ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

SYMPOSIUM ON FEDERAL AGENCY ADJUDICATION

Appointment and Removal of Federal Agency Adjudicators

August 6, 2020

TRANSCRIPT
(Not Reviewed for Errors)

Panelists

Margaret Miller, Administrative Law Judge, Federal Mine Safety and Health Review Commission; Treasurer, Federal Administrative Law Judges Conference

Linda Jellum, Associate Dean for Faculty Research & Development and Ellison Capers Palmer Sr. Professor of Tax Law, Mercer University School of Law

Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, The George Washington University Law School

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

Moderator

William Funk, Lewis & Clark Distinguished Professor of Law Emeritus, Lewis & Clark Law School

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10 3-Symposium on Federal Agency Adjudication_
11 Appointment and Removal of Adjudicators
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1 (Beginning of audio recording.)
2 MR. WIENER: Good afternoon. I'm Matthew Wiener,
3 the vice chair and executive director of the
4 Administrative Conference United States or ACUS for
5 short. Welcome to the first of four panels of this
6 virtual symposium, which is jointly sponsored by ACUS,
7 the C. Boyden Gray Center for the Study of the
8 Administrative State at the Antonin Scalia School of
9 Law at George Mason University -- yes, a long name --
10 and the Center for Progressive Reform.
11 This symposium will bring together leading
12 academics and agency officials to address the most
13 important and often contested, some of them now front
14 and center, contested issues. Some of them now front
15 and center in the courts involving Federal agency
16 adjudication.
17 Today's panel will address the key constitutional
18 and associated policy issues involving the appointment
19 and removal of agency adjudicators. How those
20 questions are answered will have real implications for
21 the independence and impartiality of agency
22 adjudicators, or at least some -- or at least some of
23 our panelists will contend.
24 Our moderator, Professor William Funk, will
25 introduce our panelists, but first, I'd like to thank

1 a few people for organizing this symposium. At the
2 Gray Center, Adam White, the Center's executive
3 director, at the Center for Progressive Reform,
4 Professor Richard Pierce, one of our panelists today
5 and also a Center scholar and James Goodwin, the
6 Center's senior policy analyst. And at ACUS, Jeremy
7 Greyvoice (phonetic), our deputy research director and
8 (Inaudible) our research director.
9 And with that, Professor Funk, the virtual floor
10 is yours.
11 MR. FUNK: Thank you very much, Matt. This is a
12 real pleasure and a privilege to be able to
13 participate in this panel, and I'm told I'm to
14 moderate the panel, but knowing some -- at least some
15 of these people personally, these are not moderate
16 people, so I don't know if I will be moderating very
17 much.
18 But we have a wonderful panel. We're going to
19 start off, our first panelist will be Professor
20 Richard Pierce, who's the Lyle -- let me get it right
21 here -- the Lyle (Inaudible) Professor of Law at
22 George Washington University, a prolific scholar,
23 prolific speaker, and a person who's never afraid to
24 let us know where he stands on an issue, if you want
25 to ask him about that.

1 Our second speaker will be Professor Linda
2 Jellum, who is the associate dean for faculty research
3 and development, and the Ellison Capers Palmer Senior
4 Professor of Tax Law at Mercer University School of
5 Law and the outgoing chair of the Administrative Law
6 Section of the American Bar Association. And she has
7 an article directly relevant to what we're talking
8 about that's published in the George Mason Law Review
9 at Volume 26, page 205, which the snappy title of
10 You're Fired: Why the ALJ Multitrack Dual Removal
11 Provisions Violate the Constitution and Possible
12 Fixes. Actually, I got that wrong. Linda's going to
13 be the 3rd speaker.
14 The second speaker is Margaret Miller. I
15 apologize for that. Margaret Miller is an
16 administrative law judge with the Federal Mind Safety
17 and Health Review Commission and also the treasurer of
18 the Federal Administrative Law Judges Conference. And
19 she'll be telling us a little bit about what judges
20 really do and how this really is practical issues
21 here.
22 And then, in cleanup will be Professor Michael
23 Rappaport, the Hugh and Hazel Darling Foundation
24 Professor of Law at the University of San Diego School
25 of Law. And he also has an article relevant to this

1 general symposium that is entitled Replacing Agency
2 Adjudication with Independent Administrative Courts.
3 And that's also at the George Mason Law Review at 26
4 -- Volume 26, page 811. Both of those are, you know,
5 very recent articles and so very timely in that
6 regard.
7 So we're going to have each of these people speak
8 in the order that I said, it's Professor Pierce, Judge
9 Miller, Professor Jellum, and Michael Rappaport.
10 They'll each speak for five to seven minutes, and
11 then, at the end of that, I will give each of them an
12 opportunity to comment on what they heard. And then,
13 we'll open up the floor to questions from the
14 audience.
15 And by opening the questions, the audience, the
16 way you ask a question is at any time during the
17 speaking, you can write a question in the question
18 column. If you're on the webinar software, there
19 should be a line where it says questions, and you can
20 type in a question there.
21 And I will then ask the question of the panelists
22 at the appropriate time. So you can write the
23 question in at any time, but we'll wait till the end
24 of all the speakers have spoken before we start the
25 questioning. And we should have plenty of time for

1 questions, given the limited time that the speakers
2 will speak.
3 So with introduction, we'll start off with
4 Professor Pierce.
5 MR. PIERCE: Thanks, Bill. So my job is just to
6 provide a context for the subsequent speakers.
7 They're each going to address issues that are really
8 raised by the 2018 decision of the Supreme Court in
9 Lucia versus SEC.
10 To understand the effects of that decision, we
11 have to go back in time a bit when you start in the
12 1930s when there were widespread and well-supported
13 complaints that the hearing examiners that were
14 presiding at hearings at agencies were systematically
15 biased in favor of the agencies where they presided.
16 And after 15 years of debate and deliberation,
17 Congress unanimously came up with what it thought was
18 a fix for this problem of biased decision-making in
19 the form of the Administrative Procedure Act, and some
20 of the provisions of that act were specifically aimed
21 at maximizing the decisional independence of
22 administrative law judges.
23 So the directors of the act identifies six
24 different ways in which agencies might be able to
25 impose pressure on what were then called hearing

1 examiners, today called administrative law judges, to
2 get them to rule in favor of the agency. And they
3 prohibited by statute each of those six practices.
4 The most important of those provisions was the
5 provision that says that no agency can remove or
6 otherwise discipline an administrative law judge.
7 They can only go to the Merit Systems Protection Board
8 and ask the Merit System Protection Board to hold a
9 hearing, and then, the ALJ can be removed if after the
10 hearing, the MSPB concludes that there's good cause to
11 remove the ALJ.
12 Now, the directors of the APA were also concerned
13 that agencies might be able to introduce bias through
14 the process of appointing ALJs who are known to be
15 biased.
16 So they -- while the statute said that the agency
17 does the appointing, it also said that the agency can
18 only appoint someone who has first been determined to
19 be qualified to be an ALJ by a separate agency, today
20 called the Office of Personnel Management. And they
21 had until 2018 in the Supreme Court opinion an
22 elaborate meritocratic system for determining whether
23 somebody was qualified to be an ALJ. And the agency
24 could make the appointment decision.
25 Well, in Lucia, what the Supreme Court held was

1 that ALJs are not employees of the government, they
2 are inferior officers. And that some immediate
3 implications and it raises a host of additional
4 issues.
5 One immediate implication became clear just a few
6 days after the Court's decision when the President
7 issued an Executive Order in which he rescinded all of
8 the rules applicable to the Office of Personnel
9 Management process of the determining whether
10 somebody's qualified to be an ALJ and replaced that
11 with just a very simple criteria that any agency head
12 can appoint anyone who is a member of the bar of any
13 state to be an ALJ.
14 That, of course, raises issues about how agencies
15 are going to exercise that new discretion. Then, the
16 indirect effects of the decision are the possibility
17 and Linda's going to be discussing this, I know, the
18 possibility that the provision of the APA that says
19 that ALJ cannot be removed except for good cause is
20 unconstitutional.
21 That could happen because the Supreme Court might
22 apply an opinion it issued in 2010 in Free Enterprise
23 Fund to ALJs. That is uncertain because a while back,
24 opinion seems to be very broadly worded and seems to
25 say that ALJs -- the removal protections of ALJs are

