ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

SYMPOSIUM ON FEDERAL AGENCY ADJUDICATION
Alternatives to Traditional 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_ Alternatives to Traditional Agency Adjudication

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(Beginning of audio recording.)

MR. GOODWIN: I'd like to thank you all for joining us today for the last of this series of webinars on the topic of agency adjudication, which we're cosponsoring, the Center for Progressive Reform, with the C. Boyden Gray Center for the Study of the Administrative State at George Mason University's law school and the Administrative Conference for the United States.

As I mentioned, the fourth webinar in the series. When we originally set out to plan this event, we had envisioned one webinar, and it quickly grew into four just revealing what a rich, important topic this is. And so I'm glad that we've been able to explore every nook and cranny of it, and I'm confident that today will be as interesting as the first three sessions.

So now, I'm going to turn it over to Adam White, who introduce the topic in greater detail, and the rest of the panelists. Thank you.

MR. WHITE: Thanks, James. Thanks to the Center for Progressive Reform and for ACUS for putting these events together with us. As James mentioned, this is the fourth of four, and for those who didn't see the earlier presentations, we saw discussions ranging from agency adjudicator appointment and removal to managing

agency adjudication to the procedures of federal agency adjudication.

Today's we're wrapping all this up with big picture thoughts on alternatives to traditional agency adjudication. Needless to say, there's going to be a little bit of overlap between our discussion today and the previous ones because, as we think through today, these deeper, big picture questions about agency adjudication, obviously, we'll be touching on many of the themes that have been raised earlier.

And so it's my pleasure to get to moderate this conversation and to introduce our speakers. I'll introduce them alphabetically. They'll present in a slightly different order.

The Honorable Ron A. Cass of Cass and Associates is the former dean of Boston University School of Law.

Rob Glicksman is the J.B. and Maurice C. Shapiro Professor of Environmental Law at George Washington University's law school.

Michael Greve is Profession of Law at George Mason University's Antonin Scalia Law School.

Rick Levy is the J.B. Smith Distinguished Professor of Constitutional Law at the University of Kansas' School of Law.

And finally, Judge A. Ashley Tabaddor is

President of the National Association of Immigration Judges.

So again, so lucky to be joined by everybody. And we'll start with a presentation by Mike Greve. He'll be basing his remarks on a paper that he wrote. It's a working paper at the C. Boyden Gray Center titled why we need federal administrative courts. Mike?

MR. GREVE: Yeah, thanks, Adam, and thanks to ACUS and the center, first of all, for holding us to these absurd sartorial standards. It took me 15 minutes to put on a tie. In five months of lockdown, I've forgotten that. And I want to thank you all for organizing this terrific series. I've watched all the preceding ones.

And there's a single theme that runs through all of them, which is the tension between politics on the one hand and rule of law values on the other, between political accountability, expertise, all the other things we expect from agencies on the one hand and impartiality, predictability, procedural fairness on the other hand.

The appellate review model that has been with us for well over a century now sort of recognizes that tension between politics and law, and then it tries to

sort of hit the sweet spot. That's Grohl (phonetic) versus Benson, that's the APA, that's the current debate over the role and the status of ALJs and AJs.

In an article a while ago, Tom Merrill explained that the adoption of the appellate review model was hardly inevitable, but then he concludes, look, it's too deeply entrenched now to do anything about it. And if that's right, maybe we ought to sort of focus on finagling the politics and law balance somehow.

But since Tom wrote that, I think four reasons suggest a somewhat broader perspective. The first one is the broad and fundamental debate over the first principles of administrative law. If we're thinking the entire enterprise, we might as well rethink this particular piece of it.

The second reason is the concern over the impartiality and independence of AJs and ALJs in the wake of Lucia and the executive order, and I suspect we'll talk about it.

Three, even very modest, circumspect reform proposals have gone nowhere in Congress, and since that's so, one might as well go for broke and propose something that has muscle on it.

And finally, the current -- many of the current reform proposals, it seems to me, aim to further

judicialize administrative procedures, and at some point down that road, maybe you should just cut the Gordian knot and say let's have actual courts.

There are a few brave souls out there who have proposed that. Steve Calabresi, Gary Lawson have done so. Mike Rappaport has presented his proposal along those lines a few weeks ago here. And as Adam mentioned, I've written a piece along similar lines. It differs from what's out there in two respects.

So first, that article confronts our system with a really stark alternative, which is Germany's system of full-scale administrative courts. Obviously, I'm not proposing to parachute that system into ours. I mean, that would be another transatlantic shipwreck. But we can learn from it in various ways.

One is it's easier to think through what administrative courts, real courts, might look like if you have an actual model in front of you.

Two, the German system is not just a sort of managerial thing. It's constitutionally mandated, and the Germans think that nothing short of ordinary administrative courts will satisfy the rule of law commands. Anything that smacks of agency adjudication is constitutionally forbidden for good reasons.

And third, and most important, so one common

defense of the appellate review model as it now exists in the United States is that modern society is just too complex, too fast moving, too big to permit anything like laborious judicial proceedings. I want that argument off the table, quite frankly, because it just strikes me as false. The German experience belies it.

So here's what I hope to be my second contribution to this debate, building on what my comrade in arms or comrades in arms there have produced, I expand on the operational details of what this might look like, especially including the court's jurisdiction and for the purposes of introductory remarks, I just want to emphasize one point.

I establish courts as an alternative to agency adjudication and leave those systems in place to basically die on the vine.

So one or the other system would operate at the private parties' choice, right? So if you're a private complainant burdened by administrative action, you can either have a relatively cheap agency and biased agency proceeding and then deferential review because that's deferential. That's always biased. Or you can go to the administrative courts.

Doing it that way, sort of having these systems

operate on parallel tracks, I think, has two advantages. One is you wouldn't have to sort of do a deep dive into thousands of organic statutes, and, two, I think institutional competition serves as a discovery process.

There's a lot of complaints about agency proceedings and agency adjudication. How robust those complaints actually are, we don't know. It's best to try it out in real life.

I'm open to discussing various options, various versions in which this might be done -- Article 1 courts, Article 3 courts. But let me mention sort of three essential conditions, and then I have one final concluding thought.

So the first minimum condition here is that the judicial proceedings must be de novo, not on the record. And the reason is that record review invariably pushes you back to a judicial deference, right, because courts are reviewing a decision that some else has already made once, at least. So why would you want to second guess that? That's what happened over time to the Crowell formula, and it would happen again, in which case you have gained nothing.

The second thing is that the administrative

courts' decisions must be irreversible by the agencies. That's what the Constitution means by the judicial power of the United States. Right? That's Heyburn's (phonetic) case. That's Plaut versus Spendthrift Farms.

And third and finally, like Professors Calabresi, Lawson, Rappaport, I'd limit the administrative court's jurisdiction to regulatory agencies in particularized (inaudible) interferences with private conduct. The FTC, the SEC, OSHA, the FCC, EPA, and the like, to the exclusion of tax matters, benefit determinations, and rule making proceedings. All of that, I would leave where it is.

Why do it that way? Here's the underlying -- the common, I think, underlying intuition. So the true pathology of American administrative law, I think, is not administrative adjudication, per se. I think over a wide range that may actually make sense.

