

Western New England Law Review

Volume 66 (1983-1984)
Issue 3

Article 11

1-1-1984

DISCIPLINARY PROCEEDINGS AGAINST FEDERAL ADMINISTRATIVE LAW JUDGES

James P. Timony

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

James P. Timony, *DISCIPLINARY PROCEEDINGS AGAINST FEDERAL ADMINISTRATIVE LAW JUDGES*, 6 W. New Eng. L. Rev. 807 (1984), <http://digitalcommons.law.wne.edu/lawreview/vol6/iss3/11>

This Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

DISCIPLINARY PROCEEDINGS AGAINST FEDERAL ADMINISTRATIVE LAW JUDGES

JAMES P. TIMONY*

I. INTRODUCTION

In the first thirty years of their existence, federal administrative law judges were involved in four disciplinary cases.¹ In the last six years, fifteen such cases have been initiated.² The recent increase in

* Administrative Law Judge, Federal Trade Commission. Judge Timony is also presently hearing cases for the International Trade Commission and the Federal Deposit Insurance Corporation. B.S., Ohio University, 1954; LL.B., Georgetown University Law Center, 1959; LL.M., Georgetown University Law Center, 1961.

The views expressed by the author in this article are his own.

1. *In re Stecher*, 11 AD. L. REP. 2D (P & F) 868 (Civil Service Comm'n 1961) (misconduct; failure to accede to demand of director of personnel that judge come to director's office to discuss judge's sickness and other matters; 30 day suspension); *McEachern v. Macy*, 233 F. Supp. 516 (W.D.S.C. 1964) (financial irresponsibility; failure to make timely payments on bills for telephone and tires and debts to credit union and bank; removal), *aff'd*, 341 F.2d 895 (4th Cir. 1965); *Bureau of Land Management v. Dumm*, No. 3 (Civil Serv. Comm'n Oct. 21, 1964) (misconduct; use of government car for social visit; fishing on ranch owned by a party in proceedings before him and accepting drinks and dinner from same party; 31 day suspension); *Hasson v. Hampton*, 34 AD. L. REP. 2D (P & F) 819 (D.D.C. 1973) (misconduct; acceptance of meals and entertainment from representatives of a company which was a party in proceedings before him and staying overnight in a hotel with a woman who was not his wife; removal).

Federal administrative law judges may also be removed for lack of funds, *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 143 (1953), or for physical or mental disability, *Benton v. United States*, 488 F.2d 1017, 1025 (Ct. Cl. 1973); *In re King*, 3 M.S.P.B. 29 (1980).

2. *National Transp. Safety Bd. v. Boyd*, No. 7 (Civil Serv. Comm'n Feb. 14, 1978) (misconduct; using government personnel and telephone for personal business; 20 day suspension and loss of status as chief judge); *In re Spielman*, 1 M.S.P.B. 50, 51 (1979) (misconduct; misrepresentations on job application; 60 day suspension); *In re O'Brien*, 1 M.S.P.B. 128 (1979) (low productivity; action dismissed upon agreement of judge to increase productivity); *In re Glover*, 2 M.S.P.B. 71 (1980) (misconduct; judge involved in scuffle with hearing assistant who tried to remove paper from photocopier; suspension for 30 days); *In re Chacallo*, 2 M.S.P.B. 20 (1980) (misconduct; judge refused to return case files and conducted hearing on case after it was removed from her jurisdiction; demonstrated bias and lack of judicial temperament; removal); *OSHRAC v. Weil*, No. HQ120100029, slip op. (M.S.P.B. March 16, 1981) (inefficiency; stipulation of dismissal); *SSA v. Arterberry*, No. HQ7521820009 (MSPB May 31, 1983) (insubordination; judge refused to travel out of local area to hear cases because of slow healing broken ankle; 30 day suspension); *HHS v. Haley*, No. HQ75218210052 (MSPB Apr. 20, 1984) (MSPB ac-

disciplinary proceedings has exposed flaws in the present system. This article will examine these flaws and will offer remedies.

II. GROWTH OF JUDICIAL DISCIPLINARY PROCEEDINGS

Although the principle of judicial discipline has been firmly established,³ the removal or sanctioning of federal or state judges for incompetence or misconduct was rare until very recently. From 1940 to 1975 fewer than twenty-five state judges were removed for misconduct.⁴ Only four federal judges have been removed by impeachment; the last in 1936.⁵ The expense and awkwardness of the disciplinary procedure undoubtedly contributed to this inactivity. The traditional procedure involved impeachment or address by the

cepted stipulation) (30 day suspension for misconduct; use of government car for personal purposes); *SSA v. Goodman*, No. HQ75218210015 (MSPB Apr. 6, 1983) (recommended decision of administrative law judge) (low productivity; judge made too many detailed findings and was inefficient; removal), *rev'd*, No. HQ7521820015 (MSPB Feb. 6, 1984) (MSPB denied agency's petition for removal; although judge heard about half as many cases as national average, that average could not validly measure comparative productivity because cases differed in difficulty); *SSA v. Shore*, No. HQ75218210013 (MSPB filed Apr. 23, 1982) (low productivity; settled Apr. 8, 1983; judge retired); *SSA v. Glover*, No. HQ 7521820025 (MSPB May 6, 1983) (recommended decision of administrative law judge) (judge failed to show proper courtesy and consideration to co-workers; 120 days suspension); *SSA v. Davis*, No. HQ75218210026 (MSPB Apr. 19, 1983) (recommended decision of administrative law judge) (misconduct; lewd and lascivious behavior, including salacious language concerning a female employee, lewd and obscene remarks to another female, and indecently describing sexual availability and responsiveness of female employees; removal), *adopted as modified*, No. HQ7521820026 (MSPB Feb. 6, 1984); *SSA v. Manion*, No. HQ75218210008 (MSPB June 17, 1983) (recommended decision of administrative law judge) (misconduct - cancelled hearings after dispute with the judge in charge of office over rule prohibiting hearing assistant travelling to out of town hearing; 30 day suspension), *adopted as modified*, No. HQ75218210008 (MSPB Feb. 6, 1984); *SSA v. Brennan*, No. HQ75218210010 (MSPB June 23, 1983) (recommended decision of administrative law judge) (low productivity and misconduct - contemptuous, disrespectful and abusive remarks to administrative law judge in charge of office; judge claimed that chief judge could only "go through the motion" of conducting hearings in issuing 80-90 decisions per month; removal), *rev'd and remanded*, No. HQ21210010 (MSPB Feb. 6, 1984) (remanded for identification of evidence supporting discipline and for credibility findings); *SSA v. Balaban*, No. HQ75218210014 (MSPB Feb. 9, 1984) (low productivity and failure to carry an acceptable workload; judge heard about half as many cases as national average but that average could not validly measure comparative productivity because cases differed in difficulty; judge's workload "compared favorably" with other judges in his office and workload was determined by volume of claims filed in that office; charges dismissed).

3. "[T]he courts ought not to hesitate. . .to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws." *Ex parte Wall*, 107 U.S. 265, 288 (1882).

4. Comment, *Judicial Discipline, Removal and Retirement*, 1976 WIS. L. REV. 563, 564-65. In 1976 there were 22,000 state judges in the United States. *Id.* at 563.

5. 124 CONG. REC. S28,284 (daily ed. Sept. 7, 1978) (statement of Sen. DeConcini).

legislature or recall by referendum.⁶ The only positive measure provided was removal. As a result, cases were brought only for flagrant misconduct.

