ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

SYMPOSIUM ON FEDERAL AGENCY ADJUDICATION
Appointment and Removal of Federal Agency Adjudicators

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TRANSCRIPT
(Not Reviewed for Errors)

Panelists

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Michael Rappaport, Hugh and Hazel Darling Foundation Professor of Law, University of San Diego School of Law

Moderator

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Transcription of Audio File:

3-Symposium on Federal Agency Adjudication
Appointment and Removal of Adjudicators

Audio Runtime: 1:31:15
MR. WIENER: Good afternoon. I'm Matthew Wiener, the vice chair and executive director of the Administrative Conference United States or ACUS for short. Welcome to the first of four panels of this virtual symposium, which is jointly sponsored by ACUS, the C. Boyden Gray Center for the Study of the Administrative State at the Antonin Scalia School of Law at George Mason University -- yes, a long name -- and the Center for Progressive Reform.

This symposium will bring together leading academics and agency officials to address the most important and often contested, some of them now front and center, contested issues. Some of them now front and center in the courts involving Federal agency adjudication.

Today's panel will address the key constitutional and associated policy issues involving the appointment and removal of agency adjudicators. How those questions are answered will have real implications for the independence and impartiality of agency adjudicators, or at least some -- or at least some of our panelists will contend.

Our moderator, Professor William Funk, will introduce our panelists, but first, I'd like to thank
a few people for organizing this symposium. At the Gray Center, Adam White, the Center's executive director, at the Center for Progressive Reform, Professor Richard Pierce, one of our panelists today and also a Center scholar and James Goodwin, the Center's senior policy analyst. And at ACUS, Jeremy Greyvoice (phonetic), our deputy research director and (Inaudible) our research director.

And with that, Professor Funk, the virtual floor is yours.

MR. FUNK: Thank you very much, Matt. This is a real pleasure and a privilege to be able to participate in this panel, and I'm told I'm to moderate the panel, but knowing some -- at least some of these people personally, these are not moderate people, so I don't know if I will be moderating very much.

But we have a wonderful panel. We're going to start off, our first panelist will be Professor Richard Pierce, who's the Lyle -- let me get it right here -- the Lyle (Inaudible) Professor of Law at George Washington University, a prolific scholar, prolific speaker, and a person who's never afraid to let us know where he stands on an issue, if you want to ask him about that.
Our second speaker will be Professor Linda Jellum, who is the associate dean for faculty research and development, and the Ellison Capers Palmer Senior Professor of Tax Law at Mercer University School of Law and the outgoing chair of the Administrative Law Section of the American Bar Association. And she has an article directly relevant to what we're talking about that's published in the George Mason Law Review at Volume 26, page 205, which the snappy title of You're Fired: Why the ALJ Multitrack Dual Removal Provisions Violate the Constitution and Possible Fixes. Actually, I got that wrong. Linda's going to be the 3rd speaker.

The second speaker is Margaret Miller. I apologize for that. Margaret Miller is an administrative law judge with the Federal Mind Safety and Health Review Commission and also the treasurer of the Federal Administrative Law Judges Conference. And she'll be telling us a little bit about what judges really do and how this really is practical issues here.

And then, in cleanup will be Professor Michael Rappaport, the Hugh and Hazel Darling Foundation Professor of Law at the University of San Diego School of Law. And he also has an article relevant to this
general symposium that is entitled Replacing Agency Adjudication with Independent Administrative Courts. And that's also at the George Mason Law Review at 26 -- Volume 26, page 811. Both of those are, you know, very recent articles and so very timely in that regard.

So we're going to have each of these people speak in the order that I said, it's Professor Pierce, Judge Miller, Professor Jellum, and Michael Rappaport. They'll each speak for five to seven minutes, and then, at the end of that, I will give each of them an opportunity to comment on what they heard. And then, we'll open up the floor to questions from the audience.

And by opening the questions, the audience, the way you ask a question is at any time during the speaking, you can write a question in the question column. If you're on the webinar software, there should be a line where it says questions, and you can type in a question there.

And I will then ask the question of the panelists at the appropriate time. So you can write the question in at any time, but we'll wait till the end of all the speakers have spoken before we start the questioning. And we should have plenty of time for
questions, given the limited time that the speakers
will speak.

So with introduction, we'll start off with
Professor Pierce.

MR. PIERCE: Thanks, Bill. So my job is just to
provide a context for the subsequent speakers.
They're each going to address issues that are really
raised by the 2018 decision of the Supreme Court in
Lucia versus SEC.

To understand the effects of that decision, we
have to go back in time a bit when you start in the
1930s when there were widespread and well-supported
complaints that the hearing examiners that were
presiding at hearings at agencies were systematically
biased in favor of the agencies where they presided.

And after 15 years of debate and deliberation,
Congress unanimously came up with what it thought was
a fix for this problem of biased decision-making in
the form of the Administrative Procedure Act, and some
of the provisions of that act were specifically aimed
at maximizing the decisional independence of
administrative law judges.

So the directors of the act identifies six
different ways in which agencies might be able to
impose pressure on what were then called hearing
examiners, today called administrative law judges, to get them to rule in favor of the agency. And they prohibited by statute each of those six practices. The most important of those provisions was the provision that says that no agency can remove or otherwise discipline an administrative law judge. They can only go to the Merit Systems Protection Board and ask the Merit System Protection Board to hold a hearing, and then, the ALJ can be removed if after the hearing, the MSPB concludes that there's good cause to remove the ALJ.

Now, the directors of the APA were also concerned that agencies might be able to introduce bias through the process of appointing ALJs who are known to be biased.

So they -- while the statute said that the agency does the appointing, it also said that the agency can only appoint someone who has first been determined to be qualified to be an ALJ by a separate agency, today called the Office of Personnel Management. And they had until 2018 in the Supreme Court opinion an elaborate meritocratic system for determining whether somebody was qualified to be an ALJ. And the agency could make the appointment decision.

Well, in Lucia, what the Supreme Court held was
that ALJs are not employees of the government, they are inferior officers. And that some immediate implications and it raises a host of additional issues.

One immediate implication became clear just a few days after the Court's decision when the President issued an Executive Order in which he rescinded all of the rules applicable to the Office of Personnel Management process of the determining whether somebody's qualified to be an ALJ and replaced that with just a very simple criteria that any agency head can appoint anyone who is a member of the bar of any state to be an ALJ.

That, of course, raises issues about how agencies are going to exercise that new discretion. Then, the indirect effects of the decision are the possibility and Linda's going to be discussing this, I know, the possibility that the provision of the APA that says that ALJ cannot be removed except for good cause is unconstitutional.

That could happen because the Supreme Court might apply an opinion it issued in 2010 in Free Enterprise Fund to ALJs. That is uncertain because a while back, opinion seems to be very broadly worded and seems to say that ALJs -- the removal protections of ALJs are
unconstitutional. The Supreme Court included a footnote in that opinion in which it says we're not necessarily addressing ALJs in this opinion. So we don't know how that's going to come out, but it's being litigated in several circuits today and will eventually get to the Supreme Court.

Another issue that is arising that perhaps even more important is a lot -- it turns out that a lot of administrative law judges and other agency adjudicators who don't -- aren't subject to the safeguards that apply to ALJs, we call them usually administrative judges, that they may not be just inferior officers, they may be principal officers of the United States.

