
SPECIALIZED COURTS IN ADMINISTRATIVE LAW

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In administrative law, specialized courts are a nostrum for occasional use (prn).¹ They offer important institutional advantages, yet at a price that has restricted their use. Their existence has owed more to history than to any grand theory of government organization. Congress has created, restructured, and abandoned particular courts, sometimes seeming merely to tinker with them. They have coexisted with generalist courts that decide many issues which appear to be equally good—or bad—candidates for separate treatment.

Today, caseload pressures on the federal courts have led to renewed interest in creating or expanding specialized courts to relieve the crush.² Since institutional change should pursue principle as well as expediency, I write to offer considerations bearing on the use of these courts in administrative law, and to suggest creation of a new administrative court with jurisdiction over cases meeting certain criteria.

All three constitutional branches have performed specialized adjudication, in ways that present only subtle functional distinctions. Our government includes Article I legislative courts, Article II executive adjudicators, and Article III judges with specialized dockets. Although no very clear normative or constitutional theory has emerged to limit congressional allocations of business among these entities, courts and commentators do display concerns that guide prescriptive analysis. A rough consensus exists that some issues should remain in generalized federal courts, and that others rest comfortably in specialized fora.

My goal here is to unravel the rather tangled history of specialized adju-

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¹I review below the history of the specialized courts that have special significance for administrative review. There are others, for example Bankruptcy Courts, the Court of Military Appeals, the Foreign Intelligence Surveillance Court, and the Special Court. Regional Rail Reorganization Act of 1973.

²See, e.g., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990); AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH (1989).

dication enough to identify the programs where it seems most usefully employed, and to offer some principles for its architecture. After a quick review of general considerations bearing on specialized courts, I canvass their history to date. The historical record is mixed enough to induce consideration of the merits of varying degrees of independence for adjudicators both inside and outside agencies. Some notes on identifiable constitutional considerations then precede conclusions regarding the best uses of specialized courts in modern administrative law.

I. THE BENEFITS AND COSTS OF SPECIALIZED COURTS

The general benefits and costs of specialized courts are well known.³ First, they relieve the caseload burdens of other courts, perhaps substantially. Gauging docket relief is not, however, a matter of simply counting filings shifted from one court to another. What matters is the amount of time and effort spared the judges. The federal judiciary has compensated for caseloads that rise faster than new judgeships by deciding many cases in a more summary manner (for example without argument or opinion) and by delegating many tasks to law clerks and other support personnel, whose numbers have multiplied.⁴ Cases that now occupy the summary docket do not necessarily deserve such treatment—they yield to cases placing higher claims on the judges' time. Victims of this process of triage could receive more attention in alternate fora, while somewhat relieving the strain on the most overloaded part of the system. And some business that now receives the full attention of federal judges could be shunted elsewhere, for maximum caseload relief. Yet caution is necessary—devotion of scarce resources to existing cases implies their importance. So the trick is to find the cases that impose the greatest burdens on the courts compared to their importance.

Second, specialized judges can become expert in the substantive and procedural issues surrounding particular programs, especially highly technical ones. More accurate decisions should result. Expertise can take several forms. Some subjects draw on extralegal training, for example the use of engineering and science in patents or environmental law. Much of this sort of expertise relates to issues of fact and policy. Although it would not be efficient for generalized courts to emphasize expensive training in the background of their judges or staff, the opposite may be true of specialized courts. Legal expertise, as in tax, may depend on long study of a complex body of law. Here also, a generalized court may waste knowledge that a specialized one could seek—or could develop through exposure to its docket.

³The considerations that I outline in this section are discussed in Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377, 377–82; Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1116–21 (1990); Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745, 747–48 (1981); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 62–74 (1975).

⁴R. POSNER, *THE FEDERAL COURTS, CRISIS AND REFORM* ch. 4 (1985).

Third, division of labor promotes efficiency. Due to expertise and a limited caseload, specialized courts can produce expeditious decisions. The number of judges can be adjusted to the historical caseload. There is, however, some special vulnerability to exogenous factors affecting the underlying controversies. For example, the number of social security disability cases rose sharply in the early 1980s, and then receded.⁵

Finally, specialized courts reduce or eliminate intercourt conflicts, promoting a uniform national body of law. A pattern of conflicting court orders, uncertainty about the law, and forum shopping has traditionally led to the establishment of specialized courts. This advantage has special importance now that caseloads have effectively decentralized the federal courts by removing the likelihood of Supreme Court review of most courts of appeals decisions.⁶ A single, specialized court can articulate a unitary body of law in a way that thirteen courts of appeals cannot approach.

A primary cost of specialization is loss of the generalist perspective. A premise of our nation's usual resort to courts of general jurisdiction is that sound decisionmaking results from exposure to a wide range of problems, rather than from initiation into an arcane set of mysteries. Generalization has two related benefits. Some loosely related legal issues may produce direct cross-fertilization of insights. More often, a wider perspective aids judgment by forestalling the exaggerated importance that long immersion may lend to some social problem. A broadened perspective may be especially important in those who review the action of bureaucracies that are themselves narrowly focused.

Also, specialization may diminish the prestige of a court. It will be staffed by lower-caliber judges, those who can tolerate life on the assembly line. Loss of prestige can fundamentally impair a court's power. Part of a court's success in obtaining compliance with its mandates flows from the respect others have for it. Depending on the subject matter that is segregated, there is also a risk of impairing the remaining generalist courts by leaving them with less interesting fare.

Specialization can produce bias problems, in two ways. First, the appointments process may be distorted as nominees are selected and confirmed for their views on specific issues. Pressure on the appointing authority flows from two sources. Interest groups affected by a court's decisions have a strong incentive to advance their allies. Yet groups vary in their intrinsic cohesion and their ability to overcome free rider effects to achieve effective organization. Government programs that affect relatively diffuse and disorganized segments of the public, for example some benefits programs, may not encounter forceful interest group response, although segments of the

⁵Galanter, *The Life and Times of the Big Six: or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 929-31.

⁶See Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

bar that serve such groups can sometimes act as surrogates.⁷ Agencies reviewed by a court will always take an active interest in appointments to it. They will discover insight and eminence in their own alumni.

Even if initially disinclined to press for favorable appointments, both interest groups and agencies may feel a need to offset the activities of the other. To be sure, the net effect of the process may be to cancel out these interested influences, although it takes some faith to believe that will occur. In any event, the pool of eligible candidates may consist of former agency staff and a specialized segment of the bar. To the extent that qualifications for the court converge with those for the principal executive positions in the agency reviewed, excessive convergence of perspective in agency and court may also occur. These problems of litmus tests and limited pools do not usually confront generalist courts.

Second, specialization can distort application of the review standard. Growing expertise may lead courts to substitute their judgment for an agency, creating an overly dominant oversight body. On the other hand, such a court can become too friendly with an agency that it reviews regularly, or with interests that dominate it. Those who litigate repeatedly before a particular court possess natural advantages over occasional participants.⁸ Again, these effects will not always counterbalance even when both agencies and interest groups regularly appear. Moreover, it is difficult for outside monitors in Congress or the public to identify distortions in the standard. Although gross rates of reversal may be suggestive, the frame of reference is suspect. For example, a high rate of reversal compared to generalist courts with similar responsibilities (if there are any) may mean that review is too stringent, or only that the agency is unusually inept.

II. A BRIEF HISTORY OF SPECIALIZED COURTS

Specialized courts of past and present have manifested the foregoing advantages and disadvantages, in a balance that lies in the eyes of the observer. Obviously, the stakes are high. I review the history of these courts briefly to identify lessons about their future prospects.

A. The Federal Circuit and Its Predecessors

In 1982, Congress formed the Court of Appeals for the Federal Circuit (CAFC)⁹ by combining and rearranging courts whose long existence testifies to some success. The evolution of these courts and the nature of their treatment in 1982 reveal both the ad hoc approach of Congress to these issues

⁷M. OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* ch. 6 (1968).

⁸Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 97-104 (1974).

⁹Federal Courts Improvements Act, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified in scattered sections of 28 U.S.C.). See generally Adams, *The Court of Appeals for the Federal Circuit: More Than a National Patent Court*, 49 *MO. L. REV.* 43 (1984).

and the inefficiencies that have sometimes resulted. In addition, the structure of the new CAFC provides a possible model for other specialized courts.

The CAFC took over some functions of our first permanent specialized court, the Court of Claims, which was established in 1855 to relieve Congress of the burden of deciding claims against the United States.¹⁰ Although Congress meant it to be an Article III court, the Supreme Court initially refused to review its judgments because they were subject to administrative review.¹¹ The Court of Claims evolved into an appellate forum, reviewing decisions of commissioners that it appointed. Its major responsibilities were to adjudicate contract and other nontort claims under the Tucker Act.¹² Congress folded its appellate functions into the new CAFC, and created a new Article I trial court, the Claims Court.¹³

The most important element of the CAFC is the former Court of Customs and Patent Appeals (CCPA).¹⁴ It began as the Court of Customs Appeals in 1909. The court, created to relieve the dockets of the circuit courts of customs matters, heard appeals from a succession of customs adjudicators.¹⁵ The CCPA became an odd hybrid in 1929, when Congress responded to longstanding calls for expertise and uniformity in patent matters by adding jurisdiction over appeals from the Commissioner of Patents.¹⁶ A more prosaic purpose may account for passage of this legislation, however. Congress

¹⁰Act of Feb. 24, 1855, ch. 122, 10 Stat. 612; *see generally* 2 W. COWEN, P. NICHOLS & M. BENNETT, *THE UNITED STATES COURT OF CLAIMS: A HISTORY* (1978).

¹¹*Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864). Curative legislation then removed the offending provision. Act of March 17, 1866, ch. 19, 14 Stat. 9.

¹²Act of March 3, 1887, ch. 359, 24 Stat. 505. It also had, however, some administrative duties to report to Congress on private relief bills. In 1933, the Supreme Court once again held the Court to be an Article I entity. *Williams v. United States*, 289 U.S. 553 (1933). Eventually, Congress once again brought it back within Article III; Act of July 28, 1953, 67 Stat. 226; *see* S. REP. NO. 261, 83d Cong., 1st Sess. (1953). This time, the Supreme Court acquiesced. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

¹³28 U.S.C. §§ 171-77 (1988). The Claims Court retains the duty to report to Congress on private bills. 28 U.S.C. §§ 1492, 2509 (1988). Staffed by the commissioners of the defunct Court of Claims, it rides circuit nationwide.

¹⁴Act of August 5, 1909, § 29, ch. 6, 36 Stat. 11, 105. My history of this court is drawn from G. RICH, *A BRIEF HISTORY OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS* (1980); F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 174-84 (1928); H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 154-61 (1973); Nathanson, *The Administrative Court Proposal*, 57 VA. L. REV. 996, 1008-09 (1971).

¹⁵These were: the old Board of General Appraisers, Act of June 10, 1890, Ch. 407, § 12, 26 Stat. 131, 137; an Article I Customs Court, Act of June 17, 1930, Ch. 497, § 518, 46 Stat. 590, 737; an Article III Customs Court, Act of July 14, 1956, ch. 589, 70 Stat. 532; and the Article III Court of International Trade, Pub. L. No. 96-417, 94 Stat. 1727 (1980). The CIT was given broad jurisdiction over international trade matters in an effort to stem jurisdictional confusion with the district courts. H. REP. NO. 1235, 96th Cong., 2d Sess. 18-19 (1980). *See generally* Cohen, *The New United States Court of International Trade*, 20 COLUM. J. TRANSNAT'L L. 277 (1981). The CIT has been relatively free of controversy. Dreyfuss, *supra* note 3, at 403.