In 1947, New York established the first Court on the Judiciary, a special six-judge tribunal that convened only to hear cases of judicial misconduct or disability. Similar to legislative methods for removal, this special court lacked secrecy in screening complaints and investigating alleged misconduct. Because the procedure was public, and removal was the only sanction, it was used only for the most notorious cases.⁷ The Court on the Judiciary convened only twice during its first eighteen years resulting in two removals and four resignations.⁸

California created its Commission on Judicial Qualifications in 1960 and structured the commission so as to avoid the problems inherent in other disciplinary methods.⁹ The commission has nine members, including judges, lawyers and lay citizens. Complaints about judicial conduct received from any source, are investigated by the agency and, if warranted, confidential adversarial hearings are convened.¹⁰ The commission then may recommend to the California Supreme Court that the judge be retired for disability, censured or removed for actions that constitute "willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."¹¹

Until the commission recommends discipline to the Supreme Court, the matter is secret. This procedure protects the judge from the harm of adverse publicity from frivolous complaints, because a full adversarial hearing will be held before any recommendation concerning the judge is made public. It also allows the commission to impose informal discipline short of recommending action to the

6. Comment, *supra* note 4, at 564-67. Impeachment is found in forty-six state constitutions and in the United States Constitution and calls for a bill of impeachment by the lower house and a trial in the upper house. Address exists in twenty-eight states and requires a concurrent resolution of both houses, without provision for a trial. Referendum is a popular vote. *Id.* at 565.

Removal by impeachment, recall and referendum is still the only method of judicial discipline used in Great Britain. S. SHETREET, *JUDGES ON TRIAL* 88 (1976).

7. I. TESITOR, *JUDICIAL CONDUCT ORGANIZATIONS* 1-2 (1978).

8. *Id.* at 2; Comment, *supra* note 4, at 567-68.

9. Comment, *supra* note 4, at 568-72. The California plan is now called the Commission on Judicial Performance.

10. *Id.* at 571.

11. CAL. CONST. art VI, § 18(c).

supreme court. Informal discipline is often very effective because it allows the judge to correct transgressions without admitting guilt.¹²

The California plan has been the model for judicial disciplinary agencies. Now all fifty states and the District of Columbia have established such commissions.¹³

Since 1980, federal judges and federal bankruptcy judges and magistrates also have had a codified disciplinary system.¹⁴ Federal law provides for disciplinary action to be taken against these judges by a judicial council of the circuit composed of judges. Such a council may, upon proof of "conduct prejudicial to the effective and expeditious administration of the business of the courts," (1) order that no further cases be assigned to a judge or magistrate;¹⁵ (2) censure or reprimand by means of private or public communication or by public announcement;¹⁶ (3) order removal of a magistrate pursuant to 28 U.S.C. § 631, or the removal of a bankruptcy judge pursuant to 28 U.S.C. § 153;¹⁷ or (4) certify to the Judicial Conference of the United States a determination that the conduct of a federal judge might constitute grounds for impeachment.¹⁸

III. DISCIPLINARY PROCEEDINGS AGAINST ADMINISTRATIVE LAW JUDGES

A. *The Judicial Status of Federal Administrative Law Judges and the Need to Protect Their Decisional Independence*

There were 1,147 administrative law judges employed by twenty-nine federal agencies in 1983.¹⁹ They conduct trial-type hearings²⁰ in administrative courts created by Congress under Article I of

12. Comment, *supra* note 4, at 571.

13. I. TESITOR & D. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 11-12 (2d ed. 1980).

14. Browning, *Evaluating Judicial Performance and Related Matters*, 90 F.R.D. 197, 200-05 (1981); see 28 U.S.C.A. § 372(c) (West Supp. 1983).

15. 28 U.S.C.A. § 372(c)(6)(B)(iv) (West Supp. 1983); see *Chandler v. Judicial Council*, 398 U.S. 74 (1970).

16. 28 U.S.C.A. § 372(c)(6)(B)(v), (vii) (West Supp. 1983).

17. *Id.* § 372(c)(6)(B)(vii).

18. *Id.* § 372(c)(7)(A).

19. 129 CONG. REC. S6610 (daily ed. May 12, 1983) (statement of Sen. Heflin). Of that number, 820 were employed by the Social Security Administration. *Id.*

20. When engaged in the process of formal adjudication, the administrative tribunal is discharging a function equally as judicial as that of an Article III court engaged in a similar process of formal adjudication. L. MAYERS, *THE AMERICAN LEGAL SYSTEM* 417-21 (rev. ed. 1964). The conflicts are "every bit as fractious" as those resolved in Article III courts. *Butz v. Economou*, 438 U.S. 478, 513 (1978).

the United States Constitution.²¹ Critics argue that administrative law judges lack judicial status on the premise that their decisions lack finality and that there are no sanctions for disobedience of their orders.²² Absent such indicia of judicial status, the argument runs, there is no need to accord administrative law judges protection from interference with their independence. In practice, however, decisions of administrative law judges are often final and binding and severe sanctions may be imposed for disobedience of their orders. Thus, administrative law judges do enjoy judicial status and the integrity of the administrative adjudicatory process requires that administrative law judges be afforded adequate protection.

Although the Administrative Procedure Act provides certain powers to all administrative law judges, other powers vary with the statute and rules of practice of the agency involved in adjudication. Administrative law judges generally make initial or recommended decisions²³ that do not become final if an appeal is filed.²⁴ Some agencies, however, accept the judge's decision as final and binding unless the agency affirmatively decides to review the matter.²⁵ Thus, judges' decisions, encompassing all findings of fact and conclusions of law, are often final and binding.

Moreover, deference is accorded the administrative law judge's observations of witness demeanor²⁶ and, although the agency generally has fact finding power on review of the judge's decision, the

21. These administrative courts are "Article I courts that go by the contemporary name of 'administrative agencies.'" *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 113 (1982) (White, J., dissenting). Federal judges are appointed and act pursuant to Article III of the constitution. *Id.* Other examples of Article I courts include military courts martial, *id.*, the Tax Court, 26 U.S.C. § 7441 (1982), and the Court of Claims, 28 U.S.C.A. § 171(a) (West Supp. 1983).

22. E. S. ROCKEFELLER, *DESK BOOK OF FTC PRACTICES AND PROCEDURE* 118-19, 130 (3d ed. 1979). Critics of administrative law judge judicial status also rely on the argument that the administrative law judge "does not wear a robe." *Id.* at 119. In fact, judges in at least nine agencies wear robes. Telephone interview with Judge Irving Sommer, Assistant Chief Judge at the Occupational Safety and Health Admin. (Dec. 27, 1983).

23. An initial decision becomes the decision of the agency if no appeal is filed. A recommended decision becomes the decision of the agency only when the agency makes the decision. 5 U.S.C. § 557(b) (1982).

24. *Id.*

25. Occupational Safety and Health Review Comm'n, 29 C.F.R. § 2200.90(b)(3) (1983); Federal Mine Safety and Health Review Comm'n, 30 U.S.C. § 823(d)(1) (Supp. V. 1981); Civil Aeronautics Board, 14 C.F.R. § 302.27(c) (1983); International Trade Comm'n, 19 C.F.R. § 210.53(h) (1983).

26. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *Eastern Engineering & Elevator Co. v. NLRB*, 637 F.2d 191, 197 (3d Cir. 1980).

judge's findings of fact at least must be considered.²⁷ At some federal agencies, the findings of judges are final and conclusive if supported by substantial evidence,²⁸ or unless clearly erroneous.²⁹ Thus, even if the agency reviews and reconsiders a judge's conclusions of law, the factual basis for such analysis may be conclusively determined by the administrative law judge.