Under two Supreme Court opinions issued in the 1990's, you can only be an inferior officer as opposed to a principal officer if you are both subject to removal by a principal officer and your decisions are subject to review by a principal officer. Well, it turns that there's about 2,000 administrative law judges and administrative judges whose decisions are only subject to review by inferior officers and they're never subject to review by a principal officer.

Well, we may see a series of opinions, and we've
already seen one from Federal circuit, that hold that these 2,000 agency adjudicators are actually principal officers and there's a big dispute if that becomes the law about what the remedy is, whether or not it's conceivable, but then, the only way we could staff those positions is through the process of nomination by the President, subject to confirmation by the Senate, and is simply unimaginable to me that that process would be capable of appointing roughly 2,000 agency adjudicators.

So we've got a lot of issues on our plate, and this panel is going to take a crack at one of the most important initially, whether the statutory safeguard against removal of an ALJ except for good cause is constitutional.

I think Margaret's going to go next and tell us what all of this looks like from the principal of somebody who's actually doing this work and subject to all of this body of complicated dynamic law.

MR. FUNK: Okay. Thank you. Margaret, you're up.

MS. MILLER: All right. Thank you. I am, as you heard, Judge Margaret Miller. I am an administrative law judge with the Federal Mind Safety and Health Review Commission. We have at the present time about
10 ALJs, although several years ago, we had 20 due to the number of cases we had. We are one of the few administrative law judge -- one of the few agencies that is separate and apart from the agency that we hear cases from.

We hear cases from the Department of Labor, but we're not part of the Department of Labor. We are like OSHA, like the Occupational Safety and Health Review Commission, which also is an independent agency, independent from the agency. All of our cases come from the Labor Department as do OSHA, but we don't have much to do with them. Department of Labor has their set of judges for another hundred other things that deal with.

I am also -- I've been an ALJ for about 12 years. I've always worked in labor and employment law, and I am also a member of the Federal Administrative Law Judge Conference, which is an organization of ALJs who talk about and deal with issues that are raised for ALJs across the spectrum.

So before I really start into what I have to say, I just have to say that I am a Federal employee of the Federal Mind Safety and Health Review Commission and a member of FALJC, but I cannot speak for them, so any opinion or suggestion that I make today, no matter how
good or bad it is, it is my own. It's not the agency, and it's not the -- it's not FALJC, the Administrative Law Judge Conference, although I certainly tell you what has gone on and some facts related to both of those things.

The first thing I think is important for everyone to know because I'm not sure who the audience is or how much you already know about ALJs, but we really are here to talk -- I am here, at least, to talk about ALJs exclusively. And there are 12,000 adjudicators across hundreds of agencies in the government, and of those 12,000, about 1,900 of them are really administrative law judges, are ALJs.

There are so many other kinds of adjudicators. And I -- just as an example, there are administrative judges, AJs, and the EEOC uses AJs, the MSPB uses AJs, and they have a completely different way of being hired, of being appointed, and of their removal.

Often, they're regular -- they fall within the regular civil service requirements and they have a GS rating, a GS-14, GS-15. They have supervisors. They get performance appraisals, promotions, and bonuses. We don't get bonuses or promotions.

So what I really want to focus on is what I know best which are ALJs. And of the 12 of the about 1,900
ALJs, there are 12,000 adjudicators, 1,900 of them are ALJs, and of those 1,900, 1,700 or more are Social Security/Medicare ALJs. So they have the bulk of the ALJ force.

There are less than 200 of the rest of us, and we are scattered among 20 to 25 agencies. Some agencies, I would say, maybe Department of Labor has 30 ALJs, some agencies have 1. Post Office -- Postal Service has one, and many agencies have a combination. They might have an ALJ, and they might have an AJ. Or they might have an ALJ and an IJ, an immigration judge.

So there are so many different kinds, and I think one of the purposes or one of the things that's going to be explored all month on these -- through these ACUS symposiums are the many different kinds of adjudicators in the government.

So in addition, so of the less than 200 ALJs, the judges have a variety of kinds of cases. I am an agency that does enforcement. We have full-blown trial -- evidentiary trials, following the civil rules of procedure and evidence, and they are all about safety and health of the minors in the country.

There are a number of agencies or ALJs that do hear regulatory cases, and then, of course, there are ALJs who hear the entitlement cases, which are mostly
the Social Security/Medicare, although there are other programs, too, like Black Lung and Longshore cases that all involve entitlements.

So there are many different kinds of us, and we all have sort of a different set up, so I can talk about the ones I know about, my friends, about what I do, and I hope I don't misspeak because there's an agency out there who handles things differently than we do.

And so the first thing, I think, that we -- that I wanted to mention was the Lucia case, which in 2018, from it -- it essentially said that the ALJs had to be appointed by the head of an agency. A lot of us had been, not everyone was, usually the process before Lucia was the chief judge would interview a qualified person, and I'm going to get to that in a minute, recommend it to the head of the agency, and the head of the agency would sign off on it.

In order to cure any deficiencies after Lucia, most agencies reaffirmed their ALJs, and the head of the agency did that. In my case, we have a chairman who is a political appointee, and we have four other commissioners. Just to be safe, all five of the commissioners reaffirmed all of the ALJs in my agency, and I understand that that's what happened in most
agencies that the judges were reaffirmed.

After Lucia, some head of departments may have more involvement in the appointment of the ALJs. I haven't heard a lot about that. Usually, it's the people working with the ALJs who decide. So I think Lucia is not really what raised a lot of flags for the ALJ.

I think it was the Executive Order that came after Lucia that then caused us to take a lot more notice because the Executive Order, 13843, which was July of 2010, essentially moved the ALJs from the competitive service in the government to the excepted service and there are a whole range of things that go with being in the excepted service as opposed to the competitive service.

And one of the main things it did is it took away OPM's ability to interview, test, and help select ALJs. Prior to the Executive Order, OPM had a process that had grown and changed over the years, and OPM, to their credit, included ALJs when they were putting together the tests and the questions and the interviews.

But the OPM was in charge of it, and in order to be an ALJ, it was a huge process. You had to fill out an application that was usually 20 to 30 pages, you
had to have been a litigator at least seven years, and so your application includes all of your experience. What kind of cases have you tried, what kind of evidence was involved, what did you do, who were your witnesses, did you use expert witnesses, all those kinds of things.

Included in that were the attorneys who worked on the opposite side of the case from you and they were asked to fill out forms about your temperament, did you lose your temper, were you easy to work with. And once you made it through the entire process, that was scored, but then, you sat for a full-day test, and the test questions were essentially here are the facts, here are the law, write a decision, and you were scored on that.

And then, last, you were -- you had an interview, a panel interview, with three people. They included an ALJ, someone from OPM, and a practitioner, an attorney, usually, and all of those scores were combined, and you were ranked according to your score on the ALJ register. Usually -- oh, and there is a veterans preference added to that score, as well.

So agencies chose from that register. They could choose an ALJ who was sitting, working for another agency, or they could choose from that register.
Well, the Executive Order took OPM out of that process. And the only requirement left was that the person who the -- person who was being selected as a judge had to have a law degree or, excuse me, had to be admitted into the bar in some location, some state or the District of Columbia.

That, I think, is where the huge change came in for us because now it's up to the agencies to decide what kind of person or what kind of candidate they want for their ALJ positions. And there can be a lot of, I think, a lot that goes with that.

