

INTRODUCTION

CHARTING THE NEW LANDSCAPE OF ADMINISTRATIVE ADJUDICATION

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In the first three years of the Trump administration, the president nominated and the Senate confirmed 187 judges to Article III federal courts, including two Supreme Court Justices, 50 circuit court judges, 133 district court judges, and two to the U.S. Court of International Trade.¹ To put that number in perspective, there are 860 authorized Article III judgeships.² So President Trump's appointees account for roughly one-fifth of the entire Article III federal judiciary. Enormous resources have been dedicated to this process, including millions of dollars and thousands of hours by outside organizations like the American Bar Association ("ABA") and other interest groups.³

Yet this focus on Article III judges is myopic. The federal judiciary today expands far beyond Article III. And I am not referring to just the 50 or so Article I judges who populate the territorial courts, the

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1. See, e.g., Colby Itkowitz, *1 in Every 4 Circuit Court Judges Is Now a Trump Appointee*, WASH. POST (Dec. 19, 2019, 7:32 PM), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html [https://perma.cc/TP9D-JGK9]. See generally *Judicial Appointment Tracker*, HERITAGE FOUND. (Feb. 19, 2020) [hereinafter *Judicial Appointment Tracker*], <https://www.heritage.org/judicialtracker> [https://perma.cc/T9GK-CPAW].

2. ADMIN. OFFICE OF THE U.S. COURTS, AUTHORIZED JUDGESHIPS 8 (2018), <http://www.uscourts.gov/sites/default/files/allauth.pdf> [https://perma.cc/VD3R-A55U].

3. See, e.g., Paul Kane, *Senate Democrats Vastly Outspent by Right in Gorsuch Fight*, WASH. POST (Mar. 18, 2017, 3:57 PM), http://wapo.st/2n1drcr?tid=ss_tw [https://perma.cc/JU7H-9A7M] (reporting Republican Party estimates that \$3.3 million were spent on ads to support the confirmation of now-Justice Gorsuch); see also AM. BAR ASS'N, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1, 1-3 (2017), <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.pdf> [https://perma.cc/FXX6-NAW9] (detailing the ABA's judicial-nominee evaluation process that has operated since 1953).

Court of Federal Claims, the Tax Court, the Court of Appeals for the Armed Forces, and the Court of Appeals for Veterans Claims.⁴ The overwhelming bulk of federal adjudication today takes place in federal agencies. There are more than 1900 administrative law judges (“ALJs”) in the federal administrative judiciary,⁵ plus more than 10,000 non-ALJ agency adjudicators who conduct evidentiary hearings that are required by statute or regulation.⁶ And these adjudicators do not engage in the hundreds of thousands of less-formal adjudications in countless regulatory contexts, conducted by tens of thousands of other agency officials.⁷

To provide just one point of comparison, through January 2020 the Trump administration’s Department of Justice (“DOJ”) has hired more immigration judges (248) than the Senate has confirmed Article III judges (187)—in total, more than half of immigration judges nationwide (466).⁸ Yet there is no ABA committee that rates proposed immigration judges or other agency adjudicators. There are no television ads run. The Senate plays no role in their selection—though Congress of course retains its oversight and appropriations authority. The president also oversees administrative adjudications to some degree. Indeed, earlier this year, the Office of Management and Budget (“OMB”) announced an ambitious plan to reassess agency adjudications in order to ensure that they “operate subject to

4. There are four Article I territorial judges and 16 judges on the Article I Court of Federal Claims. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 2. And there are currently 19 Article I judgeships on the Tax Court, *see* 26 U.S.C. § 7443(a) (2018), five Article I judgeships on the Court of Appeals for the Armed Forces, *see* 10 U.S.C. § 942(a) (2018), and between three and seven Article I judgeships on the Court of Appeals for Veterans Claims, *see* 38 U.S.C. § 7253(a) (2018).

5. *Administrative Law Judges*, U.S. OFF. PERSONNEL MGMT. (Mar. 2017), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> [<https://perma.cc/98A2-SWGD>].

6. Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 22 n.119, 32 (2019).

7. *See* Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679, 2703 & n.166 (2019).

