

UCLA

UCLA Public Law & Legal Theory Series

Title

Administrative Adjudication in the United States

Permalink

<https://escholarship.org/uc/item/0nv5904j>

ISBN

9781509966905

Author

Asimow, Michael

Publication Date

2024

Administrative Adjudication in the United States

MICHAEL ASIMOW

This chapter concerns administrative adjudication in the United States. Unlike most other English-speaking countries, the US does not rely primarily on tribunals to provide administrative hearings. Instead, the default system for both federal and state governments is a combined-function design. Under that model, a government agency adopts regulations and prosecutes violations of the governing statute and regulations. That agency then adjudicates the resulting disputes. Although the US default is the combined-function agency, its administrative adjudication system is quite varied and includes numerous tribunals. This chapter provides a general overview of that system.

This chapter sets out a theoretical approach to agency adjudication to assist the reader in distinguishing between the many design variations found in adjudicatory systems throughout the world, including both the combined-function and tribunal models. It then discusses the combined-function agency model. It sets out a typology of three different types of US combined-function administrative adjudication and discusses the US Administrative Procedure Act and the history of combined-function agencies. Finally, it discusses US tribunals.

The volume of decisions arising out of administrative adjudication is vastly greater than those resolved by courts. The outcome of most administrative disputes (such as disputes over benefit claims or minor penalties) is not very important to the government, but every one of them is vitally important to the private party who has challenged the government. For these reasons, administrative adjudication is deserving of scholarly attention. Comparative law helps scholars and policymakers to better understand their own administrative adjudicatory systems and furnishes them with ideas for transplanted procedures that might improve those systems.¹

¹ See O Tamir, 'Our Parochial Administrative Law' (2024) (forthcoming Vol 97 *Southern California Law Review*).

Five Models of Administrative Adjudication²

All schemes of government regulation and distribution of benefits generate disputes between the government and private parties. These disputes may concern a rejected application for government benefits, a rejected application for a particular land use or approval of marketing a new drug, a sanctioning decision such as a civil monetary penalty or the withdrawal of a licence, or some other regulatory action that compels a private party to take an action or refrain from an action. Administrative law must prescribe a system of adjudication that resolves such disputes in an accurate and efficient manner and in a way that generates confidence that the process was fair.

By the term ‘administrative adjudication’, I mean the entire system for resolving *individualised* disputes between private parties and government administrative agencies.³ This process starts with an administrative investigation leading to the agency’s preliminary or ‘front-line’ decision, continuing through the process by which a private party challenges the front-line decision in a process that gives rise to an initial decision, agency-level reconsideration of the initial decision, and concluding with judicial review.⁴ The systems in place for resolving individualised disputes differ around the world and are difficult to compare. Adjudication must be distinguished from rulemaking that involves agency action of *generalized* rather than individualised applicability. Rulemaking is conducted according to an entirely different set of legal constraints that vary extensively throughout the world.⁵

This part of the chapter sketches a theoretical approach to institutional design that may help the reader untangle the maze of adjudicatory systems in use around the world. It relies on three phases, four variables, and five possible models that incorporate different arrangements of these variables.

Most administrative adjudicatory systems have three phases:⁶

- *Initial decision*: this phase is the first agency proceeding that affords a private party an opportunity to present its case by challenging the front-line

² The first section of this chapter draws heavily on the author’s previous work. See M Asimow, ‘Five Models of Administrative Adjudication’ (2015) 63 *American Journal of Comparative Law* 3 (‘Five Models’), which discusses the theoretical approach to comparative institutional design in greater detail.

³ This chapter uses the term ‘agency’ as it is used in US law, meaning a governmental unit (other than a court or a legislature) having delegated power to affect legal rights and obligations through rulemaking, adjudication or similar functions. The term includes governmental units with various titles used throughout the world including commissions, ministries and departments.

⁴ In many countries, adjudicatory decisions by government agencies are referred to as ‘administrative acts’, ‘orders’, ‘decisions’, or ‘unilateral acts’.

⁵ See M Asimow, G Bocksang, M Cirotteau, Y Dotan, N Mahboubi and T Perroud, ‘Ex Ante Administrative Review of the Legality of Regulations: A Comparative Approach’ (2020) 68 *American Journal of Comparative Law* 332.

⁶ Actually, adjudication often has four phases rather than three. The three mentioned in the text are usually preceded by a preliminary investigation and a ‘front-line’ decision by the agency staff. In the preliminary investigation phase, the agency staff investigates whether an applicant should receive a

determination made by agency staff. The initial decision is legally binding unless it is challenged at a higher level.

- *Administrative reconsideration*: most administrative schemes include an opportunity for administrative reconsideration of the initial decision. Reconsideration can be performed by higher-level personnel of the same agency that made the initial decision or by a different agency.
- *Judicial review*: most administrative schemes include provision for the private party to seek review of the initial decision or the reconsidered decision in a court.⁷

There are four key variables. Each requires a design choice. The first and second variables relate to the initial decision and reconsideration phases. The third and fourth relate to the judicial review phase.

1. Is the adjudicating body a combined-function agency or a separate tribunal? In a combined-function design, the same agency combines investigation, prosecution, initial decision-making and reconsideration. In a tribunal system, a separate tribunal conducts the reconsideration but does not make initial decisions or engage in investigation or prosecution.
2. Is the proceeding adversarial or inquisitorial? Adversarial proceedings resemble the trial-type process employed in US or UK criminal cases. This process consists of a lawyer-controlled proceeding before a relatively passive and independent judge. In an adversarial system, the initial decision-making function is sharply distinguished from the investigation phase of the case. Inquisitorial administrative proceedings resemble Continental European, some Asian, or Latin American criminal process. In an inquisitorial administrative system, investigators assemble a dossier and come to a conclusion about how a dispute between government and a private party should be resolved. The initial decision phase is conducted by the staff members of the same agency that investigated or prosecuted the case. It provides the private party with a written or oral opportunity to change the minds of the investigators. Similarly, an inquisitorial reconsideration proceeding is controlled by

benefit or a licence or whether it should be targeted for a sanction or other regulatory order. The staff make a front-line decision to deny the benefit or licence or to impose the sanction or other regulatory order. This ends the case if the private party accepts the front-line decision. This sequence of investigation and front-line decision might be called 'phase zero'. See M Asimow, 'Greenlighting Administrative Prosecution' (2023) 75 *Administrative L Rev* 227 ('*Greenlighting*') for discussion of the division of authority between agency investigators, and prosecutors and the heads of the agency during phase zero. This chapter will have little to say about phase zero, given that it is highly discretionary, relatively unconstrained by legally required procedures, not meaningfully subject to judicial review, and specific to particular administrative schemes. See *Greenlighting* at 243–45. When the chapter refers to the 'three phases' of administrative adjudication, it excludes phase zero.

