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SYMPOSIUM ON FEDERAL AGENCY ADJUDICATION
Procedures of Federal Agency Adjudication

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TRANSCRIPT
(Not Reviewed for Errors)

Panelists

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Transcription of Audio File:

Symposium on Federal Agency Adjudication_ Procedures of Federal Agency Adjudication

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MR. WHITE: Hello, everybody, and welcome or welcome back to this ongoing symposium on federal agency adjudication hosted by ACUS along with the Center for Progressive Reform, and my institution, George Mason University's Grey Center for the Study of the Administrative State.

Now, this is the third in a four-discussion series. I'll just say the fourth and final panel next week, Thursday, will explore alternatives to tradition agency adjudication. That'll feature Ron Cass, Robert Glicksman, Michael Greve, Richard Levy, A. Ashley Tabaddor and me, discussing alternatives to traditional agency adjudication. So, we hope you'll join us again for the fourth and final installment.

More importantly today, we are very lucky to be joined by Renee Landers and a panel of experts to discuss the procedures of federal agency adjudication. And so, with that, I'll turn it over to to my friend, Renee Landers.

MS. LANDERS: Adam, thank you very much for the very thoughtful introduction. Really a pleasure for me to have been part of some recent discussions at ACUS that have been convened about the adjudication process in my role as a public vendor member of the

administrative conference. And it's also a special privilege today to serve as the moderator of this program on procedures featuring four distinguished scholars who focus on agency adjudications, and I will introduce them shortly.

But first, a few words about why this exploration of possible procedural reforms that the executive branch or congress might adopt to improve agency adjudications is important. For some time, scholars have observed the lack of uniformity and consistency among the procedures agencies use, especially when the actions are not subject to the formal adjudication requirements of the Administrative Procedure Act.

The administrative conference has addressed various issues that this lack of conformity presents. And one of our panelists, Matt Wiener, provided a survey of these concerns and the ACUS Model Rules and a piece that can be found on the ACUS website called general rules for agency adjudication? Which was written, I think, in 2018. Just about two years ago.

Recently, the constitutionality of the appointment process for agency adjudicators has come to the attention of the Supreme Court. In addition, news coverage of agency proceedings reflects some of the issues related to the independence of agency

adjudicators and the tension among the need for decisional integrity, the application of expert judgment that rests at the heart of the role agencies are created to perform. And the ability of agency heads to control the policy directions adjudications may reflect or embody. Exploring these issues is important to maintain public confidence in the process and outcomes of agency adjudications.

So, as you know, because you signed up for this webinar, we have four speakers today who will offer well-informed and interesting perspective on procedures and federal agency adjudications. I will introduce each briefly in the order in which they will speak, and then we will open the discussion to questions from the participants.

I understand that you will be able to submit questions using the questions feature on the go to webinar control panel on your screen, and I will try to get to as many of them as possible as the time allows after our speakers conclude.

So, our first speaker will be Emily Bremer, who is an associate professor of law at the University of Notre Dame Law School where she teaches administrative law, civil procedure, and regulatory process. Her recent research focuses on the Administrative

Procedure Act and agency discretion over procedural design, particularly in agency adjudication. And I think that this discretion will be the focus of her remarks.

Kent Barnett is the J Altan Hosh (phonetic) associate professor at the University of Georgia School of Law. He has written several law review articles on administrative adjudication including his latest article, Regulating Impartiality in Agency Adjudication, published by the Duke Law Journal in 2020.

Bijal Shah would be next. She is an associate professor of law at the Arizona State University Sandra Day O'Connor College of Law. Her teaching and research focuses on administrative law, immigration law, and structural constitutionalism. Prior to returning to academia, she served both with the George W. Bush Administration and the Obama Administration. Most recently as associate general counsel at the Department of Justice, Executive Office for Immigration Review.

And then last but not least, is Matt Wiener, is the acting chairman, vice-chairman and executive director of the Administrative Conference of the United States. He has three titles among us, and he

also the chair of the Adjudication Committee of the American Bar Association Section of Administrative Law and Regulatory Practice.

So, why don't we begin the presentations today with Emily, and we'll go on from there.

MS. BREMER: Thank you, Renee. So, that's a really wonderful introduction, and I'm going to further set the stage for today's conversation by offering some brief remarks about the minimum procedural requirements for agency adjudication.

Now, the APA has several sections, Sections 554, 556, and 557, that establish minimum procedural requirements for what is usually referred to as formal adjudication. And this process is centered around a trial like hearing which is held before an impartial administrative law judge. And a primary of purpose of those hearings is to take evidence and to resolve factual disputes.

Now, adjudication is a lot like rulemaking in one really fundamental respect. Just as most rulemaking is done informally; most adjudication is also conducted informally.

Now Section 553 of the APA establishes minimum procedural requirements for informal rulemaking. This is the notice and comment process that I think most

people are pretty familiar with. And there's developed a strong cross-institutional consensus that these are the requirements that apply uniformly across agencies whenever those agencies are making rules.

And what I mean by cross-institutional is that Congress, the courts, agencies, the White House, they all agree that Section 553 as interpreted by the courts is how you do rulemaking. And although agencies can innovate in rulemaking, and they have discretion to sort of tweak the process, they still have to meet those minimum procedural requirements. So, as a practical matter, Section 553 really cabins the agencies' procedural discretion in rulemaking.

So, what about adjudications. Now, as I said, most adjudication is informal, like most rulemaking is informal. But here's where adjudication differs really substantially from rulemaking, because there is no adjudicatory analog in the APA to Section 553. And what I mean by that is that APA does not establish minimum procedural requirement for informal adjudication. So, in informal adjudication, the only minimum requirements come from, well, really three sources. First of all, due process, which is extraordinarily minimal in terms of the requirements it places on agencies.

Secondly, there's a provision in the APA, Section 555, that addresses ancillary matters. Now, that doesn't establish an informal adjudication process. It just addresses some odds and ends that can come up in a variety of agency proceedings including informal adjudications. And then finally, agency specific statutes and regulations.

And the last category is really the most extensive, the largest source of minimum procedural requirements. Most procedural requirements for informal adjudication are found here, and they're agency specific.

So, Congress or the agencies sometimes both together, have usually created a process that's really tailor made for that individual agency and the regulatory program that it's using adjudication to administer.

So, while we usually think of administrative law as being about uniform cross cutting requirements, the dominant principle of administrative law in the informal adjudication is exactly the opposite of that. If the norm is, to the extent that there is a norm, it's an anti-norm. Right, one that resists uniform minimum requirements and really embraces the idea that each agency should have adjudication procedures that

are uniquely suited to that agency.

Now, one of the difficulties is that there's a really high of decisions that are made by agencies through informal adjudication. Even if you narrow your focus to decisions that are made through trial like evidentiary hearings, you're talking about hundreds of programs. Literally, millions of decisions every year. And it's very hard to study. Right, because you're talking about just such a vast and unwieldy world.

Now ACUS has done some really great work with Michael Asimow is their consultant, figuring out sort of what agencies are doing in all of these programs and what procedures they're following.

But the bottom line is that agency adjudication is just a vast world with a wide degree of procedural variation. And there is some reason to believe, and I'll be happy to talk about this further on in the conversation, that the result of this kind of procedural wild west is that there are some suboptimal procedural practices across agencies. Right?

The nature of the law in this area, though, makes it very difficult to identify those areas of suboptimal practice, and it makes it even harder to correct them. And any time we're going to talk about

reform as we are today, I think this really the sort of very difficult starting point that we have to recognize that we have been given by the law. And so, I'll end there, and I'll turn it over to our next speaker.

MS. LANDERS: All right, thanks very much, Emily. So, Kent, I think you're up next.

MR. BARNETT: Absolutely and thank you all for asking me to join you today. I'll try to keep brief and focused, my remarks today, on the growing concern over the impartiality of Federal adjudicators. Both the Federal Administrative law judges who oversee the formal adjudications that Emily was speaking of, and non-administrative law judges which are the other administrative adjudicators who are not administrative law judges.