Prior to the Executive Order, there were agencies who complained, look, I don't want to choose, necessarily, from the top of this register because I'm looking for someone who has expertise in the area I need. So that was sometimes a complaint. Obviously, agencies are free to do that now, look for someone with expertise in the area of whatever they handle.

The problem with it is, as you can see, well, for an example, within months of this Executive Order coming out, one of the chief judges hired his clerk. His clerk had come out of law school, worked five years for this ALJ. He said I want him to be my next ALJ, and the head of the department signed off on it. That was all that was required. No posting it, no
looking elsewhere for other judges, no other qualifications.

I think that's unusual. What happened in our agency and most other agencies that I spoke to is we put together our own requirements for an ALJ, including years of litigation, including writing ability, and judicial temperament, and all the things that OPM looked for, we now tried to look for that, and we would advertise that.

We haven't had an opening for an ALJ yet, but we would advertise that. And most likely, most agencies often take their judges from Social Security, who has, you know, has 19 or 1,700 and they've already been -- already shown their ability as a judge.

So I mean, there's room for differences in the agencies when it comes to how they're going to choose an ALJ going forward, and I think it's fair to say that moving away from those OPM guidelines and giving heads of agencies, who, in most cases, are political appointees, the opportunity to choose someone who has a law degree, who may or may not have other qualifications that other than being a political party of the person who's appointing them.

So that's one -- I think that's one of the biggest concerns that all of the judges have seen
since the Executive Order, and the OPM guidelines,
after the Executive Order, the OPM sent out a number
of guidelines, saying -- and they said, you know,
OPM's not -- is only going to be involved in certain
parts of appointment -- okay -- and that recruitment
should still be from qualified individuals on the
basis of their ability, knowledge, and skills.

So I just have a short time left, so I'm not
going to really -- I'm not sure what I can address
about the removal provisions. I would suggest that
there are a number of MSPB cases and district court
cases about removal and what good cause means.

And if you are interested in that issue, I would
point you in the direction of a case in front the D.C.
circuit at the moment, Fleming. It started as a case
with the USDA trying to protect a horse and ended up
into a whole -- and is now a forum for the discussion
of good cause removal.

And if you look at that case, all you have to do
is read the plethora of briefs, and you will see the
hundreds of different views on good cause removal and
how an ALJ should or could be removed. But the
current law is good cause. All right? Thank you.

MR. FUNK: Thank you, Margaret. And next,
Professor Jellum.
Now, I've shared a slide here. Can you see my screen?
If you'll just nod at me, so that I know that it's up.
Great. Okay. So Judge Miller talked about the
appointments process for the most part, and I'm going
to focus on the removal and the constitutional issues
with that.

First, let me thank Jeremy (inaudible) and ACUS
as well as the Center for the Study of the
Administrative State for having me. I really
appreciate an opportunity to talk with you all about
my latest article.

So what I want to do here is first describe the
ALJ for-cause removal protections. Many of you
probably already know what these are. Many of you may
even be acting within them or under them. But I will
give a view of what those are and what the concerns
are.

The biggest portion of what I'm going to do is
explain the case law, and I'm going to divide the case
law basically into three stages. Stage 1 is the stage
in which the Supreme Court really protected the
President's removal power.

Stage 2, there's a movement backwards; I call
that the cabining of the President's removal power.
And we have moved into Stage 3, starting in about maybe 2010 or so with Free Enterprise of restoring the President's removal power, which had been taken away during the cabining time.

And at the end of that, I will summarize what I think the rules are for today going forward. And then, finally, I'll back up and apply that to the ALJ for-cause removal provisions.

So here is my pictorial. Basically, there are two types of ALJs, those who work for independent agencies and those that work for executive agencies. And the issue, as you're aware, is that the way an ALJ gets removed is the ALJ would be recommended for removal by the agency head, and then, that particular case goes before the MSPB, which has an ALJ, who's also protected for-cause removal, and then, the heads of the MSPB are also protected, they're an independent agency.

So if you see these little black boxes, these are going to become important when we talk about Free Enterprise, the fact there are multiple for-cause removal provisions at work here. All right, so that's my picture for the day.

Let's talk about the case law. So our first case that I want to talk about is ex parte Hennen, which
was decided in 1839. And these three cases that I'm going to talk about next all involved inferior officers, which we know administrative law judges are mostly inferior officers. (Break in audio). I'm getting feedback on the line. I don't know if there's something that can be done or not. Okay. Seems to be gone. Thank you.

All right. So in ex parte Hennen, it involved a district court clerk who had been fired. The district court clerk sued. It was an inferior officer. The statute did not contain a removal provision, and the court held it would not imply one. Silence meant the President has his full removal power.

A few years later, we have Parsons, involving a district attorney, again, another inferior officer. That particular statute had a four-year term limit, but no removal limitation, and once again, the court said we are not going to imply any limitations on the President's removal power.

In Perkins, we get to our first removal provision, a naval cadet who was serving and the provision prohibited the department from dismissing the naval cadet during peace time. And the Supreme Court actually upheld that for-cause removal provision because it was located not -- didn't necessarily stop
the President, but it was located within the department, and because the department had the power to appoint, the department should have the power to remove.

The most important case that came out of that era is Myers. Of course, this is a case in which the Supreme Court held regarding a principal officer, that the President's power to remove simply could not be limited, that the President should absolutely have the power of removal because the President has the requirement of faithfully executing the laws, making sure the laws are being applied appropriately, and that if the President cannot remove those who are working from -- for, excuse me, him or her, then, the President cannot do the job.

In Myers, importantly, the particular removal provision allowed -- it required Congressional consent, so Congress had inserted itself into the removal process. For a President to remove the Postmaster, the President had to actually have Congressional consent.

And the court held, in a very, very long decision, that it was simply improper and held the removal provision to be unconstitutional. Importantly, that particular case, Myers, was decided
by a chief judge who had himself been a President and
may have had a very protective view of the President's
removal power.

    All right. So about ten years later, so the
Supreme Court didn't last long with its very
protective view of the President's power, the
President began cabining -- excuse me, the Supreme
Court began cabining the President's removal power.

    And it started with case involving principal
officers, Humphrey's Executor, which is well known.
It involved the head of the FTC or one of the FTC
commissioners which is an independent agency. A
particular statute included a for-cause removal
provision, the FTC commissioner could not be removed
except for inefficiency, neglect of duty, or
malfeasance in office.

    Notice that here, unlike the Myers case, Congress
did not insert itself into the process. Despite
Myers' very long and very protected view of the
President's removal power, this Supreme Court decided
that, no, no, in the case of an independent agency,
removal -- the President's removal power could be
limited, particularly because this was not a purely
executive officer as a Postmaster was. This was an
agency that had quasi-legislative and quasi-
adjudicative powers.

Now, Myers had said in dicta that even adjudicators could still not be protected by for-cause removal. That didn't slow Humphrey's down at all. The court simply said that was dicta. We're not abiding by -- we think the independence of the agency is important here. So Humphrey's started the years of cabining, which will go on for a while.

Wiener is -- in 1958, probably, I don't know if it's Wiener or Winer, one of the most important cases, I think, for administrative law judges to take hope from because Winer involved or Wiener involved a member of the War Claims Commission, so purely an adjudicator officer, principal officer. The statute actually did not have a for-cause removal provision. Despite that fact, the court went and held an applied one.

