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Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics

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COMMENTS

Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics

Just as we regulate the filing of pleadings and the admissibility of evidence, so must we regulate the conduct of those who ultimately judge the pleadings and evidence.[1]

How can I expect to win this case when the Department of Labor is my accuser, prosecutor, and judge?[2]

I. Introduction

Society depends upon the ethical responsibility of those who sit in judgment to achieve fairness and justice in an adversarial system.[3] Although judges must abide by standards of ethical conduct proscribed by the Code of Judicial Conduct (CJC),[4] no such uniform

1. S. LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES 5 (1984).

2. Comment of a pro se litigant defending himself against charges brought by the Department of Labor. This statement exemplifies the public perception of administrative law judges as being biased and partial to their employing agency. *See* E. THOMAS, ADMINISTRATIVE LAW JUDGES: THE CORPS ISSUE 5 (1987).

3. S. LUBET, *supra* note 1, at 5. "The value of any system purporting to utilize an unbiased trier of fact, whether titled 'trial judge,' 'administrative law judge,' 'hearing examiner,' or 'commissioner,' rests on the integrity of the individual occupying the position." *See* Lussier, *The Role of the Article I Trial Judge*, 6 W. NEW ENG. L. REV. 775, 778-79 (1984).

4. The seven canons of the Code of Judicial Conduct (CJC) provide:

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

Canon 3: A Judge Should Perform the Duties of His Office Impartially and Diligently

Canon 4: A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

restraint exists for administrative law judges (ALJ's). ALJ's adjudicate significant controversies between administrative agencies and the public; these proceedings resemble typical judicial court actions.[5] The varieties of disputes heard by ALJ's range from the classic agency licensing and ratemaking cases to economic regulation, health care, welfare, disability, and environmental matters.[6] ALJ's are recognized as being functionally comparable to trial judges,[7] and ALJ's decisions have considerable impact upon the lives of most Americans.[8] Their powers, duties, and status have been the subject of debate on several occasions by state and federal courts.[9] Nevertheless, due to their status as agency employees under the executive branch of government and their lack of complete independence, ALJ's are not held to the same ethical code as trial judges.[10]

Ethical standards for ALJ's are necessary due to their unique position in an expanding administrative society. The employer-employee relationship between agencies and ALJ's gives rise to a public

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Canon 5: A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

Canon 6: A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

Canon 7: A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

MODEL CODE OF JUDICIAL CONDUCT (1984) [hereinafter MODEL CODE].

The 1990 proposed revision to the Model Code of Judicial Conduct changes "should" to "shall" in each canon to express mandatory, as opposed to aspirational, standards. In addition, Canons 4, 5, and 6, all of which relate to extra-judicial activities of judges, are proposed to be combined into a new Canon 4: "A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations." The new Canon 5 of the proposed 1990 CJC, concerning political activity, would replace Canon 7 of the 1984 CJC. MODEL CODE OF JUDICIAL CONDUCT (1990) (Final Draft, Nov. 1989) [hereinafter ABA PROPOSED DRAFT].

5. E. THOMAS, *supra* note 2, at 1.

6. Simon, *For ALJ's, Obscurity is Ending*, 5 NAT'L L.J., June 6, 1983, at 1, col. 4. *See also* E. THOMAS, *supra* note 2, at 5.

7. Butz v. Economou, 438 U.S. 478 (1978). In *Butz*, the Supreme Court held that administrative law judges were entitled to the same level of absolute immunity as trial judges. The Court stated that "[t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge." *Id.* at 513.

8. *See* M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES 2 (1983). "Like death and taxes (both of which, incidentally, are matters of agency concern) the agencies reach everyone." 1 F. COOPER, STATE ADMINISTRATIVE LAW 3 (1965).

9. *See* Butz v. Economou, 438 U.S. 478 (1978); Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953); Riss & Co. v. United States, 341 U.S. 907 (1951); WongYang Sung v. McGrath, 339 U.S. 33 (1950); Benton v. United States, 488 F.2d 1017 (Ct. Cl. 1973); Myers v. Commonwealth, Dept. of Labor & Indus., 312 Pa. Super. 61, 458 A.2d 235 (1983).

10. ABA PROPOSED DRAFT, *supra* note 4, at 42. Administrative courts are considered to be Article I courts. Other notable Article I courts are the Tax Court, 26 U.S.C. § 7441 (1988) and the court of claims, 23 U.S.C. 171 (1988).

perception that ALJ's are not unbiased or impartial judges.[11] As the ALJ's role continues to evolve and the administrative process becomes more judicial, the need for uniform ethical guidelines becomes a compelling concern.[12] A recent proposal by the American Bar Association Standing Committee on Ethics and Professional Responsibility would give the states an opportunity to address this concern.[13] Pursuant to the ABA's proposed revision of the Code of Judicial Conduct, the section governing compliance would allow each adopting jurisdiction the option of electing to make the CJC applicable to state administrative law judges.[14]

This Comment explores the implications posed by the virtual lack of a binding ethical code for administrative law judges. Part II analyzes the Code of Judicial Conduct applicable to all judges and judicial officers, and considers the reasoning behind the current inapplicability of the CJC to ALJ's. Part III examines the current status of the ALJ in both the federal and state context. The functions and duties performed by ALJ's are compared with those carried out by the Article III and state judiciaries, which are bound by the CJC. Part IV addresses how the states have responded to questions of ALJ impropriety and concludes that indiscriminate application of the Code of Judicial Conduct to ALJ's is undesirable. The inadequacies of the present system and attempted changes are discussed in Part V. Finally, Part VI advocates that Pennsylvania elect to make the CJC applicable to state ALJ's. This proposal is evaluated in light of separation of powers concerns, and recommends that such an adoption of the CJC in Pennsylvania is not only feasible, but is desirable.

II. The Code of Judicial Conduct

A. Background

The roots of the modern Code of Judicial Conduct can be traced to the Canons of Judicial Ethics, formulated by the American

11. E. THOMAS, *supra* note 2, at 5. This is perhaps the most serious and fundamental problem because it directly relates to the structure of the administrative hearing system.

12. *See* Michigan Comm. on Professional and Judicial Ethics, Informal Op. CI-351 (1978).

13. *See generally* ABA PROPOSED DRAFT, *supra* note 4.

14. *Id.* (preface). The American Bar Association Standing Committee on Ethics and Professional Responsibility introduced a comprehensive draft revision of the Code of Judicial Conduct in May 1989 for comment. The proposed revisions are set forth in the Model Code of Judicial Conduct (1990), Final Draft, November 1989. Following submission to the ABA House of Delegates in February 1990 for approval, the draft was withdrawn until the August 1990 meeting. Proposed amendments may be filed until April 6, 1990.

Bar Association (ABA) in 1924.[15] Although the Canons served a useful purpose, by 1969 it became apparent that they were difficult to apply to many increasingly complex ethical problems and lacked an appropriate method of enforcement.[16] The ABA recognized the limited value of a code of conduct that only suggested guidelines for appropriate judicial behavior, and determined that a more specific and enforceable code was necessary.[17] The resulting Code of Judicial Conduct[18] is mandatory upon judges and contains specific regulations and restrictions on judicial,[19] quasi-judicial,[20] and extra-judicial[21] behavior.[22] The Code consists of broad statements designated as Canons, and sets forth specific rules supplemented by a nonbinding commentary.[23] Most jurisdictions have incorporated the CJC by statute or court rule.[24]

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15. *See* ABA CANONS OF JUDICIAL ETHICS (1924); MODEL CODE, *supra* note 4. *See also* S. LUBET, *supra* note 1, at 4.

16. Seymour, *The Code of Judicial Conduct from the Point of View of a Member of the Bar*, 1972 UTAH L. REV. 352. The controversies that arose over the activities and conduct of Supreme Court Justices Fortas and Douglas helped to demonstrate the inadequacies of the existing Canons. *Id.* The completion of the ABA's Code of Professional Responsibility for lawyers also encouraged the promulgation of a new code for judges. *Id. See also* Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410. "It seems clear from this language that the drafters of the Canons did not contemplate that they were preparing an enforceable set of rules." *Id.*

17. *See* ABA CANONS OF JUDICIAL ETHICS, preamble (1969). The preamble to the Canons spoke in general terms, requesting that the "spirit" of the adopted Canons be a guide and reminder for all judges. *Id.* In contrast, the Code of Judicial Conduct is concerned about the role of the judge in the legal system, and the judge's ability to impact the system and society by his behavior. The primary role of a judge is as a judicial officer; however, judges engage in many quasi and extra-judicial activities that may affect the legal system and are worthy of regulation. S. LUBET, *supra* note 1, at 4. *See generally* Sutton, *A Comparison of the Code of Professional Responsibility with the Code of Judicial Conduct*, 1972 UTAH L. REV. 355.

18. The CJC was adopted by the ABA in 1972, and was later revised in 1984.

19. The judicial activities that CJC Canon 3 regulates are competence (Canon 3A(1)), order and decorum (Canon 3A(2)), judicial demeanor (Canon 3A(3)), impartiality (Canons 3A(1), 3A(4), 3A(6), and 3A(7)), ex parte communications (Canon 3A(4)), and disqualification (Canon 3C). *See* MODEL CODE, *supra* note 4, Canon 3.

20. *Id.*, Canon 4. Canon 4 regulates quasi-judicial activities such as academic pursuits involving the legal system (Canon 4A), appearances before legislative and executive bodies (Canon 4B), and involvement with governmental agencies (Canon 4C). *Id.*

21. *Id.*, Canon 5. Canon 5 of the Code deals with extra-judicial activities such as avocational activities (Canon 5A), involvement with charities and civic organizations (Canon 5B), business and financial dealings (Canon 5C, 5D), acceptance of gifts (Canon 5C(4)), and extra-judicial appointments (Canon 5G). *Id.*

22. *See* MODEL CODE, *supra* note 4. The CJC replaced the Canons in an effort to establish standards "which [are] realistic and enforceable yet responsive to the legitimate expectations of the public." *See also* Weckstein, *Roundtable Discussions on the Proposed Code of Judicial Conduct: Introductory Observations on the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 785, 786 (1972).

23. ABA PROPOSED DRAFT, *supra* note 4, preamble. The text of the canons and the rule sections are authoritative. The commentary is not intended as a statement of additional rules, but provides guidance as to the meaning and application of the Canons and sections. *Id.*

24. S. LUBET, *supra* note 1, at 4. The CJC has been adopted in full by 45 states and the District of Columbia, and in part by the remaining 5 states. *Id.* Pennsylvania has adopted the

B. *Purpose of the Code of Judicial Conduct*

Ethical codes such as the Code of Judicial Conduct serve both proscriptive and prescriptive purposes.[25] The proscriptive function is legislative in nature, and sets forth definitions for acts of professional misconduct that are legally punishable.[26] In contrast, the prescriptive function sets the standards to guide behavior and serves as a statement of moral order.[27] The Code of Judicial Conduct attempts to address each of these purposes. The seven canons that comprise the CJC are intended to be the "rules" of ethical behavior expected from judicial officers.[28] The canons are intended to establish standards that govern the ethical conduct of judges and to provide a structure through which disciplinary agencies can regulate and enforce proper conduct.[29]

Professional disciplinary action is neither criminal nor civil in nature, and is not intended to be the basis for prosecution.[30] The proposed preamble to the final draft of the ABA Model Code of Judicial Conduct (1990) indicates:

> Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the im-

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Code of Judicial Conduct with minor modifications. *See generally* 204 PA. CODE § 33 (1979). For a comprehensive history of the Code of Judicial Conduct, *see generally* E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT (1973); Thode, *Roundtable Discussions on the Proposed Code of Judicial Conduct: The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793 (1972); Weckstein, *supra* note 22.