¹⁶Act of March 2, 1929, ch. 488, 45 Stat. 1475.

transferred patent appeals from an overburdened D.C. Circuit to an underutilized group of customs judges.¹⁷

Unhappily, creation of the CCPA did little to consolidate decision of patent law. Regional federal courts continued to hear many patent and trademark infringement suits. Eminent federal judges complained that they did not feel competent to decide patent litigation: "I am unable to perceive why we should not insist on the same level of scientific understanding on the patent bench that clients demand of the patent bar, or why lack of such understanding by the judge should be deemed a precious asset."¹⁸

In such a decentralized and inexpert system, intercircuit divergence was considerable; forum shopping was rampant.¹⁹ In addition, for two reasons the generalist federal courts displayed an overall difference in outlook from that of the CCPA. First, structural features of both the Patent and Trademark Office (PTO) and the CCPA made them overly favorable to granting patents. The problem was that the PTO heard *ex parte* applications for patents, and the CCPA heard only appeals from denials. Second, for a time the patent bar, which favors lenient patentability, held sway over appointments to the CCPA.²⁰ The specialists in the PTO and the CCPA began producing decisions at marked variance from those of the federal courts, which accorded their decisions little respect.²¹

To correct the imbalance, Congress consolidated both patentability and enforcement appeals in the CAFC by granting it jurisdiction over appeals from the district courts as well as from the PTO. Hearing both sides of patents controversies, the CAFC appears to have improved the state of the law.²² The broadened perspective has allowed it to make a new tradeoff. It supervises the PTO's grant of patents closely, but has strengthened the presumption of validity for patents once granted.²³ The overall effect is to increase the law's protection for patentees. Whether or not that is good patent policy, the law is more unified and clear. Hence Congress is better able to monitor and adjust patent law. A continuing disadvantage of this scheme, however, is that many complicated fact issues, for which specialization would be helpful, are decided in the generalized district courts.²⁴

In forming the CAFC, Congress sought to avoid overspecialization and

¹⁷S. REP. NO. 784, 70th Cong., 1st Sess. (1928). After some early doubts, the CCPA was held to be an Article III court. The doubts were due to dicta in *Ex parte* Bakelite Corp., 279 U.S. 438 (1929). Congress legislated to clarify the court's status, Pub. L. No. 85-755, 72 Stat. 848 (1958). The Court agreed in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

¹⁸H. FRIENDLY, *supra* note 14, at 157-58 (also reporting the views of Learned Hand).

¹⁹This paragraph reports conclusions of a study by Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).

²⁰Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 LAW & SOC'Y REV. 823, 837-43 (1977).

²¹The Supreme Court once remarked: "We have observed a notorious difference between the standards applied by the Patent Office and by the courts." *Graham v. John Deere Co.*, 383 U.S. 1, 18 (1966).

²²Dreyfuss, *supra* note 19, at 74, so concludes.

²³*Id.* at 21-26.

²⁴Dreyfuss, *supra* note 3, at 411.

capture by creating “a varied docket spanning a broad range of legal issues.”²⁵ In addition, the court must rotate its judges among panels, to ensure exposure to the entire docket.²⁶ Along with patents and customs matters, the CAFC hears appeals from the Claims Court, the Court of International Trade, the International Trade Commission, the Merit Systems Protection Board, and certain other agency and district court decisions.²⁷ The court has received mixed reviews for its performance of these other functions.²⁸ There is also some nagging jurisdictional uncertainty, although Congress tried to minimize it by assigning the court general review authority for particular trial fora and programs.²⁹

B. The Commerce Court

The “Banquo’s ghost” at any discussion of specialized courts is the Commerce Court, which had a brief, unhappy life from 1910–13.³⁰ Citing needs for expertise, expedition, and uniformity, President Taft proposed a court to review decisions of the Interstate Commerce Commission. Even as Congress complied, however, charges emerged that the court would favor the railroads.³¹ The court soon found itself in a political maelstrom, without allies—not even the railroads, which were supposed to have captured it. “[T]he Commerce Court entered an environment partial to the Commission and distrustful of courts. With undoubted courage and disinterestedness the Court, heedless of the public temper, promptly began to reverse the Commission and to curb its activity.”³² Although comparison of the court’s reversal rate of ICC orders with those of other courts does not support charges of capture by the railroads,³³ perception carried the day, and the court passed into history.

The history of the Commerce Court may have conveyed more lessons than were in it. The court existed at a time when specialized judicial review, the particular body of law to be administered, and even administrative reg-

²⁵H. R. REP. NO. 312, 97th Cong., 1st Sess. 19, 31 (1981).

²⁶28 U.S.C. § 46(b) (1988).

²⁷Adams, *supra* note 9, at 65–67.

²⁸Dreyfuss, *supra* note 3, at 404–06; *see, e.g.*, Vaughn, *Federal Employment Decisions of the Federal Circuit*, 35 AM. U.L. REV. 1037 (1986); Blatt, *The Federal Circuit’s 1985 Tax Cases: The Exercise of Equity*, 35 AM. U.L. REV. 1097 (1986).

²⁹Adams, *supra* note 9, at 68–75; Note, *An Appraisal of the Court of Appeals for the Federal Circuit*, 57 S. CAL. L. REV. 301 (1984). For example, even the court’s patents jurisdiction remains somewhat incomplete and uncertain, because it does not decide issues arising as defenses in district court. The CIT, which the CAFC reviews, also suffers jurisdictional problems. Cohen, *Recent Decisions of the Court of International Trade Relating to Jurisdiction: A Primer and a Critique*, 58 ST. JOHN’S L. REV. 700 (1984).

³⁰My history of the court is drawn from Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238 (1964); F. FRANKFURTER & J. LANDIS, *supra* note 14, at 153–74; Nathanson *supra* note 14, at 1004–08; the allusion is Judge Friendly’s, *supra* note 14, at 188.

³¹S. REP. NO. 355, 61st Cong., 2d Sess. (1910).

³²F. FRANKFURTER & J. LANDIS, *supra* note 14, at 165.

³³Dix, *supra* note 30, at 246 (Commerce Court reversal rate of 41% for ICC; 69% in circuit courts).

ulation were new, evolving, and productive of widespread controversy. Nevertheless, the enduring warning is that no specialized court should be created to oversee a single agency that deals with a single powerful interest group. Even if the court did not in fact favor the railroads, the speed with which it lost public confidence is instructive. Indeed, had the court survived, the railroads would have had every incentive to try to capture it.³⁴

C. The Tax Court

The Tax Court is part of a complex structure for litigating federal tax liability.³⁵ It began in 1924 as the Board of Tax Appeals, an executive agency designed to have some independence from the Treasury Department.³⁶ In 1969, it took its present form as an Article I court, titled the United States Tax Court.³⁷ Repeated attempts to assure the independence of the court have responded to its longstanding reputation as overstuffed with former government lawyers and, hence, biased against the taxpayer.³⁸

A disgruntled taxpayer can resort to any of three trial fora: the specialized Tax Court, the semispecialized Claims Court, or the generalized district court.³⁹ All three sit nationwide. The district courts and the Tax Court are reviewed in the regional courts of appeals; the Claims Court in the CAFC. The result is a highly decentralized system of judicial review. Commentators have heaped abuse on it for many years, with perfect logic and little effect.⁴⁰ Not surprisingly, the Internal Revenue Service has long refused to acquiesce in the orders of particular courts of appeals as determining how it should administer its programs nationally.⁴¹ The Tax Court once did so as well, but it now follows precedent of the circuit to which appeal lies from a decision.⁴²

It seems unlikely that the Tax Court is progovernment today. The government's gross recovery rate is about one-third of deficiencies claimed.⁴³

³⁴In 1894, Attorney General Olney cynically predicted that the ICC could be "of great use to the railroads" if it satisfied popular desire for regulation but was lax in enforcement. He noted that "the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things." *Quoted in* M. JOSEPHSON, *THE POLITICOS* 526 (1938). Similar hopes or fears could well have been entertained for the court.

³⁵See generally Jordan, *supra* note 3, at 749-54. For its history, see H. DUBROFF, *THE UNITED STATES TAX COURT* (1979).

³⁶Revenue Act of 1924, ch. 234, § 900, 43 Stat. 253, 336. In 1942, it was renamed the Tax Court of the United States and its members were styled judges. Revenue Act of 1942, ch. 619, § 504, 56 Stat. 798, 957.

³⁷Pub. L. No. 91-172, § 951, 83 Stat. 730 (1969).

³⁸See H. FRIENDLY, *supra* note 14, at 166, reporting this perception.

³⁹Kramer, *Jurisdiction Over Civil Tax Cases*, 1990 B.Y.U. L. REV. 443, 444.

⁴⁰See H. FRIENDLY, *supra* note 14, at 161-71 (reviewing the literature and proposing a Court of Tax Appeals).

⁴¹Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 713-14 (1989).

⁴²Golsen v. Commissioner, 54 T.C. 742, 756-58, (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

⁴³UNITED STATES TAX COURT, ANN. REP. 11 (1988).

Moreover, the court hears over 90% of the tax cases.⁴⁴ Since litigants have the option of avoiding the court if they distrust it, its substantial caseload supports its neutrality.⁴⁵ Indeed, the third of the Claims Court docket that consists of tax cases probably reflects taxpayers avoiding adverse precedent in their home circuit, in favor of the CAFC.⁴⁶ Any taxpayer victory there can create national precedent, as later cases flow to Claims Court.⁴⁷

Tax appeals are not welcomed in the generalist appellate courts. The complexity of the code has for many years daunted federal judges. (Learned Hand lamented that "the words . . . merely dance before my eyes in a meaningless procession."⁴⁸) As a result, the courts of appeals defer heavily to the Tax Court, notwithstanding congressional efforts to stop the practice.⁴⁹

The specialist approach is equally suited to tax law at both the trial and the appellate level.⁵⁰ The intellectual challenge of tax law should benefit a specialized court by attracting able judges. Also, the breadth of the code's impact on society tends to widen the view of the specialist and to cancel out particular interests in the appointment process.⁵¹

D. The Emergency Court of Appeals and the Temporary Emergency Court of Appeals

Like the "temporary" wartime buildings that long graced the Washington Mall,⁵² emergency appellate courts have demonstrated their capacity to outlast the crisis that precipitated them. The Emergency Court of Appeals (ECA) was created to exercise exclusive jurisdiction (subject to Supreme Court review) of challenges to price and rent regulations in the era of World War II.⁵³ Persons aggrieved by actions of the price administrator were required to appeal to the special court or forego review, even in defense of criminal proceedings.⁵⁴ Staffed by federal judges designated by the Chief Justice, the court sat in panels throughout the nation. Since regulations remained in effect during the pendency of review, speed and uniformity of result were imperative to the success of the control programs; and so was public confi-

⁴⁴Special Project, *An Empirical Study of Intercircuit Conflicts on Federal Income Tax Issues*, 9 VA. TAX REV. 125, 125 n.1 (1989).

⁴⁵There is a cost to the alternate fora, though. The taxpayer must pay the tax and seek a refund.

⁴⁶Adams, *supra* note 9, at 77.

⁴⁷Special Project, *supra* note 44, at 130.

⁴⁸Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947).

⁴⁹Special Project, *supra* note 44, at 132 & n.36, 141 (Tax Court affirmation rate 75%; District Court, 60%).

⁵⁰Kramer, *supra* note 39, at 449-51.

⁵¹Jordan, *supra* note 3, at 750-51.

⁵²For a description, see D. BRINKLEY, WASHINGTON GOES TO WAR 119-20 (1988).

⁵³Act of January 30, 1942, ch. 26, § 204, 56 Stat. 31; *see generally* Dreyfuss, *supra* note 3, at 393-96; Nathanson, *The Emergency Court of Appeals*, in OFFICE OF PRICE ADMINISTRATION, PROBLEMS IN PRICE CONTROL: LEGAL PHASES 1 (1947).

⁵⁴Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review*, 9 LAW & CONTEMP. PROBS. 60, 69-76 (1942). The constitutionality of the scheme was upheld in *Yakus v. United States*, 321 U.S. 414 (1944).

dence in the fairness of administration, because national economic controls cannot succeed without extensive voluntary compliance.

Although the court dealt with a single agency, its programs touched every aspect of society and probably benefited from wartime solidarity.⁵⁵ Overall, the court succeeded admirably, sustaining the administrator most of the time but giving complainants enough victories to avoid serious charges of bias.⁵⁶ Indeed, Congress kept the court in existence to review various post-war and Korean War control programs; it finally disbanded in 1961.⁵⁷

When economic controls resurfaced in the early 1970s, Congress created a similar court that still exists, the Temporary [sic] Emergency Court of Appeals (TECA).⁵⁸ Unlike its predecessor, TECA reviews the district courts; there is also some state court litigation.⁵⁹ As general economic controls withered in 1973, the energy crisis arose and TECA took on its current assignment as a reviewer of energy programs.⁶⁰ Congress did not pause to consider whether TECA's structure, which preserved access to district courts for the many small businesses affected by national controls, was best suited to a long-term program regulating a single major industry.⁶¹ Moreover, Congress left in place some truncated procedures for agency action that may have fitted an initial crisis, but caused sharp criticism of the fairness of agency action over the long run.⁶² Judicial review risked being both ineffective and duplicative at the same time, because review on a questionable administrative record in the district courts was followed by appeal of right to the courts of appeals.⁶³

Not surprisingly, TECA has received more negative reviews than its predecessor. In contrast to the old Commerce Court, which also reviewed single-industry regulation, TECA has been charged with favoring the agency.⁶⁴ Perceptions arose that TECA became "caught up in the agency's mission as its reason for being,"⁶⁵ in a fundamental confusion of roles. This charge is hard to evaluate, though, because it mimics a more benign influence—the

⁵⁵Courts reviewing various aspects of its performance invoked the war powers. Spreecher, *Price Control in the Courts*, 44 COLUM. L. REV. 34, 40-42 (1944).