So here we have not only Congress not providing a for-cause removal provision, but the court going ahead and saying, well, Congress obviously meant to include it. It's a failure to do so. The court called it failure of explicitness, meaning there was no clear statement that removal as limited. The court said it was no big deal. The statute was enacted after Humphrey's Executor was decided, and so perhaps
Congress didn't feel it was necessary to include a for-cause removal. So that case does leave us with some hope for peer adjudicators. It's never been overturned, although it is a little bit unusual, one might say, in the for-cause removal provisions.

So next, in 1986, we have Bowsher. Bowsher involved the comptroller general, a principal officer. The statute included a for-cause removal provision that specifically required a Congressional resolution from both the House and the Senate, which could be vetoed by the President.

So once again, much like Myers, we have Congress inserting itself into the removal provision. And here the court says, no, that's unacceptable. The removal provision is unconstitutional. It was interesting, the comptroller general was really considered to be -- at least Congress considered him to be someone working more for Congress than for the President. Yet, the court still held, no, that is simply unacceptable.

In regard to the inferior officers, the biggest case that was decided this term, during this time frame, was the Morrison involving the independent counsel. Now, this was an inferior officer, it was subject to the attorney general's control, and the
statute specifically limited the attorney general's ability to remove the independent counsel only for cause. And the Supreme Court upheld this provision.

What was interesting is that even though the independent counsel is entirely a purely executive position, which was sort of the distinction that Humphrey's Executor had added in, the court in Morrison actually rejected the distinction and said the decision about whether the President can take care to basically execute the laws is more important than whether the particular individual was quasi-legislative, quasi-judicial, or purely executive.

This decision, the lone dissenter was Justice Scalia. Many have said this was one of Justice Scalia's best dissents. And ultimately, Justice Scalia's dissent, I think, has held true. I think Morrison was a poorly reasoned decision.

I think it was a political decision, that it made sense to have someone investigating the President and major political offices to be (inaudible) for removal, as we've maybe even seen lately, it's an important thing to have. And I think the decision was based on that political reasoning as opposed to actually reading the case law and following the case law and the constitution.
In any event, in 2010, we have Free Enterprise, where, I believe, the court is moving back towards Myers and a restoring of the plaintiff's removal power that had been stripped away from Humphrey's Executor up to Morrison.

Free enterprise involved the board members of the public company accounting oversight board, which was an independent agency located within the SEC, another independent agency. It was a very unusual agency structure. There are, to my knowledge, no other inferior officer independent agencies within independent agencies, and that probably set it up for failure.

So the statute that created the PICA (phonetic) board was -- had a for-cause -- extremely high for-cause removal provision, which the court was very bothered by. It wasn't the same one we had seen for the FTC. It was actually extremely -- it would have been extremely difficult to remove any of the members of the PICA board.

And what was at issue here is that although Free Enterprise, although the board was -- they were inferior officers, and so removal provision within the SEC should have been acceptable under both Perkins and Morrison, which held that a department can have
removal power if it has appointment power.

Supreme Court decided that, you know what, while one is okay, two is bad, and therefore, we are going to hold that the PICA board, so the inferior-officer-level provision for-cause removal protection is unconstitutional.

The interesting thing about Free Enterprise is that the court took the party stipulation that the members of the SEC, commissioners of the SEC, were protected by for-cause removal, although their statute is actually silent.

In fact, their statute was created right after Humphrey's Executor when the idea was -- excuse me, right after Myers, when the idea was that these were unconstitutional. So no for-cause removal provision was put into the SEC's statute, enabling statute, yet the court took the party stipulation, which I think Breyer pointed out was a bad idea, and I agree completely with Breyer.

But in any event, what the court held in Free Enterprise is one is okay, two is bad. These are lawyers, we go to law school to avoid math, and so this is the opinion that we get as a result of that.

Now, actually, let me go back for a minute, Professor Pierce did mention the footnote in Free
Enterprise, footnote 10, in which Justice Roberts, who was the author of the opinion, suggested that its holding might not apply to ALJs. I'm going to tell you quite simply this is an incredibly poorly reasoned footnote.

It starts off with ALJs may be inferior -- excuse me, may be employees and not even inferior officers, see Landy, which the court only a few years later in Lucia said, no, no, they are actually inferior officers as everyone thought or as I thought anyway.

And then, the reasoning that the -- that Justice Roberts gives in the footnote talks about the level of the for-cause removal for the PICA board, that it's so high and that the ALJ standard is lower, but either for-cause removal is okay or it's not okay. It can't depend on, well, it's a little for-cause, and therefore, it's okay.

Now, the one bright spot in that footnote is that Justice Roberts did refer to the ALJs providing purely adjudicatory functions and the importance of independence. And I think if we're going to have any hope here because I think we all think the ALJs ought to have independence, if we're going to have any hope, it's going to have to be coming back to that Humphrey's Executor's distinction that those officers,
and again, Humphrey's Executor really related to the principal officers. But those officers who exercise quasi-adjudicative or quasi-legislative --

MR. FUNK: Linda?

MS. JELLUM: Yes.

MR. FUNK: Linda, wrap it up.

MS. JELLUM: Okay, yep, I am. So I will go ahead and skip these two cases, but I will give you the summary. And the summary is that for principal officers, Congress cannot limit the President's removal power except multi-headed independent agencies with quasi-legislative or adjudicative power.

For inferior officers, Congress can limit the President's removal power except when there are dual for-cause limitations, and this is essentially what Justice Roberts said in the CFPB case, the law which just came down.

So we apply those rules to our boxes that we saw earlier, you can see that most of the removal protections on the ALJs go away as unconstitutional. Potentially, the ALJs that are working for executive agencies may be okay. We will see.

And so I have questions down here. Obviously, we're going to take questions in the format, as well, but should you want to email me directly, feel free,
or if you want to copy the PowerPoint, happy to send it. And with that, Bill, I am wrapped up.

MR. FUNK: Thank you very much, Linda. And now, we turn it over -- Michael? You're on mute.

MR. RAPPAPORT: Okay. I unmuted myself, but it doesn't work, so I'm glad I'm finally unmuted.

Thanks, Bill, and I want to thank ACUS and the Boyden Gray Center for inviting me to participate in this great panel.

So as we've heard, you know, in recent years, the traditional ALJ system for adjudication has been subject to disruption due to constitutional challenges as to appointment and removal. And just very quickly, you know, in Lucia, the Supreme Court held that ALJs are officers of the United States, which has led to a change in the appointment system for ALJs, as we heard.

Agencies now may appointments as they wish without being limited by OPM selection procedures. And therefore, the agencies have largely unlimited power to select ALJs who they expect to favor their interests. So a little bit of a different point about whether they're qualified or not. They used to have to choose the top -- from amongst the top three. Now, they can pick people who they think will favor their
side, their perspective on matters.

Second, as we heard as well, serious questions exist whether ALJs can maintain the limited independence from removal that they presently enjoy. And as Linda said, some people have argued that Free Enterprise, ALJs cannot be subject to double removal provisions.

So these two developments might seem to suggest that we must choose between following the constitution or having impartial adjudicators. But in my view, we do not have to choose between the constitution and impartial adjudication; we can have both.