1 unconstitutional. The Supreme Court included a
2 footnote in that opinion in which it says we're not
3 necessarily addressing ALJs in this opinion. So we
4 don't know how that's going to come out, but it's
5 being litigated in several circuits today and will
6 eventually get to the Supreme Court.
7 Another issue that is arising that perhaps even
8 more important is a lot -- it turns out that a lot of
9 administrative law judges and other agency
10 adjudicators who don't -- aren't subject to the
11 safeguards that apply to ALJs, we call them usually
12 administrative judges, that they may not be just
13 inferior officers, they may be principal officers of
14 the United States.
15 Under two Supreme Court opinions issued in the
16 1990's, you can only be an inferior officer as opposed
17 to a principal officer if you are both subject to
18 removal by a principal officer and your decisions are
19 subject to review by a principal officer. Well, it
20 turns that there's about 2,000 administrative law
21 judges and administrative judges whose decisions are
22 only subject to review by inferior officers and
23 they're never subject to review by a principal
24 officer.
25 Well, we may see a series of opinions, and we've

1 already seen one from Federal circuit, that hold that
2 these 2,000 agency adjudicators are actually principal
3 officers and there's a big dispute if that becomes the
4 law about what the remedy is, whether or not it's
5 conceivable, but then, the only way we could staff
6 those positions is through the process of nomination
7 by the President, subject to confirmation by the
8 Senate, and is simply unimaginable to me that that
9 process would be capable of appointing roughly 2,000
10 agency adjudicators.
11 So we've got a lot of issues on our plate, and
12 this panel is going to take a crack at one of the most
13 important initially, whether the statutory safeguard
14 against removal of an ALJ except for good cause is
15 constitutional.
16 I think Margaret's going to go next and tell us
17 what all of this looks like from the principal of
18 somebody who's actually doing this work and subject to
19 all of this body of complicated dynamic law.
20 MR. FUNK: Okay. Thank you. Margaret, you're
21 up.
22 MS. MILLER: All right. Thank you. I am, as you
23 heard, Judge Margaret Miller. I am an administrative
24 law judge with the Federal Mind Safety and Health
25 Review Commission. We have at the present time about

1 10 ALJs, although several years ago, we had 20 due to
2 the number of cases we had. We are one of the few
3 administrative law judge -- one of the few agencies
4 that is separate and apart from the agency that we
5 hear cases from.
6 We hear cases from the Department of Labor, but
7 we're not part of the Department of Labor. We are
8 like OSHA, like the Occupational Safety and Health
9 Review Commission, which also is an independent
10 agency, independent from the agency. All of our cases
11 come from the Labor Department as do OSHA, but we
12 don't have much to do with them. Department of Labor
13 has their set of judges for another hundred other
14 things that deal with.
15 I am also -- I've been an ALJ for about 12 years.
16 I've always worked in labor and employment law, and I
17 am also a member of the Federal Administrative Law
18 Judge Conference, which is an organization of ALJs who
19 talk about and deal with issues that are raised for
20 ALJs across the spectrum.
21 So before I really start into what I have to say,
22 I just have to say that I am a Federal employee of the
23 Federal Mind Safety and Health Review Commission and a
24 member of FALJC, but I cannot speak for them, so any
25 opinion or suggestion that I make today, no matter how

1 good or bad it is, it is my own. It's not the agency,
2 and it's not the -- it's not FALJC, the Administrative
3 Law Judge Conference, although I certainly tell you
4 what has gone on and some facts related to both of
5 those things.
6 The first thing I think is important for everyone
7 to know because I'm not sure who the audience is or
8 how much you already know about ALJs, but we really
9 are here to talk -- I am here, at least, to talk about
10 ALJs exclusively. And there are 12,000 adjudicators
11 across hundreds of agencies in the government, and of
12 those 12,000, about 1,900 of them are really
13 administrative law judges, are ALJs.
14 There are so many other kinds of adjudicators.
15 And I -- just as an example, there are administrative
16 judges, AJs, and the EEOC uses AJs, the MSPB uses AJs,
17 and they have a completely different way of being
18 hired, of being appointed, and of their removal.
19 Often, they're regular -- they fall within the
20 regular civil service requirements and they have a GS
21 rating, a GS-14, GS-15. They have supervisors. They
22 get performance appraisals, promotions, and bonuses.
23 We don't get bonuses or promotions.
24 So what I really want to focus on is what I know
25 best which are ALJs. And of the 12 of the about 1,900

1 ALJs, there are 12,000 adjudicators, 1,900 of them are
2 ALJs, and of those 1,900, 1,700 or more are Social
3 Security/Medicare ALJs. So they have the bulk of the
4 ALJ force.
5 There are less than 200 of the rest of us, and we
6 are scattered among 20 to 25 agencies. Some agencies,
7 I would say, maybe Department of Labor has 30 ALJs,
8 some agencies have 1. Post Office -- Postal Service
9 has one, and many agencies have a combination. They
10 might have an ALJ, and they might have an AJ. Or they
11 might have an ALJ and an IJ, an immigration judge.
12 So there are so many different kinds, and I think
13 one of the purposes or one of the things that's going
14 to be explored all month on these -- through these
15 ACUS symposiums are the many different kinds of
16 adjudicators in the government.
17 So in addition, so of the less than 200 ALJs, the
18 judges have a variety of kinds of cases. I am an
19 agency that does enforcement. We have full-blown
20 trial -- evidentiary trials, following the civil rules
21 of procedure and evidence, and they are all about
22 safety and health of the minors in the country.
23 There are a number of agencies or ALJs that do
24 hear regulatory cases, and then, of course, there are
25 ALJs who hear the entitlement cases, which are mostly

1 the Social Security/Medicare, although there are other
2 programs, too, like Black Lung and Longshore cases
3 that all involve entitlements.
4 So there are many different kinds of us, and we
5 all have sort of a different set up, so I can talk
6 about the ones I know about, my friends, about what I
7 do, and I hope I don't misspeak because there's an
8 agency out there who handles things differently than
9 we do.
10 And so the first thing, I think, that we -- that
11 I wanted to mention was the Lucia case, which in 2018,
12 from it -- it essentially said that the ALJs had to be
13 appointed by the head of an agency. A lot of us had
14 been, not everyone was, usually the process before
15 Lucia was the chief judge would interview a qualified
16 person, and I'm going to get to that in a minute,
17 recommend it to the head of the agency, and the head
18 of the agency would sign off on it.
19 In order to cure any deficiencies after Lucia,
20 most agencies reaffirmed their ALJs, and the head of
21 the agency did that. In my case, we have a chairman
22 who is a political appointee, and we have four other
23 commissioners. Just to be safe, all five of the
24 commissioners reaffirmed all of the ALJs in my agency,
25 and I understand that that's what happened in most

1 agencies that the judges were reaffirmed.
2 After Lucia, some head of departments may have
3 more involvement in the appointment of the ALJs. I
4 haven't heard a lot about that. Usually, it's the
5 people working with the ALJs who decide. So I think
6 Lucia is not really what raised a lot of flags for the
7 ALJ.
8 I think it was the Executive Order that came
9 after Lucia that then caused us to take a lot more
10 notice because the Executive Order, 13843, which was
11 July of 2010, essentially moved the ALJs from the
12 competitive service in the government to the excepted
13 service and there are a whole range of things that go
14 with being in the excepted service as opposed to the
15 competitive service.
16 And one of the main things it did is it took away
17 OPM's ability to interview, test, and help select
18 ALJs. Prior to the Executive Order, OPM had a process
19 that had grown and changed over the years, and OPM, to
20 their credit, included ALJs when they were putting
21 together the tests and the questions and the
22 interviews.
23 But the OPM was in charge of it, and in order to
24 be an ALJ, it was a huge process. You had to fill out
25 an application that was usually 20 to 30 pages, you

1 had to have been a litigator at least seven years, and
2 so your application includes all of your experience.
3 What kind of cases have you tried, what kind of
4 evidence was involved, what did you do, who were your
5 witnesses, did you use expert witnesses, all those
6 kinds of things.
7 Included in that were the attorneys who worked on
8 the opposite side of the case from you and they were
9 asked to fill out forms about your temperament, did
10 you lose your temper, were you easy to work with. And
11 once you made it through the entire process, that was
12 scored, but then, you sat for a full-day test, and the
13 test questions were essentially here are the facts,
14 here are the law, write a decision, and you were
15 scored on that.
16 And then, last, you were -- you had an interview,
17 a panel interview, with three people. They included
18 an ALJ, someone from OPM, and a practitioner, an
19 attorney, usually, and all of those scores were
20 combined, and you were ranked according to your score
21 on the ALJ register. Usually -- oh, and there is a
22 veterans preference added to that score, as well.
23 So agencies chose from that register. They could
24 choose an ALJ who was sitting, working for another
25 agency, or they could choose from that register.