25. Lubet, *The Search for Analysis in Judicial Ethics or Easy Cases Don't Make Much Law*, 66 NEB. L. REV. 430, 433-34 (1987). The author stated that for codes of conduct to be effective, they must be "self-enforcing" and "able to provide their own answers to questions of interpretation." *Id.*

26. *Id.*

27. *Id.*

28. *See supra* note 4 and accompanying text. Not all commentators are in agreement that the Code has accomplished this ideal. According to one author,

> the judicial code of conduct remains a sparse and general document with consensus rules limited to fairly obvious and egregious behavior; the judicial opinions enforcing the prohibitions are abrupt and conclusory with little analysis or recognition of the difficult trade offs involved; and the scholarship on judicial ethics is minimal.

Perlman, *Judicial Ethics: Searching for Consensus*, 66 NEB. L. REV. 413, 414 (1987).

29. *See* MODEL CODE, *supra* note 4. The Code is not expected to be an exhaustive guide. It is intended to be supplemented by general ethical standards, and to "state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct." *See* ABA PROPOSED DRAFT, *supra* note 4, at 2.

30. ABA PROPOSED DRAFT, *supra* note 4, preamble.

proper activity on others or on the judicial system.[31]

The CJC is concerned not only with the actions of the violator, but must also consider the effects such actions have on the public, profession, and courts.[32] In response to concerns about judicial misconduct, many states instituted boards or commissions to investigate such allegations.[33] In Pennsylvania, for example, the Judicial Inquiry and Review Board was established as an independent agency to consider judicial misconduct charges against judges, and to make appropriate disciplinary recommendations to the Pennsylvania Supreme Court.[34] ALJ's are not considered to be within the scope of the judicial officers covered by the authority of the Board.[35]

Bar association professional ethics committees have been established to give opinions on the Code of Judicial Conduct and professional responsibility issues.[36] The ABA By-Laws assign the responsi-

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31. *Id.* at 2.

32. *See* Sutton, *supra* note 17, at 360; S. LUBET, *supra* note 1, at 5-6.

33. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). As of 1978, 47 states, the District of Columbia, and Puerto Rico had established by constitution, statute, or court rule a judicial inquiry board or commission to handle disciplinary procedures. *Id.* at 834.

34. The Pennsylvania Judicial Inquiry and Review Board (JIRB) was established in 1968 with the adoption of Article V, § 18 of the Pennsylvania Constitution. Pursuant to PA. CONST. art. V, § 18(a) (1968):

> There shall be a Judicial Inquiry and Review Board having nine members as follows: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.

See also First Amendment Coalition v. Judicial Inquiry & Review Bd., 501 Pa. 129, 460 A.2d 722 (1983).

Members of the board serve terms of four years. Upon receipt of complaints, the board makes a preliminary investigation and may order a hearing. PA. CONST. art. V, § 18(b) (1968). If good cause is found, a disciplinary recommendation is made to the Pennsylvania Supreme Court. *Id.* at 18(g). The supreme court has the ultimate authority to reject the board's recommendation or modify the proposed discipline. *Id.* at 18(b). A veil of secrecy surrounds the investigation and JIRB decision until it is submitted to the Pennsylvania Supreme Court. Liebler, *Eye on the Judiciary: Update on the JIRB*, PA. LAW., Dec. 1989, at 23.

35. The Rules of Procedure Governing the Judicial Inquiry and Review Board do not define a "judge." Rule 1(a), however, expressly indicates:

> Provided, where the judge is a justice of the peace, magistrate, alderman, or other member of the minor judiciary (including any mentioned in the schedule to Art. V, 12 and 21 of the Constitution of 1968) the Board may refer the matter to the President Judge of the county where office is held for the purpose of preliminary investigation with respect to which said President Judge shall make a report to the Board.

Rules of Procedure Governing Judicial Inquiry and Review Board, 204 PA. CODE § 41 (1985). *See generally* 42 PA. CONS. STAT. ANN. §§ 2101-2105, 3331-3334 (Purdon 1982).

36. *See* Martineau, *supra* note 16, at 412. The ABA and state bar associations have ethics committees that consider and offer advisory opinions on questions of legal ethics. These published opinions are advisory only and are not binding on any court or disciplinary authority. M. SCHWARTZ & R. WYDICK, PROBLEMS IN LEGAL ETHICS 11 (2d ed. 1988).

bility of giving formal and informal opinions to the ABA Committee on Professional Ethics.[37] Informal state professional ethics committees, such as the Pennsylvania Bar Association Committee on Ethics and Professional Responsibility, are delegated the responsibility for providing nonbinding advisory opinions at the state level.[38] Both the ABA and state ethics committees have informally applied the CJC to ALJ's.[39]

C. *Applicability of the CJC to Administrative Law Judges*

A special compliance section of the Code of Judicial Conduct sets forth the types of judicial officers that are explicitly governed by the Code.[40] The compliance section following Canon 7 states, in pertinent part:

> A. Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy,[41] special master,[42] court commissioner[43] or magistrate,[44] is a judge for purposes of this Code.[45]

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37. *See* ABA BY-LAWS art. X, § 7(1) (1970).

38. *See, e.g.*, Pennsylvania Bar Association Comm. on Legal Ethics and Professional Responsibility, Formal Op. 89-86 (1989). All opinions are qualified as follows: "The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any court. It carries only such weight as an appropriate reviewing authority may choose to give it."

39. *See infra* notes 153-95 and accompanying text.

40. MODEL CODE, *supra* note 4, Compliance with the Code of Judicial Conduct [hereinafter Compliance]. The Draft revision to the ABA Model Code changes the title from "compliance with" to "application of" in the interest of greater accuracy. *See* ABA PROPOSED DRAFT, *supra* note 4 (Legislative Draft Format).

41. A referee is a "[p]erson who is appointed to exercise judicial powers, to take testimony, to hear parties, and report his findings." Department of Motor Vehicles v. Superior Court for Los Angeles County, 271 Cal. App. 2d 770, 774, 76 Cal. Rptr. 804, 806 (1969). He is an officer exercising judicial powers, and is an arm of the court for a specific purpose. *Id.*; Segal v. Jackson, 183 Misc. 460, 462, 48 N.Y.S.2d 877, 879 (1944) (citing *In re* Hathaway, 71 N.Y. 238, 243 (1877)) (citing BLACK'S LAW DICTIONARY 1151 (5th ed. 1979)).

42. A special master is appointed to act as the representative of the court in some particular act or transaction. *See* Pewabic Mining Co. v. Mason, 145 U.S. 349 (1891).

43. A court commissioner is "[a] person appointed by a judge to take testimony and find facts or to carry out some specific function connected with a case." BLACK'S LAW DICTIONARY 319 (5th ed. 1979).

44. "In a general sense, a magistrate is a public officer, possessing such power, legislative, executive, or judicial, as the government appointing him may ordain, although in a narrow sense he is regarded as an inferior judicial officer." *See* Shadwick v. City of Tampa, 250 So. 2d 4, 5 (Fla. 1971).

45. *See* MODEL CODE, *supra* note 4, Compliance. The proposed draft revision to the ABA Model CJC modifies the officers covered by the compliance section to read:

> Anyone, whether or not a lawyer, who is an officer of a judicial system *and who performs* judicial functions, including an officer such as a *magistrate, court commissioner, special master,* or *referee,* is a judge *within the meaning* of this Code. All judges *shall* comply with this Code except as provided below.

Most state judges are subject to a version of the CJC; federal judges are also covered by virtue of the 1973 Judicial Conference.[46] In addition, the Code provides for limited compliance by retired judges,[47] part-time judges,[48] and pro tempore part-time judges.[49]

Some state courts and ethics committees have applied the CJC directly or by analogy to administrative law judges, even though the CJC does not have direct applicability.[50] The Merit Systems Protection Board (MSPB)[51] has indicated that the CJC may be an appropriate guide for evaluating the conduct of federal administrative law judges.[52] For the most part, however, ALJ's are not uniformly held to a standardized code of conduct.[53] The most commonly cited reason against such an application hinges on the constitutional status of ALJ's as members of the executive branch of the government.[54] The statutory language of the compliance section following Canon 7 does not apply to ALJ's, for their executive status renders them nonjudicial officers.[55] Procedurally, decisions of ALJ's can be overturned by agency officials. Critics believe that this reduces the need for a high degree of surety in the impartiality and fairness of the ALJ's deci-

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ABA PROPOSED DRAFT, *supra* note 4 (Legislative Draft Format) (emphasis added).

The Pennsylvania Code of Judicial Conduct substantially adopts the Model Code; however, it excepts from the compliance section justices of the peace, Pittsburgh police magistrates, and Philadelphia traffic court justices. *See* 204 PA. CODE § 33 (1979).

46. Levinson, *The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort*, 19 NEW ENG. L. REV. 733, 752 (1984).

47. MODEL CODE, *supra* note 4, Compliance (C).

48. *Id.*, Compliance (A).

49. *Id.*, Compliance (B).

50. *See infra* notes 153-87 and accompanying text.

51. The Merit Systems Protection Board (MSPB) was established under Title II of the Civil Service Reform Act of 1978. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 95th Cong., 2d Sess. (Oct. 13, 1978). The MSPB is given adjudicative and enforcement powers over federal agencies and employees. *See generally* 1 J. STEIN, G. MITCHELL & B. MEZINES, ADMINISTRATIVE LAW § 5.07(3)(b) (1988) [hereinafter J. STEIN].

52. *In re* Chocallo, 2 M.S.P.B. 23, 63-64, *aff'd*, 2 M.S.P.B. 20 (1980). "Though not specifically made applicable to, or directly binding on, federal administrative law judges, the code serves, nevertheless, as an appropriate guide for evaluating . . . [judicial] conduct." *Id.* This reasoning was cited and applied in ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1522 (1986).

53. ALJ's currently follow guidelines recommended by the Administrative Procedure Act or Model State Administrative Procedure Act, or codes of conduct advanced by the employing agency.

54. *See infra* note 65 and accompanying text. In addition to executive agencies, there are at least 63 independent agencies operating at the federal level, and many more at the state level. Independent agencies are, in theory, free from executive influence. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.8, at 88 (2d ed. 1978). This Comment focuses exclusively on executive agencies; however, the analysis is equally applicable to those considered to be independent.