Today, I want to propose a reform that would fully respect the constitution and would provide for even greater judicial independence and under the traditional ALJ system. Under my proposal, our current agency adjudication system would be replaced with one that employed fully independent adjudicators.

So my proposal grows out of a larger project that I've been working on in several different articles that applies the strictest separation of powers to administrative agencies. It does so through institutions that are designed to be workable in our current world. In other words, it seeks to establish government agencies that are both feasible and respect
a strict separation of powers. Something that people
generally don't believe is possible.

Now, in the area of administrative adjudication,
my proposal would eliminate the existing system of
adjudication by ALJs that are subject to review by
agency heads. And here, I should note that I'm just
talking about, for today and this initial phase, the
ALJs that -- and excluding Social Security and
Medicare people, so we're talking about 175, 200 ALJs
that do formal adjudications.

The existing system would be replaced with a
system of independent administrative courts that are
staffed with either Article 3 judges or Article 1
judges. And these judges would be appointed by the
President with the advice and consent of the Senate.
Now, under the arrangement, the agency would not hold
formal adjudications but would only bring enforcement
actions that would then be heard by independent -- by
the independent administrative court.

The administrative court's decisions could not be
reviewed by the agency, but instead would be subject
to appeal only to other Article 3 courts or to Article
courts, to the circuit courts. This arrangement would
provide for a much strong independence for
adjudicators that we now have, and it would do it in a
variety of ways.

First, the independent judges could only be removed for cause without the constitutional doubt about the removal of ALJs that now plagues us and that Linda talked about. If the administrative judges were Article 3 judges, they could only be removed by impeachment. If the administrative judges were Article 1 judges, they would be removable by the President or cause. And so this would avoid the Free Enterprise removal issues.

Second, the independent judges would also enjoy more independence from the agency because the agency could not, as they can do now, appoint the people — appoint people to be judges who are most likely to share the agency's viewpoint. Instead, the judges would be selected by the President with the advice and consent of the Senate. And thus the people selected would reflect a broader array of interests and perspectives than they do now.

And third, and this is the most significant of the changes, the judges would not only be insulated from easy removal, but their decisions would not be subject to review by the agency.

This reform would genuinely separate enforcement from adjudication. The agency would no longer be a
judge in its own case. It's hard for agencies to fairly adjudicate when they have already decided someone should be prosecuted.

It's also hard for agencies to make an unbiased decision on whether to bring an enforcement action if it knows it can adjudicate the case on its own.

Okay. While a system of independent judges is often been rejected on the grounds that it would deprive administrative adjudication of the expertise and low decision-making costs that it currently possesses but I believe this is mistaken. One could combine significant amounts of expertise and low decision-making costs with genuine independence.

First, independent administrative judges could have significant expertise. Under my proposal, these judges would be divided into three groups, those with expertise as to medicine, as to science, and as to economics.

They would then be assigned cases based on the issues involved rather than based on the agency from which the case derives. Thus, they would have significant expertise as to the subject matter but would not have the tunnel vision of agency adjudicators.

Now, to ensure that the persons appointed have
the requisite expertise, I think Congress should define the qualifications of the office. For example, the qualifications for the medical independent administrative judge position should be defined as requiring some expertise as to medicine. In that way, the law would actually mandate that people have the relevant knowledge or experience.

Second, the independent administrative courts could realize the lower decision-making costs of the existing administrative adjudication system. At present, administrative adjudication generally employs streamlined procedures, such as limited cross-examination or discovery and a variety of other matters. Independent administrative courts could use these same procedures, and so it could enjoy some of this low-cost decision-making.

Well, let just then conclude by saying that I believe that the independent administrative courts would be a desirable reform of our existing system of administrative adjudication. Such courts would protect judicial independence while at the same time preserving much of the expertise, the low decision-making costs of the existing system. That's it.

MR. FUNK: Thank you, Michael. Very good. Keeping it right on time. That was excellent.
So I was going to allow the panelists a brief ability to respond or ask a question.

Judge Miller, it seems you're interested in saying something.

MS. MILLER: I'm unmuted, okay. I don't know what to say about that. I think it's an interesting proposition, and obviously, I have read about it, and it's been floating around for a number of years, not in that detail.

But expertise is definitely -- I'm all for the independent part. I like that a lot. The expertise might be a little oversimplified. In the kind of work I do and in other friends who are ALJs, there's a lot of engineering that goes on. We need some engineers if you're going to have experts. You might add those to the list. So that's all I had to say.

MR. FUNK: Okay. Professor Jellum, is there anything you'd like to ask or say?

MS. JELLUM: Well, so you know, we have a system similar to that you that you propose here in Georgia, and I think it's worked pretty well. I haven't worked closely with it. I know Edward (inaudible) in Louisiana feels a little differently about the program in his state.

But I guess my question to you is practicality.
I mean, this was a choice that was made back, you know, I don't know how many years now, 70 years ago. The -- having an independent group of ALJs was considered and it was rejected by Congress at the time. And partly the reason it was rejected was the importance of agencies maintaining control over the policy-making piece of what happens as part of adjudications.

And while I think back then agencies were using adjudication a lot more commonly to create policy and rulemaking has become a little bit more common, which is good, you know, I think the concern that I might have, again, I'm not -- it works well here in Georgia -- the concern I might have really is taking the agency out of anything that might ultimately lead to some form policy decision.

I think what you're trying to do is take enforcement and separate it out from adjudication to address that, perhaps, but anyway, that would be -- the feasibility of it and also sort of that concern about agency policymaking are the concerns that I would raise.

MR. RAPPAPORT: Should I respond to some of these?

Okay. Great. Well, thank you, Judge Miller, for
that comment. That's interesting. I need to think quite a bit more about the engineering side of it. So thank you for that.

And Linda, you know, the sort of policymaking aspect of this, you're absolutely right, is important and it kind of depends on how much you want to change the existing system.

So on the one hand, you could allow the -- so the least change with the existing system would be to allow agencies to submit sort of policymaking determinations that then would be reviewed by the administrative court in the same way that circuit courts now review their policymaking.

So the agency could, you know, propose certain policy, you know, this rule ought to apply here based on, you know, good policy, and then the administrative court would accept it if it satisfied hard look or something like that. One could do that.

I'm actually a lot more skeptical about using policymaking, especially in the adjudication area. So one thing you do is you could have policymaking only adopted through rulemakings. So that might be one way.

If you said, oh, we need adjudication -- we need policymaking at adjudication (inaudible), other things
you could do. You could have -- if you have an
independent agency or a commission, you might require
a super-majority vote as a commission to adopt the
policy.

Or you could -- if you have an executive branch
agency, you might require OMB signoff on these things,
so there's lots of ways of cutting back. I actually
favor something like the Raines Act, which for
governing significance rules, and so requiring policy
to go through the rulemaking process would be
advantageous in terms of putting a check on it.

But there's a variety of ways of doing all that.
But you're absolutely right, this is a rejection of
the decisions that were made or at least in part, the
decisions were made with the Administrative Procedure
Act, and for some people, that's, you know, not going
to be an attractive suggestion, but I'm a reformer.

MR. FUNK: Okay. And Professor Pierce, I don't
see your face, but I hope you're there somewhere. And
do you have anything you wanted to add or ask? Well,
maybe he's not there. Okay. Well, in any case, we
can turn to the audience.

