June 25, 2021

STATEMENT OF OPPOSITION TO RESOLUTION 201
Section of Administrative Law and Regulatory Practice

At the upcoming Annual Meeting of the ABA in August, the National Conference on the Administrative Judiciary (NCALJ) is sponsoring HOD 201, which calls upon Congress to pass legislation to create a "federal central panel." Cases from multiple administrative agencies would be adjudicated by administrative judges who are employed by such a panel, instead of being lodged within individual agencies, as has been the norm for most federal agencies since the APA was enacted in 1946. For the reasons stated below, the Section of Administrative Law and Regulatory Practice opposes this resolution and urges members of the House to join us in rejecting it.

I. The Resolution Threatens Disruptive Consequences That Have Not Been Adequately Addressed.

Our Section has supported other initiatives to promote the general goal of Resolution 201. Only two years ago, NCALJ and our Section worked cooperatively to draft and support Resolution 100B, which was adopted at the 2019 Annual Meeting. That measure urged lawmakers "to ensure that . . . administrative adjudicators shall be protected in their decisional independence and shall be free from improper influence on their decisionmaking." In addition, we cooperated with NCALJ in supporting Resolution 100A, which encouraged *states* to consider using central panel systems for administrative law adjudications. At that time, however, we emphasized to NCALJ that we had always opposed adoption of a *federal* central panel and would continue to do so—a warning we repeated many times thereafter. Nevertheless, NCALJ has decided to forge ahead with Resolution 201, and we are forced to stand in opposition to it before the House.

The scope of the resolution is highly indeterminate, because it leaves open all questions as to which agencies' caseloads would be transferred to the central panel. According to NCALJ, the ABA merely needs to endorse the proposed statute in the abstract, because the more concrete details can be worked out later. We disagree on both counts. NCALJ has not shown a need for any central panel legislation; and it greatly understates the practical challenges that such a law would present and the disruptions that it could potentially bring about. Indeed, we believe that the resolution and report do not do justice to the complexities of the subject. In light of the immense variety of missions, types of expertise, and institutional structures in our federal executive branch, a one-size-fits-all solution like the federal central panel is a real misfit.

For example, the report mentions the possibility that disability cases adjudicated by the Social Security Administration (SSA) might be transferred to the central panel. Relocation of SSA adjudications from their current home to a mega central adjudicative agency would affect more than 1,900 SSA administrative law judges (ALJs)—more than 90% of ALJs nationwide—and, more importantly, more than half a million individuals (and their legal counsel) who go through the SSA adjudication system each year. The risks of inefficiencies, procedural deficiencies, and inter-decisional inconsistencies would be enormous. While we are concerned about the effect such a massive upheaval would have on the agency adjudicators, we are even more concerned about the

potentially catastrophic impact it would have on the individuals and their legal counsel who would struggle to navigate this new agency. Many of these individual beneficiaries and claimants—including many members of marginalized communities—cannot afford to retain counsel, and the disruptive effect on them would be especially severe.

The SSA example is just the beginning of the complications that NCALJ's vision implicates. The resolution is intended to encourage Congress to consider consolidating SSA adjudicators (and adjudications) into the same mega-agency with administrative patent judges, immigration judges, and SEC ALJs—just to name a few. Yet Congress has already created unique adjudicative systems for regularized decisionmaking in a number of these regulatory fields, such as the Patent and Trademark Appeals Board and the Board of Veterans' Appeals. And the ABA is actively engaged in developing measures to promote decisional independence through new or revamped procedures in other fields, such as the Immigration Court proposed by the ABA Commission on Immigration.[1] These systems and reform efforts would be seriously undermined if adjudicators in these fields were moved into a federal central panel. The report does not come to grips with the disruptive implications of displacing these systems. Nor does it indicate that ABA entities that specialize in these practice areas were even consulted on Resolution 201, let alone whether they support it.

We are troubled by the resolution's lack of specificity about which adjudicators would be included, as well as by the report's confident but unsubstantiated assurances that practical issues can somehow be worked out. A proposal for structural changes of the magnitude that the resolution envisions ought to rest on a firmer foundation.

Ironically, scholars, agency officials, and researchers at the Administrative Conference of the United States, among other entities, have spent decades studying and recommending improvements to specific agency adjudication systems. Like Resolution 201, these recommendations do address decisional independence, but they also address efficiency and procedural improvements to help ensure that each individual subject to adjudication at the agency level has a prompt and fair process and accurate outcome. The amount of careful research and study that has gone into improving SSA adjudication, for instance, is staggering. And yet Resolution 201 encourages Congress to consider instituting a federal central panel system that has been subjected to no comparable study. The ABA should not call on Congress to put this underdeveloped plan onto its agenda.

Compounding our concerns about the resolution are serious doubts about its intrinsic value and its workability, as we will now proceed to discuss.