Finally, administrative law judges enjoy broad discretion in ruling on discovery matters, and their determinations are reversed only for a clear abuse of discretion.³⁰

Willful failure to comply with the administrative law judge's discovery orders may risk an assessment of reasonable expenses, including attorney fees, which may be awarded to the moving party.³¹ Disobedience of a subpoena issued by the judge may result in an enforcement proceeding brought by the agency,³² or, under some statutes, a party's willful refusal to comply with a subpoena will result in a criminal information being filed.³³ Disobedience of the judge's lawful order may be considered contempt of the agency;³⁴ sanctions may be applied against a party, including applying adverse inferences, precluding the introduction of evidence, striking pleadings or motions, or deciding the proceeding against the recalcitrant party.³⁵ Attorneys who refuse to comply with the judge's directions, or who are disorderly, dilatory, obstructionist or contumacious or who use contemptuous language, may be suspended and barred

27. 5 U.S.C. § 557(c) (1982).

28. *Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 90-92 (D.C. Cir., 1983) (Federal Mine Safety and Health Review Commission); 33 U.S.C. § 901 (1976 & Supp. V 1981) (Department of Labor).

29. 19 C.F.R. § 210.54(a)(ii)(C)(1983) (United States International Trade Commission). The clearly erroneous standard applies to the findings of federal district courts. FED. R. EVID. 52(a). The substantial evidence rule places a higher limitation on judicial review. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395-96 (1948). Therefore, the findings of administrative law judges subject to the substantial evidence rule carry more weight than those of federal district court judges.

30. *In re Boise Cascade Corp.*, 100 F.T.C. 512 (1982); *FTC v. Heinz Kirchner*, 14 AD. L. REP. 2d (P&F) 580, 581 (1963).

31. *Cf. Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980) (such sanctions are within a court's inherent powers). Administrative law judges hear cases in administrative courts. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 113 (1982).

32. *See, e.g., FTC v. Retail Credit Co.*, 515 F.2d 988 (D.C. Cir. 1975).

33. *E.g.*, 26 U.S.C. § 7210 (Supp. V 1981).

34. *E.g.*, 16 C.F.R. § 3.42(h) (1983).

35. *International Union v. NLRB*, 459 F.2d 1329, 1335-39 (D.C. Cir. 1972); *NLRB v. C. H. Sprague & Son, Co.*, 27 AD. L. REP. 2D (P & F) 242, 244-45 (1st Cir. 1970). *Contra NLRB v. International Medication Systems, Ltd.*, 640 F.2d 1110, 1116 (9th Cir. 1981).

from further participation in the proceeding.³⁶ They may also be reprimanded or disbarred by the agency.³⁷ Additionally, federal statutes provide a basis for imposition of criminal sanctions for violations of protective orders issued by administrative law judges.³⁸

Thus, although many federal administrative law judges technically are "employees" of the agency prosecuting the case before them,³⁹ there can be little doubt that their role is "functionally comparable" to trial judges employed in the judicial branch.⁴⁰

The title "administrative law judge," formerly "hearing examiner," was adopted by statute in 1978.⁴¹ The legislative history of that statute demonstrates that Congress intended to insure the independence and impartiality of administrative law judges: "In essence, individuals appointed as Administrative Law Judges hold a position with tenure very similar to that provided for federal judges under the Constitution."⁴²

Judge Aldisert recently referred to the rigorous selection process

36. 16 C.F.R. § 3.42(d) (1983); 29 C.F.R. § 2700.80(e)(1983).

37. *E.g.*, 16 C.F.R. § 3.42(b)(1983); 29 C.F.R. § 2700.80(c)(1983).

38. *E.g.*, 18 U.S.C. §§ 1001, 1621, 2071(a) (1982).

39. The Administrative Procedure Act, drafted in 1946, described the administrative law judge as the "presiding employee." 5 U.S.C. § 557(b) (1982). Prospective administrative law judges must pass a competitive examination by the Office of Personnel Management (OPM). They are appointed by the employing agency from the list kept by OPM. 5 U.S.C. § 3105 (1982).

Most administrative law judges receive their pay and administrative support through the agency prosecuting cases before them. Recently, in creating new agencies, Congress has ensured the independence of administrative law judges from influence of the enforcement agency. The Occupational Safety and Health Review Commission, 29 U.S.C. § 661 (1976) and the Federal Mine Safety and Health Review Commission, 30 U.S.C. § 823 (Supp. V 1981), both are staffed with judges and are independent from the enforcing agency, the Department of Labor. *See Sullivan, Independent Adjudication and Occupational Safety and Health Policy: A Test for Administrative Court Theory*, 31 AD. L. REV. 177 (1979). Similarly, the National Transportation Safety Board, once part of the Department of Transportation, hears cases brought by pilots when the Federal Aviation Agency issues license denials, suspensions or revocations. 49 U.S.C. §§ 1422, 1429 (1976).

40. *Butz v. Economou*, 438 U.S. 478, 513 (1978); *Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980); *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 527-28 (3d Cir. 1981) (Aldisert, J., concurring).

41. Act of March 27, 1978, Pub. L. No. 95-251, §§ 2-3, 92 Stat. 183, 183-84. For example, references to administrative law judges were substituted for references to hearing examiners in both the section catchline and the text of 5 U.S.C. § 3105 (1982).

42. S. REP. NO. 697, 95th Cong., 1st Sess. 2 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 496, 497 (Under Article III of the United States Constitution, federal judges hold life tenure on "good behavior" and can be removed only by impeachment).

of administrative law judges⁴³ and the protection of their independence afforded by the Administrative Procedure Act,⁴⁴ and gave his view of the judicial status of federal administrative law judges. Noting the past prejudice of some Article III federal judges, scholarly critics and attorneys who believed that administrative law judges

43. *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 527-28 (3d Cir. 1981) (Aldisert, J., concurring).

[T]he selection process for [administrative law judges] should inspire more respect for this office than is generally extended by Article III judges; it is a process that requires rigorous inquiries into the background and competence of the candidates. Applicants must supply twenty professional references. A minimum of seven years of litigation experience is required to meet the threshold selection requirement. A test opinion must be drafted and evaluated on the basis of many factors including clarity and conciseness. . . . Finally, after the various scores have been combined, applicants considered tentatively eligible are interviewed by a special panel usually composed of an OPM official, an attorney qualified in the field of administrative law, and an agency official. This committee submits a recommendation to the director of OPM who makes final eligibility determinations among qualified candidates.

Id. at 527.

In the recent years, only twenty-eight percent of applicants for administrative law judges have passed the examination and been put on the register, ranked by score. An agency may then choose a new judge from the top three candidates on the register. SUB-COMM. ON OVERSIGHT OF GOV'T MANAGEMENT OF THE SENATE COMM. ON GOV'T AFFAIRS, THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM S. REP. NO. 111, 98th Cong., 1st Sess. 5, 6 (1983) [hereinafter cited as THE ROLE OF THE ADMINISTRATIVE LAW JUDGE].

44. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1982). The Act provides statutory protections for administrative law judges. Although each agency appoints its own judges it may appoint only those certified as qualified by the Office of Personnel Management. 5 U.S.C. § 3105 (1982). Judges are exempt from performance evaluations by their agencies, *id.* § 4301, and can be removed only for cause established after a due process hearing before the Merit System Protection Board (MSPB), *id.* § 7521. They receive periodic step increases in pay without certification by their employing agency that they are performing at an acceptable level of competence. *Id.* § 5335. Once appointed a judge is not subjected to the usual probationary period for agency employees. *Id.* § 3321(c). Administrative law judges can be disqualified from a case only upon petition by either the agency or a private party. *Id.* § 556(b). Cases are assigned to judges on a rotating basis, as far as practicable, so that agencies cannot fix the results by choice of judge. *Id.* § 3105. Judges are independent of investigative or prosecutorial personnel in the agency. *Id.* § 554(d). Parties present their case by oral and documentary evidence, *id.* § 556(d), and the transcript of testimony and exhibits, together with the pleadings, constitute the exclusive record for decision, *Id.* § 556(e). The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record. *Id.* § 557(c). The judge may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. *Id.* § 556(c). Administrative law judges may not perform duties inconsistent with their duties as judges. *Id.* § 3105. The judge may not consult any person or party, including agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. *Id.* § 554(d)(1).

were second-class judges (if judges at all), marginally qualified and too closely identified with the employing agency, he stated:

Accepting for purposes of argument that to be impartial judges must be independent of all political or employment pressures, I submit that the view that the [administrative law judges] are not sufficiently independent or competent is now so shopworn as to be totally obsolete. To the contrary, [administrative law judges], though not yet annointed with life tenure, enjoy an independence that in my view is plainly sufficient to satisfy reasonable doubts. . . .

The rigors of the selection procedure and the statutory protections of [administrative law judge] independence suggest to me that the federal judiciary need not look down its collective nose at [administrative law judge] decisions.⁴⁵

The judicial status of federal administrative law judges produces the same need for judicial independence as any other judge, and proceedings for disciplining administrative law judges should be conducted with this in mind.⁴⁶ Examination of current procedures for disciplining administrative law judges demonstrates, however, that this regard is sorely lacking.

B. *The Lack of Peer Review*

Federal administrative law judges can be removed by the agency that employs them only for good cause established before the Merit Systems Protection Board (MSPB) after opportunity for a full

45. *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 527-28 (3d Cir. 1981) (Aldisert, J., concurring).

46. Despite the fact that the United States Congress designated the title of the position as "judge", attorneys for the Social Security Administration address the administrative law judge as "Mr." in formal pleadings filed with the MSPB. *See, e.g., In re Glover*, 2 M.S.P.B. 70, 71 (1980); *SSA v. Manion*, No. HQ7521821008 (MSPB June 17, 1983); (recommended decision of administrative law judge), *adopted as modified*, No. HQ7521821008 (MSPB Feb. 6, 1984); *SSA v. Brennan*, No. HQ7521810010 (MSPB June 23, 1983) (recommended decision of administrative law judge), *rev'd and remanded*, No. HQ 7521820010 (MSPB Feb. 6, 1984). Such pettiness is perhaps evidence of ignorance of the judicial status of administrative law judges and certainly some proof that: "It seems unwise to allow bureaucrats, whether lawyers or not, to determine, even in part, the fate of judges." Kaufman, *Chilling Judicial Independence*, 88 YALE L. J. 681, 712 (1979) (footnote omitted). The professional approach is to use respondent's title until the instant that it is taken away by due process of law by the appropriate authority. *See Spruance v. Comm'n on Judicial Qualifications*, 13 Cal. 3d 778, 802-03, 532 P.2d 1209, 1226, 119 Cal. Rptr. 841, 858 (1975).

due process hearing is afforded.⁴⁷ The presiding official at the trial is the "Board or an administrative law judge designated by the Board."⁴⁸ The agency employing the administrative law judge initiates the action against the judge by filing a complaint with the MSPB, and attorneys for the employing agency prosecute the case.⁴⁹

In other systems of judicial discipline in the United States, by contrast, the decision to prosecute is generally made by a tribunal either solely or partially comprised of other judges.⁵⁰ Such peer review of the decision to initiate formal disciplinary action has beneficial results.⁵¹ Frivolous complaints may be disposed of before they become public.⁵² For example, it is difficult to imagine that peers would have initiated formal adjudication in *In re Stecher*,⁵³ where a judge was suspended without pay for thirty days after a disagreement between the judge and the agency personnel director over the office in which they would meet.⁵⁴ Furthermore, under a peer review system, there would be informal contact with the judge before formal charges were filed. The respondent judge would be more likely to agree to change the conduct complained about, without admitting guilt, before the issue was publicly joined.⁵⁵ Many of the less serious matters could be resolved⁵⁶ by admonition, reprimand or censure.⁵⁷

47. 5 U.S.C. § 7521 (1982); 5 C.F.R. §§ 1201.131-.136 (1983).

48. 5 C.F.R. § 1201.132 (1983). Two administrative law judges, employed by the MSPB, presently are eligible to hear these cases brought against judges.

49. *Id.* § 1201.134.

50. In no other system is the decision to prosecute made by representatives of a party to proceedings heard by the judge.

51. Judges can best balance the need for judicial independence against the harm to the reputation of the judiciary caused by a dishonest judge. Any tendency to overlook misconduct by a colleague is outweighed by their desire to protect the integrity of the judiciary. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-[]KENT L. REV. 1, 18-19 (1977).

52. Comment, *supra* note 4, at 571.

53. 11 AD. L. REP. 2D (P & F) 868 (Civil Service Comm'n 1961).

54. *Id.* at 881.

55. Frankel, *Judicial Discipline and Removal*, 44 TEX. L. REV. 1117, 1131 (1966); Comment, *supra* note 4, at 571; Winters, *New Ways to Deal with Judicial Misconduct*, 48 JUDICATURE 163, 164 (Feb. 1965).

56. This proposal would require a change in 5 U.S.C. § 7521 (1982), and 5 C.F.R. § 1201.133 (1983), which provide for the following as administrative law judge disciplinary sanctions: removal, suspension, reduction in grade or pay, or furlough for 30 days or less.

57. Admonition is a private discipline that declares the judge's conduct to have been improper. Reprimand is a written notice to the judge that a commission has found conduct to be unacceptable behavior under one of the grounds for discipline. Censure is a more formal statement of guilt. Reprimand and censure may be public or private. ABA JOINT COMM. ON PROFESSIONAL RESPONSIBILITY, DISCIPLINE FOR LAWYERS AND JUDGES 7, 11 (1979).

Under the present system of disciplining federal administrative law judges, these less serious matters apparently go unsanctioned or the conduct is continued and culminates in a formal action of removal or suspension.

When peers participate in the decision to bring an action to discipline a judge, far more judges are informally sanctioned.⁵⁸ For example, all of the litigated federal administrative law judge disciplinary proceedings have resulted in orders of removal or at least twenty days suspension without pay.⁵⁹ The state commission system, providing peer review, has resulted in many less severe penalties.

Between 1977 and 1982 the California Commission on Judicial Performance issued thirty-nine private admonishments.⁶⁰ Eleven judges retired or resigned during investigation of complaints brought to the Commission. Four judges were publicly censured, two were retired involuntarily and one was removed from office.⁶¹ Between 1980 and 1982, the New York Commission removed nineteen judges, censured thirty-seven, and informally warned fifty-one.⁶² Between 1978 and 1982, the Minnesota Board on Judicial Standards publicly censured six judges, sixty-one were privately reprimanded, admonished or warned, and sixty agreed to correct their behavior.⁶³ In 1982 alone, in the United States there were forty-nine judges privately censured by all state judicial disciplinary commissions; twenty-nine

58. Since most state judges face election, public criticism of a state judge is a severe penalty. For example, no Minnesota judge receiving public discipline has been reelected. Peterson & Cassano, *State's Policing of Judges Among Most Aggressive in Nation*, Minneapolis Star and Tribune, Nov. 21, 1983, at A5, col. 1.