If we start with administrative law judges, we have seen several challenges by regulated parties to administrative law judges' statutory protection from at-will removal. The argument is that under a case called Free Enterprise Fund versus Public Company Accounting Oversight Board. The ALJs protections from removal violate Article 2 because there are two tiers of protection between them and the President that protect them from at-will removal. There is one tier

as it protects them from being removed at-will by another independent agency, the merit systems protection board whose members can only be removed with certain causes.

If the challengers succeed, most likely the ALJs would be easier to remove than under current law, and it would permit higher ranking agency officials to hold the Damocles' sword of removal over the adjudicators when they're making their decisions.

As another example, we could turn away from administrative law judges and look at a group of non-administrative law judges, immigration judges. And they and their allies have challenged what they view as the Trump administration's attempt to undermine their impartiality in various ways, including through the imposition of unrealistic case processing goals.

But whether we're talking about ALJs or non-ALJs, these impartiality concerns really demonstrate the tension between political oversight on one hand and decisional impartiality on the other. Due process does apply to administrative adjudicators who much be both impartial in fact and also appear impartial, but it's far from clear exactly what's required objectively for them to appear impartial or partial. And regardless of whether there are constitutional

concerns or not, some circumstances can either bolster on one hand or undermine on the other, confidence in the adjudication and thus governmental decision making all together.

One notable circumstance that plays into this is whether the adjudicators can be removed at will by their agencies which may be parties to the adjudication or simply care about the outcome of an adjudication.

But there are other types of circumstances or characteristics that matter, such as the sharing of ex parte communications, or combined functions within an agency, whether an adjudicator can both adjudicate and do something else, perhaps like prosecute actions within the agency.

Perhaps until recently, the general consensus was that the APA hit upon a reasonable compromise by giving ALJs but not other kinds of adjudicators more protections from their agencies by limiting at-will removal, ex parte communications, combined functions and some other forms of agency oversight.

The APA's drafters assumed that significant adjudications would be handled through formal adjudication with ALJs, but that's no longer necessarily the case, and for reasons that Emily

mentioned from the much of the work that we've seen done through ACUS, Professor Asimow, and others before them, too, we now see that non-ALJs are a large cadre of adjudicators that oversee numerous adjudicatory programs, many of which can be important. Such as immigration proceedings that we just mentioned.

With these constitutional concerns that we have about impartiality, and this new awareness of non-ALJs, this is a good time to rethink what I refer to as impartiality protections for these adjudicators. What kinds of impartiality protections do we want, all or certain kinds of these adjudicators to have?

Yet, Congress may not be in the best position to think about what these impartiality protections are. Either they may be limited by the Constitution, Article 2, as to what they can do, or they may simply not have the bandwidth or the ability to create the kinds coalitions they need to enact the legislation.

This then leaves space for the Executive Branch to fill the void and provide these impartiality protections for the adjudicators working within that branch.

And to do so, the Executive Branch could use internal administrative law. That is law within the agency or the Executive Branch, and it can be used as

tool for protecting individual rights, among other things, and those individual rights can include the right to an impartial adjudicator as required by due process.

Because the action is internal with this internal administrative law, it does not implicate and cannot violate the separation of powers and it allows agencies to mold the protections as may be necessary to different kinds of adjudicators. The key downside for regulatory action is that it has less permanence than a statute.

So, make no mistake, when the Executive fills the void here, this is a second-best scenario, but it's still a useful and perhaps a necessary one here.

How would this work? I've argued that the Executive Branch should enact what I call impartiality regulations. They would be enacted within each agency based on a template that the White House provides. The template regulations would apply equally to ALJs and non-ALJs, however those regulations define it. And I can talk about different ways that we could define non-ALJs.

They would mimic current protections for some of them and add to other protections that may already exist and provide additional protections for those who

may not have them.

Agencies, however, could still ensure that the regulation accounts for any special matter for particular adjudicatory programs. These regulations would address things like adverse action against the adjudicators. More about ex parte communications creating further limits, require separation of function for adjudicators where possible. Use physical separation between the adjudicators and others within the agency along with some other ideas as well. For nearly all of these adjudicators though, these regulations would either provide additional kinds of protections or improve the existing ones that are in place.

The use of the impartiality regulations, it's important to note, would be nothing new. Nearly all civil service protections and innovations began within the Executive Branch through internal administrative law and was only later codified in 1978 in the Civil Service Reform Act.

Moreover, the Executive Branch uses these impartiality regulations today for sensitive executive actors like the special counsel, Bob Mueller most recently. In short, these impartiality regulations can be used to deal with those kinds of executive

officers who end up having a strange spot within the Executive Branch, when we have other kinds of considerations than just political oversight where we need something like independence as well.

Now, there are some possible concerns, which I don't think are too weighty, that may exist for whether we create these impartiality regulations, but I'll stop now and if people are interested, we can talk about some of those during the Q&A.

Thank you all again for having me.

MS. LANDERS: So, that was a really interesting set of proposals, Kent. It sort of reminds me a little bit of the structure set up in the Data Quality Act to, you know, have the White House sort of superintend the agency's development of data quality standards for the rules or for their decision making.

MR. BARNETT: Yeah, and just one little thing that I felt was interesting, that usually you think of OMB or the White House as coordinating things like rulemaking as opposed to adjudication, but we saw just this past, I think it was March, where the White House put out a request for information on adjudication and how to improve adjudications. So, maybe we're seeing more focus from the White House now on adjudication.

MS. LANDERS: Right. Along with the guidelines

on a, you know, appointment of ALJs to --

MR. BARNETT: That's right.

MS. LANDERS: -- the Supreme Court decision, right.

All right, so a lot of fodder for discussion there. Bijal, so let's turn to you because Kent raised the issue of the immigration system several times in his remarks, and I think that you're address some aspects of that system directly.

MS. SHAH: Yes, so I will be building on the threads of, you know, Kent's talk that referred to immigration. There is much going on in immigration and five minutes does not give me enough time to cover all of the concerns with adjudication in that context. So, I'll focus my brief remarks on one particular case study and one particular dynamic that I think has been long standing but is new again.

Okay, so in 2006, the Board of Immigration Appeals affirmed, and immigration judges granted asylum. And then subsequently explicitly rejected the government's motion to reconsider this grant of asylum.

And so, in 2006, an applicant went through the entire process at the Board of Appeals and received his asylum status. Now, this case I'm talking about

involves lots of interesting details. As one media outlet put it, the case involves the killing of a president, a decades old death sentence and hard-fought battle for asylum pinning a former Bangladeshi military officer against the US Department of Homeland Security. Spoiler, it's Politico.

But from my perspective, this case was made even more interesting recently by an action by Attorney General William Barr pursuant to a regulation.

So, HCFR 1003.1 and so on, provides that the Board of Immigration Appeals shall refer to the Attorney General for review of its decision in all cases that the Attorney General directs the board to refer to him.

And so, what this regulation-ese is saying is that the Attorney General has the authority to refer to herself decisions of the Board of Immigration Appeals. In other words, this is a process that sometimes comes through the Department of Homeland Security, sometimes through immigration judges at the Department of Justice, and usually culminates in a final decision by the Board of Immigration Appeals.

But in some cases, the Attorney General can certify that decision to themselves. Which is not unusual for agency heads to be able to engage in, you

know, adjudication when they seek to take control of that process. And so, it has some unique implications in the immigration context, but it also has relevance to other areas of administrate adjudication as well.

And so, in particular this June, in the matter of AMRC, the Attorney General used this referral and review authority to give himself the power to reopen this 2006 Board of Immigration Appeals decision that I mentioned earlier.

Now this action by the Attorney General is both part of a longstanding pattern, but also unique. As a general matter, the Attorney General occupies an interstitial space as a policy maker on the one and a political appointee on the other. And so, this suggests that the Attorney General may take over the adjudication of cases. In particular to favor political accountability over expertise or fealty to adequate process.

And so, broadly, the Attorney General's exercise of this referral and review mechanism creates a conflict between the exceptional power afforded the President and the President's appointees in immigration law and core procedural requirements of agency decision making.

