


3-15-2007

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James E. Moliterno

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### Recommended Citation

James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 27 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1 (2007)  
Available at: <http://digitalcommons.pepperdine.edu/naalj/vol27/iss1/3>

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# THE ADMINISTRATIVE JUDICIARY'S INDEPENDENCE MYTH

*James E. Moliterno\**

## INTRODUCTION

Are administrative judges<sup>1</sup> independent in the usual judicial independence sense? To the extent they are, of what are they independent? If they should be independent, what does independence mean in their unique context? In this Article, I will explore a question that has occupied some considerable attention among administrative judges and administrative law scholars.<sup>2</sup> I am neither. Instead, I bring the perspective of legal and judicial

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\* Tazewell Taylor Professor of Law, The College of William & Mary. Many thanks to my colleague, Charles Koch, for introducing me to the fascinating world of administrative judges and administrative law generally. He should not be blamed for my errors or lack of administrative law sophistication. Thanks as well for marvelous research assistance on this project to Donald Goodman and Margaret Shoup and, in general, to the Graduate Research Fellows program at William & Mary, which provides seemingly limitless, excellent research assistance.

1. In this Article, I use the general term administrative judge or administrative judiciary to include administrative law judges, administrative judges, hearing officers, and others who might fairly be included in the so-called "administrative judiciary." The differences among members of this group have modest effects on parts of this Article, effects discussed in specific sections. In the main, the differences are not consequential for this Article.

2. See, e.g., Ron Beal, *The Texas State Office of Administrative Hearings: Establishing Independent Adjudicators in Contested Case Proceedings While Preserving the Power of Institutional Decision-Making*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 119 (2005); James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1382-85 (2002); Richard B. Hoffman & Frank P. Cihlar, *Judicial Independence: Can It Be Without Article III?*, 46 MERCER L. REV. 863 (1995); Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 1 (2005); L. Hope O'Keeffe, Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591 (1986).

\* Indicates page numbering from journal of original publication —  
41 Wake Forest L. Rev. 1191 (2006).

ethics to the issue of administrative judge independence.<sup>3</sup>

After a bit of background on role and rule in the analysis of ethics issues in Part I, Part II asks whether it is proper to call administrative judges “judges.” Concluding that such a designation is accurate, Part III gives background on judicial independence and distinguishes independence from another judicial attribute, impartiality. Part IV takes this discussion of judicial independence and applies it to the role of administrative judge, concluding that administrative judges, though properly called judges, are not meant to be independent in the judicial sense.

The lack of judicial independence of administrative judges is no mark of failure or embarrassment. On the contrary, the role of administrative judge, properly understood, is critically important to our justice delivery system, although it simultaneously does not implicate judicial independence. Administrative judges have an important role to fill: they are meant to preside impartially over fair hearings that implement and administer agency policy. To perform this critical role in the most effective way, administrative judges are not to function in a judicially independent way. Instead, they must recognize that their role demands adherence to agency policy and goals. Judges of the judicial branch, acting independently of the executive and legislative branches, will apply contested legal principles and rules to executive agency action, including that taken by the administrative judiciary.

### I. ETHICS, ROLE, AND INDEPENDENCE

Ethics issues are all about role and context. Once past the simplistic “don’t lie, cheat, or steal” rule, and past just staring at the text of the rules themselves in an entirely formalist way, everything in professional ethics is about role and context. Role and context determine the appropriate actions and attributes of legal professionals. To be sure, the profession has produced a formalized version of the lawyer’s and judge’s roles by adopting sets of ethics rules,<sup>4</sup> the violation of which produces professional consequences.

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3. With the range of agencies, each with its distinct mission, structure, history, and regulations, there are few absolutes and little consistency in terminology in administrative law, and, therefore, in the life of the administrative judge. Terminology is difficult to manage because of varied usages in varied agencies. Some statements that may seem in error to some readers may simply be a reflection of my focus on one agency structure or another that is inconsistent with the reader’s knowledge base. Any real errors that remain in this piece are mine and do not belong to those from whom I have gained my modest level of administrative law knowledge.

4. See MODEL RULES OF PROF’L CONDUCT (2003); MODEL CODE OF JUD. CONDUCT (2004).

But those rules are a starting point, rather than an ending point, for most serious analysis of lawyer and judge conduct. They play a part—but only a part—in lawyer regulation.<sup>5</sup> They cover lawyers and judges in a general way, but mostly fail to account for differences in the practice settings, and say little at all about what makes a good lawyer or judge. To play a role well, whether it be in a play, in a sport, or in a professional milieu, knowing the rules of acting, of the game, or of the profession is far from fulfilling the role well. Understanding the role illuminates the rules' meaning.<sup>6</sup>

Consider, generally, the attributes of the lawyer's role: a lawyer acts as a representative of a client (as a special sort of agent), pursuing that client's interests within prescribed boundaries, while maintaining an eye on the public interest. These simple attributes of the lawyer's role dictate the nature, scope, and interpretation of the lawyer ethics rules, confidentiality rules, conflicts rules, and so on. Yet, this general description belies the complexity of the wide variety of sub-roles that lawyers serve, depending on their particular practice setting.

Prosecutors and other government lawyers have no individual client and, by role, must serve the public interest to an extent greater than other lawyers must, creating different confidentiality<sup>7</sup> and conflicts implications, all while facing the special burdens, joys, and challenges of being a public employee and a public official.<sup>8</sup> Lawyers for corporations fill a slightly different role as well, representing an entity rather than a flesh and blood individual, and

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5. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 804-14 (1992).