1 Well, the Executive Order took OPM out of that
2 process. And the only requirement left was that the
3 person who the -- person who was being selected as a
4 judge had to have a law degree or, excuse me, had to
5 be admitted into the bar in some location, some state
6 or the District of Columbia.
7 That, I think, is where the huge change came in
8 for us because now it's up to the agencies to decide
9 what kind of person or what kind of candidate they
10 want for their ALJ positions. And there can be a lot
11 of, I think, a lot that goes with that.
12 Prior to the Executive Order, there were agencies
13 who complained, look, I don't want to choose,
14 necessarily, from the top of this register because I'm
15 looking for someone who has expertise in the area I
16 need. So that was sometimes a complaint. Obviously,
17 agencies are free to do that now, look for someone
18 with expertise in the area of whatever they handle.
19 The problem with it is, as you can see, well, for
20 an example, within months of this Executive Order
21 coming out, one of the chief judges hired his clerk.
22 His clerk had come out of law school, worked five
23 years for this ALJ. He said I want him to be my next
24 ALJ, and the head of the department signed off on it.
25 That was all that was required. No posting it, no

1 looking elsewhere for other judges, no other
2 qualifications.
3 I think that's unusual. What happened in our
4 agency and most other agencies that I spoke to is we
5 put together our own requirements for an ALJ,
6 including years of litigation, including writing
7 ability, and judicial temperament, and all the things
8 that OPM looked for, we now tried to look for that,
9 and we would advertise that.
10 We haven't had an opening for an ALJ yet, but we
11 would advertise that. And most likely, most agencies
12 often take their judges from Social Security, who has,
13 you know, has 19 or 1,700 and they've already been --
14 already shown their ability as a judge.
15 So I mean, there's room for differences in the
16 agencies when it comes to how they're going to choose
17 an ALJ going forward, and I think it's fair to say
18 that moving away from those OPM guidelines and giving
19 heads of agencies, who, in most cases, are political
20 appointees, the opportunity to choose someone who has
21 a law degree, who may or may not have other
22 qualifications that other than being a political party
23 of the person who's appointing them.
24 So that's one -- I think that's one of the
25 biggest concerns that all of the judges have seen

1 since the Executive Order, and the OPM guidelines,
2 after the Executive Order, the OPM sent out a number
3 of guidelines, saying -- and they said, you know,
4 OPM's not -- is only going to be involved in certain
5 parts of appointment -- okay -- and that recruitment
6 should still be from qualified individuals on the
7 basis of their ability, knowledge, and skills.
8 So I just have a short time left, so I'm not
9 going to really -- I'm not sure what I can address
10 about the removal provisions. I would suggest that
11 there are a number of MSPB cases and district court
12 cases about removal and what good cause means.
13 And if you are interested in that issue, I would
14 point you in the direction of a case in front the D.C.
15 circuit at the moment, Fleming. It started as a case
16 with the USDA trying to protect a horse and ended up
17 into a whole -- and is now a forum for the discussion
18 of good cause removal.
19 And if you look at that case, all you have to do
20 is read the plethora of briefs, and you will see the
21 hundreds of different views on good cause removal and
22 how an ALJ should or could be removed. But the
23 current law is good cause. All right? Thank you.
24 MR. FUNK: Thank you, Margaret. And next,
25 Professor Jellum.

1 MS. JELLUM: All right. Thank you for that.
2 Now, I've shared a slide here. Can you see my screen?
3 If you'll just nod at me, so that I know that it's up.
4 Great. Okay. So Judge Miller talked about the
5 appointments process for the most part, and I'm going
6 to focus on the removal and the constitutional issues
7 with that.
8 First, let me thank Jeremy (inaudible) and ACUS
9 as well as the Center for the Study of the
10 Administrative State for having me. I really
11 appreciate an opportunity to talk with you all about
12 my latest article.
13 So what I want to do here is first describe the
14 ALJ for-cause removal protections. Many of you
15 probably already know what these are. Many of you may
16 even be acting within them or under them. But I will
17 give a view of what those are and what the concerns
18 are.
19 The biggest portion of what I'm going to do is
20 explain the case law, and I'm going to divide the case
21 law basically into three stages. Stage 1 is the stage
22 in which the Supreme Court really protected the
23 President's removal power.
24 Stage 2, there's a movement backwards; I call
25 that the cabining of the President's removal power.

1 And we have moved into Stage 3, starting in about
2 maybe 2010 or so with Free Enterprise of restoring the
3 President's removal power, which had been taken away
4 during the cabining time.
5 And at the end of that, I will summarize what I
6 think the rules are for today going forward. And
7 then, finally, I'll back up and apply that to the ALJ
8 for-cause removal provisions.
9 So here is my pictorial. Basically, there are
10 two types of ALJs, those who work for independent
11 agencies and those that work for executive agencies.
12 And the issue, as you're aware, is that the way an ALJ
13 gets removed is the ALJ would be recommended for
14 removal by the agency head, and then, that particular
15 case goes before the MSPB, which has an ALJ, who's
16 also protected for-cause removal, and then, the heads
17 of the MSPB are also protected, they're an independent
18 agency.
19 So if you see these little black boxes, these are
20 going to become important when we talk about Free
21 Enterprise, the fact there are multiple for-cause
22 removal provisions at work here. All right, so that's
23 my picture for the day.
24 Let's talk about the case law. So our first case
25 that I want to talk about is ex parte Hennen, which

1 was decided in 1839. And these three cases that I'm
2 going to talk about next all involved inferior
3 officers, which we know administrative law judges are
4 mostly inferior officers. (Break in audio). I'm
5 getting feedback on the line. I don't know if there's
6 something that can be done or not. Okay. Seems to be
7 gone. Thank you.
8 All right. So in ex parte Hennen, it involved a
9 district court clerk who had been fired. The district
10 court clerk sued. It was an inferior officer. The
11 statute did not contain a removal provision, and the
12 court held it would not imply one. Silence meant the
13 President has his full removal power.
14 A few years later, we have Parsons, involving a
15 district attorney, again, another inferior officer.
16 That particular statute had a four-year term limit,
17 but no removal limitation, and once again, the court
18 said we are not going to imply any limitations on the
19 President's removal power.
20 In Perkins, we get to our first removal
21 provision, a naval cadet who was serving and the
22 provision prohibited the department from dismissing
23 the naval cadet during peace time. And the Supreme
24 Court actually upheld that for-cause removal provision
25 because it was located not -- didn't necessarily stop

1 the President, but it was located within the
2 department, and because the department had the power
3 to appoint, the department should have the power to
4 remove.
5 The most important case that came out of that era
6 is Myers. Of course, this is a case in which the
7 Supreme Court held regarding a principal officer, that
8 the President's power to remove simply could not be
9 limited, that the President should absolutely have the
10 power of removal because the President has the
11 requirement of faithfully executing the laws, making
12 sure the laws are being applied appropriately, and
13 that if the President cannot remove those are who are
14 working from -- for, excuse me, him or her, then, the
15 President cannot do the job.
16 In Myers, importantly, the particular removal
17 provision allowed -- it required Congressional
18 consent, so Congress had inserted itself into the
19 removal process. For a President to remove the
20 Postmaster, the President had to actually have
21 Congressional consent.
22 And the court held, in a very, very long
23 decision, that it was simply improper and held the
24 removal provision to be unconstitutional.
25 Importantly, that particular case, Myers, was decided

1 by a chief judge who had himself been a President and
2 may have had a very protective view of the President's
3 removal power.
4 All right. So about ten years later, so the
5 Supreme Court didn't last long with its very
6 protective view of the President's power, the
7 President began cabining -- excuse me, the Supreme
8 Court began cabining the President's removal power.
9 And it started with case involving principal
10 officers, Humphrey's Executor, which is well known.
11 It involved the head of the FTC or one of the FTC
12 commissioners which is an independent agency. A
13 particular statute included a for-cause removal
14 provision, the FTC commissioner could not be removed
15 except for inefficiency, neglect of duty, or
16 malfeasance in office.
17 Notice that here, unlike the Myers case, Congress
18 did not insert itself into the process. Despite
19 Myers' very long and very protected view of the
20 President's removal power, this Supreme Court decided
21 that, no, no, in the case of an independent agency,
22 removal -- the President's removal power could be
23 limited, particularly because this was not a purely
24 executive officer as a Postmaster was. This was an
25 agency that had quasi-legislative and quasi-