That's not to say that Attorney Generals have

refrained from exercising this power. And, in fact, Attorney Generals from both sides of the political aisle, including Janet Reno, John Ashcroft, and Casey, and Holder, have exercised this referral and review mechanism in response to a variety of issues.

They've done so in order to make room for new regulations expanding asylum protection, and more often to limit asylum protection. Through the referral and review mechanism, Attorney Generals have decided the circuit split in favor of a minority view. They've asserted interpretations of the Constitution. They've elevated national security values, and they've altered the immigration consequences of criminal convictions. And so, this is nothing new. Attorney General Barr's actions here are not new.

And yet, his particular action may -- appears to have violated administrative law norms in a novel way. And so, for one, this appears to be the first time an Attorney General has certified a 14-year-old administrative appeals decision to decide anew, rather than certifying a pending or recently decided case to raise the same legal issue.

And so, the Attorney General's actions here suggest that anyone who prevails in immigration court might later have their case reactivated and decided

differently decades later. The Attorney General's recission of somebody's long-time asylum status also implicates due process and reliance interests because it's a recission of a long-time status and given that it concerns such an old decision it might also be arbitrary and capricious.

To my knowledge the referral authority has never before been used to overturn such longstanding precedent and declare a new interpretation of governing statue in this sort abrupt manner. And so, this has implications for the uniform and consistent development of immigration law over time as well. So, both now as in the past, the Attorney General's exercise of this power brings up a number of issues that are ripe for reform.

So, examples of potential reform involving this particular referral and review process include the potential improvement of due process, the notice to the parties, the publication of an intent to refer the case, a notice upon actual review, the identification of issues to be resolved by the Attorney General, an opportunity to submit briefing, transparency in the decision making process. In other words, a more formalized process that might otherwise be found at lower levels of adjudication. As of now, there are no

requirements for process when the Attorney General chooses to re-adjudicate a case. To Attorney General Barr's credit, he has invited briefing on this matter. And this has not always been the case for previous exercises of this authority.

Other potential reform could include requiring substantive justification for the AG's decision here to avoid arbitrary and capricious outcomes. Making transparent the presidential interests such as foreign policy, national security, sort of broader immigration goals and other, as well as creating statutory checks on political incentives that underlie the Attorney General's immigration decision.

And finally, putting a limit on the timeframe within which the Attorney General can refer a decision to herself for review so that there is some sense that a decision made that grants -- that grants a status has permanence to it.

And of course, increasing the public's awareness and understanding of the AG's immigration decision and how they may impact the immigration landscape, would encourage a more consistent, uniform, and reliable approach to immigration policy and law.

So, I'm happy to talk about these reforms either in the immigration context or the implications they

may have for other areas of informal adjudication in the Q&A. Thanks so much.

MS. LANDERS: Well, thank you very much, Bijal. Your comments reminded me of some of the discussion in the Chadha Case that the Supreme Court had about the Congressional Review Act, you know, oversight of, you know, some of these suspension deportation cases. So, and some of those same kind of due process and reliance issues, I think, kind of were sort of underlying the Supreme Court's conclusion in that case.

So, batting cleanup, we have Matt. I know baseball metaphors are probably not so great this year, but there do seem to be some games playing and being played, and so I think Matt is going to try to weave together some more general comments here before we go to our discussion.

MR. WIENER: Sure. Let me just sort of declare my own perspective at the outset. My overarching perspective on administrate adjudication is that the problems with it are less procedural in nature than they are bureaucratic, managerial, and budgetary.

And my own perspective is that I am generally skeptical of large-scale systemic reforms across adjudication programs government wide. And in saying,

that, I assume that any such reforms really have to come from Congress.

Though as Kent pointed out, the Trump administration did issue an executive order in, I think it was May, in furtherance of its request for information on adjudication in which the President did at least dictate a very high level of generality to agencies, what sort of general adjudication norms they should adhere to at least enforcement regulatory types of situations.

That's an interesting development. I'm not sure I've seen an executive order along those lines. But we'll have to wait and see if there's anything further on that front.

But the fact is is that any kind of -- I think right -- I think the assumption any real adjudication reform would have to come from Congress. I don't think there's an empirical basis for any kind of systemic reform, I'm skeptical also because there's always the problem of unintended consequences. I question Congress's competency to legislate in this area, at least at any level of specificity. There's a good reason why Congress doesn't -- leaves rulemaking for the lower Federal courts in the hands of the judicial conference rather that assuming

responsibility itself even though it almost certainly has the constitutional authority to prescribe Federal rules for the lower Federal courts at least.

I'm also sort of skeptical of reform for a reason that Kent pointed out and is the basis of the article about which he talked which is that Congress has shown no inclination to do anything in this area. There was a spade of regulatory activity during the last several congresses. And the most important piece of legislation, I suppose, was the Regulatory Accountability Act that was at least the most ambitious. And I don't think there's anything in there about adjudication. And I'm not aware of - I'm not aware of any legislation that's been introduced over the last several congresses that would address adjudication on any kind of cross cutting basis.

Yes, there's been pieces of legislation here and there. There most recently perhaps of significance is the legislation to reverse -- override the executive order putting ALJs in the accepted service. But I don't this is an area in which Congress has shown any inclination to be involved.

The third reason I'm somewhat skeptical of system wide cross agency reform is I'm not sure that there are real demonstrated systemic failures justifying

Congressional intervention. Yes, there are certainly problems with particular programs, and there are programs that are probably in need of serious reform, but I'm not sure if there's a governmentwide problem.

I'm putting aside here the question of whether the problem -- the question of whether which will be addressed next week as to whether certain agency adjudication should be moved over into the Federal Court system, whether it's an Article 3 Court or a specialized Article 1 Court.

So, where I end up with respect to procedural form, is in the position of thinking that we should be focusing on incremental and to a large extent agency specific reforms of the sort that ACUS has been very much involved in over that last, oh, I don't know, six, seven, eight years.

Let me -- maybe it would be useful to just highlight a few initiatives ACUS has taken in this space with Kent Barnett servicing as the reporter, ACUS promulgated a set of model adjudication rules which while not necessarily appropriate for adoption in toto by agencies, it does officer agencies the -- a list of important considerations to which it should attend in designing new and revising existing procedural rules.

ACUS, probably the most important recommendation we put out, which largely came off of Michael Asimow's pen was Recommendation 2016-14, which deals with adjudicative practices in non -- adjudications not subject to the formal adjudication provisions of the APA, but nevertheless, involve trial like procedures as a result of a statutory or a regulatory mandate.

We've put out a recommendation on recusal rules for adjudicators. Many agencies don't have -- while they're bound by general ethic rules, promulgated by the Office of Government Ethics, they don't have recusal rules -- many of them don't have recusal rules of the sort that Federal judges are bound by under provision of Title 28.

And then, I guess the last thing that I would -- two other things, let me say. One, is we put out a recommendation on aggregation -- the possibility of aggregating cases in agency adjudications building on work by Michael San Ambrosio and Adam Zimmerman. In particular, their article The Agency Class Action, which became an ACUS report.

Another thing that ACUS has, I think, been on the forefront of is adopting several recommendations urging greater transparency in agency adjudication and providing for greater -- urging agencies to provide

greater disclosure of their procedural practices and so forth and so on. That is a good way for the public and Congress and agencies to identify what I think Emily referred to as suboptimal practices and procedures.

And the last comment I do want to make here is that when we talk about agency procedural -- when we talk about procedural reform with adjudication, I think we have to be very, very attentive to the heterogeneity in the system, and we have to be very specific about what types of adjudications we're talking about.

Emily referred to formal adjudications under the APA and also trial like sort informal adjudications, but there are many still less formal adjudications in which important interests are adjudicated, and they may not be -- they present very different types of challenges than many other adjudications do. And when you starting getting into the -- at that level of very informal adjudication by which I mean they're not often conducted with trial like procedures, you would be very hard pressed to design any kind of cross cutting procedures to which those programs could reasonably be expected to adhere.

So, those are my general perspectives and I'm

happy to participate in the conversation that I hope we'll have now.