⁵⁶See Nathanson, *supra* note 14, at 1009-12.

⁵⁷Transcript of Proceedings of the Final Session of the United States Emergency Court of Appeals, 299 F.2d 1 (1961).

⁵⁸Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(b) (1), 85 Stat. 743, 749.

⁵⁹See Jordan, *supra* note 3, at 759-62.

⁶⁰Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, § 5, 87 Stat. 627, 633; Emergency Natural Gas Act of 1977, Pub. L. No. 95-2, § 10(b), 91 Stat. 4, 9.

⁶¹See generally Aman, *Institutionalizing the Energy Crisis: Some Structural and Procedural Lessons*, 65 CORNELL L. REV. 491 (1980).

⁶²These programs were exempted from the adjudicative requirements of the Administrative Procedure Act. *Id.* at 496-97, 527-28, 532-36, 571-72; Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113, 132-36.

⁶³Aman, *supra* note 61, at 563-71.

⁶⁴Elkins, *supra* note 62.

⁶⁵Leventhal, *Environmental Decisionmaking and the Role of Courts*, 122 U. PA. L. REV. 509, 515 (1974).

court's awareness of the difficulty of administering highly complex energy programs and a consequent stance of deference.⁶⁶ Perhaps such a stance is natural to generalist judges who have enough exposure to particular specialist programs to form some sympathy with those who must administer them.

Because its power is limited to issues arising under particular statutes, TECA has also suffered jurisdictional difficulties.⁶⁷ Litigants and the court devote substantial resources to deciding jurisdictional issues. Since TECA issues often accompany unrelated ones, bifurcation of appeals is frequent, and sometimes appeal rights evaporate entirely.⁶⁸

E. Lessons Learned

Some guidelines for constructing specialized courts emerge from this overview. First, to minimize jurisdictional uncertainty and litigation, subject matter should be chosen for its segregability from other claims. For example, tax issues usually do not accompany others; energy issues eligible for TECA often do. To avoid bifurcating appeals, litigation should be shunted to the specialized court in its entirety (as occurs with the CAFC)⁶⁹ or left in the generalist courts. Too many forum-shopping opportunities attend creation of a new court with jurisdiction over only a portion of an integrated subject matter, such as the old CCPA or the Tax Court. Why endure the general disadvantages of specialization while forfeiting the primary benefit of unification of the law?

Second, the nature of a court's docket should expose the judges to both sides of pertinent controversies, instead of a set of appeals presenting skewed arguments, as in the CCPA. The CAFC, with a wider jurisdiction, sees a full range of related problems in patent law, and must directly balance interests in invention and competition. Also, the consolidation of the cases gives the new court adequate remedial scope to adjust the body of law it administers.

Third, allocations of subject matter should avoid combining generalists and specialists in ways that erode gains from specialization. It makes little sense to have the specialist trial forum of the Tax Court reviewed in the generalist courts of appeals.⁷⁰ Similarly, difficulties that the generalist district courts have with patents litigation cannot all be cured by the CAFC, operating under the constraints of appellate review.⁷¹

⁶⁶See Jordan, *supra* note 3, at 760-61. Another explanation is that both agency and court needed a shakedown period, after which the review relationship is no longer a very distinctive one. *Id.* at 761-62.

⁶⁷Dreyfuss, *supra* note 3, at 398, 412.

⁶⁸Note, *The Appellate Jurisdiction of the Temporary Emergency Court of Appeals*, 64 MINN. L. REV. 1247, 1256-57 (1980).

⁶⁹The CAFC applies the law of the circuit from which a case comes to nonpatent issues found in cases within its jurisdiction. Dreyfuss, *supra* note 3, at 413.

⁷⁰See generally Kramer, *supra* note 39.

⁷¹Dreyfuss, *supra* note 3, at 411-12.

Fourth, each stage of judicial review should serve a distinctive function that is best performed by the court employed. Repetitive appellate review in different courts under TECA wastes resources. True, district courts are best able to supplement thin agency records, which have been a problem for TECA, but an obvious cure for that is to provide for adequate administrative process in the first place and to go directly to a court of appeals, with its greater familiarity with substantive issues in administrative programs.⁷²

Direct appellate review of final orders suits adjudications involving large amounts in controversy, as in TECA and in many trade, labor, and securities programs. Since high stakes encourage the pursuit of all available appeals, initial district court review becomes duplicative. Moreover, the requirement of exhausting administrative remedies before seeking review allows the agency to perform the winnowing function of the district courts.⁷³ Efficiency is promoted, because agencies have more latitude than trial courts to conform their procedures to the nature of the issues arising in a particular program, within limits set by the Administrative Procedure Act (APA)⁷⁴ and other statutes.

Vesting initial review in district courts produces the advantages and disadvantages that attend their greater decentralization and single-judge structure. Private litigants gain more convenient fora; the judiciary conserves two-thirds of the judges needed per case.⁷⁵ Perhaps most important, the district courts can be expanded to handle large caseloads without encountering the structural problems that collegial courts present. Hence, Congress often provides district court review of high-volume agency adjudications involving individuals, for example social security disability⁷⁶ and immigration⁷⁷ programs.

Some administrative cases could be assigned initially to district court, with discretionary review in the court of appeals for the fraction that raise issues of broad importance.⁷⁸ Relatively fact-intensive adjudications that usually do not present broad issues of policy and law seem the best candidates.⁷⁹ For example, review of Social Security disability determinations presently begins in district court, with appeal of right to circuit court. Most of these cases challenge only the evidentiary support for a determination of no disability. District court provides a relatively convenient and cheap forum for

⁷²See Sargentich, *The Jurisdiction of Federal Courts in Administrative Cases: Developments*, 41 ADMIN. L. REV. 201 (1989).

⁷³Currie & Goodman, *supra* note 3, at 6.

⁷⁴5 U.S.C. §§ 551-559 (1988).

⁷⁵Currie & Goodman, *supra* note 3, at 7-9.

⁷⁶For overview and analysis of this program, see J. MASHAW, BUREAUCRATIC JUSTICE, MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1985).

⁷⁷See generally Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297 (1986).

⁷⁸H. FRIENDLY, *supra* note 14, at 176.

⁷⁹The Administrative Conference so recommends; see Recommendation No. 75-3, 1 CFR § 305.75-3 (1990).

claimants who are typically of modest means. Given the high volume of these cases, existing rights to appeal burden the courts of appeals substantially.

There are several ways to structure discretionary appeals.⁸⁰ For court of appeals resources to be conserved, screening appeals requests must be efficient.⁸¹ To eliminate a voluminous source of appeals, assertion of legal error rather than simple fact error by the district judge could be made a precondition to appeal.

Fifth, the Commerce Court and TECA have demonstrated that a court for a single industry or a single agency is in jeopardy of capture by its clientele, or at least debilitating suspicion that it has occurred. In modern contexts where the politics of administration is intense, as it was for railroad regulation early in this century, similar problems might await. Regulation in fields such as environmental quality, nuclear safety, labor relations, and occupational health and safety leads individuals to align themselves with one side or another. For example, law firms do not ordinarily represent clients on both sides of these controversies. A specialized court assigned to any of these fields would provoke wars over appointments and invite cynicism about decisions. The fact that health and safety agencies usually have jurisdiction over many industries is not likely to matter very much. The relevant political dispositions—favoring the environment or economic growth, workers or management—could still be sought in nominees and could be expected to transcend particular industries affected by the agency.

Even if multiple industries and agencies are gathered in a single broad theme (an environmental court, for example⁸²) these fears are justified. So a mix of somewhat unrelated business, as the CAFC now has, appears to be optimum. Such semispecialization resulted from using generalist judges part-time on the wartime ECA, and seems to have aided that court's success. Semispecialization may allow us not only to dampen appointments abuses, but also to adjust the court's proximity to the private litigants and agencies it hears and its identification with their problems.

Before deriving specific structural prescriptions from this history, though,

⁸⁰The agency, but not the claimant, could be provided automatic appeal from an adverse district court ruling, in a rough effort to identify appeals likely to raise systemic issues. H. FRIENDLY, *supra* note 14, at 176.

⁸¹Currie & Goodman, *supra* note 3, at 20. For example, appellants could be required to file a brief jurisdictional statement showing the presence of an issue meriting review.

⁸²An environmental court proposal arose as environmental law burst on the scene in the 1970s. Legislation mandated a study. Federal Water Pollution Control Act, Pub. L. No. 92-5, § 9, 86 Stat. 816, 899 (1972). See generally Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973). The proposal died after the executive persuasively objected that the jurisdiction of any specialized court should be broad enough to reduce special interest pressure on appointments, to avoid overfamiliarity with the issues and the litigants, and to keep prestige high. LAND AND NATURAL RESOURCES DIV., DEP'T OF JUSTICE, REPORT OF THE PRESIDENT, ACTING THROUGH THE ATTORNEY GENERAL, ON THE FEASIBILITY OF ESTABLISHING AN ENVIRONMENTAL COURT SYSTEM (1973) [hereinafter PRESIDENT'S REPORT]; see also Hines & Nathanson, *Preliminary Analysis of Environmental Court Proposal Suggested in the Federal Water Pollution Control Act Amendments of 1972*, reprinted in PRESIDENT'S REPORT app. C.

it is necessary to separate two important variables that the preceding discussion has mixed: specialization and independence. A court's jurisdiction can be narrow (Commerce Court), intermediate (CAFC), or broad (U.S. District Court). The tenure of its judges can be unprotected (the pleasure of the President), conditional (a statutory term with removal restrictions), or complete (life tenure). Independence is also a function of the organizational placement of adjudication within an agency or in a separate institution. Although Congress has reserved general federal jurisdiction to the constitutional judiciary, specialized functions of varying breadth have been conferred on adjudicators whose tenure and placement also varies. I now examine the relationship of varying degrees of independence to adjudicative behavior. That discussion grounds analysis in the following section of the role that Article III judges should play in overseeing their fellow adjudicators in order to assure the constitutionality of specialized courts that are not staffed by federal judges.

III. A COMPARISON OF FEDERAL ADJUDICATORS

Separation of powers analysis usually places particular officers "in" one branch of government or another according to statutory provisions controlling their appointment, responsibilities, salary, and removal, and associated doctrines concerning their amenability to supervision by other officers.⁸³ Hence, a statement that an adjudicator belongs with the core judiciary of Article III, the "legislative" courts of Article I, or the executive officers of Article II implies a set of preexisting conclusions about the particular attributes of the office in question.

Since federal adjudicators are all appointed by the President or by other executive officers, it is the other variables that determine degrees of independence. The Constitution's focus on life tenure and salary stability as attributes of federal judges suggests that the constitutional stature of other adjudicators depends mostly on their job security.⁸⁴

Certainly the relative security of adjudicators' tenure implies the independence of their judgment, at least when we consider broad differences in protection. A legislative judge with a fifteen-year term is obviously less vulnerable to outside pressure than a cabinet secretary serving at the pleasure of the President. Difficulty arises, however, in marginal comparisons, for example between long statutory terms and life tenure. Moreover, focusing on formal tenure may obscure the importance of actual practice. Expectations created when a class of adjudicators almost never suffers removal can furnish real independence of judgment. Constitutional distinctions among such similar categories seem evanescent.

Perhaps, then, we must retreat to pure formalism: the Constitution knows

⁸³P. SHANE & H. BRUFF, *THE LAW OF PRESIDENTIAL POWER*, ch. 4 (1988).

⁸⁴A cynic might note the obvious appeal to a law professor of any theory that links job prestige to tenure.

two categories, the life-tenured and everyone else, no matter the legal or practical protections available to the unanointed. If so, constitutional requisites for exercise of the judicial power will focus on the roles assigned federal judges and on their relationships with other adjudicators, without regard to particular characteristics of the latter. As we shall see, constitutional analysis has that characteristic. To aid prescriptive analysis, though, we need to survey the legal and practical tenure of adjudicators in the various branches of government, and the differences in behavior that follow differences in their assigned roles.

A. Federal Judges

Of course, all federal judges share the same tenure protections, and today no one doubts their independence.⁸⁵ I discuss them only to note some differences between district and circuit judges that bear on the assignment to them of administrative review responsibilities.