1 adjudicative powers.
2 Now, Myers had said in dicta that even
3 adjudicators could still not be protected by for-cause
4 removal. That didn't slow Humphrey's down at all.
5 The court simply said that was dicta. We're not
6 abiding by -- we think the independence of the agency
7 is important here. So Humphrey's started the years of
8 cabining, which will go on for a while.
9 Wiener is -- in 1958, probably, I don't know if
10 it's Wiener or Winer, one of the most important cases,
11 I think, for administrative law judges to take hope
12 from because Winer involved or Wiener involved a
13 member of the War Claims Commission, so purely an
14 adjudicator officer, principal officer. The statute
15 actually did not have a for-cause removal provision.
16 Despite that fact, the court went and held an applied
17 one.
18 So here we have not only Congress not providing a
19 for-cause removal provision, but the court going ahead
20 and saying, well, Congress obviously meant to include
21 it. It's a failure to do so. The court called it
22 failure of explicitness, meaning there was no clear
23 statement that removal as limited. The court said it
24 was no big deal. The statute was enacted after
25 Humphrey's Executor was decided, and so perhaps

1 Congress didn't feel it was necessary to include a
2 for-cause removal.
3 So that case does leave us with some hope for
4 peer adjudicators. It's never been overturned,
5 although it is a little bit unusual, one might say, in
6 the for-cause removal provisions.
7 So next, in 1986, we have Bowsher. Bowsher
8 involved the comptroller general, a principal officer.
9 The statute included a for-cause removal provision
10 that specifically required a Congressional resolution
11 from both the House and the Senate, which could be
12 vetoed by the President.
13 So once again, much like Myers, we have Congress
14 inserting itself into the removal provision. And here
15 the court says, no, that's unacceptable. The removal
16 provision is unconstitutional. It was interesting,
17 the comptroller general was really considered to be --
18 at least Congress considered him to be someone working
19 more for Congress than for the President. Yet, the
20 court still held, no, that is simply unacceptable.
21 In regard to the inferior officers, the biggest
22 case that was decided this term, during this time
23 frame, was the Morrison involving the independent
24 counsel. Now, this was an inferior officer, it was
25 subject to the attorney general's control, and the

1 statute specifically limited the attorney general's
2 ability to remove the independent counsel only for
3 cause. And the Supreme Court upheld this provision.
4 What was interesting is that even though the
5 independent counsel is entirely a purely executive
6 position, which was sort of the distinction that
7 Humphrey's Executor had added in, the court in
8 Morrison actually rejected the distinction and said
9 the decision about whether the President can take care
10 to basically execute the laws is more important than
11 whether the particular individual was quasi-
12 legislative, quasi-judicial, or purely executive.
13 This decision, the lone dissenter was Justice
14 Scalia. Many have said this was one of Justice
15 Scalia's best dissents. And ultimately, Justice
16 Scalia's dissent, I think, has held true. I think
17 Morrison was a poorly reasoned decision.
18 I think it was a political decision, that it made
19 sense to have someone investigating the President and
20 major political offices to be (inaudible) for removal,
21 as we've maybe even seen lately, it's an important
22 thing to have. And I think the decision was based on
23 that political reasoning as opposed to actually
24 reading the case law and following the case law and
25 the constitution.

1 In any event, in 2010, we have Free Enterprise,
2 where, I believe, the court is moving back towards
3 Myers and a restoring of the plaintiff's removal power
4 that had been stripped away from Humphrey's Executor
5 up to Morrison.
6 Free enterprise involved the board members of the
7 public company accounting oversight board, which was
8 an independent agency located within the SEC, another
9 independent agency. It was a very unusual agency
10 structure. There are, to my knowledge, no other
11 inferior officer independent agencies within
12 independent agencies, and that probably set it up for
13 failure.
14 So the statute that created the PICA (phonetic)
15 board was -- had a for-cause -- extremely high for-
16 cause removal provision, which the court was very
17 bothered by. It wasn't the same one we had seen for
18 the FTC. It was actually extremely -- it would have
19 been extremely difficult to remove any of the members
20 of the PICA board.
21 And what was at issue here is that although Free
22 Enterprise, although the board was -- they were
23 inferior officers, and so removal provision within the
24 SEC should have been acceptable under both Perkins and
25 Morrison, which held that a department can have

1 removal power if it has appointment power.
2 Supreme Court decided that, you know what, while
3 one is okay, two is bad, and therefore, we are going
4 to hold that the PICA board, so the inferior-officer-
5 level provision for-cause removal protection is
6 unconstitutional.
7 The interesting thing about Free Enterprise is
8 that the court took the party stipulation that the
9 members of the SEC, commissioners of the SEC, were
10 protected by for-cause removal, although their statute
11 is actually silent.
12 In fact, their statute was created right after
13 Humphrey's Executor when the idea was -- excuse me,
14 right after Myers, when the idea was that these were
15 unconstitutional. So no for-cause removal provision
16 was put into the SEC's statute, enabling statute, yet
17 the court took the party stipulation, which I think
18 Breyer pointed out was a bad idea, and I agree
19 completely with Breyer.
20 But in any event, what the court held in Free
21 Enterprise is one is okay, two is bad. These are
22 lawyers, we go to law school to avoid math, and so
23 this is the opinion that we get as a result of that.
24 Now, actually, let me go back for a minute,
25 Professor Pierce did mention the footnote in Free

1 Enterprise, footnote 10, in which Justice Roberts, who
2 was the author of the opinion, suggested that its
3 holding might not apply to ALJs. I'm going to tell
4 you quite simply this is an incredibly poorly reasoned
5 footnote.
6 It starts off with ALJs may be inferior -- excuse
7 me, may be employees and not even inferior officers,
8 see Landy, which the court only a few years later in
9 Lucia said, no, no, they are actually inferior
10 officers as everyone thought or as I thought anyway.
11 And then, the reasoning that the -- that Justice
12 Roberts gives in the footnote talks about the level of
13 the for-cause removal for the PICA board, that it's so
14 high and that the ALJ standard is lower, but either
15 for-cause removal is okay or it's not okay. It can't
16 depend on, well, it's a little for-cause, and
17 therefore, it's okay.
18 Now, the one bright spot in that footnote is that
19 Justice Roberts did refer to the ALJs providing purely
20 adjudicatory functions and the importance of
21 independence. And I think if we're going to have any
22 hope here because I think we all think the ALJs ought
23 to have independence, if we're going to have any hope,
24 it's going to have to be coming back to that
25 Humphrey's Executor's distinction that those officers,

1 and again, Humphrey's Executor really related to the
2 principal officers. But those officers who exercise
3 quasi-adjudicative or quasi-legislative --
4 MR. FUNK: Linda?
5 MS. JELLUM: Yes.
6 MR. FUNK: Linda, wrap it up.
7 MS. JELLUM: Okay, yep, I am. So I will go ahead
8 and skip these two cases, but I will give you the
9 summary. And the summary is that for principal
10 officers, Congress cannot limit the President's
11 removal power except multi-headed independent agencies
12 with quasi-legislative or adjudicative power.
13 For inferior officers, Congress can limit the
14 President's removal power except when there are dual
15 for-cause limitations, and this is essentially what
16 Justice Roberts said in the CFPB case, the law which
17 just came down.
18 So we apply those rules to our boxes that we saw
19 earlier, you can see that most of the removal
20 protections on the ALJs go away as unconstitutional.
21 Potentially, the ALJs that are working for executive
22 agencies may be okay. We will see.
23 And so I have questions down here. Obviously,
24 we're going to take questions in the format, as well,
25 but should you want to email me directly, feel free,

1 or if you want to copy the PowerPoint, happy to send
2 it. And with that, Bill, I am wrapped up.
3 MR. FUNK: Thank you very much, Linda. And now,
4 we turn it over -- Michael? You're on mute.
5 MR. RAPPAPORT: Okay. I unmuted myself, but it
6 doesn't work, so I'm glad I'm finally unmuted.
7 Thanks, Bill, and I want to thank ACUS and the
8 Boyden Gray Center for inviting me to participate in
9 this great panel.
10 So as we've heard, you know, in recent years, the
11 traditional ALJ system for adjudication has been
12 subject to disruption due to constitutional challenges
13 as to appointment and removal. And just very quickly,
14 you know, in Lucia, the Supreme Court held that ALJs
15 are officers of the United States, which has led to a
16 change in the appointment system for ALJs, as we
17 heard.
18 Agencies now may appointments as they wish
19 without being limited by OPM selection procedures.
20 And therefore, the agencies have largely unlimited
21 power to select ALJs who they expect to favor their
22 interests. So a little bit of a different point about
23 whether they're qualified or not. They used to have
24 to choose the top -- from amongst the top three. Now,
25 they can pick people who they think will favor their