MS. LANDERS: Great. That's sets the table very well, and I'm glad that you mentioned Kent's role in the Model Adjudication Rules that ACUS developed a few years ago, so that was really terrific work that he performed.

So, maybe one place to start with the Q&A is, while our audience formulates some additional questions is to ask Emily about those suboptimal practices and how big a problem do you think this is. What are some of the examples of the kind of thing that perhaps the public should be concerned about?

MS. BREMER: I'm so glad you asked that, because I actually have up on screen a chart that I published in a recent Duke Law Journal article that tries to get at some of this. And I used actually really the data that was put together by ACUS and by Michael Asimow to try to get a sense of, you know, where does this hurt and how does it hurt if at all. And it's really challenging.

What I ended up doing was identifying ten sort of procedural elements, things that seem really fundamental that it feels like a hearing before an agency. And that's really what I'm focused on by the

way, just it's sort of in response what Matt was saying. And I think we should really focus first and foremost on these kind of evidentiary hearings. But I identified ten principles that I think anyone would think should be a part of the procedures in a hearing. And a lot of these are things that are in the APA's adjudication provisions. Like things like ex parte protection or bias protection for the decision maker. Those kinds of things.

And of those ten elements, I think I picked half a dozen programs, mainly because they were big important programs and I tried to pick a variety of programs. And then I put a chart in the article that just basically identifies whether or not these programs have these procedural protections. And there was only one program I identified that had all of them and that was Social Security Administration hearings, which makes sense because they're conducted under the APA, and some of those elements were missing from every other program I'd picked.

And the thing that was most glaring to me is that actually if the programs I picked, the only one that had ex parte protections was SSA hearings. And actually every -- all the -- the five of the six others that I picked, did not have ex parte

protections or only partially had ex parte protections.

And so, one of the things that I think is difficult is not only that these things are missing where you think they should be, but also it's really to figure out, you know, what programs have them, what programs that don't. I mean, sometimes there aren't even sort of clearly identifiable written procedural regulations.

And so, part of the reason why I think come cross cutting reform maybe is needed, is just because it's so difficult to get a handle on what the problem is. And is seems so incredibly inefficient with respect to at least these most fundamental issues to sort of rely on agencies to have to to do it by themselves.

MS. LANDERS: Is there anything that either Bijal or Kent would like to add to this part of the conversation?

MR. BARNETT: I'll add just a bit, and it's really seconding what Emily was saying. The key concern I see right now, especially, if you -- before taking any kind of omnibus action for a certain kind of adjudication, however exactly we define it, is we simply need more information about what the world looks like right now. And I think this is where ACUS

has been extremely helpful, and you have the Asimow Project which is really remarkable in how much information it does provide on this.

But when I was looking separately into something about the same time that Michael was doing his project, it was another project just on impartiality, and figuring out what kind of protections may exists for various kinds of non-ALJs, and one of the big takeaway's I had was not only may there not be that many protections like Emily was suggesting, but even when there were suggestions, they weren't anywhere that I could go find them easily. They weren't in regulations. They weren't in some kind of guidance document.

Very frequently, an agency would invoke what it just called custom. The understanding of the agency that you couldn't have ex parte communications, or something like that. And it makes it really hard to ascertain what the landscape really looks like. And one thing I proposed for impartiality specifically, but I think you could go broader if you're taking this a little further as Emily's suggesting, is mandating disclosures.

And you need a repository for these disclosures of whether an agency, let's say, limits ex parte

communications, whether it limits the kinds of functions that an adjudicator can have. And this may need to be something that is housed within the White House, OMB, something like that especially if it's going to be looking at adjudication more where we have a repository of information that we can use for research and later solutions and improvements.

MS. SHAH: Just a quick add. It seems like we have -- this group has sort of a consensus that it would be difficult to implement broad strokes reform because agency specific reform and agency specific sort of responsiveness is what's required to improve adjudication.

Just to play devil's advocate for a moment, right? Whether it be broad strokes regulation programs in an agency or whether it be legislation, it need not be the language itself requiring a floor need not be specified, right.

So, to the extent we're concerned, for instance, regarding formal adjudication that there are absolutely no requirements in place and the APA basically ignores what has become perhaps the largest body of decision -- they're the largest form of decision making across the government. Perhaps we should be looking for some sort of admittedly broad

approach to developing a floor of requirements that agencies can then choose to implement in ways that are specific to their needs and to the sort of outputs that they're seeking.

So, just to -- you know, and I think Emily's project actually could help support an approach like this to some extent, so just to sort of put out that it doesn't have to be either or. Either we have really specific legislation that requires agencies to do the same thing across all informal adjudication, or the current free for all that we have. There may be some sort of, you know, middle ground there.

MS. LANDERS: Yeah, that's good. There actually is a question about impartiality. And this is the question, if agencies enacted impartiality regulations, would that then clear the way for less process and removing ALJs for cause? Does anyone want to --

MR. BARNETT: And no, it wouldn't change it. And the reason for that is even assuming that you didn't have the statute that exists now that permits ALJs to be removed only for good cause as established by the merits system protection board, you can implement that same protection through regulation.

The organic act for the merit system's protection

board allows it to have jurisdiction that is granted by statue or by regulation. And there are examples where there has been a regulation enacted by an agency saying that the MSPB should a matter. And under my proposal, you would do the same thing for ALJs now in case that there is an Article 2 problem with the current statutory protection that they have. It gets us to the same place.

MS. LANDERS: So, where is this -- so a lot of the concerns that you all have been talking about deal with this question of, you know, what kind of influence the policy makers and the agencies should have over the content and the form of the adjudications and Bijal's example, I mean, go right to the heart of that issue with the Attorney General's ability to kind of cherry pick issues that the DOJ wants to, you know, weigh in about.

So, where is the right balance? I mean, you identified, Bijal, in your remarks some of the constraints that you would impose. Is that workable model in some of the other agencies? I mean, there was an article about a Department of Labor adjudication in the New York Times this week, or last week, where the secretary was, you know, wanting to weigh in on the conduct of, you know, the agencies'

position on a particular adjudication. Which, you know, under current law is not necessarily prohibited, right? So, why -- where is the right balance in these policy versus adjudicatory fairness issues?

MS. SHAH: You know, I think immigration -- I have long advocated for the idea that immigration is actually not exceptional and that it is part of administrative law, but I'm going to backtrack on that longstanding position just for moment here and say the reason why immigration is sort of good case study for these discussions is because the repercussions of problems in due process and lacks of transparency can be huge. It can be huge for the individual. It can involve things like, you know, what's now being called immigration prison or deportation.

And on the other side, they can involve concerns such as national security, foreign policy in areas where not only the Attorney General has an interest, but the President has particular plenary power, and so the tension there is particular stark.

But I think that tension exists to some extent in just about any agency and has to be balanced accordingly. Right? And so, you know, one -- certainly the Department of Labor has its own life or death situations that it deals with. Like workplace

safety and others.

But to the extent we are talking about sort of less dramatic political involvement in order to sort of point the agency in the direction of the agency heads or even the President's agenda, and the outcomes of this involvement or the sort of breaks in due process that result from political influence don't have the same repercussions for applicants or individuals or the public as a whole, we may be more inclined to allow for ad hoc political influence that is not as transparent as we might demand it be in an area like immigration.

And so, case by case basis is -- you know, I don't mean that as a sort of cop out. More -- it's important that we pay attention to this tension and we sort of think about it -- we bring it to the fore and we make explicit policy balance it -- acknowledging and balancing this tension instead of ignoring the fact that there is a tension when political influence plays a part in adjudication.

MS. LANDERS: Emily, you look like you have a comment.

MS. BREMER: I always have a comment.

I love that. And one thing that I will say is, I think the legal regime that I described in my remarks,

because it really embraces this idea that from all agencies are unique little flowers with their, you know, their particular adjudication program. I think it puts us in a position when we're studying agency adjudications really emphasis difference. Right? And you look at this vast world of agency adjudication, and they all seem so different in size and what they do, and it statutory requirements and all of those things.

