Bennett Nuss (BN) Hello and welcome to another episode of A Hard Look, an administrative law podcast brought to you by the Administrative Law Review, Washington College of Law and the American Bar Association. My name is Bennett News, the Senior Technology Editor of the Administrative Law Review, and supporting me in the booth is the unrivaled Anthony Aviza, ALR’s Technology Editor.

Before we begin, please note that the positions views and ideas advanced by speakers on this podcast are representative of themselves alone. Their positions cannot be fairly attributed to the administrative law review, Washington College of Law, the American Bar Association, nor any other organization to which the speakers may be affiliated.

To those who may not be aware, the American Bar Association has a number of member groups to which lawyers may voluntarily join called sections. These groups generally surround practice or disciplinary focuses from items as wide ranging as litigation and law practice to specific areas like intellectual property and criminal justice. Most importantly for our current guest is the Administrative Law and Regulatory Practice section, which works to advance the knowledge and discipline of administrative law as well support the publication of the Administrative Law Review. The current chairman of the Administrative Law and Regulatory Practice section joins us today to talk about his work, the work of the section, and look to the immediate future of administrative law and where the uncertain future of the discipline will take us.

Adam White is the current chairman of the American Bar Association's Administrative and regulatory law craft section, but this is only one of his several roles among vaunted institutions. He is also a senior fellow at the American Enterprise Institute, a DC based think tank where he regularly writes on the Supreme Court and Administrative Law. He also co directs the C. Boyden Gray Center for the Study of the Administrative State at George Mason University’s Antonin Scalia School of Law, and he is a senior fellow at the Administrative Conference of the United States. In 2021, President Biden appointed him to the Presidential Commission on the Supreme Court of the United States as well. He writes broadly on the Supreme Court and Administrative Law and is a regular contributor to the Yale Journal on regulations notice and comment blog to which I am proud to announce that ALR forgives him for.

So thank you for coming on to the show Adam!

Adam White (AW): Thanks guys. I really appreciate being here, I appreciate you not taking offense at my writing habits elsewhere.

BN: No worries. So just getting right into it. So for those that may not be aware precisely of the intricacies that the ABA does when it comes to our specific field, what exactly does the regulatory practice section do in terms of interacting with the administrative law community?

AW: Well, it does a lot. I mean, I'm really, really excited to not only be on the podcast but to, to have a year to be a steward of the Ad laws section as we often call it, the Ad laws section does a few things. I mean, first and foremost, it exists as part of the ABA to further the ABA’s broader mission of legal education and professional development. And so a lot of what the section does, maybe the most important things, are its work through its annual fall conference and spring conference and other programs to bring together lawyers and, and academics and others to really think hard and teach about the development of administrative law, and there's a lot to talk about these days given that there's a lot of debates which I'm sure we'll get into.

But the section also does a lot more as you of course know, we support the Administrative Law Review and we're very, very proud to do that. It really is the key journal on administrative law as its name suggests. We also put out a magazine of our own administrative law and regulatory news where we bring together recent developments in the courts in Congress and Legal Practice and elsewhere in a, in a magazine format, we also support the aforementioned Yale journal and regulation blog titled, Notice and Comment. Between notice and comment and a hard look, we're running out of ad law terms to name new media publications after, but we're very, very proud to do that.

It's a nice complement to the administrative law review. It's a chance for scholars to write quickly and briefly but not, but not flippantly on fast moving developments in the law. And beyond that, I know I'm leaving some things out, but we just, we do so much and we're always thinking sort of collectively at leadership level on how we can make the section more useful, more valuable to experienced lawyers and new lawyers, lawyers in academia in government and nonprofit sectors.

And in the private sector, the administrative law section has a big, big history of playing an important role in administrative law all the way back to the, the 75 years or more to the creation of the Administrative Procedure Act and the debates that preceded it. We've had some great, great chairs over the years, surely most famous was Antonin Scalia, who chaired the section in the early eighties. And also my, my mentor, I used to practice law with him.

And now, as you mentioned, I, I co direct a center at George Mason's law School that bears his name, the C. Boyden Gray Center. So, we've got a great history and as I said, it's a real honor to be a steward of, of that legacy and help bring the section forward.

BN: Yeah, absolutely. So moving a little bit to administrative law and expanding it in the field of kind of. the professional realm of understanding, you're really the face of the ABA’s effort to broaden its reach to try and interact with more lawyers who may not be wholly familiar with administrative law, especially considering that it kind of goes to the core of the bounds of constitutional powers in the United States. And it's central to a lot of debates that we have in politics and law and just in the kind of public domain.

So you obviously as a person have your own views, but the administrative law field is very broad in terms of the different people that it represents and those people have different ideas. So what kind of challenges has that presented in trying to be this neutral kind of director of the spreading of the good word of administrative law as it were?