8. *Compare* Itkowitz, *supra* note 1 (reporting that, as of December 19, 2019, 187 Trump-appointed Article III judges had been confirmed), *with* EXEC. OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: IMMIGRATION JUDGE (IJ) HIRING (Jan. 2020) (noting 466 total immigration judges as of January 2020, 92 of whom were hired in fiscal year (“FY”) 2019, while 28 were hired in the first quarter of FY2020), *and* Press Release, U.S. Dep’t of Justice, EOIR Announces Largest Ever Immigration Judge Investiture (Sept. 28, 2018), <https://www.justice.gov/opa/pr/eoir-announces-largest-ever-immigration-judge-investiture> [<https://perma.cc/Q9U3-5SMS>] (“Since the end of January 2017, 128 immigration judges have been sworn in.”).

requirements that ensure they are fair, speedy, accurate, transparent, and respectful of the rights of Americans.”⁹

This Charting the New Landscape of Administrative Adjudication Symposium, which commemorates the *Duke Law Journal’s* 50th annual administrative law symposium,¹⁰ thus arrives at a crucial time. Indeed, in many ways, the Symposium returns us to the beginning of the modern administrative state and the first years of the *Duke Law Journal’s* annual administrative law symposium. After all, the founders of the Administrative Procedure Act (“APA”) of 1946 were primarily concerned with administrative adjudication.¹¹ That continued to be the case for two decades after the APA’s enactment.¹² Then, in the 1960s and 1970s, courts, scholars, and policymakers turned their attention to rulemaking—perhaps viewing it as a more democratic and legitimate mode of administration.¹³ Professors Daniel Farber and Anne Joseph O’Connell effectively illustrate this shift by looking at the evolution of administrative law casebooks:

[A]s late as 1974, the Gellhorn and Byse casebook in the field devoted only twenty-two pages to rulemaking proceedings, which mostly was a lengthy excerpt from a single case limiting the use of formal rulemaking. By contrast, it devoted two chapters (281 pages) to adjudication. . . . Even more strikingly, the first edition of the Davis casebook in 1951 dedicated only three pages to notice-and-comment rulemaking, though it gave a whole chapter to formal rulemaking, which uses essentially adjudicatory techniques.¹⁴

In the past few years, however, administrative adjudication has begun to receive renewed attention—and scrutiny. The Supreme Court has recently considered constitutional questions regarding the appointment of ALJs¹⁵ and the limits of agency adjudication under

9. Request for Information: Improving and/or Reforming Regulatory Enforcement and Adjudication, 85 Fed. Reg. 5482, 5483 (Jan. 30, 2020).

10. For more on the 50-year history of the annual administrative law symposium, see Randolph J. May, *Foreword: The Symposium at Fifty*, 69 DUKE L.J. 1681 (2020).

11. See generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1575–77 (1996).

12. See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1143–44 (2014).

13. See Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 456 (1986) (describing an emerging need for rulemaking to complement a spate of new statutes in the 1960s and 1970s).

14. Farber & O’Connell, *supra* note 12, at 1144.

15. See *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (considering whether ALJs are “Officers” within the meaning of Art. II, § 2, cl. 2 of the Constitution).

Article III.¹⁶ In response to *Lucia v. SEC*,¹⁷ the president issued an executive order that radically alters the process for selecting and appointing ALJs,¹⁸ and DOJ has issued similar guidance to federal agencies.¹⁹ Several large-scale studies of agency adjudicators and adjudicative procedures have been published.²⁰ These studies have greatly informed an increasingly robust debate about the current landscape and future of administrative adjudication. This debate has high stakes for matters of national concern, most notably in the areas of patent law and immigration.

The contributions to this Symposium nicely capture and advance the debate. Professor Emily Bremer sets the stage by mapping out the great diversity of adjudicative systems in the modern regulatory state and arguing for more uniformity in those systems.²¹ The former observation has been an emerging theme in the literature. For instance, in 2016, the Administrative Conference of the United States recognized an important tripart categorization of agency adjudicative systems: Type A adjudication is the classic, formal adjudication prescribed by the APA and normally presided over by an ALJ; Type B adjudication is similarly formal but occurs outside of the APA's formal-adjudication provisions, where non-ALJ agency adjudicators are required to hold a hearing by a statute, regulation, or executive order; and Type C adjudication is the residual category for less-formal adjudications where no evidentiary hearing is required.²²

In other words, the new landscape of administrative adjudication is yet another example of Farber and O'Connell's "lost world of administrative law" in that "the actual workings of the administrative state have increasingly diverged from the assumptions animating the

16. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018).