But I don't think they're actually that different. And I don't think they need such radically different fundamental rules as a baseline. I mean, look at the counter example of rulemaking, right? I think regime in rulemaking emphasizes similarity, right, by having all these uniform requirements that seem to work great. But if you were to really be looking the differences across rulemaking programs, they're there, and they're there in as much degree as the differences across adjudication programs.

So, I think I'm skeptical that of this sort of exceptionalism that has sort of taken over adjudication. And that makes me correspondingly more hopeful that at least if you're focusing on really basic uniform procedures, the project is a doable one.

MS. LANDERS: Right. So, I'm going to come back

to that point about, you know, with the right structure is for may be arriving at some generalized requirements or principles, but --

MR. WIENER: Can I just --

MS. LANDERS: Oh, yes.

MR. WIENER: -- jump in here real quickly. And I -- all I want to do is, I just want to give a small shout out to Michael Asimow on a project that he's doing for ACUS now on the subject of the tension that you described within agencies given that there's political components to the decision making.

Michael is looking at, for ACUS, the phenomena in which agency heads at the front end of an adjudication have to authorize the complaint in adjudication. Think, for instance, an agency like the SEC, and at the same time on the backend after the case has gone through the ALJ process and so forth, the agency heads are then serving as the final adjudicator of the case. And it's a very interesting phenomenon.

And I guess I would just say, I mean, there is an aspect in which agency adjudications are Executive Branch functions. They are not judicial functions, and if you don't want them in -- if you want all the trappings of a judicial regime, then put him over into the judiciary. And that, I think, is the discussion

or some of them, of course, that's the discussion for Panel 4 next week.

MS. LANDERS: Right. And actually, you know, I know this is a -- these conversations are about the Federal process, but when you think about what's happening in the states as well, right, you know, the many state regulatory boards, professional licensing boards, they all operate in the way that Matt just described. And so, that would be quite a sea change, right, in the law if there wasn't that sort of filter at the beginning imposed by the agency heads and then the opportunity again at the backend to, you know, think about what the results of the process should be.

There is one more question on this -- there's another question about impartiality that I think is an interesting one, so and it also is a person who's giving a shoutout to Kent.

But as an ALJ, I usually look to the model -- to the ABA model code of judicial conduct for guidance. Why not simply assume in the absence of more rulemaking that Federal ALJs should follow all applicable ABA, MCJ, C rules so that there is a uniform use of well vetted rules of judicial behavior in both Article 1 and Article 3 courts?

And I'm not sure I can see who is asking that

question, so I'm not sure who's saying hi.

MR. BARNETT: Well, I don't know if I know enough to really answer the question fully, but my initial thought is if we were going to go down that path is why are those ethical rules put in place? And I would suspect if you're thinking especially Federal courts but also state courts as well, they have separation of powers component to them where we are trying to keep the court separate from the legislature and from the executive.

Well, of course, that's going to be more difficult with executive adjudicators who are within a branch and they don't present the same kind of problem that we would have with the judiciary which is meant to be stand alone.

That said, I suspect many of the limitations would apply when it's things that look political in nature and therefore may actually implicate how you appear impartial in some way. If you've got campaign signs up, and you're, you know, an adjudicator at a particularly politically sensitive agency.

Yeah, not that I think they necessarily have one, but Federal Election Commission, if you're doing something there. You're putting up, you know, Biden signs in your yard, that may implicate what your

impartiality looks like. My guess is they are a very good starting point for it, but you would have to go back in and ask yourself, what is the actual theory or purpose behind each rule and does it make sense within administrative adjudication.

MR. WIENER: Renee, this is a -- this subject of the application of the model code -- the judicial code to ALJs has been debated for decades and decades, especially within the ALJ communities. And I think there are certainly some ALJs who apropos of Kent's point have urged a more selective application of the model code to recognize the distinction between the role of an ALJ as an Executive Branch official and an Article 3 Federal judge.

There's also -- the big sort of -- the big institutional hurdle to the imposition of a special code for ALJs is that -- is the office of government ethics, which has, as I understand it, has been opposed to special ethical rules for a discreet class of Federal employees. At least a set of rules on the order of the model code.

MS. LANDERS: So, I actually have a unique perspective on this because I have been on the Commission of Judicial Conduct in Massachusetts in the past. And I'm also serving now on a committee on

judicial ethics which gives advice to judges who can -- - to -- so that they -- to help them identify issues and conform their behavior to the code, or their conduct to the code. And -- but we also have a state conflict of interest statute that a different agency administers. The State Ethics Commission.

And so, there is this overlapping obligation on the part of judges to adhere both to the code of judicial conduct and to the conflicts of interest statute with two different agencies, you know, sort of in charge of interpreting the two different sources of law.

And there are a few exceptions that have been carved out from the conflict of interest regulatory regime for judges. One of them involved, you know, judges being able to, you know, take a plaque that's worth more than $50, or whatever the limit is under the conflict of interest statute as an award, you know, from like a bar association, or something like that. But they're very narrow and very specific.

And, you know, their issues come up all the time where our committee says to the judge, you have to go to the State Ethics Committee first and see what they think about that conflict of interest statue and then we'll tell you what we -- what the code -- how the

code would react, that advice you got from the (inaudible). So, I think that is a really pretty serious issue trying to figure out how the two -- how judges as employees of the government might be different than other rank and file employees of the government.

MR. WIENER: Renee, if I may, I just -- I would like to point out that after ACUS, last year or two years ago, issued a recommendation on recusal rules for agency adjudicators as distinct from ethics rules. We have Lou Virelli, Professor Lou Virelli prepare a report which is up on the ACUS website, and it is an extensive catalog of the recusal rules really impartiality rules and conflict of interest rules that agencies do have in place. And I think it's -- I would really -- I would commend it to everyone, and especially Federal agencies that don't have these rules in place and are thinking about putting them in place.

MS. LANDERS: Yeah, I think that's a good -- I think that's a really good steer because I think that there is a lot of good work reflected in that set of recommendations.

So, one question that this discussion has called to my mind is, you know, Emily mentioned in her

presentation how the APA has, you know, very fully formed procedures about rulemaking that seem to apply across the board, and there are a lot of variations. You know, the whole hybrid rulemaking thing that we talk about with our students, and in administrative law, you know, that creates a lot of individual variation among agencies, but still the bedrock is -- are the procedures in Section 553 of the APA.

Why is it -- do you -- do we know why Congress just didn't tackle this issue for informal adjudications when the APA was originally adopted? I'm hoping that someone here is a legal historian and will be able to answer this question.

MS. BREMER: So, this is actually part of the subject of an article I'm writing right now. I've spent the summer reading all of the monographs that the Attorney General's committee on administrative procedure published that are really sort of the baseline for the APA.

It's been -- I've been like live tweeting it, so if you don't follow me on Twitter, and you want random tidbits from my Ten 40 Agency's practice, I'm -- I've got you covered.

But I think that part of the answer here is that you know the APA divides everything and the Attorney

General's committee divides everything that they're studying into rulemaking and adjudication that is quasi legislative and quasi-judicial activity by agencies. And that's the entire universe.

And in the APA, the way it was drafted is that informal adjudication is really a catch all category. And the way it's drafted is if it's not rulemaking and its formal adjudication, it's informal adjudication.

And I think that the reason why is partially just because they thought that well, if it's a hearing, any kind of hearing, it should be under the adjudication provisions. And if it's not a hearing, then it's a lot stuff that you don't need informal requirements for, in part, because you'd have hearing later in the process.

And in fact, that's part of the argument I'm going to be making in this new article is we have it wrong when we think about adjudication as informal and formal stages. The -- or informal and formal modes. The way they thought about it at the time the APA was enacted was stages. And you have informal stages of adjudication followed by a hearing. And when you get to the hearing stage, that's when the APA's procedures are in place. You don't need them earlier because you have the opportunity for hearing later.

And all of that stuff, and this sort of is consistent with something Matt said, a lot of this informal adjudication stuff is not -- it's not quasi-judicial in any meaningful sense. It's really executive action. It's agencies doing what Congress in the law has told them to do. And it's not quasi-judicial in any meaningful sense or in any sense that really requires the imposition of procedures. And that's not something that's really acknowledged at the APA -- the time of the APA's adoption.