6. James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprenticeship System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83, 99 (1991) (“[L]earning to play the game well (learning to lawyer ethically) is accomplished not so much by learning the game’s rules, though learn them the players must, as by the activity of playing (experience with lawyering behavior). . . . A player might well learn the text and basic meaning of the rules by reading and discussing them; but to learn the subtleties that define what it means to play well, the player must experience the play itself.”).

7. James E. Moliterno, *The Federal Government Lawyer’s Duty to Breach Confidentiality*, 14 TEMP. POL. & CIV. RTS. L. REV. 633, 633 (2005).

8. See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2003) (noting that a prosecutor has the responsibility for being not only an advocate, but also a minister of justice who carries the obligation of ensuring that defendants receive “procedural justice and that guilt is decided upon the basis of sufficient evidence”); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 790 (2000).

different ethics rules and interpretations apply to them as a result.<sup>9</sup> In-house corporate lawyers have, as well, their lawyer role swirled with that of employee, creating further complications in the law that governs their conduct and its implications.<sup>10</sup> Criminal defense lawyers, in recognition of their special role in representing the individual in jeopardy against the power of the state, face particular ethical challenges. And the list goes on and on from practice setting to practice setting.<sup>11</sup>

And then there is the judge's role and the range of ethics standards with which judges must comply. Judges who are also licensed to practice law must abide by the lawyer ethics rules that are not representation-related. The judge's role requires an entirely new lens for ethics analysis: forget (largely) about confidentiality; forget about client loyalty and those sorts of conflicts. Judges must focus on integrity, impartiality, independence, fairness, competence, and, because of the judge's closer connection with the system of justice and the public interest involved, appearance of impropriety as it relates to public confidence in the justice system.

And then there are administrative judges. If we are not surprised that lawyer ethics principles change from practice setting to practice setting, we should not be surprised to find that the ethics attributes of the one kind of judge (an administrative judge) should differ from those of another kind of judge. Arguably, administrative judges have the most complex mixture of roles, and therefore of ethics guidelines, of any law professional. For those administrative judges who are lawyers, the lawyers' rules govern some aspects of their behavior.<sup>12</sup> To some extent, the ethics rules for judges apply to administrative judges, though finding the appropriate, specific set of governing rules is not always straightforward.<sup>13</sup> As public officials,

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9. See Sarbanes-Oxley Act § 307, 15 U.S.C. § 7245 (Supp. II 2004) (requiring the Securities and Exchange Commission ("SEC") to issue rules setting minimum standards of professional conduct for attorneys appearing and practicing before the SEC); *Upjohn Co. v. United States*, 449 U.S. 383, 391-92 (1981); MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003).

10. See, e.g., *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487, 490 (Cal. 1994); *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 110 (Ill. 1991); *Mourad v. Auto. Club Ins. Ass'n*, 465 N.W.2d 395, 397-98 (Mich. Ct. App. 1991); *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 858 (Tenn. 2002); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-424 (2001).

11. See James E. Moliterno, *Practice Setting as an Organizing Theme for a Law and Ethics of Lawyering Curriculum*, 39 WM. & MARY L. REV. 393, 394 (1998).

12. See MODEL RULES OF PROF'L CONDUCT R. 8.1-4 (2003).

13. See MODEL CODE OF JUD. CONDUCT (2004); MODEL CODE OF JUD. CONDUCT FOR STATE ADMIN. LAW JUDGES (1995); MODEL CODE OF JUD. CONDUCT FOR FED. ADMIN. LAW JUDGES (1989).

administrative judges must account for the public interest in somewhat the same way as does a prosecutor, a government lawyer, a commissioner of an agency, or a bureaucrat.<sup>14</sup> As a federal or state employee, administrative judges must comply with applicable ethics statutes regarding conflicts and regulations of their particular agencies.<sup>15</sup>

Complicating this overlay of ethics rules is the reality of many administrative judges' particular agency roles. Often, one of the litigants before the administrative judge is the judge's employer. When the agency appears in the matter, one of the lawyers before the administrative judge is a co-worker, at least in some broad sense.<sup>16</sup> Often, the experts for one of the litigants are co-workers of the judge; often, the administrator of one of the litigants is in control of the judge's budget. What seems to pass for ethics determinations regarding some administrative<sup>17</sup> decisions are really employment law issues<sup>18</sup> that find a place in the Merit Systems Protection Board

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14. See 7 U.S.C. § 87 (2000) (prohibiting a person performing an official function under the grain standards chapter from being "financially interested . . . in any business entity owning or operating any grain elevator or warehouse or engaged in the merchandising of grain"); 18 U.S.C. § 207 (2000, Supp. III 2005) (restricting, for a time, former officers, employees, and elected officials of the executive and legislative branches from communicating with an officer or employee of the United States or District of Columbia with the intent to influence that person on behalf of another in connection with described matters); CAL. GOV'T CODE § 1090 (Deering 2002) (prohibiting public officials from being "financially interested in any contract made by them in their official capacity" or from being "purchasers at any sale or vendors at any purchase made by them in their official capacity"); KAN. STAT. ANN. § 75-4304 (1997) ("No local governmental officer or employee shall, in the capacity of such an officer or employee, make or participate in the making of a contract with any person or business by which the officer or employee is employed or in whose business the officer or employee has a substantial interest.").

15. See, e.g., 40 C.F.R. § 164.40(a) (2005) (prohibiting Environmental Protection Agency administrative law judges from deciding "any matter in connection with a proceeding where he has a financial interest in any of the parties or a relationship with a party that would make it otherwise inappropriate for him to act").