55. *See* MODEL CODE, *supra* note 4, Compliance. *See also* ABA PROPOSED DRAFT, *supra* note 4, at 42 n.2.

sion.[56] The assumption that the CJC can be applied unofficially has also hindered the adoption of an official ethical conduct code for administrative law judges.[57]

In May 1989, a subcommittee of the ABA Standing Committee on Ethics and Professional Responsibility undertook a revision of the Code of Judicial Conduct.[58] A footnote to the proposed revision of the compliance section clearly states that ALJ's are *not* governed by the Code of Judicial Conduct, unless the Code is expressly adopted by the jurisdiction or executive agency in which the ALJ functions.[59] Thus, the decision of whether to apply the CJC to ALJ's rests with each state.

III. Administrative Law Judges

A. Historical Treatment

Federal and state government agencies employ administrative law judges to conduct hearings and make initial administrative determinations.[60] Powers and responsibilities are defined and delegated to ALJ's in the Administrative Procedure Act,[61] state administrative acts, and in enabling statutes and procedural rules of the various agencies.[62] The duties of ALJ's vary depending upon the type of hearing and the nature of the agency conducting the proceeding.[63] Administrative law judges are commonly called the "hidden judici-

56. Jeon, *First Conduct Code Adopted for Administrative Judges*, LEGAL TIMES, Aug. 8, 1983 (Nexis, Nexis library, Wires file). It should be noted, however, that erroneous judicial decisions may also be reversed by a reviewing authority.

57. A Securities and Exchange Commission (SEC) ALJ indicated that administrative law judges vetoed the establishment of their own code in 1982. He noted that if standards are needed for ALJ's, the ABA Code of Judicial Conduct could be applied unofficially. *Id.*

58. *See generally* ABA PROPOSED DRAFT, *supra* note 4. This is the first total re-examination of the CJC since it was adopted in 1972. *ABA/BNA Lawyers Manual on Professional Conduct, Current Reports* (May 10, 1989).

59. The footnote provides:

> Applicability of this Code to administrative law judges should be determined by each adopting jurisdiction. Administrative law judges generally are affiliated with the executive branch of government rather than the judicial branch and each adopting jurisdiction should consider the unique characteristics of particular administrative law judge positions in adopting and adapting the Code for administrative law judges.

ABA PROPOSED DRAFT, *supra* note 4, at 42 n.2.

60. *See* 1 J. STEIN, *supra* note 51, § 6.01.

61. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified at 5 U.S.C. §§ 551-559, 701-706, 3105, 3344, 6362, 7562 (1988)).

62. M. RUHLEN, MANUAL FOR ADMINISTRATIVE LAW JUDGES 1 (1982).

63. *See* M. RICH & W. BRUCAR, *supra* note 8, at 10. For example, in worker's compensation and unemployment insurance agencies in which there is a great deal of litigation, ALJ's are maintained on a full-time basis. In contrast, some smaller agencies will employ part-time ALJ's when cases arise. *Id.*

ary" by virtue of their impact, which far exceeds their public visibility.[64] Even though ALJ's often appear to function as part of the judicial branch, they are, in fact, integral components of the executive branch.[65] As such, the agency administrative law judge does not maintain the independence or stature of the Article III or state level judiciary because the executive branch has jurisdiction and control over the ALJ's employment.[66]

Administrative hearings have occurred since 1789,[67] although the examiners employed by the Interstate Commerce Commission (ICC) in 1906 are considered to be the first administrative hearing officers to have the title "examiner."[68] Initially, the hearing examiners were employed in strictly ministerial capacities to improve efficiency by gathering information for agency officials.[69] Gradually, the hearing examiners took a more active role in filing proposed reports and making initial summaries and recommendations.[70] As greater functional specialization became a concern of the agencies, the hearing examiners were delegated greater factfinding duties and increased independence.[71] The New Deal and its innovative economic regulatory legislation further expanded the adjudicatory and investigatory roles of administrative agencies, and hence, the role of the examiner.[72]

The 1930s saw the advent of several proposals to establish an

64. *See* Simon, *supra* note 6, at 1, col. 4. "But while their actions touch the lives of most Americans, they have received only a fraction of the attention accorded federal district judges—whom they outnumber more than 2-1." *Id. See also* M. RICH & W. BRUCAR, *supra* note 8, at vii (noting that "state administrative law judges have remained a hidden judiciary"); Segal, *The Administrative Law Judge: Thirty Years of Progress and the Road Ahead*, 62 A.B.A. J. 1424, 1425 (1976).

65. The United States Constitution, Article II states that the President "shall take care that the laws be faithfully executed" and mentions "executive departments" and "officers" under the President who would administer the legislation adopted by Congress. U.S. CONST. art. II. *See* D. BARRY & H. WHITCOMB, THE LEGAL FOUNDATIONS OF PUBLIC ADMINISTRATION 53 (1981).

66. *See* Lussier, *supra* note 3, at 776. The author notes, however, that this lack of independence or stature does not alter the judicial nature of the adjudicatory function involved. *Id.*

67. 3 K. DAVIS, *supra* note 54, § 17.11, at 313. The first administrative hearing officers may have been the officers who determined whether soldiers were disabled "during the late war," or customs officials used to estimate duties. Subsequent administrative hearing officers were inspectors of vessels who decided cases in 1838, and registers of the General Land Office in 1840. *Id.*

68. *Id.*

69. Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Examiner*, 1977 DUKE L. REV. 389, 392.

70. *Id.*

71. 3 K. DAVIS, *supra* note 54, § 17.11, at 313-14.

72. S. REIGAL & P. OWEN, ADMINISTRATIVE LAW—THE LAW OF GOVERNMENT AGENCIES 3 (1982). The New Deal Depression era agencies were conceived to regulate the entire economy out of a depression. This produced a noticeable expansion in the size and scope of government activities, primarily through newly created agencies. *Id.*

administrative court of general jurisdiction.[73] Although none of these proposals ever came to fruition, the widespread concern over the combination of adjudicatory and prosecutorial functions led to a greater separation of functions, at least for federal ALJ's, in the Administrative Procedure Act (APA).[74] The APA was enacted in 1946 in response to increasing dissatisfaction with the administrative adjudicative process.[75] This signaled the beginning of the modern administrative hearing process.[76] While the APA increased the status and power of the federal hearing examiner only slightly, the role of the examiner has become increasingly judicialized so as to make the administrative process more closely resemble general jurisdiction courts.[77]

Concurrent with this judicialization process, courts began to expand the scope of individual interests that require an administrative hearing before being affected.[78] The fourteenth amendment to the United States Constitution provides that procedural due process protections must be extended prior to the deprivation of certain property interests.[79] This has been judicially interpreted to mean that notice and an opportunity for a hearing must accompany certain administrative actions.[80] The changing nature of government responsibilities, coupled with the judicial imposition of hearing requirements, has necessitated an expansion of government agencies and ALJ's to ade-

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73. For a thorough discussion of past and present administrative court proposals, see E. THOMAS, *supra* note 2, at 18-25; deSeife, *Administrative Law Reform: A Focus on the Administrative Law Judge*, 13 VAL. U.L. REV. 229 (1979).

74. E. THOMAS, *supra* note 2, at 18-21.

75. *Id.* at 20-21.

76. *Id.* at 1.

77. 3 K. DAVIS, *supra* note 54, § 17.11, at 315-16. *See also* M. RICH & W. BRUCAR, *supra* note 8, at 1. Judicialization of the administrative process encompasses the idea that certain types of governmental actions cannot be sustained unless the agency has extended the adversely affected party procedural protection, such as notice and an opportunity to be heard. As the spectrum of protected individual interests has expanded, agency adjudications have become increasingly judicialized to meet due process standards. *See* Davis, *supra* note 69, at 391.

78. The expansion of rights has permeated into almost all socio-economic areas. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (public high school student may not be dismissed or suspended without first being given oral or written notice and an opportunity to rebut the evidence); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of governmental welfare benefits require prior notice and an opportunity for an administrative hearing). *See also* Davis, *supra* note 69, at 391.

79. The fourteenth amendment states in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

80. *See* Davis, *supra* note 69, at 391.

quately meet the increased demand for agency hearings.[81] Thus, the modern hearing process is mandated to incorporate essential elements of the judicial model.[82] The change in title from "hearing examiner" to "administrative law judge," implemented by the Civil Service Commission in 1972, adequately reflects the current role of the ALJ.[83] This change emphasizes that the role of the ALJ is not solely to hear or examine, but also to judge.[84]

1. Federal Administrative Law Judges.—Federal ALJ's are created by and governed under the Administrative Procedure Act (APA).[85] The APA attempts to separate ALJ's from their agencies to increase the level of judicial independence.[86] This is accomplished in Title 5 of the United States Code, which statutorily provides for security in tenure, promotion, and compensation.[87] The relevant APA provisions provide for civil service merit appointments[88] for ALJ's by the Office of Personnel Management (OPM),[89] compensa-

81. M. RICH & W. BRUCAR, *supra* note 8, at 8.

82. *See* Davis, *supra* note 69, at 391.

83. 5 C.F.R. § 930.203(a) (1977), Pub. L. No. 95-251, 92 Stat. 183 (amending 5 U.S.C. § 3105).

84. Segal, *supra* note 64, at 1425.

85. *See supra* note 61.

86. 5 U.S.C. § 554(d) (1988). Internal separation of functions prohibits an employee engaged in the performance of investigative or prosecutorial functions from participating or advising in the ultimate decision. *Id.*

87. 5 U.S.C. §§ 5372, 7521 (1988). *See also* E. THOMAS, *supra* note 2, at 3.

88. 5 U.S.C. § 3105 (1988), provides:

> Each agency shall appoint as many administrative law judges as are necessary for proceedings to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

Federal ALJ's are appointed through a professional merit selection system. ALJ's tend to come from government service, often from the agency over whose hearings they preside. Candidates must be members of a bar, and have at least seven years experience, including two years with an agency. *See* C. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 6.4 (1985). A candidate is subjected to examinations and interviews by the Office of Personnel Management. Those candidates meeting all requirements are certified and their names are placed on a register, which is supplied to agencies upon request. The agencies must select their ALJ's from the register, but may impose their own further qualifications as conditions for appointment. (For example, a set number of years of practice in the field of administrative law or an expertise in a particular area). *Id.*

As a result of this selective service, many agencies hire former staff attorneys to fill ALJ positions. This practice has been severely criticized by many as creating an "unhealthy appearance of institutional bias." *See* Davis, *supra* note 69, at 403. As Bernard Segal noted,

> The permanent assignment of an administrative law judge to a single agency also tends to produce an inbreeding, which in turn contributes even more to the appearance of bias. For example, of the thirteen administrative law judges assigned to the Federal Trade Commission, twelve are former employees of that Commission . . . .

Segal, *supra* note 64, at 1426.

89. The OPM is a governmental body separate from the employing agency. The OPM

tion without regard for ratings or recommendations,[90] and discharge only upon a showing of "good cause" and a hearing before the Merit Systems Protection Board.[91] The federal approach officially makes the ALJ an employee of a particular agency, but provides a career appointment and an internal separation of the prosecutorial and adjudicatory functions.[92]

The APA provides that administrative law judges must preside over all formal and informal trial-type proceedings, unless the agency or an appointed member presides in lieu of the ALJ.[93] ALJ's, in practice, preside at most proceedings and make the initial or recommended decision, which is then reviewed by the agency.[94] Agency decisions are ultimately reviewable by the courts.[95]

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handles ALJ recruitment and qualifications. *See generally* 1 J. STEIN, *supra* note 51, § 5.07(3)(a).