Part of my working hypothesis is that, you know, they were working in a world after the Supreme Court had said, you know, agencies are not executive, right? Especially independent agencies, they're not executive. Right?

And the Attorney General's Committee was studying independent agencies and studying executive agencies. And they just ignored the executive characteristics, because a lot of what the independent agencies were doing was exactly the same stuff that executive branch agencies were doing.

So, this would have been a sort of Constitutional landmine to acknowledge in the research in the statute that there's a category of agency action that is quasi-judicial and is not quasi legislative. That's

really just pure executive.

MS. BARNETT: And just to follow up on that. Just a little bit, just quickly. I think Emily's right about that, how they were thinking if you were going to get a hearing, it was going to be formal in some way. Remember that we have another revolution with Chevron that comes later where before Chevron, the ideal was there was a presumption that if there was a hearing then it was to be formal adjudication. It was to be on the record.

And then, after Chevron, the question is is whatever the phrase is that's used in the statute, which maybe just hearing, is that sufficient to show that it was record on a -- is it sufficient to show a hearing on a record or not. And at this point, we only have one circuit, the Ninth Circuit, which says that we still have the presumption in place that hearing leads to formal adjudication. The other circuits say now with Chevron, that's an agency determination.

And if you're an agency, it might be a lot easier working in a world where you don't have these mandates that are imposed by the APA.

MS. SHAH: To add to this a little bit, I've a bit a of research on this timeframe as well for a

paper I have coming out in Irvine, although not much of the research made it into the paper. But it was fun to do, nonetheless.

And so, it's important to remember that the Administrative Procedure Act, and this builds, only builds on what Emily and Kent are saying that the Administrative Procedure Act was itself a compromise and that the precursor to the administrative act, the Walter-Logan Act, in fact, had far more provisions in it for sort of judicial oversight of and proceduralization of what agencies did.

And so things that we might conceive of as informal adjudication are sort of of the stuff, maybe you'd call the executive stuff of agencies, was at the time in the minds of -- and I've looked a lot into the the legislative history and sort of conversations surrounding the Walter-Logan Act before we led to the -- before we get to the APA. And the rallying cry that came out of the agencies was we cannot judicialize the executive branch. We cannot judicialize the administrative agencies.

And there was such a resistance, in fact, the APA was a pretty unpopular -- the idea of judicializing administrative process while or proceduralizing administration while sort of accepted today was fairly

unpopular when it came to those who had sort of stakes in the legislation that was passed at the time.

And so, the Walter-Logan Act did not -- did, you know, was not approved by the President and so this led to sort of a de-judicialization of many agency actions that were, in fact, considered for more formal process in previous iterations of the APA.

And so, it's not as if this was ignored. There was actually pretty big political fight over how much process should be imposed on, you know, even the lowest or the most ground level agency action, and those that wanted that process in place, lost. And so, you ended up with the APA that did not ignore informal adjudication because it wasn't aware of these activities, but purposefully, in order to get the APA sort of through the political process and passed. So, that's my sort of take on the history and the conversation at the time.

MS. LANDERS: Matt wants to add something here.

MR. WIENER: Yeah, first, I'd like to -- I agree with Emily and Kent that the original intention of the APA covered a much greater swath of the adjudications than it probably does now, than the APA probably does now as interpreted by the courts. I also agree with Kent's point about Chevron.

The fact is thought is the rules -- the judicial rules on when the APA formal adjudication provisions are bought into play are pretty stable right now. I think Congress knows them and one interesting question is, why does Congress not provide for APA adjudications when it, formal APA adjudications when it establishes adjudication systems. And I can't answer that question.

But one thing that certain here, it's very difficult, and this is just a political reality, it's very difficult these days at least, and it has been for a long time, to separate the question of whether the APA's formal adjudication provision should be extended. It's difficult to separate that question from the question who should be presiding over adjudications. And this whole issue is largely bound up with the use of ALJs.

And I -- this is not a normative statement I'm making, it's just an empirical statement. Agencies for the most part do not want to use ALJs. They would prefer to use administrative adjudicators. And I suspect, and it's just a theory, is that when Congressional staff is working with agencies in the design of adjudication programs, that the agencies are often quite explicit in ensuring that the adjudication

provisions do not provide for ALJs. That's just a theory of mine.

MS. SHAH: But this sort of touches back on the history, right? The largest sort of opponents of any kind of procedural requirements imposed on the executive branch were the agencies themselves. And so it makes sense that even today they want the flexibility and the freedom to sort of behave as they think fit, and to not be held to requirements for various reasons we can sort of discuss what the incentives are answer whether their positive, neutral, or sort of of self-interested. But you know that sort of makes sense, I guess that agencies would rather be free and flexible when not if they have option, right? And so, what you're saying makes a lot of sense to me, Matt.

MR. WIENER: And there maybe, you know, it's not something that's often talked about. There may be some compromises between the system we have now, but where ALJs get life tenure in a system in which agencies basically have free reign to set the terms and conditions of their adjudicator's employment.

MS. SHAH: Well, one --

MS. LANDERS: I'm sorry, Emily.

MS. BREMER: I'm sorry.

Well, I will say I completely agree with Matt, and Jeff Lovers and others have over the years said, you know, a big part of the reason why agencies fled from formal adjudication is they did want to use the ALJs. And a big part of that is that they're more expensive, you know, than non-ALJ adjudicators.

And when I was on the staff at ACUS, we did a report for the EEOC, sort of giving them guidance about what they would want to think about if they were going to make their non-ALJs into ALJs and we had a huge chuck of that report is a very detailed budget analysis of what the financial consequences of that transition would be. Because it was big part of the analysis.

And one of the interesting things that we discovered in the course of that research is that there have been over the years, actually a couple of instances in which agencies wanted to appoint ALJs and they went to what was then the Civil Service Commission saying hey, we want to appoint these ALJs and the Civil Service Commission said no. And they said no because they looked at the agency statute and said you're not required by statute to conduct your adjudication under the APA. And we are reserving these positions for agencies that are subject to that

statutory requirement.

And the reason why is because they are what are known as super grade positions. Right, they're paid on a different pay scale than most civil service employees. They're above GS scale and it used to be, it isn't anymore, but it used to be that there was a hard cap on the number of super grade positions that could exist in the Federal government.

So, the Civil Service Commission took this very restrictive interpretation and approach because they were like well, we've only got so many of these super grade positions, we'd better save them for when it's really clear that Congress meant for that agency to use an ALJ.

But as that, you know, that super grade limitation went away, but the legal interpretation that you have to be really certain that Congress has required you to use APA adjudication and I has remained. And we actually found that that is still part of the policy that OPM was following when it considers agencies requests to appoint ALJs.

MR. WIENER: And maybe it's, I know the Trump administration executive order putting the ALJs in the accepted service was very unpopular in some quarters. You know, maybe in some sense that kind of reform and

others could encourage agencies to make greater use of ALJs in appropriate circumstances.

MR. BARNETT: Yeah, I've made a similar -- it's not gone over very well, but I've made a similar point when I've spoken to ALJ conference where the ALJs generally have not appreciated what was referred to as selective certification where agencies could put their own requirements out for what kind of ALJ they wanted to hire.

And I always thought that was really against our own interest because if agencies felt better about who they were hiring on the frontend and they didn't have to go through the full OPM process, which they often found very turgid, too, that they may be more predisposed to take an ALJ and create them as the adjudicators for their programs.

One other just small thing I was going to say is just the flip side of what Matt and Bijal were saying about how agencies were the ones trying to kind of lessen the process that would occur through these adjudications.

Well, remember who the other parties were to this. You know, one of the key reasons we have the ALJs that look the way they do now with their various protections really are because of regulated parties,

specifically, regulated parties at the SEC who were very unhappy with the adjudicators at the time who were there that they found weren't terribly sophisticated and wanted a more impartial and sophisticated cadre of adjudicators.