The pathology, to my mind, is the near boundless suite of the public rights, so called, exception. It's not an exception at all because it covers the administrative waterfront, except for criminal proceedings and a few constitutional rights. So long as the government is a party and even sometimes when it's not a party, it's a matter of public right and

then agency adjudication will do.

I don't think so, and that's what, I think, this is about. That opens up sort of an alternative to all these laborious administrative courts' proposals. We could just rethink the public rights doctrine and say that private rights -- the right to use your land, to hire and fire, to pursue your livelihood without the government messing around with you -- that those rights must be adjudicated in Article 3 courts and nowhere else. That wouldn't require new legislature. It wouldn't require a new institution, so the Supreme Court could do that all by itself, but especially in the wake of oils states, energy, I frankly despair of that project, and so that's why I'm proposing administrative courts as a way of restoring long-lost, to my mind, (break in audio).

MR. WHITE: Thanks, Mike. I want to say before we go onto our next speakers, I forgot to mention at the outset that there'll be a time for audience questions. I see one has already appeared in the online queue. So if you have a question, just type it into the submission form, and we'll read questions after initial presentations.

Our next speaker is Rob Glicksman, and his remarks are being drawn from an essay or an article

that he cowrote with Rick Levy. It's titled restoring ALJ independence, and it's forthcoming from the Minnesota Law Review. Rob?

MR. GLICKSMAN: Thanks, Adam, and thanks to the three sponsors of today's program. I'm very pleased to be here. Ours is going to be a two-part presentation. I'm going to start, and then Mr. Levy will take over. I'm going to sketch out the developments that we think have created unprecedented threats to the independence of administrative law judges, and we're going to focus on ALJs rather than administrative judges.

And then Professor Levy will discuss possible responses to those threats, including the adoption of the central panel model that's used in some states.

Our premise is that institutional structures that protect the impartiality of administrative law judges are essential to the constitutional legitimacy of agency adjudication.

Currently the APA and civil service laws incorporate such protections, including dependent merit selection and good cause requirements for removal or other disciplinary actions against ALJs, and combination of recent judicial decisions and executive branch actions threaten ALJ independence.

So let me start with the developments that concern appointment of administrative law judges. In Lucia versus SEC, the Supreme Court held that ALJs are officers of the United States subject to the appointments clause, which included in that case appointment of SEC ALJs by ALJ staff as opposed to the agency itself.

Lucia's analysis bears equally applicable ALJs in other agencies. The case didn't discuss it, but ALJs are probably inferior officers, who may be appointed by department heads, not principal officers who need to be appointed by the President with Senate consent.

Unlike administrative patent judges deemed to be principal officers in the recent Arthrex case, ALJ decisions are subject to de novo administrative review by the agency who deploys them.

If indeed they are inferior officers, an agency head could correct past improper appointments by reappointing ALJs, clearing them to issue decisions in future cases. That fix would not by itself threaten ALJ independence as long as appointments conform to competitive civil service processes.

But the Trump administration's actions in the wake of Lucia do, we think, present a threat to ALJ independence. Merit-based civil service hiring

processes have been a core protection for adjudicatory independence since the APA's adoption in 1946. After Lucia President Trump issued Executive Order 13843. It amended Office of Personnel Management rules to exempt newly appointed ALJs from competitive civil service hiring processes. Eligibility for appointment as an ALJ now only requires under the executive order a professional license to practice law.

The order opens up the hiring process to potential cronyism or political favoritism because the agencies are no longer required to select ALJs through a merit-based selection process.

What about removal of ALJs? What developments have occurred in that arena? We think that weakened protections against removal or retaliatory disciplinary actions is perhaps even more problematic than what's occurred in the appointment realm.

The APA and civil service laws require good cause for those actions and provide for neutral adjudicatory processes before the merit system's protection board before those sanctions can be imposed.

But again, a combination of recent judicial decisions and executive actions has undermined these good-cause protections.

The Supreme Court in the Free Enterprise Fund

case held that two layers of good-cause protection such as those apply to ALJs who work in independent agencies impermissibly interfere with the President's Article 2 responsibilities. Court stated in the footnote that it wasn't addressing ALJs in independent agencies but its efforts to distinguish them were not entirely convincing.

So as a result, the constitutionality of dual good-cause removal provisions for ALJs in those agencies remains in doubt.

If those provisions are, as it turns out, improper, it's important to know whether the relevant principal officer is the agency that employs the ALJ or the merit system's protection board, which adjudicates removal in disciplinary actions. If the principal is the agency, the problem of dual cause removal relates only to independent agencies (inaudible) subject to good-cause protections.

If, however, the principal is the MSPB, whose members are removed only for cause, then the Free Enterprise problem applies to all ALJs who are subject to good-cause removal protections. We think, for reasons we can explore in the Q&A, if it comes up, that the agency, not MSPB, is the principal.

Assuming that's so and that dual for-cause

removal provisions for ALJs are unconstitutional, what would be the proper remedy?

Well, there are two possibilities -- invalidation of ALJ removal protections would threaten impartiality by exposing ALJs to removal in retaliation for decisions objectionable to their politically appointed superiors.

But the alternative in validating protections for agency heads would eliminate the independence of agencies like the SEC or SSA.

A final issue concerns the legality of good-cause removal restrictions, even apart from the dual protection problem. The Supreme Court held a couple of months ago in the (inaudible) Law case that good-cause protection for the CFPBs had was unconstitutional. If the SSA commissioner can also be fired for good cause, the validity of dual good-cause removal for SSA ALJs would be moot, assuming the principal officer for SSA ALJs is the commissioner, not MSPB.

But seeing the law's embrace of a strong unitary executive principal might imply that good-cause removal protections for ALJs are unconstitutional, even apart from the dual cause problem.

Finally, aside from these judicially created

threats, the Solicitor General has advanced statutory and constitutional avoidance arguments that would weaken existing good-cause removal protections even when they remain in effect.

In recent guidance, the Solicitor General argued that ALJs may be removed for failure to perform adequately or to follow agency policies or instructions, and that MSPB must defer to the agency's conclusion that there's good cause to remove an ALJ. That approach, we think, places ALJs in an untenable position if agencies adopt informal policies or issues instructions that appear to conflict with statutes and regulations.

So what do we do about this conundrum? Professor Levy is going to provide an answer.

MR. WHITE: Go ahead, Rick. Rick, you're muted right now.

MR. LEVY: I think I've hit unmute. And so thank you, Adam, and thank you, Rob. And thanks to the organizers of the conference. I'm really pleased to be here today.

As Rob explained, we are concerned that the weakening of protections surrounding the appointment and removal of ALJs threatens the impartiality of administrative adjudication and necessitate a

meaningful legislative response.

In my part of the presentation, I want to make three key points. The first point is that when you erode protections for appointment and removal, you increase the risk that improper agency influence will have an effect on APA adjudication in ways that compromise fundamental issues of fairness. That requires a response.

Second point I want to make is that we think the central panel model has advantages over the other principal alternatives to correcting this problem, which would include either shoring up specific statutory provisions for appointment and removal or the creation of an Article 1 or even an Article 3 administrative court.

And third, I will try to explain to you we think that a central panel model could be designed so as to minimize the risk of constitutional problems, protecting independence of administrative adjudication, and allow agencies appropriate means to oversee administrative processes.