90. 5 U.S.C. § 5372 (1988): "Administrative law judges appointed under section 3105 of this title are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations and ratings . . . ."

91. 5 U.S.C. § 7521 (1988). This provision provides:

> (a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.
>
> (b) The actions covered by this section are—
>
> (1) a removal;
>
> (2) a suspension;
>
> (3) a reduction in grade;
>
> (4) a reduction in pay; and
>
> (5) a furlough of 30 days or less;
>
> but do not include—
>
> (A) a suspension or removal under section 7532 of this title;
>
> (B) a reduction-in-force action under section 3502 of this title; or
>
> (C) any action initiated under section 1206 of this title.

For a comprehensive discussion of "good cause" removal, see Rosenblum, *Contexts and Contents of "For Good Cause" as Criterion For Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. NEW ENG. L. REV. 593 (1984).

92. M. RICH & W. BRUCAR, *supra* note 8, at 2. *See also* E. THOMAS, *supra* note 2, at 3, 20.

93. 5 U.S.C. § 556(b) (1988):

> There shall preside at the taking of evidence—
>
> (1) the agency;
>
> (2) one or more members of the body which comprises the agency; or
>
> (3) one or more administrative law judges appointed under section 3105 of this title.

94. 5 U.S.C. § 557(b) (1988). The agency is free to substitute its judgment for that of the ALJ. *See infra* notes 117-19 and accompanying text.

95. The Administrative Procedure Act provides for judicial review of "[a]gency action made reviewable by statute and final agency action . . . ." 5 U.S.C. § 704 (1988). Review has been held to be appropriate when the agency action is final, binding on the parties involved, and has injured an affected party. *See* 5 U.S.C. §§ 701-706 (1988). *See generally* 5 J. STEIN, *supra* note 51, § 43.01.

2. State Administrative Law Judges.—Little attention has been paid to state administrative agencies and ALJ's as compared to their federal counterparts.[96] This lack of attention does not reflect that ALJ's are used more frequently by state administrative agencies than by federal agencies.[97] Despite this widespread use, developments at the state level have generally been inconsistent and have not adopted the advancements made at the federal level.[98] The most fundamental differences between a federal agency and a state agency is in size and organization; state agencies are often smaller and more loosely organized than their federal counterparts.[99] Although smaller size provides for a more intimate agency environment, it also may lead to delicate questions concerning possible favoritism or bias.[100]

The most common approach adopted by the states is an agency staff system.[101] This model is similar to the federal approach because, under both approaches, the ALJ bears more of a resemblance to an agency employee than to a judicial officer.[102] Agencies delegate authority to the ALJ, and exercise ultimate supervision and control over ALJ activity.[103] Often, the hearing officer remains a functionary of the employing agency, reflecting a ministerial conception of the ALJ's function.[104] The agency controls hiring, firing, and disciplining ALJ's.[105] Many states have adopted legislation governing adminis-

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96. M. RICH & W. BRUCAR, *supra* note 8, at 9.

97. *Id.*

98. *Id.* "[M]any state statutes continue to reflect the early view of the presiding officer as a functionary." Davis, *supra* note 69, at 393.

99. *See* 1 F. COOPER, *supra* note 8, at 2.

100. *Id.*

101. M. RICH & W. BRUCAR, *supra* note 8, at 9.

102. *Id.*

103. *See, e.g.*, 1 PA. CODE § 35.185-.189 (1988).

104. *See* Davis, *supra* note 69, at 392. *See also* M. RICH & W. BRUCAR, *supra* note 8, at 2.

105. *Id. See, e.g.*, 1 PA. CODE § 35.186 (1988):

> A presiding officer may withdraw from a proceeding when he deems himself disqualified, or he may be withdrawn by the agency head for good cause found after timely affidavits alleging personal bias or other disqualification have been filed and the matter has been heard by the agency head or by another presiding officer to whom the agency head has delegated the matter for investigation and report.

See also 1 PA. CODE § 35.188 (1988):

> (a) Presiding officers may perform no duties inconsistent with their duties and responsibilities as such.
>
> (b) Save to the extent required for the disposition of *ex parte* matters as authorized by law and by the regulations of the agency, no presiding officer shall, in a proceeding which the agency head has directed be conducted under this subsection, consult a person or party on a fact in issue unless upon notice and opportunity for participants to participate.

trative procedures based upon the Model State Administrative Procedure Act.[106] Due to variations between state agencies and procedures, the duties of administrative law judges vary from state to state, and from agency to agency.[107]

A novel approach adopted by ten states to address the issue of increasing ALJ independence is the central panel system.[108] Under this approach, an independent, managing agency is created to conduct administrative hearings.[109] Central panel systems increase the "judicialization" of the administrative process.[110] By separating ALJ's from their agencies, this system serves to make the adjudicatory process appear more objective.[111] The managing agency assigns ALJ's to preside over hearings upon the request of an agency, which allows an ALJ to serve numerous agencies instead of a specific one.[112] ALJ decisions remain subject to agency adoption;[113] however, the increased independence from a specific agency is thought to improve the fairness of the decision.[114] The success of this state central panel system has encouraged other states to investigate such a system.[115] Implementation of a comparable system at the federal level continues to generate much debate and discussion.[116]

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106. MODEL STATE ADMINISTRATIVE PROCEDURE ACT, 14 U.L.A. 357 (Master ed. 1981) [hereinafter MODEL STATE APA]. The Model Act was adopted in 1946 by the National Conference of Commissioners on Uniform State Laws. It was designed to serve as a guide to the states, and, as of 1989, 29 states have adopted its provisions. The Model Act provides for disqualification of an ALJ for bias, prohibits certain ex parte communications, requires ALJ decisions to be supported by an accompanying record, and confers powers upon ALJ's for the conduct of hearings. *See* M. RICH & W. BRUCAR, *supra* note 8, at 10-11.

107. M. RICH & W. BRUCAR, *supra* note 8, at 10.

108. *See* E. THOMAS, *supra* note 2, at 10-11. The 10 states that have adopted the central panel system for administrative adjudication are: California, CAL. GOV'T CODE §§ 11370, 11502 (Deering 1982); Colorado, COLO. REV. STAT. § 24-30-1001 (1982); Florida, FLA. STAT. § 120.65 (1983); Massachusetts, MASS. GEN. L. ANN. ch. 7, § 4 H (Law. Co-op. 1984); Minnesota, MINN. STAT. ANN. § 15.052 (West Supp. 1984); Missouri, MO. ANN. STAT. § 621.015 (Vernon Supp. 1987); New Jersey, N.J. STAT. ANN. § 52:14 F (West Supp. 1984-85); North Carolina, N.C. GEN. STAT. § 150 B-23 (Interim Supp. 1986); Tennessee, TENN. CODE ANN. § 4-5-120 (Supp. 1984); Washington, WASH. REV. CODE § 34.12 (1983). *See also* Harves, *The 1981 Model State Administrative Procedure Act: The Impact on Central Panel States*, 6 W. NEW ENG. L. REV. 661 (1984).

109. M. RICH & W. BRUCAR, *supra* note 8, at vii.

110. *Id.*

111. *Id.* For an overview of the central panel system, see Harves, *supra* note 108; Rich, *The Central Panel System and the Decisionmaking Independence of Administrative Law Judges: Lessons for a Proposed Federal Program*, 6 W. NEW ENG. L. REV. 643 (1984).

112. M. RICH & W. BRUCAR, *supra* note 8, at 14.

113. *Id.* at 11.

114. *Id.* at 14.

115. Sixteen other states have indicated an interest in implementing central panel systems: Alabama, Arizona, Georgia, Illinois, Indiana, Maryland, Michigan, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Virginia, and Wyoming. *See* E. THOMAS, *supra* note 2, at 11 n.38.

116. *Id.* For a discussion of the Heflin bill and other federal proposals, see E. THOMAS,

B. *Comparability to Judges*

1. Similarities in Role.—Like their judicial counterparts, presiding ALJ's have an affirmative duty to be impartial decisionmakers. In formal, trial-type hearings, the ALJ serves as the presiding officer and has broad adjudicatory powers to make initial or recommended agency decisions.[117] In such a hearing, the ALJ's duties are similar to those of a trial judge; however, the ALJ's ruling is more a recommendation than a final decision.[118] Although ALJ rulings are recommendations subject to review, most rulings are given considerable weight by the agency and become final agency decisions.[119] Since the presiding ALJ controls discovery, the admissibility of evidence, and the conduct of the hearing, he directly affects the record upon which the ultimate agency decision will be based.[120]

The actual duties performed by federal and state ALJ's demonstrate their resemblance to trial judges:[121]

ADMINISTRATIVE LAW JUDGES: THE CORPS ISSUE (1987); Joost, *A Corps of Federal Administrative Law Judges: Why? What Kind? Operating How? Under Whose Control?*, 19 NEW ENG. L. REV. 695 (1984); Levant, *A Unified Corps of Administrative Law Judges—The Transition from a Concept to an Eventual Reality*, 6 W. NEW ENG. L. REV. 705 (1984); Levinson, *The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort*, 19 NEW ENG. L. REV. 733 (1984); Palmer & Bernstein, *Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill*, 6 W. NEW ENG. L. REV. 673 (1984); *cf.* Zankel, *A Unified Corps of Administrative Law Judges is Not Needed*, 6 W. NEW ENG. L. REV. 723 (1984).

117. *See* 1 J. STEIN, *supra* note 51, § 6.01. An initial decision becomes the final agency action unless it is reviewed by an appeal board or agency head. A recommended decision must be considered and acted upon by agency leadership before it can take effect. *Id.*

118. *See* 3 K. DAVIS, *supra* note 54, § 17.11, at 315. Proposals have been advanced to increase ALJ power to make it comparable to that of a district court judge. There is an inherent limitation, however, in the Administrative Procedure Act. APA § 557(b) provides in relevant part: "on appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b) (1988).

Various statutes and regulations delegate similar powers of review to the respective agencies. *See* 1 J. STEIN, *supra* note 51, § 6.01.

