALJs, ALCs can produce the sort of burdensome case backlogs they were intended to prevent.

Transparency problems

Transparency varies widely among agencies.[21] Among the 34 federal departments and agencies housing ALCs, 26 catalog and provide public access to their case history. Nine of these 26 agencies feature online pages with profiles on their current judges, links for individuals to file a claim, and instructions for participating in an administrative proceeding. Despite this, seven of these nine agencies fail to list anything about their current or prior cases. Additionally, four of these agencies possess scant or missing data on case totals across select years.

The agencies that lack an administrative case database are: The Department of the Interior (DOI), Department of Transportation (DOT), Drug Enforcement Administration (DEA), Federal Aviation Administration (FAA), Federal Energy Regulatory Commission (FERC), Food and Drug Administration (FDA), and the General Services Administration (GSA).

Two of these ALCs belong to executive branch departments (DOI and DOT), three belong to sub-agencies of executive departments (DEA, FAA, and FDA), and three are in independent federal agencies (FERC, GSA, ITC).

Four federal agencies—the Federal Communications Commission (FCC), Office of Financial Institution Adjudication, and the Social Security Administration (SSA)—possess online pages that list only a limited number of cases. These ALCs only provide their adjudicative history spanning the last four or five years. This paints a very limited picture of what types of cases these select agencies have overseen and how often their ALCs process cases. Some agencies, like the GSA, run their in-house court system under an alternative name: "The Civilian Board of Contract Appeals (CBCA)." This type of termininology makes it even more difficult to discover if certain agencies even possess an ALC.

Congress intended the APA to provide uniform standards for agency decision-making and clear standards for their administrative law courts to follow. Not all agencies meet this standard.

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[19] *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 US 477, (2010).

[20] Presidential removal powers over non-appointees in the executive branch are a nuanced question on which we do not take a definitive stance in this paper. Congressional Research Service, "Removal Protections for Administrative Adjudicators: Constitutional Scrutiny and Considerations for Congress," CRS Legal Sidebar, September 21, 2022, https://crsreports.congress.gov/product/pdf/LSB/LSB10823.

[21] Stone Washington, "Time to rip the veil of secrecy off government agencies' in-house courts," Open Market (blog), Competitive Enterprise Institute, May 18, 2023, https://cei.org/blog/time-to-rip-the-veil-of-secrecy-off-government-agencies-in-house-courts/.

Since ALCs are not part of the judicial branchm they do not guarantee the right to a jury trial. This is not only a transparency problem, it is a fairness problem.[22] Many ALCs also restrict "forum selection," which enables litigants to select an appropriate court to handle their dispute. While the Supreme Court's recent decision in *Axon v. FTC* provides an opening for litigants to sue an agency directly in federal district court on constitutional and structural grounds, ALCs still preserve the exclusive right to process administrative law matters.[23]

A notable tool that the SEC's courts have used to undermine judicial transparency and fairness is known as "control deficiency." This refers to the circulation of case-specific information between the ALJ and the SEC lawyers. This process permitted SEC prosecutors to wield the sole right to review an ALJ's private notes and bench memos. Judicial clerks were not permitted to share this sensitive information with the defendant side. This reinforces the issue of ALCs undermining the separation of powers doctrine that is essential for ensuring fair outcomes.

After openly admitting this, the SEC's Division of Enforcement was forced to dismiss 42 active cases that were tainted by improper access.[24] Among the cases dismissed was *SEC v. Cochran*. The Commission stopped short of retroactively dismissing the hundreds of other cases that were likely tainted by control deficiency, meaning that improperly decided cases will remain in effect. Far too often, ALCs blend their executive and judicial functions at whim, which breeds a lack of transparency and abuse of due process under the law.

FTC's troubling cancer ruling

The Federal Trade Commission's ALC recently ended a 25-year streak during which the government won every case. When the FTC lost its ALC case against the Illumina-Grail merger in 2022, the FTC commissioners overruled their own ALJ and handed themselves the victory anyway.[25] As of this writing, that case is being appealed in a regular Article III court.[26]

Grail is a company that developed a multi-cancer early detection test. It was originally a part of Illumina, and was spun off into a separate company. Grail wants to re-merge with Illumina, because Illumina has the resources to manufacture and distribute Grail's cancer tests at a scale Grail cannot achieve on its own. The merger, if allowed, has the potential to save thousands of lives.

The FTC objects to the merger on the grounds that Grail's test, being the first of its kind, would enjoy a monopoly over its market when it comes out. The FTC's own ALJ did not find the FTC's argument persuasive, in part because this is true of every new product, yet new products remain desirable. It will be some time before an Article III judge decides the case. In the meantime, an unknown number of cancer cases might not be caught until it is too late.