⁷For purposes of this chapter, the term 'judicial review' includes 'appeal'. Many countries distinguish between the two, treating 'appeal' as a judicial remedy provided by statute and 'judicial review' as a non-statutory remedy.

the investigative and prosecutorial staff. No system is purely adversarial or purely inquisitorial. Nevertheless, procedures can be arrayed on this axis and will tend to fall nearer the adversarial or inquisitorial poles.

3. Is judicial review open or closed?⁸ In an open system, either party can introduce new evidence in court (in addition to the evidence introduced during earlier stages) or the court can request the parties to produce new evidence. Either party can offer new arguments that were not advanced at earlier stages and the government can offer new reasons for its actions. In other words, in an open system, the record does not crystallise until the judicial review stage. In a closed system, the parties cannot introduce new evidence, new reasons, or new arguments. The record crystallised either at the initial decision or reconsideration stage.
4. Does a reviewing court have generalised jurisdiction or is it a specialised administrative court?⁹

These variables can be shuffled to provide five models of administrative adjudication, each of them in use in different jurisdictions. Each of the five models involves a change in a single variable from previously described models. Each jurisdiction tends to rely *primarily on one of the three phases* (that is, initial decision, reconsideration, or judicial review) to achieve a fair and accurate result. Efficiency concerns require jurisdictions to make this choice. Jurisdictions cannot afford to invest resources equally in two, much less all three, of the phases. The phase that each jurisdiction chooses to receive the most resources is likely to be the phase that private parties regard as providing their best chance to win the case.

At this point, I introduce some methodological reservations. First, the approach discussed in Part I of this chapter oversimplifies the details of the adjudication schemes under discussion. Oversimplification is an inevitable flaw of model building in social science. It is necessary to abstract complex systems to compare and contrast them with examples in other countries.¹⁰ I hope that my oversimplified description of these various adjudicatory systems does not distort their essential nature. Second, for political and historical reasons, the administrative adjudication systems of any given jurisdiction cannot all be described by a single model. As discussed below, for example, the US has a dominant or default model, but each of the four other models can be found somewhere in US administrative law.

⁸ See *Five Models* (n 2) 20–27; M Asimow and Y Dotan (2016) ‘Open and Closed Judicial Review of Agency Action’ 64 *American Journal of Comparative Law* 521.

⁹ See *Five Models* (n 2) 24–27.

¹⁰ The value of any model of administrative justice depends on ‘what an analyst is trying to do’. Jerry L Mashaw, ‘Models of Administrative Justice’ in M Hertogh, R Kirkham, R Thomas and J Tomlinson (eds), *The Oxford Handbook of Administrative Justice* (OUP, 2021) 375, 393. The purpose of this chapter is to illuminate the design choices that are reflected in different systems of administrative justice around the world and to permit comparisons between them.

Model 1 – Adversarial Hearing/Combined Function/Limited Judicial Review

Model 1 is the default US design. A single agency investigates the case and makes the initial decision and performs reconsideration. The initial decision occurs after an *adversarial* hearing presided over by a hearing officer ('HO') who renders the initial decision.¹¹ The HO works for the agency that is a party to the dispute, rather than being independent of that agency.¹² The HO is expected to apply established agency policy as expressed in regulations, guidance documents or precedential adjudicatory decisions. As discussed below,¹³ combined-function agencies have an internal separation of functions, meaning that investigators and administrative prosecutors cannot participate in the decisional process (except as witnesses or prosecutors).

The reconsideration phase occurs at a higher level of the same agency that rendered the initial decision and is performed either by the heads of the agency or a delegated reviewer or review panel. Especially when the reviewers are the agency heads, they are empowered to substitute new findings of fact or new legal interpretations or adopt new policies that have retroactive effect.¹⁴ Courts of general jurisdiction review the legality and reasonableness of the agency decision.¹⁵ Judicial review is closed (meaning neither side can introduce new evidence, arguments, or reasons).

Model 2 – Inquisitorial Hearing/Combined Function/Limited Judicial Review

Model 2 is the same as Model 1, except that the initial decision and the reconsideration are inquisitorial rather than adversarial. There is no separation of functions,

¹¹ In US practice, the HO is frequently referred to as an administrative judge or an administrative law judge (ALJ) or by some other title (such as Immigration Judge or Patent Judge). In most countries, however, an administrative HO would not be referred to as a 'judge' since this title is enjoyed only by decision-makers in the judicial system. In the US, administrative judges are 'functionally comparable' to judges in the judicial system. An administrative HO's powers 'are often, if not generally, comparable to those of a trial judge ... More importantly the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency' – *Butz v Economou* (1978) 438 US 478, 513 (citations omitted).

¹² For discussion of the independence of administrative HOs in combined-function agencies as compared to judges in the judicial branch, see J Moliterno, 'The Administrative Judiciary's Independence Myth' (2006) 41 *Wake Forest LR* 1191.

¹³ See text at n 28.

¹⁴ The federal Administrative Procedure Act provides: 'On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision ...' 5 USC §557(b).

¹⁵ 5 USC §706.

meaning the same person or persons exercise investigatory, prosecutorial and adjudicatory functions. Proceedings at the initial decision level are considered part of the investigation. The decision-maker is active rather than passive and assists unrepresented parties. Closed judicial review takes place in a generalised court. This model describes a substantial segment of US administrative adjudication.¹⁶ It is also employed in cases decided at the level of the European Union (EU) institutions, but not in cases decided by EU member states.