We have a number of questions from the audience,
and there's a couple of different people have asked
the question of Judge Miller to identify the agency in
which the chief ALJ appointed his clerk.

MS. MILLER: I can't do that. I studiously avoided that.

MR. FUNK: Well, all right. So they were interested in knowing, but I guess that's it.

MR. RAPPAPORT: Aren't we all, aren't we all.

MR. FUNK: A question by Professor Richard Levy is would the panelists to speak to the Solicitor General's position on good-cause removal. His -- I interpret that as being his position on what good-cause removal means.

You may recall in the CFPD case, (inaudible) law, it's my understanding that the Solicitor General said you could -- or somebody, I think it was Mikas (phonetic) actually who argued that good cause could be read to mean a lot less than -- in other words, could it involve policy disagreement, and how do you view that?

MS. JELLUM: So I think that's a little disingenuous. It's not originally what was meant by good cause. And keep in mind that there's just one good cause standard. It's not just, you know, malfeasance, whatever the one that they -- MTC had. There are different for-cause standards.

And in the Arthrex case, if I'm saying that
correctly, the Federal circuit 2019 just recently came
down and even said that the regular civil service
protections were too much for -- a for-cause removal
is inacceptable than even a very, very light standard
is still unacceptable.

So I think that the position of the -- what was
it -- Solicitor General -- I just think it's -- it
doesn't make sense to me anyway. I don't know maybe
Michael has a different take on it, but to me, I just
want the save the statute, so I'm going to argue
something that I can't.

And I think based on traditional statutory
interpretation provisions and -- it doesn't make any
sense to me that that would be okay. It would
essentially have -- you have just too many different
for-cause provisions that you would have a hard time
policing.

MR. FUNK: Anyone else?

MR. RAPPAPORT: Yeah, sure. Well, I don't think
that's -- if one were just looking at the statutory
provisions, I don't think that's the interpretation
one would come up with.

On the other hand, like it or not, we have a
costitutional avoidance canon that's out there. I
don't particularly like it, but that doesn't really
matter, right? It's part of the law, so I suppose the question would be whether or not we -- one declares this unconstitutional or one interprets in a way to avoid the constitutional problem or the constitutional question.

So I don't have a strong view about the matter, but I don't think you can reject that interpretation sort of wholesale because it's a standard move within statutory interpretation.

MS. JELLUM: Well, it is, but these days, the constitutional avoidance doctrine is being applied much more like ambiguity, is that the two interpretations have to relatively equal. You know, before that, there was the fair interpretation standard, that one is usually better, but we'll take this other one that's sort of the -- if I can remember the case law off the top of my head.

But more commonly today, the courts are using the constitutional avoidance doctrine as an ambiguity resolver. And there's -- I don't see that this is ambiguous. So it depends in some respects, I think, with Michael's point that if the courts apply the traditional approach to constitutional avoidance, then perhaps.

But the courts, I think, much like Michael, sort
of the movement is away from using constitutional
avoidance as much as it's been used in the past, like,
NRLB was a case I was thinking -- I think, anyway. So
that would raise that issue.

MR. RAPPAPORT: The only thing I would say is
they move away from it except when they don't move
away from it. It was interesting to see Chief Justice
Roberts in Lucia Law talk about, you know, well, we
really can't use constitutional avoidance if the
language isn't ambiguous.

And I'm scratching my head going, well, I do
remember a case. It wasn't a very important case, but
people might have heard about it, Sebelius involving
the Affordable Care Act where the Chief Justice
thought constitutional avoidance ought to be employed,
even though it wasn't ambiguous.

But -- so you know, I agree with you that there's
some movement to cabinet. On the other hand, as with
the Supreme Court so often, consistency is not
necessarily their highest virtue.

MR. FUNK: I have another question from Professor
Michael Asimow. Does the transfer of ALJs to the
excepted service mean they can be removed without
cause? I think that's a question for Judge Miller.

MS. MILLER: It could, except that the OPM
guidelines and the Executive Order specifically say --
first of all, all of us who are already ALJs are
staying in the competitive service. It only applies
to new ALJs or ALJs who move between agencies. And
that actually happens a lot because many agencies hire
judges who are first hired by Social Security
Administration, and they come to us.

If they make that move now, then, you're moved to
the excepted service. And the excepted service does
have different removal provisions, except that there
are guidelines and things out there so far that say
not yet. We're not moving ALJs to that yet. But it
could happen.

MR. FUNK: I have a question from Judge McCarthy,
a question for Professor Jellum, removal under Free
Enterprise Fund, why not sever the principal
adjudicators rather than the -- in other words, if the
SEC members could only be removed for cause or not,
depending about how you want to read the statute, and
their ALJs could only be removed for cause, why not
take away the SEC members' rule for cause rather than
the ALJs. So that's the question.

MS. JELLUM: Yeah, you'd have to ask Judge
Roberts, Justice Roberts, excuse me, why he made that
choice because potentially, either was an option. I
think that the court is still reluctant to reverse Humphrey's Executor. I think there's some feeling that independent agencies are independent for a reason, and part of what makes them independent is the limitation on their removal.

And so when Chief Justice Roberts decided the Free Enterprise case law, I guess he wasn't alone, but when the court decided the Free Enterprise case, the removal choice they took was to sever the provision relating to PICA. The argument was that it was PICA that was unconstitutional and that was a particular act in front of the court, and so the court simply severed the unconstitutional provision rather than declaring the entire PICA board unconstitutional, which, I think, some people had hoped for.

But so the difficulty we have in finding the SEC or an independent agency that actually has a for-cause removal provision is Humphrey's Executor. And so in the most recent case, the CFPB case for Seila Law 2020, Justice Roberts, again, wrote the majority, and all of the justices who signed on to it, with the expectation of Thomas, who was in the majority, well, Thomas said straight up, let's just reverse Humphrey's because it completely disagreed with Myers.

It doesn't make sense, and I'm not completely
sure I disagree with that. I mean, one of my findings in the George Mason Law Review is that I think that Humphrey's was probably wrong. I know people disagree with me on that, but to answer your question, that's why the court didn't sever the SEC's potential for-cause removal.

MR. FUNK: Okay. Professor Michael Asimow also asked can a new President adopt an Executive Order that would prohibit agencies from using political considerations in appointments and confer for-cause removal protection on all administrative -- let's see, all administrative judges or all administrative law judges? I didn't see which one he asked. All administrative hearing officers. Could the President do that by Executive Order, give for-cause protection, even for AJs, for that matter?

MS. JELLUM: So if I'm up on this one, and hi, Michael, hope you're well, my take would probably yes. Can the President issue an Executive Order that limits his or her ability to remove those that work beneath the office? I would think yes because alternatively, the President could simply get rid of the Executive Order, as well, or an incoming President could get rid of the outgoing President's Executive Order.

So I don't see why a President couldn't choose to
limit his or her own discretion in this area. But I will say that Executive Orders are not my particular area of expertise.

MR. RAPPAPORT: One thing I mention here, there's something of a precedent for this in the sense that the special counsel that the Department of Justice used, so that's Special Counsel Mueller was enacted pursuant to a regulation where there are limited removal aspects to -- and could control and removal aspects of the special counsel. So that would be an example of that.