So turning to the first point, the erosion of appointment and removal safeguards matters because it increases the risk that improper influence will compromise impartial adjudication. Now, we start with

the premise that agencies do have a legitimate interest in making policy, both through regulation and through precedential decisions, and they have an interest in ensuring that ALJs and other adjudicators apply these policies consistently and accurately.

So we're not opposed to that sort of agency oversight. But we worry that informal guidance and instructions would pressure ALJs to decide cases in ways that violate due process or are otherwise inconsistent with the controlling legal standards.

In our conversations with ALJs, we've had a lot of them since we put our article out on SSRN, we've been told repeatedly that virtually every ALJ has stories to tell about efforts to improperly influence their decisions. And we think that with removal for merit selection, the problem of cronyism and with weakening of good-cause protections for removal and other discipline, it's more and more likely that agencies are going to want -- excuse me, ALJs are going to want to curry favor with their politically appointed supervisors, and that's a threaten to impartial adjudication.

So then the question becomes what to do about it. The central panel model, we think, which is employed in many states, has advantages over the main

alternative response.

So one possibility that we've seen in the literature is simply fixing the statutes, restoring merit-based civil service appointment processes of fixing problems with good-cause removal provisions that are created by dual good-cause arrangements and the like.

But we think that's actually more complicated and less clear a path to fixing these problems than is commonly assumed.

Another possibility and one that has some appeal and corresponds with Michael's suggestion might be the creation of an Article 1 court or perhaps even an Article 3 court to constitute an administrative adjudicator. We think that would certainly maximize the independence of adjudication, but our concern is that that would also prevent any sort of agency oversight or precedential agency adjudication as a means of formulating policy. And we think that's a legitimate and essential tool for many agencies. We'd be reluctant to take it away, and we suspect that most agencies would scream bloody murder if there was an effort to do that.

So we think the middle ground, the one that could maximize the most advantages and minimize the most

problems, would be to follow the model that many states have used and create a central panel. The central panel could establish a firm and constitutionally sound foundation for ALJ independence, while still preserving an appropriate role for an agency head as the highest adjudicatory body within the agency.

So what would the design of such a model look like? So the first thing would be we'd have to move ALJs from their current position in existing agencies, regulatory or benefit agencies, and house them in a separate agency that's not beholden to any of the agencies for whom the ALJs adjudicate cases.

We think that to maximize ALJ independence, this should be a freestanding agency, and it sole function should be to adjudicate cases arising and involving administrative agencies.

The head of the panel would have to be a principal officer and we think subject to appointment by the President with Senate consent, and to avoid problems under Free Enterprise (inaudible) Law would have to be removable at will. So having a freestanding, apolitical agency would be essential.

Current ALJs could be transferred to the panel. New ALJs could be appointed by either courts or by

means of civil service merit selection processes. ALJ provisions for removal and other disciplinary actions should incorporate a strongly worded good-cause removal requirement that's not susceptible to relaxed interpretation along the lines suggested by the Solicitor General.

Now, within this model, ALJs would be assigned cases randomly, but particularly for large agencies with many adjudications, you could specialize or ALJs could specialize in adjudicating for a single agency like the SSA or the NLRB, or where ALJs serve multiple agencies, they could focus on a subject matter and develop subject matter expertise like financial accounting or scientific expertise.

So under this model, as it is in many states, the agency itself would still be able to take an important case and adjudicate it in the first instance as a way of establishing through precedent policies, and the central panel ALJs would still be bound by regulations, precedential adjudications, and other policies adopted by the agencies that have the force of law.

But ALJs would not be bound by guidance or instructions that are not legally binding. Major interpretative rules and policy statements could

support ALJ decisions. ALJs might be required to respond or explain why they're not applying them, but they would not be directly bindings.

There's a host of other wrinkles that have to be thought through on this kind of a structure. What kind of appointment process would be best, how do we ensure that ALJs are inferior rather than principal officers? What role, if any, should the merit system's protection board have in disciplinary actions?

But I think we've sketched out the main contours of the model that we have in mind. So in conclusion, we think that this approach would be the best way to secure agency independence, administrative adjudicatory independence (break in audio) and minimize constitutional problems while allowing for legitimate agency oversight. Thank you.

MR. WHITE: Thanks, Rick. Thanks, Rob. Just real quick question, Rick. I mentioned that your paper is forthcoming from the Minnesota Law Review. Do you and Rob have any sense of when -- I mean, there's already a draft online, but just for the audience's sake, do you have any sense of when it'll be in print?

MR. LEVY: Well, we've currently gone through two

edits, but they're just the Word edits, and they're starting the substantive and technical cite-checking process. My guess is it'll probably be out by the end of the year but probably not much before then.

MR. WHITE: Okay, coming soon to a law library near you. All right, next up will be Ashley Tabaddor. Judge?

MS. TABADDOR: Thank you. Thank you so much, Adam, and thank you for inviting me on this panel, and I'm so honored to share the stage.

I'm here, as I always have to do, unfortunately, to clarify at first that I'm here in my capacity as the President of the National Association of Immigration Judges, NAIJ, for short. It's the official union for all the immigration judges across the country, and so that's the capacity in which I speak.

Maybe I should preface this by saying immigration court and immigration judges are a great example of what happens if you take all the bad ideas, mash them up together, and create a court. And that's why I'm here to really explain why we are a unique example and why the solution, the lasting solution for immigration court and immigration judges is really a creation of ideally an Article 3 court but at a minimum an

independent Article 1 court.

So I should also preface by saying that I've spent my entire professional career with the Department of Justice, focusing on immigration, starting out as a law clerk, and I've been on the bench with immigration court for about 15 years.

I've had the opportunity to really look at this and experience this from many different angles as well as, obviously, my role as the president of NAIJ.

So I have four major talking points that I think would hopefully help explain the context and the rationale for why an independent immigration court is really critical at this point.

Let's start with some of the statistics. We have a court system, immigration court system, and a law enforcement agency. We're in the United States Department of Justice. We are headed by the country's chief federal prosecutor, the U.S. Attorney General. So we are a court system and a law enforcement agency headed by a prosecutor.

We have 67 courts across the country plus two adjudication centers that don't allow public access. They're fully dedicated video teleconferencing centers. We are now about 500 immigration judges and over 1.2 million pending cases.

And in the past three years alone, the pending cases have doubled. We started out in 2016, 2017 for a little bit over 600,000 cases. We're now almost to 1.3 million cases. And in that same time frame, the number of judges have almost doubled from about 280 to about 500.

Now, what's interesting about immigration court is that -- is the history or the evolution of the court. We were borne out of the former Immigration and Naturalization Service, INS, who was also within the Department of Justice at some point.

In 1983, there was an understanding that there's an inherent conflict of interest of having the adjudicatory arm of the Department of Justice within the law enforcement arm. So that's -- that is how the Department of Justice came up with the Executive Office for Immigration of Review, the creation of the immigration court.

And once again, when the Department of Homeland Security was created in 2005, there was a recognition that the adjudicatory arm of immigration-related issues should really be independent from the law enforcement arm. And so the law enforcement arm was pulled out, the INS, and CNS, and CBP, all of those were pulled out of the Department of Justice and

placed within the Department of Homeland Security.

Nevertheless, the conflicts of interest that are obvious when you have a law enforcement agency working together with another law enforcement agency has plagued the court.