16. See 5 U.S.C. § 554(d) (2000) (prohibiting an employee from consulting a person or party on a fact in issue without giving all parties an opportunity to participate; prohibiting an employee from being subject to the supervision of an employee or agent performing investigative or prosecutorial functions for an agency; and prohibiting an employee engaged in the performance of investigative or prosecutorial functions for an agency in that or a factually related case from participating or advising in the decision, recommended decision, or agency review, except as witness or counsel in public proceedings).

17. See *id.* § 7703.

18. See *Yates v. Merit Sys. Prot. Bd.*, 145 F.3d 1480, 1481 (1998).

review process.<sup>19</sup>

No other legal professional has this complex a mix—not private practice lawyers, not criminal defense lawyers, not prosecutors, not civil-side government lawyers, and not ordinary judges.

The administrative judiciary presents a unique challenge for ethics study. Role is all that really matters at the bottom, and the role of the administrative judge is not merely complex in its generic form, but also varies further from agency to agency, taking into account the unique mission, history, and political setting of each agency. The differences between state and federal agencies alone makes generalization dangerous. And within state systems, which themselves vary, or within the federal system, the nuances and variances are myriad and significant. Studying the administrative judiciary requires studying the administrative state. I make no pretense of fully understanding the nuances present in the roles of the wide range of individuals who might fairly be called administrative judges. I will attempt to confine myself to common, generic attributes of most administrative judges, and I address in this Article one issue regarding the role of administrative judge: independence.

Plainly, a major issue for administrative judges is the friction between independence and accountability. And given the unique setting of a judge who is employed by what is frequently one of the parties before the judge, that issue's prominence is unsurprising. If independence is truly a core attribute of the American style of judging, and if administrative judges are not independent, then administrative judges are more administrative functionaries with judge-like duties than they are judges. By contrast, if independence is not an essential attribute of judging, then perhaps non-independent administrative judges are judges after all.

In the end, the role question is always the same: what does the system within which this person functions expect of her? And for this inquiry, what does the system expect of administrative judges? Are they expert dispute resolvers within an agency, still carrying out the mission of the agency? What is the implication of the role question for administrative judges?

## II. ARE ADMINISTRATIVE JUDGES “JUDGES”?

Administrative judges are judges in a fairly narrow, specific sense. They possess, of course, the fundamental core of the judicial definition, which, while nowhere given authoritatively, is by wide

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19. 5 U.S.C. § 7521 (providing that “good cause” is required for discipline). There have been only twenty-four reported cases since 1946; see *infra* note 150 and accompanying text.

approval known to consist in the impartial adjudication of cases. A judge is “[a] public official appointed or elected to hear and decide legal matters in court.”<sup>20</sup> The American Bar Association’s *Model Code of Judicial Conduct* does not define “judge” in its terminology section; it does, however, state that “[t]he judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.”<sup>21</sup> Administrative judges are certainly both, and, in a most important and fundamental sense, they can certainly be called “judges.” The Supreme Court has acknowledged as much:

There can be little doubt that the role of the modern federal 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. . . . More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him,<sup>22</sup> free from pressures by the parties or other officials within the agency.<sup>23</sup>

These protections on impartial decisionmaking are so important, in fact, that, like other judges, administrative judges are granted an absolute immunity from suit for actions committed in the performance of their duties.<sup>24</sup> Administrative judges are true judges on this basis because they are impartial decisionmakers who adjudicate disputes between parties.

All judges share this common characteristic. Even in legal systems that follow a different model, such as the civil law, judges are meant to be impartial adjudicators of disputes. One of the unique characteristics of the civil law, for example, is “the responsibility it places on the judge in dispute resolution.”<sup>25</sup> Civil law countries commonly do not use juries on the belief that the law is “too technical and refined to be properly understood by laymen”<sup>26</sup>

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20. BLACK’S LAW DICTIONARY 844 (7th ed. 1999).

21. MODEL CODE OF JUD. CONDUCT pmbl. (2004).

22. Interestingly, the Court uses the word “independent” here. The context reveals that the Court is referring to independent fact finding, an activity more associated with the judicial attribute of impartiality rather than the traditional notions of judicial independence. *See infra* Part III.

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

24. *Id.* at 514.

25. Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 139 (2004).

26. Konstantinos D. Kerameus, *A Civilian Lawyer Looks at Common Law Procedure*, 47 LA. L. REV. 493, 502 (1987).



and that trial by jury suffers from “the cost of insensibility to general legal precepts and to predictability of result.”<sup>27</sup> It is, therefore, entirely the judge’s responsibility to determine both facts and law. Administrative judges find facts and determine the law to be applied to those facts, though they do not make new law.<sup>28</sup> In this sense, an administrative judge is very much like a civil law judge, but again, very much a judge.

Indeed, administrative judges in the Social Security Administration (“SSA”) are like civilian judges in more than their sole responsibility for adjudication. A SSA proceeding “is a system bearing little resemblance to the traditions of Anglo-American jurisprudence.”<sup>29</sup> Specifically, the inquisitorial system that prevails in the civilian tradition is also commonly used in SSA hearings. In the inquisitorial system, the judge plays an active role in both the fact-gathering and the fact-finding processes.<sup>30</sup> In many forms of administrative hearings, the government is not present, and although the plaintiff (claimant, really) presents his claim, the administrative judge calls witnesses, collects evidence, and ensures that the record is fully developed.<sup>31</sup> All of this establishes that administrative judges, while more active in the adjudicatory process than their Article III counterparts, are certainly judges in the broad sense—even if they often resemble their civil law, more than their common law, counterparts. In the end, they are impartial adjudicators of disputes.