1 side, their perspective on matters.
2 Second, as we heard as well, serious questions
3 exist whether ALJs can maintain the limited
4 independence from removal that they presently enjoy.
5 And as Linda said, some people have argued that Free
6 Enterprise, ALJs cannot be subject to double removal
7 provisions.
8 So these two developments might seem to suggest
9 that we must choose between following the constitution
10 or having impartial adjudicators. But in my view, we
11 do not have to choose between the constitution and
12 impartial adjudication; we can have both.
13 Today, I want to propose a reform that would
14 fully respect the constitution and would provide for
15 even greater judicial independence and under the
16 traditional ALJ system. Under my proposal, our
17 current agency adjudication system would be replaced
18 with one that employed fully independent adjudicators.
19 So my proposal grows out of a larger project that
20 I've been working on in several different articles
21 that applies the strictest separation of powers to
22 administrative agencies. It does so through
23 institutions that are designed to be workable in our
24 current world. In other words, it seeks to establish
25 government agencies that are both feasible and respect

1 a strict separation of powers. Something that people
2 generally don't believe is possible.
3 Now, in the area of administrative adjudication,
4 my proposal would eliminate the existing system of
5 adjudication by ALJs that are subject to review by
6 agency heads. And here, I should note that I'm just
7 talking about, for today and this initial phase, the
8 ALJs that -- and excluding Social Security and
9 Medicare people, so we're talking about 175, 200 ALJs
10 that do formal adjudications.
11 The existing system would be replaced with a
12 system of independent administrative courts that are
13 staffed with either Article 3 judges or Article 1
14 judges. And these judges would be appointed by the
15 President with the advice and consent of the Senate.
16 Now, under the arrangement, the agency would not hold
17 formal adjudications but would only bring enforcement
18 actions that would then be heard by independent -- by
19 the independent administrative court.
20 The administrative court's decisions could not be
21 reviewed by the agency, but instead would be subject
22 to appeal only to other Article 3 courts or to Article
23 courts, to the circuit courts. This arrangement would
24 provide for a much strong independence for
25 adjudicators that we now have, and it would do it in a

1 variety of ways.
2 First, the independent judges could only be
3 removed for cause without the constitutional doubt
4 about the removal of ALJs that now plagues us and that
5 Linda talked about. If the administrative judges were
6 Article 3 judges, they could only be removed by
7 impeachment. If the administrative judges were
8 Article 1 judges, they would be removable by the
9 President or cause. And so this would avoid the Free
10 Enterprise removal issues.
11 Second, the independent judges would also enjoy
12 more independence from the agency because the agency
13 could not, as they can do now, appoint the people --
14 appoint people to be judges who are most likely to
15 share the agency's viewpoint. Instead, the judges
16 would be selected by the President with the advice and
17 consent of the Senate. And thus the people selected
18 would reflect a broader array of interests and
19 perspectives than they do now.
20 And third, and this is the most significant of
21 the changes, the judges would not only be insulated
22 from easy removal, but their decisions would not be
23 subject to review by the agency.
24 This reform would genuinely separate enforcement
25 from adjudication. The agency would no longer be a

1 judge in its own case. It's hard for agencies to
2 fairly adjudicate when they have already decided
3 someone should be prosecuted.
4 It's also hard for agencies to make an unbiased
5 decision on whether to bring an enforcement action if
6 it knows it can adjudicate the case on its own.
7 Okay. While a system of independent judges is
8 often been rejected on the grounds that it would
9 deprive administrative adjudication of the expertise
10 and low decision-making costs that it currently
11 possesses but I believe this is mistaken. One could
12 combine significant amounts of expertise and low
13 decision-making costs with genuine independence.
14 First, independent administrative judges could
15 have significant expertise. Under my proposal, these
16 judges would be divided into three groups, those with
17 expertise as to medicine, as to science, and as to
18 economics.
19 They would then be assigned cases based on the
20 issues involved rather than based on the agency from
21 which the case derives. Thus, they would have
22 significant expertise as to the subject matter but
23 would not have the tunnel vision of agency
24 adjudicators.
25 Now, to ensure that the persons appointed have

1 the requisite expertise, I think Congress should
2 define the qualifications of the office. For example,
3 the qualifications for the medical independent
4 administrative judge position should be defined as
5 requiring some expertise as to medicine. In that way,
6 the law would actually mandate that people have the
7 relevant knowledge or experience.
8 Second, the independent administrative courts
9 could realize the lower decision-making costs of the
10 existing administrative adjudication system. At
11 present, administrative adjudication generally employs
12 streamlined procedures, such as limited cross-
13 examination or discovery and a variety of other
14 matters. Independent administrative courts could use
15 these same procedures, and so it could enjoy some of
16 this low-cost decision-making.
17 Well, let just then conclude by saying that I
18 believe that the independent administrative courts
19 would be a desirable reform of our existing system of
20 administrative adjudication. Such courts would
21 protect judicial independence while at the same time
22 preserving much of the expertise, the low decision-
23 making costs of the existing system. That's it.
24 MR. FUNK: Thank you, Michael. Very good.
25 Keeping it right on time. That was excellent.

1 So I was going to allow the panelists a brief
2 ability to respond or ask a question.
3 Judge Miller, it seems you're interested in
4 saying something.
5 MS. MILLER: I'm unmuted, okay. I don't know
6 what to say about that. I think it's an interesting
7 proposition, and obviously, I have read about it, and
8 it's been floating around for a number of years, not
9 in that detail.
10 But expertise is definitely -- I'm all for the
11 independent part. I like that a lot. The expertise
12 might be a little oversimplified. In the kind of work
13 I do and in other friends who are ALJs, there's a lot
14 of engineering that goes on. We need some engineers
15 if you're going to have experts. You might add those
16 to the list. So that's all I had to say.
17 MR. FUNK: Okay. Professor Jellum, is there
18 anything you'd like to ask or say?
19 MS. JELLUM: Well, so you know, we have a system
20 similar to that you that you propose here in Georgia,
21 and I think it's worked pretty well. I haven't worked
22 closely with it. I know Edward (inaudible) in
23 Louisiana feels a little differently about the program
24 in his state.
25 But I guess my question to you is practicality.

1 I mean, this was a choice that was made back, you
2 know, I don't know how many years now, 70 years ago.
3 The -- having an independent group of ALJs was
4 considered and it was rejected by Congress at the
5 time. And partly the reason it was rejected was the
6 importance of agencies maintaining control over the
7 policy-making piece of what happens as part of
8 adjudications.
9 And while I think back then agencies were using
10 adjudication a lot more commonly to create policy and
11 rulemaking has become a little bit more common, which
12 is good, you know, I think the concern that I might
13 have, again, I'm not -- it works well here in Georgia
14 -- the concern I might have really is taking the
15 agency out of anything that might ultimately lead to
16 some form policy decision.
17 I think what you're trying to do is take
18 enforcement and separate it out from adjudication to
19 address that, perhaps, but anyway, that would be --
20 the feasibility of it and also sort of that concern
21 about agency policymaking are the concerns that I
22 would raise.
23 MR. RAPPAPORT: Should I respond to some of
24 these?
25 Okay. Great. Well, thank you, Judge Miller, for

1 that comment. That's interesting. I need to think
2 quite a bit more about the engineering side of it. So
3 thank you for that.
4 And Linda, you know, the sort of policymaking
5 aspect of this, you're absolutely right, is important
6 and it kind of depends on how much want to change the
7 existing system.
8 So on the one hand, you could allow the -- so the
9 least change with the existing system would be to
10 allow agencies to submit sort of policymaking
11 determinations that then would be reviewed by the
12 administrative court in the same way that circuit
13 courts now review their policymaking.
14 So the agency could, you know, propose certain
15 policy, you know, this rule ought to apply here based
16 on, you know, good policy, and then the administrative
17 court would accept it if it satisfied hard look or
18 something like that. One could do that.
19 I'm actually a lot more skeptical about using
20 policymaking, especially in the adjudication area. So
21 one thing you do is you could have policymaking only
22 adopted through rulemakings. So that might be one
23 way.
24 If you said, oh, we need adjudication -- we need
25 policymaking at adjudication (inaudible), other things

1 you could do. You could have -- if you have an
2 independent agency or a commission, you might require
3 a super-majority vote as a commission to adopt the
4 policy.
5 Or you could -- if you have an executive branch
6 agency, you might require OMB signoff on these things,
7 so there's lots of ways of cutting back. I actually
8 favor something like the Raines Act, which for
9 governing significance rules, and so requiring policy
10 to go through the rulemaking process would be
11 advantageous in terms of putting a check on it.
12 But there's a variety of ways of doing all that.
13 But you're absolutely right, this is a rejection of
14 the decisions that were made or at least in part, the
15 decisions were made with the Administrative Procedure
16 Act, and for some people, that's, you know, not going
17 to be an attractive suggestion, but I'm a reformer.
18 MR. FUNK: Okay. And Professor Pierce, I don't
19 see your face, but I hope you're there somewhere. And
20 do you have anything you wanted to add or ask? Well,
21 maybe he's not there. Okay. Well, in any case, we
22 can turn to the audience.
23 We have a number of questions from the audience,
24 and there's a couple of different people have asked
25 the question of Judge Miller to identify the agency in