Single-judge district courts lack the collegial mechanisms by which the courts of appeals seek correct and consistent outcomes.⁸⁶ Multi-member panels dampen the idiosyncrasy or incompetence of a single judge. Thus, circuit judges have independence from other branches of government, but not decisional independence from one another. Joint decisionmaking benefits both from deliberative interchange and from the need to articulate a legally supportable reason for a decision. Indeed, Congress has sometimes reined in district judges in sensitive areas of public policy by forbidding issuance of injunctions or by requiring three-judge courts. Similarly, the fact that district judges handling constitutional litigation now exercise great (and controversial) power over public bodies, such as school boards and jails, does not necessarily commend the single-judge model for expanded use in major administrative controversies.⁸⁷

District court decentralization also hinders the formation of a relatively uniform body of law over a large territory.⁸⁸ A single judge's decision on an important point of law should not qualify as the "law of the circuit." Inconsistencies result, yet en banc procedures for the district courts remain at a distinctly experimental stage.⁸⁹ Hence, although fact-intensive administrative cases can appropriately be assigned to district judges, controversies raising broad issues of law or policy should go to the courts of appeals, where mechanisms to promote legal uniformity are more feasible.⁹⁰

⁸⁵The controversies early in our national life about impeaching judges on grounds other than commission of serious crimes were settled in favor of the judges. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 129-31 (2d ed. 1985).

⁸⁶Currie & Goodman, *supra* note 3, at 10-12.

⁸⁷For an overview and analysis of such litigation, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

⁸⁸Currie & Goodman, *supra* note 3, at 15-16.

⁸⁹Bartels, *United States District Courts En Banc—Resolving the Ambiguities*, 73 JUDICATURE 40 (1989).

⁹⁰See generally Bruff, *Coordinating Judicial Review in Administrative Law* (forthcoming, UCLA L. REV.).

The experience of circuit judges may make them better suited than district judges to exercise administrative review, because appellate judges always serve as restrained reviewers of decisions by others, not initial triers of fact. A district judge, possessed of tools for original fact-finding and accustomed to their use, may be reluctant to lay them aside. Still, district judges should be able to understand the dominant standard for judicial review of formal agency adjudication, the "substantial evidence" test, because the leading Supreme Court case explicitly analogized the reviewing court's role to that of a trial judge deciding what issues to leave with a jury.⁹¹

The courts of appeals follow procedures designed for resolution of issues of law.⁹² Their intellectual process is abstract. Their physical location, especially in the D.C. Circuit, is often remote from the impact of administration around the nation. With their high degree of insulation from political pressures, appellate judges may be tempted to cast themselves in the role of guardians of the public interest, against a tendency of bureaucrats to yield to powerful interests.⁹³ District judges, on the other hand, are fact-finders, given to specifics. They are dispersed around the nation, and have closer ties to their communities than do appellate judges. They see administration at the point of impact, and experience its factual context in their courtrooms. Small wonder, then, if there are often differences in perspective about government programs between trial and appellate judges. Most broadly, one might say that district judges are more isolated than circuit judges from the rest of their own branch, yet are less isolated from practical pressures flowing from the litigation they decide.

B. Legislative Judges

Outside the constitutional judiciary, judges of Article I legislative courts most closely approximate the formal independence of federal judges. Their statutory terms are the longest in government.⁹⁴ For example, Claims Court judges have fifteen-year terms, and are removable by the CAFC only for cause or disability.⁹⁵ Tax Court judges also serve for fifteen years, and are removable by the President only for cause.⁹⁶

Renewable terms risk executive influence on legislative courts, as judges curry favor in hopes of reappointment. For several reasons, though, this risk seems small. First, legislative courts have had low political profiles, so that the prospect of attracting presidential attention is reduced. To be sure, the executive agencies and interest groups that practice before these courts have incentives to monitor judicial performance and to lobby for or against

⁹¹Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (Frankfurter, J.).

⁹²Unless otherwise noted, this paragraph reports conclusions of R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT, ch. 10 (1983).

⁹³See Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

⁹⁴Except for the Comptroller General, who has a fifteen-year, nonrenewable term due to the sensitivity of the auditing function. 31 U.S.C. § 703(b) (1988).

⁹⁵28 U.S.C. §§ 172(a), 176 (1988). Removal is by a majority of the court, after a hearing.

⁹⁶26 U.S.C. § 7443(e), (f) (1988). Again, opportunity for a hearing is provided.

reappointment. To some extent, these influences counterbalance. Perhaps, then, reappointment opportunities serve mostly to dampen obvious bias by legislative judges, of a sort that would provoke someone's intense opposition to continuation. Second, as the foregoing analysis suggests, there has been a practice of nearly automatic reappointment to these courts.⁹⁷ Third, the statutory terms span enough of a person's career to diminish the lure of reappointment for all but the youngest appointees. Perhaps hope of promotion to an Article III court causes some judges on legislative courts to curry presidential favor, but judges on lower federal courts also feel the lure of ambition.

Fear of removal cannot cause many sleepless nights for any legislative judge who eschews conduct that would impeach a federal judge. Statutory removal restrictions remain undefined due to a void of litigated removals. And process protections flowing from statute or due process make it unlikely that the authority possessing removal power will think the battle worth the effort.⁹⁸ After all, the judge's tenure will eventually expire, even if the judge does not.

When we seek a truly independent adjudicator, institutional separation is nearly as important a tool as a tenure guarantee. Article I judges do reside in separate organizations from the agencies they review, but they remain less independent than are district judges. The vulnerability of specialized adjudication to perceptions of capture is partly due to the effects of a steady diet of subject matter and repeated advocacy from a single source. Thus, even formally separate institutions can come to share values, if the informal links between them are strong enough.

C. Administrative Adjudicators

There is a fundamental difference between agencies and Article I courts. The latter are true courts, in the sense that they do nothing but adjudicate.⁹⁹ They make policy only as all courts do, incidentally to the decision of cases. Agencies, on the other hand, use adjudication along with rulemaking and enforcement processes as tools for the articulation of policy as well as its application to particular parties.¹⁰⁰ This central and distinctive characteristic of the administrative process has led to some structural and legal accommodations that affect adjudicative independence. For agencies have legitimate interests in supervising the performance of their adjudicative processes in ways that might be inappropriate for Article I judges.

⁹⁷See H. DUBROFF, *supra* note 35, at 212 n.335 (since 1924, only three members of Tax Court and its predecessor have been denied reappointment).

⁹⁸See *Bowsher v. Synar*, 478 U.S. 714, 770 (1986) (White, J., dissenting).

⁹⁹Although some legislative courts have lost Article III status due to "administrative" responsibilities such as reporting claims recommendations to Congress, such functions are incidental to the main duties of these courts, and seem readily separable as well. See *supra* note 12.

¹⁰⁰This has long been clear. See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

Administrative law displays a basic ambivalence about adjudicative neutrality—the benefits of obtaining knowledgeable decisionmaking are gained at the risk of introducing unacceptable levels of bias or interest. This tension between expertise and bias has existed for centuries.¹⁰¹ Today's accommodation, which is basic to the legitimacy of administrative adjudication, is a set of statutory controls that somewhat resemble judicial structure and procedure.¹⁰² These are: organizational separation of investigative and adjudicative staffs below the level of the heads of an agency, the statutory guarantees of independence that administrative law judges (ALJs) enjoy, and the APA's adjudicative procedures, which are designed to balance informality and fairness.

The Supreme Court has upheld this general arrangement against due process attack.¹⁰³ The Court values the protections flowing from separation of functions and procedural guarantees;¹⁰⁴ it tolerates some loss of neutrality as the cost of obtaining the policymaking advantages of combined functions at the top of the agency.¹⁰⁵ Nevertheless, the Court has made it clear that a scheme's particular characteristics can present unacceptable dangers of bias or interest.¹⁰⁶

Congress has sometimes separated adjudicators entirely from the rest of an agency. This step is feasible for fact-intensive matters such as enforcement proceedings, where adjudication is not central to general policymaking. Moreover, enforcement presents especially sensitive concerns for the fairness of adjudication. This "split enforcement" pattern is prominent in the Department of Labor.¹⁰⁷ It brings charges against those who violate regulations issued under the Occupational Safety and Health Act of 1970

¹⁰¹See Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 34 (1926).

¹⁰²See Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1279 (1975) ("the further the tribunal is removed from . . . any suspicion of bias, the less may be the need for other procedural safeguards").

¹⁰³*Withrow v. Larkin*, 421 U.S. 35 (1975) (state board of medical examiners could both investigate and decide charges against a doctor).

¹⁰⁴See *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) (administrator acting as prosecutor could make preliminary assessment of civil penalties when administrative law judge adjudicated the penalties).

¹⁰⁵See *Friedman v. Rogers*, 440 U.S. 1, 18 (1979) (legislature can draw administrators from an organization sympathetic to the rules to be enforced); *Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482 (1976) (school board could both negotiate with teachers and discharge them for illegal strike after negotiations failed); *FTC v. Cement Institute*, 333 U.S. 683 (1948) (FTC Commissioners could both testify before Congress regarding the illegality of a practice and later adjudicate the matter).

¹⁰⁶For example, in *Gibson v. Berryhill*, 411 U.S. 564 (1973), the Court would not allow a licensing board drawn from one-half of a state's optometrists to decide whether the other half were engaged in unprofessional conduct. See also *Tumey v. Ohio*, 273 U.S. 510 (1927) (town mayor could not adjudicate where fines paid his salary); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (*Tumey* controlled where fines formed a substantial part of municipal revenues).

¹⁰⁷Other examples are National Transportation Safety Board adjudication of Federal Aviation Administration charges against pilots, 49 U.S.C. §§ 1422, 1429 (1988), and Merit Systems Protection Board adjudication of charges against federal employees. 5 U.S.C. § 1201 (1988).

and the Federal Mine Safety and Health Act of 1977 before special adjudicatory agencies.¹⁰⁸ After study, the Administrative Conference was unable to conclude whether split enforcement better promotes fairness than traditional agency structure.¹⁰⁹ Not surprisingly, there are signs of confusion over policymaking responsibilities.¹¹⁰ In short, split enforcement is not a cure-all for structural tensions in the administrative process.

The degree to which administrative procedure must mimic judicial norms is controlled by due process doctrine. The leading case is *Mathews v. Eldridge*,¹¹¹ which upheld the constitutionality of the SSA's procedures for adjudicating disability benefits. The Court called for a utilitarian calculus that weighs the individual's interest in the benefits, the government's interest in informality, and the accuracy of existing procedures.¹¹² *Eldridge* signaled the Court's awareness of the limits of judicial capacity to improve complex administrative schemes, especially through the imposition of procedures like those of common law courts.¹¹³ Most administrative adjudication is not very vulnerable to constitutional invalidation under the due process clause. Even though the *Eldridge* formulation is indeterminate in application and may be an inappropriate way to approach individual rights,¹¹⁴ it should suffice to ensure that adjudication is minimally fair.¹¹⁵

Within agencies, the trial judges usually have substantial guarantees of independence. This has not always been the case. Passage of the APA in 1946 was spurred partly by complaints that agencies used hearing examiners

¹⁰⁸Occupational Safety and Health Review Commission, 29 U.S.C. § 661 (1988); Federal Mine Safety and Health Review Commission, 30 U.S.C. § 823 (1988).

¹⁰⁹Recommendations of the Administrative Conference of the United States, Recommendation No. 86-4, 1 C.F.R. § 305.86-4 (1990); see Johnson, *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 1986 ACUS 293.

¹¹⁰See, e.g., *Dole v. Occupational Safety and Health Review Comm'n*, 891 F.2d 1495 (10th Cir. 1989), cert. granted, 110 S. Ct. 3235 (1990) (courts defer to Commission's interpretation of regulation rather than Secretary's).

¹¹¹424 U.S. 319 (1976).

¹¹²424 U.S. at 335. The Court thought that SSA procedures were adequately geared to the nature of the participants and issues involved in the program, and it emphasized the need to defer to legislative judgments about optimal procedure.

¹¹³See also *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). In the massive entitlements programs like SSA disability or VA benefits, the government's interest lies in minimizing the sum of process and error costs. The agency is best situated to balance these factors. Moreover, the nonadversary character of administrative hearings is closely related to the substantive goals of these programs, which are paternalistic. See *Walters*, 473 U.S. at 322-23. Administrative procedure is structured to favor the claimant, since the government is not formally represented, and new evidence factoring the claim can be introduced at any stage.

¹¹⁴See generally J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985).