Well, I wanna say right off the bat, I, I don't think I've ever been described as the face of anything and that's probably for good reason! So I don't know that I'm, I should be the face of the ABA either, except maybe in, in its audio format, but I'll, I'll say you're exactly right that the section's work is relevant to a lot of people and not just people of diverse professional backgrounds and, and other diverse backgrounds, but also just in their views of administrative law as it currently exists, as it's recently existed, and as it may exist in the years ahead, this is a moment in which you're seeing fundamental debates. And I'm, I guess we'll unpack this later, surley, but we're seeing fundamental debates over timeless questions in administrative law and also some new questions.

And so one of the real keys, I think for the, for the section and I, I keep this in mind in as a steward of the section is the importance to really lean into that, to really foster debate, to bring in a variety of voices. Allow the section and its programs to really be a place for a thoughtful conversation and not just debate and argument but actual dialogue and conversation where people can learn from each other, both from, again, from their different views of what the law should be and also their different professional backgrounds, let's say at this point in time, the ad law section is probably more, this is just my sense of it.

I might have this wrong but my sense just from our programs the last 10 years is that we've become more and more…I don't know the right word is, but, but our membership and our most active participants are, are more and more drawn from academia and from government lawyering. I think there has been a little bit of a step back in, in and among the private bar and I do worry about that a little bit. I do worry that there's a, there's a risk that the, the section itself might come to be seen as more and more academic or disproportionately academic.

And so I think one of my roles and get coming back from my own background as having been in private practice for about a dozen years before I joined the world of think tanks and law schools is to, is to always have an ear out for opportunities to really engage the private bar, not just as an audience, but as contributors and, and that's one of my, my main priorities not in a heavy handed way. I mean, John Roberts, he often says that the, Supreme Court, the chief justice holds the rein lightly, lest you find out it's not attached to anything. And I mean, frankly, as the chair of the AD law section, I have even less power, institutionally. And my, my goal is, is to be a voice for all parts of our work, but especially the ones that are, are, are a little less represented than they used to be.

BN: And kind of extending off of that, it's hard to get students interested, even students coming from where I am as a law student, it's hard to get students interested in administrative law because it's not a doctrinal class. It's entirely elective at practically every law school that I'm familiar with.

How can you get people who may not be academically vested in the discipline and get them interested in studying this field of law that tends to kind of play by its own rules sometimes.

AW: Well, we're helped by the fact that administrative law is increasingly the center of gravity of the Supreme Court's docket. Although I guess now we're, you know, we're in an election year so I'm sure elections will be the center of gravity of the court's docket for the coming year.

But you've seen in recent years, more and more cases involving different aspects of administrative law in this current term in the Supreme Court, we're seeing cases involving everything from Chevron deference and administrative law judges to the funding structure of the Consumer Financial Protection Bureau, and so I think law students may become more and more interested in the years ahead in administrative law simply because it's going to be in the news, in the legal news a lot more.

Also, I think, as administrative agencies have become sort of the center gravity of modern policy making, you're seeing more and more debates around the agency processes themselves, and I think that's gonna have a real effect of getting students interested.

Thing is though administrative law is incredibly hard to teach, I really respect the professors who do, who do it well and who create really engaging casebooks. I taught Administrative law for, I think four years at George Mason first as an adjunct and then as an assistant professor and I just found it, I mean, as a geek over administrative law, I love teaching it, but it, it's very daunting as to where you actually bring students into the material. What's the right point of entry?

Because by the end of the class, everything you've learned over the course of the semester is going to inform everything that you've learned over the semester, right? The Chevron deference cases will look a little different, the more you learn about agency structure and process and judicial review more generally, and vice versa.

And so I think for students where I'm going with this is for students, I don't blame them for maybe shying away from administrative law because it's incredibly hard to teach, it's incredibly hard to structure a casebook around. And, and I think that makes it more daunting then for students who might take it but might have heard that it's a, a very, very difficult and let's face it sometimes a little dry class for every big case over Chevron deference or something big. You know, there's a bunch of cases from the 1970’s about fuel regulation that are going to be the subject matter for all kinds of administrative law cases and full of acronyms like FERC and so on. And that's a federal Energy Regulatory Commission for the folks keeping the score at home. And it risks being really, really dry when in fact, what it is is “constitutional law as applied in modern government”.

BN: While we're on the subject of schools and academia, and as while we're talking about kind of developing lessons and methods of getting students and people that may be interested in the more academic side of the law involved, we kind of turn naturally to your work with the C. Borden Gray Center. As one of the directors of the center, you do have this kind of unique position of being able to direct an entire center dedicated to the study of administrative law. And so what would you say your mission statement for the center is, and how is that mission related to how the Center puts out its work?

AW: Well, I'm really, really lucky to get to do the gray Center. I sort of came into it on accident by the way, it was created around 2015 by then Professor Naomi Rao. She's an old friend of mine, and so when she, when I was at the Hoover Institution in those days, and when she got called by President Trump to go to the White House to lead OIRA, she asked, hey, Adam, could you just maybe help run this program for a year or two until I come back?

Little did we know she'd become a DC circuit judge, and she ain't coming back. So I've now been directing or co directing the Gray Center for 6.5 years, which is far longer than I expected to. But I really, I really, really love it.