59. In seven of the disciplinary cases brought against federal administrative law judges in recent years, the penalty imposed has been suspension without pay. Six of these cases were prosecuted by the Social Security Administration, which has a large workload and backlog. *Heckler v. Campbell*, 103 S. Ct. 1952, 1954 n.2 (1983); *Nash v. Califano*, 613 F.2d 10, 12 (2d Cir. 1980). Suspension would mean shifting the work of these errant judges to others, with attendant delay and hardship on innocent parties, *In re Anderson*, 312 Minn. 442, 448, 252 N.W.2d 592, 595 (Minn. 1977); *In re Kuehnel*, 413 N.Y.S. 2d 809, 811 (N.Y. Ct. on the Judiciary 1978); *In re Cieminski*, 270 N.W.2d 321, 331 (N.D. 1978). A more rational approach would be to impose a fine, which would also help to pay for the proceeding. See 1982 MINN. BOARD OF JUD. STANDARDS ANN. REP. 6-7.

60. As of January 1, 1983, the California Commission had jurisdiction over 1308 judges. 1982 CAL. COMM'N ON JUD. PERFORMANCE, REP. TO THE GOVERNOR 8.

61. *Id.* at 13.

62. ABA, *Judicial Conduct Reporter*, vols. 3-5, no. 3 (Fall 1980-1982).

63. Peterson & Cassano, *supra* note 58, at 1, col. 1; Note, *Judicial Disciplinary Proceedings in Minnesota*, 7 WM. MITCHELL L. REV. 459, 475-76 (1981). Private reprimands are disclosed to governors and United States Presidents considering whether to elevate judges to higher courts. Minneapolis Star & Tribune, Nov. 21, 1983, at A8, col. 3.

were publicly censured; sixteen were removed from office; ten were suspended without pay; and 191 were informally warned or admonished.⁶⁴

This system of graduated sanctions — ranging from private admonition to removal — seems a much more effective and precise method of dealing with judicial indiscretion than the rigid, severe sanctions now applied by the MSPB. Only in systems providing for peer review have graduated sanctions been imposed.

IV. RECOMMENDED CHANGES IN ADMINISTRATIVE LAW JUDGE DISCIPLINARY PROCEEDINGS

Any procedure for disciplining judges should be created with the principle of judicial independence as its polestar. Judge Irving Kaufman describes the necessity for judicial independence as follows:

In principle, the answer is clear: the judge must be assured unequivocally that his legal decisions, no matter how unpopular, will not threaten his term of office and that the only indignity he may suffer for error is reversal. In short, he must be certain that disagreeable views will not lead to personal punishment. Judges should be removable only for the most serious offenses, and then only by an especially cautious procedure. It is essential to remember that provisions protecting judicial tenure were “not created for the benefit of the judges, but for the benefit of the judged.”⁶⁵

A. *Proposed Structural Changes in Adjudication of Cases Involving Administrative Law Judges*

The United States Congress has received in recent years two proposals which would change the procedure by which federal administrative law judges are disciplined. Both would provide peer participation in the investigation of formal disciplinary proceedings.

In 1980, the Federal Administrative Law Judges Conference (FALJC),⁶⁶ proposed a bill to the House Committee on Post Office and Civil Service⁶⁷ which would have established a peer review sys-

64. ABA, *Judicial Conduct Reporter*, vol. 5, no. 3 (Fall 1983).

65. Kaufman, *supra* note 46, at 690 (citing Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 698 (1969)).

66. The Federal Administrative Law Judges Conference is an unincorporated association of about 800 federal administrative law judges, and was previously known as “The Federal Trial Examiners Conference.” See *Ramspeck v. Trial Examiners Conference*, 345 U.S. 128, 129 (1953).

67. H.R. 6768, 96th Cong., 2d Sess. (1980).

tem for federal administrative law judges similar to the commission and judicial council systems employed to discipline state and federal judges. Under the proposal, the Chairman of the Administrative Conference of the United States would have been the chairman of a committee⁶⁸ to provide peer participation in the investigation of complaints regarding administrative law judges, and in the decision to institute disciplinary action. Half of the members of the committee, not counting the chairman, would be administrative law judges. The other members would have been lay and professional persons from both private and public sectors. Terms of membership would have been staggered to prevent control of the committee by an administration.⁶⁹

On May 12, 1983, Senator Heflin of Alabama introduced Senate bill 1275,⁷⁰ a bill creating a unified corps of federal administrative law judges. Under Senate bill 1275, no judge would be employed by the agency instituting an action; thus, the judge hearing the case would be independent of the agency. The policymaking body of the Corps would be composed of a chief judge and several division chief judges.⁷¹ The bill also provides for removal and discipline of administrative law judges, with investigation of complaints against judges to be conducted by a "Complaint Resolution Board" which would function very much like a federal judicial council in the case of disciplinary proceedings against federal judges.⁷²

Peer participation in judicial disciplining of administrative law judges could also be achieved by the creation of a Commission on Performance of Federal Administrative Law Judges, composed of,⁷³

68. The mere existence of such a committee would undoubtedly help maintain public confidence in administrative law judges and create a greater awareness of proper judicial behavior on the part of judges, two of the fundamental purposes of judicial discipline. ABA JOINT COMM. ON PROFESSIONAL RESPONSIBILITY, PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES 14 (1979).

69. See H.R. 6768, 96th Cong., 2d Sess. (1980).

70. 129 CONG. REC. S6609 (daily ed. May 12, 1983) (statement of Sen. Heflin).

71. S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 565(a)).

72. *Id.* (proposing codification at 5 U.S.C. § 659). One commentator has suggested the creation of a performance review board established to conduct periodic performance appraisals of administrative law judges and to handle complaints of undue interference in the judge's duties by agency officials. The review board could take varying degrees of disciplinary action against judges subject to appeal to the MSPB, except that removal cases should be subject to *de novo* hearings by the MSPB. Lubbers, *Federal Administrative Law Judges: A Focus of Our Invisible Judiciary*, 33 AD. L. REV. 109, 128 (1981). A similar proposal was made in Marquardt & Wheat, *Hidden Allocators*, 2 LAW & POL'Y Q. 472, 490 (1980).

73. The composition of state judicial disciplinary commissions varies in number

for example, five administrative law judges, two attorneys, and two public members, all appointed by the President with a four year term.⁷⁴ The Commission would have the power to investigate allegations of wrongdoing by administrative law judges and to settle informally with the accused judge, as well as to initiate formal proceedings to be litigated before the MSPB with prosecution to be handled by the special counsel of that agency.⁷⁵

Even under the present system, once formal adjudicatory proceedings have been initiated by the agency employing the judge, peer participation in the adjudication of the disciplinary proceeding could be accomplished by expanding the number of judges who would make the recommended decision in adjudications before the MSPB. Those cases are presently heard by one of two administrative law judges employed by the MSPB. Instead, these disciplinary cases could be heard by a panel of three administrative law judges with two of them being employed by agencies other than the MSPB or the prosecuting agency but assigned on rotation from a list kept by the Office of Personnel Management.⁷⁶ To help ensure fairness, the respondent judge could be given two peremptory challenges.

There is precedent for such a judicial tribunal to sit at disciplinary proceedings. The California commission system for disciplining judges — the model for all such present state judicial disciplinary proceedings — has had a provision for a three-judge panel since 1966.⁷⁷ The United States Department of Labor employs a similar

and type of members. I. TESITOR & D. SINKS, *JUDICIAL CONDUCT ORGANIZATIONS* 28-38 (2d ed. 1980).