119. M. RICH & W. BRUCAR, *supra* note 8, at 1-2. Although ALJ rulings are reviewed by the agency and may be overturned, in reality most become the final agency decision. *Id.* The ALJ has elicited the facts, weighed the evidence, and assessed witness credibility; agency reviewers are dependent solely upon the factual record developed by the ALJ at the proceeding. *Id.*

120. Lussier, *supra* note 3.

121. 5 U.S.C. § 556(c) (1988) lists the powers of presiding officers:

> (c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—
>
> (1) administer oaths and affirmations;
>
> (2) issue subpoenas authorized by law;
>
> (3) rule upon offers of proof and receive relevant evidence;
>
> (4) take depositions or have depositions taken when the ends of justice would be served;
>
> (5) regulate the course of the hearing;
>
> (6) hold conferences for the settlement or simplification of the issues

> Like the district court judge in a nonjury trial, administrative law judges are largely finders of fact. They are not "special masters," advisers, or counsellors. Their function is to judge, after hearing counsel and the testimony and doing the necessary analyzing, weighing, and studying, case by case, issue by issue.[122]

The administrative hearing, like a judicial action, emphasizes legal representation and the use of procedural and evidentiary rules.[123] ALJ's often have special expertise in the area they serve, and thus are often given a greater role than a trial judge in developing law and policy.[124] ALJ's may issue subpoenas and orders requiring answers to questions, compel admissions, rule on admissibility of evidence, regulate the course of the hearing, hold conferences for settlement, rule on motions, and file initial decisions.[125] Although ALJ's do not hold contempt powers, they do have the power to suspend or bar an attorney from participation in a particular proceeding for dis-

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by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

Cf. 1 PA. CODE § 35.187 (1988), which provides:

Presiding officers designated by the agency head to preside at hearings shall have the authority, within the powers and subject to the regulations of the agency, as follows:

(1) To regulate the course of the hearings, including the scheduling thereof, subject to the approval of the agency head, and the recessing, reconvening, and adjournment thereof, unless otherwise provided by the agency head, as provided in 35.102(b) (relating to hearing calendar).

(2) To administer oaths and affirmations.

(3) To issue subpoenas.

(4) To rule upon offers of proof and receive evidence.

(5) To take or cause depositions to be taken.

(6) To hold appropriate conferences before or during hearings.

(7) To dispose of procedural matters but not, before their proposed report, if any, to dispose of motions made during hearings to dismiss proceedings or other motions which involve final determination of proceedings.

(8) Within their discretion, or upon direction of the agency head, to certify any question to the agency head for consideration and disposition by the agency head.

(9) To submit their proposed reports in accordance with 35.202 (relating to proceedings in which proposed reports are prepared).

(10) To take other action necessary or appropriate to the discharge of duties vested in them, consistent with the statutory or other authorities under which the agency functions and with the regulations and policies of the agency.

122. Segal, *supra* note 64, at 1425.

123. Rich, *supra* note 111, at 643 n.2.

124. C. KOCH, *supra* note 88, § 6.5.

125. E. ROCKEFELLER, DESK BOOK OF FTC PRACTICE AND PROCEDURE 118-19 (3d ed. 1979).

orderly conduct.[126]

The last decade has seen noticeable trends toward upgrading qualifications for ALJ's, making them more "judicialized" in all of their functions.[127] Administrative law judges are increasingly perceived as comparable in function to trial judges since the Supreme Court recognized the judicial nature of the ALJ role.[128] In *Butz v. Economou*,[129] the Supreme Court held that federal ALJ's were entitled to the same absolute immunity as judges. The Court recognized that the administrative adjudicatory process "shares enough of the characteristics of the judicial process" that absolute judicial immunity should apply to ALJ's.[130] Absolute immunity has been further extended to encompass state quasi-judicial and inferior judicial officers.[131]

ALJ's tend to think of themselves as judges, or "comparable to judges," as evidenced by the title "administrative law *judge*" and by their Federal *Trial* Examiners Conference.[132] Lawyers practicing in both the courts and in agency proceedings have indicated that there are no significant differences between the two forums.[133] When engaged in formal adjudication, the administrative forum is conducting a proceeding as equally judicial as that of an Article III court.[134] Thus, despite the differences in adjudicative form, the administrative

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126. *Id.*

127. Davis, *supra* note 69, at 407. *See supra* note 77. *See also* NLRB v. Permanent Label Corp., 657 F.2d 512 (3d Cir. 1981) (court enforced an order of the NLRB based upon ALJ statement of reasons justifying choice of bargaining order over ordering of new elections).

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

129. 438 U.S. 478 (1978).

130. *Id.* at 513.

> The conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court . . . . Moreover, federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature . . . .
>
> There can be little doubt that the role of the modern hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge . . . .

Id.

131. *See* Petition of Dwyer, 486 Pa. 585, 406 A.2d 1355 (1979) (court adopted principle of quasi-judicial immunity for agency officials); Myers v. Commonwealth, Dept. of Labor & Indus., 312 Pa. Super. 61, 458 A.2d 235 (1983) (worker's compensation referee granted absolute immunity in civil damage action because "[h]e is, in short, the trial judge of the worker's compensation system").

132. Pops, *Judicialization of Federal Administrative Law Judges: Implications for Policymaking*, 81 W. VA. L. REV. 169, 197 (1979).

133. E. THOMAS, *supra* note 2, at 2.

134. Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W. NEW ENG. L. REV. 807, 810 n.20 (1984) (citing L. MAYERS, THE AMERICAN LEGAL SYSTEM 417-21 (rev. ed. 1964)).

hearing and presiding ALJ should be given the same deference as a trial judge.

2. Differences in Role.—Although ALJ's may resemble judges in many of their functions, there are essential differences that preclude a finding of bona fide judicial status. Constitutionally, federal ALJ's are considered agency employees under the executive branch of government.[135] Executive status distinguishes ALJ's from actual judges. Additionally, ALJ power is still subordinate to that of the agency, despite APA language that makes ALJ initial decisions final unless there is further agency action.[136] Since the initial decision is only a recommendation that can be replaced, it does not reach the independent level of judicial decisionmaking.[137] Thus, the decision of an ALJ, even though reached after a hearing resembling a trial and consisting of many judicial procedures, may still be rejected or modified by the agency.[138]

In contrast to the judiciary, agencies have a statutory goal and ALJ's must develop the facts at a hearing in order to carry out that mandate. Thus, the proceeding may be largely "inquisitorial," with the ALJ taking a more active role in questioning witnesses and eliciting relevant facts, rather than a pure adversarial contest.[139] Similarly, ALJ's have a greater affirmative responsibility than a trial judge to assure that a full and accurate record is developed at the hearing.[140]

The punishments that ALJ's may impose are more limited than those available to judicial officers. Administrative agencies may not constitutionally impose imprisonment as a penalty for violation of a statute or regulation.[141] Similarly, the guarantee of a trial by jury bars the consideration of felony cases by administrative agencies.[142]

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135. *See supra* note 65 and accompanying text.

136. 5 U.S.C. § 557(b) (1988).

137. *See* 3 K. DAVIS, *supra* note 54, § 17.11, at 316.

> But the power of district judges is considerably greater, for their decisions are final except in the few cases that are appealed, and review of their findings is governed by the "clearly erroneous" test, whereas ALJs' decisions are typically in the nature of recommendations (even when they are called "initial decisions"), because 556(b) of the APA provides that in reviewing an initial decision of an ALJ "the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

Id.

138. Davis, *supra* note 69, at 406-07.

139. *See* 3 K. DAVIS, *supra* note 54, § 17.13, at 319.

140. C. KOCH, *supra* note 88, § 6.5.

141. S. REIGAL & P. OWEN, *supra* note 72, at 17.

142. *Id.*

The Supreme Court, in *Ramspeck v. Federal Trial Examiners Conference*,[143] found that Congress intended ALJ's to be only "a special class of semi-independent subordinate hearing officers" within the federal administrative system, and not the equivalent of judges.[144] Agency control over ALJ decisions, conduct, and schedules seems to confirm this intent. The hierarchy of power can subject ALJ's to a variety of pressures and influence not experienced by the Article III judiciary.[145] The existence of such pressures makes the need for additional controls over ALJ's all the more obvious.

IV. Current Regulation of ALJ Conduct

A. Statutory Guidelines

Administrative law judges, as lawyers, are subject to the canons of ethics of the bar.[146] Additional standards are set forth by the federal government,[147] and by the employing agencies.[148] Although Congress did not incorporate ethical standards for ALJ's into the Administrative Procedure Act, the APA and the Model State APA do provide some general guidelines to ALJ's regarding ex parte communications,[149] and disqualification for bias or impartiality.[150] The legislative history of the APA confirms the intent to monitor official ALJ conduct.[151] Violations of these guidelines are actionable only if

143. 345 U.S. 128, *reh'g denied*, 345 U.S. 931 (1953).

144. *Id.* at 130. The three dissenting justices indicated that they believed Congress intended ALJ's to be "very nearly the equivalent of judges even though operating within the Federal System of administrative justice." *Id.* at 144 (Black, Douglas, Frankfurter, J., dissenting) (quoting S. Doc. No. 82, 82d Cong., 1st Sess. 9 (1946)).

145. E. THOMAS, *supra* note 2, at 5-6.

146. Many states apply the Model Code of Professional Responsibility or the Model Rules of Professional Conduct to quasi-judicial officers instead of the Code of Judicial Conduct. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981); MODEL RULES OF PROFESSIONAL CONDUCT (1983). The CJC and the professional responsibility codes attempt to solve many of the same ethical questions. In some instances, there is a direct interrelationship between the two codes; they are complementary in coverage and have only minor divergences. *See generally* Sutton, *supra* note 17.

147. 5 C.F.R. 735 (1981).

148. M. RUHLEN, *supra* note 62, at 70.

149. 5 U.S.C. § 557(d) (1988); MODEL STATE APA, *supra* note 106, § 14; 1 PA. CODE § 35.188 (1988).

150. 5 U.S.C. § 556(b) (1988) provides in pertinent part:

> The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

See also 1 PA. CODE § 35.189 (1988).

151.

> Those who . . . preside . . . must conduct the hearing in a strictly impar-

"good cause" for removal can be shown.[152] Additionally, any individual agency regulations regarding official conduct must be rigorously observed.

B. Applicability of the Code of Judicial Conduct to Administrative Law Judges

1. The Federal Context.—The American Bar Association Committee on Ethics and Professional Responsibility has applied the Canons of Judicial Ethics[153] and the Code of Judicial Conduct to federal ALJ's by analogy.[154] In an informal opinion, the Committee indicated that in some cases a hearing officer or member of a quasi-judicial body would be subject to the Canons of Judicial Ethics.[155] This implication was expanded in a later opinion, which recommended that a federal ALJ may not represent another ALJ as counsel in a disciplinary proceeding.[156] The Committee applied the reasoning of a Merit Systems Protection Board opinion[157] in analogizing the use of the CJC.[158] Noting that although the CJC is not specifically applicable in this context, the Committee agreed that it is an appropriate guide for evaluating ALJ conduct.[159] Accordingly, the

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> tial and considerate manner, rather than as representatives of an investigative or prosecuting authority. They may make sure that all necessary evidence is adduced and keep the hearing orderly and efficient. No examiner may proceed in willful disregard of law. Presiding officers must conduct themselves in accord with the requirements of this bill and with due regard for the rights of all parties as well as the facts, the law, and the need for prompt and orderly dispatch of public business.

REPORT OF THE HOUSE COMMITTEE ON THE JUDICIARY ON S. 7, H.R. REP. NO. 1980, ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY S. DOC. NO. 248, 79th Cong., 2d Sess. 268 (1946).

152. 5 U.S.C. § 7521 (1988). The "good cause" standard for removal is considered to be not as strict as the "good behavior" criteria imposed upon federal judges. *See* Rosenblum, *supra* note 91.

153. ABA Comm. on Ethics and Professional Responsibility, Informal Op. C-449 (1961).

154. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1522 (1986); *In re* Chocallo, 2 M.S.P.B. 23, *aff'd*, 2 M.S.P.B. 20 (1980).