To actually answer your question, our mission is first and foremost to be a of a home for these debates, these debates over timeless questions and new ones, debates in academia among policymakers and in the courts and to really bring together of these flourishing academic debates and the really hard questions of actual day to day governance and litigation. So the core of what we did from the start was re was hosting research roundtables where we bring in scholars from all sides of these issues to write and discuss deliberate debate.

And for years now we've posted working papers that have gone on to be published in law reviews and cited, I think at this point more than 2000 times by judges, justices and other academics. But now as we've grown, we do a variety of other things.

We, we have a clinic that files briefs,, students work on briefs and they, they file them in the courts of appeals and the Supreme Court, we have big conferences, we even have a podcast of our own.

Everybody, I guess everybody's got a podcast, but we have a podcast of our own, called Gray Matters, because we couldn't think of an even worse pun. And we do a lot to educate and really connect ideas to these public policy debates.

But, and this is bringing it back to the ABA Ad Laws section. You know, when I helped to take over the Gray Center in 2017, I had already at that point been a litigator and a writer on a lot of these issues. I'm a center right conservative and I've been writing along those teams for a long time.

And so I really bent over backwards from the start of my, my stewardship of the Gray Center to really make clear to my friends that I disagree with that the Gray Center would be a place worth engaging, a place worth coming to, worth debating.

We've supported a lot of legal scholarship that I totally disagree with on the merits of it, because I think debate and research is important regardless of whether I happen to agree or disagree with the conclusions that a particular researcher reaches. And I'm very, very proud of that.

BN: Going to some of that output and kind of the ideological bent of the Center, and this is to its credit, it tends to be a little bit more critical than most other publications writing on the Administrative State, including the sister publications to this podcast at the Administrative Law Review. And to as the Gray Center generally to borrow a phrase from William F. Buckley “stands athwart for history” in many instances. It kind of places it at odds with many prominent scholars in the field of the study of administrative law who tend to focus their research on how best can the state respond to an issue within the extent of these constraints or within the extent of its powers as it can envision them. What kind of challenges of this general opposition to most of the voices in the sphere of administrative law present for the Center and its general impact and reach?

(AW) Yeah, well, I mean, first and foremost, just to point out a lot of the leading scholars who you might classify as being on the other side of the some of these issues than me. However, they are often active participants in Gray Center programs and they've written papers that we've, we've supported with research on area, like again, even though I disagree with them.

I'm very proud of that, they participate in our programs that take it as a real vote of confidence that what we're doing is serious. The Buckley quote is sort of ironic here when you say we're standing athwart history, yelling stop. Sometimes I actually think in administrative law, it's weirdly enough, It's actually the other direction. That some of the most sort of “small-c” conservative voices in administrative law. The ones who want to keep things the way they are my friends who on loosely speaking, the left or the center left, who sort of like the status quo and administrative law.

Of course, that encompasses a variety of issues, but which is very generally speaking, they like the status quo, they thought the status quo was legitimate on a variety of levels and, and defensible and needing defense. Whereas I think a lot of the “capital letter c” Conservatives, political conservatives who are in administrative law now are actually the ones sort of pushing a kind of progress forward. At least they're advocating for change in some ways, a return to much older things, like a view of the, the, the, the original constitution, but also push forward.

To really grapple and this is myself to really grapple with some of the modern realities of administrative agencies that I just don't think administrative law up till recently really took seriously real innovations and agency structure and process, and just the innovative ways with which agencies are able to make policy and regulate sometimes outside of rulemaking processes or agency adjudication.

And so in that respect, the Gray Center, I think is the Conservatives like me and my co-director Jen Mascott, I'd like to think that we're the tide of history and that my, my friends are the ones trying to stand to thwart us, but they probably disagree with that, right?

BN: And just as a quick extension off of that, the way that you kind of characterized, how kind of politics and political leanings look at administrative law. Do you think it would be fair to say that administrative law might not be best looked at through a conventional left/right lens and more through the lens of if people see the state as working and whether there needs to be a little bit of change versus an overhaul of how the administrative state operates and runs?

AW: Yeah, I think that's fair and I, and that's why I sort of pause and hem and haw, every time I, I use the word conservative or progressive or center right center left in these conversations because it doesn't just easily map from political left/right onto administrative law debates.

Now there is a to be fair, a lot of overlap, right? Political conservatives tend to be much happier with the Roberts Court's recent decision on administrative law than political progressives. But I think there's a variety of debates happening under the surface.

There are debates about expertise and not just expertise in the sense of, you know, technocratic policy making expertise, but judges are a kind of expertise and expertise in the law. And you have some people who are put much more confidence in judges than, than in other parts of, of government. And that works on both the right and the left.

So you have debates about expertise, and on the flip side, debates around democracy and democratic accountability also have interesting debates about just the speed of the administrative process.

Right now, there's a number of my friends on the center-left who are very worried that it's impossible to build anything in America anymore, and for the last 25 years, that's largely been a conservative or libertarian argument, right? That, that the environmental laws have made it and other laws have made it impossible to build infrastructure in this country.