74. Disciplinary councils composed of judges apparently are not very active. Neither the judicial councils of federal judges under 28 U.S.C. § 372(c) (1976), *see supra* note 14, nor the Labor Department Advisory Committee, *see infra* note 78 and accompanying text, have resulted in disciplinary action against judges. Telephone interviews with Terrence J. Brooks, Assistant Director for Judicial Conduct Organizations, February 21, 1984, and Judge Everette E. Thomas, Associate Chief Judge, Department of Labor, Feb. 15, 1984. The United States Court of Appeals for the Seventh Circuit may have issued a private reprimand for misconduct to a district judge in the Northern District of Indiana. *Chicago Sun-Times*, Feb. 4, 1983, at 14, col. 1.

75. The special counsel is already authorized to prosecute certain categories of cases before the MSPB. *E.g.*, 5 U.S.C. § 1206(g) (1982).

76. OPM presently keeps a list of administrative law judges who have volunteered for assignment to hear cases brought by agencies with backlogs of cases or agencies such as the Federal Deposit Insurance Corporation which do not employ judges on a permanent basis.

77. *See* *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 517 n.3, 526 P.2d 268, 272 n.3, 116 Cal. Rptr. 260, 264 n.3 (1974). Rule 907 of the California Rules of Court states: "[T]he commission shall order a hearing to be held before it concerning the censure, removal or retirement of the judge, or the commission may request the Supreme Court to appoint three special masters, who shall be judges of courts of

system⁷⁸ and three-member panels are also suggested by the ABA for both judicial and lawyer disciplinary hearings.⁷⁹ This suggested procedure could be accomplished by changing the MSPB rule to incorporate these changes.⁸⁰

These proposed systems of peer participation in disciplinary proceedings would be as effective as the present system in removing and disciplining errant administrative law judges,⁸¹ and they would better accomplish the fundamental principle upon which standards of judicial discipline are based: "[T]he major purpose of judicial discipline is not to punish judges but to protect the public and, thus, preserve the integrity of judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior on the part of judges themselves."⁸²

B. *Good Cause as the Standard for Removing Federal Administrative Law Judges*

Cases decided by the MSPB use a broad and expanding interpretation of the statutory "good cause"⁸³ by which federal administrative law judges are disciplined.⁸⁴ The standard for removal of judges applied by the MSPB, while based on the requirement of

record, to hear and take evidence in such matters." CAL. R. OF COURT 907. New Jersey, New Mexico and Wyoming have similar provisions. *In re Yengo*, 72 N.J. 425, 427, 371 A.2d 41, 43 (1977); *Martinee v. Members of Judicial Standards Comm'n*, 386 F. Supp. 169, 170 n.1, 171 (D.N.M. 1974); *In re Johnson*, 568 P.2d 855, 857 (Wyo. 1977).

78. Under the procedures adopted by the Secretary of Labor, complaints of misconduct of Labor Department administrative law judges may be referred for limited informal inquiry to an advisory committee made up of three judges appointed by the chief judge. This peer review program covers eighty-four judges. Procedures for Internal Handling of Complaints of Judicial Misconduct, 46 Fed. Reg. 28,050 (1981).

79. ABA JOINT COMM. ON PROFESSIONAL DISCIPLINE, PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES 43, 87 (1979).

80. The present applicable rule of practice of the MSPB is 5 C.F.R. § 1201.132 (1983), which states: "The presiding official in all cases brought under this section shall be the Board or an administrative law judge designated by the Board." *Id.*

Until 1980, the applicable MSPB rule would have allowed the appointment of such three judge panels. "The Commission, or member of the Commission, or one or more administrative law judges appointed under section 3105 of Title 5, United States Code shall preside at any hearing under this subpart." 5 C.F.R. § 930.226 (1977).

81. See *supra* notes 58-64 and accompanying text.

82. ABA JOINT COMM. ON PROFESSIONAL DISCIPLINE, PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES 14 (1979).

83. The statutory basis for these standards is found in 5 U.S.C. § 7521 (1982), which states that "[a]n action may be taken against an administrative law judge. . . by the agency in which the administrative law judge is employed only for good cause. . . ." *Id.*

84. ABA JOINT COMM. ON PROFESSIONAL DISCIPLINE, PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES 14 (1979).

showing "good cause," has broadened in the cases decided by the Board, and by administrative law judges employed by the Board.⁸⁵ Standards applied include: inefficiency, through low productivity;⁸⁶ conduct subjecting the agency to adverse criticism or disrepute;⁸⁷ violations of the American Bar Association (ABA) Code of Judicial Conduct,⁸⁸ ABA Code of Professional Responsibility for attorneys,⁸⁹ agency canons of conduct,⁹⁰ or generally accepted rules of conduct;⁹¹ detriment to efficiency, good order and proper function of agency;⁹² and violation of a government-wide regulation of government employees requiring that courtesy, consideration and promptness must be shown in dealing with other government employees.⁹³

Such broad and amorphous standards may impinge on judicial independence,⁹⁴ making more difficult the securing of fair and competent judges who are the "heart of formal administrative adjudications."⁹⁵

On February 6, 1984, the MSPB held that the Social Security Administration had failed to show good cause to remove an administrative law judge for low productivity in *Social Security Administration v. Goodman*.⁹⁶ The recommended decision found that, although Judge Robert Goodman was industrious and conscientious, he made too many detailed findings and was inefficient, having decided approximately sixteen cases a month compared to the agency average

85. See cases cited *supra* note 2.

86. *SSA v. Goodman*, No. HQ7521821005 (MSPB June 23, 1983) (recommended decision of administrative law judge), *rev'd*, No. HQ75218210015 (MSPB Feb. 6, 1984); see *supra* note 2.

87. See *Hasson v. Hampton*, 34 AD. L. REP. 2D (P & F) 819 (D.D.C. 1973); *McEachern v. Macy*, 233 F. Supp. 516 (W.D.S.C. 1964), *aff'd*, 341 F.2d 895 (4th Cir. 1965); see *supra* note 1.

88. *In re Chocallo*, 2 M.S.P.B. 20 (1980); see also, *Chocallo v. Bureau of Hearings & Appeals*, 548 F. Supp. 1349 (E.D. Pa.), *aff'd in part and vacated and remanded in part*, 673 F.2d 551 (D.C. Cir.), *cert. denied*, 103 S. Ct. 128 (1982).

89. *In re Spielman*, 1 M.S.P.B. 50 (1979); see *supra* note 2.

90. *Hasson v. Hampton*, 34 AD. L. REP. 2D (P & F) 819 (D.D.C. 1973).

91. *In re Glover*, 2 M.S.P.B. 70 (1980).

92. *In re Stecher*, 11 AD. L. REP. 2D (P & F) 868, 878 (Civil Service Comm'n 1961); see *supra* note 1. But see *SSA v. Goodman*, No. HQ75218210015 (MSPB Feb. 6, 1984); see *infra* text accompanying notes 96-102; *SSA v. Davis*, No. HQ75218210026 (MSPB Feb. 6, 1984); see *infra* note 104.

93. *In re Glover*, 2 M.S.P.B. 70 (1980).

94. Kaufman, *supra* note 46, at 690 (citing Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 698 (1969)).

95. ATT'Y GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 46 (1941).

96. No. HQ75218210015 (MSPB Feb. 6, 1984).

of thirty to thirty-two cases.⁹⁷ The MSPB held that the recommended decision improperly equated the "good cause"⁹⁸ test with "efficiency of the service,"⁹⁹ but that, as a matter of law, low productivity could constitute the basis for a removal of an administrative law judge.¹⁰⁰ The MSPB found, however, that the evidence did not establish the comparability of the statistics used to measure productivity.¹⁰¹ The nationwide average was not a measurement of reasonable productivity because it included different types of cases and dispositions such as dismissals, full opinions, short form reversals, and affirmances, both on the written record and after a hearing. "Only if approximately the same amount of time was required to render most final dispositions" or "if the complexities presented by the mix of cases assigned to the respondent mirrored the complexities of those included in the national average," would the MSPB be justified in inferring that comparative productivity could be measured by case disposition statistics.¹⁰²

MSPB's interpretation in *Goodman* of "good cause"¹⁰³ under 5

97. No. HQ75218210015, slip op. at 4, 20 (MSPB Apr. 6, 1983)(recommended decision of administrative law judge). An average of forty-five dispositions per month is currently the goal. Dunlavey, *ALJ's Pressured to Expedite Social Security Cases*, *Legal Times of Wash.*, Apr. 2, 1984, at 5, col. 4.