Third, the issue to keep in mind is that the nature of the law, immigration and nationality law, governing the cases that we here are really judicial in nature. So the position of immigration judge, for example, is statutorily created. The paradigm of the types of hearings or the types of cases that have been created by Congress is also judicial in nature.

In every one of our cases, we have the Government initiating the proceedings. We have a set of rules and procedures that mimic that of a judicial setting. And we have expectations and code of ethics and judicial models that we are supposed to follow.

And most importantly, the rights that are at issue here are really fundamentally constitutional law principles of liberty and associational rights of individuals, both citizens and non-citizens.

And I think there's also a confusion regarding the role of policy or the prerogative of the agency on policy issues. When it comes to the particular issues that are at play in the immigration court system,

there's really no room for agency policy making. Those things are within the paradigm of the Department of Homeland Security within its prosecutorial role, not within its judicial role.

And this is what has happened then is by conflicting the two is the extreme politicization of the court, where you're getting neither efficiency nor fairness from the court. And I'll just throw out some example.

Every administration has utilized the court as a law enforcement tool that has compromised the integrity, efficiency, and fairness. It has engaged in what we are -- what we call aimless docket shuffling, which is reorganizing our monstrosity of docket in constant efforts for political messaging. And we have seen a constant conflict of interest where the, for example, the contempt authority that Congress expressly bestowed on immigration judges has been withheld by the Department of Justice as an act of professional courtesy to Department of Homeland Security trial attorneys who come before the court. So the conflict of interest has, again, plagued us historically.

And the last several years between the two administrations we've seen what happens with the

extreme politicization of the court with the pendulum swings, 180-degree pendulum swings in terms of how to utilize the court for essentially conflicting law enforcement priorities.

And in the last three years, we've seen extreme, extreme inference and reconstituting of the court in line with the executive branch's law enforcement policies such as introduction of quotas and deadlines, things that administrative law judges do not have to deal with in the context of individual performance evaluations. We have to deal with those utilizing the certification process to wholesale rewrite the law and place the judges between a rock and a hard place in following circuit law or the Attorney General certification process.

The certification process has been utilized to bring back to life cases that are 14 years old, cases that are not in dispute between the parties, cases that not -- no one knew was being considered for certification. So the entire utilization of the court as an attempt to rewrite the law wholesale, which will subject it to being revisited upon a future administration who would disagree with it.

And one of the more egregious steps that has been taken is to bestow the director of the agency, who is

essentially a political appointee, with the supreme adjudicatory power. And this is one of those concepts that for decades was recognized as a -- as such an egregious violation of conflict of interest that there were rules that precluded the director from even asserting himself or herself in a singular case in terms of adjudication, and yet now because of the effort to essentially dismantle the court and reconstitute it as a law enforcement agency, the director has been given the authority to be the super adjudicator, issue precedent decision, oversee cases, adjudication of cases.

So if you want to protect all of those principles that Michael spoke with, both the issues of recognizing fairness, recognizing the role of policy making as the prosecutor, recognizing efficiency, rule of law, all of those, the only way that you can fix the immigration court at this point is to just remove it from the -- from the Department of Justice and give it to the protections that a judicial model would have.

So I'm happy to answer any other questions on that. Thank you.

MR. WHITE: Great. Thanks, Judge. And finally, we'll have some thoughts from Ron Cass.

MR. CASS: Thank you very much, and thanks, as other panelists have said, to all the organizers of this particular program.

I'm going to start with a reference to one of the better-known legal authorities of the last century, George Burns, who was famously married to fellow comedian Gracie Allen. They had a long career in Vaudeville and radio and television.

At one point, George Burns was asked what was the secret to a long and happy marriage. And he said the secret is a romantic dinner twice a week. He said I go out on Tuesdays. Gracie goes out on Thursdays.

There are some ideas that sound terrific until you really figure out how they work in practice. And a lot of what we're dealing with today are how we figure out how some of the ideas about reforming the system we have will work in practice.

I want to step back and say there are two different ways of looking at the sort of problems we deal with in administrative adjudications.

The first is the Constitution. And the Constitution has a very simple answer to what we do. It says there are questions that are fundamentally judicial. And Michael referenced a -- the split between private rights and public rights. Anything

that falls within the category of what the Constitution says is a judicial matter must be decided by an Article 3 court. There's no question, there's no separate exception for something that is more efficiently done by an administrative agency for something that can be done more quickly or more cheaply by an administrative agency. If it's judicial, it has to be done by Article 3 courts.

The second question is how are things actually working in practice? What do we have? What's the system of decision making we have? In the executive branch, there are some decisions that are, by their nature, adjudicatory. It's making decisions that are retrospective that are applying the law to the facts and making an individualized determination.

There are a lot of those decisions that take place within the federal government. You have in addition to the Article 3 judges, the roughly 900 or so Article 3 judges, you have about 2,000 ALJs and about 10,000 administrative judges who are not ALJs but enjoy those protections that ALJs do -- or the sort of insulation ALJs have.

The ALJs and the administrative judges are located within agencies and generally subject to oversight by and reversal by the agency heads. A lot

of the questions that are being raised are questions of whether we can get away from that model and have further insulation of the ALJs and the AJs and the agency heads in a variety of cases, I think that's a bad idea.

I think in a lot of cases, we've having the agency head who's responsible for setting policy, for implementing policy in other ways also overseeing adjudication is a good idea.

There are some cases, however, where clearly we are dealing with questions of rights, where the government is seeking to enforce its view of what the law is against individuals who do have private rights. And I will put off to one side Michael's question about whether we ought to expand the notion of private rights, reinterpret that notion.

But right now we have clearly some categories that I think are enforcement actions by the government labeled civil enforcement now so they're not criminal. But they are the sort of enforcement actions that really should be viewed as implicating private rights. They are decided sometimes by ALJs, sometimes by AJs, sometimes by other mechanisms within the government. I think that requires a very careful look because those sort of questions that really are matters of

right ought to be decided by Article 3 courts. And I think we all ought to see some movement in that direction.

The biggest categories of decision making now by ALJs and administrative judges, however, are in categories that are classically thought of public rights categories. The ascertainment of benefits obligations, which has been cabined by one set of proposals often aside, is viewed as a matter of public right. These are benefits that don't have to be given by the government. The question is how to meter how they are given out.

Historically, those have been things that administrative adjudicators have handled since the beginning of the republic.

The second category are patent rights, and those are the bulk of the decisions handled by AJs these days. Those are the things that were referenced in the Supreme Court case which was decided a few years back, which also said they remain as public rights, not private rights.

I believe if you take those two big categories out, the SSA determinations of benefits and the PTO, the public -- the Patent and Trademark Office determinations of patent rights -- you have a much

smaller category of cases.

So in trying to figure out, then, how we deal with those, which system, whether it's a German-style administrative court system, or a different system of administrative adjudication within the agencies, I think we have an easier time dealing with that than we would if we had the public rights cases, the patents, and the benefits lumped in as well.

I'm not sure that any of the proposals that we have are going to work well across the board in all the different types of cases. Increasing insulation of ALJs has some attractions in some categories of cases but in a lot of cases where the ALJ insulation would be especially valued, ALJs right now operate quite independently and I think do a credible job in a lot of these cases.

At the end of the day, I think what we have to do is ask the question that we asked with George Burns and Gracie Allen, which is not does the idea sound good in theory but will it work in practice.