Now, a lot of my friends on the left and center left, who are focused on climate change are very, very worried with how difficult it is under things like the National Environmental Policy Act and, and the California Environmental Quality Act to build infrastructure.

And so you get interesting debates across the usual ideological categories there too. So again, it's one of the reasons why I find this area of law and policy so endlessly interesting. It’s why others should too and join our section and pay dues! But it's, it is definitely more complicated than the easy left right categories that we usually think of.

BN: So going off of these kinds of less conventional debates that are held within administrative law spheres, and as we've also mentioned that administrative law is kind of esoteric and people tend to just not really understand what's going on. They just see judges saying that the government can or cannot do X or Y without probably much basis for why. Do you think that practitioners and scholars within the administrative law field itself could make good use of more public facing events and outreach to try and explain the doctrines in a more cognizable sense in exactly what's going on?

The reason I'm asking is because generally, this lack of understanding seems to be a perennial problem across the board, not just with students, but also with journalists, politicians, people who are invested in these kind of policy debates that often occur within the field of administrative law. Rectifying this lapse of information between academics and practitioners versus people who are affected by these decisions seems to be a focus that might be worth looking at. Do you agree?

Yeah, I do agree. We just had our big annual fall conference and had more than 1000 people register to watch. It's all, it's, it's now a, an all-virtual conference. So we can make it available to people across the country.

We had a huge conference and I thought it was very, very successful, which I guess I would since I was the chair for it. But I always worried a little bit in the planning process that I had failed to really get broader groups engaged in the planning process. We had a great, great set of panels and to the great credit of the four co-chairs, who really put together a great program.

But my failing in it was to not bring in more speakers from the private sector from groups that additionally don't engage the ABA’s section as much, you know, just today, the White House Office of Information and Regulatory Affairs set out its latest guidance on outreach to, to groups that generally don't participate in this process.

And, I feel like maybe I should have done something similar with the fall conference to really broaden our appeal beyond our core base and our core base is great. It's 1000 plus people, but it was, you know, mostly academics and government lawyers.

And I, I worry that the section is at risk of losing touch with these broader legal and nonlegal communities. And this is a crucial moment. As you, as you point out, there's a lot changing, there's a lot happening in the courts, there's a lot happening in the White House and in agencies and in Congress, and States by the way, are really experimenting in really, really interesting ways. It's something we focused on at the Gray Center, and so there's a lot that could be ha there's a lot of benefit to be had in more discussions, more, more deliberation, more debate. And I think it's important for this section to, to play that role.

Now it becomes tricky when you're trying to bring academic research to those debates because academic research at its best doesn't happen quickly. It's thoughtful and deliberative, not reactive or reactionary, and so there is, there's just an inherent limit in how you can bring academic thought to fast changing debates.

But it, so there's a limit but, but the section like what we do at the Gray Center really should, should have a goal of, of being in the long term a transmission belt from, from great academic ideas to real lawyer education and real judicial decision making.

And by the way, the transmission belt should go in the other way too. The academics should not always be in the transmit mode, they should sometimes be in the receive mode and not just from their colleagues. But from what's happening in the real world, I think the best legal scholarship is scholarship that does take the reality of administration seriously, and that's something I, I think we could probably do a better job of in the section.

BN: As you kind of alluded to, this coming year is going to be a big year, not just because of presidential elections and all of the chaos surrounding that, but because the Court is taking on a lot of really fundamental administrative law sections, we've harped on a lot about Loper Bright on this podcast probably to a nauseating degree to some of our listeners, but there are other cases involved too that have some really fundamental questions going on as to how the administrative state operates.

And so how do you see the future of administrative law changing in this next year following what the Roberts Court may or may not do and while, you know, while trying to gaze into the future isn't really our profession, trying to figure out how the landscape might change. I think it's kind of an important question to ask.

AW: Well, it really is, and just the cases we've already referred to the administrative law cases, they cover some really different aspects of administration, right from Chevron Deference in judicial review to the, the, the, the adjudication of cases by in-house, ALJs. And then again, the question is about the structure of agencies and their funding.

So it's, it's probably impossible to say: “Here's the theme, like here's where it's all headed.” It might be that different, different groups of justices or judges will, will, you know, tackle different issues in different ways.

And it's hard to find a unifying theme, but I'd say the most underrated unifying theme, this doesn't answer everything, but I think it a actually answers more than people might notice, is that I do think that the center of gravity of the Supreme Court right now is very wary of the administrative state has a sort of habit of flip flopping. You know, every presidential election is kind of the everything election, every everything is on the table.

A new administration comes in with a full head of steam and a big stack of executive orders and makes a bunch of new policies and takes down a bunch of old policies and the agencies get to work on new policies and then they get bogged once the policies are ready. Two years later, they get bogged down in district court litigation and on and on. It's very unsettled and unsettling.

And when you go back and read the Federalist, which I, I highly encourage when you read the Federalist on administration, so, like papers basically 68 to 76, you get what Hamilton especially was very worried about administrative instability, what they called mutable administration. Just constant changing of trajectory by administrations, and it's even more significant in our own time since agencies do so much more.