1 which the chief ALJ appointed his clerk.
2 MS. MILLER: I can't do that. I studiously
3 avoided that.
4 MR. FUNK: Well, all right. So they were
5 interested in knowing, but I guess that's it.
6 MR. RAPPAPORT: Aren't we all, aren't we all.
7 MR. FUNK: A question by Professor Richard Levy
8 is would the panelists to speak to the Solicitor
9 General's position on good-cause removal. His -- I
10 interpret that as being his position on what good-
11 cause removal means.
12 You may recall in the CFPD case, (inaudible) law,
13 it's my understanding that the Solicitor General said
14 you could -- or somebody, I think it was Mikas
15 (phonetic) actually who argued that good cause could
16 be read to mean a lot less than -- in other words,
17 could it involve policy disagreement, and how do you
18 view that?
19 MS. JELLUM: So I think that's a little
20 disingenuous. It's not originally what was meant by
21 good cause. And keep in mind that there's just one
22 good cause standard. It's not just, you know,
23 malfeasance, whatever the one that they -- MTC had.
24 There are different for-cause standards.
25 And in the Arthrex case, if I'm saying that

1 correctly, the Federal circuit 2019 just recently came
2 down and even said that the regular civil service
3 protections were too much for -- a for-cause removal
4 is inacceptable than even a very, very light standard
5 is still unacceptable.
6 So I think that the position of the -- what was
7 it -- Solicitor General -- I just think it's -- it
8 doesn't make sense to me anyway. I don't know maybe
9 Michael has a different take on it, but to me, I just
10 want the save the statute, so I'm going to argue
11 something that I can't.
12 And I think based on traditional statutory
13 interpretation provisions and -- it doesn't make any
14 sense to me that that would be okay. It would
15 essentially have -- you have just too many different
16 for-cause provisions that you would have a hard time
17 policing.
18 MR. FUNK: Anyone else?
19 MR. RAPPAPORT: Yeah, sure. Well, I don't think
20 that's -- if one were just looking at the statutory
21 provisions, I don't think that's the interpretation
22 one would come up with.
23 On the other hand, like it or not, we have a
24 constitutional avoidance canon that's out there. I
25 don't particularly like it, but that doesn't really

1 matter, right? It's part of the law, so I suppose the
2 question would be whether or not we -- one declares
3 this unconstitutional or one interprets in a way to
4 avoid the constitutional problem or the constitutional
5 question.
6 So I don't have a strong view about the matter,
7 but I don't think you can reject that interpretation
8 sort of wholesale because it's a standard move within
9 statutory interpretation.
10 MS. JELLUM: Well, it is, but these days, the
11 constitutional avoidance doctrine is being applied
12 much more like ambiguity, is that the two
13 interpretations have to relatively equal. You know,
14 before that, there was the fair interpretation
15 standard, that one is usually better, but we'll take
16 this other one that's sort of the -- if I can remember
17 the case law off the top of my head.
18 But more commonly today, the courts are using the
19 constitutional avoidance doctrine as an ambiguity
20 resolver. And there's -- I don't see that this is
21 ambiguous. So it depends in some respects, I think,
22 with Michael's point that if the courts apply the
23 traditional approach to constitutional avoidance, then
24 perhaps.
25 But the courts, I think, much like Michael, sort

1 of the movement is away from using constitutional
2 avoidance as much as it's been used in the past, like,
3 NRLB was a case I was thinking -- I think, anyway. So
4 that would raise that issue.
5 MR. RAPPAPORT: The only thing I would say is
6 they move away from it except when they don't move
7 away from it. It was interesting to see Chief Justice
8 Roberts in Lucia Law talk about, you know, well, we
9 really can't use constitutional avoidance if the
10 language isn't ambiguous.
11 And I'm scratching my head going, well, I do
12 remember a case. It wasn't a very important case, but
13 people might have heard about it, Sebelius involving
14 the Affordable Care Act where the Chief Justice
15 thought constitutional avoidance ought to be employed,
16 even though it wasn't ambiguous.
17 But -- so you know, I agree with you that there's
18 some movement to cabinet. On the other hand, as with
19 the Supreme Court so often, consistency is not
20 necessarily their highest virtue.
21 MR. FUNK: I have another question from Professor
22 Michael Asimow. Does the transfer of ALJs to the
23 excepted service mean they can be removed without
24 cause? I think that's a question for Judge Miller.
25 MS. MILLER: It could, except that the OPM

1 guidelines and the Executive Order specifically say --
2 first of all, all of us who are already ALJs are
3 staying in the competitive service. It only applies
4 to new ALJs or ALJs who move between agencies. And
5 that actually happens a lot because many agencies hire
6 judges who are first hired by Social Security
7 Administration, and they come to us.
8 If they make that move now, then, you're moved to
9 the excepted service. And the excepted service does
10 have different removal provisions, except that there
11 are guidelines and things out there so far that say
12 not yet. We're not moving ALJs to that yet. But it
13 could happen.
14 MR. FUNK: I have a question from Judge McCarthy,
15 a question for Professor Jellum, removal under Free
16 Enterprise Fund, why not sever the principal
17 adjudicators rather than the -- in other words, if the
18 SEC members could only be removed for cause or not,
19 depending about how you want to read the statute, and
20 their ALJs could only be removed for cause, why not
21 take away the SEC members' rule for cause rather than
22 the ALJs. So that's the question.
23 MS. JELLUM: Yeah, you'd have to ask Judge
24 Roberts, Justice Roberts, excuse me, why he made that
25 choice because potentially, either was an option. I

1 think that the court is still reluctant to reverse
2 Humphrey's Executor. I think there's some feeling
3 that independent agencies are independent for a
4 reason, and part of what makes them independent is the
5 limitation on their removal.
6 And so when Chief Justice Roberts decided the
7 Free Enterprise case law, I guess he wasn't alone, but
8 when the court decided the Free Enterprise case, the
9 removal choice they took was to sever the provision
10 relating to PICA. The argument was that it was PICA
11 that was unconstitutional and that was a particular
12 act in front of the court, and so the court simply
13 severed the unconstitutional provision rather than
14 declaring the entire PICA board unconstitutional,
15 which, I think, some people had hoped for.
16 But so the difficulty we have in finding the SEC
17 or an independent agency that actually has a for-cause
18 removal provision is Humphrey's Executor. And so in
19 the most recent case, the CFPB case for Seila Law
20 2020, Justice Roberts, again, wrote the majority, and
21 all of the justices who signed on to it, with the
22 expectation of Thomas, who was in the majority, well,
23 Thomas said straight up, let's just reverse Humphrey's
24 because it completely disagreed with Myers.
25 It doesn't make sense, and I'm not completely

1 sure I disagree with that. I mean, one of my findings
2 in the George Mason Law Review is that I think that
3 Humphrey's was probably wrong. I know people disagree
4 with me on that, but to answer your question, that's
5 why the court didn't sever the SEC's potential for-
6 cause removal.
7 MR. FUNK: Okay. Professor Michael Asimow also
8 asked can a new President adopt an Executive Order
9 that would prohibit agencies from using political
10 considerations in appointments and confer for-cause
11 removal protection on all administrative -- let's see,
12 all administrative judges or all administrative law
13 judges? I didn't see which one he asked. All
14 administrative hearing officers. Could the President
15 do that by Executive Order, give for-cause protection,
16 even for AJs, for that matter?
17 MS. JELLUM: So if I'm up on this one, and hi,
18 Michael, hope you're well, my take would probably yes.
19 Can the President issue an Executive Order that limits
20 his or her ability to remove those that work beneath
21 the office? I would think yes because alternatively,
22 the President could simply get rid of the Executive
23 Order, as well, or an incoming President could get rid
24 of the outgoing President's Executive Order.
25 So I don't see why a President couldn't choose to