98. 5 U.S.C. § 7521 (1982).

99. Other federal employees may be removed, without a prior hearing, for "such cause as will promote the efficiency of the service." 5 U.S.C. § 7513 (1982); see *Arnett v. Kennedy*, 416 U.S. 134 (1974). Inefficiency under the section 7513 test includes taking too much time to perform an assignment. *Perlstein v. United States*, 182 Ct. Cl. 865 (1968).

100. *SSA v. Goodman*, No. HQ75218210015, slip op. at 18 (MSPB Feb. 6, 1984).

101. *Id.* The MSPB found that "no evidence was offered regarding the time required to render dispositions or comparing respondent's assignments with those included in the national average," but then referred to the testimony of two agency witnesses that most of the cases were similar and that it was unusual for any one case to be more time-consuming than another. *Id.* The opinion cites the testimony of another witness that the cases did vary in difficulty, and the statements of agency counsel at oral argument — apparently on the basis that such statements constituted an authorized admission — that the cases were not fungible, that the average productivity figures were not offered to prove the existence of a standard measurement of reasonable productivity, and that even with a random assignment method, a judge could have been assigned a disproportionate share of difficult and time-consuming cases. *Id.*

102. *Id.* at 18. Another relevant consideration, not mentioned in the opinion, would be the comparable history of the judge's cases on appeal. If a low producing judge's cases are almost always upheld on appeal, he may in fact be more, "productive" than a high producer who is often reversed on appeal.

103. MSPB dismissed the argument that the good cause standard should be equated very nearly with the "good behavior" standard applied to federal judges by the Constitution under which they can be removed only on impeachment and conviction of "Treason, Bribery, or other high Crimes and Misdemeanors." *Id.* at 7, 6-10. The opinion relies heavily on a statement by Senator McCarran, the author of the Administrative

U.S.C. § 7521 (a) is very broad, adumbrating that administrative law judges may have even less tenure rights than other federal employees. In holding that "good cause" was not the equivalent of the "efficiency of the service" test, MSPB stated that:

The good cause and the efficiency of the service standards are different. While traditional chapter 75 cases provide guidance in section 7521 cases, the efficiency of the service is not imputed into the good cause standard. There may well be specific fact situations which would meet both standards, but the standards are distinct. We reserve, for later cases, the questions of whether good cause is a stricter standard and whether good cause could ever be based upon facts which would not also have satisfied the efficiency of the service standard.¹⁰⁴

This broad interpretation of "good cause" seems inconsistent with the intent to make administrative law judges "independent and secure in their tenure,"¹⁰⁵ and "'functionally comparable' to"¹⁰⁶ and "'very nearly the equivalent of'" judges employed in the judicial branch.¹⁰⁷

The amorphous phrase "good cause" could, however, be made

Procedure Act, made in debate, that it is the duty of the courts to determine the meaning of the words and phrases of the bill. *Id.* at 6 (citing S. Doc. No. 248, 79th Cong., 2d Sess. 326 (1946)). Since courts have already upheld removals of administrative law judges for financial irresponsibility, insubordination and intemperate behavior and bias — lesser faults than those that would justify removal under the constitutional "good behavior" standard — MSPB was convinced that it was not bound by the "good behavior" standard. *Id.* at 8. MSPB cited *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 143 n.9 (1953) for the proposition that the "Supreme Court rejected an assertion the Congress, in enacting the APA, intended [administrative law judges] to be very nearly the equivalent of federal judges." *Id.* at 8 n.6. In fact, the Court in *Ramspeck* rejected the assertion, not on the merits, but because it was written five years after the Act was passed. 345 U.S. at 143 n.9. In the contemporaneous Senate Report on the APA, however, Senator McCarran made clear that Congress intended the administrative law judges (then "examiners") were to have tenure very nearly equivalent to that enjoyed by federal judges. He said that the APA "relie[d] upon independence, salary, security, and tenure during *good behavior* of examiners within the framework of the civil service. . . ." S. Doc. No. 248, 79th Cong., 2d Sess. (1937), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 193, 303 (1946) (emphasis added).

104. *Goodman*, No. HQ75218210015, slip op. at 15, n.8. In *SSA v. Davis*, No. HQ75218210026 (MSPB Feb. 6, 1984), decided the same day as *Goodman*, the Board seemed to rely in part on a rule very similar to the efficiency of the service test in determining good cause for a judge's removal. The Board held that good cause included judge's conduct which has "a disruptive effect on the work place and which tends to erode confidence in the administrative adjudicatory process." *Id.* at 4.

105. *Benton v. United States*, 488 F.2d 1017, 1022 (Ct. Cl. 1973).

106. *Butz v. Economou*, 438 U.S. 478, 513 (1978).

107. *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 144 (1953) (Black, J., dissenting) (quoting S. Doc. No. 82, 82d Cong., 1st Sess. 9 (1931)).

more specific.¹⁰⁸ For example, the disciplinary standard for the United States Court of Claims, an Article I court,¹⁰⁹ is relatively clear: "Removal of a judge of the United States Claims Court. . . shall be only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability."¹¹⁰

C. *Burden of Proof*

The burden of proof in disciplinary proceedings against federal administrative law judges presently requires only that the agency prove the charge by a preponderance of the evidence.¹¹¹ Because of the possible impact of these proceedings on judicial independence, this standard should be made more stringent.

The burden of proof in state judicial disciplinary proceedings requires that allegations of misconduct be proved by a preponderance of the evidence in six states and by clear and convincing evidence sufficient to sustain the charges to a reasonable certainty in sixteen states.¹¹² The standard employed by the Supreme Court of New Jersey regarding removal of a judge is proof beyond a reasonable doubt.¹¹³

The burden of proof in disciplinary proceedings brought against

108. The ABA standard for judicial discipline is an example of one which is too specific. It provides:

Grounds for discipline should include:

- (a) Conviction of a felony;
- (b) Willful misconduct in office;
- (c) Willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute;
- (d) Conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, whether conduct in office or outside of judicial duties, that brings the judicial office into disrepute;
- (e) Any conduct that constitutes a violation of judicial conduct or professional responsibility.

ABA JOINT COMM. ON PROFESSIONAL DISCIPLINE, PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES 29 (1979).

109. 28 U.S.C.A. § 171(a) (West Supp. 1983).

110. *Id.* § 176. Similarly, removal of bankruptcy judges can be "only for incompetency, misconduct, neglect of duty or physical or mental disability." *Id.* § 153(b).

111. *SSA v. Brennan*, No. HQ75218210010, slip op. at 17 (MSPB June 23, 1983) (recommended decision of administrative law judge), *rev'd on other grounds*, No. HQ75218210010 (MSPB Feb. 6, 1984). *Cf.* *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981) (standard of proof in administrative adjudications under the APA is the preponderance of the evidence standard); 5 C.F.R. §§ 1201.56, 1201.131 (1983).