¹¹⁵The evolution of administrative law protections for the fairness of adjudication may have helped persuade the Court that juries are not needed to check agency discretion. In *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), the Court held that the Seventh Amendment does not apply to the assessment of civil penalties in an administrative adjudication. See also *Tull v. United States*, 481 U.S. 412 (1987) (holding that the Seventh Amendment does apply to civil penalty actions brought in district court, and distinguishing *Atlas Roofing* as "holding that the Seventh Amendment is not applicable to administrative proceedings," 481 U.S. at 418 n.4).

who lacked objectivity because the agency controlled their tenure.¹¹⁶ The APA included basic "separation of functions" requirements, forbidding examiners to be supervised by investigative or prosecutorial personnel.¹¹⁷

The examiners' modern counterparts, administrative law judges, enjoy statutory tenure protections that justify their loftier title.¹¹⁸ Agencies select new ALJs from lists of qualified persons maintained by the Office of Personnel Management. OPM, not the employing agency, determines their pay and promotion.¹¹⁹ ALJs are assigned to cases in rotation and may not perform duties inconsistent with those of an ALJ.¹²⁰ They may be removed only for good cause, as determined by the Merit Systems Protection Board after a hearing.¹²¹ Not surprisingly, agencies that do not use ALJs to make initial decisions endure criticism regarding the fairness of their processes.¹²²

For many years, ALJs were in little danger of removal by disciplinary proceedings.¹²³ A recent, sharp upturn in the frequency of removal attempts, though, signals ALJs that their indefinite terms of office are not the practical equivalent of tenure until retirement.¹²⁴ Nevertheless, it seems to be generally understood that removal is not proper for reasons that threaten decisional independence of the ALJs, as opposed to misconduct, unethical behavior, or poor work habits (for example, low productivity).¹²⁵ Thus, even principles of decisional independence do not free ALJs from all types of administrative control by the agency that employs them.¹²⁶ Although the line between independence and administrative control is ultimately evanescent, working definitions often state that ALJs must follow law and policy

¹¹⁶Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. B. NEWS & J. 383 (1984); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478-79 (1951).

¹¹⁷5 U.S.C. § 554(d) (2) (1988). See generally Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981).

¹¹⁸See generally P. BURGER, JUDGES IN SEARCH OF A COURT: CHARACTERISTICS, FUNCTIONS, AND PERCEPTIONS OF FEDERAL ADMINISTRATIVE LAW JUDGES (1984); Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109 (1981); Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 377-80 (1986).

¹¹⁹5 U.S.C. § 5372 (1988).

¹²⁰5 U.S.C. § 3105 (1988); see *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 139-40 (1953) (approving a rotation scheme for examiners that reflected their ability to handle difficult cases).

¹²¹5 U.S.C. § 7521 (1988).

¹²²See Aman, *supra* note 61, at 587-92 (Department of Energy).

¹²³Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W. NEW ENG. L. REV. 807, 807 n.1 (1984) (four proceedings in thirty years).

¹²⁴See generally Rosenblum, *Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. NEW ENG. L. REV. 593 (1984).

¹²⁵*Id.*; Timony, *supra* note 123, at 822.

¹²⁶*Ramspeck v. Federal Trial Conf.*, 345 U.S. 128, 142 (1953) (ALJs "were not to be paid, promoted or discharged at the whim or caprice of the agency or for political reasons," but were subject to personnel practices including "reduction in force for lack of funds, . . . decrease of work, and similar reasons"). See also *Butz v. Economou*, 438 U.S. 478, 514 (1978) (referring to "the importance of preserving the independent judgment" of ALJs); 43 Op. Att'y Gen. No. 9 at 3 (1977) (APA provides "a certain degree of independence of status but not complete independence from administrative control.").

of the agency, and are free from interference only in their fact judgments in particular cases.¹²⁷

An illustration of the difficulty of defining the appropriate degree of independence for ALJs is provided by a controversy in the SSA's disability benefits program.¹²⁸ Turmoil followed SSA's initiation of case disposition goals for individual ALJs, along with a quality assurance program that identified ALJs whose decisions deviated markedly from the average reversal rate of initial benefits denials.¹²⁹ Pressure ensued to keep production up and allowance of claims down.¹³⁰ The controversy abated somewhat when SSA modified the program to review allowances at random.¹³¹ This episode gave monitoring an unnecessarily bad name because the executive oversight technique seemed designed to skew the outcome of pending adjudications regardless of their merits, thereby invading the realm of fact judgment that has usually been regarded as sacrosanct.

The SSA controversy reveals the enduring tensions that attend the incompleteness of separation of functions in the agencies.¹³² The ALJs are in, but not of, the agencies. Proposals currently circulate to form them into a separate corps, free of residual agency influence.¹³³ Yet the agencies do retain a legitimate interest in ALJ performance. If an ALJ systematically diverges from the agency's view of its statute or its policies on methods of fact determination, the agency bears a responsibility to try to avert the resulting inequality or illegality. The federal courts lack the perspective to monitor and correct systemic deficiencies in programs like disability benefits. The agency has the capacity to gather the necessary information and to send signals that

¹²⁷Rosenblum, *supra* note 124, at 617. See *Heckler v. Campbell*, 461 U.S. 458 (1983) (upholding particular HHS instructions to ALJs). See also Recommendations of the Administrative Conference of the United States, Recommendation No. 78-2, 1 C.F.R. § 305.78-2 (1990) ("[m]aintaining the administrative law judges' decisional independence does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies"); M. RUHLEN, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* 79 (rev. ed. 1982) ("[i]t is the Judge's duty to decide all cases in accordance with agency policy").

¹²⁸See generally Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 B.Y.U. L. REV. 461, 476-502. See also *Nash v. Bowen*, 869 F.2d 675 (2d Cir. 1989); *W.C. v. Bowen*, 807 F.2d 1502 (9th Cir. 1987).

¹²⁹See generally Note, *Preserving the Judicial Independence of Federal Administrative Law Judges: Are Existing Protections Sufficient?*, 4 J. LAW & POL. 207, 217-22 (1987); Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591 (1986).

¹³⁰SUBCOMM. ON OVERSIGHT OF GOV'T MANAGEMENT OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, 98th Cong., 1st Sess., *THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM* 36 (Comm. print 1983).

¹³¹Association of Admin. Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984).

¹³²See J. MASHAW, *supra* note 76, at 41-44. Professor Asimow, *supra* note 117, at 759 n.1, notes that in 1941 Professor Nathanson could refer to separation of functions controversy as a "hardy perennial." By now, it is an oak.

¹³³See generally Symposium, *Administrative Law Judges*, 6 W. NEW ENG. L. REV. 587 (1984); Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266 (1981).

will register, both through general policymaking and through managerial monitoring.

An agency's final decision is often vested in its head officers.¹³⁴ At this level, sharp differences in formal tenure appear. Members of the independent regulatory agencies serve substantial terms (shorter, though, than Article I judges) and are usually removable by the President only for cause.¹³⁵ Presidents rarely remove these commissioners,¹³⁶ although a whiff of scandal and a threat of removal force an occasional resignation. Three potent factors deter active presidential supervision and removal. First, the Supreme Court has made broad statements supporting the independence of these officers from presidential supervision.¹³⁷ Second, Congress is quite jealous of its hegemony over the independent agencies, and can be expected to react strongly to any executive poaching.¹³⁸ Third, removal of an officer who adjudicates can offend due process and statutory restrictions on outside interference with decisions in particular cases.¹³⁹

Cabinet officers, who sometimes finally decide adjudicative matters,¹⁴⁰ serve at the pleasure of the President. Nevertheless, as a consequence of the third factor above, it is generally understood that presidential supervision of execution should steer clear of interference in adjudications, no matter who performs them.¹⁴¹ Nor is presidential interest in and dislike of a particular decision likely to rise to the point of firing a subordinate whose performance is otherwise satisfactory. Indeed, cabinet officers having adjudicative responsibilities often find it wise to delegate them to less politically involved subordinates,¹⁴² thereby divesting themselves of control over

¹³⁴Above the ALJs, some agencies have intermediate appellate review boards. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U.L. REV. 1 (1986); Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969).

¹³⁵*E.g.*, 15 U.S.C. § 41 (1988) (Federal Trade Commissioner serves seven years and is removable by President only for "inefficiency, neglect of duty, or malfeasance in office"). The constitutionality of this provision, on which many later ones are based, was upheld by the Supreme Court in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

¹³⁶For an exception, see *Berry v. Reagan*, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C.), *vacated as moot*, 732 F.2d 949 (D.C. Cir. 1983).

¹³⁷*Humphrey's Executor*, 295 U.S. at 628-30. See Scalia, *Historical Anomalies in Administrative Law*, SUPREME COURT HISTORICAL SOCIETY YEARBOOK 1985, at 110 (remarking that the case "continues to induce the Executive to leave the policy control of the independent agencies to congressional committees, and fastidiously to avoid any appearances of influence in those entities").

¹³⁸For an example of congressional attitudes about agency independence, see SENATE COMM. ON GOVERNMENTAL AFFAIRS, 5 STUDY ON FEDERAL REGULATION, REGULATORY ORGANIZATION, S. DOC. NO. 91, 95th Cong., 2nd Sess. (1977).

¹³⁹See *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966) (condemning congressional pressure on a pending adjudication); 5 U.S.C. § 557(d) (1988).

¹⁴⁰*E.g.*, *United States v. Morgan*, 313 U.S. 409 (1941) (Secretary of Agriculture).

¹⁴¹ABA COMMISSION ON LAW & THE ECONOMY, *FEDERAL REGULATION: ROADS TO REFORM 79-84* (1979) (recommending presidential authority to intervene in agency decisions except for adjudications).

¹⁴²For example, the Environmental Protection Agency has a judicial officer. See generally, *Hercules Inc. v. EPA*, 598 F.2d 91, 119-28 (D.C. Cir. 1978).

the decisions unless and until the delegation is rescinded.¹⁴³ Unlike ALJs, these officers may enjoy no formal tenure protections,¹⁴⁴ but there is often de facto job security.¹⁴⁵

Thus, all of our nonconstitutional judges can decide cases without serious fear of removal for a particular decision. Perhaps, though, the Article I officers derive somewhat greater independence than ALJs or independent agency commissioners enjoy, due to the longer assured term or the title of judge.

Still, there is a basic difference in the vulnerability of decisions of adjudicators to reversal by higher authority. The courts of appeals review findings of Article I judges as they do those of district judges, under the "clearly erroneous" standard.¹⁴⁶ In administrative law, officers reviewing ALJ findings are not constrained by any deferential standard. Instead, courts review the *agency's* final decision for substantial evidence on the whole record, and grant the ALJ's contribution only "such probative force as it intrinsically commands."¹⁴⁷ The substantial evidence and clearly erroneous tests are approximately equivalent; if anything, courts are supposed to defer somewhat more to agencies than to district judges.¹⁴⁸ Hence, it is the *agency's* final deciders and not its ALJs whose decisions are difficult to displace.

Some differences in behavior between Article I trial judges and ALJs stem from differences in their assigned roles. Although the common law trial model probably fits Article I judges about as well as it does district judges, ALJs often depart from the norms of the adversary system. First, in their traditional service in economic regulation, ALJs have freely articulated policy proposals for agency consideration. Second, their role has evolved substantially:

[I]t is inescapable that the administrative law judge in today's Federal Government has become less an organizer and initial decider of regulatory policy issues and more the (often-final) dispenser of disability benefits or arbiter of civil money penalties—cases where factfinding, demeanor evidence, fairness and speed are hallmarks, and policy issues absent or submerged.¹⁴⁹

Moreover, this more usual modern service in fact-intensive adjudication is often defined nonadversarially. In the mass benefits programs such as SSA disability, the government is not formally represented and the ALJs are

¹⁴³United States v. Nixon, 418 U.S. 683 (1974).

¹⁴⁴See, e.g., Kalaris v. Donovan, 697 F.2d 376 (D.C. Cir. 1983) (members of Department of Labor's Benefits Review Board lack protected tenure).

¹⁴⁵See Koch & Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U.L. REV. 199, 269 (1990).

¹⁴⁶FED. R. CIV. P. 52(a). 26 U.S.C. § 7482(a) (1) (1988) requires the courts of appeals to review Tax Court decisions in the "same manner" as those of district courts.

¹⁴⁷Universal Camera Corp. v. NLRB, 340 U.S. 474, 495 (1951).

¹⁴⁸Ethyl Corp. v. EPA, 541 F.2d 1, 34 n.74 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976).

¹⁴⁹Lubbers, *supra* note 116, at 385. See also Pops, *Judicialization of Federal Administrative Law Judges: Implications for Policymaking*, 81 W. VA. L. REV. 169 (1979).

charged with an active role in developing the claimant's case.¹⁵⁰ The Supreme Court, upholding the constitutionality of a statutory provision that effectively excluded lawyers from the Veterans Administration claims process, stressed the nonadversarial, inquisitorial, and paternalistic aspects of the program, which the introduction of lawyers might disrupt.¹⁵¹

Even when Article I judges and ALJs have superficially similar responsibilities, there may be real behavioral differences. Agencies make policy not only through substantive regulations that have the force of law, but also through interpretive regulations and other informal policy statements that have an uncertain capacity to bind adjudicators.¹⁵² It may be that ALJs treat the interpretive and informal policies of their employing agency with more deference than an Article I judge would accord to the policy of a formally separate agency. For example, IRS interpretive regulations probably receive more independent scrutiny in the Tax Court than do similar SSA policy statements before their ALJs.

More generally, those who work within an agency are subject to a multitude of open or subtle socializing pressures that do not reach a separate institution.¹⁵³ For example, an increase or decrease in the staff assigned to a task may signal its importance to agency personnel, or headquarters may grumble about the number of claims being honored. These pressures may be more important than formally stated policy, but they may be very difficult to detect and monitor from the outside. This does not mean that they are necessarily pernicious—for example, a tradition of devotion to high quality public service is to be hoped, if not expected, of every agency.