MS. JELLUM: Well, in that case, the agency itself limited its removal power, which is interesting, because I was waiting --

MR. RAPPAPORT: No, I -- granted, that's the difference, but I'm not -- I think it's analogous.

MS. JELLUM: Yeah, no, I think you're right. And it would have been really interesting to see what would have happened if President Trump had decided to try to remove Mueller. As you recall, that was quite a threat during that period of time. So that would have been interesting to see what would have happened, but yeah, it's a good point.

MR. RAPPAPORT: This is a question from Professor Desai (phonetic) for Professor Rappaport. Isn't one
of the rationales for presidential control over both principal and inferior officers the fact that policy should be subject to presidential control. So to the extent that adjudicators are in the course of their decision-making making policy, don't we want those decisions subject to presidential political appointee control?

MR. RAPPAPORT: Well, you know, courts -- okay, so that's a good point, and it depends how much policymaking one is going to have. So under the sort of strong reform that I would like to see, the policymaking would be very limited. Agencies could still do it, but they would do it through the rulemaking process.

And maybe that rulemaking process would be subject to a Raines Act limitation or not. So to that extent, the policymaking would still be as part of the executive branch. I wouldn't want the agencies making -- sorry -- I wouldn't want the independent administrative courts making policy.

And so I didn't want to suggest that they would be making policy determinations. They would have to be deciding the cases in the same way that a standard Article 3 court decides them, which of course, we know, Article 3 courts never consider policy. But you
know, to the joke aside, I wouldn't want the
independent administrative court to be employing
policy in the way that agencies are now thought to do
so.

MR. FUNK: Okay. I'm sorry that Professor Pierce
isn't with us anymore. Dick, you're not there?
Because one of his points was the question whether or
not inferior officers -- whether ALJs could be
principal officers rather than inferior officers.

And the reason that I would have asked about
that, well, why would that be when they are both
subject to their -- the procedures that they operate
under are adopted by a principal officer, the agency,
and their decisions are reviewed by principal
officers, the agency, often times, rubber stamped, but
nevertheless, as a formal matter, they are subject to
review by a principal officer.

So I was wondering how do you people feel about
whether or not there's any real problem with ALJs
being only inferior officers and not principal
officers?

MS. JELLUM: Yeah, I mean, that was the Arthrex
case, right? They were the patent judges, appellate
patent judges, I believe was their term, APJs. And
the Federal circuit found them to be under the Supreme
Court Edmonds case and I think maybe the Morrison case, I may have the second one wrong, but basically found that there were two requirements to be a principal officer. One is that there is a -- you're an inferior officer if you have a principal officer and the President above you, so that's one sort of the supervisory role. And the other was the ability of the people above to reverse decision-making that was done by the inferior officer. So inferior officers' decisions are usually reviewed by principal officers.

And I know in Dick's article that he wrote recently, he talked about how some of the ALJs and, by the way, AJs have no one really reviewing the decisions. They're pretty much pro forma, become the agency's decision. And Dick raised the question that these particular AJs and ALJs may actually be principal officers under the court's current test and that was what the Arthrex case held.

Now, I think if I could just say that one of the issues was back in the Hennen case, you know, back in the 1800's and stuff when these cases were initially decided, the court only saw two kind of officers, principal and inferior. Let me say, two kinds of employees, principal and inferior officers. There was no sort of employee category.
And as a result, we had a huge -- this is one of the reasons I think Lucia held that the ALJ are inferior officers. The number of different types of individuals that were held to be inferior officers over the years was so broad. There was no way ALJs weren't going to fit in that group. And it was -- if you looked at it, it was a no-brainer decision the court had to make.

And so I think that set us up to the problem that we're in now with the court's test. And I think it was Scalia who articulated it in Edmonds, as I recall, but it's just basically, you're inferior if there's a principal over the top of you.

And then, one of the cases also added in the finality of the decision-making. I'm not sure that's the right test. I'm not sure it's what it should be, but that's kind of where we're at. So if that test is -- holds true, and has Dick has pointed out, there are a number of different agencies that have AJs and ALJs who are making these final decisions with no one, no principal officer able to really effectively reverse the decisions.

It's going to be interesting. And principal officers, it's much harder to put for-cause removal provisions on principal officers compared to inferior
officers based on the court's test in Seila Law.

MR. RAPPAPORT: If I could just chime in, Bill, so I think there's a sort of ambiguity here or uncertainty about what it means for an inferior officer to effectively have the final decision. So you might take a look at this matter as a formal matter.

And even though the agency heads don't typically review what the inferior officer does, as long as they have the authority to review it, one might think that they nevertheless have that authority and the inferior officer then is inferior.

If, on the other hand, the agency heads do not have the authority at all to be able to reverse the inferior officer's decision, then, I think that's a pretty clear case where that person would be a principal officer under the type of analysis that Judge Scalia makes in Edmonds and the like.

So it's kind of now -- now if you want to say, well, yes, they theoretically have the authority. They've never exercised it in these thousands of cases, well, then you might want to think about that as a sort of functionalistic section to the formal aspects to it. But my take on this would be that the formal -- as long as they have the formal authority,
that's good enough.

MR. FUNK: Dick, I see you're back. You're on mute, though. You're muted. Go. Not hearing you, we're not hearing you.

MR. RAPPAPORT: That's what happened with me. Somebody else has to unmute him. I think the -- that's --

MR. FUNK: Try it now. Nope. We've lost your audio. What a shame. Don't know what -- I can't help you at this point.

Let me turn to a question that Professor Jeffrey Lubbers asked, which is have there been any lower court decisions on the constitutionality of the ALJ double for-cause protections?

MS. JELLUM: I honestly don't know. I've been working on a different writing project this summer and had not followed up on that. I know that in Lucia on remand, they were making that argument. I don't know where it's been, so I'm sorry, Jeff, I don't have a good answer for you.

MR. FUNK: Okay.

MS. MILLER: The only case -- there might have been lower court cases that I'm not aware of, but the case before the D.C. circuit right now, the Fleming case that I mentioned, is probably the one that has
the most information, the most briefs, the most
everything in it about the removal. And I don't
remember reading about any lower case. That one came
directly from the USDA, not from a lower court.

MR. FUNK: Uh-huh, okay. Good. Professor Jordan
asked how is it possible to avoid policymaking in
adjudication? Some policymaking is inevitable, isn't
it? I think he's really aiming at Professor Rappaport
in that question.

MR. RAPPAPORT: Well, if -- so if a court is
deciding facts, factual questions, then that's not
policymaking, that's fact finding. If a court is
interpreting law, that's not fact finding -- I'm so
sorry, that's not policymaking, that's interpretation.

Now, I understand lots of people think that
policy goes into law interpretation and maybe it goes
into fact finding.

Now, it is certainly true that we have a category
in administrative law that actually most other areas
don't actually separate out of policymaking, and those
are policymaking aspects to them. So that would be
policymaking, but of course, I wouldn't want courts to
be making those type of determinations.

So in the typical Article 3 case, where a circuit
court decides a matter, let's say, outside of
administrative law, what do they do? They talk about
we're engaged in fact finding, we're engaged in law
interpretation, maybe they're engaged in common-law
reasoning, where the theory behind that is that
they're actually following the common law and looking
at practices and other decisions.