Administrative judges are also like civil law judges, and unlike common law judges, in that they are not formally bound by their own precedent. The fact that “the doctrine of stare decisis generally is not . . . fully or strictly applicable to administrative decisions”<sup>32</sup> is well understood by administrative law scholars and courts.<sup>33</sup> Since

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27. *Id.* at 503.

28. *See infra* Part IV.

29. Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293, 295 (1997).

30. *Id.* at 303.

31. *Id.* at 310; *see also* Frank S. Bloch et al., *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 31 (2003).

32. E. H. Schopler, Annotation, *Comment Note: Applicability of Stare Decisis Doctrine to Decisions of Administrative Agencies*, 79 A.L.R.2d 1126, 1131-32 (1961).

33. *See, e.g.*, *B&J Oil & Gas v. Fed. Energy Regulatory Comm’n*, 353 F.3d 71, 76 (D.C. Cir. 2004) (“[W]e observed—unremarkably—that agencies may change their policies as long as they engage in reasoned decisionmaking and explain their breaks with precedent.”); *State Airlines, Inc. v. Civil Aeronautics Bd.*, 174 F.2d 510, 518 (D.C. Cir. 1949), *rev’d on other grounds*, 338 U.S. 572

the doctrine of stare decisis “has for its object the salutary effect of uniformity, certainty, and stability in the law,”<sup>34</sup> it contributes to impartial decisionmaking by preventing judges from deciding cases simply as they will. Instead, they must follow precedent. The comparable limiting principle for civil law judges is the Code. Administrative judges, not bound by their own precedent, are guided and constrained in their determinations by the state of the law external to their own decisions: statutes, court precedent, and administrative regulations.<sup>35</sup>

Although administrative judges are not required to follow precedent, they are required to make their decisions impartially based on factors outside of their own senses of proper agency policy. Clearly, administrative judges must follow the agency’s legislative rules, but, perhaps more controversially with some administrative judges, they must also follow other statements or indicators of agency policy.<sup>36</sup> They are, after all, agents of the agency and have no independent authority to divine policy. The only true source of their authority is the agency itself, and their judgment must be informed by the agency’s and not their own sense of good policy. This aspect is an important distinction between administrative judges and Article III judges and their state court counterparts.

In reality, if not required, administrative judges generally follow precedents in the same way as Article III courts,<sup>37</sup> further cementing their status as impartial decisionmakers, and therefore eminently worthy of the name, “judge.” However, the fact remains that Article III judges are able to make law by the doctrine of stare decisis, whereas administrative judges are entirely incapable of making law which is actually, rather than merely customarily, binding upon their fellows, or even upon their inferiors. In this way, then, administrative judges are judges in that they are impartial decisionmakers, but of a very different kind than are Article III judges or common law judges generally.

### III. IMPARTIALITY AND INDEPENDENCE

Like most carefully defined concepts, judicial independence

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(1950) (“[A]dministrative agencies are free from the application of the judicial doctrines of *stare decisis* and *res judicata* . . .”).

34. Schopler, *supra* note 32, at 1128.

35. As a practical matter, requiring administrative judges in many settings—SSA determinations, for example—to follow precedent would be virtually impossible to manage given the multitude of judges and decisions.

36. Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 695-96 (2005).

37. Schopler, *supra* note 32, at 1132 (“[A]dministrative agencies . . . act very much like courts, as regards precedents.”).

exists as a matter of degree. In the narrow (and probably more precise) sense, independence is about insulating a judge's decisionmaking from interference from either the electorate, the legislative branch, or the executive branch. Thought of this way, some judges are more independent than others. Impartiality as a judicial trait is often confused with independence. Impartiality is about fair-minded, neutral decisionmaking. Independence is created primarily by structural aspects of government. Impartiality is created primarily by the structure of the dispute resolution process. All judges are in systems that foster impartiality; some judges are in structures that foster independence. Is independence a fundamental attribute of a judge? What is independence in the judicial sense?<sup>38</sup>

Another way of seeing the relationship is to say that independence is a subset of impartiality, isolating only those influences that come from the electorate, the political process, or the other branches of government. The independence subset is not necessary to the role of judge, but is a desirable attribute if the judge is meant to check the other branches.

One major process attribute designed to foster impartiality is

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38. See, e.g., WALTER GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* 78-81 (1941); CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW & PRACTICE* (2d ed. 1997); RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* § 9.10 (4th ed. 2002); Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L.J. 323, 338-39 (2003); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 80 (1998); Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 370 (2002); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 965 (2002); Walter Gellhorn, *The Improvement of Public Administration*, 2 NAT'L LAW. GUILD Q. 20, 23 (1940); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 164-65 (2003); Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1007, 1012 (2002); Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 536 (1999); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 688 (1980) [hereinafter Kaufman, *Essence of Judicial Independence*]; Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 683-84 (1979) [hereinafter Kaufman, *Chilling Judicial Independence*]; Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 458-64, 467 (1986); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1572 (1996); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 632 (1999); Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119, 1125 (1997).

the prohibition on ex parte communications. Ex parte communications are communications with either party to a case concerning the case in the absence of the other parties; they are forbidden by the American Bar Association's *Model Code of Judicial Conduct*<sup>39</sup> and are not permitted under the Administrative Procedure Act ("APA") in formal adjudications.<sup>40</sup> The basic concept of a fair hearing entails contemporaneous opportunities to be heard in response to an opposing party's factual and legal assertions. Ex parte communications undermine that concept by allowing one party access to the decisionmaker in the absence of others. A judge so exposed to the unchecked arguments of one party experiences a threat to the judge's impartiality, not independence.