Model 3 – Tribunal System¹⁷

Model 3 is like Model 1, except that the reconsideration decision is made by a *tribunal*. A tribunal is an agency engaged only in adjudication that is separate from and independent of the agency that investigated and prosecuted the case and made the initial decision. The tribunal model is used in numerous jurisdictions whose legal system is derived from the UK and is the model described in most of the chapters of this book. Some tribunals, like those in Canada,¹⁸ are specific to the agency that made the initial decision; some, like those in the UK or Australia,¹⁹ reconsider initial decisions by many agencies. As discussed in Part III of this chapter, the US administrative adjudicatory system includes tribunals, particularly at the state level.

Model 4 – Open Judicial Review

The initial decision and reconsideration phases are like Model 2, meaning that the initial decision and reconsideration stages are inquisitorial. However, judicial review is *open*, meaning that the reviewing court can consider new evidence, reasons and arguments, and the court is empowered to substitute its judgment for that of the agency on factual and discretionary issues as well as legal issues. This model is employed in mainland China, Japan and Argentina, among many other jurisdictions.²⁰

¹⁶ See M Asimow, 'The Last Frontier: Fair Procedure in Informal Adjudication' (2024) – *Michigan Journal of Environmental and Administrative Law*. Available at: <https://ssrn.com/abstract=4738364>.

¹⁷ In some jurisdictions, the word 'tribunal' is used to refer only to courts. This chapter uses the term to refer to an adjudicative administrative body that is not a court and is independent of the agency that made the initial decision.

¹⁸ See L Jacobs, 'A Wavering Commitment? Administrative Independence and Collaborative Governance in Ontario's Adjudicative Tribunals Accountability Legislation' (2010) 28 *Windsor Year Book of Access to Justice* 285, 294–97; L Sossin and S Hoffman, 'The Elusive Search for Accountability: Evaluating Adjudicative Tribunals' (2010) 28 *Windsor Year Book of Access to Justice* 343.

¹⁹ See M Asimow and J Lubbers, 'The Merits of Merits Review: A Comparative Look at the Australian Administrative Appeals Tribunal' (2010) 28 *Windsor Year Book of Access to Justice* 261, 262–70; and Groves and Weeks, Chapter 7 in this volume.

²⁰ See *Five Models* (n 2) 20–24.

Model 5 – Specialised Administrative Courts

The initial decision and reconsideration phases are like Model 2, but the court that conducts judicial review is separate from the general court system and it decides only administrative law cases. This model is employed in France, Germany and numerous other jurisdictions in Europe, Asia and Latin America.²¹

Obviously, the four variables could be manipulated to produce more than five models. However, these five models describe the most frequently encountered adjudicatory systems in use today.

Perhaps an example will clarify how the five models might work in resolving a typical administrative adjudicatory dispute. Suppose that the Ministry of Transport ('MT') in Country C licenses ferry operators. The MT regulations and the specific licenses contain provisions relating to safety and environmental protection. One such provision prohibits ferries from disposing of waste by dumping it into the water. Cap operates a licensed ferry service. MT receives a complaint from Ed (a former employee of Cap), investigates the matter, and charges Cap with dumping waste into the water. This is MT's front-line decision.²²

The *initial decision* process gives Cap an opportunity to challenge the frontline decision. Ed states that he saw Cap dump waste into the water. Cap states that he fired Ed for incompetence the previous year and Ed has a grudge against him. Cap denies that any dumping ever occurred and testifies that all waste has been disposed of properly. Several of Cap's employees testify that they never saw any illegal dumping and that company policy prohibits it. The official responsible for making the *initial decision* determines that Cap dumped waste in violation of the terms of his licence and recommends that Cap's licence be revoked (as opposed to paying a financial penalty). A reconsideration decision upholds the initial decision. Cap seeks *judicial review*. On judicial review, there are no issues of law or procedure. There are only two issues. First, who is telling the truth as a matter of fact – Cap or Ed? Second, if the dumping charge is upheld, what should the penalty be?

- *Model 1*: MT is a combined-function agency, meaning that it is responsible for investigation, prosecution, adjudication and reconsideration. At the initial decision phase, MT conducts a trial-type, adversarial hearing presided over by an HO who works for MT but has not been involved in the investigation and prosecution of Cap's case. The HO decision revokes Cap's licence. Cap has an opportunity to seek reconsideration at a higher level of MT, such as the agency head. The reconsidering official upholds the HO's decision. MT's decision is reviewed by a court of general jurisdiction in a closed proceeding. The court must sustain MT's decision (both the factual conclusions and the discretionary

²¹ *ibid* 24–27.

²² See n 4 for discussion of front-line decisions.

choice of penalty) if it is ‘reasonable’ in light of the record made at the initial decision stage.²³ This is the default model in the US.

- *Model 2:* Model 2 is the same as Model 1 except that the initial decision and reconsideration phases are inquisitorial rather than adversarial. The initial decision consists of a hearing that is treated as part of the agency investigation. It is conducted by MT investigators and prosecutors rather than by an HO. The reconsideration process is informal and is also conducted by MT staff or agency heads. This model occurs frequently in the US but is not the default.
- *Model 3:* Model 3 is the same as Model 1, except that reconsideration is provided by a tribunal that is independent of MT. The tribunal makes a written merits decision after an adversarial trial-type hearing. Model 3 occurs occasionally in the US but is not the default.
- *Model 4:* Model 4 is the same as Model 2 except that judicial review is open rather than closed. This means that the initial decision and reconsideration phases do not crystallise the record. The reviewing court has the power to receive new evidence or arguments from either side, and MT can introduce additional reasons for its discretionary decision. The court makes a merits decision, meaning that it has power to substitute its judgment on factual or discretionary issues for MT’s judgment. Model 4 occurs in the US but is relatively infrequent.
- *Model 5:* Model 5 is the same as Model 4, except that review takes place in a specialized administrative court rather than a court of general jurisdiction. Few courts in the US are specialised but there are exceptions, such as the Court of Appeals for Veterans Claims.