The Securities and Exchange Commission's ALCs also enjoy plenty of built-in advantages when adjudicating their own cases. In *Lucia v. SEC*, an unconstitutionally appointed ALJ imposed sanctions against Raymond Lucia for anti-fraud violations brought by the SEC's Division of Enforcement.[27] The SEC's Commissioners upheld the ALJ's initial ruling and imposed the sanctions. After years of exhausting his dispute within the ALC, Lucia appealed his case to the D.C. Circuit. He argued that the ALJ had not been constitutionally appointed by the president, a court of law, or a head of an executive branch department, and thus lacked the authority to oversee such administrative proceedings.[28]

After Lucia's argument was rejected by the D.C. Circuit, the Supreme Court ruled in his favor, determining that administrative ruling was null, since ALJs were executive branch officers that must be properly appointed under the Appointments Clause of the Constitution. As a result, the case was

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[22] There is a trend away from juries in independent courts as well, as settlements and plea bargains become more common. While this trend is problematic, at least defendants retain the right to a jury trial if they request it. Many ALCs forbid jury trials altogether. Emanuella Evans, "Jury trials are disappearing. Here's why." Injustice Watch, February 17, 2021, https://www.injusticewatch.org/news/2021/disappearing-jury-trials-study/.

[23] *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S 175, (2023), https://www.supremecourt.gov/opinions/22pdf/21-86_l5gm.pdf.

[24] Dave Michaels, "SEC Drops 42 Enforcement Cases After Employees Accessed Restricted Records", *The Wall Street Journal*, June 2023, https://www.wsj.com/articles/sec-drops-40-enforcement-cases-it-says-were-tainted-by-improper-access-to-restricted-records-4807aa44.

[25] *Illumina v. FTC*, No. 23-60167, (5th Cir.), https://www.ftc.gov/system/files/ftc_gov/pdf/illumina_v._ftc_ftc_brief_public_version_8.4.23.pdf.

[26] *Illumina v. FTC*.

[27] *Lucia, et al v. Securities and Exchange Commission*.

[28] Stone Washington, "What Are Administrative Law Courts? Why Do They Matter?".

remanded for review once the SEC reappointed its judges in accordance with the Constitution. *Lucia* represents a rare victory against an ALC that wins 90 percent of its cases, and in which most litigants do not possess the time and resources to survive the protracted adjudicatory process to bring their case before an Article III federal court. By the SEC's own data, 98 percent of people charged by Commission are forced to settle in the face of overwhelming odds and insurmountable legal fees.[29] Regarding fees, a 2015 study by the US Chamber of Commerce revealed that a simple SEC examination imposed $4.6 million of direct costs on average on affected companies.[30] Some SEC examinations can rise to $100 million when indirect costs are also included.

Lucia also sheds light on how for years certain ALCs upheld decisions by government officials that were never constitutionally appointed. This contributes to the ongoing issue of ALCs uprooting established norms of constitutional fairness under the premise that they exist outside of the Constitution's requirements.

What real courts think of ALCs

ALCs have recently run into constitutional trouble in court. *Jarkesy v. SEC* (2022) questioned whether ALC litigants were being denied their procedural rights, since the SEC had the power to decide to hear a case in-house or in a regular court.[31] The Fifth Circuit Court decided that Congress granted an unconstitutional delegation of legislative power to the SEC by giving it full power to decide whether a case will appear in an Article III court or its own ALC.

Congress must possess an "intelligible principle" to justify its grant of legislative venue selection to the SEC, and the Fifth Circuit ruled it did not. This decision presented a major challenge to the constitutionality of the administrative law process.[32]

ALCs' denial of the right to a jury trial in civil cases runs afoul of the Seventh Amendment's guarantee to juries. This was also a factor in *Jarkesy*. As an exclamation point on the decision, the Fifth Circuit also denied the SEC the full-court rehearing of the case that it requested.[33] The US Supreme Court will hear the case during its 2023 term.

Another case, *Axon v. FTC*, struck a further blow against ALCs.[34] The Supreme Court unanimously ruled that private litigants suing a federal agency (here the FTC) possessed the right to file their case in an Article III court so long as they satisfied the criteria laid forth in *Thunder Basin Coal Co. v. Reich*.[35] The three factors are: (1) the issue must fall beyond the agency's bureaucratic competence, (2) the legal claims raised must be "collateral" to the traditional work of the agency, (3) the matter must be of the type that Congress did not intend to be reviewed within the agency's statutory structure.

The joint *Axon* opinion included the *SEC v. Cochran* dispute to provide a double blow against ALCs monopoly control over adjudicating disputes. Litigants who present challenges to the administrative structure of agency courts or raise arguments about their constitutionality that satisfy the *Thunder Basin* factors can now have a chance of winning before a regular court. Understandably, ALCs were deemed to be incapable of rendering impartial decisions in matters that challenged their own structure and existence.

