NOTE

Deciding Without an Appointment: Examining the Appointments Clause and Administrative Arbitration

MATTHEW CALABRESE*

Through its recent Appointments Clause and administrative law jurisprudence, the Supreme Court has applied a formalistic view of the separation of powers that is rapidly remaking the administrative state. Specifically, the Court has spearheaded an important debate on what level of executive accountability is constitutionally required in agency adjudications. Still, despite these updates in constitutional and administrative law, it has been over two decades since any significant scholarly discussion of agencies' use of binding arbitration under the Administrative Dispute Resolution Act of 1996. This Note analyzes the Court's appointments jurisprudence and whether administrative arbitrators constitute an Appointments Clause violation. This Note further investigates the policy merits of administrative arbitration and calls for legislative and administrative reforms to the system.

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INTRODUCTION

There has been extensive litigation and scholarship related to legal, political, and constitutional issues surrounding administrative agency adjudication of individual disputes.[1] Notably, through its recent Appointments Clause and administrative law jurisprudence, the Supreme Court has spearheaded a significant debate on what level of executive accountability is constitutionally required in agency adjudications.[2] The Court appears to be interested in clarifying the

1. *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044 (2018) (holding SEC Administrative Law Judges' (ALJs) appointment violated the Appointments Clause when ALJs were appointed by SEC staff members); United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) (holding Administrative Patent Judge (APJ) decisions must be reviewable by an agency head to comply with the Appointments Clause); Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 GEO. MASON L. REV. 861, 861 (2019) (providing "a holistic understanding of where non-Article III adjudicators are situated within the federal government"); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1514 (2020) ("[A]djudication outside Article III [is] generally consistent with the text and structure of the Constitution.").

2. *See Arthrex*, 141 S. Ct. at 1988 (Gorsuch, J., concurring in part and dissenting in part) (agreeing with the Court that "Article II vests the 'executive Power' in the President alone" and that "[t]his admittedly formal rule serves a vital function. If the executive power is exercised poorly, the Constitution's design at least ensures '[t]he people know whom to blame'—and hold accountable" (quoting Morrison v. Olson, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting))); *Lucia*, 138 S. Ct. at 2057 (Thomas, J., concurring) (making an originalist argument that "[t]he Founders considered individuals to be officers even if they performed only ministerial statutory duties . . . . [Thus,] [a]pplying the original meaning here, the administrative law judges of the Securities and Exchange Commission easily qualify as 'Officers of the United States'"); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 687

meaning of the Appointments Clause by laying out the constitutional difference between principal officers (requiring presidential and Senate confirmation), inferior officers (requiring appointment from the President, federal courts, or agency heads without Senate confirmation), and governmental non-officers (for example, employees or contractors).[3] Yet, despite these updates in constitutional and administrative law, it has been over two decades since any significant scholarly discussion of agencies' use of binding arbitration.[4] A new examination of binding arbitration is needed because the Administrative Conference of the United States (ACUS) is "undertaking a project to study how federal agencies use and might better use different types of ADR [(alternative dispute resolution)]."[5] The last time ACUS undertook such a project, the agency largely influenced the drafting and ultimate passage of the Administrative Dispute Resolution Act (ADRA),[6] which authorized administrative agencies to enter into arbitration in lieu of traditional agency adjudication proceedings.[7]

This Note examines administrative agencies' use of binding arbitration (an ADR technique this Note refers to as "administrative arbitration"[8]) and the

(D.C. Cir. 2008) (Kavanaugh, J., dissenting) (understanding the Appointments Clause to require that members of the Public Company Accounting Oversight Board (PCAOB) "be appointed by the President with the advice and consent of the Senate[,] [and that] [t]hey are not inferior officers because they are not 'directed and supervised' by the SEC" (quoting Edmond v. United States, 520 U.S. 651, 663 (1997))), *aff'd in part, rev'd in part*, 561 U.S. 477 (2010).

3. *See* U.S. CONST, art. II, § 2, cl. 2; *Arthrex*, 141 S. Ct. at 1985–86.

4. Although I do not claim to be the first to examine this issue, most of the scholarship related to the topic dates to the 1980s and 1990s when Congress first debated and passed the Administrative Dispute Resolution Act (ADRA) or soon after the passage of the ADRA of 1996. The notes and articles that examine the ADRA, without the hindsight of time, do not consider how agencies have used administrative arbitration over the last twenty-five years, nor do they examine whether administrative arbitration meets constitutional muster after recent Supreme Court decisions such as *Lucia* and *Arthrex*. *See, e.g.*, David Seibel, *To Enhance the Operation of Government: Reauthorizing the Administrative Dispute Resolution Act*, 1 HARV. NEGOT. L. REV. 239 (1996); Robin J. Evans, Note, *The Administrative Dispute Resolution Act of 1996: Improving Federal Agency Use of Alternative Dispute Resolution Processes*, 50 ADMIN. L. REV. 217 (1998); Jonathan D. Mester, Note, *The Administrative Dispute Resolution Act of 1996: Will the New Era of ADR in Federal Administrative Agencies Occur at the Expense of Public Accountability?*, 13 OHIO ST. J. ON DISP. RESOL. 167 (1997); Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441 (1989).

5. ADMIN. CONF. OF U.S., REQUEST FOR PROPOSALS—JUNE 19, 2020 ALTERNATIVE DISPUTE RESOLUTION IN AGENCY ADJUDICATION (June 19, 2020), https://www.acus.gov/sites/default/files/documents/ADR_RFP_61920_0.pdf [https://perma.cc/6NLF-FDLH].

6. Pub. L. No. 101-552, 104 Stat. 2736 (1990) (amended 1992 and 1996) (current version at 5 U.S.C. §§ 571–584).

7. *See Administrative Dispute Resolution Act*, ADMIN. CONF. U.S.: FED. ADMIN. PROC. SOURCEBOOK, https://sourcebook.acus.gov/wiki/Administrative_Dispute_Resolution_Act/view#Administrative_Dispute_Resolution_Act_of_1990 [https://perma.cc/GF9M-G8RA] (last visited Oct. 12, 2022) (highlighting that the "ADRA reflects numerous ACUS recommendations" and the ADRA of 1996 "reflect[s] numerous suggestions made in ACUS's 1995 reports to Congress on implementation of the ADRA"); Administrative Dispute Resolution Act sec. 4, § 585, 104 Stat. at 2742 (providing for "Authorization of arbitration").

8. This term has also been used by numerous government agencies and scholars when discussing agency use of binding arbitration under the ADRA and ADRA of 1996. *See, e.g.*, Philip J. Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, *in* ADMIN. CONF. OF

Appointments Clause.[9] Binding arbitration is a commonly used ADR technique where disputing parties present evidence and arguments before an extrajudicial third party who makes a final and binding legal decision resolving the dispute in a confidential setting.[10] During the 1980s, this technique became popular with the private sector. Private sector motivation centered on lowering litigation costs and streamlining disputes in a private setting where, unlike cases litigated in courts, details of individual adjudications are not subject to public disclosure, nor do they create a judicial precedent on appeal.[11]

During the 1980s, agency adjudications also began to become more common, complicated, and increasingly backlogged.[12] Accordingly, in the late 1980s and early 1990s, Congress began debating broadening the agency adjudication tool kit by authorizing agencies to use various ADR techniques, including administrative arbitration.[13] In 1990, through the passage of the Administrative Dispute Resolution Act (the ADRA of 1990), Congress first authorized federal agencies to enter into administrative arbitration instead of—as found by Congress—more "formal, costly, and lengthy" adjudicative proceedings.[14] The ADRA of 1990 allowed parties (the agency and the opposing individual party) to agree upon the appointment of a third-party arbitrator[15] to preside over the adjudicative proceeding and make a final decision with the force of law.[16]

THE U.S., RECOMMENDATIONS AND REPORTS 165, 187–204 (1986); *Federal Administrative Arbitration at-a-Glance*, OFF. LEGAL POL'Y, DOJ (Nov. 26, 2021), https://perma.cc/G5K6-GK4S.

9. U.S. CONST, art. II, § 2, cl. 2.

10. *See Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019).

11. *See generally* James F. Henry, *Alternative Dispute Resolution: Meeting the Legal Needs of the 1980s*, 1 OHIO ST. J. ON DISP. RESOL. 113 (1985) (summarizing why, in the 1980s, corporations were moving away from litigation and toward arbitration proceedings in resolving disputes).

12. As ACUS noted in 1996,

> Federal agencies now decide hundreds of thousands of cases annually—far more than do federal courts. The formality, costs and delays incurred in administrative proceedings have steadily increased, and in some cases now approach those of courts. Many agencies act pursuant to procedures that waste litigants' time and society's resources and whose formality can reduce the chances for consensual resolution. The recent trend toward elaborate procedures has in many cases imposed safeguards whose transaction costs, to agencies and the public in general, can substantially outweigh their benefits.

Agencies' Use of Alternative Means of Dispute Resolution (Recommendation No. 86-3), 51 Fed. Reg. 25641, 25643 (July 16, 1986).

13. *See* Administrative Dispute Resolution Act of 1988, H.R. 5101, 100th Cong. (1988); Administrative Dispute Resolution Act of 1988, S. 2274, 100th Cong. (1988); Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990).

14. § 2, 104 Stat. at 2736 (congressional findings).

15. *See id.* sec. 4 § 585. However, as discussed in Part I, *infra*, under the ADRA of 1996, the selection of a neutral arbitrator is subject to an agency's guidance document. *See, e.g.*, OFF. OF DISP. RESOL. FOR ACQUISITION, FAA, GUIDANCE FOR THE USE OF BINDING ARBITRATION UNDER THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996 17–18 (2001), https://www.faa.gov/sites/faa.gov/files/2021-12/Arbitration%20Guidance.pdf [https://perma.cc/DF5C-2LBD] ("Issue 12: What selection criteria will be considered in choosing an arbitrator?").

16. However, as discussed in Section I.C, *infra*, the ADRA included an agency escape clause, allowing an agency head to vacate an arbitration award or terminate an arbitration agreement after an arbitrator issues a final decision. *See* Administrative Dispute Resolution Act, sec. 4, §590(c), 104 Stat. at

Differing views on the meaning of the Appointments Clause created debate and changes to the ADRA prior to its enactment. Sparked by the concerns of then-U.S. Assistant Attorney General for the Office of Legal Counsel (OLC) Bill Barr, the George H. W. Bush Justice Department cautioned Congress that the ADRA of 1990's authorization for agencies to enter into binding arbitration proceedings violated the Appointments Clause because an arbitrator's decision would bind the Executive Branch. Barr concluded this function could only be executed by a principal officer nominated by the President and confirmed by the Senate.[17] This opinion was in line with a growing legal philosophy of the unitary executive theory.[18] Although many proponents of administrative arbitration disagreed with this view,[19] Congress sought to fend off this potential constitutional violation through the inclusion of the "escape clause."[20]

In the eyes of individual litigants, the escape clause created problems due to the optics of a required two-way opt-in and one-way opt-out. Specifically, the escape clause granted only agencies (through the agency head), and not the adverse parties, the ability to terminate an arbitration agreement or "vacate any award issued pursuant to the proceeding."[21] Thus, the escape clause created a quasi-binding arbitration system, where arbitration awards were binding upon only the individual litigant and not the agency.[22] The escape clause also disincentivized individual parties from choosing administrative arbitration over typical agency adjudicative procedures for fear the agency would back out of an adverse

2743. Still, as noted in Section I.D, *infra*, the escape clause was removed when Congress reauthorized administrative arbitration under the ADRA of 1996. *See* 5 U.S.C. § 580(c) ("A final award is binding on the parties to the arbitration proceeding . . . .").

17. *See Administrative Dispute Resolution Act of 1989: Hearing Before the Subcomm. on Oversight of Gov't Mgmt. of the S. Comm. on Governmental Affs.*, 101st Cong. 94 (1989) [hereinafter *1989 Senate Hearing*] (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice) (claiming administrative arbitration "would dilute accountability and disrupt the making of policy by responsible officials" and "would remove the power to execute the laws from Cabinet officials and agency heads who are in turn responsible to the only figure in American government elected by all of the people, and would transfer that power to arbitrators accountable to no one"); *Administrative Dispute Resolution Act: Hearing on H.R. 2497 Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 101st Cong. 42 (1990) [hereinafter *1990 House Hearing*] (prepared statement of William P. Barr, Assistant Att'y Gen., Office of Legal Counsel, Department of Justice) (same).

18. *See* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 178–80 (2021) (explaining the basis of the unitary executive theory); Mark Tushnet, *A Political Perspective on the Theory of the Unitary Executive*, 12 U. PA. J. CONST. L. 313, 313 (2010) (providing a "highly speculative political, intellectual, and legal history of the theory of the unitary executive in the late twentieth century").

19. *See, e.g.*, Harter, *supra* note 8, at 204 (concluding administrative arbitration "pass[es] constitutional muster" and that arbitrators "can decide any issue an agency can so long as they adhere to at least minimal procedures, avoid major policy matters, and are subjected to at least some judicial review"); Bruff, *supra* note 4, at 490 ("Available methods of controlling arbitration can meet the executive's constitutional responsibilities.").

20. *See* sec. 4, §590(c), 104 Stat. at 2743.