Dispute resolution structures other than the ex parte prohibition foster impartiality by removing the judge's personal interests from the equation. The classic impartiality case<sup>41</sup> illustrates: During the prohibition era, the General Code of Ohio gave mayors, among others, authority to try without a jury cases of persons charged with unlawfully possessing intoxicating liquor in violation of the state's Prohibition Act.<sup>42</sup> Defendant Tumey was tried and convicted before the mayor of the Village of North College Hill, Ohio, for such a violation.<sup>43</sup> Tumey appealed his conviction as a violation of the due process guaranteed him under the Fourteenth Amendment of the Constitution.<sup>44</sup> Fines collected upon conviction under the statute were divided between the state and the village.<sup>45</sup> Under a local village ordinance, deputy marshals, detectives, prosecuting attorneys, and the mayor were compensated from the village's portion of the fines above their normal salaries for their parts in securing a conviction.<sup>46</sup> Since no fees or costs in such cases were paid to the mayor, except by the defendant if convicted, there was no way by which the mayor would be paid for his service as judge if he did not convict those who were brought before him.<sup>47</sup> The Supreme Court held:

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39. MODEL CODE OF JUD. CONDUCT Canon 3, § B(7) (2004).

40. 5 U.S.C. § 554(d) (2000). The ex parte and separation of functions prohibitions together insulate administrative judges from party influence in formal adjudications. The restrictions themselves are described in 5 U.S.C. § 557. Through 5 U.S.C. § 556, these restrictions apply in the instances of formal hearing as described in 5 U.S.C. § 554(a).

41. *Tumey v. Ohio*, 273 U.S. 510 (1927).

42. *Id.* at 516-17.

43. *Id.* at 516.

44. *Id.* at 514-15.

45. *Id.* at 517.

46. *Id.* at 518-19.

47. *Id.* at 520.

[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.<sup>48</sup>

Additionally, the mayor was “the chief executive of the village,” and thus responsible for the finances of the village.<sup>49</sup> The statute offered the village officers “a means of substantially adding to the income of the village to relieve it from further taxation.”<sup>50</sup> The Court summarized, “A situation in which an official performs two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.”<sup>51</sup>

By contrast to the ever-necessary judicial attribute of impartiality, some judges are meant to be more independent than others, without diminishing the sense in which the less independent judge is a judge. Even the most independent U.S. judges, Article III judges, are not completely<sup>52</sup> and literally independent.<sup>53</sup>

“Independence” literally means the absence of dependence, which is to say complete autonomy and insusceptibility to external guidance, influence, or control. If

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48. *Id.* at 523.

49. *Id.* at 533.

50. *Id.*

51. *Id.* at 534.

52. *See, e.g.,* Burbank, *supra* note 38, at 326–27 (recognizing that a completely independent judiciary would not create an orderly society); Terri Peretti, *A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence*, 64 OHIO ST. L.J. 349, 349 (2003) (“Evidence abounds that American judges possess only a modest amount of independence.”).

53. For example, the judiciary was threatened with impeachment and restrictions on their judicial independence following the case of a Florida woman, Terri Schiavo. Schiavo lapsed into a permanent vegetative state after heart failure deprived her brain of oxygen for an extended period. *See* Carl Hulse & David D. Kirkpatrick, *Even Death Does Not Quiet Harsh Political Fight*, N.Y. TIMES, Apr. 1, 2005, at A1. For fifteen years, a feeding tube provided artificial nutrition and hydration to keep her body alive. *See id.* In early 2005, federal courts refused to get involved after lower courts ordered doctors to remove Schiavo’s feeding tube. *See id.* Then House Majority Leader Tom DeLay suggested impeachment for those federal judges who did not intervene in Schiavo’s case, warning they would be responsible for their behavior. *See id.* DeLay stepped back from those warnings somewhat, but still instructed the House Judiciary Committee to examine the actions of federal judges in the Schiavo case and to recommend possible legislation. *See* David Sommer, *Schiavo Autopsy*, TAMPA TRIB., June 16, 2005, at 1; Sheryl Gay Stolberg, *Majority Leader Asks House Panel to Review Judges*, N.Y. TIMES, Apr. 14, 2005, at A1.

we think of judicial independence in literal terms, however, federal judges are not “independent,” at least not as dictionaries define the word. They are not autonomous, because Congress retains ultimate control over their budget, jurisdiction, structure, size, administration, and rulemaking. Moreover, they are susceptible to outside influence; if judges engage in behavior (on or off the bench) that the political branches characterize as criminal, they may be prosecuted and imprisoned; if they make politically unacceptable decisions, the President and Senate may decline to appoint them to higher judicial office; if they commit “high crimes and misdemeanors,” they may be impeached and removed from office; if they make decisions with which higher courts disagree, their decisions may be reversed; and if they engage in behavior that judicial councils regard as misconduct, they may be disciplined.<sup>54</sup>

In turn, “[f]ederal judges are thereby rendered autonomous in the limited sense that they have an enforceable monopoly over ‘the judicial power,’ and are insulated from two discrete forms of influence or control, namely, threats to their tenure and salary.”<sup>55</sup> That is what makes Article III judges independent. Why are they not completely independent? Because “[i]ncreased judicial independence is not always better.”<sup>56</sup> Judicial independence is not an end in itself; it is a means to an end,<sup>57</sup> and it ought to be curtailed when it ceases to be conducive to that end.