What Congress should do

While judicial reform is a a step in the right direction, Congress should pass legislation formally moving ALCs out of agencies and into the standard court system. The Competitive Enterprise Institute's Devin Watkins and Dan Greenberg proposed this as part of a larger separation of powers reform program:

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[29] Margaret Little, Opening Brief, SEC v. Novinger, No. 21-10985, December 15, 2021, https://nclalegal.org/wp-content/uploads/2021/12/Novinger-Opening-Brief-As-Filed-Court-Stamped.pdf.

[30] William Baker III and Joel Trotter, "Nothing to Fear From the SEC?", The Wall Street Journal, October 2015, https://www.wsj.com/articles/nothing-to-fear-from-the-sec-1446073083.

[31] *Jarkesy v. SEC*, No. 20-61007 (5th Cir. 2022), https://law.justia.com/cases/federal/appellate-courts/ca5/20-61007/20-61007-2022-05-18.html.

[32] Deborah Meshulam and Andrea Guzman, "Jarkesy v SEC: Fifth Circuit vacates SEC decision – latest case questioning constitutionality of the ALJ process," DLA Piper, May 31, 2022, https://www.dlapiper.com/en/insights/publications/2022/06/jarksey-v-sec-fifth-circuit-vacates-sec-decision.

[33] Bill Flook, "Fifth Circuit Denies Rehearing in SEC Administrative Judges Decision," Thomson Reuters, October 26, 2022, https://tax.thomsonreuters.com/news/fifth-circuit-denies-rehearing-in-sec-administrative-judges-decision/.

[34] Stone Washington, "The Supreme Court's Axon decision shatters the in-house advantage of administrative law courts," Open Market (blog), Competitive Enterprise Institute, April 19, 2023, https://cei.org/blog/the-supreme-courts-axon-decision-shatters-the-in-house-advantage-of-administrative-law-courts/ .

[35] *Thunder Basin Coal Co. v. Reich*, 510 US, 200 (1994), https://supreme.justia.com/cases/federal/us/510/200/.

> *In theory, the judicial reform portion of a constitutional restoration agenda is simple. Congress should end all relevant funding for all binding adjudicators and quasi-judicial bodies housed in executive and independent agencies. Simultaneously, Congress could expand funding for additional Article III trial courts that can hear the cases and controversies that agency courts would formerly have heard.*[36]

In implementing this policy, there would be various precautions to take into account. For instance, Greenberg and Watkins point out that the president at the time of the transition would appoint a massive number of judges. This would tilt the judicial system too far in one party's image. Given how politicized court appointments have become in recent years, the inevitable political battles that would ensue may impose too large a shock to judicial stability.

One solution is gradualism. ALCs could move to the judicial branch a few agencies at a time over several presidential administrations, so neither party could stack the new courts. While this option is politically palatable, it would deny justice to people whose cases are being heard in agencies further down the reform queue.

This is why Greenberg and Watkins propose a different option: Give ALCs their own special wing of the judiciary.

> *[A]n arguably superior option would be for Congress to fund a new system of federal magistrates with more or less the same function as current administrative courts: these new tribunals could issue judgments that would be directly appealable to Article III appellate courts. These federal magistrates would be appointed by and accountable to the circuit courts that would hear appeals of the magistrates' judgments.*[37]

Circuit judges choosing the new ALJ-equivalents would keep the temperature down on most appointment battles. Since Circuit judges are roughly balanced in partisan terms, the new ALCs would not be ideologically tilted. Both sides might grumble, but would likely accept the deal as fair.

Both the gradualist reform model and the magistrate reform model would take away the unfair advantages wield in their ALCs, while retaining the advantages that ALCs can offer as a braintrust for administrative specialization.

Conclusion

Administrative law courts are unfair and regressive. They violate the separation of powers. They do not relieve regular court backlogs, and they do not necessarily offer better expert knowledge in many cases. They also unjustly empower agencies to blend executive and judicial powers, while providing a prolonged process that drains a private litigant of valuable time and money.

ALCs are ripe for reform, but because most people do not even know that ALCs even exist, there has been little popular push for reform. When people do find out about ALCs, they tend not to like what they see. This is as true in the judiciary as it is with regular people, as the *Jarkesy, Axon,* and *Cochran* cases show. Congress needs to reform ALCs, either by moving them to the judicial branch, or by funding a magistrate-style system where circuit courts oversee ALC-like bodies.

[36] Dan Greenberg and Devin Watkins, "Constitutional Restoration: How to rebuild the separation of powers," Competitive Enterprise Institute, *Issue Analysis* 2023 No. 2, June 2023, p. 4, https://cei.org/studies/constitutional-restoration-how-to-rebuild-the-separation-of-powers/.

[37] Greenberg and Watkins, "Constitutional Restoration: How to rebuild the separation of powers".

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