21. *Id.*

22. *See id.*

decision.[23] Under this system, an agency could theoretically use the escape clause as a tactic to require parties to litigate their cases twice: once through quasi-binding arbitration and, if an agency received an adverse decision, again through an agency's typical adjudication process. On the one hand, the escape clause strictly complied with the Appointments Clause and mirrored standard agency adjudication processes where an agency head typically has the authority to overrule an agency adjudication decision.[24] On the other hand, the escape clause violated both the function and spirit of the ADRA: to provide an alternative adjudication option to speed the pace of agency adjudications and lower litigation costs.[25]

After the ADRA of 1990's sunset in 1995, Congress removed the escape clause when it permanently reauthorized administrative arbitration.[26] This decision can be traced to an OLC opinion (penned under the Clinton Administration) holding that administrative arbitration did not constitute an Appointments Clause violation.[27] Therefore, Congress's passage of the ADRA of 1996—without the escape clause—finally made administrative arbitration truly "binding arbitration."[28]

This Note examines the constitutionality and policy merits of administrative arbitration. Part I examines the legislative history of the 1990 and 1996 ADRAs and explains the basics of administrative arbitration. Part II studies the Court's evolving Appointments Clause jurisprudence and concludes the modern Supreme Court would find modern administrative arbitration unconstitutional. However, Part II also concludes that the violation is merely theoretical and practically shielded from judicial intervention. Part III explores the policy merits of

23. *See, e.g.*, 142 CONG. REC. 13816 (1996) (statement of Sen. William Cohen) ("Unfortunately, [the escape clause] has deterred private parties from entering into arbitration with the Government. As one witness testified at the hearing on [the ADRA of 1996], unless the escape clause is eliminated, 'arbitration likely will never become a viable alternative for the Federal Government.'" (quoting *1995 Senate Hearing*, *infra* note 26)).

24. *See 1989 Senate Hearing*, *supra* note 17, at 21 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice) (arguing the Appointments Clause violation could be foreclosed if, for example, reviewability "to the same extent there [is] reviewability of an administrative law judge's decision," was included as a provision in the ADRA); *see, e.g.*, Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 143 (2019) (explaining how formal adjudications under the Administrative Procedure Act (APA) allow "the agency head [to] review[] ALJ decisions de novo" and authorizes the agency head to have "final decision-making authority" (citing 5 U.S.C. § 557(b))).

25. *See 1989 Senate Hearing*, *supra* note 17, at 3 (statement of Sen. Charles E. Grassley) ("[The ADRA] is a bill designed to encourage prompt, informal, and inexpensive resolution of administrative disputes involving Federal agencies.").

26. *See, e.g.*, *S. 1224—The Administrative Dispute Resolution Act of 1995: Hearing on S. 1224 Before the Subcomm. on Oversight of Gov't Mgmt. and the D.C. of S. Comm. on Governmental Affs.*, 104th Cong. 77 (1995) [hereinafter *1995 Senate Hearing*] (statement of John Calhoun Wells, Director, Federal Mediation and Conciliation Service) (testifying that removal of the escape clause would "encourage the government's use of ADR processes").

27. Const. Limitations on Fed. Gov't Participation in Binding Arb., 19 Op. O.L.C. 208, 210–23 (1995).

28. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, 3872 (1996) (codified at 5 U.S.C. §§ 571–584).

administrative arbitration and provides a substantive critique on whether the system services the public's interest.

I. WHAT IS ADMINISTRATIVE ARBITRATION?

In 2012, at a symposium on federal alternative dispute resolution programs, then-Attorney General Eric Holder stated that agency use of ADR techniques provided a more "efficient way to resolve public disputes involving the government."[29] Simply put, agencies are extremely busy and are responsible for adjudicating millions of individual disputes per year.[30] For example, in fiscal year (FY) 2013, a joint project of ACUS and Stanford Law School found that agencies had decided or closed at least 1,448,193 cases.[31] This number is likely even more significant because the study is missing or was unable to verify adjudication data from over twenty agencies and hundreds of subagency offices.[32] Still, unsurprisingly, heavy caseloads combined with limited government resources lead to extreme backlogs. For example, the Executive Office for Immigration Review had a backlog of 1,406,631 pending immigration cases at the end of FY 2021.[33] Alternative dispute resolution techniques, such as administrative arbitration, are vital adjudicative tools "to reduce costs, to save time, and to promote collaborative problem solving across all levels of government."[34]

This Part examines the legislative history of administrative arbitration, revealing a familiar tension between constitutional formalism and functionalism, especially with regard to the Appointments Clause. First, this Part explains the basics of administrative arbitration. Next, this Part explores the rich legislative development of administrative arbitration at ACUS and in Congress, ultimately leading to passage of the ADRA of 1990 and ADRA of 1996.

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29. Eric H. Holder, Jr., U.S. Att'y Gen., Welcoming Address to the Symposium on Federal Alternative Dispute Resolution Programs: Successes and Challenges (Mar. 19, 2012) (transcript available at https://www.acus.gov/sites/default/files/documents/Eric%20H.%20Holder%20Welcoming%20Address.pdf [https://perma.cc/FG6Z-J3HJ]).

30. *See Caseload Statistics*, ADMIN. CONF. U.S. ADJUDICATION RSCH: STAN. UNIV., https://acus.law.stanford.edu/reports/caseload-statistics [https://perma.cc/36L9-T54B] (last visited Oct. 12, 2022).

31. This statistic is the total sum of "Cases Decided/Closed" as found by the joint ACUS and Stanford Law School project. *See id.*

32. There are no uniform disclosure requirements for agency adjudication statistics, thus, fully tracking agency adjudications across government—without a change in the law—is nearly impossible. Therefore, the ACUS and Stanford Law School project was seemingly unable to procure data or verify adjudication statistics for the entire federal government. *See id.*

33. *See* EXEC. OFF. FOR IMMIGR. REV., DOJ, PENDING CASES, NEW CASES, & TOTAL COMPLETIONS (2022), https://www.justice.gov/eoir/page/file/1242166/download [https://perma.cc/DN5N-JGJA]; *see also* HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., R47077, U.S. IMMIGRATION COURTS AND THE PENDING CASES BACKLOG 17–30 (2022), https://crsreports.congress.gov/product/pdf/R/R47077 [https://perma.cc/6L3U-D45K] (explaining the broader causes, implications, and solutions to the immigration adjudication backlog).

34. Holder, Jr., *supra* note 29.

A. ADMINISTRATIVE ARBITRATION 101

To law students, agency adjudication can feel like the black hole of an administrative law course.[35] The subject is complicated, open to expansive legal and scholarly debate,[36] and filled with unintuitive rules.[37] It also requires one to understand an agency's executive and quasi-judicial functions and how these functions affect both individual parties on a case-by-case basis and an agency's interaction with the public and other Branches of government.[38] This Section briefly explains what administrative arbitration is and how it differs from typical arbitration proceedings before diving into the legislative history of the system.

At a micro level, much like the Federal Rules of Civil Procedure, administrative arbitration exists "to secure the just, speedy, and inexpensive determination"[39] of individual disputes with federal agencies. At a macro level, administrative arbitration also serves the dual purpose of "enhanc[ing] the operation of the Government [to] better serve the public."[40] Thus, an analysis of administrative arbitration requires one to look at the system's duality within the administrative state's constitutional structure.

Administrative arbitration is significantly similar to typical private sector binding arbitration proceedings[41] and even the ancient arbitration proceedings presided over by King Solomon.[42] Both administrative arbitration and typical arbitration are extrajudicial proceedings where the disputing parties present evidence and arguments to a presiding arbitrator who holds the duty and authority to make a legally binding decision that is enforceable in courts of law.[43] However,

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35. By agency adjudications, I am referring to Type A, Type B, and Type C adjudications. Type A, or formal adjudications, are adjudications subject to Section 554 of the APA, which require trial-like hearings and procedures presided over by a neutral ALJ. *See* 5 U.S.C. §§ 554–559; MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 3–4 (2019). Type B adjudications utilize evidentiary hearings and are regulated by agency-specific statutes (besides the APA), regulations, or executive orders, and are presided over by Administrative Judges (AJs) or an agency head. *See id.* at 4. Type C adjudications do not employ "legally required evidentiary hearings," vary widely in importance, and can be as simple as the U.S. Department of Agriculture's Forest Service's issuance of campsite permits. *See id.* at 4, 92, 98.

36. *See, e.g.*, Walker & Wasserman, *supra* note 24, at 148–53 (discussing "[t]he Lost World: APA-Governed Adjudication").

37. *See, e.g.*, Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993) (barring ex parte communications in Section 554 formal adjudications but only requiring an evidentiary hearing when the APA is violated, rather than stopping the ultimate action).

38. *See generally* Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 Nw. U. L. REV. 1569 (2013) (exploring Article III judicial review of agency adjudications of "public rights" versus "private rights").

39. FED. R. CIV. P. 1.

40. Administrative Dispute Resolution Act, Pub. L. No. 101-552, § 2, 104 Stat. 2736, 2736 (1990) (congressional findings).

41. By typical binding arbitration proceeding, this Note is referring to disputes litigated before a private extrajudicial third party.

42. *See* Frank D. Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L. REV. 155, 155–56 (1970) ("[T]he procedure used by [Solomon] was in many respects similar to that used by arbitrators today.").

43. *Compare, e.g.*, Distrib. Specialists, Inc., FMCSA-2007-290850008 (Fed. Motor Carrier Safety Admin. 2010) (Vergilio, Arb.) (exemplifying an administrative arbitration proceeding where both

administrative arbitration differs in three distinct ways: (1) whether a dispute is decided through administrative arbitration is dependent on a mutual agreement between the agency and the individual party to enter into administrative arbitration;[44] (2) the identity of the arbitrator is subject to both the agreement of the disputing parties and an agency's guidance document;[45] and (3) administrative arbitration proceedings are not secret[46] and arbitration awards and all communications with the arbitrator may be subject to public disclosure by the agency, individual party, or by a public records request under the Freedom of Information Act (FOIA).[47]

Theoretically, the public nature of administrative arbitration and the inability to foreclose public disclosure of all communications is a key difference with typical private sector binding arbitration. Though the ADRA of 1996 allows for public disclosure, there are no proactive public disclosure requirements—effectively shielding the public from administrative arbitration proceedings. As noted in Part III, the ADRA of 1996 does not require—nor does it bar—agencies to publicly disclose arbitration awards. The Federal Motor Carrier Safety Administration (FMCSA) has the most robust affirmative disclosure policy and releases arbitration awards on Regulations.gov in accordance with the case's docket.[48] Still, FMCSA arbitration awards posted to Regulations.gov are alongside thousands of other notices and are not uniformly marked or easy to access.[49] Other agencies do

parties presented written argument on the proper administrative fine that should be levied, and the arbitrator made a final binding decision, ending the dispute), *with* COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-32 (AM. ARB. ASS'N 2013), https://www.adr.org/sites/default/files/CommercialRules_Web-Final.pdf [https://perma.cc/422Z-JRM4] ("The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense.").

44. *See* 5 U.S.C. § 575(a)(1) ("Arbitration may be used as an alternative means of dispute resolution whenever *all parties consent*.") (emphasis added).

45. *See id.* § 577(a) ("The parties to an arbitration proceeding shall be entitled to participate in the selection of the arbitrator."); *id.* § 575(c) ("Prior to using binding arbitration . . . the head of an agency, in consultation with the Attorney General . . . shall issue guidance on the appropriate use of binding arbitration . . . ."). *But see infra* Part III (explaining how the selection of an arbitrator is not always made mutually per se).

46. This is in direct contrast to private sector arbitration proceedings, which can be completely secret to the public. *See* Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1259–61 (2006) (explaining the meaning of arbitration confidentiality).

47. *See* 5 U.S.C. § 574; *id.* § 552 (FOIA); *see, e.g.*, Distrib. Specialists, Inc., FMCSA-2007-29085-0008 (Fed. Motor Carrier Safety Admin. 2010) (Vergilio, Arb.), https://www.regulations.gov/document/FMCSA-2007-29085-0008 [https://perma.cc/DW9X-LS7R].

48. The FMCSA's administrative arbitration guidance document provides that "[a]rbitration awards are not confidential documents" and that "[a]wards shall be entered into the FMCSA docket for the case." *See* Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996, 69 Fed. Reg. 10288, 10293 (Mar. 4, 2004). However, as explained in Part III, *infra*, most agency arbitrations are effectively hidden from public view.

49. The FMCSA's docket search is not intuitive, nor does it clearly mark final arbitration decisions. *See, e.g.*, Distrib. Specialists, Inc., FMCSA-2007-29085-0008 (Fed. Motor Carrier Safety Admin. 2010) (Vergilio, Arb.), https://www.regulations.gov/document/FMCSA-2007-29085-0008 [https://perma.cc/DW9X-LS7R] (FMCSA externally labels this case as "other" and only upon clicking the case link is one able to identify that this docket contains an "Arbitrator's Final Decision").

not have a similar affirmative policy or practice.[50] Consequently, although administrative arbitration awards are not secret, they are principally sheltered from public view.[51] Thus, examples of cases litigated through administrative arbitration are few and far between.

Although the results of individual administrative arbitration proceedings may be hard to pinpoint, the larger process of utilizing administrative arbitration in an agency is unique. The ADRA of 1996 provides a statutory prerequisite to an agency's use of administrative arbitration, requiring an agency head, in consultation with the Attorney General, to "issue guidance on the appropriate use of binding arbitration and when an officer or employee of the agency has authority to settle an issue in controversy through binding arbitration."[52] Out of the plethora of federal agencies with adjudicative authority (that could thus engage in administrative arbitration),[53] only six agencies are known to have issued such guidance: the FMCSA, the Federal Aviation Administration (FAA), the Federal Deposit Insurance Corporation (FDIC), the Department of the Navy, the Presidio Trust,[54] and the Internal Revenue Service (IRS).[55] Consequently, only six agencies are *effectively* authorized to use administrative arbitration.[56]

Requiring an agency head to issue implementation guidance in consultation with the Attorney General is meant to force agencies only to authorize the use of administrative arbitration when the issue at hand is not a major policy or legal question.[57] Thus, agency guidance documents limit the types of disputes agencies

50. For example, although the FAA's administrative arbitration guidance document acknowledges that arbitration agreements and arbitration awards are not confidential, the guidance provides no affirmative duty for the FAA to affirmatively release arbitration agreements and arbitration awards like the FMCSA's policy does. *See* OFF. OF DISP. RESOL. FOR ACQUISITION, *supra* note 15, at 19 ("[N]either the [arbitration] [a]greement nor the arbitration award will be considered confidential.").