155. ABA Comm. on Ethics and Professional Responsibility, Informal Op. C-449 (1961). This opinion dealt with a situation in which a lawyer was to appear before an administrative board of which his spouse was a member. The Committee noted that the Canons of Judicial Conduct make it clear that a judge should at all times avoid the appearance or suspicion of impropriety. The opinion provided that the spouse should consider disqualification in such a situation.

156. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1522 (1986).

157. *In re* Chocallo, 2 M.S.P.B. 23, *aff'd*, 2 M.S.P.B. 20 (1980) (The Civil Service Commission investigated allegations of ALJ misconduct, and determined that good cause existed for disciplinary action to be taken against the ALJ.).

158. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1522 (1986).

159. *Id. See also In re* Chocallo, 2 M.S.P.B. 23, 63-64, *aff'd*, 2 M.S.P.B. 20 (1980).

Committee reasoned that a federal ALJ is a "judge" and "an officer of a judicial system performing judicial functions" for purposes of the CJC, even though such judges are employees of a federal agency.[160]

2. The State Context.—If the CJC is applicable by analogy to ALJ's in the federal context, then it should be equally applicable to state ALJ's. Such an analogy was defeated in a footnote to an ABA informal opinion, which indicated that the applicability of the CJC provisions to state ALJ's depends upon the facts of the particular case and the applicable law and judicial code in effect in that jurisdiction.[161] The uncertainty that prevails in this area is further evidenced by state ethics opinions that have attempted to address this ambiguity.[162]

(a) Directly applying the CJC to ALJ's.—States that have directly applied the Code of Judicial Conduct (CJC) to ALJ's have done so through a logical expansion of the language in the CJC compliance section and an interpretation of what constitutes "an officer of a judicial system performing judicial functions."[163] The states that directly apply the CJC advocate that the term "judge" or "judicial officer" be broadly construed.

The Pennsylvania Bar Association (PBA) Committee on Legal Ethics and Professional Responsibility has applied the CJC directly to part-time domestic relations special masters and hearing officers in conjunction with the applicable provisions of the Pennsylvania

160. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1522 (1986).

161.

> Though not specifically within the scope of the inquiry, it should be pointed out that the applicability of the provisions of the Code of Judicial Conduct to state administrative law judges depends upon the facts of the particular case and the applicable law and judicial code in the jurisdiction in which it arises.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1522 (1986).

162. *See infra* notes 163-95. Due to the variations in state administrative law, agency procedures, and judicial codes, it is difficult to generalize about how states have handled ALJ conduct inquiries. Differences between officers classified as "hearing examiners," "referees," or "special masters" generally are not substantive and refer to quasi-judicial officers comparable to ALJ's.

163. *See* MODEL CODE, *supra* note 4, Compliance. *See, e.g.*, PBA Comm. on Legal Ethics and Professional Responsibility, Formal Op. 89-86 (1989); PBA Comm. on Legal Ethics and Professional Responsibility, Inquiry No. 88-22 (1988); PBA Comm. on Legal Ethics and Professional Responsibility, Inquiry No. 88-250 (1988); Philadelphia Bar Association Professional Guidance Comm., Op. 87-20 (1987); Ohio State Bar Association Comm. on Legal Ethics and Professional Conduct, Formal Op. 34 (1981). *Cf.* Michigan Comm. on Professional and Judicial Ethics, Op. CI-633 (1981); Michigan Comm. on Professional and Judicial Ethics, Op. CI-351 (1978).

Rules of Professional Conduct.[164] Accordingly, a special master appointed in connection with the dissolution of a two-lawyer firm was held subject to the CJC through the provisions requiring special masters to comply with the Code when performing "judicial functions."[165] More recently, the PBA Ethics Committee indicated that in the absence of any other ethical provisions regulating their conduct, workers' compensation referees should be governed by the CJC.[166] The Committee noted that the issue is far from clear but indicated its preference for applying the CJC to quasi-judicial officers, and concluded that the CJC should govern the conduct of workers' compensation referees.[167] Pennsylvania has also accepted the CJC as applicable authority to govern the removal of a Nuclear Regulatory ALJ who demonstrated a strong appearance of bias.[168]

Other states have also directly applied provisions of the Code of Judicial Conduct to quasi-judicial officers. The Ohio State Bar Association applied the CJC directly to full-time referees, reasoning that "a referee is an officer of a judicial system performing judicial functions within the meaning of the Compliance Section of the Code of Judicial Conduct."[169] The Committee supported its reasoning by examining the role of the referee: "a referee, in the trial before him, acts as and takes the place of the court appointing him, and he possesses substantially all the authority of such court, with the excep-

164. PBA Comm. on Legal Ethics and Professional Responsibility, Formal Op. 88-138 (1988). The Committee indicated that a joint reading of the Code of Judicial Conduct and the Rules of Professional Conduct requires that those serving as hearing examiners be beyond suspicion in order to maintain public confidence in the impartiality and independence of the judicial system. *Id.* The Committee concluded that lawyers serving as special masters should be disqualified from representing individuals before that court. *Id.*

165. PBA Comm. on Legal Ethics and Professional Responsibility, Informal Op. 88-250 (1988). "Initially, since the inquirer is not serving as a lawyer but as a judicial officer, the appropriate source of the ethical propriety of these actions is more properly found in the Code of Judicial Conduct." *Id.* Thus, pursuant to Canon 3(C)(1), a special master should disqualify himself in proceedings in which his impartiality might reasonably be questioned. *Id.*

166. *See* PBA Comm. on Legal Ethics and Professional Responsibility, Formal Op. 89-86 (1989). The opinion stated that a lawyer who is both a workers' compensation referee and a part-time lawyer may not accept a client referral from a lawyer who will appear before him at workers' compensation hearings. *Id.*

167. *Id.*

168. U.P.I., Jan. 11, 1985 (Nexis, Nexis library, Wires file). The Commonwealth of Pennsylvania filed a motion to remove a Nuclear Regulatory ALJ for demonstrating a strong appearance of bias. In doing so, the Commonwealth noted that the ALJ's conduct "likely violates the American Bar Association's Code of Judicial Conduct." *Id.*

169. Ohio State Bar Association Comm. on Legal Ethics and Professional Conduct, Formal Op. 34 (1981). The Commission was of the opinion that full-time referees are "judges" for purposes of the Code of Judicial Conduct, and should comply with Canon 5(F), which precludes judges from practicing law. A part-time referee is considered to be a "part-time judge" under the CJC, and should comply with all provisions except those noted in section A(1)(2) of the Compliance section. *Id.*

tions of the powers of rendering judgments and issuing executions."[170] Additionally, the New York State Bar Association stated that a member of the Administrative Appeals Board of the State Motor Vehicle Department is subject to the same restrictions imposed upon judges.[171] Similarly, an attorney serving as a hearing officer in proceedings to review small claim property tax assessments has also been held to the same conduct as a judge.[172]

(b) Applying the CJC to ALJ's by analogy.—More often than direct application, the CJC is applied by analogy to encompass officers not listed in the CJC but who perform similar quasi-judicial functions. The Pennsylvania Bar Association Ethics Committee, for example, applied the CJC by analogy to Public Utility Commission (PUC) ALJ's,[173] and to masters in divorce proceedings.[174] In applying the CJC to PUC administrative law judges, the PBA Ethics Committee noted that Canon 3(C)(1)(d) may require disqualification of an ALJ if his impartiality might be questioned.[175] Application of the Code was by analogy because, under a prior Pennsylvania decision, ALJ's may not be included in the category of judges.[176] Similarly, the Philadelphia Bar Association Professional Guidance Committee held that a lawyer may not serve as a member of the Worker's Compensation Appeal Board if his law firm represents clients before the board, since the quasi-judicial functions he performs may require compliance with the CJC.[177] The dual obligations

170. *Id.*

171. New York State Bar Association Comm. on Professional Ethics, Op. 365 (1974). The Committee further held that neither the lawyer nor other lawyers in his firm could represent private clients at a hearing conducted by a motor vehicle referee. *Id.*

172. New York State Bar Association Comm. on Professional Ethics, Op. 543 (1982). "Even if such decisions are to possess no precedential value, the integrity and impartiality of the assessment review procedures should not be clouded by such dual role inconsistencies." *Id.*

173. PBA Comm. on Legal Ethics and Professional Responsibility, Informal Op. 88-22 (1988). The opinion applied CJC Canon 3(c)(1)(d) by analogy because ALJ's are not included in the category of judges. It should be noted, however, that Pennsylvania Public Utility Commission ALJ's are governed by their own code of conduct. *See* 66 PA. CONS. STAT. ANN. § 319 (Purdon 1978).

174. PBA Comm. on Legal Ethics and Professional Responsibility, Informal Op. 80-47 (1980). A master in divorce proceedings is forbidden to represent one of the parties in later litigation involving visitation rights. "When an attorney was acting as a master, he or she was acting as the judge in the case for all practical purposes." *Id.*

175. PBA Comm. on Legal Ethics and Professional Responsibility, Informal Op. 88-22 (1988).

176. *Id.*

177. Philadelphia Bar Association Professional Guidance Comm., Op. 87-20 (1987). The CJC prohibits the lawyer or judge from associating himself with other lawyers likely to appear before him and from entering into financial or business dealings that may tend to reflect adversely on his impartiality. Such an association may also interfere with the performance of the judge's judicial duties. *See* MODEL CODE, *supra* note 4, Canons 2, 3.

presented conflict with the requirement that he perform his judicial duties impartially.[178]

The Arizona Ethics Committee addressed the propriety of ex parte communications between an administrative law judge and a lawyer appearing before him.[179] The Committee noted that although judicial ethics was outside the scope of its opinion, Canon 3(A)(4) of the CJC would prohibit a "judge" from initiating or considering ex parte communications concerning a pending proceeding.[180] A subsequent Arizona Ethics Committee opinion indicated that the Committee considered an ALJ to be an "adjudicative officer."[181] This characterization brings the ALJ within the Code of Judicial Conduct and prohibits him from serving as a consultant or representative for a law firm in a case over which he previously presided.[182] The State Bar of New Mexico, without applying the CJC, indicated that a hearing officer fulfills a judicial role in a quasi-judicial forum.[183] Hearing officers, therefore, are precluded from appearing before their forums because of the implications of improper influence.[184] Illinois has adopted a similar position by requiring hearing officers to be guided by the CJC as to disqualification and avoidance of the appearance of impropriety.[185]

Application by analogy avoids the potential dispute that may arise when ALJ's are considered to be "judicial officers" in violation of the separation of powers.[186] Although ALJ's perform a variety of judicial functions, they are not officers of a *judicial system* by virtue of their status as administrative employees under the executive branch.[187] This would appear to defeat any direct application of the CJC to state administrative law judges without express adoption by a state legislature.

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178. *Id.*

179. Arizona Comm. on Rules of Professional Conduct, Op. 88-04 (1988); Arizona Comm. on Rules of Professional Conduct, Op. 87-2 (1987).