17. *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

18. Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018).

19. Memorandum from the Solicitor General, U.S. Dep't of Justice, to Agency Gen. Counsels, Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) (July 2018).

20. See, e.g., MICHAEL ASIMOW, ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (Admin. Conf. U.S. ed., 2016), <https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-updated-draft-report.pdf> [<https://perma.cc/7JTH-J2VF>]; Barnett & Weaver, *supra* note 6.

21. Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749 (2020).

22. Adoption of Recommendations, 81 Fed. Reg. 94,312, 94,314–15 (Dec. 23, 2016). The ABA adopted the same categorization a decade earlier. See AM. BAR ASS'N, RESOLUTION 114 (Feb. 2005), https://www.americanbar.org/content/dam/aba/administrative/administrative_law_judiciary/resolution_114.authcheckdam.pdf [<https://perma.cc/88ZY-A3Y3>].

APA and classic judicial decisions that followed.”²³ As Bremer underscores, however, it is not a new world just because the vast majority of adjudications take place outside of the formal provisions of the APA; there is also an APA-departing norm of “exceptionalism” in the new world of agency adjudication—“a presumption in favor of procedural specialization and against uniform, cross-cutting procedural requirements.”²⁴ Bremer chronicles this new world of exceptionalism, ultimately concluding that administrative adjudications should be more uniform.²⁵ Such a move toward uniformity—perhaps accomplished by creating a federal administrative adjudication “bill of rights” of sorts—would be, in my view, a welcome development. It would not at all surprise me if OMB’s current efforts to reform administrative adjudication moved in that direction and drew substantially from Bremer’s important contribution to this Symposium.

Professor Kent Barnett’s contribution turns to the constitutional tensions in agency adjudication introduced by recent Supreme Court decisions.²⁶ As Barnett explains, there is a tension between political control and independence: agency heads now have the ability to remove agency adjudicators essentially at will—thus risking the decisional independence and impartiality due process may require—and Congress lacks the authority to protect such agency adjudicators from at-will removal.²⁷ Barnett proposes a novel solution to this constitutional quandary: drawing on principles of internal administrative law, he suggests that the executive branch should bind itself by promulgating impartiality regulations that reinstate a merit-based appointment process as well as a good-cause removal standard and accompanying procedural protections from removal.²⁸

This is a fascinating proposal—one that merits consideration by OMB in its current efforts and by subsequent presidential administrations that may be even more interested in ensuring

23. Farber & O’Connell, *supra* note 12, at 1140. Melissa Wasserman and I have compared and contrasted these lost and new worlds of agency adjudication in greater detail. See Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 148–57 (2019).

24. Bremer, *supra* note 21, at 1752.

25. *Id.* at Part III.

26. Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695 (2020).

27. See *id.* at Part I (discussing, inter alia, *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2020); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Wiener v. United States*, 357 U.S. 349 (1958)).

28. See *id.* at Part III.

impartiality in agency adjudication. If the proposal sounds familiar, that is because it is modeled after DOJ's special-counsel regulations that facilitated Robert Mueller's high-profile investigation of the 2016 presidential election.²⁹ If Barnett's approach is adopted, it will be interesting to see if litigants—or future administrations that may disagree with the impartiality regulations—raise constitutional concerns with the regulations or otherwise argue that the president nevertheless retains the constitutional authority to remove agency adjudicators at will.³⁰ And it will be even more fascinating to see how the courts deal with such challenges.

The final two contributions take an empirical turn. Professors Catherine Kim and Amy Semet explore the role of presidential ideology in immigration adjudication—one of the most prominent Type B adjudications in the new landscape of agency adjudication.³¹ There is a rich empirical literature on immigration adjudication, which largely underscores the disparities in rulings among immigration judges and the importance of legal representation (or the lack thereof) in adjudicative outcomes.³² Using a dataset of more than 600,000