51. Both administrative arbitration awards and agreements could be disclosed via a FOIA request. However, receiving government held documents through a FOIA request can be a long and tedious process. *See, e.g.*, Matthew L. Wald, *Slow Responses Cloud a Window into Washington*, N.Y. TIMES (Jan. 28, 2012), https://www.nytimes.com/2012/01/29/us/slow-freedom-of-information-responses-cloud-a-window-into-washington.html; Jenna Greene, *Wait What? FDA Wants 55 Years to Process FOIA Request over Vaccine Data*, REUTERS (Nov. 18, 2021, 4:31 PM), https://www.reuters.com/legal/government/wait-what-fda-wants-55-years-process-foia-request-over-vaccine-data-2021-11-18/.

52. 5 U.S.C. § 575(c).

53. By adjudicative authority, this Note is referring to agencies who have been statutorily authorized to engage in adjudicative proceedings of individual disputes before itself.

54. The Presidio Trust is "an innovative federal agency" established through the passage of the Presidio Trust Act in 1996, charged with operating the Presidio of San Francisco. The agency receives no government funding and raises revenue through "leasing homes and workplaces" and "offering visitor amenities," such as hotels, a golf course, and other venues within the park. *See About the Presidio Trust*, PRESIDIO TR., https://www.presidio.gov/presidio-trust/about [https://perma.cc/7FZJ-D357] (last visited Oct. 12, 2022); *see also* The Presidio Trust Act, 16 U.S.C. § 460bb.

55. *See Federal Administrative Arbitration at-a-Glance*, *supra* note 8 (tracking agency guidance documents related to administrative arbitration since the passage of the ADRA of 1996 to August 2009). As of October 2022, there is no evidence to suggest any agency beyond six listed agencies have issued administrative arbitration guidance, in consultation with the Justice Department. *See* 5 U.S.C. § 575(c).

56. *See Federal Administrative Arbitration at-a-Glance*, *supra* note 8.

57. *See infra* Section I.D; H.R. REP. NO. 104-841, at 9 (1996) (Conf. Rep.) (noting Congress's intent to include consultation with the Attorney General for the issuance of agency guidance as an effort to

can litigate through administrative arbitration. For example, the IRS will only agree to administrative arbitration in cases "involv[ing] solely a factual issue or multiple issues where the factual issue can be severed" and that are not of significant "importance."[58] The FMCSA will only agree to administrative arbitration "in civil penalty forfeiture proceedings in which the only issues remaining to be resolved are the amount of the civil penalty owed and the length of time in which to pay it."[59] The FMCSA will also not agree to arbitrate "any cases that deal with an interpretation of the regulations or with important policy issues."[60] Lastly, the FAA will only agree to arbitrate bid protests and government contract disputes that do not involve "significant questions of Government policy."[61] This information indicates that administrative arbitration impacts a mere fraction of the millions of agency adjudications conducted annually.[62]

B. THE LEAD-UP TO THE ADMINISTRATIVE DISPUTE RESOLUTION ACT

After the rise of private sector use of ADR techniques of the 1980s and 1990s,[63] Congress began debating whether agency use of ADR techniques could better resolve individual disputes with federal agencies.[64] Given that ACUS publicly claims to have produced "the first draft of what became the [ADRA], enacted in 1990,"[65] this Section explores ACUS' recommendations that led to the passage of the ADRA of 1990.

Early in the 1980s, ACUS began researching ways to incorporate private sector applications of ADR techniques into administrative adjudications.[66] This research

ensure "that an arbitrator shall not grant an award that is inconsistent with law"); *see also* Harter, *supra* note 8, at 198–99 (concluding only "significant decisions" must be made by, or under the reviewable discretion of, an Officer of the United States) (interpreting Buckley v. Valeo, 424 U.S. 1, 140–41 (1976) (per curiam) (holding "performance of a significant governmental duty exercised pursuant to a public law" can only be executed by an Officer of the United States)).

58. IRM 35.5.5.1(2) (Dec. 14, 2010).

59. Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996, 69 Fed. Reg. 10288, 10288 (Mar. 4, 2004) (publishing FMCSA's administrative arbitration guidance document).

60. *Id*. at 10292.

61. OFF. OF DISP. RESOL. FOR ACQUISITION, *supra* note 15, at 5.

62. *See supra* notes 30–32 and accompanying text.

63. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 181–89 (2003) (detailing increased private sector use of ADR in the 1980s and 1990s).

64. In 1988, Congress began debating legislation to authorize and mandate that agencies implement policies to utilize ADR techniques in agency adjudications. *See* Administrative Dispute Resolution Act of 1988, H.R. 5101, 100th Cong. (1988); Administrative Dispute Resolution Act of 1988, S. 2274, 100th Cong. (1988). Agencies were ultimately granted this authority when, in 1990, Congress passed and President George H. W. Bush signed the Administrative Dispute Resolution Act. *See* Pub. L. No. 101-552, 104 Stat. 2736 (1990).

65. David M. Pritzker, *The Administrative Conference and the Development of Federal ADR*, ADMIN. CONF. U.S. (Oct. 29, 2014, 8:05 AM), https://www.acus.gov/newsroom/administrative-fix-blog/administrative-conference-and-development-federal-adr [https://perma.cc/RJJ6-Z7VL].

66. *See id*.

culminated in two ACUS recommendations: *Agencies' Use of Alternative Means of Dispute Resolution* (published in 1986)[67] and *Arbitration in Federal Programs* (published in 1987).[68] The 1986 recommendation found that—at the time—"[f]ederal agencies now decide *hundreds of thousands* of cases annually—far more than do federal courts."[69] The recommendation also took issue with the increased formalities of agency adjudicative procedures, which were increasingly mirroring procedures of federal courts, noting that they "waste litigants' time and society's resources" and "in many cases impose[] safeguards whose transaction costs, to agencies and the public in general, can substantially outweigh their benefits."[70] In part, ACUS recommended that Congress take action to provide statutory authorization for agencies to use various ADR techniques—such as mediation and administrative arbitration.[71] In particular, ACUS recommended Congress "authorize agencies to adopt arbitration procedures to resolve matters that would otherwise be decided by the agency pursuant to the Administrative Procedure Act ("APA") or other formal procedures."[72]

ACUS also found that administrative arbitration would conform with the Appointments Clause so long as the power of arbitrators were limited. Specifically, ACUS took the position that administrative arbitration would not incur a violation of the Appointments Clause so long as Congress provided discernable statutory instructions—or agencies promulgated subsequent regulations—that limited the power of arbitrators to deciding the "factual basis" of an individual claim or "a mixed question of law and fact in which the norms are already relatively well developed."[73] This determination was based on ACUS's reading of *Buckley v. Valeo*, where the Court held that "performance of a significant governmental duty exercised pursuant to a public law" can only be executed by a principal or inferior officer appointed in strict adherence with the Appointments Clause.[74] ACUS understood the holding of *Buckley* "to bar [an] arbitrator[] [from] deciding major policy questions."[75]

ACUS also wanted to design administrative arbitration for speed and convenience, and thus requiring the head of an agency or the President to appoint arbitrators would be untenable. Therefore, the subsequent 1987 ACUS recommendation formalized this principle by providing Congress with "procedural advice" on how to legislatively authorize administrative arbitration without upsetting the

67. Agencies' Use of Alternative Means of Dispute Resolution (Recommendation No. 86-3), 51 Fed. Reg. 25643, 25643 (July 16, 1986).

68. Arbitration in Federal Programs (Recommendation 87-5), 52 Fed. Reg. 23635, 23645 (June 24, 1987).

69. Agencies' Use of Alternative Means of Dispute Resolution (Recommendation No. 86-3), 51 Fed. Reg. at 25643 (emphasis added).

70. *Id.*

71. *See id.* at 25643–45.

72. *Id.* at 25643.

73. Harter, *supra* note 8, at 199.

74. Buckley v. Valeo, 424 U.S. 1, 140–41 (1976) (per curiam); *see* Harter, *supra* note 8, at 198–99.

75. Harter, *supra* note 8, at 199.

Appointments Clause.[76] ACUS recommended that Congress—and subsequent implementation regulations—limit the power of administrative arbitrators to deciding cases involving "questions of fact or the application of well-established norms, even if statutory, rather than precedential issues or application of fundamental legal norms that are evolving."[77] To ACUS, this limitation was enough to pass constitutional muster under the Appointments Clause.

C. THE ESCAPE CLAUSE AND THE FIRST ADMINISTRATIVE DISPUTE RESOLUTION ACT

In 1988, during the 100th Congress, seemingly identical versions of the ADRA (primarily drafted by ACUS) were introduced in the House and Senate.[78] In the spring and summer of 1988, Subcommittees of the House and Senate Judiciary Committees even held hearings on the legislation.[79] Although neither bill made it out of committee, this momentum sparked a legislative idea ultimately leading to the passage of the ADRA in the 101st Congress.[80] However, administrative arbitration underwent a significant revision before the final passage of the ADRA: the inclusion of the escape clause.[81] This begs the question, how was this sausage made?

Constitutional law questions related to whether unappointed arbitrators violated the Appointments Clause were present throughout Congress's debate on the ADRA. This first occurred during a 1988 House Judiciary Committee Subcommittee hearing on ADRA legislation.[82] There, Senator Chuck Grassley, the sponsor of the bill, made the unusual decision to cross over to the House to provide live testimony in favor of the legislation.[83] When responding to a question by the Subcommittee Chairman, Senator Grassley defended the constitutionality of administrative arbitration, noting that the "parties have to agree to this method of dispute resolution" and that the legislation would bar agencies from using arbitration for "precedent-setting" purposes.[84]

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76. *See* Arbitration in Federal Programs (Recommendation 87-5), 52 Fed. Reg. 23635 (June 24, 1987).

77. *Id*. at 23635.

78. *See* Administrative Dispute Resolution Act of 1988, H.R. 5101, 100th Cong. (1988); Administrative Dispute Resolution Act of 1988, S. 2274, 100th Cong. (1988).

79. *Alternative Dispute Resolution Use by Federal Agencies: Hearing Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 100th Cong. (1988) [hereinafter *1988 House Hearing*]; *Alternative Dispute Resolution: Hearing on S. 2274 Before the Subcomm. on Cts. & Admin. Prac. of the S. Comm. on the Judiciary*, 100th Cong. (1988).

80. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990).

81. *See id*. sec. 4, §590(c), 104 Stat. at 2743.

82. *1988 House Hearing*, *supra* note 79.

83. *Id*. at 1–3 (statement of Sen. Charles E. Grassley). Senator Grassley not only provided written testimony for the hearing, but also sat for questioning from various congressmen on the Subcommittee. *See id*. at 4–8 (written statement of Sen. Charles E. Grassley); *id*. at 33 (statement of Sen. Charles E. Grassley) (responding to questioning from Subcommittee Chairman Representative Barney Frank); *id*. at 34–35 (statement of Sen. Charles E. Grassley) (responding to questioning from Representative Benjamin Cardin).

84. *Id*. at 33 (statement of Sen. Charles E. Grassley).

Less than a year later, Congress furnished a report justifying the procedure's constitutionality. During the 101st Congress, the Congressional Research Service (CRS) produced a memorandum addressing the constitutional issues of administrative arbitration.[85] On the Appointments Clause question, CRS determined that arbitrators would not violate the Appointments Clause or the traditional notions of the separation of powers because Congress would not be aggrandizing congressional power "at the expense of a coordinate branch."[86] Still, CRS's opinion was somewhat simplistic and incomplete. It failed to fully account for whether arbitrators would be "sufficiently controlled by [a] responsible officer"[87] or if the power wielded by arbitrators constituted the authority to make a decision binding on the Executive Branch.[88] Further, CRS also misunderstood the proposed language of Senator Grassley's bill to mean that arbitrators would be "appointed by the 'Heads of Departments,'" thus rendering them inferior officers.[89]

Nonetheless, the CRS opinion checked a box, noting the Senate had investigated the matter and CRS's findings were consistent with the proponents' view of the constitutionality of administrative arbitration.[90] However, one key holdout, then-OLC head Bill Barr, held a constitutional view that administrative arbitration violated the Appointments Clause.[91] Barr's reservations about the constitutionality of administrative arbitration became public during a Senate Subcommittee hearing (which at times reads more like a preview of the Supreme Court's oral arguments in *United States v. Arthrex, Inc.*).[92] Barr claimed administrative arbitration

85. Letter from Henry Cohen, Am. L. Div., Cong. Rsch. Serv., Libr. of Cong., to Subcomm. on Oversight of Gov't Mgmt. of the S. Comm. on Governmental Affs. (Aug. 17, 1989).

86. *See id.* at 3–5 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986)).

87. *See* Bruff, *supra* note 4, at 489–90.

88. *See* Harter, *supra* note 8, at 198–99.