What, then, is the purpose of Article III judicial independence? What end is served? While independence, in part, enhances impartiality, that enhancement is far from the primary purpose of independence. Most fundamentally, independence “preserve[s] the integrity of the judiciary as a separate branch of government.”<sup>58</sup> We

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54. Geyh, *supra* note 38, at 159 (footnotes omitted).

55. *Id.*

56. Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 195 (2003) (footnote omitted).

57. Burbank, *supra* note 38, at 324; see Geyh, *supra* note 38, at 163 n.29 (“[J]udicial independence is not an end in itself, but an instrumental value that serves another end.”).

58. *Id.* at 162; see also Cross, *supra* note 56, at 195 (defining judicial independence as “freedom from control . . . by the other political branches of government”); Ferejohn & Kramer, *supra* note 38, at 962 (noting that the end of independence and accountability is “a well-functioning system of adjudication”); Kaufman, *Essence of Judicial Independence*, *supra* note 38, at 691 (observing that the Supreme Court’s definition of judicial independence has stated that its purpose is keeping the judiciary “free from undue interference by the President or Congress”); Kaufman, *Chilling Judicial Independence*, *supra* note 38, at 713 (arguing that judicial independence should not only protect the independence of the judicial branch, but also the independence of the individual judges); Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and*

want individual judges to decide cases without being influenced by anything other than the facts and the law. We also want the judiciary to function as a third branch of government and check the other two. At the same time, however, we do not want the judiciary to be able to run amok, doing whatever it wants. So we guarantee judicial tenure and salary, but we do not guarantee that the entire judiciary will be free from any checks from the other branches. We see, then, elements of both independence and accountability<sup>59</sup> in the formulation of our federal judiciary. But to make the judicial checks on the other branches meaningful, the Article III balance is decidedly tilted toward independence and away from accountability.

These accountability checks on the courts are almost never used, even though they are technically available to Congress,<sup>60</sup> perhaps because Congress does not want to interfere with judicial independence, or perhaps for fear of partisan tit for tat. There is, therefore, a definite “tension”<sup>61</sup> between independence and accountability.<sup>62</sup> How can we resolve this tension, keeping judges accountable to the other branches while not beholden to them?

Geyh distinguished between three types of independence in order to help explain how the Constitution, and the way we have interpreted it, does so. There is “doctrinal” independence (simply the independence which Article III makes indisputable), “functional” independence (that independence which is at the sufferance of Congress), and “customary” independence (the independence granted by the customs of interfering or not interfering in constitutionally permitted ways with judicial independence).<sup>63</sup>

The political branches struck a constitutional balance over time

*Popular Democracy*, 79 DENV. U. L. REV. 65, 65 (2001) (explaining that judicial independence enables courts to “serve as an institutional check on the legislative and executive branches and that judicial independence is essential for the judiciary to protect the rule of law”) (footnotes omitted).

59. The desirable degree of accountability, of course, depends upon our theory of judicial decision making. See Larkin, *supra* note 58, at 66 (recognizing that the importance of judicial accountability over and against judicial independence depends on “what political and social role a judge should play”). The debate over judicial activism is crucial on this point; here, however, it is not at issue.

60. See Geyh, *supra* note 38, at 163-64.

61. Larkin, *supra* note 58, at 65.

62. Burbank has argued that this is not really a conflict, but simply another side to the judicial coin. However, his own phraseology establishes that the two balance one another, and so the distinction is most likely solely rhetorical; Burbank merely means to say that the tension between independence and accountability is not a conflict, but a balancing. See Burbank, *supra* note 38, at 330-32.

63. Geyh, *supra* note 38, at 164-65.

between judicial accountability and independence.<sup>64</sup> This balance, which is represented by customary independence, can be altered by the political branches.<sup>65</sup> Similarly, the courts may alter the scope of doctrinal independence.<sup>66</sup> Though doctrinal independence and customary independence are bound to constitutional norms, functional independence is “shaped by the vagaries of any given day’s public policy.”<sup>67</sup> This customary independence is not, of course, inviolable. However, methods of constraining the judiciary which have traditionally been considered antithetical to judicial independence are presumptively unconstitutional according to this scheme.<sup>68</sup> Essentially, Geyh argued that Congress has refrained from interfering with this “customary independence” because it has so interpreted the Constitution as to make such interference unconstitutional.<sup>69</sup> Congress is, by so doing, exercising self-restraint,<sup>70</sup> just as courts occasionally do.

Article III judges, at least when thought of as members of courts made up of several judges (the Supreme Court, the courts of appeal, and the district court panels), are themselves the products of a combination of executive and legislative choice.<sup>71</sup> The selection and confirmation process is a real but modest detraction from judicial independence. Although each individual Article III judge may be almost entirely insulated from legislative and executive oversight once confirmed (there remains only the impeachment threat), even they are less than perfectly independent. They remain as members of courts the composition of which will be influenced by future appointments.<sup>72</sup> Even seeming lone-ranger district court judges have changing panels of future appellate courts to which they look

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64. *Id.* at 165.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 165-66.

69. *Id.* at 166.

70. *Id.* at 165.

71. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL & HISTORICAL ANALYSIS* 141 (2000) (discussing the 1999 choreographed exchange between President Clinton and Senator Orrin Hatch, in which Senator Hatch agreed to move pending judicial nominations through the confirmation process as long as the President kept Senator Hatch’s preferred candidate moving through the nomination process).