Now, courts do engage in policymaking at that
stage, but they don't like to call it policymaking.
If that's all that the Article 3, the independent
administrative courts would be doing, exercising the
same type of policymaking that Article 3 courts do,
well, if you want to call it that, so be it. So maybe
one -- if one's concerned about calling it
policymaking, let me say, these independent
administrative courts would not exercise any more
policymaking than Article 3 typically exercise.
That's a reformulation if one prefers that formulation
of it.

MR. FUNK: Judge McCarthy asks in Lucia, the SEC
chair was precluded from -- was precluded under the
Reorganization Act from being the head of the agency.
Is this still an open issue at other independent
agencies? For example, can the chair of the Federal
Trade Commission be the head of the agency for
purposes of appointments and removals? (Inaudible)
appointments, but removals? Yeah, appointments and removals. Linda?

MS. JELLUM: Yeah, I think the case law was pretty clear that it doesn't have to actually be the head of a department, that someone that serves in that capacity, whether it's a department or someone else. I can't recall where I read that, but back when I was writing the article, the idea was it didn't have to be just the head of the department.

MR. FUNK: It's clear the agency, by a majority vote, can exercise -- as being the head of the department for constitutional purposes, but I think it is sort of still an open question, whether or not the head of the independent -- the chair --

MS. JELLUM: Oh, I'm sorry. I misunderstood the question. I apologize. Yeah, I misunderstood the question. I thought you were talking about other agencies within departments, whether they would count, but no, in terms of department, I think, independent agencies, you are correct, that I think it's still open, whether the chair alone can do it, or it would need the board. So my apologies, I misspoke there.

MR. RAPPAPORT: Now, wasn't it true in Freitag that the -- I mean, I understand it's the tax court here, but in Freitag, the special trial judges were
appointed by the chief of the tax court, and so now,
there were two different theories on why that
appointment could -- was okay there, right? But the
Scalia theory would have thought of the tax
court as an agency, and under that view presumably the
chair of the agency, the chief judge, would be the
head of the department.

MR. FUNK: Okay. Professor Desai asks is there
truly -- is there a truly a distinction between
administrative agencies and Article 1 courts? Aren't
those judges, for example, the Court of Claims judges
really executive principal officers? They're
appointed by the same person, President, as current
agency heads who do adjudications like the NLRB and
OSHAC (phonetic), et cetera. Question for Professor
Rappaport.

MR. RAPPAPORT: Oh, well, I have a lot of
sympathy for that view, and as at least a matter of
the original meaning, it's not our world, but as a
matter of the original meaning, I do think that. And
if one does think that, then, my independent
administrative courts need to be Article 3 courts, not
Article 1 courts.

MR. FUNK: Let me follow up on that and ask
what's the difference between your independent courts
and a central panel?

MR. RAPPAPORT: Sorry?

MR. FUNK: For you.

MR. RAPPAPORT: Well, I mean, it has a different structure to it in the sense that there's the dividing of the judges into different levels of expertise and if they're Article 3 courts, they're in a completely different brand.

MR. FUNK: The central panel, I mean, the idea of -- instead of having ALJs being resident within an agency, they'd be resident within an independent agency, which we'll call the central panel. And the central panel hires the people and deals with the people, and -- but it would still result in the decision of the ALJ going back to the agency for review, just as ALJ decisions now are.

So the question is you get complete independence for the ALJs, and so there's no problem about independence. They're not part of the agency. They have no stake in it. They're not hired by the agency, they're not fired by the agency they're reviewing, but at the same time, you don't take policymaking out of adjudication because it's -- it just goes back to the agency as it does now.

MR. RAPPAPORT: Well, can the agency reverse the
fact findings, let's say, of the central panel?

MR. FUNK: Let's say we haven't amended the APA in that regard, and they can decide the decision de novo on the record.

MR. RAPPAPORT: Well, then, that's a very big difference between my (break in audio).

MR. FUNK: We're losing you. We just lost -- speak louder.

MALE VOICE: Sorry to interrupt, Professor Pierce, are you able to speak now? Is your audio returned?

MR. PIERCE: My audio has returned, however I don't have any idea of the context in which this conversation is now going.

MALE VOICE: Yeah, the last couple of (break in audio) he was able to rejoin.

MR. FUNK: Well, maybe I can pass -- go onto another question from Professor Asimow, saying is there a serious risk under Trump's Executive Order of politically based appointments, especially at EOIR, Executive Order -- I don't -- Executive Office of something -- Immigration Review? If a new President wanted to deal with this, what should the appointment process look like, not just ALJs, but AJs, as well? I guess that's for anybody.
MS. MILLER: I'm not sure what the question is, but right now, EOIR is an agency from the Attorney General who -- it's run by the Attorney General. I think they have one ALJ, but they have 460 immigration judges, and there's been a lot written. I'm sure you can all -- everyone can read about the ability to be independent in that scenario.

So that's a different question than asking it about an ALJ, say, with the Occupational Safety and Health Review Commission. So I'm not sure what --

MR. FUNK: You had a response?

MR. PIERCE: Well, I think this is a real problem. It's Dick Pierce. I think this is a real problem, and I don't have a good solution for it because once somebody's determined to be an inferior officer, then, we're dealing with the appointment power under the constitution.

There is no law whatsoever on the power of Congress to impose conditions on the appointments clause. There's actually two paragraphs of dicta in Chief Taft's opinion in Myers in which he says, well, yeah, you could probably do that as long as it's not too restrictive.

So I'm sure you could say, well, you got to be a member of the bar, but I don't think you can go --
that Congress can go much beyond that. Now, the
President can, so a future President or conceivably
this President could issue a new Executive Order
saying, well, here's all the prerequisites for
appointment by an agency head. I don't think there's
any problem, constitutional problem, with the
President imposing conditions. But Congress has very
limited ability to impose conditions.

MR. RAPPAPORT: (Break in audio) I'm getting some
feedback, but anyway --

MR. FUNK: (Inaudible). Michael, you go first.

MR. RAPPAPORT: I just think there's feedback.
But -- so when I was LLC, and that's been some years,
right, there was a couple of views about this and some
people thought no limitations at all can be placed on
the -- no qualifications for office can be placed,
that those are -- all go to the appointment, and
that's the appointing person gets to decide that
matter.

But my view is that if it's a genuine
qualification, it's not a list supplied by the Speaker
of the House, but if it's a general qualification like
being a member of the bar or having expertise in
medicine, then that would be something that Congress
would have the authority to impose as part of its
authority to define the office.

MR. FUNK: This could on forever. I have a bunch a questions that I haven't gotten to ask, like why do we care about protections for ALJs when we have AJs, who have no protections, either appointments or removals, so -- but be that as it may, we're supposed to end at this time.

And I don't know if I have authority to make us go longer, so I think I'm going to have say thank you, everybody, for participating, thank the audience. I hope you've enjoyed it as much as I have, and don't miss the following one -- panels that will occur on different dates but dealing again with this concept of adjudication. So thank you, and good afternoon.

MS. MILLER: Thank you.

MR. RAPPAHART: Thank you.

MR. FUNK: Now the question is how do I stop this all.

(End of audio recording.)
CERTIFICATE

I, Wendy Sawyer, do hereby certify that I was authorized to and transcribed the foregoing recorded proceedings and that the transcript is a true record, to the best of my ability.

DATED this 3rd day of September, 2020.

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WENDY SAWYER, CDLT