II. NCALJ Has Not Shown a Need for a Federal Central Panel.

In the first place, we do not share NCALJ's overwhelmingly negative view of the threats to decisional independence that arise from the basic structural model of the Administrative Procedure Act (APA). That model has served the nation well for three quarters of a century. The APA preserves the decisional independence of administrative law judges (ALJs) through a multitude of

[1] ABA COMM'N ON IMMIGRATION, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf.

safeguards, including prohibitions on ALJ subordination to agency investigative staff, bans on ex parte contacts with investigative or enforcement staff, and for-cause removal protections. At the same time, the drafters carefully limited the scope of these measures in order to enable the executive branch to carry out the public's business efficiently and to carry out statutory mandates effectively. Any further legislation in this area should strive to avoid upending that careful balance.

As for adjudicators who are not administrative law judges—commonly called administrative judges (AJs)—the APA itself provides fewer structural safeguards. But, as we noted above, Congress has instituted a variety of specialized adjudication systems to structure decisionmaking in a number of these areas, and the ABA should continue to advocate for further specific structural safeguards in those contexts, where appropriate—as it has done with its Article I immigration court proposal, to name only one example. The systems we have mentioned would be decimated if the adjudicators in these fields were suddenly assigned to a federal central panel.

Administrative law reform is a gradual process. We joined and supported Resolution 100B two years ago to express our backing for moderate, prudent measures that would enhance decisional independence for members of the administrative judiciary. But major structural change is not warranted.

Relatedly, we cannot endorse NCALJ's broad assertion that the lodgment of ALJs within individual agencies creates the reality (or even the appearance) of an "inherent conflict of interest" for agency heads. In particular contexts, an agency or its leadership may be committed to objectives that conflict with the statutory mandate, and one may speak of those "interests" as being in "conflict" with fair adjudication of claims within their purview. But the overgeneralized, indiscriminate manner in which NCALJ applies that phrase to agency heads government-wide is something altogether different. It is, instead, an argumentative spin on the straightforward fact that agency heads have a statutory obligation to promote their statutory missions and to implement programs effectively. To do so, they must oversee the adjudications that come from their agencies. The fact that NCALJ dismisses this legitimate concern with a pejorative label suggests that its attitude toward the dynamics of relations between administrative judges and agency heads is too singleminded (if not influenced by an "inherent conflict of interest" between the needs of the administrative law system and its own members' interest in being less answerable to agency officials).[2]

Finally, NCALJ seeks to bolster its case for a federal central panel by pointing to a few recent developments that have transformed, and arguably weakened, the administrative adjudication system. One such development was Executive Order 13,843,[3] issued by the Trump administration, which exempted ALJs from the civil service system of merit selection. In NCALJ's words, this

[2] The "Disclosure of Interest" section of the General Information Form accompanying Resolution 201 candidly acknowledges that "[t]he National Conference of the Administrative Law Judiciary's membership is comprised of federal agency adjudicators who would directly benefit from the creation of a federal central panel . . . ." We do not mean to cast aspersions on NCALJ for sponsoring a resolution that it believes will benefit its members. But, in light of its own interests in the matter, its disparaging references to agency leaders' "inherent conflict of interest" seem unwarranted.

[3] 83 Fed. Reg. 32,755 (July 18, 2018).

order gives rise to worries about "cronyism and politicization in ALJ appointments." Another source of concern is a pair of recent Supreme Court cases, *Free Enterprise Fund v. PCAOB*[4] and *Seila Law, LLC v. CFPB*,[5] which hold that in some circumstances the President must be able to remove executive officials at will. NCALJ fears that these holdings may soon be extended in a manner that would result in invalidation of good-cause removal protections for ALJs (or, alternatively, dilution of those guarantees through statutory interpretations that would seek to avoid the supposed constitutional defect).

It is true that many ABA members, including members of our Section, have been troubled by these developments. If NCALJ had come forward with one or more proposals for resolutions that would challenge those developments directly, we would, at the very least, have given serious consideration to those proposals. To our knowledge, NCALJ never pursued that option. Instead, it seeks to use these developments as justifications for adoption of Resolution 201. This line of argument is simply illogical.

Suppose that, as NCALJ fears, implementation of the order leads to appointment of unqualified or partisan ALJs. That result would be very regrettable, but it is surely not a good reason for wanting to create a new entity that would give these assumedly unqualified or partisan ALJs *more* decisional independence. As for the removal cases, we would by no means favor an extension of *Free Enterprise Fund* and *Seila Law* that would undermine good-cause protections for ALJs and similar adjudicators.[6] Again, however, adoption of a central panel would not ameliorate the problems that such an extension would bring about. Presumably, that extension would apply just as fully to central panel judges as to judges who are lodged within a regulatory agency. NCALJ has not suggested any basis on which the two situations could be distinguished.