89. Letter from Henry Cohen, *supra* note 85, at 4. The draft of Senator Grassley's bill unequivocally stated that an arbitrator may be a "permanent or temporary government employee or a private individual *who is acceptable to the parties* to a dispute resolution proceeding." S. 971, 101st Cong. sec. 4, § 583 (1989) (emphasis added). Thus, CRS's reading of the bill, at best, can be considered faulty. *Cf.* Letter from Henry Cohen, *supra* note 85, at 4; U.S. CONST. art. II, § 2, cl. 2.

90. At the 1989 Senate Subcommittee hearing on the legislation, Senator Grassley stated the CRS report "lends strong credibility to our point on the constitutionality of this legislation." *1989 Senate Hearing*, *supra* note 17, at 4 (statement of Sen. Charles E. Grassley). Senator Grassley even went on to support his conclusion that the ADRA of 1990 complied with the Constitution by entering a portion of Harold Bruff's article, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, *supra* note 4, at 445–97, into the hearing record. *See 1989 Senate Hearing*, *supra* note 17, at 4 (statement of Sen. Charles E. Grassley); *id.* at 272–324.

91. *See 1989 Senate Hearing*, *supra* note 17, at 13 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice) (stating Barr "believe[s] that [administrative arbitration] is inconsistent with the appointments clause").

92. *Compare 1989 Senate Hearing*, *supra* note 17, at 13 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice) ("[To] obviate these constitutional concerns[] [t]he arbitrator could be selected and could be removed by the head of an agency with the arbitral decision not to become final until reviewed and approved by the head of the agency who is accountable to the President."), *with* Transcript of Oral Argument at 22, United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) (No. 19-1434) ("The lack of agency review of the ALJ decision by someone who's appointed by the President with advice and consent of the Senate is absent here and is ordinarily

"would dilute accountability and disrupt the making of policy by responsible officials" and "would remove the power to execute the laws from Cabinet officials and agency heads who are in turn responsible to the only figure in American government elected by all of the people, and would transfer that power to arbitrators accountable to no one."[93] Upon questioning, Barr openly interrogated the mechanics of administrative arbitration, comparing it to agency adjudication, where "ALJ decisions are reviewable" and "can be reversed" by the agency head.[94] Under Barr's reading of the Constitution, administrative arbitration could comply with the Appointments Clause only "[i]f there was reviewability . . . to the same extent there was reviewability of an administrative law judge's decision."[95] Thus, according to Barr, the constitutionally viable version of administrative arbitration would require an agency head to have the authority to overturn or withdraw from an administrative arbitration proceeding—similar to the power of an agency head under Section 557 of the APA.[96]

Barr's objection created a compromise—the escape clause. In a parallel hearing in the House four months later, Barr announced the compromise with the bill's proponents and the Justice Department.[97] This compromise would become known as the escape clause, which was adopted in both the House and Senate versions of the ADRA and included in the final passed bill without any documented resistance.[98] As articulated in the House Report, the escape clause provided reviewability, ensuring that "an officer of the United States would be responsible for each arbitral decision."[99] Specifically, the provision authorized the head of any agency that is a party to an administrative arbitration proceeding to "terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final."[100] As awards become "final 30 days after [they are] served on all parties," the escape clause converted binding

present and historically has been present. And then, second, the lack of accountability, . . . these are multimillion, sometimes billion-dollar decisions being made not by someone who's accountable in the usual way that the Appointments Clause demands." (question from Kavanaugh, J.)).

93. *1989 Senate Hearing*, *supra* note 17, at 94 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice).

94. *Id.* at 19 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice).

95. *Id.* at 21 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice).

96. *See id*; 5 U.S.C. § 557(b); *see also* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 136–37 (2008) (explaining the rise of the Federalist Society and the conservative legal movement in the 1980s that created the basis for Barr's view of the Appointments Clause).

97. *1990 House Hearing*, *supra* note 17, at 35–36 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice) (offering "a proposed modification of the bill that is acceptable to both the Department of Justice and the ABA" and supported by ACUS).

98. *See* H.R. REP. NO. 101-513, at 12–13 (1990); S. REP. NO. 101-543, at 5–7 (1990).

99. H.R. REP. NO. 101-513, at 13.

100. Administrative Dispute Resolution Act, Pub. L. No. 101-552, sec. 4, §590(c), 104 Stat. 2736, 2743 (1990).

arbitration into a temporary one-sided nonbinding proceeding for an agency party.[101] Thus, administrative arbitration under the ADRA was merely quasi-binding.

It appears Congress thought the inclusion of the escape clause would be a minor update to the ADRA. Congress indicated that instances when the escape clause could be invoked would be rare and did not expect the inclusion of the provision to deter parties from entering into administrative arbitration proceedings so long as an agency head did not overturn arbitration decisions "on a regular basis."[102] Yet, when Congress revisited administrative arbitration after the ADRA's five-year sunset provision,[103] Congress found the escape clause made the system untenable.

D. RESCISSION OF THE ESCAPE CLAUSE

The ADRA had a five-year sunset clause meant, in part, to test the effectiveness and willingness of parties to use ADR techniques in agency disputes.[104] When permanently renewing the ADRA in 1996, Congress omitted the escape clause because the clause disincentivized parties from choosing administrative arbitration in agency disputes, where agencies were perceived not to be bound by arbitration awards.[105] Practical examinations and a political change at the Justice Department led to the excise of this provision.

The practical problem with the escape clause is simple to understand: why would anyone enter a proceeding where only one side is bound by its results? Put best by Marshall Breger, former ACUS Chair and a then-Senior Fellow at The Heritage Foundation, "[t]he plain fact is that no one in the private sector will chance arbitration that provides for a one-way opt-out option by the federal government."[106] Congress found in the ADRA of 1990 that administrative proceedings had become "increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes . . . ."[107] The ADRA sought to authorize ADR techniques to yield "faster, less expensive, and less contentious" results in administrative adjudications.[108] But, the escape clause violated these tenets and asked

101. *See id.* §590(b)–(c), 104 Stat. at 2743; *see also* H.R. REP. NO. 101-513, at 13 ("Under the [escape clause], the arbitrator's decision would, in effect, become 'non-binding' for a period of 30 days . . . .").

102. *See* H.R. REP. NO. 101-513, at 13 ("[H]owever, it is not expected than [sic] an agency head would often reverse an arbitral award. If agency heads were to do so on a regular basis, parties would simply refuse to enter into arbitral agreements.").

103. Administrative Dispute Resolution Act § 11, 104 Stat. at 2747.

104. *See id.*

105. *See* 142 CONG. REC. 13816 (1996) (statement of Sen. William Cohen) ("Unfortunately, [the escape clause] has deterred private parties from entering into arbitration with the Government. As one witness testified at the hearing on [the ADRA of 1996], unless the escape clause is eliminated, 'arbitration likely will never become a viable alternative for the Federal Government.'" (quoting *1995 Senate Hearing*, *supra* note 26, at 148 (statement of Charles Pou, Jr.))).

106. *1995 Senate Hearing*, *supra* note 26, at 123 (statement of Marshall J. Berger, Senior Fellow, The Heritage Foundation and Former Chair of ACUS).

107. Administrative Dispute Resolution Act § 2, 104 Stat. at 2736 (congressional findings).

108. *Id.*

would-be parties to decide whether to take their chances in an unfamiliar quasi-binding arbitration system where an individual party faced the risk of litigating their case against an administrative agency twice.[109] So, how could this system yield "faster, less expensive, and less contentious" results?[110] Even though it would be challenging for an agency to overturn an arbitration award in practice,[111] the mere possibility that it could happen was enough to dissuade would-be users over the five-year period of the original ADRA (1990–1995). Although no definitive government record explains how much—or how little, if at all—administrative arbitration was utilized from 1990 to 1995, all indications from scholarship[112] and congressional testimony[113] appear to show that, at most, administrative arbitration was sparingly used.[114]

Political leadership change in the White House in 1992 is likely the main reason Congress was able to excise the escape clause in the ADRA of 1996. In 1992 President Bill Clinton won the election and thus replaced Republican Justice Department appointees—including Barr.[115] Although Barr led the Justice Department's opposition to the constitutionality of binding arbitration in 1990,[116] he failed to formalize this position in an official OLC opinion.[117] As told by

109. *See id.* sec 4., §590(c), 104 Stat. at 2743 (indicating that an agency head may "terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding").

110. *Id.* § 2, 104 Stat. at 2736 (congressional findings).

111. This would require the agency head to personally put their finger on the scale and dictate an alternative outcome. This type of system governs most agency adjudications, and agency heads rarely, if ever, exercise their power to overturn an adjudicative decision by an ALJ. *See* Walker & Wasserman, *supra* note 24, at 148–52.

112. *See, e.g.*, Seibel, *supra* note 4, at 241 (noting the inclusion of the escape clause in the ADRA caused "a substantial limitation on arbitral awards").

113. John Wagner, Manager of ADR Services at the Federal Mediation and Conciliation Service, was asked by Senator Carl Levin, "Do we ever get requests for binding arbitration from the private sector?" *1995 Senate Hearing*, *supra* note 26, at 21 (statement of Sen. Carl Levin). In response Wagner stated, "Not as much, no." *Id.* (statement of John A. Wagner, Manager, ADR Services, Federal Mediation and Conciliation Service).

114. For example, when asked at the same Senate subcommittee hearing on the reauthorization of the ADRA whether the escape clause had ever been utilized, Peter Steenland, Senior Counsel for the Office of Alternative Dispute Resolution at the U.S. Department of Justice, responded that it "ha[d] not been used" from 1990 to 1995. *See id.* at 22 (statement of Peter R. Steenland, Jr., Senior Counsel for Alternative Dispute Resolution, Department of Justice) (responding to questioning from Senator Carl Levin).

115. *See* Gwen Ifill, *Reno Is Confirmed in Top Justice Job*, N.Y TIMES, Mar. 12, 1993, at A10 (covering Janet Reno's confirmation).

116. *See, e.g.*, *1989 Senate Hearing*, *supra* note 17 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice) (claiming administrative arbitration "would dilute accountability and disrupt the making of policy by responsible officials" and "would remove the power to execute the laws from Cabinet officials and agency heads who are in turn responsible to the only figure in American government elected by all of the people, and would transfer that power to arbitrators accountable to no one").

117. The only "official" Justice Department documentation indicating constitutional concerns was Barr's written testimony to Congress regarding on the ADRA. *Id.* at 93–102 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice) (describing the "Constitutional Problems" with administrative arbitration); *1990 House Hearing*, *supra* note 17, at 41–48 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice) (same).

Philip Harter, who at the time of the 1990 passage represented the American Bar Association (ABA), as Chair of the ABA's Section of Administrative Law and Regulatory Practice:

> At the time of the hearing, in this very room, the ABA was strongly of the view, and remains strongly of the view, that our constitutional analysis was right, that it was fully permissible for the United States Government to be bound by arbitration. The Department of Justice asserted *with very little analysis*, that it was not. OLC is the '800 pound gorilla' on constitutional issues . . . . [Thus] we worked out the agreement that included the opt out provision. That satisfied the Department of Justice's concern that an officer of the United States had to have the final say.[118]

Given the informality and singularity of Barr's OLC objection to administrative arbitration, the Clinton Administration had the ability to quickly erode this line of constitutional interpretation by penning an official OLC opinion directly contradicting Barr's stance.[119] The OLC opinion mostly agrees with Harter that arbitrators could "run afoul of the Appointments Clause" if an arbitrator's decisions decide significant issues of policy that inhibit the government's exercise of significant authority.[120] Thus, to heed this possible constitutional issue, the ADRA of 1996 included a statutory prerequisite requiring an agency head to consult with the Attorney General on an agency's administrative arbitration guidance.[121] Congress included this provision to check an agency's authority, ensuring their use of administrative arbitration would not be "inconsistent with law."[122] Still, this type of statutory drafting implies that the Justice Department is an independent legal advisor whose interests rest outside of politics.[123]

II. THE APPOINTMENTS CLAUSE

Understanding the Supreme Court's Appointments Clause jurisprudence can, at times, feel like a rendition of "Who's on First."[124] Starting from *United States v. Hartwell*[125] in 1867, to *United States v. Arthrex, Inc.*[126] in 2021, at best, the

118. *1995 Senate Hearing*, *supra* note 26, at 27 (statement of Philip J. Harter, Chairman, Section of Administrative Law and Regulatory Practice, American Bar Association) (emphasis added).

119. *See* Const. Limitations on Fed. Gov't Participation in Binding Arb., *supra* note 27.

120. *Id.* at 219; *see also* Harter, *supra* note 8, at 199 (noting that "significant decisions" of law and government policy cannot be decided by arbitrators).

121. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, sec. 8, 110 Stat. 3870, 3872 (codified as amended at 5 U.S.C. § 575(c))

122. H.R. REP. NO. 104-841, at 9 (1996) (Conf. Rep.).

123. *See, e.g.*, Daniel Cotter, *The Attorney General Should Be Separate*, HARV. L. & POL'Y REV.: HLPR BLOG: NOTICE & COMMENT (Apr. 22, 2020), https://harvardlpr.com/2020/04/22/the-attorney-general-should-be-separate/ [https://perma.cc/R5RV-2MHZ] (arguing for increased independence for the Office of the Attorney General).

124. *See* Universal Pictures, *Who's on First? – Abbott and Costello* (Television Corporation of America broadcast May 15, 1953), https://www.youtube.com/watch?v=sYOUFGfK4bU.

125. *See* 73 U.S. (6 Wall.) 385 (1867).

126. 141 S. Ct. 1970 (2021).