But I, I'd say a lot of what the court is reacting to right now is the fact that we kind of live in Alexander Hamilton's nightmare when so much can change so quickly based on basically one presidential election at a time. And so across the board, you've seen cases whether it's Chevron deference to the major questions doctrine where the court is in effect, limiting agencies sort of capacity for change. And people focus on those cases right now, but go back five years and look at the cases during the Trump administration, look at the cases on the census and on DACA, those were cases where the majorities of the court were slowing the pace of change. Go back even further when in the Obama administration, when the court decided the King v. Burwell case involving the insurance subsidy provisions of the Affordable Care Act. Chief Justice Roberts writes the opinion and he says off the bat, this is not going to be a Chevron deference case. Why? Well, he gives a few reasons, but one of the reasons he gave at oral argument was if they gave the agency Chevron deference, then the next agency would change and then the next agency would change. It'd be a recipe for disaster. So I think that theme actually is the underrated theme. It might be the central theme of the next 10 years of the Roberts Court. A return to steadier administration, more limited flip flopping by agencies. There are drawbacks to that, a lot of them, but I think the court really is right to worry about how unsteady modern administrations are.

BN: Kind of extending off of that. I mean, it's steady administration is kind of an interesting topic to look at because if you're looking at some of the new additions to the court within the last decade, I'm speaking specifically of justices, Gorsuch, Kavanaugh and Barrett, they all uniformly seem to share this general skepticism of the administrative, process, which isn't really the same kind of motivation if you look at administrative decisions that have been handed down by Justice Roberts especially, but also to a lesser extent Justice Thomas.

Do you think that this kind of shift towards overwhelming…or not overwhelming, but kind of omnipresent skepticism is going to change this kind of emphasis on trying to make administration steady? Or is it going to turn into this whole “we need to return to Article One Supremacy” movement in a way?

AW: Well, even among those three recent justices, three of the four newest justices now, I guess, you're right that each of them has a kind of skepticism, but even among those three, it's interesting to see different flavors of that skepticism. Right. Justice Barrett writes an opinion in, was it the student loan case, I guess Biden versus Missouri, where she says, yeah, her concurrence where she says, hey, here's what I think the major questions doctrine is actually about and oh, by the way, it's different from what every other conservative justice has sort of described the major questions doctrine as being about.

Gorsuch has been wary of administrative agencies discretion all the way back to his time on the 10th circuit where he wrote really interesting decisions, opinions sorry about Chevron Deference and our deference often in immigration cases, where he very clearly was sympathetic to say Philip Hamburger's worry that judicial deference had become judicial abdication and really was reducing the power of law to protect people's rights.

Kavanaugh meanwhile agrees with a lot of that, but he in other opinions has actually been worried about the courts doing too much to micromanage agencies. He had an opinion in a DC circuit case years ago called American Radio Relay League where he worried that a lot of modern administrative law, the Portland cement rule and things like that were actually an unlawful addition to the APA that it was a case of judges, really micromanaging agencies in a way they weren't authorized to. So you're seeing, you're definitely seeing skepticism but, it is subtly different from justice to justice. Maybe my favorite article on this with all due respect to ALR . It was not an A LR, but it was a Gray Center paper. It was a paper that, Jeff Podowski of Notre Dame wrote for a Gray Center round table. It was later published in another prominent law journal. I won't say which one because I know we're not here to advertise other law journals. But it was called Neoclassical Administrative Law with a question mark. And what he was really trying to do was think through the differences between judicial review of, of text versus process versus reasoning and really think through where different kinds of judicial skepticism might come to be brought to be bare in different parts of administrative law.

BN: Well, I mean, I guess we're going to really have to see how these kind of different flavors materialize themselves over the next term. And that kind of brings us into kind of a preview for the 2024 Administrative Law questions that are yet to go up on or have already been argued and haven't been published yet, at least at the time of recording or that have yet to be argued generally.

So the first case that I kind of want to mention, it's one that you're kind of intimately familiar with is CFPB v. Community Financial Services Association of America, which specifically has to deal with the funding of how or how the government funds the CFPB which the litigants are arguing violates the appropriations clause of the constitution. And if the lower court's verdict is upheld, meaning that the CFPB is improperly funded, what changes can we expect to see in the administrative state going forward if independent agencies are unconstitutional in their funding via the appropriations clause?