Overall, the job security of federal adjudicators correlates with their independence from the policy preferences of agencies. Federal judges rank the highest in both variables; legislative judges, in the middle; agency adjudicators, the lowest. Although these were mostly variations in degree, they are worth considering when designing institutions. Before proceeding to some recommendations for that task, I pause to review some governing constitutional considerations.

IV. NOTES ON CONSTITUTIONAL ARCHITECTURE¹⁵⁴

Everyone agrees that congressional power to allocate adjudicative functions among legislative courts, administrative agencies, and constitutional

¹⁵⁰See, e.g., *Heckler v. Campbell*, 461 U.S. 458, 470–76 (1983) (Brennan, J., concurring and Marshall, J., concurring) (complaining about sufficiency of ALJ's discharge of "duty of inquiry").

¹⁵¹*Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

¹⁵²*Chrysler Corp. v. Brown*, 441 U.S. 281, 301–03 (1979) (explaining the difference between substantive and interpretive regulations, and declining to defer to the latter). See also *American Bus Ass'n v. United States*, 627 F.2d 525 (D.C. Cir. 1980) (delineating the murky boundary between these categories of regulation); Koch, *Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy*, 64 GEO. L.J. 1047 (1976).

¹⁵³See J. MASHAW, *supra* note 76, ch. 7; Koch & Koplow, *supra* note 145, at 239.

¹⁵⁴The title of this section is a bow to a fine article by the late Paul Bator. Bator, *The*

courts is broad. No clear limits have emerged; the Supreme Court cases are notoriously obscure. This is not the place to grapple with the tar baby, but it is necessary to outline some fundamentals about the use of specialized courts.

A dilemma confounds the constitutional analysis. Separation of powers principles suggest that some "inherent" or "core" functions may not be taken from the constitutional courts. Identifying these, however, is no easy matter. For we cannot simply require that all adjudicative functions be placed in the federal courts and not elsewhere.¹⁵⁵ Many adjudicative activities are "executive" in the sense that they may or must be placed in that branch.¹⁵⁶ For example, the first Congress enacted statutes vesting determinations of veterans' benefits and customs duties in executive officers.¹⁵⁷ Thus, adjudication has been both a judicial and an executive function from the outset.¹⁵⁸

To further complicate matters, a theory of legislative courts arose in *American Insurance Co. v. Canter*.¹⁵⁹ Chief Justice Marshall held that the creation

Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 IND. L.J. 233 (1990). The article appears in *Symposium, Paul Bator: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. Number 2 (1990). See also Fallon, *Of Legislative Courts' Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); Sager, *The Supreme Court, 1980 Term: Foreword—Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

¹⁵⁵The Court has inadvertently demonstrated why a simple formalist distinction will not suffice for separation of powers purposes, by remarking that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Yet this definition also describes much of what the federal courts do. See *INS v. Chadha*, 462 U.S. 919, 963-67 (1983) (Powell, J., concurring) (characterizing congressional supervision of agency action performed by adjudication as unconstitutional intervention in a judicial function); *Bowsher*, 478 U.S. at 748-53 (Stevens, J., concurring).

¹⁵⁶Bator, *supra* note 154, at 263-65. Examples include many of the President's exercises of law-applying judgment pursuant to statutes or the Constitution. See Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 17-18 (1982). True, most adjudication that occurs in administrative agencies and legislative courts could be assigned to the federal courts under the federal question jurisdiction. To do so, however, could create a vastly bloated judiciary and an equally shrunken executive.

¹⁵⁷Fallon, *supra* note 154, at 919. Perhaps Congress thought that these claims against the government were otherwise barred by sovereign immunity, and were therefore fit for executive determination. The common law doctrine of sovereign immunity was not clearly received into our law until the nineteenth century, however. See P. SHANE & H. BRUFF, *supra* note 83, at 43.

¹⁵⁸The Court understood this. In *Murray's Lessee v. Hoboken Land Improvement Co.*, 59 U.S. (18 How.) 272 (1855), the Court considered the validity of a warrant issued by a Treasury officer who had made adjudicative determinations: "That [setting the amount of a duty] may be, in an enlarged sense, a judicial act, must be admitted. . . . In this sense the act of the President in calling out the militia under [a statute], or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial." *Id.* at 274. Perhaps perceiving—and wishing to obscure—this point, the Supreme Court soon approved the placement of various adjudicative functions in the executive by labelling them "executive" or "administrative." Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 795-98 (1986). For example, the Court upheld the Secretary of the Navy's denial of death benefits to the widow of Admiral Decatur. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840).

¹⁵⁹26 U.S. (1 Pet.) 511, 546 (1828).

of Florida's territorial court, whose judges had four-year terms, was a valid exercise of the legislative powers of Congress, and was therefore freed of Article III requirements. Marshall's sweeping rationale has suffered withering criticism.¹⁶⁰ No matter, Marshall's basic notion that Congress could rely on its Article I powers to create adjudicative bodies has endured. Indeed, it is easy to see why some place for legislative courts would be found in the Constitution, and equally easy to see why setting limits would prove vexing. By the time *Canter* was decided, overlap between judicial and executive functions was already visible. If executive bodies having few or none of the traditional tenure and process safeguards of the courts could adjudicate, why not bodies having *some* of those safeguards? Moreover, the diversity of the functions entrusted to government suggests a need for flexible institutional structure.¹⁶¹

Yet once these general concessions are made, it becomes very hard to know where to stop.¹⁶² All federal statutes must rest on a grant of power somewhere in Article I—may all implementation of these powers therefore be committed to Article I courts? And at what point does the formation of legislative courts intrude not on judicial but on executive authority, by infringing the President's power to supervise execution?¹⁶³

The Supreme Court's traditional formulation of the limit to congressional power is the doctrine that "public rights" can be decided outside constitutional courts.¹⁶⁴ In practice, the doctrine has involved more labeling than

¹⁶⁰C. WRIGHT, *THE LAW OF FEDERAL COURTS* 41-42 (4th ed. 1983); M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 36-39 (1980).

¹⁶¹For example, courts-martial, traditionally viewed as legislative courts, see *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955), reflect both special characteristics of the military and special constitutional considerations flowing from the President's role as Commander-in-Chief.

¹⁶²A modern case that exemplifies the persisting confusion is *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). The Court held that the Court of Claims and the Court of Customs and Patent Appeals, which had previously been held to be legislative courts, *Williams v. United States*, 289 U.S. 553 (1933); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), were Article III courts. But no majority could be mustered for a rationale. Three justices thought that they had always been constitutional courts; two, that they had been so since Congress had so designated them; two, that they remained legislative courts. Justice Harlan's plurality opinion suggested that Congress might need special justification to create legislative courts, "when the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlling," 370 U.S. at 548, yet assumed that no "inherently" judicial business was involved in this case. *Id.* at 549.

¹⁶³Consider the independent agencies, which are sometimes characterized as legislative courts as though that diminishes concern for their legitimacy. Sommer, *Independent Agencies as Article One Tribunals: Foundations of a Theory of Agency Independence*, 39 ADMIN. L. REV. 83, 94-100 (1987).

¹⁶⁴It originated in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), which upheld a summary procedure for the government to recoup its funds from its customs collectors. After opining that Congress could not withdraw from the courts any "matter which, from its nature" is judicial, the Court noted that: "At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.* at 284. The Court's opacity probably

analysis, but at least it has sanctioned the creation of the administrative state.¹⁶⁵ *Crowell v. Benson*¹⁶⁶ established the modern theoretical foundation for delegating adjudicative power to administrative agencies.¹⁶⁷ The Court rejected a due process assault on administrative factfinding, because the courts were allowed to decide issues of law on judicial review (including the presence of substantial evidence for the agency's findings).¹⁶⁸ The basic strategy of *Crowell*, then, was to allow administrative adjudication as long as vital judicial controls were present.¹⁶⁹ Congress was free to allocate initial authority to tribunals that might be temporary, specialized, and informal, without staffing them with federal judges, as long as appropriate appellate jurisdiction remained in the federal courts.¹⁷⁰

Crowell's theoretical compromise still holds sway, although the Court has struggled in recent years to find the limits of congressional power to convert traditional judicial functions into public rights to be adjudicated by agencies or legislative courts.¹⁷¹ In *Commodity Futures Trading Com'n v. Schor*,¹⁷² the Court allowed agency adjudicators to entertain state law counterclaims in reparation proceedings, in which disgruntled customers seek redress for brokers' violations of statutes or regulations. Justice O'Connor's majority opinion asked whether the new forum exercised the "range of jurisdiction and powers normally vested only in Article III courts," and whether the latter retained the "essential attributes of judicial power."¹⁷³ Only the jurisdiction over counterclaims differed from the usual agency model.¹⁷⁴ Thus, *Schor* suggests that agencies may resolve even a traditional state-law claim

stemmed from its recognition of the overlap of judicial and executive functions, which it drew from Marshall's earlier insight. *Id.* at 280.

¹⁶⁵Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 630-32 (1984); Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 468-77 (1989).

¹⁶⁶285 U.S. 22 (1932).

¹⁶⁷Congress had created a worker's compensation scheme for longshoremen. An agency was authorized to decide claims under formal adjudicative procedures resembling those later codified in the APA (an examiner was to conduct evidentiary hearings on a record). *Id.* at 47-48.

¹⁶⁸The Court held, however, that courts must perform independent review of issues of constitutional or jurisdictional fact going to the power of the agency in the premises, such as whether an accident had occurred on the navigable waters. *Id.* at 63-64. The doctrines of constitutional and jurisdictional fact have since fallen into desuetude. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 249-50 (1985).

¹⁶⁹See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372-85 (1953).

¹⁷⁰Bator, *supra* note 154, at 266-68.

¹⁷¹See sources cited *supra* notes 154 & 165; see also Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197.

¹⁷²478 U.S. 833 (1986).

¹⁷³*Id.* at 851. Justices Brennan and Marshall, dissenting, argued that the majority was allowing the undue dilution of judicial authority in service of legislative convenience. *Id.* at 863-65.

¹⁷⁴The CFTC's jurisdiction was specialized; its enforcement powers were limited; its orders received normal judicial review. The Court saw no reason to deny agencies all pendent jurisdiction. *Id.* at 852-57.

that is closely related to a federal issue within their jurisdiction.¹⁷⁵

There are several justifications for placing adjudicative functions in the executive. First, like common law courts, agencies use adjudication to form policy.¹⁷⁶ Therefore, the Court's doctrine of deference to an agency's judgments of law and policy extends to the adjudicative context.¹⁷⁷ Nevertheless, the policymaking component of agency adjudication varies across a wide spectrum. For example, compare the frank policy orientation of the Federal Communications Commission's hearings on renewal of broadcast licenses¹⁷⁸ with the narrow factual focus of a Social Security Administration determination of an individual's disability.¹⁷⁹

When adjudication focuses on application of a known legal criterion to disputed facts,¹⁸⁰ the justification for transferring it out of federal court does not evaporate. A traditional justification for creating agencies has been to obtain speedy and informal adjudication. Congressional judgments about the appropriateness of administrative rather than judicial process have long been entitled to judicial weight.¹⁸¹ Moreover, shunting fact-intensive adjudications to agencies or to legislative courts can leave the federal courts free for their central responsibilities of interpreting the Constitution and statutes.

Agencies and Article I courts decide issues of constitutionality, law, and fact. Of course, these categories blur at the margin, but they aid analysis.¹⁸² Which of these issues must an Article III court review, and with what intensity?¹⁸³ The Supreme Court has never decided whether the due process clause allows Congress to preclude review of an administrative decision com-

¹⁷⁵In *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989), the Court held that a person who had not submitted a claim against a bankruptcy estate had a right to a jury trial when sued by the bankruptcy trustee to recover an allegedly fraudulent money transfer. Justice Brennan's majority opinion stressed that "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." *Id.* at 2797. The trustee's claim was not intertwined with a regulatory program as were those in *Schor*; it asserted a "private right." Justice Scalia, concurring, argued that public rights were based on sovereign immunity and were therefore restricted to claims by or against the government. Dissenting opinions by Justices White, Blackmun, and O'Connor feared a retreat from *Atlas Roofing* and *Schor*, and thought that juries were out of place in the integrated scheme of bankruptcy law.

¹⁷⁶*See, e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

¹⁷⁷*E.g.*, *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

¹⁷⁸*See generally* Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169 (1978).

¹⁷⁹*E.g.*, *Heckler v. Campbell*, 461 U.S. 458 (1983).

¹⁸⁰For a helpful summary of administrative law distinctions between issues of fact and law, see *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590-91 (2d Cir. 1961) (Friendly, J.).