Court's jurisprudence is confusing. However, the Court is in a time of transformation. One of the most durable effects of Trump's presidency will be his remaking of the federal judiciary.[127] As some of the nation's most important legal questions hinge on the powers and limits of administrative agencies,[128] the new six-to-three conservative majority will undoubtedly shape the future of the administrative state.[129] In this posture, this Part speculates whether administrative arbitration under the ADRA of 1996 violates the Appointments Clause. First, this Part examines the Court's Appointments Clause jurisprudence, concluding that an Appointments Clause analysis of an administrative adjudicator requires an independent two-factor inquiry which examines the tenure and nature of the position and the delegation of power to the position. Second, this Part then applies this test to administrative arbitrators, arguing that their positions are occasional and temporary, and that the voluntary agreement of the agency to enter into an arbitration agreement indicates sufficient executive supervision. Third, this Part then concludes that the current Court would find a constitutional violation with the Appointments Clause, but also determines that administrative arbitration is likely shielded from Article III judicial intervention.

A. WHAT'S AN OFFICER? YOU'LL KNOW IT WHEN YOU SEE IT

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States" but allows Congress to vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments."[130] Administrative arbitrators are not appointed; instead, they are selected by the disputing parties. Thus, when determining whether an arbitrator's selection under the ADRA of 1996 passes constitutional muster, the only real inquiry is whether arbitrators are "[o]fficers" within the text and meaning of the Appointments Clause.[131] This question of what an officer is—or is not—has vexed the Court for over a century.[132]

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127. *See, e.g.*, John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/Z2LR-3EC7].

128. *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (per curiam) (holding the Centers for Disease Control and Prevention exceeded its authority by issuing an eviction moratorium, noting "[i]f a federally imposed eviction moratorium is to continue, Congress must specifically authorize it").

129. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2610, 2615–16 (2022) (utilizing the major questions doctrine to limit EPA's authority to regulate under Section 111(d) of the Clean Air Act); *id.* at 2616 (Gorsuch, J., concurring) ("[The major questions doctrine] operates to protect foundational constitutional guarantees.").

130. U.S. CONST. art. II, § 2, cl. 2.

131. *Id.*

132. *See, e.g.*, United States v. Hartwell, 73 U.S. (6 Wall.) 385, 392–93 (1867) (outlining the meaning of an "office"); United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985–86 (2021) (expanding on what duties can only be fulfilled by principal officers).

The Court began to form a definition of "officer" in 1867 with *United States v. Hartwell*.[133] There, the Court decided whether a clerk working in the office of the Assistant U.S. Treasurer in Boston met the definition of a "public officer" and thus could be indicted under the Sub-Treasury Act of 1846.[134] The Court laid out three foundational guideposts. First, "[a]n office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."[135] Second, an officer's duty is "in the public service of the United States . . . appointed pursuant to law" with a fixed compensation and with duties that are "continuing and permanent, not occasional or temporary."[136] Third, "[a] government office is different from a government contract"—a government contract is "limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."[137]

Applying the criteria outlined in *Hartwell* to modern Appointments Clause inquiries also requires one to differentiate between legislative and executive power. This requirement is because the Appointments Clause unambiguously vests the power of appointment with the President and power to create positions requiring—or not requiring—appointment with Congress.[138] In 1928, the Court explained the difference between legislative power and executive power, noting that "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."[139] Building upon these measures, the Court held in *Buckley v. Valeo* that congressional appointment of Commissioners to the Federal Election Commission (FEC) violated the Appointments Clause.[140] The Court ruled that the Commissioners were "Officers of the United States" because they executed extensively executive functions such as rulemaking, quasi-judicial tasks, and "conducting civil litigation in the courts of the United States."[141] The Court explained that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'" and "must, therefore, be appointed in the manner prescribed by [the Appointments Clause]."[142] Thus, the *Buckley* Court drew the line that "performance of a significant governmental duty exercised pursuant to a public law" must be discharged by a principal or inferior officer.[143]

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133. 73 U.S. at 392–93.
134. *See id*.
135. *Id*. at 393.
136. *Id*.
137. *Id*.
138. *See* U.S. CONST. art. II, § 2, cl. 2.
139. Springer v. Gov't of the Philippine Islands, 277 U.S. 189, 202 (1928) (citing and explaining Myers v. United States, 272 U.S. 52 (1926)).
140. 424 U.S. 1, 140–43 (1976) (per curiam).
141. *Id*. at 140.
142. *Id*. at 126 (quoting U.S. CONST. art. II, § 2, cl. 2).
143. *See id*. at 141; *see also* Harter, *supra* note 8, at 198–99 (explaining *Buckley*).

In *Morrison v. Olson*,[144] *Freytag v. Commissioner*,[145] and *Lucia v. SEC*,[146] the Court also explained the difference between officers and non-officers. Citing *Buckley*, the Court noted that, in *Morrison v. Olson*, "[i]t is clear that [the independent counsel] is an 'officer' of the United States, not an 'employee.'"[147] This means that what can differentiate a government employee or contractor from an "officer" is the extent to which one is subject to "control or direction of any other executive, judicial, or legislative authority."[148] Thus, in *Freytag*, when applying this standard to special trial judges (STJs) of the Tax Court, the Court ruled they were inferior officers because they "exercise independent authority" since, as STJs, they were delegated duties such as "render[ing] the decisions of the Tax Court in declaratory judgment proceedings."[149] The Court reaffirmed this view in *Lucia*, holding that ALJs of the Securities and Exchange Commission (SEC) were inferior officers because they "exercise the same 'significant discretion' when carrying out the same 'important functions' as STJs do" and thus "have equivalent duties and powers as STJs in conducting adversarial inquiries."[150] The Court further distinguished "officers" from employees or temporary contractors, highlighting that employees and contractor duties are "'occasional or temporary' rather than 'continuing and permanent.'"[151]

In *United States v. Arthrex, Inc.*[152] the Court addressed what level of reviewability of administrative adjudicator decisions is constitutionally required. There, the Court held that administrative patent judges (APJs) exercised authority "incompatible with their appointment by the Secretary [of Commerce] to an inferior office" because APJ decisions were unreviewable by an agency head.[153] The Court explained that "Congress ha[d] assigned APJs 'significant authority' in adjudicating the public rights of private parties, while also insulating their decisions from review and their offices from removal."[154] The Court further muddied the waters by claiming impermissible delegation of authority and improper appointment both "describe the same constitutional violation: Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch . . . ."[155] On the one hand, this holding could be seen as a conservative Court—skeptical of the modern administrative state—effectuating a strict adherence to the unitary executive theory that has somewhat combined a constitutional Appointments Clause inquiry with the nondelegation doctrine. On

144. 487 U.S. 654 (1988).
145. 501 U.S. 868 (1991).
146. 138 S. Ct. 2044 (2018).
147. 487 U.S. at 671 n.12 (citing and quoting Buckley v. Valeo, 424 U.S. 1, 126 & n.162 (1976) (per curiam)).
148. *Buckley*, 424 U.S. at 126 n.162.
149. 501 U.S. at 882.
150. 138 S. Ct. at 2053 (quoting *Freytag*, 501 U.S. at 882).
151. *Id.* at 2051 (quoting United States v. Germaine, 99 U.S. 508, 511–12 (1878)).
152. 141 S. Ct. 1970 (2021).
153. *Id.* at 1985.
154. *Id.* at 1986 (citing Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam)).
155. *See id.* at 1985.

the other hand—although formalistic—the Court's ruling could also be viewed as a practical answer to Justice Sotomayor's dissent in *Lucia* where she called on the Court to articulate a bright-line rule that "final decisionmaking authority is a prerequisite to officer status"[156] and that the Court's announcement of such a clear precedent "would go a long way to aiding Congress and the Executive Branch in sorting out who is an officer and who is a mere employee."[157]

Both the Court's decision in *Arthrex* and Justice Sotomayor's dissent in *Lucia* fail to fully consider Congress's vested constitutional powers to structure the administrative state.[158] As noted by Professor Josh Chafetz, "[r]ather than attempting to determine what constitutes an inherently principal or inferior office, it makes more sense to say that this determination is part and parcel of Congress's ability to structure the bureaucracy."[159]

Beyond Congress's enumerated Article I powers,[160] the text of the Appointments Clause supports the view that Congress has a significant role and vested powers in defining what an officer is or is not.[161] As provided by the Appointments Clause, Congress is directed and vested, through its legislative powers,[162] that it "shall . . . establish[] *by Law*"[163] all "other Officers of the United States, whose Appointments are not herein" the Constitution and that "Congress may *by Law* vest the Appointment of such inferior Officers, *as they think proper*, in the President alone, in the Courts of Law, or in the Heads of Departments."[164]

Three key points can be drawn from this constitutional text. First, as Article I vests Congress with exclusive legislative powers,[165] and because the Framers were specific to note that "other Officers of the United States . . . *shall* be established *by Law*," the text of the Appointments Clause provides a mandatory command that Congress, after ratification, should expand the size of the federal government by passing laws creating new principal officers.[166] Principal officers are in charge of executive agencies and must have the power to act. Consequently, the text of the Appointments Clause provides a strong indication that the Framers anticipated that Congress should have an organizing role in creating Executive Branch agencies—the legislative power to create and organize. Second, the usage of the words "by Law"[167] to dictate the establishment of "Officers of the United States"[168] and "inferior Officers"[169] vests significant

156. *Lucia*, 138 S. Ct. at 2065 (Sotomayor, J., dissenting).
157. *Id.* at 2065–66.
158. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 119–22 (2017) (describing Congress's "role in appointments").
159. *Id.* at 121.
160. U.S. CONST. art. I, § 8.
161. *See* CHAFETZ, *supra* note 158, at 119–22.
162. U.S. CONST. art. I, § 1.
163. *Id.* art. II, § 2, cl. 2 (emphasis added).
164. *Id.* (emphasis added).
165. *See id.* art. I, § 1.
166. *See id.* art. II, § 2, cl. 2 (emphasis added).
167. *Id.*
168. *Id.*

discretion in Congress to determine who an officer is. This point was articulated by Justice Breyer in his concurrence in *Lucia* that "the legislative power [of] Congress[] suggests that . . . Congress, not the Judicial Branch alone, must play a major role in determining who is an 'Office[r] of the United States,'" and "given the constitutional language, the Court, when deciding whether other positions are 'Officers of the United States' under the Appointments Clause, should give substantial weight to Congress' decision."[170] The indication is that the Constitution provides that Congress shall be the continuous architect of the administrative state through its exclusive role in creating officers. Again, this implicates Congress's legislative power to create and organize versus executive power to appoint and act upon the laws created by Congress. Third, because Congress is vested with establishing principal and inferior officers, it seems illogical to suggest Congress lacks the implied power to establish what they are not.[171]

Throughout history, Congress has exercised its Appointments Clause powers to structure the administrative state by creating agencies and defining the duties of officers and non-officers within those agencies. For example, when establishing the nation's first executive department under the Constitution, the Department of Foreign Affairs,[172] the First Congress statutorily established that the Department "shall" have a principal officer and an inferior officer, each with different defined duties.[173] Congress also organized the Department in such a way to authorize the hiring of employees who would not be officers.[174] The Department of Foreign Affairs example showcases how Congress, from the beginning, has historically exercised its agency organizing powers under the Appointments Clause.[175] As Chafetz points out, Congress has also exercised its

169. *Id.*

170. Lucia v. SEC, 138 S. Ct. 2044, 2062 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part).

171. *See, e.g.*, *id.* ("[T]he Appointments Clause is properly understood to grant Congress a degree of leeway as to whether particular Government workers are officers or instead mere employees not subject to the Appointments Clause.").

172. Months after its establishment, Congress renamed the Department of Foreign Affairs to the Department of State and "assigned to it certain domestic duties" such as "publication and distribution of Acts of Congress, custody of the Great Seal of the United States, affixing the seal to civil commissions of officials appointed by the President, and custody of Departmental records." *Administrative Timeline of the Department of State*, OFF. HISTORIAN, DEP'T STATE, https://history.state.gov/departmenthistory/timeline/1789-1899 [https://perma.cc/H5N6-3DPV] (last visited Oct. 14, 2022).

173. As provided by the statute, the Secretary, the "principal officer . . . shall perform and execute such duties" related to foreign affairs "as the President . . . shall assign." An Act for Establishing an Executive Department, to be denominated the Department of Foreign Affairs, ch. 4 sec. 1, 1 Stat. 28. (1789). Further, the Chief Clerk of the Department of Foreign Affairs, would be the "inferior officer . . . appointed by the said principal," who "in any . . . case of vacancy, shall . . . have the charge and custody of all records, books and papers appertaining to the said department." *Id.* at sec. 2, 1 Stat. at 29. ("An act for establishing an Executive Department, to be denominated the Department of Foreign Affairs.").

174. *See id.* sec. 3, 1 Stat. at 29 ("[The] principal officer, and every other person to be *appointed* or *employed* in the said department, shall, before he enters on the execution of his *office* or *employment*, take an oath or affirmation, well and faithfully to execute the trust committed to him." (emphasis added)).