MR. WHITE: All right, thanks, Ron. We've already got two questions from the audience, and I'm going to turn to those shortly, but before I do, I just want to give everybody a chance to respond to anything they've heard so far. A lot of ideas have

been put on the table. And now that folks have made their own sort of initial presentations, I just want to make sure that everybody has a chance to weigh in on anything that's been raised so far. Maybe to keep it simple, I'll go in the same order that folks originally presented in. So Mike, anything? Hold on, Mike, you're muted. I can't hear you.

MS. TABADDOR: Yeah, I can't hear you either.

MR. WHITE: Try one more time.

MR. GREVE: I'm unmuted now. I was muted by the organizer, which was harsh.

MR. WHITE: Don't take it personally, Mike.

MR. GREVE: No, no, no. I want to say on one quick or two quick points maybe, there's sort of -- I mean, one way of looking at this discussion, which I thought was terrific and terrifically informative, is that there's sort of a tacit consensus almost because the -- or at least a conceivable, possible consensus. Let me put it that way.

What Rick and Rob described is 85 percent Social Security Administration. That's the bulk of it. Some little agencies that swirl around it, but that's basically the bulk of it.

And that's also what Ron means by benefit determinations, right -- disability, Social Security,

the works, those kinds of things.

I would not want my administrative courts to be open to those claims at all because they would threaten to overwhelm the system and turn those courts into sort of small claims courts, which is the opposite of what I would like.

And I am with Rick and Rob, maybe not on the sort of central panel model, but the gist of it strikes me as just plainly right. You want to have some kind of a logical response or coherent response to Lucia and Free Enterprise and all the rest of it. That's very much worth thinking about.

So when it comes to these benefit agencies, I'm totally open to that proposal. And in -- when it comes to enforcement decisions and regulatory decisions that take the form of adjudication, I'm with Ashley. If these agencies want to set policy, by all means let them do so. That's what we call enforcement.

Or alternatively, they can write rules. They can do one or the other thing. I am in those kinds of setting -- you know, the Atlas Roofing kind of scenario, you know, that kind of thing. I am deeply skeptical of making agency policy by means of formal adjudication for all the conundrums that have been so

forcefully articulated here.

MR. WHITE: Thanks, Mike. Rob, Rick, do you have anything to add?

MR. GLICKSMAN: I'll just make two quick points. One is that in response to Ron's way to think about whether something that looks good in theory would actually work in practice, we do have some evidence that both Mike's recommendation and Rick and mine have a good chance of working.

Mike's model has worked in Germany, and ours has worked in the States. And so I don't think we're starting from scratch when we propose these recommendations. There is some real role there, but they are feasible alternatives to the current system.

Second point I would make is that at least in the limited realm -- and Mike has done a good job having out what our proposal would cover -- at least in that limited realm I think we -- Rick and I would agree that our proposal strikes an appropriate balance to what we sometimes refer to as the essential conflict in administrative law between taking advantage of the expertise of agencies -- one of the main reasons we created administrative agencies to make policy in the first place -- and ensuring that they be held accountable.

MR. WHITE: Go ahead, Rick.

MR. LEVY: Let me unmute. Can everyone hear me? I also have a couple of points. So the first point would simply be that although our article is focused on ALJs and ALJs as a driving concern for our writing the article, I think that the central panel model would be adaptable, potentially, and could be expanded to include AJs of various kinds as well as ALJs and might be a response to those many thousands of judges that don't even have the protections that ALJs do. So that would be one point.

And then a second point would be ever since I had comparative law with John Langbine (phonetic), I've been impressed with the German system. But I also remember that the adjudicatory model in Germany is quite different than the adjudicatory model in the United States. The judiciary operates using nonadversarial procedures. Judges are much more active in managing. And the size of the judiciary in Germany is much larger than the size of the judiciary in the United States.

So I would be a little bit concerned that if we try to follow the German model, the adaptations that we would need to make would be problematic and then it might not graft well onto our system with adversarial

proceedings and a less bureaucratic judiciary.

MR. WHITE: Great. Thank you. Ashley?

MS. TABADDOR: Sure. So I guess to start with Ron's point, which I think is a good one to say, okay, let's look at the practical solutions, and I want to indicate that for the immigration courts, the Federal Bar Association drafted proposed Article 1 legislation fully researching all the issues about the constitutional appointments and striking that balance between having sort of DHS ability to have a voice on the policy side but removing the immigration court and providing that sort of practical -- that sort of balancing act.

And frankly, looking at where we are now, where we have neither efficiency nor fundamental fairness as fully contemplated, I would say to Ron what do we have to lose, right? So we have tried every other way. We've given every administration every chance. And if nothing has shown, it's that if you have a situation where you don't provide the protections to the immigration judges the way that ALJs have in terms of hiring, selection, review, if you have no checks and balances on the administration of the court, and then you utilize the court in a way to basically rewrite the law in guise of the policy on essentially

fundamentally -- akin to fundamentally judicial rights, this is the worst of the worst that you're going to get. So let's fix it.

MR. WHITE: Ron, it can only get better, right?

MR. CASS: Well, I'm always skeptical of a question how could it get worse. Usually when we ask that question, it does get worse. I think an English commentator at one point said don't speak to me of reform. Things are bad enough as they are.

But I do want to just engage very quickly one point that I think Rob and Rick made. And that is that the central panel may have advantages in some areas. There may be some types of disputes, where you can pick it up very quickly, where you don't need a lot of background to do a good job resolving it.

I'm familiar with the International Trade Commission ALJ decisions on patent validity and patent infringement questions, and those happen to be very technical areas where having a background not just in the law but also in the particular sorts of technologies that they deal with on a repeat basis happens to have a great deal of advantage.

And I know if I were having a dispute resolved by someone on a question of patent law and application, I certainly would want someone who has a deeper

background than you're likely to get with a central panel.

So I'm just cautioning there may be some areas where application of the system would have disadvantages that are greater than the advantages that you might have.

And last, as someone who served for a long time as a dean, I think getting anyone to do something that the person nominally in charge thinks is a good idea is a benefit, and I say that. I know faculties don't think the dean is even nominally in charge. My parents actually thought I was. But I think they may have been the only ones.

I do think that the agency heads have policies they have to implement. They have tasks they have to perform. And having people working actually for them who do that in many cases is advantageous, and that may include a number of adjudicatory decisions as well.

MR. WHITE: Now, we already have some questions lined up, and so maybe I'll just pose one before turning it over to the audience. So much of what we've discussed today, including the papers that we referred to, they are -- they're calls for reform but with an eye to the practical limits on what can be

achieved either as a matter of precedent, political reality, and so on.

And so at risk of asking a very broad question, I'm just curious if anybody has thoughts on what's the ideal -- what's sort of the ideal of ALJ or AJ independence, right? What are we grading all this against? If you could set aside sort of existing Supreme Court precedent or practical limitations and you're able to write on more or less a blank slate, what is the ideal of independence for ALJs and AJs, just so we have a sense of what we're grading against? Anybody, Ron?

MS. TABADDOR: Go ahead.

MR. WHITE: Judge, why don't you go first?

MS. TABADDOR: Well, I think, you know, the judicial model in large part, I think, gives us a very good starting part that you want to make sure -- at least I can tell you from experience that the principles are only as helpful as there are structures in place to protect it.