29. See *id.* at Part III.A.1 (citing 28 C.F.R. §§ 600.1–600.10 (2018)).

30. Compare Steven G. Calabresi, *Mueller's Investigation Crosses the Legal Line*, WALL ST. J. (May 13, 2018, 1:49 PM), <https://www.wsj.com/articles/muellers-investigation-crosses-the-legal-line-1526233750> [<https://perma.cc/QK8W-2V8C>] (“Mr. Mueller’s investigation has crossed a constitutional line, for reasons the U.S. Supreme Court made clear in the 1988 case *Morrison v. Olson*. . . Chief Justice William Rehnquist’s opinion for the court, while upholding the statute, set forth limits that the Mueller investigation has exceeded.”), with George Conway, *The Terrible Arguments Against the Constitutionality of the Mueller Investigation*, LAWFARE (June 11, 2018, 5:54 PM), <https://www.lawfareblog.com/terrible-arguments-against-constitutionality-mueller-investigation> [<https://perma.cc/6UU4-7KUH>] (disagreeing with Professor Calabresi because, *inter alia*, “the special counsel regulations can be unilaterally revoked by the very executive branch that unilaterally created them”), and Josh Blackman, *Can the Special Counsel Regulations Be Unilaterally Revoked?*, LAWFARE (July 5, 2018, 7:22 AM), <https://www.lawfareblog.com/can-special-counsel-regulations-be-unilaterally-revoked> [<https://perma.cc/573V-F4F8>] (“Conway is probably correct, but there is enough doubt on the point that courts could sufficiently impede the president’s rescission power to raise precisely the sort of separation-of-powers problem his piece argues does not exist.”).

31. Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention*, 69 DUKE L.J. 1855 (2020).

32. See, e.g., Ingrid V. Eagly & Steven Shafer, *A National Study of Access To Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 30–44 (2015) (finding disparities between judges in granting immigrants additional time to find counsel); David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1213 (2016) (finding immigrants are treated unequally because immigration judges differ in how much help they provide immigrants in finding counsel); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (noting that represented asylum seekers were granted asylum at a rate almost three times as high as those without legal counsel).

individual custody decisions, Kim and Semet find that “on every metric of bond hearings, noncitizens fared worse during the Trump Era than they did during either the Bush II or Obama Eras.”³³ These findings contribute greatly to an important inquiry into the role that presidential influence or political control plays in agency adjudication. This issue has taken on extra significance following the rise of political control of agency adjudication documented by Barnett in his Symposium article.³⁴

In their contribution to the Symposium, Professors Michael Frakes and Melissa Wasserman shed empirical light on trademark adjudication at the U.S. Patent and Trademark Office (“USPTO”),³⁵ a fitting complement to their previous pathbreaking empirical work on patent adjudication at the USPTO.³⁶ In this study, they study decisions by trademark-examining attorneys, thus moving beyond Type A and Type B adjudication, and passing into the realm of Type C adjudication. And this is another high-volume adjudicative system. For instance, their dataset includes more than 7.8 million trademark applications adjudicated by more than 1300 trademark-examining attorneys from 1982 to the present.³⁷ On a variety of measures, they find “substantial variation in outcomes across trademark-examining attorneys,” which “remains true even after accounting for a rich degree of application characteristics that may also impact these outcomes.”³⁸ Such disparities, they rightly point out, raise essential questions of fairness, equity, and social welfare—concerns shared throughout the new landscape of administrative adjudication.

This Symposium charts much of the important terrain in the new landscape of administrative adjudication. Our federal judiciary today has moved far beyond Article III courts. We have also moved beyond the APA’s vision of the federal administrative judiciary, which consists of ALJs conducting hearings under the APA’s formal-adjudication provisions. Today, the vast majority of federal adjudications take place outside of Article III courts and APA formal adjudications. In

33. Kim & Semet, *supra* note 31, at 1865.

34. See Barnett, *supra* note 26, at Part I.

35. Michael D. Frakes & Melissa F. Wasserman, *Are There as Many Trademark Offices as Trademark Examiners?*, 69 DUKE L.J. 1807 (2020).

36. See, e.g., Michael D. Frakes & Melissa F. Wasserman, *Patent Office Cohorts*, 65 DUKE L.J. 1601, 1601–02 (2016) (finding the year that a USPTO “examiner was hired has a lasting effect on her granting patterns over the course of her career”).

37. Frakes & Wasserman, *supra* note 35, at Part III.A.

38. *Id.* at Part IV.

particular, more than 10,000 other agency adjudicators hold hearings to adjudicate hundreds of thousands of matters each year. And thousands more adjudicate matters without even a hearing. It is safe to conclude that this Symposium will not be the last word on the new landscape of administrative adjudication. But the contributions in this Symposium will no doubt help frame those debates and discussions for years to come.