AW: Yeah. And my background with the case as you allude to is that a little over a decade ago when I was still a practicing lawyer, I joined up with my friend and mentor C. Boyden Gray. He just started a law firm Boyden Gray and Associates and we were co-counsel in the original constitutional challenges to the CFPB and other parts of Dodd Frank. And in the CF B case, we challenged the agency's independence from the president which ultimately became the issue in the Seila law case. And we also, in our case, brought a challenge to the CFPB’s funding structure. Which always sort of got left to the side when, judges would decide these cases. Although before mentioned, Justice Kavanaugh, when he was a judge, he had a footnote in one of his cases involving the CFPB where he kind of shrugged off the funding issue. He didn't need to decide it in that case since they decided on the executive power issue. But I think he referred to the funding structure as at most a not more unconstitutional icing on an already unconstitutional cake or something like that. So this issue has kind of lingered on the sidelines for 12 years and it was quite frankly, it was my pet issue, when I was a lawyer on those cases. And so I've always been interested in it. I tend to think and again, I was a litigator when I started. So I started from some biases, I suppose, but my sense of it was that the CFPB’s funding structure really was different. That you've never seen an executive agency, an enforcement agency that was funded completely by a separate pot of money that it wasn't from Congress, it wasn't from fees or anything like that. The agency itself had obtained, but it was something different. And when others would say, well, no, this is like the Fed or the FDIC or other agencies that are fully or partially funded outside of the appropriations process My reaction was always, no, that's not right because the agency is different and the sources of money are different in ways that really do implicate our constitutional structure.

So now the court's got the case, I guess they heard all oral argument. We're all waiting for decision. A lot hinges on how the court decides it. It might just be that the court will uphold the CFPB’s funding structure. It'll say actually what, the CFPB’s funding structure here is not materially different than non-appropriated funds that other agencies receive. So I guess that'd be one way to settle it.

It could be that the court goes very broadly in the other direction and says actually, no agency can spend any money that isn't appropriated by Congress. And that, and that crucially in this case, Dodd Frank itself was not an appropriation that could have huge effects. I would be surprised if the court went that way.

For me, I've always thought this case is best understood as a basically a delegation case. That what's important here is that Congress completely delegated the funding of this to the agency itself in conjunction with the fed in perpetuity. Best way, it's almost like what Scalia called the junior varsity Congress in Mastretta. But for funding purposes here, if the court were to decide the case along those lines, say Congress can't put an agency in a regulatory, an executive agency on permanent funding Auto Drive autopilot. That would be simple. It would also be very, very limited. It means that Congress could do 99 year appropriations or maybe permanent appropriations for 50 or 75% of its budget. We have a lot of ways that Congress could limit it as I wrote for the Wall Street Journal right before oral argument. It's very easy for the court, I think to rightly decide this case without touching something like the Federal Reserve. And I think that's, if the court's going to rule against the agency, I'd like to think that's the most likely outcome. But then again, of course, I would think that because that's the outcome I've been advocating for, for the last 12 years of my life.

BN: Right and so let's say, you know, in a world where the court holds that CFPB is unconstitutionally funded and this kind of turns to something that's been eating at me a little bit and our listeners may notice this if they go back and listen to the episodes is that agencies have such a kind of vested interest in things staying and then being able to operate in the way that they are. And well, it may not be legally cognizable. It's definitely institutionally predicated. And so if the CFPB is improperly funded, it means that Congress needs to either properly fund it or get rid of it. And so, and Congress is not exactly well in the most functional state at the moment. And so does this mean that, you know, the CFPB is going to have to be on autopilot? Is it going to have to be absent while Congress gets its act together or is something else going to happen in the meantime, where the CFP’s responsibilities are handled by different branches of government?

AW: Well, I don't think the CF, I mean, the CFPB and Dodd Frank actually received statutory authority for like 13 pre-existing programs. I don't think that those things could be re-divested out to the prior agencies. Some of which, like the Office of Thrift supervision simply don't exist anymore. So it really would, the ball would be in Congress's court. There's no way around it. I think Congress, in the budget debates has signaled that it would fund the CFPB and maybe not enough to fund all that the CFPB wants to do. I don't know. But I've been happy that so far we've not seen sort of a broad movement to totally defund the CFPB because whatever one thinks of the CFPB, and I'm not a fan of its recent years. I'd say it is tasked with enforcing the laws that currently exist. And so I would want Congress to think hard about how much funding to give it.

But I'll add to that. I do think that Congress's power of the purse and its power to, to grant or withhold funds is a core constitutional power. I was once on an on a panel and a friend of mine who will go nameless. He's a great, great environmental law professor and we disagree on a lot of things and he was talking and he was worried about Congress not giving the EPA enough money and he said something like Congress passed all these laws tasking the agency with doing things. Now, it's Congress's obligation to fund the agency accordingly and I was struck by that phrasing of it. I said, I don't think I agree with that actually. I think each Congress has its own responsibility. And if Congress in its current form thinks an agency is doing too much, either going beyond its statutory mission or maybe its statutory mission proved to be more than Congress wants it to do. Well, I think Congress can and should use its power of the purse to recalibrate the agency's operations accordingly. I think that's really what's at stake with this case is Congress's ongoing responsibilities. And anything that channels that power away from Congress, I'm very, very wary of, you said at the outset of the question about 27 minutes ago, my into my filibuster that, you know, Congress today doesn't do that much and I agree, but I think often the causal effect goes, the other causal relationship goes the other way, Congress doesn't do much and it's not capable of doing much because the rest of government has learned how to do so much. Right, Presidents always say Congress won't act therefore I will, which is true. But I think it's also true that Congress won't act because presidents will. And I think to the extent that courts can redirect political energy and responsibility back to Congress on the things that Congress is truly supposed to be responsible for. I think that's a good thing and it might take Congress a little while to relearn how to do those things. But in the long run, that's a, a much better way to run a country.