So if you are going to give someone decisional independence but then as a matter of structure place them in a situation where they have to constantly be mindful of external quotas and deadlines as part of their sort of daily lives, and yet the agency also

gives the doublespeak that, oh no, you're only supposed to consider the fact and the law, those types of situations just can't happen.

So just take a look at the judicial models. There really needs to be a level of transparency and accountability, but the level of transparency and accountability for a judicial model is different than your average bureaucrat or employee. There really needs to be a selection of individuals on merit so you do bring in people that the society respects who are qualified, who have exemplary records. So these are role models in the community. You bring them on. You need to have a diversity on the bench, and you need to ensure that they feel comfortable making hard decisions.

It doesn't mean that they should be immune from any removal action, but they -- there needs to be sort of that good-cause removal. There needs to be this sort of judicial standard, not your traditional bureaucratic or federal employee standard.

MR. GREVE: Can I just add to that?

MR. WHITE: Sure. Go ahead, Mike.

MR. GREVE: I agree with much of what Ashley just said, and to my mind, the crucial structural question is the question of reversibility. I think so long as

AJs and ALJs can be reversed by their agency heads, so long as the agency heads have referral authority or can yank, you know, cases that they think are important out of the ordinary system, you know, the best you can hope for is sort of an appearance of impartiality and no more.

Now, maybe as Ron said, in some settings, that may actually be enough. And I would park the Social Security cases under that heading.

But when something serious is at stake like deportation, right, or people's livelihood in the sense of, you know, can I actually earn a living here or can the agency just crush me, in those kinds of scenarios, to my mind, you need a real court.

I want to add very quickly to Rick's observations earlier. He's, of course, right. It's a very different judicial model in Germany, right? I don't think that's actually -- I mean, the investigative versus adversarial model, I don't think that's a big obstacle. Our judges have plenty of ways to figure out what the facts are.

What is absolutely true is that Germany has a lot more judges relative to population and relative to the case volume than we do. And I would actually turn that into sort of an affirmative point. I hope

there's no federal judge in the audience now because what I'm saying now may be sort of offensive to them.

I think it is insane to try to run the country of 350 million people with 900 federal judges. It's just an absurdity. And the only reason why that last is the sort of self-important and the prestige hunger among federal judges because their prestige hangs on there not being too many of them.

You circumvent that problem a little bit by creating Article 1 judges, but I concede, and I frankly volunteer that a system like the one I'm contemplating -- and maybe what Ashley is contemplating in the immigration context, you need way more judges. This is the wrong front on which to economize. It's preposterous. Let's be grownups about this.

MS. TABADDOR: Yes.

MR. WHITE: Ron?

MR. CASS: I wanted to just --

MR. WHITE: Rick, go ahead. Go ahead, Rick. Sorry, Ron.

MR. LEVY: Yeah, I just wanted to suggest that to your question of how do we define independence, what's the baseline of independence, I actually want to pick up on something that Ron suggested or a point that Ron

made. There may be some context in which it's appropriate for people who are engaged in what's nominally referred to as adjudication to be representatives of the agency whose function it is to implement the agency's mission, to further the mission of the agency.

But if we're talking about independence, and if we care about independence, then I think what the measure of independence is the ability of a judge to represent the law, to represent the facts as indicated in the record, and to pursue those, the correct applications of law, the correct determination of facts, without fear of any kind of retaliation or retribution or adverse consequences that come from following that.

And in that respect, I would have to differ with Michael about the reversibility. So federal District Court judges are reversable by federal Court of Appeals judges, but we don't think that compromises the independence of federal District judges. That just creates a hierarchy.

So I personally am less concerned that an adjudicator might be reversed using an adjudicatory process that's a kind of appeal within the agency than I am about threats of retaliation or the hiring of

cronies that are going to be more loyal to the political leaders of the agency than they would be to the facts and law.

MR. WHITE: Go ahead, Ron.

MR. CASS: I want to pick on something which actually does follow from Rick's point. And that is, I think, the key question is what's the degree of discretionary authority that's properly vested in the agency.

If you have an agency that has legitimately the discretionary authority to do something, then it makes sense to have the agency have more control over the adjudicatory process that is testing how it's doing than it does if the agency really shouldn't be engaged in this, if the agency's authority really shouldn't extend to the discretion to do certain things.

If we had a well-functioning and well-applied nondelegation doctrine, I think some of these questions would look very different than they do in today's world, where agencies have been indulged a range of authorities that may not properly be vested in an administrator, may be properly vested higher up the food chain than they are today.

MS. TABADDOR: Can I add just one point to this conversation? I guess to what Rick was saying on

reversibility and what Michael was saying to reversibility, at least from the perspective of a judge.

I think it's absolutely correct that, you know, reversibility as a regular appellate process that's part of the process, it doesn't necessarily mean that there's some inherent compromising of one's independence.

The problem comes in when that reversibility is in the structurally flawed setting where those who are reviewing your decisions are heavily politicized and that -- and that, at least in the context of immigration judges, not only is it a matter of just saying, well, whatever, they can decide whatever they want. But I can lose my job if I get -- if I get reversed a certain period of time.

And I think that's sort of, at least how I interpreted Michael's comment in terms of reversibility is that the reversibility has to be by people that we also trust to be sort of independent from this politicization.

MR. WHITE: Rob, would you like to weigh in on this at all?

MR. GLICKSMAN: Yeah, I'm not sure I'll add too much that's new, but I would just say that, echoing

what some of the others have said, what's critical is the adjudicator's ability to apply binding rules of law without fear of sanction.

MR. WHITE: Well, we have 25 minutes left and five questions. So why don't we turn to those? We'll start with a question from Alex Manual. He writes in Freitag, Justice Blackmon discussed whether administrative judges wield the judicial power of the United States under Article 3 or executive or legislative powers. Majority held that the tax court, special trial judges wield judicial powers. Can you discuss the considerations that define judges who wield judicial power versus executive powers? Is it simply a matter of whether the AJs' enabling statute permits agency review of the AJ or ALJ's decision? I think this question came in early during Mike's presentation. So maybe I'll put him on the spot first and see if he has any thoughts on this and then let anybody else weigh in.

MR. GREVE: Look, I'd stamp my foot. I'd have to reread Freitag, but I'll stamp my foot on this. So long as adjudicatory decisions by an AJ or an ALJ are reversible by an executive officer, the exercise of the power must have been executive. It can't be anything else because -- right? If it's reversible by

the executive, it cannot conceivably have been judicial because the judicial power of the United States means finality and binding effect, end of debate.

MR. WHITE: Well, now you said like Scalia in Brand X. Rick, do you want to jump in? Go ahead, Rick.

MR. LEVY: Yeah. So I agree with Michael's point, but I don't think it follows that just because it's reversible by the executive it's -- it is not characterizable by -- as judicial power. It doesn't resolve the question of whether the exercise of that power by the executive branch is proper under Article 3.

So I think in order for an adjudication that is reversible by the executive branch to be the proper exercise of executive authority, you have to decide that the matter is one that can be properly resolved at the -- by the executive and not by the judiciary.

And I guess I've long been puzzled by the public rights doctrine. I have no idea why the public rights doctrine means that it's not judicial power or why it's exempt. I've written about that before as well.