180. Arizona Comm. on Rules of Professional Conduct, Op. 87-2 (1987). The Committee analogized Arizona cases that disapproved of judicial ex parte communications, thus implying that the ALJ should be treated under judicial standards.

181. Arizona Comm. on Rules of Professional Conduct, Op. 88-04 (1988).

182. *Id.*

183. State Bar of New Mexico Bar Advisory Opinions Comm., Op. 1985-7 (1985).

184. *Id.*

185. *ABA/BNA Lawyers' Manual on Professional Conduct*, Illinois State Bar Association Comm. on Professional Ethics, Op. 87-14 (1988).

186. *See infra* notes 236-51 and accompanying text.

187. *See* MODEL CODE, *supra* note 4, Compliance; ABA PROPOSED DRAFT, *supra* note 4, at 42. *See also* PBA Comm. on Legal Ethics and Professional Responsibility, Formal Op. 89-86 (1989).

(c) The inapplicability of the CJC to ALJ's.—States that have declined to apply the Code of Judicial Conduct to state administrative law judges have questioned the legal foundation of such an application.[188] When it first addressed the issue, the Michigan Committee on Professional and Judicial Ethics concluded that the CJC, read in conjunction with the Michigan Administrative Procedure Act and ABA ethics opinions, would seem to apply to ALJ's.[189] The Committee refused to completely endorse this view; however, it did note that it would consider the relevant facts in each situation to determine the extent to which the CJC would be applicable.[190] Later reconsideration of the issue led the Committee to state: "[I]n the absence of a definitive legal resolution of the question, this Committee is still not prepared to view the Michigan Code of Judicial Conduct as directly applicable to administrative law judges."[191] The Committee, however, analyzed the appropriate CJC provisions as if they were applicable.[192] The Legal Ethics Committee of the District of Columbia Bar also declined to apply the Code of Judicial Conduct to a hearing examiner who acted in a quasi-judicial capacity.[193] Noting that a hearing examiner is not an "officer of a judicial system" but an employee of an administrative agency, the Committee reasoned that the Code of Judicial Conduct was inapplicable.[194]

Although some state ethics committees have declined to apply the CJC to administrative law judges, there is evidence that this is not a hard-line position. For example, the Michigan Committee on Professional and Judicial Ethics indicated: "As administrative law judges continue to undertake greater portions of the decision making in Michigan, rather than simply acting as policy enforcers, the rationale for applying the Code of Judicial Conduct to their actions will be all the more compelling."[195]

188. *See* Michigan Comm. on Professional and Judicial Ethics, Informal Op. CI-633 (1981) ("The Committee's caution as regards to finding the Michigan Code of Judicial Conduct directly applicable to administrative law judges seems particularly well-advised in light of our understanding that the Judicial Tenure Committee took the position only last year that it lacked jurisdiction over such officials because they are not 'judges' within the meaning of GCR 932.3(b)."); Legal Ethics Comm. of the District of Columbia Bar, Informal Op. 133 (1984).

189. Michigan Comm. on Professional and Judicial Ethics, Informal Op. CI-351 (1978).

190. *Id.*

191. Michigan Comm. on Professional and Judicial Ethics, Informal Op. CI-633 (1981).

192. *Id.*

193. District of Columbia Bar Legal Ethics Comm., Op. 133 (1986).

194. *Id.*

195. Michigan Comm. on Professional and Judicial Ethics, Informal Op. CI-351 (1978).

V. Inadequacies of the Present Approach

The divergent results reached by state ethics committees demonstrates why an ad hoc application of the CJC is undesirable. The lack of uniformity in this area places a great burden on administrative law judges because there are few specific guidelines to follow.

The states have continued to develop alternative approaches as a means of compensating for the lack of a binding ALJ conduct code. One such approach is the establishment of limitations on the practice of law for part-time ALJ's.[196] The jurisdictions that have considered such limitations have not treated the matter with uniformity.[197] For example, the West Virginia Bar Association resolved that a lawyer could serve as a hearing examiner for a state human rights commission while a member of his firm represented clients before that commission, provided certain safeguards were followed.[198] In Indiana, part-time commissioners may represent clients before all courts except those that approve the commissioners' decisions.[199] In contrast, New Mexico,[200] Ohio,[201] and New York[202] Bar Association opinions prohibit quasi-judicial officers from practicing law or appearing in their own forum. Virginia opinions have adhered to both positions when applied to various examiners.[203]

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196. *See* West Virginia State Bar Legal Ethics Comm., Op. 87-02 (1987).

197. *Id.*

198. The safeguards provided that the lawyer could serve as a hearing examiner if he:

> (1) does not hear a case in which he or any member of his firm has been previously involved, or in which a lawyer or his firm is involved as counsel, or a client of the firm is a party;
>
> (2) does not knowingly agree to hear a case involving a major uncontested legal issue in which his law firm has a present interest;
>
> (3) disqualifies himself in the event a conflict develops unless all parties concerned, after full disclosure, agree in writing that he may continue to act as a hearing examiner; and
>
> (4) does not state or imply to any client of his own or his firm that his service as a hearing examiner provides an opportunity to influence the commission.

West Virginia State Bar Legal Ethics Comm., Informal Op. 85-01 (1985).

199. *See id.* (citing an unidentified Indiana advisory opinion).

200. New Mexico State Bar Advisory Opinions Comm., Op. 1985-7 (1985).

201. Ohio State Bar Association Comm. on Legal Ethics and Professional Conduct, Op. 34 (1981) ("referees employed by judges in the general division of the Court of Common Pleas may not practice in that division of the Court").

202. New York State Bar Association Comm. on Professional Ethics, Op. 543 (1982) (prohibits a hearing officer in tax assessment cases from representing private clients in the same type of proceeding in the same jurisdiction).

203. In Virginia, part-time commissioners in chancery for divorce may represent clients before the court that appointed them. Virginia State Bar Standing Comm. on Legal Ethics, Op. 670 (1985). In contrast, part-time hearing examiners for the state employment commission may not. Virginia State Bar Standing Comm. on Legal Ethics, Op. 549 (1984). Additionally, a lawyer who serves as a hearing officer in special education due process hearings may not appear as an advocate in similar but unrelated hearings or in appellate hearings in other juris-

The state central panel system, designed to make the ALJ more independent of agency influence, is another attempt by states to alleviate the problems of potential ALJ bias or impropriety.[204] Nevertheless, this effort only addresses part of the problem. Additionally, some state agencies have adopted their own ethical codes for ALJ's.[205] For example, Pennsylvania's Public Utility Commission requires its ALJ's to abide by an agency enforced code of conduct.[206]

The enactment of legislative reforms by some states indicates at least a recognition of the problem. West Virginia expanded the jurisdiction of its Judicial Investigation Commission, which enforces the Judicial Code of Ethics, to include family law masters.[207] Similarly, Indiana amended its state administrative procedures to provide ALJ's with greater restrictions on judicial communications[208] and disqualification,[209] so that violations of prescribed conduct could result in a Class A misdemeanor charge.[210] Indiana has also attempted to address the problem of excessive outside influence on ALJ's by introducing a bill to the Indiana Legislature barring the use of undue influence to sway the outcome of administrative hearings.[211] The bill recommended that the hearing process be brought under the same ethical code as trial judges, and proposed imposing the Code of Judicial Conduct on participants in state administrative hearings.[212] The Indiana Attorney General, in proposing the reform, cited the tremendous pressure often exerted on hearing officers by hospital and nursing home lobbyists.[213]

These approaches alone, however, are inadequate to remedy the problem. There is an unavoidable appearance of bias inherent in the structure of the administrative adjudicatory system when an agency ALJ presides in litigation between its employing agency and a private party.[214] It is virtually impossible for an ALJ to convey the im-

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dictions in the state. Virginia State Bar Standing Comm. on Legal Ethics, Op. 583 (1984).

204. *See supra* notes 108-16 and accompanying text.

205. *See, e.g.*, Pennsylvania Utility Commission Act, 66 PA. CONS. STAT. ANN §§ 304, 319 (Purdon 1978).

206. *Id.*

207. In West Virginia, family law masters fill a quasi-judicial position created by the legislature. The masters have authority to enter temporary support and custody orders, and make recommended findings to the circuit court. *See* West Virginia State Bar Legal Ethics Comm., Informal Op. 85-01 (1985).

208. IND. CODE ANN. § 4-21.5-3-11 (Burns 1986).

209. *Id.* § 4-21.5-3-12.

210. *See id.* § 4-21.5-3-36.

211. U.P.I., Dec. 30, 1984 (Nexis, Nexis library, Wires file).

212. *Id.*

213. *Id.*

214. Segal, *supra* note 64, at 1426.

age of an impartial factfinder in such a situation.[215] "As long as administrative law judges are employees of the agencies that appear before them, their independence is suspect, and the ability of an agency to exert improper influence over them is ever-threatening."[216] Steps that have been taken to ensure that ALJ's act independently of their agencies have not gone far enough. Freedom from bias, coercion, or outside influence affecting the fairness of the decision or the decision itself must be safeguarded for ALJ's, as it is for judges and judicial officers.[217]

The possibility that agencies will exert undue influence upon ALJ's compromises the integrity of the system.[218] ALJ's are vulnerable to a variety of subtle pressures because the agency generally controls promotional opportunities, support staff, scheduling, and personal reputation of the ALJ.[219] Conflict seems inevitable given the hybrid nature of the ALJ role: independent adjudicator and agency employee. The public perception that ALJ's are not unbiased and impartial because they are agency employees highlights the need for reform.[220]

VI. Legislative Proposal: Pennsylvania Should Elect to Make the CJC Applicable to State Administrative Law Judges

The current approach—permanent ALJ assignment to a particular agency—is recognized by many as flawed.[221] This system creates the appearance of bias in favor of the agency and is counterproductive to the goal of providing an ALJ who is fair, objective, and free from agency bias. Both commentators and administrative law judges have recognized the need for the establishment of an effective system, similar to that controlling judges, to guide the removal, discipline, and compulsory retirement of ALJ's.[222]

A binding conduct code imposed upon ALJ's could remedy some of the glaring problems that exist in the present system. The ABA proposed revision to the Code of Judicial Conduct opens the

215. "[S]o long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder." *Id.*

216. E. THOMAS, *supra* note 2, at 3-4.

217. Lussier, *supra* note 3, at 777.

218. E. THOMAS, *supra* note 2, at 6.

219. *Id.* at 6-7.

220. *Id.* at 5.

221. *See supra* notes 214-20 and accompanying text.