The Default US Model: Combined Functions

Historical Development of the US Combined-Function Model

The default adjudicatory design used in the US is described by Model 1: an agency with combined functions conducts an adversarial trial-type hearing and renders the initial decision. The same agency reconsiders the initial decision (either at the agency head level or through a delegated reviewer or review board). Judicial review of the agency decision is closed and takes place in a court of general jurisdiction.

The Struggle to Regulate the Railroads

The US combined-function model developed as part of the struggle to regulate the railroads during the late 1800s and early 1900s. Various market failures made some

²³ See *Five Models* (n 2) 11–13.

form of regulation imperative. Both railroads and shippers pressed for federal regulation which resulted in the creation of the Interstate Commerce Commission ('ICC') in 1887.²⁴

The original version of the ICC was largely toothless, and what few teeth it possessed were soon pulled by the courts.²⁵ By 1920, however, the ICC emerged as the prototypical combined-function economic regulatory agency. It had broad authority to regulate the railroads, including the power to adopt regulations, set and modify railroad rates, and disapprove mergers. In addition to its regulatory authority, the ICC adjudicated enforcement cases brought by shippers against railroads charging violation of ICC regulations, such as accusations that railroads charged an unreasonable rate or failed to follow rate tariffs.

The ICC was a classic example of a Model 1 adjudicating system. It exercised *combined functions*, meaning that it adopted regulations, approved or disapproved railroad rates, and investigated and prosecuted violations of statutes or regulations. It then resolved disputes through an internal adjudicatory process conducted by an HO, followed by reconsideration conducted by the five agency heads. The ICC even adjudicated private disputes between railroads and shippers, although such private disputes could also be adjudicated in courts. The losing party could seek closed judicial review in a court of general jurisdiction.

Congress followed the ICC model when it created the Federal Trade Commission ('FTC') in 1914.²⁶ The FTC was a policing agency with power to investigate, prosecute and adjudicate claims of unfair competition and antitrust violations. Legislatures adapted the combined-function model to countless regulatory and benefit-disbursing agencies at the federal, state and local levels throughout the twentieth century and continue to do so in the twenty-first.

Between 1906 and 1920, the ICC began to use its staff as hearing officers (HOs) to conduct the initial decision phase in railway rate cases. HOs presided over adversarial, trial-type hearings at which private lawyers opposed ICC staff counsel, or at which private lawyers for shippers and carriers opposed each other. The HOs wrote detailed initial decisions that became final and binding unless reconsidered by the five agency heads. The same HO design was copied in many other regulatory agencies including the FTC.²⁷

The Administrative Procedure Act

During the depression era of the 1930s, federal combined-function regulatory agencies proliferated as part of President Franklin D Roosevelt's *New Deal*. Federal

²⁴ See R Rabin, 'Federal Regulation in Historical Perspective' (1986) 38 *Stanford Law Review* 1189, 1197–236. The ICC was abolished in 1995 and some of its functions were taken over by other agencies. ICC Termination Act of 1995, Pub L 104-88 §1 (1995).

²⁵ *ibid.*

²⁶ *ibid* at 1216–29.

²⁷ See DJ Gifford, 'Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions' (1997) 49 *Administrative Law Review* 1, 4–5.

combined-function agencies regulated labour relations, banking, securities, energy, communications, agriculture and other sectors of the economy that had previously been regulated at the state level. Congress also created Social Security and other federal benefit agencies that were also designed to exercise combined functions. In the early 1930s, the Supreme Court overturned several federal regulatory schemes on constitutional grounds. By the late 1930s, however, the Supreme Court reversed direction and consistently upheld the constitutional validity of federal agencies that combined the various functions. Business interests (championed by the American Bar Association) protested mightily against the broadened scope of federal regulatory scheme and the combined-function agencies, but to no avail.

The lengthy and bitter battle to contain federal regulatory agencies was interrupted by the Second World War. After the War, Congress finally ended the political struggle by enacting the Administrative Procedure Act ('APA') of 1946,²⁸ which passed Congress by unanimous vote. The APA was a massive compromise that satisfied neither business nor government but was agreed as the best feasible outcome.²⁹ The APA prescribed the procedures for federal agency adjudication and rulemaking. It preserved the system of judicial review that existed before 1946³⁰ and contained detailed treatment of the standards courts would use to review administrative decisions and rules. The rulemaking process included an opportunity for public notice of proposed rules and an opportunity to comment on them.³¹ All the states have enacted APAs, but there is a good deal of variation between them as well as between state and federal APAs.

For adjudication, the federal APA prescribed a detailed and rather formal process of agency trial-type hearings.³² The APA preserved the system of combined functions and did not require that adjudication be performed by tribunals or that judicial review be conducted by administrative courts. Agencies retained the power to prosecute, investigate and decide the resulting disputes through a system of adversarial trial-type hearings and agency-head reconsideration.

The rationale for entrusting the reconsideration function to the heads of the agency that had conducted the investigation and prosecution and made the initial decision was that agency adjudication was often used to establish agency policy. The agency heads could retroactively establish new policy when they issued their final decision. Of course, agency policy could (and perhaps should) be made through the adoption of prospective rules rather than case-by-case adjudication, but rulemaking was relatively unfamiliar in 1946. In any case, the use of the adjudication function to make general policy was well established in 1946³³ and

²⁸ 5 USC §§551 to 706.

²⁹ GB Shepherd, 'Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics' (1996) 90 *Northwestern University Law Review* 1557.

³⁰ 5 USC §§701–706.

³¹ 5 USC §553.

³² See 5 USC §§554, 556, 557.

³³ See *Securities and Exchange Commission v Chenery Corp* (1947) 332 US 194.

Congress wanted to preserve the control of regulatory agencies over the adjudication function.³⁴

Decision-maker Impartiality Under the APA

The combined-function model in which the same agency is both prosecutor and judge inherently raises issues relating to impartiality of the adjudicative process. These are issues that do not arise to the same extent under a tribunal system where the adjudicators are independent of the prosecutors. The APA dealt with the issue of impartiality in carefully drafted compromise provisions.