But I was struck -- if you actually read Murray's (inaudible), which is a case that everybody quotes and

nobody reads, the Court actually talks about, I think, the idea that many executive decisions necessarily involves the determination of facts and the application of law to facts in individual cases. And that's going to be true even in quintessentially executive actions like deciding whether or not to prosecute someone for a crime.

Some kind of determination of fact is being made. Some kind of decision that the law as applied to those facts warrants a determination of guilt and will sustain a finding of guilt.

So I think there's a huge overlap between the kinds of matters that can be resolved by the executive and the kind of matters that can be resolved by the judiciary. And the real question is sort of when is a resolution of a particular matter by the judiciary so central to the judicial power -- excuse me, particular matter by the executive so central to the judicial power that it interferes improperly with that matter.

MR. WHITE: Go ahead, Ron.

MR. CASS: Yeah, I want to agree with both Michael and Rick. But I think it's quite clear that what Justice Blackmon said in Freitag was a mistake. That he can't be saying that these people are legitimately constitutionally exercising judicial

power. They're not. They're making an adjudication. They're exercising executive power.

And if they were exercising judicial power, then the question wouldn't be whether they're inferior officers or superior officers. The question is whether they're Article 3 judges or not.

And so the statement in the opinion is just one of those statements that you look at, and when you're teaching the case, you explain to students why that is clearly wrong.

Now, some of the people who were on the Supreme Court at the time have explained why that statement got into the opinion, why it stayed in the opinion, why it wasn't a subject of a more pointed dissent, but I think it's fair enough.

And anybody who has been the job of making decisions on a public record knows that sometimes you say things that you look back on and say why did I say that. Sometimes you join things others have said that you look back on and say why did I join that.

I think this is one of those statements that whoever asked the question was right to mark out as one of the -- as a statement that shouldn't have been made and shouldn't be taken as -- as it's written.

MR. WHITE: All right. The next question is for

Rob. John Dietrich writes administrative judges have been in the federal service for years, but they're not accorded the same removal protection that's provided to administrative law judges. I hear Professor Glicksman's concerns about weakening the protection of ALJs, but is there substantial empirical evidence that AJs have suffered improper political pressure?

MR. GLICKSMAN: I can't purport to have come across any rigorous empirical study, but as Rick has indicated in his remarks, since we began working on this project and (inaudible), and we've heard from quite a few administrative judges and ALJs, all of whom signal that they themselves had been or knew others who had been subject to what they regard as undue political pressure.

And so the administrative judges themselves deem this to be a problem, at least the ones we've heard from. And I take them at face value.

MR. WHITE: Rick, go ahead, and then Ashley.

MR. LEVY: Well, I think I was going to actually probably say much of what Ashley would want to say. I think immigration judges are a classic example of what happens if you don't have even the protections that ALJs have. You become susceptible to political pressure.

And I do believe we cite, at least in our article, some reports concerning various kinds of political pressures that have been exerted on administrative judges by politicized agencies.

MS. TABADDOR: Let me just add one more thing, if you don't mind, on this conversation. Because what the agency has to try to do is re, sort of, configure the issue of what it means to exercise undue influence. And every time we've discussed this, their point is, well, we didn't tell you to grant or deny it. We didn't direct the final resolution of a case.

And I think it's very critical to recognize that undue influence or interference with a judge's independent decision making is not limited to being told whether you should grant or deny a particular application. It's that constant sort of hold over your head, it's that constant interference with your docket management that, you know, the intermediary decisions that you're making, calling you out on the carpet to explain why certain cases are on the docket in certain ways.

So the context within which we should look at this is not that limited, very minute -- not minute as insignificant, but small, but part of a bigger picture.

MR. WHITE: I have -- let me just throw in one more question of my own that occurred to me. As we think through the practical realities from agency to agency and subject matter to subject matter, Ron's initial comments, you know, raised with me the question is it good to deal with these issues of ALJs and AJs as one size fits all, or is this something that really requires us to go back to the drawing board, not that, but I mean, examine these agency by agency and not have the broad brush that we usually bring to these things? Rob, do you have any thoughts on that?

MR. GLICKSMAN: Well, I think at a minimum, we might want to distinguish between the kinds of adjudications that are being conducted as adversarial or nonadversarial adjudications, we might want to structure the protections differently for judges engaged in those two different kinds of tasks.

MR. WHITE: Anybody else?

MS. TABADDOR: I would also add that looking at the nature, you know, as we said, the dealing with the immigration court issues, not only is it adversarial that's much more the traditional judicial paradigm but also looking at the nature of the claims.

So you know, Michael mentioned, you know, we're

dealing with, you know, constitutional principles. Even if you're putting it as a "civil proceedings", Supreme Court has recognized over and over again that banishment from the United States, exile, you know, these issues are much more similar to frankly criminal proceedings that bring with it those additional protections.

I guess my short answer is that I don't think you can throw everything in one basket. It doesn't mean that we don't have overlapping principles and certainly guiding principles that should help us, but I don't think -- I don't think it's going to work if you're going to throw everything into one basket.

MR. GREVE: Yeah, just to add to this a little bit. The way the German system works, actually, is they make distinctions between particular agencies and kinds of decisions.

So their so-called social courts, which deal with what we call Social Security cases, right, public insurance and benefit determinations, and so on and so forth. They're structured like the administrative courts. It's a three-tier system with the Supreme Court at the top. But it's separate from the administrative courts.

That system has its critics, but by and large, it

has proven stable because it makes a tolerable amount of sense. And that's the same kind of distinction I would draw.

The harder question is with respect to immigration cases, which in Germany are run through the ordinary administrative courts, that system almost crashed during the migration crisis because all of a sudden, you know, you had a million and a half new immigrants and hundreds of thousands of cases.

It survived that challenge. I'd keep the immigration system separate as -- in Ashley's fashion -- as an Article -- separate Article 3 system, one, because it is so intensely political that, you know, it would -- I mean, the inclusion of that system would bring everything else to a grinding halt, and second because of the sheer volume.

I mean, 1.3 million pending cases? Right? It would dwarf all of the other stuff that -- that -- that we've been talking about.

And so that tripartite, three-pronged system, you know, immigration courts, administrative courts, and leave the rest of benefit determinations with some form of central panel or reformed ALJ system that, to my mind, makes intuitive sense.

MR. WHITE: For the next question -- so go ahead,

go ahead, please.

MR. LEVY: Well, I was just going to say I think this question also goes to the larger problem of administrative law. To what extent do you have one administrative law that's essentially transsubstantive and applies across the board to agencies of various kinds, and versus to what extent do you have separate systems for particular agencies, each of which is unique and has its own different sets of laws and the like.

And the APA is really designed to have a little bit of both -- some overarching across the board principles that apply broadly but also some flexibility that's built in that allows different agencies to work and interact differently with the APA.

So I guess I would sort of be in favor of maybe trying to carry forward that model where you have core principles that apply broadly but then also allow variation as needed to address to the needs of particular (inaudible).

MR. CASS: One thought here before you move on, Adam. We've been talking a lot about trying to keep politics out of these decisions. I think there are decisions where you want politics in there, where

things are given to the executive branch to make determinations based on what the current policy is, which is obviously made in a political framework.

And I think we do have to distinguish between cases where that is an appropriate source of constraint on what the decisions are in the agency and situations where that may not be the case.

MR. WHITE: Ron, do you want to offer an example of that?