¹⁸¹*E.g.*, *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

¹⁸²*See* Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 9-14 (1985).

¹⁸³*Crowell* contemplated judicial review of all three, with independent judgment or the limited deference that characterizes substantial evidence review of fact issues. Yet we must accommodate both subsequent doctrinal developments and a competing tradition that expected little or no judicial review of public rights cases. For the latter, see Strauss, *supra* note 165, at 632: "[T]he whole point of the 'public rights' analysis" has often been that "no judicial involvement at all was required—executive determination alone would suffice."

pletely.¹⁸⁴ To avoid reaching this troubling separation of powers issue, courts often read statutes that appear to preclude all review to permit at least constitutional inquiries.¹⁸⁵

In administrative law, statutes usually authorize rather than forbid judicial review. Even when review is authorized, however, courts decline to review some executive functions, including some adjudicative ones.¹⁸⁶ Broad statements about the necessity for preserving judicial review of administrative action must be qualified by recognition that not all executive activity is suitable for review.¹⁸⁷ The Court has emphasized, however, that nonreviewability is "a very narrow exception," applicable only when "statutes are drawn in such broad terms that . . . there is no law to apply."¹⁸⁸ Nonreviewable functions often feature broad agency discretion, needs for expertise, informality, and expedition, a large volume of potentially appealable actions, and the presence of other methods of preventing abuses of discretion.¹⁸⁹ To the extent that an administrative program possesses these characteristics, courts are likely to honor statutory limits on review even if they would not invoke nonreviewability doctrine on their own.

Congress should not restrict federal court review of constitutional issues.¹⁹⁰ Tenure and salary protections for federal judges were meant to insulate them from pressure emanating from Congress and the executive. They are ideally situated to check aggrandizement by either of the political branches,¹⁹¹ and to protect individual rights. And surely there is no better use for their limited time than resolution of these issues.

Judicial review of statutory issues should also be preserved.¹⁹² As with constitutional questions, the law-declaring role of a generalist and independent judiciary is paramount. Administrative law contains numerous safeguards against capture of agencies by interest groups; judicial review of questions of law is one of the most important.¹⁹³ Moreover, agencies have significant incentives to aggrandize their own power through aggressive

¹⁸⁴Sager, *supra* note 154.

¹⁸⁵*E.g.*, Johnson v. Robinson, 415 U.S. 361 (1974); Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir.), *reinstated and motion for rehearing en banc denied*, 824 F.2d 1240 (1987) (limitation on judicial review in Medicare Act does not apply to constitutional challenges to Act).

¹⁸⁶*E.g.*, Heckler v. Chaney, 470 U.S. 821 (1985).

¹⁸⁷Indeed, the public rights doctrine arose in an era of quite limited review of executive action. Young, *supra* note 158, at 795-804.

¹⁸⁸Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (quoting the APA's legislative history, S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945)).

¹⁸⁹See generally Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

¹⁹⁰Fallon, *supra* note 154, at 975-76.

¹⁹¹Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 517-26 (1987); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 448-50, 467-68 (1987).

¹⁹²Fallon, *supra* note 154, at 976-82.

¹⁹³See Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207 (1984).

statutory interpretation.¹⁹⁴ Fortunately, outright congressional preclusion of review is rare;¹⁹⁵ it is also unnecessary. Judicial review of an agency's statutory interpretations can be deferential enough to avoid unwarranted interference with administrative discretion.¹⁹⁶

It is enough for constitutional courts to scrutinize the legality of generally applicable administrative policies, procedures, and regulations, without delving into their application to particular facts.¹⁹⁷ Here we depart from *Crowell*, but codify existing judicial tendencies to reach issues that concern the overall structure and validity of a statutory scheme, but to honor preclusions of fact review.¹⁹⁸ Thus, the Supreme Court reviewed a scheme for arbitration of certain Medicare claims, and decided that it comported with due process.¹⁹⁹ A companion case, *United States v. Erika, Inc.*,²⁰⁰ found that no judicial review of particular awards was authorized. The Court noted that the preclusion did not extend to initial determinations of entitlement to participate in the Medicare program, but only to the processing of individual claims. So limited, the preclusion prevented "the overloading of the courts with trivial matters."²⁰¹ The Court subsequently held that the preclusion did not extend to statutory issues concerning the overall method by which claims are to be computed, as opposed to particular determinations under the general criteria.²⁰²

There are two principal reasons for restricting judicial review of facts. First, "retail" review of fact determinations in particular cases can absorb vastly more judicial resources than "wholesale" review of overall policy and procedure. Yet if individual rights must suffer, we should be most reluctant

¹⁹⁴ Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 552-54 (1989); Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 371 (1986).

¹⁹⁵ A prominent historical example, actions of the Veterans Administration, has been eliminated by legislation that I discuss *infra* part V.A. See generally Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1975).

¹⁹⁶ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); see generally Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?* 7 YALE J. ON REG. 1 (1990).

¹⁹⁷ Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 HARV. L. REV. 778, 792-93 (1984) (reporting that the courts have so behaved).

¹⁹⁸ E.g., *Lindahl v. Office of Personnel Management*, 470 U.S. 768 (1985). The Court interpreted a broad preclusion provision of the Civil Service Retirement Act, 5 U.S.C. § 8347(c), to allow review of procedural irregularity, statutory misconstruction, or other error "going to the heart of the administrative determination," but not fact review. 470 U.S. at 779-81.

¹⁹⁹ *Schweiker v. McClure*, 456 U.S. 188 (1982).

²⁰⁰ 456 U.S. 201 (1982).

²⁰¹ *Id.* at 210 n.13 (quoting the legislative history). The Court did not, however, reach issues concerning any constitutional right to review. *Id.* at 211 n.14.

²⁰² *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). See also *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991).

to invoke this ground alone.²⁰³ Here we must realize that “minor” administrative cases often receive only summary review in federal court, whatever their importance to affected individuals.²⁰⁴ Thus, raw statistics on review caseloads can overstate both the actual burden on the courts and the contribution of the constitutional judiciary to review efforts.²⁰⁵

Second, stopping fact review short of federal court may actually improve the fairness and consistency of factfinding in some administrative programs. The SSA’s disability benefits adjudications provide a prominent example. Internal SSA mechanisms are better able to promote fairness and consistency of outcome than are decentralized district courts reviewing episodically.²⁰⁶ The agency’s internal Appeals Council, which reviews ALJ decisions, has the potential to monitor adjudications systematically and to translate needed correctives into binding policy.²⁰⁷

This does not mean, however, that agency factfinding should be final. Legislative courts may provide acceptable substitutes for the constitutional courts, bearing institutional benefits for both the agencies they review and the courts they partially displace. I turn to that prospect.

V. A LEGISLATIVE COURT FOR INITIAL REVIEW OF SELECTED AGENCY PROGRAMS

A brief review of my major conclusions so far may aid consideration of the specific recommendations to follow. Part I described the benefits of specialized adjudication as caseload relief for other courts, expert and efficient case disposition, institutional flexibility, and promotion of a uniform body of law. The costs were lower prestige, distortion of the appointments process, and loss of appropriate perspective on administrative problems.

Part II concluded that the history of these courts showed needs for jurisdictional clarity, exposure to both sides of controversies, comprehensive control of subject matter, attention to the respective contributions of specialists and generalists in any mixed scheme, allocation of review functions to trial or appellate courts according to their abilities, and the need to avoid narrow specialization, with its dangers of capture.

Part III portrayed the decisional independence of legislative judges as more resembling that of federal judges than that of agency adjudicators. Key to this conclusion was the institutional separation that legislative courts

²⁰³See Strauss, *Article III Courts and the Constitutional Structure*, 65 IND. L.J. 307, 309 (1990) (“Why isn’t the impartial decision of specific cases the essence of the judicial function?”).

²⁰⁴See Koch & Koplow, *supra* note 145, at 225 n.142 (SSA disability cases in district courts routinely sent to magistrates for recommended decision).

²⁰⁵See Flanders, *What Do the Federal Courts Do? A Research Note*, 5 REV. OF LITIGATION 199, 206 (1986) (SSA disability cases 15% to 20% of federal court filings, but perhaps only 2% of actual workload).

²⁰⁶J. MASHAW, *supra* note 76, at 187–93, 213–14, 222–23.

²⁰⁷Koch & Koplow, *supra* note 145, at 264, 302, 305. The Administrative Conference has recommended restructuring the Appeals Council to reduce its currently overwhelming caseload and to focus its attention on systemic improvements. 1 C.F.R. § 305.87–7 (1990).

have from those they review, as contrasted with the compromised neutrality that attends combination of functions in agencies.

Part IV concluded that federal courts should retain their ultimate power to declare the law, but that legislative courts could better perform some initial review functions. Specialized review offered special potential for more thorough fact review, gathered in one institution for improved consistency.

From all of this no panacea emerges, for specialization is always a matter of tradeoffs. Yet there is an institutional structure that does appear to capture most of the benefits of specialization, while minimizing its costs. That structure employs a semi-specialized legislative court sitting nationwide to review both high-volume, fact-intensive agency adjudications, and some other programs that especially need specialization. From that court appeals would flow to the CAFC, itself a semi-specialized court that can provide informed review and that can articulate uniform national law.

Obviously, such a structure could not concentrate all review in a single administrative court; nor should we attempt to do so.²⁰⁸ Instead, the point is to be selective, picking programs that most need institutional change and that can most benefit from the attributes of this particular scheme. Certainly, reasonable minds could differ on the particular mix of jurisdiction to assign the new court. I offer general criteria for programs to be included, and some specific nominees. The point of beginning is a unique structure that Congress recently created for review of veterans' benefits determinations by legislative and constitutional courts. This could form the core of a more generalized institution for other federal programs as well.

A. The Court of Veterans Appeals

In 1988, Congress ended its longstanding preclusion of judicial review of veterans' claims decisions²⁰⁹ and created the Court of Veterans Appeals (CVA), a legislative court with exclusive initial review jurisdiction over issues of law, fact, and constitutionality arising under laws administered by the Department of Veterans' Affairs (VA).²¹⁰ The President appoints its seven judges for fifteen-year terms, and may remove them only for cause. The court may sit nationwide.²¹¹ Although only veterans and not the VA may invoke the court's jurisdiction, the VA does appear through its General

²⁰⁸For discussion of the disadvantages of a single administrative court (principally large size and inconvenience), see Bruff, *supra* note 90.

²⁰⁹See generally Rabin, *supra* note 195.

²¹⁰Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105. See generally H.R. REP. NO. 963, 100th Cong., 2d Sess., pt. 1 (1988); Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings*, 41 ADMIN. L. REV. 365 (1989).

²¹¹Congress gave the new court discretion to sit by single judges or in panels, and to decide the extent to which it will hear cases outside Washington, D.C. 38 U.S.C. §§ 4054(b), 4055, 4056 (1988).

Counsel.²¹² Review is on the administrative record, and the court may set aside VA fact determinations that are “clearly erroneous.”²¹³ This test was used in place of the more familiar “substantial evidence” or “arbitrary and capricious” formulas in order to allow intensified fact review.²¹⁴

Either a veteran or the agency may appeal to the CAFC, which may consider issues concerning the validity of statutes, regulations, and policies, but not errors of fact.²¹⁵ Some jurisdictional litigation is sure to flow from this restriction. Where the law-fact distinction is cloudy, the legislative history stresses the difference between decisions of general importance and those limited to the correctness of a particular award.²¹⁶ From the CAFC, review may be sought in the Supreme Court.

Obviously, the unique politics of veterans' claims infuse this delicate scheme. With one hand, Congress gave veterans—but not the agency—a right to appeal to a new forum having exceptional power to overturn agency fact judgments. With the other hand, Congress made the legislative court's fact determinations safe from further review in federal court. Only the latter feature is suited to wider use, however. An agency as well as an affected individual should have appeal rights to a legislative court, to show the court the full range of controversies the agency decides. Also, the court should perform ordinary fact review for substantial evidence. True, the purpose of vesting this review in a legislative court is to allow more thorough inspection of the administrative record than federal district judges can provide. But that does not mean that the ultimate standard of review should be altered from one that has proved itself in administrative law to another that is geared to relationships between federal district and circuit judges.

In its other features, the scheme correctly follows principles of comparative institutional competence. It recognizes that constitutional decisions need the full independence of viewpoint that Article III courts possess. True, agencies should consider the constitutionality of their programs and procedures insofar as their statutes allow change to meet constitutional objections.²¹⁷ But neither they nor legislative courts possess the attributes for final decision of these issues. Legislative courts such as the CVA stand in a closer relation to the agencies they review than do Article III courts. This produces

²¹²Although the new court's caseload is not yet clear, estimates can be made by comparing appeals rates in somewhat similar SSA disability cases. The SSA's Appeals Council, like the Board of Veterans' Appeals in the VA, decides about 44,000 cases per year, from which over 13,000 appeals flowed in one recent year. See *Judicial Review of Veterans' Affairs, Hearing Before the House Comm. on Veterans' Affairs* [hereinafter *Hearing: Judicial Review*], 100th Cong., 2d Sess. 259–66 (statement of Paul R. Verkuil) (Ser. 100–60, Sept. 8, 1988).