72. See, e.g., Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*, 29 J. LEGAL STUD. 685, 686 (2000); Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805, 806, 808 (1999); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997).



forward. Nonetheless, Article III judges possess the greatest measure of independence of any American judges.

Where does this leave accountability, however, if Congress has progressively abandoned the constitutionally permitted methods of curbing the courts? Perhaps it lies entirely in the appointment process.<sup>73</sup> The appointment process is the only constitutional restraint on the judiciary that Congress has shown itself willing to exercise; every other method (adjusting court size, reducing court budgets, impeachment for unfavorable decisions) has been gradually abandoned, forming the “customary” independence of Article III courts.<sup>74</sup> The appointment process stands as the only remaining check on Article III independence, ensuring the judiciary’s integrity as a third branch of government so that it can serve as a check on the two others and its own accountability.<sup>75</sup>

Many state court judges have a high degree of independence from the legislative and executive branches, but less than that of Article III judges. State judges lack life tenure and perfect protection against compensation reduction. State court judicial selection and renewal processes result in structures less friendly to independence than those of Article III judges. Elected state judges have significant independence from the legislative and executive branches, but must answer to the electorate and have a lower measure of independence from the people as a result. To be sure, in many states, terms are long,<sup>76</sup> and reelection processes so substantially favor incumbents that this reduction from life tenure may, in practice, be modest. But it exists to some measure in all instances. Given the new freedom to campaign in judicial elections,<sup>77</sup> independence from the electorate is likely to diminish

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73. Geyh, *supra* note 38, at 220 (“[I]f Congress is to reclaim ground lost to the Supreme Court . . . it will be via the appointments process.”).

74. *Id.* at 211 (noting that Congress restrains itself against limiting the court except in the appointments process).

75. Whether or not reducing congressional control of the judiciary entirely to the appointment process does, in fact, maintain judicial accountability is not at issue here; we are only concerned with the principles behind the facts, not the facts themselves.

76. See, e.g., Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 630 (1981); Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1435 (2003); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1156 (1993). Information on state judicial term limits is found in 37 COUNCIL OF STATE GOV'TS, BOOK OF THE STATES 318-21 tbl.5.6 (2005). Examples of long terms for state judges include fourteen-year initial terms for trial-level judges in New York, twelve-year terms in Delaware, and ten-year terms in Pennsylvania. *Id.*

77. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)

further for elected judges.

Appointed state judges begin with some form of the same input from the other branches as Article III judges, but their renewal processes substantially decrease their independence. These judges periodically must stand for reappointment by either the executive or the legislative branch period and risk termination when they act in ways that displease the branch that considers their renewal.<sup>78</sup> While appointed judges are less beholden to the electorate than elected judges, they remain just a step removed: the branch that renews judges is itself subject to the winds of electoral change.

There are two sets of system attributes that support independence. One set is structural: federal judges are selected through a process that involves both of the other branches; they have life tenure; and their salary cannot be reduced. State judges live in a system that is less structurally friendly to independence: many are elected; some are selected by legislatures; most are closer to the political process for one reason or another; and their court budgets are subject to local political contests. When these structural

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(holding that a Minnesota law prohibiting judicial candidates from announcing their views on legal and political issues violates the First Amendment); *Weaver v. Bonner*, 309 F.3d 1312, 1320-21 (11th Cir. 2002) (upholding First Amendment protection of campaign-related speech made by judicial candidates).

78. In Virginia, judges of state courts of record are elected by a majority vote of each house of the General Assembly ("GA"). VA. CONST. art. VI, § 7. Candidates must go through steps, however, before they are voted on by the GA. First, candidates interview with a panel of citizens and lawyers. Katrice Hardy, *GOP Leaders Hope to Change How Judges are Reappointed*, ROANOKE TIMES, Jan. 27, 2004, at B3. Then, the candidate seeks support "from [her] bar associations and must win nominations from [her] Senate and House representatives." *Id.* The leading candidates then interview with the Senate and House Courts of Justice committees. *Id.* After the committees make their top selections, the Senate and House vote on the judgeships. *Id.* Virginia's system of judicial appointment has received criticism, as shown in the case of Verbena Askew, a Newport News Circuit Judge denied a second term in 2003. See Robert McCabe, *Lawmakers Deny 2nd Term to Judge; Racism Charged in Controversial Decision on Newport News Jurist*, VIRGINIAN-PILOT, Jan. 23, 2003, at A1. Due to lawyers' complaints about Askew's demeanor and work habits on the bench and due to Askew's failure to disclose during the judicial review process a complaint filed by a former city employee alleging sexual harassment and retaliation by Askew, the Senate and House Courts of Justice committees found Askew was not qualified for reappointment. *Id.* The decision not to reappoint Askew resulted in allegations of discrimination based on race and sexual orientation, as well as allegations that the decision was politically motivated. *Id.* More recently, legislators have been working to improve the judicial appointment process, including proposing a reform that would require independent performance evaluations of judges up for reappointment. See Hardy, *supra*, at B3.

attributes are present, as they are in the federal judicial system, they tend to foster independence from interference by the other branches.

The other set is largely relational, rather than structural: judges are insulated from most ex parte communication; they are not to be the recipient of extravagant gifts; and they must monitor their outside interests. These rules are largely meant to foster judicial independence from inappropriate influence by the parties to litigation or others interested in the outcome of litigation. This set of attributes might more accurately be said to foster impartiality as much as they foster independence.