BN: Turning to kind of the next major case that the court has heard. This term is SEC versus Jarkesy, which I hope I'm pronouncing that correctly. Which specifically has to do with a few questions and it goes to kind of a pet project or a pet interest of mine, which is administrative hearings which in this case specifically held by the SEC and Jarkesy and associated parties are arguing that these hearings violate the seventh amendment. And also they're further arguing whether these agency adjudications violate non delegation doctrine. And also whether Congress violated article two by granting for cause removal to ALJ is kind of a Seila law interest. So these are all pretty big areas of law which could topple the entire infrastructure of independent adjudications altogether if it's held in a kind of sweeping fashion. So what do you see is at stake in this case? And were the court to find in favor of the respondents, how would this change the operation of the country itself?

AW: Yeah. And I like how you, you describe the case, you called it, SEC versus Jarkesy, or at least I hope I pronounced the name correctly. That's literally how everybody describes. That might literally be the name of the case at this point is SEC versus Jarkesy. I hope it was pronounced correctly.

So they had oral argument and you're right, there was a lot of issues in the case. The Fifth Circuit's decision really swung at all of them, right? They said the agency's discretion to choose whether to bring a case in court or before an ALJ was an unconstitutional delegation of power. They said, right that the ALJ’s independence was unconstitutional and they said that the fact that the ALJ’s could decide these cases without a jury was a violation of the seventh Amendment

At oral argument The Supreme Court if I remember correctly, basically, 100% of the oral argument went to the jury question. I would be shocked if the Supreme Court, made any major change in the law on delegation or even on the, I think it was the removal issue was the third issue in the case. And that's obviously a very live issue, in other cases. But the Justices seemed most interested in the question of whether you really can adjudicate some of an issue like this, like the issue at hand in Jarkesy without a jury under the precedent of Atlas Roofing. I think that's surely where the court's going to go.

It seems to me that there's a majority of justices inclined to clarify or, or recalibrate or maybe even overturn Atlas Roofing and sort of reassert some kind of line in agency adjudication between public and private rights that would trigger some kind of jury requirement, which in effect, I think would effectively require those cases to go to court rather than agencies. But even that kind of decision would be much narrower than the things that a lot of people were writing about in the Atlantic Monthly and elsewhere on the eve of the case. I think as the case has come into clearer view after oral argument, it's an important case, don't get me wrong, but it's not going to be a sweeping all or nothing statement about the about the administrative state.

BN: But even if it is able to adjudicate on the jury issue exclusively, which as you indicated, maybe where the court's going with this. We do have another case that's percolating up, that was kind of brought to my attention during preparations for this episode, which is FTC versus META, which is a case by in late November, which seems to follow much in the same vein as Jarkesy except that it's targeting the administrative hearings specifically citing violations of due process but also citing unconstitutional installation of removal non-delegation and article three.

And this doesn't have the seventh amendment question tied to it. And so there's no real escape vector for the court to avoid ruling on this question if it ends up at the Supreme Court and they accept cert. So considering this case targets this issue specifically, what do you think the future of this case will be, will it just linger in the courts? Is Meta going to kind of step away from this litigation or can we expect a major overhaul in the next couple of years as this case makes its way to the top?

AW: Yeah, this case really does feel like the everything case. This one is an administrative law nerd's dream or nightmare. It's got the delegation issue, right? Does the underlying statutes that the FTC is administering here are they unconstitutionally broad delegations of legislative power? It has the agency independence issue, right? The Humphrey's Executor issue and it has the agency due process issue.

So of course, the court could strike down the agency's action on any one of those themes. But these are basically the three core themes of modern administrative law debate separate from Chevron. And I, we'll see how the case, we'll see how the case develops. But that is the case I'm really keeping an eye on. and, you know, I'll just say and this might get a little political so, you know, hit mute any time you want.

But I'd say, I think the FTC itself has put itself in a very difficult position. For the last few years the FTC and the Securities Exchange Commission have been extremely energetic, extremely creative, extremely ambitious and I'd say that the FTC has done everything possible to really dispel the appearance of the FTC as a sleepy quiet, purely technical, you know, judicious, quasi legislative, quasi-judicial body. I mean, I scholars can disagree over whether the FTC was any of those things when Humphrey's Executor was decided a century ago. But I think it's very hard, especially after the last few years to look at the FTC and think of it as a sleepy boring expert commission. And so I think the FTC’s last few years have actually ratcheted up the legal jeopardy that the agency now faces because these legal issues about delegation about independence about due process start to look very, very different when they're, you're seeing it through the lens of the modern FTC rather than the FTC of the 1940s or 50s. Not that it wasn't controversial then.