222. Segal, *supra* note 64, at 1426. *See also* Levinson, *supra* note 46, at 752-53.

door for Pennsylvania and other states to effectuate change by electing to make the CJC applicable to state administrative law judges.[223] Such an election by the states is both feasible and desirable. Currently, there are indications that Pennsylvania would support the election of the CJC; the advisory opinions of the Pennsylvania Bar Association Ethics Committee have been amenable to application of the CJC by analogy.[224]

A. Advantages to Application

Application of the Code of Judicial Conduct to administrative law judges would provide ALJ's with advanced knowledge of the standards of conduct expected of them. Presumably, ALJ's would prefer to receive prior notice of unacceptable conduct than to be informed of it in a disciplinary proceeding. The confusion currently experienced by ALJ's as to what constitutes unprofessional judicial conduct is evidenced by the many requests for advisory opinions made to bar association ethics committees each year.[225]

The CJC, if made applicable to Pennsylvania ALJ's, would advise the ALJ under Canon 2 to avoid impropriety or the appearance of impropriety in official proceedings. Applied to an ALJ, this could be interpreted to mean that no overt favoritism should be shown to the agency during the administrative hearing. Additionally, Canon 3 would mandate that ALJ's perform the duties of their office diligently and impartially. Ideally, such standards would encourage agencies to abstain from questioning an ALJ's benefit allowance rate.[226] The CJC would ban an ALJ from ex parte communications on a pending case outside the formal proceeding and would require him to disqualify himself if his impartiality might be questioned.[227] Although the requirement of disqualification for bias would duplicate some existing statutory standards that apply to ALJ's, the CJC would provide more detailed guidance on improper conduct *before* such conduct occurs and would give the existing standards a more

223. *See generally* ABA PROPOSED DRAFT, *supra* note 4.

224. *See supra* notes 164-68, 173-78 and accompanying text.

225. *See supra* notes 153-95 and accompanying text.

226. On the federal level, programs requiring agency review of decisions of ALJ's who allowed benefits in 70 percent or more of their decisions were found violative of the APA. *See* Association of Admin. Law Judges, Inc. v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984). The court found that such programs could reasonably pressure ALJ's to render fewer allowance decisions and influence some outcomes. *Id.* at 1142.

227. *See* MODEL CODE, *supra* note 4, Canon 3(A)(4). *See also* Levinson, *supra* note 46, at 752.

viable enforcement mechanism.[228] Application of the CJC would prohibit an ALJ from serving as a member of a board of directors of a business corporation,[229] or from hearing a case in which the ALJ has a financial or other interest,[230] and would restrict questionable quasi-judicial and extra-judicial activities.[231]

Perhaps the most significant effect of electing to apply the CJC to ALJ's would be the change in public perception of bias inherent in the administrative adjudicatory system. With concrete standards to govern ALJ behavior, the public perception of ALJ's as biased and partial agency actors will be alleviated, and would finally bring uniformity to a currently uncertain area. A concrete code that sets ethical standards and provides a punishment mechanism would help to alter the perception of impartiality in the adjudicatory process.

An election to apply the CJC to administrative law judges would ease the interpretation problem experienced by state ethics committees, who are uncertain about how to treat ALJ inquiries. The CJC would be easy for state agencies to implement, and would provide certainty in application. The jurisdiction of the Judicial Inquiry and Review Board could be expanded to encompass ALJ's.[232] Alternatively, a separate Administrative Inquiry and Review Board could be implemented to deal exclusively with agency grievances and misconduct allegations.

B. Problems to Overcome

The above recommendations are not without associated problems. A further expansion of the Code of Judicial Conduct to administrative law judges may be viewed by some as a further relaxation of the separation of powers.[233] Many critics of the present administrative system believe that there has been too much judicialization, which endangers the entire administrative process.[234] The current practice of hiring ALJ's from previous agency service will continue to raise questions of ALJ impartiality. Additionally, adoption of the Code of Judicial Conduct will only serve to codify many

228. MODEL CODE, *supra* note 4, Canon 3(C). *See also* Levinson, *supra* note 46, at 752 n.108.

229. MODEL CODE, *supra* note 4, Canon 5(C)(2).

230. *Id.*, Canon 3(C), 5(C). *See also* Levinson, *supra* note 46, at 753 (advocating the application of the CJC to federal administrative law judges: "if these provisions are salutary when applied to judges, they appear just as appropriate for application to ALJ's.").

231. *Id.*, Canon 5, 6.

232. *See supra* notes 33-35 and accompanying text.

233. *See infra* notes 236-51 and accompanying text.

234. *See* deSeife, *supra* note 73.

ethical procedures that some agencies already unofficially embrace. Arguably, agencies would also lose some element of control over their ALJ's if outside standards are imputed to govern their conduct.

A literal application of the CJC could also create interpretive problems. For example, Canon 2 states that a judge should avoid the appearance of impropriety. As previously indicated, the agency system itself gives rise to some presumptions of bias or impropriety. Reconciliation between the literal meaning of the CJC and the basic agency structure would be difficult without some modifications of the CJC. Due to the unique characteristics of ALJ's, a separate code of conduct exclusively for ALJ's could be the ultimate answer to this problem.[235] Nevertheless, in light of the current disorganization of the ALJ system, perhaps the states are better equipped to reconcile their Codes with the unique needs of their ALJ's.

C. *Reconciling the Problems with Separation of Powers*

A characteristic feature of the United States Constitution is the separation of functions among three co-equal branches of government—legislative, executive, and judicial.[236] The separation of powers principle acts in a broad sense to confine to each branch those powers that it has been delegated by the Constitution.[237] In theory, the checks and balances imposed upon each branch act as safeguards against one branch attempting to exercise powers expressly delegated to another.[238] In reality, the three powers are often blended together and commonly interact.[239]

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235. At least one ALJ organization has endorsed a model code of judicial conduct for federal ALJ's. *See* ABA PROPOSED DRAFT, *supra* note 4, at 42 (citing *Model Code of Judicial Conduct for Federal Administrative Law Judges*, endorsed by the National Conference of ALJ's in Feb. 1989).

236. The United States Constitution, in the first three articles, provides for the establishment of the legislative, executive, and judicial branches of government. U.S. CONST. arts. I, II, III.

237. The framers of the Constitution sought to create a government which would be free from the tyranny that could result from a concentration of power in one branch. *See* 1 J. STEIN, *supra* note 51, § 3.01.

238. In theory, the system of checks and balances works well. Each branch carries out those powers that they have been delegated by the Constitution. In practice, however, the strict separation that the theory advances does not exist. Occasionally, the President makes laws by issuing executive orders, and may take on additional legislative functions in times of crisis. Courts often take it upon themselves to legislate. The commingling of functions within an agency, therefore, is not necessarily as unusual or evil as some believe. *See* deSeife, *supra* note 73, at 234-35.

239.

> The Constitution itself points the way by explicitly providing for blending. It provides that the President shall participate in the legislative process by approving or vetoing bills and in the judicial process by exercising the power of pardon, that the House shall act executively in impeaching officers, that the Sen-

In many ways, administrative agencies defy the strict interpretation of separation of powers by the fusion of their legislative, executive, and judicial functions. In effect, agencies combine under one roof the three powers that the Constitution sought to separate.[240] This intermingling of functions has caused many to consider administrative agencies to be a virtual fourth branch of government.[241] Despite the vague constitutional underpinnings upon which such a delegation of power is based, the Supreme Court has consistently supported congressional delegation of legislative and judicial power to administrative agencies.[242]

The doctrine of separation of powers does not necessarily preclude a certain mixture of these functions. To perform properly, administrative agencies should be allowed to exercise quasi-legislative, quasi-executive, and quasi-judicial functions.[243] Each function should be assessed under the standards set forth by the respective branch.[244] Thus, the adequacy of ALJ performance in their adjudicatory role *should* be assessed from the judicial perspective. Judicial power should be conferred upon agencies if they are to adjudicate important rights, even if the particular power has been traditionally exercised only by the courts.[245] Mixing adjudicative functions with administrative and rulemaking functions enables agencies to utilize their expertise to implement regulatory policies in a way that might not be possible within rigidly separated boundaries.[246] Furthermore, agencies have a greater ability to accomplish their statutory mandate

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ate shall act judicially in trying impeachments, and that the Senate shall participate in an executive function in advising on and consenting to appointments to public office.

1 K. DAVIS, *supra* note 54, § 2.5, at 73.

240. *See* deSeife, *supra* note 73, at 233-34.

241. *Id. See also* Pops, *supra* note 132.

242. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1 (1965); State of Az. v. State of Cal., 373 U.S. 546 (1963); Kent v. Dulles, 357 U.S. 116 (1958); Yakus v. United States, 321 U.S. 414 (1944); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940). The Supreme Court has invalidated only two delegations to administrative agencies. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495 (1935).

243. *See* deSeife, *supra* note 73, at 236.

244. *See id.* The author suggests that any proposed agency standards be assessed at the proper level. Thus, any proposed standards in rulemaking functions should be assessed from the legislative perspective, any changes in executive functions ought to be proposed on the basis of enforcement standards, and the adequacy of their adjudicatory role should be assessed from the judicial perspective. *Id.*

245. *See* Crowell v. Benson, 285 U.S. 22 (1932) (the exercise of adjudicative functions by administrative bodies is not a withdrawal of the judicial function from the courts in contravention of the constitutional doctrine of separation of powers); 1 K. DAVIS, *supra* note 54, § 2.6, at 79.

246. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 935 (1988).

with the combination of functions.[247]

The fourteenth amendment due process clause does not embrace the federal concept of separation of powers for the states, and leaves the states free to allocate such powers as the states deem necessary.[248] Practically all state constitutions provide for some degree of separation of powers.[249]

Separation of powers does not prohibit an ALJ from complying with judicial procedures in the interest of due process and providing a fair hearing.[250] The Code of Judicial Conduct currently encompasses inferior judicial officers who perform similar functions to those carried out by ALJ's.[251] A further extension to include ALJ's would not overstep the bounds of constitutional authority. Since they function as the trial judges of the administrative system, ALJ's should be evaluated like trial judges without reference to their actual constitutional status.

VII. Conclusion

The increased judicialization of administrative law judges requires that a comprehensive code of conduct be implemented to overcome perceptions of bias and partially inherent in the administrative adjudicatory process. Administrative law judges are subject to intense agency pressures that are not experienced by the independent judiciary. Subtle forms of influence exist and are perpetuated by an administrative system that inherently controls ALJ action. Public perceptions of biased administrative law judges indicate that ethical reforms are needed, and actual incidents of ALJ misconduct reinforce this need.

The proposed revisions to the Model Code of Judicial Conduct give states the opportunity to promulgate and implement a workable code of conduct to guide ALJ behavior. Our system of justice mandates that decisionmakers be neutral and honest when acting in an adjudicatory capacity. Since the administrative hearing process is an integral part of our legal system, it should be made to conform to the principles of justice "upon which our legal system is grounded."[252]

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247. *Id.*

248. *See* International Bhd. of Teamsters Union, Local 309 v. Hanke, 339 U.S. 470 (1950) (the fourteenth amendment leaves the states free to distribute the powers of government between their legislative and judicial branches).

249. *See, e.g.*, PA. CONST. art. V, § 1 (1968).

250. *See supra* notes 78-81, 121-26 and accompanying text.

251. *See* MODEL CODE, *supra* note 4, Compliance.

252. *See* E. THOMAS, *supra* note 2, at 9.

Enforcement of standards of ethical conduct cannot, and should not, be left to the conscience of the individual. The Code of Judicial Conduct embodies principles that all decisionmakers, including those who are "technically" under a different branch of government, should strive to follow. As vital decisionmakers, ALJ's wield a great deal of power because they adjudicate important individual rights in a quasi-judicial, if not judicial, context. As such, ALJ's should be held to the same standards as their judicial counterparts.

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