Protection of the Independence of HOs

The APA's adjudication provisions prescribe adversarial trial-type hearings. The hearings are conducted by HOs who work for the prosecuting agency and make the initial agency decisions. In 1978, the HOs governed by the APA received a new and cherished title – Administrative Law Judges (ALJs).

The most important innovation of the APA's adjudication provisions was an elaborate set of protections of ALJ independence within the agency structure. The APA drafters intended that ALJs would be the primary fact finders in the adjudicatory process and should be secure from influence exerted by prosecutors or the agency heads.

Although ALJs are employed by the prosecuting agency, they must be organisationally separated from agency investigators and prosecutors.³⁵ Once hired by an agency, ALJs enjoy life tenure without any probationary period. They are highly compensated, relative to other government employees. They cannot be removed except for good cause. Cases involving the discharge of ALJs for good cause are heard by ALJs working for a separate agency, the Merit Systems Protection Board. ALJs cannot be given tasks other than deciding cases and must be assigned to cases by rotation so far as practicable. Unique among federal employees, ALJs are not subject to performance evaluation.³⁶ Federal ALJs are well organised and often take collective action to protect their turf.

Some administrative law scholars have argued that ALJs are overprotected.³⁷ There is a serious issue of the constitutionality of the provision that prevents the executive branch from discharging ALJs without cause. This issue may be decided by the Supreme Court in 2024.³⁸ Agencies such as Social Security have engaged

³⁴ See DJ Gifford, 'Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure' (1990) 66 *Notre Dame L R* 965, 976–81, 992–94.

³⁵ ALJs 'cannot be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency' – 5 USC §554(d)(2).

³⁶ See 5 USC §§3105, 5372, 7521.

³⁷ A Scalia, 'The ALJ Fiasco – A Reprise' (1979) 47 *University of Chicago Law Review* 57.

³⁸ See discussion of the *Jarkesy* decision in text at n 62 below.

in long-term battles with their ALJs over management issues, such as decisional quotas.³⁹ The American Bar Association has proposed the creation of a Social Security tribunal to remove the ALJs from control by the agency that administers the programme to end the bickering.⁴⁰

Protection of the Adversarial Hearing

The APA contains several provisions designed to protect the adversarial trial-type character of the initial decision process.⁴¹ The Act requires ALJs and other agency adjudicatory decision-makers to be impartial, meaning free of conflict of interest, animus toward the parties or prejudgment of adjudicatory facts.⁴² Adjudicatory decision-makers may not receive *ex parte* (meaning off-the-record) communications from persons outside the agency; if such communications occur, they must be placed on the record.⁴³ A more specific *ex parte* communication provision prohibits ALJs from consulting a person or party (including any other agency staff member) on a fact in issue, unless the discussion is on the record.⁴⁴

The APA requires internal separation of functions, meaning that agency staff ‘adversaries’ (prosecutors, investigators and advocates) in a case are excluded from serving as decision-makers in that case or furnishing off-the-record advice to ALJs or agency heads. Only staff members who have not served as adversaries in a given case can provide such advice.⁴⁵ The APA also establishes the ‘exclusive record’ principle, meaning that decision-makers can consider only evidence that was introduced at the hearing, not information learned through their own experience or personal investigations.⁴⁶

This elaborate system of neutrality-protection can have only limited efficacy. All agency decision-makers – both ALJs and especially agency heads – are likely to possess ‘institutional bias’, meaning they support the agency’s regulatory mission and want to uphold the hard work of its investigators and prosecutors.⁴⁷ Agencies are sometimes ‘captured’, meaning they have been essentially taken over by the

³⁹ See MH Taylor, ‘Russian Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication’ (2007) 60 *Stanford Law Review* 475, 485–90; Gifford, *Adjudication in Independent Tribunals* (n 34), 1005–19.

⁴⁰ Resolution 201 (2021). See www.americanbar.org/content/dam/aba/administrative/house_of_delegates/ebook-of-resolutions-with-reports/2021-annual-resolution-ebook.pdf. For discussion of a separate Social Security tribunal, see PR Verkuil and JS Lubbers, ‘Alternative Approaches to Judicial Review of Social Security Disability Cases’ (2003) 55 *Administrative Law Review* 731.

⁴¹ See 5 USC §§554, 556, 557.

⁴² 5 USC §556(b). See L Virelli, ‘Integrity in Agency Adjudication,’ in American Bar Association, *A Guide to Federal Agency Adjudication* Chapter 10 (3rd edn, 2023).

⁴³ 5 USC §557(d).

⁴⁴ 5 USC §554(d)(1).

⁴⁵ 5 USC §554(d). See M Asimow, ‘When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies’ (1981) 81 *Columbia Law Review* 759.

⁴⁶ 5 USC §556(e).

⁴⁷ See *Greenlighting* (n 4), 251.

industries they are supposed to regulate.⁴⁸ In the reconsideration process, agency heads may be subject to confirmation bias, because they have approved an earlier decision to prosecute and then must decide whether to uphold an ALJ decision resulting from that prosecution.⁴⁹ If the heads decide to overturn an ALJ's decision against a private party, that would suggest that they were wrong to have approved the prosecution in the first place and consequently wasted agency resources pursuing the case. Nobody likes to admit a blunder.

Types A, B and C Adjudication

Newcomers to US federal administrative law often assume that the APA describes all of it. This is more or less true of rulemaking, freedom of information and judicial review, but it is emphatically not true of adjudication. In order to understand the federal US administrative adjudicatory system, it is necessary to distinguish three different types of agency adjudication that I refer to as Types A, B and C adjudication.⁵⁰

Type A involves adjudicatory disputes governed by the APA, as described above. To oversimplify a complex question,⁵¹ the APA adjudication system applies *only* where the agency's governing statute requires it to apply. As a result, most federal agency adjudication is *not* covered by the APA. There is little logic to which agencies are subject to the APA and which are not.