So I think the FTC should be worried. There's another case, by the way that I find very, very amusing, you know, for years, people have defended Humphrey's Executor. They said agency independence is important. The FTC is not like every other executive agency and so it's ok for it to have this independence. Well, when the FTC brought an enforcement act case against Walmart in I think the Northern District of Illinois. Walmart actually kind of turned Humphrey's Executor around at the agency and said, hey, agency, you can't bring an enforcement action against us because enforcement actions are quintessentially executive and you, after all are a quasi-judicial, quasi legislative body. Haven't you read Humphrey's executor, haven't you read Seila Law. And so it was a very creative fun, ironic twist on those debates to see the agency's independence sort of turned back around at the agency in the Walmart case.

Walmart isn't arguing that the agency has unconstitutional independence. They're saying that because it has independence, it, it cannot constitution wield executive power. And so, I'm watching both of those cases. They are among my favorite cases percolating up through the federal judiciary, not just as, again as a critic of the current FTC, but just as an administrative law nerd who likes to sit back and get out of the bag of popcorn and sort of watch the show. This is going to be really, really interesting coming up through the seventh circuit for the Walmart case. The META case I presume is in the fifth circuit like everything else these days and eventually in the Supreme court.

BN: Yeah. And so kind of the next and the last case that we're going to discuss, which is the real specter hanging over this term in specific is Loper Bright Enterprises. And you should check out our last episode with Dan Sullivan for a lot more details on that, which discusses the propriety of Chevron deference itself, the legal disposition, which provides preference to determination of agencies and the promulgation of rules and regulations.

But so in your opinion, and we've gotten a kind of a diversity of viewpoints on this, even on the podcast, if the court were to do away with Chevron, or at least substantially alter it in a way that we have to rely on some new procedure that is definitely less deferential towards agencies because that seems like where the court's going. What would the impact be on how courts approach agency action perhaps more contentiously would this be a good development?

AW: Yeah, by the way, my own sense of Chevron deference is much closer to the Justice Scalia version. You know, the late judge Silberman, we just had a conference in his honor at AEI He was a former, like Scalia, he was a former AEI fellow. And, we talked about Silberman's arguments for Chevron deference. Now, of course, Scalia seemed to be recalibrating a bit towards the end and maybe Silberman was too. But I, but I'm still closer to that view than I am towards, say the Philip Hamburger view that judicial deference is a constitutional infamy I just don't think so. And here's why I think that as James Madison wrote in Federalist 37 it's impossible, impossible to wring out all of the ambiguity in a law when you're writing the law. Congress should always try as hard as possible to be as precise as possible. But as Madison writes in Federalist 37 there's always going to be some vagueness left over and the court is going to have to find a way to adjudicate cases under those, those laws that are sometimes a little vague, sometimes a lot vague, sometimes unconstitutionally vague too. And so there's always going to have to be some, some way to grapple with that vagueness. It's going to be, I think inevitably some kind of deference whether it's Chevron, whether it's Skidmore, whether it's something else. And so I'll be surprised if the court in Loper Bright is relentless and they declare that there's no judicial deference and that all legal interpretation must be decided de Novo without giving any weight to an agency interpretation.

I'm curious to see how much more the court narrows that field of deference. I think they will narrow it some more along the same lines as the major questions doctrine. But I'll be very curious at the end of the day, how Roberts and Kavanaugh, and Barrett, where they wind up on that issue. We've got Justice Gorsuch who has written a lot, on the Supreme Court in the 10th Circuit. Justice Thomas has written a lot. But the other justices that I just mentioned, Chief Justice Roberts and Justices Barrett and Kavanaugh, I'll be curious to see where they wind up on the deference issue. I think there'll be a kind of a mend it don't end it approach. But they might decide that there's a lot there that needs to be mended

BN: And I guess that's something that we're just going to have to wait for the opinion to come out to see which is going to take far too long for my liking. But yeah, thank you so much for coming on, Adam. It's a pleasure to have you. If people want to find more of your work or anything that you do, where can they best do so?

AW: But first and foremost, goes to the Gray Center's work. Our website is administrativestate.gmu.edu. You won't find really any of my work there. My, my job there is really to be a steward of other people's work. And so you'll see a lot of, a lot of research by a lot of other great scholars. and including my co-director Jen Mascot. So first and foremost, go there. If people really have nothing better to do with their time and they want to see more of my work. Then just Google me and AEI for American Enterprise Institute. AEI keeps an archive of my work there. But above all, I hope people will stay engaged with the section and if they're not all members, I hope they'll join, I'm really, really proud of the work the section does, especially in conjunction with the ALR. And so I, again, I'm trying to be a good steward of it and grateful for that chance and, and grateful for the chance to be on this podcast with you.

BN: Absolutely. And all of those resources that Adam mentioned as well as brief kind of explanations of the cases that we talked about can be found in this episode's description. Thank you for listening to this episode of A Hard Look and thanks to everyone listening, a very happy New Year and I hope you stick with us because we have an exciting year ahead of us. My name is Bennett Nuss and this has been another episode of A Hard Look and we'll see you next time.