1 limit his or her own discretion in this area. But I
2 will say that Executive Orders are not my particular
3 area of expertise.
4 MR. RAPPAPORT: One thing I mention here, there's
5 something of a precedent for this in the sense that
6 the special counsel that the Department of Justice
7 used, so that's Special Counsel Mueller was enacted
8 pursuant to a regulation where there are limited
9 removal aspects to -- and could control and removal
10 aspects of the special counsel. So that would be an
11 example of that.
12 MS. JELLUM: Well, in that case, the agency
13 itself limited its removal power, which is
14 interesting, because I was waiting --
15 MR. RAPPAPORT: No, I -- granted, that's the
16 difference, but I'm not -- I think it's analogous.
17 MS. JELLUM: Yeah, no, I think you're right. And
18 it would have been really interesting to see what
19 would have happened if President Trump had decided to
20 try to remove Mueller. As you recall, that was quite
21 a threat during that period of time. So that would
22 have been interesting to see what would have happened,
23 but yeah, it's a good point.
24 MR. RAPPAPORT: This is a question from Professor
25 Desai (phonetic) for Professor Rappaport. Isn't one

1 of the rationales for presidential control over both
2 principal and inferior officers the fact that policy
3 should be subject to presidential control. So to the
4 extent that adjudicators are in the course of their
5 decision-making making policy, don't we want those
6 decisions subject to presidential political appointee
7 control?
8 MR. RAPPAPORT: Well, you know, courts -- okay,
9 so that's a good point, and it depends how much
10 policymaking one is going to have. So under the sort
11 of strong reform that I would like to see, the
12 policymaking would be very limited. Agencies could
13 still do it, but they would do it through the
14 rulemaking process.
15 And maybe that rulemaking process would be
16 subject to a Raines Act limitation or not. So to that
17 extent, the policymaking would still be as part of the
18 executive branch. I wouldn't want the agencies making
19 -- sorry -- I wouldn't want the independent
20 administrative courts making policy.
21 And so I didn't want to suggest that they would
22 be making policy determinations. They would have to
23 be deciding the cases in the same way that a standard
24 Article 3 court decides them, which of course, we
25 know, Article 3 courts never consider policy. But you

1 know, to the joke aside, I wouldn't want the
2 independent administrative court to be employing
3 policy in the way that agencies are now thought to do
4 so.
5 MR. FUNK: Okay. I'm sorry that Professor Pierce
6 isn't with us anymore. Dick, you're not there?
7 Because one of his points was the question whether or
8 not inferior officers -- whether ALJs could be
9 principal officers rather than inferior officers.
10 And the reason that I would have asked about
11 that, well, why would that be when they are both
12 subject to their -- the procedures that they operate
13 under are adopted by a principal officer, the agency,
14 and their decisions are reviewed by principal
15 officers, the agency, often times, rubber stamped, but
16 nevertheless, as a formal matter, they are subject to
17 review by a principal officer.
18 So I was wondering how do you people feel about
19 whether or not there's any real problem with ALJs
20 being only inferior officers and not principal
21 officers?
22 MS. JELLUM: Yeah, I mean, that was the Arthrex
23 case, right? They were the patent judges, appellate
24 patent judges, I believe was their term, APJs. And
25 the Federal circuit found them to be under the Supreme

1 Court Edmonds case and I think maybe the Morrison
2 case, I may have the second one wrong, but basically
3 found that there were two requirements to be a
4 principal officer. One is that there is a -- you're
5 an inferior officer if you have a principal officer
6 and the President above you, so that's one sort of the
7 supervisory role. And the other was the ability of
8 the people above to reverse decision-making that was
9 done by the inferior officer. So inferior officers'
10 decisions are usually reviewed by principal officers.
11 And I know in Dick's article that he wrote
12 recently, he talked about how some of the ALJs and, by
13 the way, AJs have no one really reviewing the
14 decisions. They're pretty much pro forma, become the
15 agency's decision. And Dick raised the question that
16 these particular AJs and ALJs may actually be
17 principal officers under the court's current test and
18 that was what the Arthrex case held.
19 Now, I think if I could just say that one of the
20 issues was back in the Hennen case, you know, back in
21 the 1800's and stuff when these cases were initially
22 decided, the court only saw two kind of officers,
23 principal and inferior. Let me say, two kinds of
24 employees, principal and inferior officers. There was
25 no sort of employee category.

1 And as a result, we had a huge -- this is one of
2 the reasons I think Lucia held that the ALJ are
3 inferior officers. The number of different types of
4 individuals that were held to be inferior officers
5 over the years was so broad. There was no way ALJs
6 weren't going to fit in that group. And it was -- if
7 you looked at it, it was a no-brainer decision the
8 court had to make.
9 And so I think that set us up to the problem that
10 we're in now with the court's test. And I think it
11 was Scalia who articulated it in Edmonds, as I recall,
12 but it's just basically, you're inferior if there's a
13 principal over the top of you.
14 And then, one of the cases also added in the
15 finality of the decision-making. I'm not sure that's
16 the right test. I'm not sure it's what it should be,
17 but that's kind of where we're at. So if that test is
18 -- holds true, and has Dick has pointed out, there are
19 a number of different agencies that have AJs and ALJs
20 who are making these final decisions with no one, no
21 principal officer able to really effectively reverse
22 the decisions.
23 It's going to be interesting. And principal
24 officers, it's much harder to put for-cause removal
25 provisions on principal officers compared to inferior

1 officers based on the court's test in Seila Law.
2 MR. RAPPAPORT: If I could just chime in, Bill,
3 so I think there's a sort of ambiguity here or
4 uncertainty about what it means for an inferior
5 officer to effectively have the final decision. So
6 you might take a look at this matter as a formal
7 matter.
8 And even though the agency heads don't typically
9 review what the inferior officer does, as long as they
10 have the authority to review it, one might think that
11 they nevertheless have that authority and the inferior
12 officer then is inferior.
13 If, on the other hand, the agency heads do not
14 have the authority at all to be able to reverse the
15 inferior officer's decision, then, I think that's a
16 pretty clear case where that person would be a
17 principal officer under the type of analysis that
18 Judge Scalia makes in Edmonds and the like.
19 So it's kind of now -- now if you want to say,
20 well, yes, they theoretically have the authority.
21 They've never exercised it in these thousands of
22 cases, well, then you might want to think about that
23 as a sort of functionalistic section to the formal
24 aspects to it. But my take on this would be that the
25 formal -- as long as they have the formal authority,

1 that's good enough.
2 MR. FUNK: Dick, I see you're back. You're on
3 mute, though. You're muted. Go. Not hearing you,
4 we're not hearing you.
5 MR. RAPPAPORT: That's what happened with me.
6 Somebody else has to unmute him. I think the --
7 that's --
8 MR. FUNK: Try it now. Nope. We've lost your
9 audio. What a shame. Don't know what -- I can't help
10 you at this point.
11 Let me turn to a question that Professor Jeffrey
12 Lubbers asked, which is have there been any lower
13 court decisions on the constitutionality of the ALJ
14 double for-cause protections?
15 MS. JELLUM: I honestly don't know. I've been
16 working on a different writing project this summer and
17 had not followed up on that. I know that in Lucia on
18 remand, they were making that argument. I don't know
19 where it's been, so I'm sorry, Jeff, I don't have a
20 good answer for you.
21 MR. FUNK: Okay.
22 MS. MILLER: The only case -- there might have
23 been lower court cases that I'm not aware of, but the
24 case before the D.C. circuit right now, the Fleming
25 case that I mentioned, is probably the one that has

1 the most information, the most briefs, the most
2 everything in it about the removal. And I don't
3 remember reading about any lower case. That one came
4 directly from the USDA, not from a lower court.
5 MR. FUNK: Uh-huh, okay. Good. Professor Jordan
6 asked how is it possible to avoid policymaking in
7 adjudication? Some policymaking is inevitable, isn't
8 it? I think he's really aiming at Professor Rappaport
9 in that question.
10 MR. RAPPAPORT: Well, if -- so if a court is
11 deciding facts, factual questions, then that's not
12 policymaking, that's fact finding. If a court is
13 interpreting law, that's not fact finding -- I'm so
14 sorry, that's not policymaking, that's interpretation.
15 Now, I understand lots of people think that
16 policy goes into law interpretation and maybe it goes
17 into fact finding.
18 Now, it is certainly true that we have a category
19 in administrative law that actually most other areas
20 don't actually separate out of policymaking, and those
21 are policymaking aspects to them. So that would be
22 policymaking, but of course, I wouldn't want courts to
23 be making those type of determinations.
24 So in the typical Article 3 case, where a circuit
25 court decides a matter, let's say, outside of