Numerous important federal regulatory agencies conduct Type A adjudication. Most of these agencies provide Model 1 procedure, meaning they conduct adversarial trial type hearings presided over by ALJs. Agency heads reconsider the ALJ decisions and make the final agency decision. Most Type A regulatory agencies are 'independent' of executive control, meaning that the President cannot remove their agency heads except for good cause.

The vast majority of Type A adjudications are Social Security disability disputes that do not fit Model 1. Social Security ALJs are a part of the agency that manages the disability benefits programme. Social Security cases are inquisitorial rather than adversarial and thus properly described by Model 2. In Social Security

⁴⁸ There is a vast literature on the subject of agency capture. See, eg, RE Barkow, 'Insulating Agencies: Avoiding Capture Through Institutional Design' (2010) 89 *Texas Law Review* 15.

⁴⁹ See *Greenlighting*, (n 4), 251–56.

⁵⁰ The A-B-C typology originated in a report by the author to the Administrative Conference of the United States ('ACUS'), a federal agency that considers and recommends governance proposals: M Asimow, 'Adjudication Outside the Administrative Procedure Act' (2016) 81 *Fed Reg* 94, 314 ('*ACUS Type B Report*'). It has been employed in subsequent ACUS reports and recommendations and in numerous academic articles. See, eg, M Asimow, 'The Last Frontier: Fair Procedure in Administrative Adjudication', n 16; ES Bremer, 'The Exceptionalism Norm in Administrative Adjudication' (2019) *Wisconsin Law Review* 1351, 1405–09.

⁵¹ J Lubbers, 'Constitutional and Statutory Foundations,' in *A Guide to Federal Agency Adjudication* 253–55, n 42.

hearings, the government is not represented and the ALJ is responsible for developing the record and then deciding the case. Especially when claimants are not represented by lawyers, ALJs must make sure their interests are protected. Initial decisions by Social Security ALJs are reviewed by an internal review board called the Appeals Council rather than by the agency head.

Type B adjudications involve *evidentiary hearings required by statute* that are *not* covered by the APA because no statute requires the APA to apply.⁵² Most Type B adjudication is Model 1. Type B proceedings resemble Type A proceedings and are often just as adversarial and as formal as Type A's. Agency-specific *procedural regulations* generally require that the agency's Type B adjudication complies with the same neutrality-protective principles that are set forth by the APA, including absence of bias, exclusive record, prohibition of ex parte outsider communications and internal separation of functions. Reconsideration is provided by higher level staff or review boards or by the agency heads.

The presiding officers at Type B evidentiary hearings are *not* ALJs. Hearings are presided over by staff members called administrative judges ('AJs') with varying titles, including Patent Judges or Immigration Judges. AJs lack the thicket of independence-protecting statutory provisions enjoyed by ALJs. Examples of Type B proceedings are those conducted by the Patent Trial and Appeal Board, the Environmental Review Board, the Board of Contract Appeals, the Board of Veterans' Appeals, the Immigration Court⁵³ and many others.

Type C adjudication occurs where *no statute requires the agency to conduct evidentiary hearings*.⁵⁴ Most Type C agencies exercise combined functions. Their proceedings are inquisitorial, so they fall within Model 2 rather than Model 1. Type C adjudicatory disputes are generally resolved through informal document exchange and oral argument, sometimes with public legislative-type hearings. Often agency investigators and prosecutors in a case serve as the initial decision-makers in the same case. Some important Type C functions include new drug approvals, bank licensing, land use planning approvals, scientific grant-making and many immigration decisions. Type C adjudication ranges from economically consequential disputes down to quite trivial disputes (the prototype trivial dispute involves the allocation of campsites by rangers at national forest campgrounds). Type C adjudications undoubtedly outnumber Types A and B adjudications combined.⁵⁵

Judicial Review of Agency Adjudicatory Decisions

The APA did not significantly change the rules relating to judicial review of agency adjudicatory decisions. In general, all adjudicatory decisions (whether Types A, B

⁵² Type B proceedings are described in the *ACUS Type B Report* (n 50).

⁵³ The Immigration Court is further discussed in text at nn 71–77.

⁵⁴ See Asimow (n 16).

⁵⁵ See M Asimow, 'Federal Administrative Adjudication Outside the Administrative Procedure Act' (2019) ch 5; Asimow, (n 16).

or C) are subject to judicial review. Federal or state courts of general jurisdiction provide closed judicial review. In other words, neither party to judicial review can introduce evidence or arguments that were not introduced at the agency level and the agency cannot supply additional reasons for its decision.⁵⁶ The courts must uphold an agency's fact findings if they are reasonable, based on the entire record of proceedings before the agency, and must uphold the reasonable exercise of discretionary authority.⁵⁷ In the federal system, the court must also uphold a reasonable agency interpretation of an ambiguous statute or regulation,⁵⁸ but state courts usually have full power to decide legal issues.

The Initial Decision as the Most Important Level of Administrative Adjudication

As mentioned above, a jurisdiction tends to rely heavily on one of the three phases of adjudication to reach a correct and fair result. In Model 1 jurisdictions like the US, that phase is the *initial decision*. Far fewer resources are invested in reconsideration or judicial review, which are designed as a check against an unreasonable or legally flawed initial decision. Lawyers concentrate most of their efforts at the initial decision phase, since it is relatively unlikely that an initial decision will be overturned because of errors at the initial decision or reconsideration phases.

The Attack on Combined-Function Agencies

Currently, combined-function agencies are under sustained attack from academic and judicial conservatives. These attacks are based on the separation of powers and due process provisions of the Constitution as well as political opposition to government regulation of the economy. For example, the Supreme Court invalidated the decisional process of the Patent Trial and Appeal Board because its HOs rendered decisions that were not subject to reconsideration by the agency head.⁵⁹ The Securities and Exchange Commission ('SEC') invalidly appointed its ALJs because the appointments were by lower-level staff rather than by the agency heads.⁶⁰ The court invalidated the structure of the Consumer Financial Protection

⁵⁶ See *Securities and Exchange Commission v Chenery Corp* (1947) 332 US 194.