Well, there is some irony, though, that it's regulated parties by the SEC who attacked the appointment system through which ALJs were appointed and now has been held unconstitutional, and now it's agencies themselves more politically having more of a role in the appointment system.

So, it will just be kind of interesting to see, like Matt's suggesting, what the larger ramifications of this change are, and how the dancing partners switch a little bit about how they think about ALJs and their suitability.

MS. BREMER: And I actually just this morning tweeted out the quotations from the monograph on the SEC complaining about exactly issue. They were mean. They did not like the hearing examiners -- the trial examiners at the SEC.

MS. LANDERS: That's always the tension though. The litigators always are complaining about whatever the system is for selecting the people, right, that the -- it's always part of that wanting to pick your

own decision maker kind of aspect of things, which is why in some ways, you know, ADR has gotten some more traction, you know, with the time issues, but also because of that ability to have a little bit more control over who the decision maker is in arbitration.

Anyway, so I just want to ask one more -- another question about this, and then there's a question I want to go to that I think is more for Bijal, which is -- so we would agree then that if Congress were to decide to impose some additional procedures that there would not be a problem with, you know, the cases like Florida's Coast Railway, or any of that. That those are really statutory decisions and that the Congress would have pretty free reign to change that understanding of what the requirements could be.

Too dumb a question? Okay. All right. All right. I'll let it go, right?

Anyway, I just wanted to make that clear, right, that there is a -- in case anybody was sitting out there worried about that. Okay.

MR. BARNETT: I'd say I agree with you. They could definitely do it. I think the harder part becomes what exactly is the formulation for when it occurs. It is anytime you call it an evidentiary hearing. Is it -- are we back to this hearing on a

record idea. What would be the actual trigger look like and how specific can you really make it?

MS. LANDERS: Right. Right.

MS. BREMER: I mean, it's hard to come up with any language that's clearer, right, than what the APA already has. I mean, and one thing that I've been -- you know, has -- is very interesting the really large consensus that Florida East Coast Railway's just wrong. Right, like if you were going to come up with the paradigmatic example of formal rulemaking it would be the ICC rate making that was at issue in that case. There was really, I mean, it -- they're just -- like it's just wrong, right?

And the on the record language that appears in 554 on the adjudication side, I mean, I actually don't think that was meant to do any work. I don't think the intention was at all to differentiate between hearings on the record and any other kind of hearing because there was really no such thing as a hearing that was not on the record.

And one of the things that is in every single APA monograph in discussing hearings, and there's no doubt about what hearing is. There is a record taken and there's a stenographer present, and the decision is made on the record that's taken at the hearing. And

it's not a differentiating factor, it's an absolutely essential component of any hearing, period.

So, I think that one of the things that you have to just sort of think about if you're thinking about reform is well, if the courts have been unwilling to enforce what seems to be a perfectly crystal clear language in the APA, then even if Congress comes up with some other perfectly crystal clear language, how do you have any confidence that the courts are going to change course or perhaps revert to course. Right?

I mean, if you look at the Supreme Court's 1950 decision in Wong Yang Sung holding that deportation proceedings are subject to the APA, I mean, that was the original position, the court got it right at first, but backed off immediately. And I just don't think you're likely to find the courts really very open to enforcing these requirements.

I mean, it's the same problem with Chevron, right? You could have Congress come up with a statutory reversal of Chevron, but what degree of confidence can you have that the courts will follow that or in that they won't just come up with a new Chevron Doctrine in different language.

MR. BARNETT: And if I can get on my soapbox for just one moment and respond to what you said about

Florida East Coast just being wrong. I actually wrote a small essay where I went into the files of the court in Florida East Coast and it's preceding case, Allegheny-Ludlum, and you learn when you go into this that the issue of whether formal rulemaking applied or not was never briefed. It was brought up sua sponte by the court which is taking all of these ICC cases at the time that it had to take through a direct appeal, and it hated them. Indeed, I even found a mock opinion in Allegheny-Ludlum where Justice Rehnquist creates this mock opinion talking about how much they hate ICC opinions and they never want to see them come back again.

Well, why were they having all these ICC decisions coming to them, people would bring formal rulemaking challenges that they didn't get the right kind of process. Usually, they would say they were entitled to some kind of cross examination or so. So, I think you can understand Free Enterprise Fund and Allegheny-Ludlum really as judicial docketing devices that were being sent as a way, as Emily's suggesting, of limiting what's going to be coming to them. And would you see an appetite from the courts now of changing suit? I'm skeptical.

MS. BREMER: Well, just two little tiny things,

but the Attorney General's committee on administrative procedure looked at ICC rate making as adjudication. They did not think it was rulemaking. They just thought it was adjudication.

And also, the part of the ICC that dealt with rate making was called the Formal Cases Bureau. Like the they called them formal cases. It was literally the name of the division that conducted these proceedings, and then the Supreme Court later says no, no, no, that's not formal.

MS. SHAH: You know, just to sort of say I think the point is a good one, right? The court in particular in evaluating the APA and applying the APO over the years has not implemented the statute, it's rendered judgment on the meaningfulness and on the value of the statute (inaudible). Right? And so, it sort of gone back and forth. On the one hand, it doesn't think -- the court doesn't seem to think at that time and since then, that agencies should be so hindered in the rulemaking process as to require a process that looks more like adjudication. And yet, on the other hand, even a court that you might not expect to sort of take this position, has pushed back against violations of notice and comment recently even if those violations or those -- or the sort of the

lack of notice and comment is in response to very direct Presidential directive and so on and so forth. The court in that regard thinks okay, we're not requiring formal process, we're requiring fairly informal rulemaking process, but we are requiring some sort of limited process in order to ensure whatever it is we ensure as a result of notice and comment participation, and so on and so forth.

So, all of this is to say that, I don't know that these cases that sort of excise formal rulemaking from the government are necessarily an indication that courts would refuse to apply future language regarding informal actions or informal adjudication.

I think that key would be for that language, for better or for worse, for, you know, that -- for judicial doctrine to be foremost in the minds of legislatures so that they could anticipate to some extent the balance that courts would like to see them strike when it comes to imposing requirements on agencies in the informal adjudication context.

I don't know what that would look like, and I think that would require a lot of thinking and maybe then, you know, that cuts against this idea that any kind of overarching reform is possible. But I don't think that those cases are sort of a stake in the

coffin of any potential imposition of requirements by the court on informal process.

MS. LANDERS: Right. Right, I see what you're saying. After the Congressional directive sort of changes, right, in response to the current state of the law.

So, this is the question for you, and then I think there are a couple more questions that I haven't had a chance to look at yet.

This question is the Attorney General's review power unique in its lack of procedural requirements, or are there other agency heads review power similarly unencumbered? What level of procedural requirements is appropriate?

So, you already answered that last one about, you know, what constraints you might think about imposing, but what about the rest of it?

MS. SHAH: Yeah, so my sense is that, you know, their informal process there are ex parte rules and other sorts of things that exclude or limit political influence. But when it comes to informal processes. When it comes to informal processes, my sense without expertise across agencies, my sense is that, you know, the authority for an agency had to refer a case to him or herself and review that case does exist across

agencies in that -- and that there is fairly little process in place. And that the process that is required is not sort of required by regulation let alone statute, but process that the agency head may choose to implement in any given situation.

And so, you know, I do think in immigration that there are concerns, especially given the sorts of outcomes of the use of this mechanism in immigration including to -- you know, I mentioned briefly that there was a case used to decide a circuit split in favor of a minority. What didn't -- the minor was -- what I didn't say was something like seven circuits have made a decision in one direction. And one circuit hadn't and the Attorney General referred a case to himself and then made a decision that supported that one small minority. And so, the power -- the referral and review mechanism is used to great effect and with sort of powerful results from a fairly process-less paradigm -- resulting from a process-less paradigm. And so that is cause for concern, particularly in the immigration context.