²¹³38 U.S.C. § 4061(a) (4) (1988).

²¹⁴Stichman, *supra* note 210, at 377.

²¹⁵38 U.S.C. § 4092 (1988).

²¹⁶The CAFC may reverse a decision “resting upon a policy judgment, reasoning, or factual premise so unacceptable as to render the matter arbitrary or capricious,” but may not review allegations of “an erroneous factual determination nor could it review the application of any law or regulation to those facts.” H.R. REP., *supra* note 210, at 8.

²¹⁷See Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682 (1977).

advantages for other issues, but disadvantages for constitutional ones. For most issues, both substantive and procedural constitutional review are supposed to be deferential and unconfining; the counterweight is that they be performed by officers whose neutrality is protected by complete independence from the political branches.

For issues of law, again the ultimate check of an Article III court is necessary, but agencies and legislative courts can play unique and important intermediate roles. Centralized legal monitoring by these entities can be closer than in constitutional courts. The Supreme Court's recent mandates that federal courts pay special deference to agency judgments on issues of law²¹⁸ and procedure²¹⁹ probably resulted from judicial decentralization and overload.²²⁰ They also had separation of powers overtones based on the limited role of the federal courts that would not necessarily apply with the same force to legislative courts. Specialized initial review can deal more confidently with issues about the structure and implied purpose of an agency's statute or about optimal procedure than can generalized judges who touch these matters only occasionally. Also, a unified reviewing court avoids problems of inconsistent directives to agencies that currently hamper review by the decentralized federal courts.²²¹ To be sure, this is a delicate matter. Specialized review can readily degenerate into intrusion into issues of law and policy that agencies should decide. Still, jurisdictional adjustments can calibrate a court's proximity to the agencies it reviews, as we shall see.

For issues of fact, the typical structure of a legislative court, such as the CVA, should produce sufficient independence to justify finality. The judges and their employing institution are outside the agency, and are therefore less subject to subtle socializing influences than are ALJs or similar adjudicators. Moreover, several of the factors that cause constitutional courts to stay their hands by invoking nonreviewability doctrine are present: high volume, a need for specialization, and the presence of an outside check on administration.

The principal disadvantage of this structure is the danger of capture by an agency or an interest group, or the perception that it has occurred. The VA is meant to be responsive to veterans' interests—that is the reason for its existence. The Court of Veterans Appeals could all too easily become Commerce Court II. Longstanding legislative courts such as the Tax Court and the Court of Customs and Patent Appeals have weathered charges of bias, but not without difficulty. In an effort to dampen bias by broadening jurisdiction, proposals have floated to form a legislative court to hear appeals

²¹⁸*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²¹⁹*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

²²⁰*See Strauss, supra* note 6.

²²¹Bruff, *supra* note 90.

from many government benefits decisions, into which veterans' claims could be folded.²²² Let us examine that possibility.

B. A Benefits Court

Among federal benefits programs, social security disability has produced the most frequent proposals for specialized review.²²³ In the wake of the new veterans' legislation, expansion of the CVA/CAFC model to include SSA disability has attracted support.²²⁴ The issues and procedures in federal disability programs, or even in benefits programs more generally, are similar enough to invite such consolidation.²²⁵

Even if the CVA became a benefits court, though, appointments problems would remain. The political issues are simple enough (claimant vs. taxpayer orientation) to invite focused and intense lobbying by affected interests. For example, veterans' and other benefits recipients' support groups would agree on desirable characteristics in nominees. Hence I conclude that although a new legislative court should contain a benefits review component, it should have an even broader jurisdiction to diffuse appointments pressures.

C. A Semi-specialized Administrative Court

The best way to maximize the benefits of specialized review while minimizing the detriments may be to broaden the veterans' review model to include a range of subjects other than federal benefits. That is, the new court's jurisdiction should be semi-specialized—broad enough to remove litmus tests in the appointments process and to avoid comparisons to the assembly line, narrow enough to allow regular and informed monitoring of the agency programs selected. The exact mix of jurisdiction chosen for the new court is not crucial if these criteria are met.

It should not be necessary to match the numbers of benefits cases with other kinds of cases on the court's docket. (The benefits cases are so numerous that an administrative court would have to be quite large to do so.) It is enough to assign meaningful numbers of other kinds of cases, especially those that ordinarily merit plenary review. Thus, fewer numbers of more time-consuming cases would significantly diversify the court's daily work-

²²²E.g., STUDY COMMITTEE REPORT, *supra* note 2, at 57.

²²³See generally Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U.L. REV. 1 (1987); Arner, *The Social Security Court Proposal: An Answer to a Critique*, 10 J. LEGIS. 324 (1983); Ogilvy, *The Social Security Court Proposal: A Critique*, 9 J. LEGIS. 229 (1982); J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS 146-50 (1978).

²²⁴Levy, *supra* note 128.

²²⁵Adding SSA appeals would approximately double the CVA's caseload, and presumably also its size. See *Hearing: Judicial Review*, *supra* note 212, at 265. See also DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1990 ANNUAL REPORT [hereinafter, 1990 AO REPORT], Table C-2, (revealing that of the 7439 Social Security cases filed in district courts in 1990, 7048 concerned disability (including SSI cases)). The added burden to the CAFC is harder to estimate, due to the restriction on review of fact issues. In recent years, there have been about 1,000 SSA appeals to the circuit courts. Levy, *supra* note 128, at 480.

load. The prestige of the court would be raised and interest in its operations would be widespread enough to diffuse appointments pressures.

Hence I propose a new Article I Administrative Court, to have initial review jurisdiction over selected programs, final as to fact for some of them. Review of this court could be assigned to the Article III CAFC, reinforcing the current status of that court as a leader in administrative review, like the D.C. Circuit. The Administrative Court would sit nationwide, providing single-judge review for some high-volume, fact-intensive programs such as veterans and social security benefits. Other matters could be decided by panels, and without factual finality. When the new court sat in such an appellate capacity, further review in the federal courts could be made discretionary, to avoid duplicative appellate review.

Thus, either limited circuit-riding or decentralized organization would be needed for the new court. It would not be fair to concentrate all initial review of important agency decisions in Washington.²²⁶ The benefits programs, with small money value but high importance to affected individuals, especially demand a local forum.²²⁷ Some specialized courts have ridden circuit in the past.²²⁸ The attendant inefficiencies can be avoided if the court has enough business to justify permanent locations around the nation. To avoid geographic inconsistencies in the law, it would then be necessary to provide a mechanism for part or all of the full court to review decisions of its local components.²²⁹

Enrichment of the court's diet could be accomplished by reassigning some jurisdiction that is presently vested in specialized fora. Elements could include the Claims Court's nontax jurisdiction,²³⁰ appeals from the International

²²⁶The Supreme Court has shown some concern about the fairness of narrow venue restrictions. In *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), the Court softened a requirement that certain EPA standards be challenged in the D.C. Circuit within a short period, by allowing affected firms that had foregone appeal to litigate the issue whether the standard in question was within the scope of the restriction. In passing, the Court remarked that the "severity" of the scheme was accentuated because small firms could protect their rights only by "daily perusal of . . . the Federal Register and by immediate initiation of litigation in the District of Columbia to protect their interests." *Id.* at 283 n.2. Justice Powell, concurring, thought the restriction arguably raised a due process issue by its short deadline and inadequate notice. Thus, attempts to centralize administrative review can raise the Court's hackles. Even with efforts to provide adequate notice, inconvenience to private litigants could be sufficient to impair review rights in some cases.

²²⁷For the relatively few cases presenting issues of programmatic importance, placing appellate venue in the CAFC should not pose extreme inconvenience. These cases are likely to attract support from interest groups, such as recipients' organizations.

²²⁸Dreyfuss, *supra* note 3, at 422 n.191.

²²⁹For a survey of available techniques, including limited en banc review, see Bruff, *supra* note 90. See also H. DUBROFF, *supra* note 35, at 352-53 (summarizing a "conference system" involving panel review of single-judge decisions, used by the Tax Court to promote uniformity).

²³⁰In 1989, 717 complaints were filed in the Claims court, including 170 tax cases. Director of the Administrative Office of the United States Courts, 1989 Annual Report [hereinafter 1989 AO REPORT] at 370 (Table G-3a). In the same year, 112 appeals were filed in the CAFC from the court. *Id.* at 369 (Table G-2).

Trade Commission,²³¹ enforcement cases now decided by special split-enforcement tribunals,²³² and appeals from the Merit Systems Protection Board.²³³ Patent cases now found in district court could be transferred to the Administrative Court to give it and the CAFC more complete control over that subject matter.²³⁴ Also, Congress could reassign the portions of immigration jurisdiction currently vested in district court.²³⁵ (Deportation cases, currently mostly reviewed in circuit court, may involve sufficiently important interests to deserve immediate resort to a constitutional court.) Appeals from decisions of the National Labor Relations Board could be shunted from the circuit courts.²³⁶

Tax cases from the Claims Court, the Tax Court, and the district court may deserve separate treatment.²³⁷ The complexity of tax law and the breadth of the issues it raises suggest the wisdom of a specialized court deciding only tax cases. Still, the present Tax Court could be established as a separate division of the Administrative Court, to exercise all initial review functions in tax cases.²³⁸ Appeals from this division would then go to the CAFC, as with the Administrative Court's other cases.²³⁹

To discharge its various responsibilities, the nontax division of the Administrative Court might need about twenty judges, a number comparable to that of the Tax Court. Such a court could hear cases in the nation's cities, as the Tax Court does.²⁴⁰ Of course, it is difficult to predict necessary staffing for a court not yet established. But one of the virtues of legislative courts is that their number of judgeships can be adjusted with relative ease. As for the CAFC, its present size of twelve might remain sufficient, or nearly so,

²³¹In 1990, there were 8 appeals from the ITC to the CAFC. 1990 AO REPORT (Table A).

²³²In 1989, there were 12 FMS&HRC appeals in the circuit courts, and 11 OSHRC appeals. 1989 AO REPORT at 105 (Table S-1). Of course, these appeals represent a substantially larger number of cases brought in those two fora.

²³³In 1989, there were 590 MSPB appeals to the CAFC. *Id.* at 369 (Table G-2). For 1990, the figure was 687. 1990 AO REPORT (Table A).

²³⁴See *supra* note 29. To identify cases belonging in the new court, the well-pleaded complaint rule that the CAFC uses to define its appellate jurisdiction could be employed.

²³⁵For surveys of judicial review in immigration law, see D. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW (Fed. Jud. Ctr. 1987); Legomsky, *supra* note 77. In 1989, 285,424 petitions for naturalization were filed in the district courts. AO REPORT at 127 (Table S-23).

²³⁶See R. POSNER, *supra* note 4, at 149 (suggesting specialized treatment of these cases). In 1989, there were 543 NLRB appeals filed in the circuit courts. 1989 AO REPORT at 105 (Table S-1).

²³⁷STUDY COMMITTEE REPORT *supra* note 2, at 69-71; Kramer, *supra* note 39, at 105.

²³⁸In 1989, 170 tax cases were filed in Claims Court, 1989 AO REPORT at 370 (Table G-3a); 2,555 were filed in district court, *id.* at 179 (Table C-2); 31,453 were filed in the Tax Court, U.S. Tax Court, FY 1989 Annual Report.

²³⁹In 1989, there were 419 circuit court appeals from the Tax Court, 1989 AO REPORT at 105 (Table S-1), and 310 from the district courts, *id.* at 141 (Table B-1A).

²⁴⁰The nineteen judges of the Tax Court hear cases in about 80 cities.

because some of its present cases would be shunted to the Administrative Court, never to return.²⁴¹

Whatever the final jurisdictional package chosen for an Administrative Court, the opportunity exists to provide the federal courts relief from review responsibilities that they are too overloaded to discharge well or happily,²⁴² and to improve the quality of both individual case disposition and overall agency monitoring. Equally important, a centralized system for administrative review can articulate uniform national law for the programs it considers.

²⁴¹In 1989, the Circuit received 1,417 appeals, 590 of them from the MSPB. 1989 AO REPORT at 369 (Table G-2). For 1990, the total was 1,466, with 687 of them from the MSPB. 1990 AO REPORT (Table A).

²⁴²Although creation of an Administrative Court would provide the federal courts some docket relief, it would not contribute importantly to resolution of the current caseload crisis there. All administrative cases comprised only 14% of the federal courts' cases in 1989. See Bruff, *supra* note 90.