III. The Central Panel Proposal Raises a Host of Practical Concerns.

We also have several concerns about the workability of the federal central panel proposal. Although the range of cases that the panel would handle remains unspecified, one can reasonably assume that its caseload would be much larger than that of any state central panel. Thus, the track record of the state panels, which we have supported, does not necessarily foretell equally good results in a panel with nationwide scope, overseeing federal programs that in many cases raise remarkably complex substantive issues.

One concern is that, even though the traditional APA model gives rise to certain risks that agency heads may sometimes interfere with adjudicators' decisional independence for political or arbitrary reasons, it's also possible that oversight by central panel directors could prove to be political or arbitrary for other reasons. It is scarcely difficult to imagine a president appointing a political associate or ideologically motivated person to fill this slot. Moreover, even if the director were to turn out to be well-qualified and well-motivated, the central panel would be a very large entity (far

[4] 561 U.S. 477 (2010).
[5] 140 S. Ct. 2183 (2020).
[6] Indeed, a year ago we cosponsored Resolution 108A, which was designed to restore good-cause protection for administrative patent judges. At the time, a Federal Circuit opinion had nullified that protection. This month the Supreme Court, reversing the Federal Circuit, used its remedial power to adopt a fix that, in substance, was the same as the ABA's resolution had proposed. *United States v. Arthrex, Inc.*, 2021 WL 2519433 (June 21, 2021).

larger than any existing state central panel), and the borderline between "supervision" and "undue pressure" would likely be indistinct. One can only speculate about the pressures that the director or directors would be in a position to exert in the name of supervision, and about whether there would be adequate institutional safeguards to prevent misuses of the director's supervisory authority.

Moreover, it is unclear whether a federal central panel would be able to maintain the advantages of specialization that accrue under the current APA structural model. Under the latter model, ALJs who regularly work within one agency develop an understanding of the issues it faces, many of which can be extremely specialized and technical. They also become familiar with the agency's written and unwritten policies and priorities. Indeed, agencies can benefit from the informed ground-level critiques that ALJs can provide as a result of their past experience in working with the agency's caseload.

In contrast, the great majority of state central panels are staffed by generalist ALJs who may be assigned to a variety of cases over time. If the federal panel were to follow that model, opinions would often be written by ALJs who would be unfamiliar with the relevant subject matter and agency practices. One likely consequence would be many more appeals to agency heads and more time spent reworking ALJs' conclusions when the cases are appealed. This development would tend to delay the agencies' final dispositions regarding those disputes, in an environment in which case backlogs are already extreme and the wheels of justice are already turning far too slowly.

NCALJ dismisses this concern by asserting that the federal central panel could be subdivided by specialty, so that panel judges could continue to use or develop expertise in their respective areas. But that argument does not answer the question of how such judges would be supervised. The director, lacking the agency's substantive expertise and program responsibilities, might make decisions on an arbitrary or unwise basis; and political accountability for such improvident decisions might be hard to maintain, because they would likely have less visibility than a typical agency head has.

Other oversight issues would raise similar concerns. Two years ago, the House declared in Resolution 100B that "[i]mproper influence [on administrative adjudicators' decision-making] includes the imposition of decisional quotas that are unreasonably high or not reasonably determined." But that statement tells only half the story, because the accompanying report (submitted by NCALJ itself) also recognized that "the courts have held, apparently without exception, that reasonable productivity goals are permissible and do not infringe on the decisional independence of the adjudicator."[7] An agency head that undertakes to prescribe "reasonable productivity goals" can be guided by program needs, but a director with no responsibility for implementing the substantive statute would lack that baseline. To be sure, NCALJ, or at least some of its members, might prefer not to have anyone exercising oversight to monitor their productivity; but, as just noted, the courts have not supported that preference.

For all of their imperfections, the institutional relationships between the leadership of federal agencies and the ALJs who respectively hear cases in those agencies are structured by longstanding

[7] https://www.americanbar.org/content/dam/aba/directories/policy/annual -2019/100b-annual-2019.pdf.

statutes, rules, policies, and norms of agency practice. Our Section does not favor legislation to replace this relatively stable and familiar regime with a completely ill-defined, unstudied alternative.

IV. Conclusion

In conclusion, the Section shares NCALJ's goal of maintaining a system of federal administrative adjudication that includes strong safeguards for adjudicators' decisional independence. We demonstrated our tangible support for this goal when we joined with NCALJ in 2019 to draft and support Resolution 100B, and we believe there are other areas in which our two entities could find common ground on a resolution that would advance that goal, including measures that would undo some of the unfortunate developments that made their appearance in recent years. But we do not think Resolution 201 is a promising vehicle for such initiatives. We hope it will be withdrawn. But if it is not, we call upon other Delegates to join with us in opposing the resolution.

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