Whether that's the case in other agencies, I'm not quite sure. I think if the agency has had a lighter touch if they are more consistently involved in agency adjudication, but they are involved in ways

that don't have the same sort of, you know, incredible outcomes as a result of the political influence. If the impact or repercussions for the individual applicants, you know, if we're talking about corporations or others that are better resourced to be able to engage in the review process even if the agency head doesn't require formal process. You know, if somehow advocacy looks better in other agency contexts, the necessity for reform might be less than it is in immigration.

So, this kind of brings us back to the tension we were talking about earlier between political influence and political goals and the requirements of due process and the benefits of them and kind of how that tension plays out differently in different contexts would determine what sorts of reforms and the extent of those -- the reforms required.

MS. LANDERS: Right, and so there was, you know, an example that we haven't alluded to yet, you know, back in the '80s where the Reagan administration tried to, you know, sort of change some of the legal standards, that Social Security, ALJs and then there was, I remember, a big kerfuffle at the time over that.

And so, you know, these things happen from time

to time where there's a particular decision that seems to have a particularly big impact that causes people to really think about these, you know, these abilities to kind of change the policy rules that cover --

(Overlapping voices)

MS. SHAH: Well, I was going to say, it's important to keep in mind, so we might see the agency heads or the Attorney General as sort of proxies or reflective of the President's interests and rightfully pursuing those interests at the agency level.

But in many ways agency has to do is far less transparent than what the President does, which is maybe counterintuitive, right? You would think that the less powerful someone is the more transparency they would have to adhere to, and yet that's not the case. It's certainly not the case for Attorney Generals and their engagement in immigration policy.

When the President engages in immigration policy through executive order or directives or just sort of, you know, pontificating or whatever, taking the sort of bully pulpit, there's a lot of media and a lot of attention paid to what it is that the President is doing, and advocates sort of step forward to ensure that there are constraints on what the President is able to accomplish.

The Attorney General does a lot of what, at least in the immigration context, a lot of what he or she or does in somewhat secret. And so, to the extent we're seeing similar dynamics in other agencies where large policy changes are happening, in fact, doctrine -- judicial doctrine is being changed or applied differently at the agency level, and there's very little transparency to that process. You know, that's concerning. Again, it's likely to play out differently in different agencies, but it's worth considering when it comes to reform.

MS. LANDERS: Right. So, one of the things -- I want to get to one of these other questions that -- because it will allow Matt to talk about something that ACUS recently accomplished or put out. But it -- yeah, that whole visibility of what happens at that agency issue is I think I pretty significant one. And I think that that's good that you flagged that because the other earlier part of conversation reminded me about the APA exception, right, for procedural rules, right?

And that, you know, that again could -- has the potential to allow a lot of things to change under the radar in this area that we're talking about without a lot of opportunity for public notice or comment or

attention being paid to it. So, I wanted to say that because of something that came up earlier.

But anyway, this is the question. Do you have any generic standards you would recommend to all agencies in adopting certain qualifications for selective ALJ hiring?

So, did we, in response to the President executive order, didn't ACUS issue some sort of guidelines for agencies processes about, you know, to consider in the selection of ALJs?

MR. WIENER: Yes, and you were on the committee that, I believe, Renee, that put forward the initial draft of that recommendation.

Yes, there's a recommendation on the selection of ALJs, and it sets forth general principles for agencies. And one of them is to ensure that the process does not become politicized. And another is to maximize transparency as much as possible with respect to the processes.

So, there are several agencies that have already put out in the Federal register and thereby made public specific -- they've specific procedures for the hiring of ALJs. The Office of Medicare and Hearings Appeals is a good example. The Department of Labor.

And there is a lot of, you know, there's all this

-- there's speculation that this process has become, or it has or may become politicized. I don't -- I haven't there may -- that may be true at some point, I haven't seen empirical evidence to that effect. But yes, ACUS has put out a very good recommendation on the subject, and it's in accord with the practices of hiring agencies.

The fact is though is that very few agencies are hiring -- hire ALJs at all. I mean, the Social Security Administration employs like something like 85 percent of all ALJs and then you have a few fairly big users like OPM and the Department of Labor of the NRLB, but there's not that much ALJ hiring that goes on outside of SSA.

MS. LANDERS: Right. So, kind of a different question. Could an executive order require, at least to executive agencies, not the independent agencies, to hire and use ALJs to hear cases now being heard by AJs? For example, what if President Biden required, you know, the executive office of immigration review to use ALJs?

MS. SHAH: I can try to answer this.

Could the EEO have an ALJ hear a hearing that currently an AJ does? I think the answer is yes. They -- that could be required. The only thing -- and

Emily, you may be able to help me with this. The only hiccup in all of this is whether they could be hiring for ALJ that would do this as opposed to ALJs that are already in the system. My recollection is that, and again, Emily, you may remember this better, I think OPM had a stated position that said that the ALJ can only hear formal adjudications. And I don't see that in the actual statute itself. Instead, that seems to be their gloss on it.

My understanding when I read it is, I think it says ALJs that are necessary for all formal adjudications. I'm paraphrasing a bit. But that doesn't say they can't hear non-formal adjudications. So, again, there may be hiring hiccup in all of this, but I don't think it would actually preclude them from hearing them, especially in something that would be salient or politically sensitive.

MS. BREMER: (Inaudible).

MS. SHAH: Oops, sorry.

MS. BREMER: I think that's exactly right. The EEOC report that I mentioned earlier that's on ACUS's website, gives exactly this analysis. And it talks about OPM's position which was -- and I described the historical background of it, but they still maintain that there has to be a requirement that these are

adjudicators hearing, you know, cases that are run through a process that at least looks like the APA process and is required to be conducted under that process whether the requirement comes from statute or regulation.

So, an executive order requiring the use of ALJs could work, but it would also have to require that the agencies observe APA procedures because that's going to be important for OPM in approving the hiring of an ALJ.

MS. SHAH: Yeah, my understanding reflects what you all are saying. So, for instance, if there are other contingent -- if there is a contingent of ALJs in an agency, the President's executive order could perhaps change that set of ALJs docket, right? The sorts of cases they're hearing. The subject matter focus and move the docket -- informal agency -- information adjudicator's docket to a more -- to the formal adjudication docket.

But in the immigration context, this would be very difficult because there aren't formal adjudicators for the most part that are part of the immigration adjudication system, right? And so, it would require hiring, which I think would be far more difficult to accomplish through EEO as Kent is saying.

The better option would be to require immigration judges and the BIA to adhere to more formal process. I mean, the outcome would be sort of similar instead moving the docket to ALJs, require, you know, informal adjudicators to act more ALJs, which is similar to what Emily's doing, if that's something a new President wanted to accomplish in the immigration context.

MS. LANDERS: There's also a case that I saw from the DC Circuit a year or two ago about sort of ex parte communications and other kinds of, you know, goings on involving one of the military commissions at Guantanamo that raised some of these issues. And the DC Circuit seemed very, you know, the conduct was concerning to say the least.

And DC Circuit did seem inclined to, you know, have this kind of due process oriented baseline and I realize the whole military commission context is, you know, quite different, but think that that's -- but I think that there is some sense that there are -- there is a line below which even these adjudicators that don't have to adhere to the formal procedures cannot fall in, you know, for some kinds of behavior at least.

So, I think we are at the end of our time. Is

that correct? Or am I -- yes, I think we are at the end of our time.

I want to give my personal thanks to our speakers who have had -- given us a very erudite analysis of some of the considerations involved with adjudication procedures. And to thank the administrative conference and the other two sponsors of this series, the Center for Progressive Reform and George Mason's Gray Center for Study of the Administrative State.

And thank you all for the really questions of all the participants. And I think I'm going to turn it over to Matt now to kind of close us out.

MR. WIENER: I don't think there's anything I need to do by way of closing everything out other than to thank all of our attendees of whom there were many and to thank Renee and all of our panelists, and to turn it over to the ACUS staff to shut down the meeting.

MS. BREMER: Thank you.

MR. BARNETT: Thank you.

MS. LANDERS: Have a good weekend everyone.

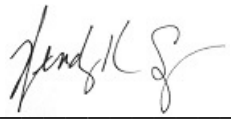
MS. SHAH: You, too.

(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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