⁵⁷ 5 USC §706.

⁵⁸ *Chevron USA, Inc v Natural Resources Defense Council* (1984) 467 US 837; *Auer v Robbins* (1997) 519 US 452. The *Chevron* methodology that requires a court to defer to an agency's reasonable interpretation of ambiguous statutory language is under sustained attack and might be overruled by the Supreme Court during the 2023–24 term. See *Loper Bright Enterprises v Raimondo*, 45 F4th 359 (DC Cir 2022), *cert granted*, 143 S Ct 2429 (2023).

⁵⁹ *United States v Arthrex, Inc* (2021) 141 S Ct 1970.

⁶⁰ *Lucia v Securities and Exchange Commission* (2018) 138 S Ct 2033.

Board because the President could not remove the one-person head of the agency without cause.⁶¹

Lower courts have been even more aggressive in attacking combined-function agencies. In the *Jarkesy* case⁶² the Federal Court of Appeal in New Orleans invalidated an SEC adjudicatory decision imposing a monetary penalty for securities fraud on a regulated hedge fund operator and investment advisor. The grounds were that (i) the respondent was denied a jury trial to which he was entitled under the Seventh Amendment to the Constitution, (ii) the non-delegation doctrine prohibited giving the SEC power to decide whether it should proceed through internal adjudication or through seeking the same remedy in a federal court, and (iii) the SEC's ALJ's are unconstitutionally protected from being removed without cause. All these holdings represent a sharp break from established law.⁶³ Whether the US Supreme Court will follow any or all of the *Jarkesy* holdings remains to be seen, but the decision is momentous and indicates the level of hostility in conservative legal circles to combined-function regulatory agencies.

Tribunals in the US

The design of every jurisdiction's administrative adjudicatory system resists being compressed into a single model. There are exceptions to every generalisation. The design of a particular adjudication system is shaped by historical circumstances, legal culture and political struggle, rather than by legal theory or by mechanically following existing models. In the US, for example, there are numerous Model 3 tribunals, meaning adjudicating agencies that provide reconsideration of agency initial decisions that are independent of agency prosecutors or agency personnel that manage benefit programmes.⁶⁴ In addition, there are examples in the US of open judicial review (Model 4) and specialised administrative courts (Model 5) but these variations from the norm are not discussed in this chapter.⁶⁵

United States Tax Court

The Internal Revenue Service ('IRS') is the federal tax collecting agency. It audits tax returns and asserts tax deficiencies. Most tax deficiency disputes are settled by

⁶¹ *Seila Law LLC v Consumer Financial Protection Bureau* (2020) 140 S Ct 2183.

⁶² *Jarkesy v Securities and Exchange Commission* (5th Cir 2022) 34 F 4th 446. The Court of Appeals declined rehearing by a vote of 10-6. (5th Cir 2022) 51 F 4th 644. The Supreme Court has granted a petition for certiorari in the *Jarkesy* case and is expected to issue a decision during 2024.

⁶³ See *Atlas Roofing Co v Occupational Safety & Health Review Comm'n* (1977) 430 US 442 (holding that the right to a jury trial does not apply to civil penalties imposed by administrative agency).

⁶⁴ See Gifford (n 27).

⁶⁵ See *Five Models* (n 2) at 14–15.

the IRS' Office of Appeals, but some disputes remain. Although there are alternative venues, almost all these cases are resolved by the Tax Court, because taxpayers can litigate the tax issues before paying the disputed tax. The Tax Court is esteemed by tax professionals for its expertise, fairness and efficiency in resolving cases. It is independent of the IRS and thus should be considered a Model 3 tribunal.

The Tax Court consists of 19 judges who preside over adversarial evidentiary hearings in tax cases. The judges are appointed by the President and subject to confirmation by the Senate and can only be removed for good cause.⁶⁶ The Tax Court also appoints Special Trial Judges who hear small tax cases under a less formal procedure.⁶⁷ Appeals of Tax Court decisions go to the Federal Court of Appeal located in the taxpayer's home area. These appellate courts provide closed review of Tax Court decisions and apply a clearly erroneous standard to the review of its fact findings. Decisions of the Special Trial Judges are not subject to judicial review.

Until 1942, review of IRS tax decisions was provided by an internal unit of the IRS called the Board of Tax Appeals. In 1942, Congress created an agency called the Tax Court that was separated from the IRS. In 1969, the Tax Court became a 'legislative court' under Article I of the Constitution, which is a somewhat anomalous status.⁶⁸ Although the Supreme Court referred to the Tax Court as a 'court of law'⁶⁹ it is not within the judicial branch nor is it subject to the authority of the bodies that establish procedures for the federal courts.⁷⁰ Its budget is provided annually by Congress separately from any other court or agency.

Executive Office of Immigration Review

The Executive Office for Immigration Review ('EOIR')⁷¹ consists of the Immigration Court ('IC') and the Board of Immigration Appeals ('BIA'). EOIR adjudicates a wide range of cases involving immigration law, including asylum claims and issues relating to removal of undocumented aliens. EOIR employs hundreds of Immigration Judges ('IJs').

EOIR engages only in adjudication and is thus a Model 3 tribunal. The IC and BIA are organisationally separate from the immigration investigators and

⁶⁶ 26 USC §§7443, 7453.

⁶⁷ 26 USC §§7443A, 7463.

⁶⁸ See W Baude, 'Adjudication Outside Article III' (2020) 133 *Harvard Law Review* 1511, 1563–67; *Kuretzky v Commissioner* (DC Cir 2014) 755 F 3d 929.

⁶⁹ *Freytag v Commissioner* (1991) 501 US 868.

⁷⁰ See L Lederman, 'Tax Appeal: A Proposal to Make the United States Tax Court More Judicial' (2008) 85 *Washington University Law Review* 1196 (criticising the insularity and lack of transparency of the Tax Court); BJ Hellwig, 'The Constitutional Nature of the United States Tax Court' (2016) 35 *Virginia Tax Review* 269.