175. *See id.*

organizational powers in modern times to control the power of the executive by requiring Senate confirmation for "those nominees it considers most important."[176] Beyond its constitutional authority to do so,[177] Congress, by its structural design as the Legislative Branch filled with elected representatives responsive to the people via election,[178] may be better suited than appointed judges[179] to make determinations on the structure of Executive Branch agencies.[180] For instance, Congress can act in response to changing environments without a case or controversy. In 1972, responding to the long and controversial tenure of former FBI Director J. Edgar Hoover,[181] Congress upgraded the FBI Director position from an inferior officer to a principal officer.[182] In 1986, Congress did the same with the increasingly powerful Administrator of the Office of Information and Regulatory Affairs.[183] Thus, it could be understood that the term "officer" has no fixed constitutional meaning but for the one Congress prescribes to it.[184]

Originalist scholars, such as Professor Jennifer Mascott, argue, "Officers of the United States is not a term of art creating a new, especially significant class of government officers."[185] Instead, the phrase is a "descriptive phrase indicating that the officers are federal, and not state or private, actors."[186] Thus, an "originalist" constitutional analysis of the Appointments Clause centers on determining how an "ordinary American citizen fluent in English as spoken in the late eighteenth century [would] have understood the word[]" officer.[187] Mascott resolves that "the original public meaning of 'officer' in Article II includes all federal

176. *See* CHAFETZ, *supra* note 158, at 121.

177. *See* U.S. CONST. art. II, § 2, cl. 2.

178. *See id.* art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."); *id.* amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . ."). *But see*, *e.g.*, Nick Corasaniti, Reid J. Epstein, Taylor Johnston, Rebecca Lieberman & Eden Weingart, *How Maps Reshape American Politics*, N.Y. TIMES (Nov. 7, 2021), https://www.nytimes.com/interactive/2021/11/07/us/politics/redistricting-maps-explained.html (explaining redistricting, gerrymandering, and its effects on American politics).

179. *See* U.S. CONST. art. II, § 2, cl. 2.

180. *See* CHAFETZ, *supra* note 158, at 121–22.

181. *See* Kurt A. Schmautz, Book Note, 90 MICH. L. REV. 1812, 1812 (1992) (reviewing CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS (1991)) ("During his forty-eight-year tenure as Director of the Federal Bureau of Investigation, J. Edgar Hoover became the most powerful bureaucrat in American history . . . . The FBI's triumphs made him a national hero, its prestige fueled his ambition, and its investigative authority became a license to spy on his enemies. By the end of the Roosevelt Administration, [Hoover's] potent political machine was unstoppable and unaccountable to the political process.").

182. CHAFETZ, *supra* note 158, at 121.

183. *Id.*

184. *See id.*; Lucia v. SEC, 138 S. Ct. 2044, 2062 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part).

185. Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 471 (2018) (internal quotation marks omitted).

186. *Id.*

187. *See id.* at 466 (quoting Lawrence B. Solum, *We Are All Originalists Now*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 3 (2011)).

officials with responsibility for an ongoing statutory duty."[188] This conclusion fits within the larger concept of the unitary executive theory,[189] a theory that requires a "clear and effective chain of command"[190] so the public can "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall."[191] To unitary executive theorists, all federal officers must be responsive to the President because "[t]he President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame, whereas 'one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility.'"[192] Therefore, as explained by Professor Steven G. Calabresi and Professor Gary Lawson, the proposition that Congress has the constitutional authority to designate a position, such as an ALJ, as a non-officer by statute "with no change in their actual authority . . . is plainly wrong."[193] Mascott's conclusion of the original meaning of the term "officer" fits within the broader scholarly discussion of the unitary executive theory to announce a threshold Congress cannot go below to ensure the bureaucracy is sufficiently responsive to the President's executive authority.[194] The current conservative majority of the Supreme Court appears supportive of this view, as exemplified by Justice Thomas' concurrence in *Lucia* that "all federal officials with ongoing statutory duties [must] be appointed in compliance with the Appointments Clause."[195]

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188. Mascott, *supra* note 185, at 564.

189. *See* Birk, *supra* note 18, at 179 ("The unitary executive theory holds that Article II's declaration that 'the executive Power shall be vested in a President of the United States of America' means that there is one—and only one—person constitutionally authorized to wield the executive power: the President of the United States. Thus, all executive-branch officers exercise authority only as delegates of the President and must be subject to his control." (quoting U.S. CONST. art II, § 1)).

190. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 498 (2010); *see generally* John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1966–85 (2009) (discussing a historical context that supports the unitary executive theory).

191. *Free Enter. Fund*, 561 U.S. at 498 (quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton) (J. Cooke ed., 1961)).

192. Morrison v. Olson, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 70, at 427 (Alexander Hamilton) (Rossiter ed., 1961)); *see also* Yoo, *supra* note 190, at 1947–48 (explaining Scalia's dissent in *Morrison* in the broader context of executive authority under the unitary executive theory).

193. Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 130–31 (2019).

194. *See* Mascott, *supra* note 185, at 564. Scholars such as Steven G. Calabresi and Kevin H. Rhodes also point to the Writing Clause, vesting the President with the power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," to be further evidence that the bureaucracy should be responsive to the President. U.S. CONST. art. II, § 2, cl. 1; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1206 (1992) (suggesting the Writing Clause was "intended to augment the unified, hierarchical executive created by Article II, Section I, and not to insulate executive officers from presidential control").

195. Lucia v. SEC., 138 S. Ct. 2044, 2057 (2018) (Thomas, J., concurring) (citing Mascott, *supra* note 185, at 507–45)); *see also* Transcript of Oral Argument at 6, United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) (No. 19-1434) ("[T]he Appointments Clause was designed to . . . make it clear who's responsible." (question of Roberts, C.J.)).

After reviewing scholarship and over a century's worth of Supreme Court decisions, one is left with clues but no definite answers to what an officer is within the text and meaning of the Appointments Clause. Nevertheless, the Court has provided that determining what an "officer" is—or is not—requires two separate inquiries; one, into the tenure and nature of the position, and another, into the delegation of power wielded by the position. After *Arthrex*, the Court has clarified that both "describe the same constitutional violation," thus, either can be dispositive.[196] Therefore, in the context of administrative arbitrators, the independent dual-prong inquiry begins with determining if an arbitrator's position is "continuing and permanent"—as opposed to "occasional or temporary"—by investigating an arbitrator's tenure, duration of services, and statutory position.[197] If a court concludes that the position is occasional or temporary, then it should also determine the extent to which an arbitrator is controlled or serves at the direction of an Executive Branch authority and whether their decisions are an exercise of significant government authority that binds the Executive Branch.[198]

B. PRONG ONE: THE OFFICE OF THE ADMINISTRATIVE ARBITRATOR

A robust case can be made that administrative arbitrators under the ADRA of 1996 do not incur an Appointments Clause violation. Under the first prong of the Appointments Clause analysis, the ADRA of 1996 does not provide an "office" for an arbitrator to hold; instead, their services are occasional and temporary.[199]

The difference between officers and non-officers can be exemplified by the difference in the permanence of their positions. As outlined in *Hartwell*, "[a]n office is a public station, or employment, conferred by the appointment of government . . . embrac[ing] the ideas of tenure, duration, emolument, and duties."[200] The Court's analysis of an "office" in *Hartwell* is extensively consistent with Mascott's conclusion regarding the "the original public meaning of 'officer' . . . [to] include[] all federal officials with responsibility for an ongoing statutory duty."[201] Both center on the idea that there must be some level of permanence to constitute a position as an "officer."[202] Using this guidepost, the Court has distinguished government officers from temporary employees or contractors by noting that positions such as ALJs are "continuing and permanent" and not "occasional or temporary."[203] Like the STJs in *Freytag*,[204] ALJs "'receive[] a career appointment"[205] to a position created by

196. *Arthrex, Inc.*, 141 S. Ct. at 1985.

197. *See* United States v. Hartwell, 73 U.S. (6 Wall.) 385, 392–93 (1867); *Lucia*, 138 S. Ct. at 2051 (citing United States v. Germaine, 99 U.S. 508, 511–12 (1878)).

198. *See* Buckley v. Valeo, 424 U.S. 1, 125–26 (1976) (per curiam); Morrison v. Olson, 487 U.S. 654, 671 (1988) (citing *Buckley*, 424 U.S. at 126 & n.162); Freytag v. Comm'r, 501 U.S. 868, 882 (1991); *Arthrex*, 141 S. Ct. at 1986.

199. *See* 5 U.S.C §§ 575–580.

200. *Hartwell*, 73 U.S. at 393.

201. Mascott, *supra* note 185, at 564.

202. *See id.*

203. Lucia v. SEC, 138 S. Ct. 2044, 2051–53 (2018) (internal citation and quotation marks omitted).

204. 501 U.S. 868, 882 (1991).

205. *Lucia*, 138 S. Ct. at 2053 (omission in original) (quoting 5 C.F.R. § 930.204(a)).

statute, which sets forth the "'duties, salary, and means of appointment.'"[206] On the flip side, as decided in *United States v. Germaine*, civil surgeons were not "officers" because their duties were "occasional and intermittent" because they were "only to act when called on . . . in some special case."[207] A 2007 OLC opinion further explained the limits of this distinction, noting, "a temporary position also may be continuing, if it is not personal, transient, or incidental."[208] Applying the 2007 OLC opinion, Calabresi and Lawson have argued positions such as a "one-time diplomatic endeavor or a short-term contract to value imported goods" are positions that could be considered noncontinuing.[209]

Administrative arbitrators likely even fit Calabresi and Lawson's criteria because their means of selection, employment status, duration, duties, and salary are inconsistent with a continuing or ongoing commitment. First, an arbitrator's appointment is temporary, lasting only for the duration of the dispute at hand, and subject to the *voluntary selection* of the disputing parties.[210] Thus, an administrative arbitrator's duties are discharged upon the disposition of a case.[211] By any logic, this fact dictates that an arbitrator's duties cannot continue because they conclude after each case they preside over.[212] Even if an arbitrator presides over multiple cases at a time, these duties would still not be continuing because each case is independent, requiring its own arbitration agreement.[213] This is comprehensively different from positions such as ALJs, who are appointed to career government positions and, by statute, "shall be assigned to cases."[214] Therefore, by the Court's logic, the appointment and status of an ALJ confers a regular, continuing, and tenured duty to the Government of the United States.[215] By contrast, an administrative arbitrator meets none of these officer requirements and resembles more characteristics of the civil surgeons in *Germaine* because arbitrators only act when called upon for a particular case by the disputing parties.[216]

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206. *Id.* (quoting *Freytag*, 501 U.S. at 881) (citing 5 U.S.C. §§ 556–557, 5372, 3105 (setting forth the duties, salary, and means of appointment for SEC ALJs, respectively)).

207. United States v. Germaine, 99 U.S. 508, 512 (1878).

208. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 100 (2007) (internal quotation marks omitted), https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v031-p0083.pdf [https://perma.cc/6NEY-HLCU].

209. Calabresi & Lawson, *supra* note 193, at 133–34 (discussing OLC's 2007 opinion).

210. *See* 5 U.S.C. § 575(a)(1) ("Arbitration may be used as an alternative means of dispute resolution *whenever all parties consent*." (emphasis added)); *id.* § 577(a) ("The parties to an arbitration proceeding *shall be entitled to participate in the selection of the arbitrator*." (emphasis added)).

211. *Id.* § 575.

212. *See id.*

213. *See id.*

214. *Id.* § 3105 (providing statutory requirements for the "[a]ppointment of administrative law judges").

215. *See* Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018) (noting that SEC ALJs "hold a continuing office established by law" and "receive a career appointment" (internal quotation marks and citations omitted)).

216. *Compare* 5 U.S.C. § 575(a)(1) ("Arbitration may be used as an alternative means of dispute resolution whenever all parties consent."), *with* United States v. Germaine, 99 U.S. 508, 512 (1878) ("[Civil] surgeon[s] [are] only to act when called on by the Commissioner of Pensions in some special case . . . .").

An administrative arbitrator's salary further showcases the temporary nature of the position. Their duties and salary are not set by statute or regulation but instead are fixed by the parties' contractual agreement.[217] The term salary is not even consistent with their functions. As noted in *Lucia*, 5 U.S.C. § 5372 provides there "shall be . . . levels of basic pay for administrative law judges" and denotes specific other salary requirements ALJs "shall" receive.[218] By contrast, the ADRA of 1996 does not even require administrative arbitrators to be paid.[219] Additionally, the common definition of salary—a "fixed compensation paid regularly for services"[220]—is inconsistent with the function and practice of administrative arbitrators. Comparably, if an administrative arbitrator is paid, the payment is not regular, meaning it is not recurring because an arbitrator is contracted on a case-by-case basis.[221]

Altogether, administrative arbitration fails to meet the criteria of the first prong of an Appointments Clause inquiry. The second prong of the Appointments Clause inquiry is a closer call, but a strong argument can be made that administrative arbitrators do not wield an impermissible delegation of authority because arbitrators are sufficiently controlled by the Executive Branch.

C. PRONG TWO: WHO'S BINDING WHOM?

Under the second prong of the Appointments Clause analysis, a robust case can be made that administrative arbitrators are sufficiently controlled by the Executive Branch because—subject to an agency's own guidance and discretion—an agency must *voluntarily* choose to enter into an administrative arbitration proceeding.[222] Thus, an agency exercises sufficient executive supervision through its discretion to decide to—or decide not to—submit a dispute for final disposition within the confines of an extensively contractual agreement under the ADRA of 1996.[223] This Section explains past policy decisions, brings forward a colorable argument to defend the constitutionality of administrative arbitration, and speculates how the current Court would view administrative arbitration.

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217. *See* 5 U.S.C. § 575.

218. *Id.* § 5372(b)(1)(A); *see also Lucia*, 138 S. Ct. at 2053

219. No provision of the ADRA of 1996 provides that an arbitrator *must* be paid. In fact, the only mention of payment in the ADRA of 1996 concerns when any of the disputing parties desires a record of the proceeding. *See* 5 U.S.C. § 579(b)(4) ("Any party wishing a record of the hearing shall . . . pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that the costs should be apportioned."). For example, as noted in Part III, *infra*, the common practice of the FMCSA is to use unpaid arbitrators. *See, e.g.*, Distrib. Specialists, Inc., FMCSA-2007-29085-0008 (Fed. Motor Carrier Safety Admin. 2010) (Vergilio, Arb.) (noting the arbitration agreement specified the arbitrator could be uncompensated).