1 administrative law, what do they do? They talk about
2 we're engaged in fact finding, we're engaged in law
3 interpretation, maybe they're engaged in common-law
4 reasoning, where the theory behind that is that
5 they're actually following the common law and looking
6 at practices and other decisions.
7 Now, courts do engage in policymaking at that
8 stage, but they don't like to call it policymaking.
9 If that's all that the Article 3, the independent
10 administrative courts would be doing, exercising the
11 same type of policymaking that Article 3 courts do,
12 well, if you want to call it that, so be it. So maybe
13 one -- if one's concerned about calling it
14 policymaking, let me say, these independent
15 administrative courts would not exercise any more
16 policymaking than Article 3 typically exercise.
17 That's a reformulation if one prefers that formulation
18 of it.
19 MR. FUNK: Judge McCarthy asks in Lucia, the SEC
20 chair was precluded from -- was precluded under the
21 Reorganization Act from being the head of the agency.
22 Is this still an open issue at other independent
23 agencies? For example, can the chair of the Federal
24 Trade Commission be the head of the agency for
25 purposes of appointments and removals? (Inaudible)

1 appointments, but removals? Yeah, appointments and
2 removals. Linda?
3 MS. JELLUM: Yeah, I think the case law was
4 pretty clear that it doesn't have to actually be the
5 head of a department, that someone that serves in that
6 capacity, whether it's a department or someone else.
7 I can't recall where I read that, but back when I was
8 writing the article, the idea was it didn't have to be
9 just the head of the department.
10 MR. FUNK: It's clear the agency, by a majority
11 vote, can exercise -- as being the head of the
12 department for constitutional purposes, but I think it
13 is sort of still an open question, whether or not the
14 head of the independent -- the chair --
15 MS. JELLUM: Oh, I'm sorry. I misunderstood the
16 question. I apologize. Yeah, I misunderstood the
17 question. I thought you were talking about other
18 agencies within departments, whether they would count,
19 but no, in terms of department, I think, independent
20 agencies, you are correct, that I think it's still
21 open, whether the chair alone can do it, or it would
22 need the board. So my apologies, I misspoke there.
23 MR. RAPPAPORT: Now, wasn't it true in Freitag
24 that the -- I mean, I understand it's the tax court
25 here, but in Freitag, the special trial judges were

1 appointed by the chief of the tax court, and so now,
2 there were two different theories on why that
3 appointment could -- was okay there, right? But the
4 Scalia theory would have would have thought of the tax
5 court as an agency, and under that view presumably the
6 chair of the agency, the chief judge, would be the
7 head of the department.
8 MR. FUNK: Okay. Professor Desai asks is there
9 truly -- is there a truly a distinction between
10 administrative agencies and Article 1 courts? Aren't
11 those judges, for example, the Court of Claims judges
12 really executive principal officers? They're
13 appointed by the same person, President, as current
14 agency heads who do adjudications like the NLRB and
15 OSHAC (phonetic), et cetera. Question for Professor
16 Rappaport.
17 MR. RAPPAPORT: Oh, well, I have a lot of
18 sympathy for that view, and as at least a matter of
19 the original meaning, it's not our world, but as a
20 matter of the original meaning, I do think that. And
21 if one does think that, then, my independent
22 administrative courts need to be Article 3 courts, not
23 Article 1 courts.
24 MR. FUNK: Let me follow up on that and ask
25 what's the difference between your independent courts

1 and a central panel?

2 MR. RAPPAPORT: Sorry?

3 MR. FUNK: For you.

4 MR. RAPPAPORT: Well, I mean, it has a different

5 structure to it in the sense that there's the dividing

6 of the judges into different levels of expertise and

7 if they're Article 3 courts, they're in a completely

8 different brand.

9 MR. FUNK: The central panel, I mean, the idea of

10 -- instead of having ALJs being resident within an

11 agency, they'd be resident within an independent

12 agency, which we'll call the central panel. And the

13 central panel hires the people and deals with the

14 people, and -- but it would still result in the

15 decision of the ALJ going back to the agency for

16 review, just as ALJ decisions now are.

17 So the question is you get complete independence

18 for the ALJs, and so there's no problem about

19 independence. They're not part of the agency. They

20 have no stake in it. They're not hired by the agency,

21 they're not fired by the agency they're reviewing, but

22 at the same time, you don't take policymaking out of

23 adjudication because it's -- it just goes back to the

24 agency as it does now.

25 MR. RAPPAPORT: Well, can the agency reverse the

1 fact findings, let's say, of the central panel?
2 MR. FUNK: Let's say we haven't amended the APA
3 in that regard, and they can decide the decision de
4 novo on the record.
5 MR. RAPPAPORT: Well, then, that's a very big
6 difference between my (break in audio).
7 MR. FUNK: We're losing you. We just lost --
8 speak louder.
9 MALE VOICE: Sorry to interrupt, Professor
10 Pierce, are you able to speak now? Is your audio
11 returned?
12 MR. PIERCE: My audio has returned, however I
13 don't have any idea of the context in which this
14 conversation is now going.
15 MALE VOICE: Yeah, the last couple of (break in
16 audio) he was able to rejoin.
17 MR. FUNK: Well, maybe I can pass -- go onto
18 another question from Professor Asimow, saying is
19 there a serious risk under Trump's Executive Order of
20 politically based appointments, especially at EOIR,
21 Executive Order -- I don't -- Executive Office of
22 something -- Immigration Review? If a new President
23 wanted to deal with this, what should the appointment
24 process look like, not just ALJs, but AJs, as well? I
25 guess that's for anybody.

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1 MS. MILLER: I'm not sure what the question is,
2 but right now, EOIR is an agency from the Attorney
3 General who -- it's run by the Attorney General. I
4 think they have one ALJ, but they have 460 immigration
5 judges, and there's been a lot written. I'm sure you
6 can all -- everyone can read about the ability to be
7 independent in that scenario.
8 So that's a different question than asking it
9 about an ALJ, say, with the Occupational Safety and
10 Health Review Commission. So I'm not sure what --
11 MR. FUNK: You had a response?
12 MR. PIERCE: Well, I think this is a real
13 problem. It's Dick Pierce. I think this is a real
14 problem, and I don't have a good solution for it
15 because once somebody's determined to be an inferior
16 officer, then, we're dealing with the appointment
17 power under the constitution.
18 There is no law whatsoever on the power of
19 Congress to impose conditions on the appointments
20 clause. There's actually two paragraphs of dicta in
21 Chief Taft's opinion in Myers in which he says, well,
22 yeah, you could probably do that as long as it's not
23 too restrictive.
24 So I'm sure you could say, well, you got to be a
25 member of the bar, but I don't think you can go --

1 that Congress can go much beyond that. Now, the
2 President can, so a future President or conceivably
3 this President could issue a new Executive Order
4 saying, well, here's all the prerequisites for
5 appointment by an agency head. I don't think there's
6 any problem, constitutional problem, with the
7 President imposing conditions. But Congress has very
8 limited ability to impose conditions.
9 MR. RAPPAPORT: (Break in audio) I'm getting some
10 feedback, but anyway --
11 MR. FUNK: (Inaudible). Michael, you go first.
12 MR. RAPPAPORT: I just think there's feedback.
13 But -- so when I was LLC, and that's been some years,
14 right, there was a couple of views about this and some
15 people thought no limitations at all can be placed on
16 the -- no qualifications for office can be placed,
17 that those are -- all go to the appointment, and
18 that's the appointing person gets to decide that
19 matter.
20 But my view is that if it's a genuine
21 qualification, it's not a list supplied by the Speaker
22 of the House, but if it's a general qualification like
23 being a member of the bar or having expertise in
24 medicine, then that would be something that Congress
25 would have the authority to impose as part of its

1 authority to define the office.
2 MR. FUNK: This could on forever. I have a bunch
3 a questions that I haven't gotten to ask, like why do
4 we care about protections for ALJs when we have AJs,
5 who have no protections, either appointments or
6 removals, so -- but be that as it may, we're supposed
7 to end at this time.
8 And I don't know if I have authority to make us
9 go longer, so I think I'm going to have say thank you,
10 everybody, for participating, thank the audience. I
11 hope you've enjoyed it as much as I have, and don't
12 miss the following one -- panels that will occur on
13 different dates but dealing again with this concept of
14 adjudication. So thank you, and good afternoon.
15 MS. MILLER: Thank you.
16 MR. RAPPAPORT: Thank you.
17 MR. FUNK: Now the question is how do I stop this
18 all.
19 (End of audio recording.)
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1 CERTIFICATE

2

3 I, Wendy Sawyer, do hereby certify that I was

4 authorized to and transcribed the foregoing recorded

5 proceedings and that the transcript is a true record, to

6 the best of my ability.

7

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9 DATED this 3rd day of September, 2020.

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12 WENDY SAWYER, CDLT

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