MR. CASS: I would love to offer an example of that if I had a handy one.

MR. WHITE: Okay. So I'm embarrassed to say, my question window on my app is frozen up. Jeremy Grabois (phonetic) from ACUS, are you on the line? Could you ask the question from Jeff Lubbers (phonetic), and when you begin to ask the question, I'll restart my app?

MR. GRABOIS: Yeah, happy to. So the question from Jeff Lubbers is for Judge Tabaddor. Could you sketch out the type of court you envision for what the IJs and BIA do now, would you have an Article 1 trial court for review in the circuit courts. In that scenario wouldn't the BIA and AG certification go away and wouldn't that be a very large court?

MS. TABADDOR: Thank you. There are a number of

different models that would work. The Federal Bar Association model is an Article 1 model. It's not an Article 3. I do think actually that the standard is Article 3, similar to -- are you hearing a feedback or is it just me? Okay.

So Article 3, similar to the bankruptcy court, and it would remove the certification authority. As I said, it would completely separate out and not just sort of the selection process, the administration process, but also remove the DOJ, the Department of Justice's sort of claim to policy making authority.

The Department of Homeland Security would obviously retain the authority that it has, whatever other sort of Congressionally delegated authority and policy making, but it would not have it within the -- within the Article 3 or Article 1 court.

And if the Federal Bar Association model does bring in an internal sort of all-inclusive appellate process, and it's designed to deal with the appointment clause, (inaudible) clause so that the appellate judges would be appointed in a bipartisan fashion between sort of staggered terms between different presidents, and then the immigration judges would be appointed through an advisory -- sort of a -- I would say like a magistrate judge process, where

there is an advisory committee given to the board panel, and then they would be selected. And they would also have removal protections similar to the judicial model.

MR. WHITE: Would anybody else like to weigh in on this one? Okay. The next question is from Phillip (inaudible), and he writes could one of the constitutional scholars -- everybody here I would call a constitutional scholar -- address whether the 500 immigration judges could constitutionally become an Article 1 court and still not be subject to having their decisions overturned by a political officer? Presumably, we can't have presidential appointments for 500 officers, so would they have to be subject to appointment and removal by a superior officer based on political considerations?

I mean, in general, there are these practical considerations of how do we get even if we can identify -- this is me saying -- even if we can identify a viable alternative, the political challenge of getting from here to there strikes me as astonishingly great including for my colleague Mike Greve's project. So Mike, maybe we'll start with you. Do you have any thoughts on this?

MR. GREVE: No. Not really. Look, the model I

had in mind is -- I mean, with respect to the specific question that just came up, the U.S. Tax Court is a bit like that, right? So you have those justices -- or chief judges on the tax court appointed, and they appoint their own -- whatever these people are called. Tax examiners. I can't remember what --

MR. LEVY: Special trial judges or something --

MR. GREVE: Yeah, something like that. I should know the answer. I could look it up. I can't remember.

So the numbers problem there doesn't strike me as -- as quite as dramatic as it might seem. You would obviously have that problem if you construe these -- or try to build these courts at Article 3 courts.

Look, I see the politics in the way, but you know, if that were the standard of exploring ideas, you know, I'd go to the golf course and stop thinking all together because everything is hopeless. So this is no more hopeless than other endeavors.

MS. TABADDOR: Adam, maybe I can jump in a little bit on that because it's near and dear topic to us. I think in terms of -- if you go down sort of the Article 3 model, if you take the bankruptcy court as an example, then it would be within the judiciary, and they would be selected from the Article 3 judges, and

the Article 3 judges are the ones who are nominated, appointed, and then the judges themselves would go through a regular selection process. Bankruptcy judges have a large number of judge corps as well.

But even in an Article 1 setting in terms of an independent court setting, the structure would be -- and that's why it's very critical, also, to bring in the entire agency, sort of eliminate the entire agency, bring in the appellate division, which are about 20 -- right now, they're 23, of course, you can make it whatever you want. But let's say a manageable size of anywhere -- 19, 21, and that it'll be staggered terms, and they would be appointed by the president and confirmed by the Senate. So you would address the appointment clause issues there. And then they would be able to appoint immigration judges. And that's completely doable.

MR. WHITE: Go ahead, Rick.

MR. LEVY: Okay. So I've never been able to figure out what Article 1 courts are. They're sort of nominally in the judiciary, but they're not staffed by Article 3 judges. And as we discussed earlier, are they exercising judicial power or are they exercising executive power?

If they're exercising judicial power, then any

kind of executive branch revision would seem to be constitutionally impermissible under Heyburn's case and Plaut versus Spendthrift Farms because only the judiciary can make a final decision in matters within the scope of the judicial power.

If on the other hand, they're exercising executive power, I don't know how they could be part of the judiciary, nor do I know how their decisions can be completely unreviewable by anybody in the executive branch.

So I'm very confused about Article 1 courts. I don't know why they're courts. I don't know why we call them Article 1 courts. I don't know how they can be constitutional either. But given the current doctrine, I would say they're something like courts, and therefore, their decisions would have to be unreviewable by executive agencies, and their decisions would be subject to appellate review within the structure of the judiciary rather than within the structure of the executive (inaudible).

MS. TABADDOR: Agreed.

MR. CASS: Yeah, I -- these courts can't be Article 3 courts. They can't be exercising Article 3 powers. They can't be exercising the judicial power. And so they can be seen as exercising executive power,

in which case they can be subject to executive review.

But then you have the question of the appointments and removal issues.

MR. WHITE: Rob?

MR. GLICKSMAN: Yeah, I just -- something what Rick said -- if the issue is whether Article 1 courts are judges or agencies, it turns out that you get different answers in the cases whether you're talking about constitutional issues or statutory issues like review under the APA. So that muddies the waters still further.

MS. TABADDOR: We're up against time. We only have about a minute left. Does anybody have any concluding thoughts? I'm sorry we're not going to get a chance to get to all of the audience questions, but does anybody have any thoughts in closing? Feel free to raise your hand? Judge, go ahead.

MS. TABADDOR: I just want to say for those who are interested in learning more about how to really help us to get to a win/win situation, feel free to reach out to NIAJ. That's NIAJ-usa.org. It's on our website, NIAJ-usa.org, and we would welcome collaborating with interested people. Including all the panelists, which I'm going to follow up with.

MS. TABADDOR: Great, everybody. You've got

homework assignments. Anybody else? That last discussion called to my mind one of my favorite papers in American Law and History, Federalist 37, where James Madison wrote that experience has instructed us that no skill in the science of government has yet to be able to discriminate and define with sufficient certainty its three great provinces -- the legislative, executive, and judiciary. So thanks, everybody, for confirming once again James Madison's wisdom.

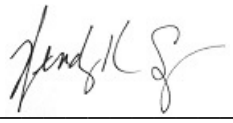
And maybe on that note, we'll bring this to a close. Thanks again to the Center for Progressive Reform and ACUS for co-organizing this program with the Gray Center. Thanks, especially, to ACUS, the ACUS team, for handling all the logistics on this. Thanks to our speakers for taking the time to share their thoughts with all of us today on this -- these crucial and timeless issues. And thanks, of course, to all of you for joining us for the conversation today. So with that, we'll bring this to a close. Please keep an eye on ACUS's calendar for future events on modern administration.

(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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