220. *Compare Salary*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2012), *with Lucia*, 138 S. Ct. at 2053 ("SEC ALJs receive[ ] a career appointment . . . to a position created by statute, down to its duties, salary, and means of appointment." (first omission in original) (internal quotation marks and citations omitted)).

221. *See* 5 U.S.C. § 575.

222. *See id.*

223. *See id.*; *see also* Harter, *supra* note 8, at 199.

1. The Case for Constitutional Compliance

Under the ADRA of 1996, an administrative arbitration award "is binding on the parties to the arbitration proceeding."[224] Hence, because administrative arbitration is *always* a dispute between an agency and an individual party, an arbitrator's decision "is binding" on the Executive Branch.[225] As noted by Harter, OLC, CRS, and others in the 1980s and 1990s, the Court's holding in *Buckley* seemed to allow for a permissible delegation of authority to arbitrators so long as they did not exercise "significant authority" or a "significant governmental duty."[226] Consequently, in the 1980s and 1990s and prior to the Court's ruling in *Arthrex*, scholars seemed to agree that so long as arbitrators were not given the authority to decide major policy questions, their appointment to preside over an administrative dispute did not constitute an Appointments Clause violation.[227] However, after the Court's decision in *Arthrex*, this type of permissible delegation of executive authority is likely no longer valid. The Court's decision announced a clear rule, consistent with a formalistic understanding of the separation of powers in line with the unitary executive theory, holding "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch."[228]

Even under *Arthrex*, there is still a strong case that administrative arbitrators are sufficiently supervised by the Executive Branch to the effect that arbitrators wield a permissible delegation of authority subject to executive supervision. The ultimate decision of whether to—or not to—enter an administrative arbitration proceeding is a matter of executive discretion. As noted by Justice Scalia's dissent in *Morrison v. Olson* (a dissent frequently cited as authoritative by consecutive Justices in Appointments Clause cases),[229] "the balancing of various legal, practical, and political considerations . . . is the very essence of prosecutorial discretion,"[230] which in his view was a "quintessentially executive

224. 5 U.S.C. § 580(c).

225. *See id.*

226. Buckley v. Valeo, 424 U.S. 1, 126, 141 (1976) (per curiam); Harter, *supra* note 8, at 199 (noting "the restriction [articulated in *Buckley*] would appear to bar the arbitrator's deciding major policy questions, not the factual basis of such a decision or a mixed question of law and fact in which the norms are already relatively well developed" and "[t]he Article II limits . . . do not appear to be a practical concern"); Letter from Henry Cohen, *supra* note 85, at 4 ("[I]f arbitrators were not appointed in accordance with Article II, it seems unlikely that there would be a constitutional problem."); Bruff, *supra* note 4, at 497 (noting that administrative arbitration is constitutionally permissible so long as "the basic role of arbitration in federal programs is to apply relatively well-defined public-law norms to factual disputes").

227. *See* Harter, *supra* note 8, at 199; Bruff, *supra* note 4, at 497.

228. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021).

229. *See, e.g.*, *id.* at 1988 (Gorsuch, J., concurring in part and dissenting in part) (quoting and citing with approval Morrison v. Olson, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting)); NLRB v. Sw. Gen., Inc., 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring) (citing with approval *Morrison*, 487 U.S. at 719–21 (Scalia, J., dissenting)); PHH Corp. v. CFPB, 881 F.3d 75, 183 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (quoting and citing with approval *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting)), *abrogated by* Seila L. LLC v. CFPB, 140 S. Ct. 2183 (2020).

230. *Morrison*, 487 U.S. at 708 (1988) (Scalia, J., dissenting).

function."[231] Here, Justice Scalia provides the logical inference that, under the separation of powers, the Executive Branch must be free to use its discretion to choose whether to act.[232] As statutorily provided under the ADRA of 1996, administrative arbitration is nothing more than an executive decision on whether to be bound by the terms of a contract, otherwise known as an arbitration agreement.[233] In effect, the Executive Branch is wielding its discretion by binding itself to the terms of a contract that allows for an arbitrator's decision to end a dispute.

Agency discretion lends strong support for this position. Specifically, this opinion is bolstered by noting that only agency personnel who have the "authority to enter into a settlement concerning the matter; or [are] otherwise specifically authorized by the agency to consent to the use of arbitration" may enter into an agreement with the disputing party to submit a case to administrative arbitration.[234] Further, these decisions are subject to agency guidance that, by statute, must be issued by "the head of an agency, in consultation with the Attorney General."[235] The decision to enter arbitration is *voluntary*, indicating that whether an agency acts is a matter of discretion. Most importantly, an arbitration agreement is nothing more than a contractual agreement, because it is a voluntary agreement between the parties that states the essential terms of the proceeding, and it must be in writing.[236] The ADRA of 1996 even provides that "[a] decision by an agency to use or not to use a dispute resolution proceeding . . . *shall be committed to the discretion of the agency*."[237] Because no constitutional provision or Supreme Court precedent indicates that the Executive Branch lacks the general authority to enter into a contract, under this theory, administrative arbitration should be considered permissible.

2. The Current Court and Administrative Arbitration

Conversely, given the sweeping holding of *Arthrex*[238] and the Court's current personnel,[239] it seems unlikely that the current Court would entertain the constitutionality of administrative arbitration. Accordingly, the constitutional violation

231. *Id.* at 706 (Scalia, J., dissenting).

232. *See id.* (Scalia, J., dissenting).

233. *See* 5 U.S.C. § 575(a)(2) ("The arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing. Each such arbitration agreement shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes.").

234. *Id.* § 575(b)(1)–(2).

235. *Id.* § 575(c).

236. *See id.* § 575(a)(2).

237. *Id.* § 581(b) (emphasis added).

238. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021) ("Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch . . . .").

239. *See* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 22–23 (2017) (explaining the conservative skepticism toward the administrative state); *see also, e.g.*, Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 62–63 (2015) (Alito, J., concurring) (stating that a private arbitrator cannot constitutionally "resolve a dispute between Amtrak and the [Federal Railroad Administration]" and that a public

analysis is quick. As authorized by the ADRA of 1996, administrative arbitration is an ADR technique where the agency and disputing party voluntarily choose a neutral third party to make a final and binding decision resolving the dispute. As provided by the ADRA of 1996, "[a] final award is binding on the parties to the arbitration proceeding."[240] Thus, the analysis indicates a constitutional violation under strict adherence to the Court's decision in *Arthrex*. After the recission of the escape clause, arbitrator decisions bind the Executive Branch because they are unreviewable by an agency head.[241] Thus, as forewarned by Bill Barr in 1989, administrative arbitration raises "serious issue[s] about [its] conformity with the Constitution."[242]

Still, assuming the Court found a constitutional violation with the selection of arbitrators, there is likely no remedy that could preserve the system. As noted by the Court in *Arthrex*, "'when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem' by disregarding the 'problematic portions while leaving the remainder intact.'"[243] If the Court were to disregard 5 U.S.C § 580(c), then the ADRA of 1996 would contain no provision that binds the parties to an arbitrator's decision. Therefore, in effect, this would create a nonbinding administrative arbitration system.

D. THEORETICAL CONSTITUTIONAL VIOLATION

If a tree falls in a forest and no one is around to hear it, does it make a sound? By comparison, if a constitutional violation is evident but no one can challenge it, is it real or merely theoretical? Administrative arbitration is likely practically shielded from constitutional challenges.

Administrative arbitration is not a high-stakes litigation arena; instead, as presently used by agencies such as the FMCSA, administrative arbitration resembles something more akin to small claims court.[244] The case of Roxana Argueta exemplifies the typical scenario litigated through FMCSA's administrative arbitration proceedings. On December 22, 2020, FMCSA issued a Notice of Claim alleging that Argueta had committed a regulatory violation carrying a proposed penalty of $5,890.[245] On January 21, 2021, Argueta responded to FMCSA's Notice of Claim, admitting to the violations and submitting to an administrative arbitration proceeding to "contest the amount of the civil penalty and/or the length of time to

arbitrator who is authorized to issue decisions that binds the Executive Branch must be an "Officer of the United States" (internal quotation marks and citations omitted)).

240. 5 U.S.C. § 580(c).

241. *See id.*

242. *1989 Senate Hearing*, *supra* note 17 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice)

243. *Arthrex*, 141 S. Ct. at 1986 (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–29 (2006)).

244. *Compare, e.g.*, Roxana L. Argueta, FMCSA-2021-0069 (Fed. Motor Carrier Safety Admin. 2021) (Cho, Arb.) (disputing a civil penalty of $5,890), *with* CAL. CIV. PROC. CODE 116.220(a)(1) (noting that California small claims court only has jurisdiction over disputes involving up $5,000).

245. Roxana L. Argueta, FMCSA-2021-0069 (Fed. Motor Carrier Safety Admin. 2021) (Cho, Arb.).

pay the civil penalty."[246] On March 26, 2021, FMCSA agreed to resolve the dispute via administrative arbitration.[247]

Individual litigants such as Argueta may choose administrative arbitration as a means to a faster and cheaper adjudication of a dispute with an agency. This is in direct contrast to cases such as *Arthrex*, whose procedural posture in the Supreme Court was a result of a protracted patent dispute dealing with "[b]illions of dollars."[248] Disputes before an agency, such as the FMCSA, end up in administrative arbitration proceedings because litigants and the agency are mutually choosing a cheaper and more rapid choice to resolve a low-stakes dispute. Further, even if the agency believes a litigant is seeking to move a case through an administrative arbitration proceeding as a constitutional test case,[249] the agency can always choose not to agree to litigate the case through administrative arbitration. This would avoid any possibility of judicial intervention into the mechanics of administrative arbitration. Since 1990, no litigant has brought a lawsuit into federal court constitutionally challenging the authority of an administrative arbitrator. However, the door is always open for a federal court to vacate an arbitration award on the grounds that "the arbitrator[] exceeded their powers" under the Appointments Clause.[250] In conclusion, although there is strong likelihood the current Court would rule administrative arbitration is unconstitutional, this conclusion is merely theoretical. Practically speaking, administrative arbitration is likely shielded from Article III judicial intervention.

III. DOES ADMINISTRATIVE ARBITRATION SERVE THE PUBLIC GOOD?

As found by Congress in 1990 in the ADRA, "the availability of a wide range of dispute resolution procedures . . . will enhance the operation of the Government and *better serve the public*."[251] Over three decades later, does administrative arbitration better serve the public? This question should be studied by Congress and ACUS as part of their current examination of ADR in agency adjudications.[252] As such, this Part seeks to provide recommendations and pose questions as to how the system can work better to serve the public's interest. First, this Part highlights the transparency gap in administrative arbitration. Next, this Part explores issues of congressional oversight related to the selection of administrative arbitrators, suggesting areas of study and ways Congress can fix the system.

246. *Id.*

247. *Id.*

248. *See Arthrex*, 141 S. Ct. at 1976.

249. *See, e.g.*, FEC v. Cruz, 142 S. Ct. 1638 (2022).

250. *See* 9 U.S.C § 10(a)(4) (granting, by statute, jurisdiction of a federal district court to decide this type of claim).

251. Administrative Dispute Resolution Act, Pub. L. No. 101-552, § 2, 104 Stat. 2736, 2736 (1990) (emphasis added) (congressional findings).

252. ADMIN. CONF. OF U.S., *supra* note 5.

A. TRANSPARENCY

By its very nature, administrative arbitration is different in one major respect from typical arbitration; administrative arbitration is a federal governmental system for adjudicating individual disputes between the government and an individual member or entity of the public.[253] Transparency and agency disclosure of administrative arbitration proceedings are lacking. This is in direct conflict with the tenets of democracy.[254]

In the case of administrative arbitration, the public is largely shielded from this system which creates a shadow adjudication scheme. The ADRA of 1996 states that an arbitration award "shall include a brief, informal discussion of the factual and legal basis for the award."[255] Yet, the ADRA of 1996 provides no requirement that agencies make these decisions publicly available. Further, as a general matter, agency guidance documents fail to provide a mechanism for coherent disclosure of arbitration awards.[256]

Even an agency which agrees that the public has an interest in viewing arbitration documents fails to provide an intelligible means for public access. For example, FMCSA's agency guidance agrees with the public nature of administrative arbitration, noting that "[a]rbitration awards are not confidential documents" and that "[a]wards shall be entered into the FMCSA docket for the case."[257] Although FMCSA posts case dockets to Regulations.gov, these postings are unintuitive because they are not identifiably marked and are one of the thousands of FMCSA adjudication postings, making it nearly impossible for a litigant to find a string of previous arbitration decisions or allow for Congress or academia to study the system.[258] Further, although six agencies are known to have issued administrative adjudication guidance, [259] only selective decisions from the FMCSA are publicly accessible.[260] The IRS even dictates in its sample arbitration agreements that any

253. *See* 5 U.S.C. § 575.

254. As noted by Margaret Kwoka, "the right of the public to access government information has arguably risen beyond a statutory right, or even arguments for a constitutional right, but indeed has been declared a human right." Margaret B. Kwoka, *FOIA, Inc*., 65 DUKE L.J. 1361, 1367 (2016) (citations omitted) (discussing the arc of FOIA and global government transparency movements and noting how government transparency grew from a statutory idea to human right recognized by multiple international human rights courts in South America and Europe).