⁷¹ See Note, 'Courts in Name Only: Repairing America's Immigration Adjudication System' (2023) 136 *Harvard Law Review* 908 (hereinafter *Courts in Name Only*); ACUS Type B report (n 50).

prosecutors, who work for Customs and Border Protection ('CBP') which is a unit of the cabinet-level Department of Homeland Security ('DHS'). CBP renders initial decisions in immigration cases using Type C adjudication.⁷² IC conducts adversarial Type B trial-type hearings that provide *de novo* merits reconsideration of CPB's initial decisions. BIA provides appeals from IC decisions.

Although EOIR was separated from the immigration enforcement agency (now CBP) in 1983, it does not satisfy generally accepted standards of tribunal independence. EOIR is an agency of the Department of Justice ('DOJ'), headed by the Attorney General of the United States. The DOJ is a prosecutorial agency and the Attorney General (a member of the President's cabinet) is the nation's chief prosecutor. The DOJ selects the IJs and sometimes has done so through politicised criteria.⁷³ Obviously, immigration issues are politically salient and US presidents need to seem tough on immigration. The Attorney General's control over EOIR reflects that political policy.⁷⁴

The EOIR agencies are highly dysfunctional with overwhelming backlogs of undecided cases. The IJs are overworked and subject to decisional quotas. There are enormous decisional variations between various IJs.⁷⁵ BIA usually provides single-judge reconsiderations, most of which rubber-stamp the IC decision under review. IJs are vulnerable to at-will dismissal if the DOJ disapproves of their rulings; obviously at-will removal severely compromises the independence of the IJs.⁷⁶ Academic commentators have urged that the IC and BIA become a true tribunal, free of the influence of prosecuting agencies, but this is unlikely to occur.⁷⁷

State and Local Benefit Tribunals

US states administer a wide variety of employment benefit programmes, including unemployment compensation and workers' compensation (which provides compensation for injuries incurred in the course of employment). Agencies administer these programmes and collect a tax or an insurance premium imposed on employers. Applications for both unemployment and workers' compensation can be denied, while benefits can be revoked for various reasons. Most states utilise tribunals that are independent of the agency administering the programme. The tribunals provide a process of reconsideration of initial decisions rendered by

⁷² *Courts in Name Only* (n 71); J Ramji-Nogales, AI Schoenholtz and PG Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication' (2007) 60 *Stanford Law Review* 295, 305–10 (2007); Taylor (n 39), 482–83.

⁷³ *Courts in Name Only* (n 71), at 910–11.

⁷⁴ *ibid* at 912–17.

⁷⁵ Ramji-Nogales (n 72); Taylor (n 39).

⁷⁶ NS Tashovski, 'Immigration Judge Independence Under Attack: A Call to Re-Evaluate the Current Method of IJ Appointment and Create a Separate Immigration Court System' (2022) 19 *Hastings Race & Poverty Law Review* 173, 177–91.

⁷⁷ *Courts in Name Only* (n 71).

the administering agencies that deny or revoke benefits.⁷⁸ The tribunals conduct adversarial hearings and have large caseloads. Generally, judicial review of the decisions of these benefit tribunals lies in courts of general jurisdiction on a closed record.

Federal Tribunals: Mine Safety and Occupational Safety

Several federal statutes create administrative systems that provide for occupational health and safety as well as mine health and safety. These statutes create independent tribunals to provide reconsideration of initial decisions imposing penalties on employers rendered by the agencies that administer these systems and prosecute violations of their regulations. The Occupational Safety and Health Review Commission ('OSHRC') reviews initial decisions relating to worker safety made by the Occupational Safety and Health Administration ('OSHA').⁷⁹ The Mine Safety and Health Review Commission reviews initial decisions of the Mine Safety and Health Administration. Congress created this split-enforcement model as a political compromise because employers feared lodging the adjudicatory function in the same agency as the enforcement function.⁸⁰

An early article studied the split-enforcement model.⁸¹ It concluded that the separation of enforcement and adjudication created serious turf battles between the enforcement and adjudicating agencies, although these have abated since a Supreme Court decision required courts to defer to legal interpretations of the enforcement agency rather than those of the adjudicating agency.⁸²

Conclusion

The US administrative adjudication system at state and federal levels is complex and contains numerous design variations. It is fair to say that the combined-function model is the default arrangement, whether the agency adjudication is Type A (meaning it is covered by the APA), Type B (meaning the agency is required to provide evidentiary hearings but is not covered by the APA), or Type C (meaning the agency does not employ evidentiary hearings and generally uses inquisitorial rather than adversarial procedure).

⁷⁸ Thus California, Florida, New Jersey and New York all make use of independent tribunals to provide reconsideration of initial decisions denying benefits in workers' compensation and unemployment compensation cases.

⁷⁹ See Gifford (n 34) at 1000-03.

⁸⁰ GR Johnson, Jr, 'The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences' (1987) 39 *Administrative Law Review* 315.

⁸¹ *ibid.*

⁸² *Martin v Occupational Health & Safety Review Commission* (1991) 499 US 1441.

Under the combined-function system, an agency investigates and prosecutes a case and makes the frontline decision denying a benefit application or a licence or imposing a regulatory sanction. The same agency then makes the initial decision in the case and provides reconsideration of that decision. In Type A and B adjudication, statutes or regulations impose a complex system of internal separation of functions to counteract the potential institutional bias inherent in a combined-function system.

The US employs some tribunals that are independent of the agency that engages in law enforcement or in administration of benefit programmes. These tribunals adjudicate disputes about federal taxation, immigration, worker and mine safety and state employment benefits. These US tribunals have worked well and generally are approved of by their stakeholders. The Immigration Court is an exception; it is dysfunctional and is controlled by Department of Justice prosecutors (even though it is separate from the immigration enforcement agencies).

Tribunals have been widely viewed as successful models for the adjudication of disputes between government and private parties. In contrast, US combined-function agencies inspire little confidence and are currently the subject of sustained legal and academic criticism. This suggests that the US should continue to experiment with independent tribunals to provide reconsideration of agency initial decisions.