112. AMERICAN JUDICATURE SOCIETY, JUDICIAL DISCIPLINE AND DISABILITY DIGEST 196-98 (1960-1978).

113. *In re Hardt*, 72 N.J. 160, 165, 369 A.2d 5, 7 (1977).

federal administrative law judges should at least require proof to a reasonable certainty and that any reasonable doubts should be resolved in favor of the accused judge.¹¹⁴

D. *Low Productivity*

In *Goodman*, the MSPB held that administrative law judges can be removed for inefficiency based on low productivity.¹¹⁵ Generally, a judge should not be removed absent proof of dereliction of duty.¹¹⁶ In social security disability cases, moreover, there is a basic obligation on the administrative law judge in these non-adversarial proceedings to develop a full and fair record and to scrupulously and conscientiously explore all of the relevant facts.¹¹⁷ The judge must, therefore, be afforded enough time to research and investigate a case and to develop and examine all of the available evidence. As judges are pressured to increase their productivity, they are forced to devote less time to developing the evidence and the claimant's right to a full and fair hearing may be jeopardized.¹¹⁸

Recognizing the problems involved in removal cases based solely on lack of production, the *Goodman* opinion implies that the agency could promote higher productivity by ordering the judge "to take reasonable steps to improve his productivity."¹¹⁹ As support, *Social Security Administration v. Manion*¹²⁰ was cited, in which, on the same day, the MSPB upheld sanctions against a judge who failed

114. *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 275, 515 P.2d 1, 4, 110 Cal. Rptr. 201, 204 (1973).

115. *Goodman*, No. HQ75218210015, slip op. at 12.

116. *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 535, 526 P.2d 268, 285, 116 Cal. Rptr. 260, 276 (1974). In *McCartney*, a judge was censured for several instances of misbehavior. The California Supreme Court, however, held that his conduct in delaying court proceedings for periods of up to thirty minutes while he stared at the ceiling meditating about a ruling and running proceedings far into evening hours, was not misconduct and should be handled by the administrative process rather than formal discipline. Although the court found that the judge's "languor" and "inefficiency" caused, among other problems, "considerable strain on the municipal court calendar," he was conscientious and made a determined effort to conduct his share of the affairs before the court; his inefficiency stemmed from an unrealistic and unjustified attention to details and not a neglect of responsibility. The court held, therefore, that "a judge should not be disciplined for inefficiency absent proof of dereliction of duty. . . ." *Id.* at 535 n.12, 526 P.2d at 285 n.12, 116 Cal. Rptr. at 276 n.12.

117. *Heckler v. Campbell*, 103 S. Ct. 1952, 1959 (1983) (Brennan, J., concurring) (citing *Broz v. Schweiker*, 677 F.2d 1351, 1364 (11th Cir. 1982)); *Narrol v. Heckler*, No. 81-01347, slip op. (D.C. Cir. Feb. 24, 1984).

118. THE ROLE OF THE ADMINISTRATIVE LAW JUDGE, *supra* note 43, at 17.

119. *Goodman*, No. HQ75218210015, slip op. at 16.

120. No. HQ75218210008 (MSPB Feb. 6, 1984).

to obey instructions to schedule cases.¹²¹ Rather than instructing a judge to hold a particular set of hearings, higher productivity might be achieved, with less interference with the judicial function, by setting a time limit by which a case must be disposed.¹²²

There is a precedent for time limits imposed on the conduct of administrative adjudicatory proceedings. The Federal Trade Commission, for example, requires the judge to hold a prehearing conference in a complex case within forty-five days after the filing of the answer to the complaint,¹²³ and to state the issues within thirty days after the conference.¹²⁴ The judge's initial decision must be filed within ninety days after the record is closed.¹²⁵ And, in unfair trade cases, a statute requires the United States International Trade Commission to make its determination within one year, or eighteen months in complex cases.¹²⁶ Rather than the *ad hoc* instruction to a particular judge to set a hearing schedule, general time limitations for the disposition of social security disability cases would seem more reasonable, and would allow the judges to continue to control their own docket.¹²⁷

121. *Id.* at 9.

122. Numerous courts have ordered time limits on Social Security cases. *E.g.*, Day v. Schweiker, 685 F.2d 19, 22-23 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3774 (Dec. 5, 1983); see *Goodman*, No. HQ75218210015, slip op. at 3 (MSPB) (citing cases); Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978).

123. 16 C.F.R. § 3.21(b)(1) (1983).

124. *Id.* § 3.21(b)(3).

125. *Id.* § 3.51(a).

126. 19 U.S.C. § 1337(b)(1) (1983).

127. In addition to the monthly production quota, the Social Security Administration staff allegedly review the work of judges outside of the Administration's normal appellate process. The Administration's review procedures include giving the judges mandatory instructions on the length of hearings and opinions, evidence required, and use of expert witnesses, as well as monitoring, counseling, and admonishing judges whose decisions deviate from a fifty percent average rate favorable to claimants. *Nash v. Califano*, 613 F.2d 10, 13 (2d Cir. 1980). The validity of these practices is currently being litigated in *Association of Administrative Law Judges v. Heckler*, No. 83-124 (D.D.C. filed Jan. 19, 1983).

Thomas Babington Macaulay provided a vivid description of review outside of the normal appellate process conducted by Frederic the Great whose opinions were not always followed by judges:

The resistance opposed to him by the tribunals inflamed him to a fury. He reviled his Chancellor. He kicked the shins of his Judges. He did not, it is true, intend to act unjustly. He firmly believed that he was doing right, and defending the cause of the poor against the wealthy. Yet this well-meant meddling probable did far more harm than all the explosions of his evil passions during the whole of his long reign. We could make shift to live under a debauchee or a tyrant; but to be ruled by a busybody is more than human nature can bear.

3 MACAULAY, CRITICAL AND HISTORICAL ESSAYS 278-79 (1901).

A lazy and irresponsible administrative law judge should, of course, be disciplined.¹²⁸ If judicial independence is not to be diminished, however, the judge who is steady, earnest and energetic should not be punished for an output that is lower than the average. Rather, the judge should be helped administratively through, for example, additional clerical help¹²⁹ or advice from the chief judge of the agency. Reasonable time limits for final disposition of cases, stated in statute or regulation, could help prod slower judges, but to attempt efficiency by requiring a tightly controlled production line effort in turning out decisions would usurp a judicial function.

V. CONCLUSION

Administrative law judges are, in fact, judges and must conduct themselves in the performance of their duties according to standards of acceptable behavior. The principle of judicial independence, however, distinguishes disciplinary proceedings brought against judges from those brought against other civil servants: "Our judicial system can better survive the much discussed but rarely existent senile or inebriate judge than it can withstand the loss of judicial independence that would ensue if removal of judges could be effected by a procedure too facile or a standard too malleable."¹³⁰

Unlike any other disciplinary proceeding involving judges, those proceedings against federal administrative law judges are now prosecuted by the agency which employs the judge. The agency is usually a party to cases regularly heard by the judge. The appearance of impropriety is manifest in having a party to a judge's cases able to prosecute the judge for alleged disciplinary infractions.

Participation by administrative law judges in disciplining other administrative law judges — especially in the decision to bring charges — would advance judicial independence, while increased use of graduated sanctions, with emphasis on early and frequent informal sanctions of questionable judicial conduct, would protect the public and preserve the government's investment in trained federal administrative law judges.

128. Canon 3 of the ABA Code of Judicial Conduct provides that a judge should be diligent. ABA CODE OF JUDICIAL CONDUCT Canon 3 (1972).

129. In *Goodman*, the MSPB reserved decision on whether an instruction to use the services of a decision writer would constitute improper interference with the judicial function. No. HQ75218210015, slip op. at 16 n.11.

130. Kaufman, *supra* note 46, at 681.