255. 5 U.S.C. § 580(a)(1).

256. For example, the IRS regulation on administrative arbitration fails to mention and provides no mechanism for public release of arbitration awards or arbitration agreements. *See* IRM 35.5.5.1 (Dec. 14, 2010).

257. *See* Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996, 69 Fed. Reg. 10288, 10293 (Mar. 4, 2004).

258. For example, FMCSA does not use a uniform key word identifier to allow one to pull a series of arbitration awards and agreements. Instead, FMCSA posts docket information under the key term "other." The FMCSA will also create a new posting for each stage of a case. Thus, a case can have multiple incomplete entries on Regulations.gov containing different documents.

259. *See Federal Administrative Arbitration at-a-Glance*, *supra* note 8 (tracking agency guidance documents related to administrative arbitration since the passage of the ADRA of 1996 to August 2009).

260. Based on the research for this Note, the author has only been able to locate selective arbitration awards and agreements from FMCSA. Although this Note does not foreclose that administrative

"recording of [an] Arbitration Session *shall remain confidential* and *will be destroyed* once the Arbitrator reaches a decision."[261] Still, this transparency deficit is not limited to administrative arbitration. In 2015, ACUS observed that there was "no single, up-to-date resource that painted a comprehensive picture of agency adjudications across the federal government."[262]

At least in the administrative arbitration context, Congress should fix this problem and require agencies that use administrative arbitration to maintain a decision database on their websites. As Professor Michael J. Klarman explained, "[d]emocracy requires that citizens be able to hold their government accountable, which is possible only if the government is sufficiently transparent."[263] Transparency is not just practically important for litigants and scholars but is required to bear legitimacy before the public the agency serves.

Models already exists for Congress to use in creating a more transparent system. For example, Congress has already statutorily designed such a system for the Federal Labor Relations Authority (FLRA), and this Note suggests Congress should do the same for administrative arbitration. Under the Civil Service Reform Act of 1978, the FLRA is authorized to decide disputes between federal agencies and labor organizations, which represent federal workers, through arbitration.[264] However, FLRA's arbitration authority also includes a disclosure requirement that FLRA "shall publish the texts of its decisions."[265] With this disclosure requirement codified into law, FLRA has created a publicly accessible database on its website containing all arbitration decisions.[266] Further, this database is coherently structured, allowing one to search by date, keyword, and title.[267] Applying this type of database to administrative arbitration more broadly would better serve the public's interest by allowing litigants to prepare for arbitration proceedings. It would also allow Congress or other interested parties to study and examine the system as a whole or on a case-by-case basis.

B. CONGRESSIONAL OVERSIGHT

The lack of oversight provisions in the ADRA of 1996 is a congressional failure. As passed into law, the ADRA of 1996 permanently authorizes federal agencies to utilize administrative arbitration but requires no continuous oversight of

arbitration awards may be available somewhere, this Note does conclude that, for the most part, administrative arbitration awards are either not available or inaccessible unless by a FOIA request.

261. IRS, ARBITRATION AGREEMENT (2002) (emphasis added), https://www.irs.gov/pub/irs-utl/revised_351_arbitration_agmt_10-28-02.pdf [https://perma.cc/RA6C-VG5Z] (proving a standard, boiler plate IRS arbitration agreement).

262. *Federal Administrative Adjudication Database*, ADMIN. CONF. U.S., https://www.acus.gov/research-projects/federal-administrative-adjudication-database [https://perma.cc/3KS9-NAU7] (last visited Oct. 19, 2022).

263. Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy — and the Court*, 134 HARV. L. REV. 1, 38 (2020).

264. *See* 5 U.S.C. §§ 7101–7135.

265. *Id.* § 7133(a).

266. *See Authority Decisions*, FED. LAB. RELS. AUTH. http://flra.gov/decisions/authority-decisions [https://perma.cc/3S7E-BABA] (last visited Oct. 19, 2022).

267. *See id.*

the program.[268] Congress authorized the program with the explicit understanding that ADR (like arbitration) in agency adjudications "can lead to more creative, efficient, and sensible outcomes" that avoid a typical adjudication's "formal, costly, and lengthy" procedures.[269] So, how does Congress know if ADR techniques, such as administrative arbitration, are actually effectuating "more creative, efficient, and sensible outcomes"?[270] To cure this issue, Congress should institute a statutory "Police-Patrol Oversight" system,"[271] requiring agencies to annually report how many adjudications were resolved through administrative arbitration. This would help Congress properly oversee a legislatively created system, understand its effectiveness, and enact legislation fixes to potential problems.

Agency reporting requirements should also be tailored to the specificities of administrative arbitration. For administrative arbitration, these requirements should instruct agencies to track who is serving as an arbitrator and how much each arbitrator is paid for their services. A question posed by Bill Barr in 1989 during the congressional debate on the ADRA centered on why agencies needed arbitration authority when they were already authorized to adjudicate claims through administrative adjudication proceedings.[272] Under the ADRA of 1996, an administrative arbitrator may be "a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding."[273] However, the ADRA of 1996 does not require adjudicators to be paid. This can lead to a situation where administrative arbitrators are no different from administrative adjudicators, except that they are unbound by the procedural formalities of typical agency adjudications.[274]

In 2010, FMCSA and Distribution Specialists, Inc. agreed to adjudicate a dispute through administrative arbitration.[275] After both sides agreed to the dispute resolution technique of administrative arbitration, the agency provided Distribution Specialists, Inc. with a list, consistent with the agency's guidance, of acceptable arbitrators.[276] These included:

(1) Civilian Board of Contract Appeals Judges or representatives from other government agencies who have been trained in arbitration;

(2) Uncompensated neutral parties from local communities; or

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268. *See* 5 U.S.C. § 575.

269. Administrative Dispute Resolution Act, Pub. L. No. 101-552, § 2, 104 Stat. 2736, 2736 (1990) (congressional findings).

270. *See id*.

271. *See* Mathew D. McCubbins & Thomas Schwartz, C*ongressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

272. *See 1989 Senate Hearing*, *supra* note 17, at 19 (statement of William P. Barr, Assistant Att'y Gen. for the Office of Legal Counsel, Department of Justice).

273. *See* 5 U.S.C. § 573(a).

274. *See id*. § 573(c)(2).

275. Distrib. Specialists, Inc., FMCSA-2007-29085-0008 (Fed. Motor Carrier Safety Admin. 2010) (Vergilio, Arb.).

276. *Id*.

(3) Compensated neutral parties from outside the government, whose costs are to be shared by agreement of the parties.[277]

In this case, the parties choose to arbitrate before a Civilian Board of Contract Appeals Judge, Board Judge Joseph A. Vergilio.[278] The arbitration agreement also specified that Judge Vergilio was to be uncompensated for his services.[279] When examining a sample of five other FMCSA arbitration agreements from 2007 to 2017, all five of those arbitration proceedings were also presided over by uncompensated Board Judges.[280] These arbitration agreements appear to indicate that an employee of the federal government is performing a governmental service outside of their normal contracting functions without compensation.

This insight highlights a couple of important questions that ACUS and Congress should investigate. First, are administrative arbitrators quasi-governmental actors acting outside of agency adjudicative procedures? This question implicates whether Congress should reassess agency adjudication processes. Second, are administrative arbitrators really neutral?

1. Administrative Arbitrators: A Wolf in Sheep's Clothing?

First, are administrative arbitrators just governmental administrative adjudicators acting in a different quasi-governmental capacity? If so, why should Congress authorize agencies to use both administrative adjudication and arbitration? Instead, if agencies are exclusively using no-cost governmental administrative adjudicators as arbitrators, this could be a sign that an agency's current adjudicative system is not working or is too "formal, costly, and lengthy" for at least some types of administrative disputes.[281] Thus, Congress should consider rescinding, for example, FMCSA's adjudicative authority for claims under a certain monetary threshold and replacing its adjudicative authority with a system akin to administrative arbitration. This new system could be practically the same as administrative arbitration, under the ADRA of 1996, except that the parties would not be free to choose the arbitrator. Instead, the arbitrator would be a governmental adjudicator (like an ALJ).

277. *Id.*

278. *Id.*

279. *Id.*

280. *See* Major Petrol. Indus., FMCSA-2006-25769-0010 (Fed. Motor Carrier Safety Admin. 2007) (Gilmore, Arb.) ("We agree to pay the Arbitrator a fee of $0.00 ('the fee') for the services as an arbitrator."); Driveway Lady LLC, FMCSA-2009-0211-0004 (Fed. Motor Carrier Safety Admin. 2010) (McCann, Arb.) ("We understand that the Arbitrator will not charge a fee for the Arbitrator's services."); J.W. Express, Inc., FMCSA-2016-0285-0003 (Fed. Motor Carrier Safety Admin. 2017) (Lester, Jr., Arb.) (same); Super Bread II Corp., FMCSA-2012-0260-0002 (Fed. Motor Carrier Safety Admin. 2012) (Pollack, Arb.) (same); Ertel Farms, Inc., FMCSA-2016-0076-0003 (Fed. Motor Carrier Safety Admin. 2016) (Goodman, Arb.) (same).

281. Administrative Dispute Resolution Act, Pub. L. No. 101-552, § 2, 104 Stat. 2736, 2736 (1990) (congressional findings).

Agency adjudications are bound by processes meant for *all* litigants who come before the agency. But administrative arbitration proceedings allow for separate procedures for *each* adjudication. This new type of administrative adjudicative proceeding could save the government and individual litigants time and money by streamlining the adjudicative process and allowing for *individualized procedures* that result in a quicker final decision.[282] Nonetheless, *United States v. Arthrex, Inc*. would dictate that a decision in this system would need to be subject to reviewability by an agency head.[283] Still, agency head reviewability would likely not plague the system because it would no longer be *voluntary* for the parties to choose to use it.

2. Are Administrative Arbitrators Neutral?

Second, has any individual litigant successfully used a private arbitrator in an administrative arbitration proceeding? Or, if government adjudicators are exclusively serving as administrative arbitrators at no fee, are they really "neutral"[284] in the way the ADRA of 1996 purports to guarantee?[285] This Note has not examined enough data to make a discernable conclusion. However, searching through agency websites, Regulations.gov, and the Federal Register, there are no discernable examples of any administrative arbitration proceeding presided over by a private arbitrator or a paid government adjudicator.

Still, at least in the context of FMCSA's administrative arbitration proceedings,[286] it appears as if an individual does not have a real choice in choosing an arbitrator to preside over their case. The FMCSA procedures provide that an individual must choose between a no-cost Board Judge or the duty to find one's own arbitrator.[287] When, for example, an individual such as Roxana Argueta is facing a maximum civil penalty of $5,890,[288] it would make little sense for her or a similarly situated party to spend thousands of dollars on a private arbitrator.[289] More generally, when the average salary of a semitruck driver ranges from $60,000 to $70,000, it seems unlikely that any litigant in an administrative arbitration proceeding before the FMCSA would be financially capable of paying

282. *See supra* Section I.A (noting that administrative arbitration decisions are, for the most part, final because a litigant can only challenge limited parts of an arbitration award).

283. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1986 (2021).

284. 5 U.S.C. § 573.

285. *See id*. ("A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.").

286. *See, e.g*., Distrib. Specialists, Inc., FMCSA-2007-29085-0008 (Fed. Motor Carrier Safety Admin. 2010) (Vergilio, Arb.).

287. *See id*.

288. *See* Roxana L. Argueta, FMCSA-2021-0069 (Fed. Motor Carrier Safety Admin. 2021) (Cho, Arb.).

289. *See* Deborah Rothman, *Trends in Arbitrator Compensation*, DISP. RESOL. MAG., Spring 2017, at 8 ("Anecdotal and off-the-record conversations suggest that [American Arbitration Association] arbitrators charge as little as $300 and as much as $1,150 an hour . . . and that rates tend to be highest in the largest markets of New York, Los Angeles, and San Francisco.").

thousands of dollars for chosen arbitrators.[290] Although individuals *technically* have the ability to choose their own arbitrator and agree to terms with the agency on cost-sharing, this theoretical course of events is economically impractical for most parties—especially before the FMCSA.[291] Therefore, although the ADRA was specifically designed to allow a litigant to choose who should preside over their case, in practice there is no choice at all. This Note does not accuse Board Judges of being partial, but it does seek to raise the question: what is the point of a statutory right if it cannot be properly exercised?

CONCLUSION

Administrative arbitration is a niche understudied segment of administrative law. However, the system and structure highlight many important and interesting questions at the intersection of constitutional law and the administrative state. The Court's decision in *United States v. Arthrex, Inc*. has upended previous congressional conclusions on how to organize the administrative state. The Appointments Clause is an active and evolving area of constitutional law that holds immense importance for the future of administrative governance. This Note is not intended to solve all the issues of administrative arbitration; instead, it seeks to explain the Appointments Clause and shine a light on an understudied system. More work must be done to better understand and reform an understudied system for the benefit of the government and the public it seeks to serve.

290. *See How Much Does an Owner-Operator Truck Driver Make?*, INT'L USED TRUCK CTRS. (Nov. 10, 2020), https://www.internationalusedtrucks.com/driver-tips/owner-operator-truck-driver-salary/ [https://perma.cc/YT2E-NKHY].

291. *See* 5 U.S.C. §§ 573(d), 575; Distrib. Specialists, Inc., FMCSA-2007-29085-0008 (Fed. Motor Carrier Safety Admin. 2010) (Vergilio, Arb.) (noting that FMCSA guidance allows for a "[c]ompensated neutral [arbitrator] from outside the government, *whose costs are to be shared by agreement of the parties*") (emphasis added)).