In some sense, independence is a personal trait.<sup>79</sup> Structures can foster it or not. On some level, however, judges are, or are not, independent because of their personal qualities. State judges might act independently of political influence from the other branches and of the electorate, even though structures do not lend support to such conduct. Such judges run the risk of being ex-judges, and when that occurs, the structures have won. In any event, even judges of independent spirit and inclination are not independent in the judicial sense when their decisions are subject to direct, de novo review by the agency.

Independence is not an essential attribute of judging. While many state court judges may function with high levels of independence, structures to foster high levels of independence are not in place in most states. One can only conclude that state government founders did not regard judicial independence with the same regard as did federal government founders. Independence, at least the structural independence from interference from the other branches, is most important when the judiciary is expected to function in a counter-majoritarian manner.<sup>80</sup>

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79. Edwin Felter distinguishes between “functional” and “practical” independence. He says functional independence is the personal trait of being independent, despite structures that disfavor independence. Practical independence refers to the institutional structures that foster independence. Edwin L. Felter, Jr., *Special Problems of State Administrative Law Judges*, 53 ADMIN. L. REV. 403, 413 (2001); see also Ann Marshall Young, *Judicial Independence in Administrative Adjudication: Past, Present, and Future*, JUDGES’ J., Summer 1999, at 16, 42 (defining “functional decisional independence” and “practical decisional independence”).

80. See Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1491-94 (2005) (“[Though] there is indeed increasing evidence that many elections for state supreme courts are hotly contested, costly, and highly politicized affairs. . . . [I]t is not unfair to call these exceptions to the rule of low-profile [state] judicial campaigns. The majoritarian pressures of the exceptions are indeed troubling, but they do not support a conclusion that state judges, at any level, are *systematically* forfeiting federal constitutional rights due to a fear

## IV. ADMINISTRATIVE JUDGE INDEPENDENCE

Many reliable and prominent administrative law scholars,<sup>81</sup> courts,<sup>82</sup> and administrative judges<sup>83</sup> use the word “independence” to describe administrative judges, and seem to assume that administrative judges are expected to share this attribute with judicial branch decisionmakers. In fact, administrative judges are meant to make impartial decisions, but not to be independent. These two judicial concepts are easily conflated and confused with one another.<sup>84</sup>

In the broader sense of “judge” in the federal system, however, administrative judges cannot be so called. In the first place, not even the most zealous administrative judge would deny that “[t]he ALJ . . . has not been invested with judicial authority independent of the agency head.”<sup>85</sup> This is a vital difference which forever puts to rest the idea that administrative judges are judges just as Article III judges are. Furthermore, Article III judges are given a power beyond the simple adjudication of disputes. Justice Antonin Scalia notes this difference in his article on administrative judges, observing that the Article III judge has the “authority to overrule the actions of the two elected branches,”<sup>86</sup> but that “[n]o such power inheres in the presiding officers at administrative hearings, even if Congress chooses to call them judges.”<sup>87</sup>

The Supreme Court has weighed in similarly in this regard, declaring that, while administrative judges cannot be compared to the Article III judiciary, they are nevertheless a true judiciary. In addition to their affirmation of administrative judge judicial status in *Butz v. Economou*,<sup>88</sup> the Court’s position is further specified in

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of the electorate.”) (footnotes omitted).

81. KOCH, *supra* note 38, § 5.24; PIERCE, *supra* note 38.

82. *Butz v. Economou*, 438 U.S. 478, 513 (1978) (“[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment . . . .”); *Stephens v. Merit Sys. Prot. Bd.*, 986 F.2d 493, 494-96 (Fed. Cir. 1993).

83. See Edwin L. Felter, Jr., *Maintaining the Balance Between Judicial Independence and Accountability in Administrative Law*, JUDGES’ J., Winter 1997, at 22, 22; Young, *supra* note 79, at 42.

84. See Johnson, *supra* note 38, at 1014 (discussing judicial independence and factors that affect judicial decisionmaking).

85. Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475, 515 (2001).

86. Antonin Scalia, *The ALJ Fiasco—a Reprise*, 47 U. CHI. L. REV. 57, 61 (1979).

87. *Id.* at 61-62.

88. 438 U.S. 478 (1978).

*Ramspeck v. Federal Trial Examiners Conference.*<sup>89</sup> While occasionally referring to administrative judges as “quasi-judicial officers,”<sup>90</sup> implying that they are not truly judges, the Court unambiguously affirmed the status of administrative judges as members of a true judiciary. The Court stated that “Congress intended to make hearing examiners ‘a special class of semi-independent subordinate hearing officers.’”<sup>91</sup>

The Court was clear that administrative judges are fundamentally different from Article III judges. It even enumerated the differences precisely:

The position of hearing examiners is not a constitutionally protected position. It is a creature of congressional enactment. The respondents have no vested right to positions as examiners. They hold their posts by such tenure as Congress sees fit to give them. Their positions may be regulated completely by Congress, or Congress may delegate the exercise of its regulatory power, under proper standards, to the Civil Service Commission, which it has done in this case.<sup>92</sup>

Administrative judges are not federal judges; they are a special kind of judge, which is only “semi-independent,” and which is substantially different from the type of judge envisioned by Article III. What are the causes of these differences? To answer this question we must first examine the question of judicial independence generally. What do we mean by saying that federal judges are independent, and that administrative judges are “semi-independent”? Their version of independence should be thought of with this qualification in mind.

There is no need for the defensiveness exhibited in a variety of administrative judge-written pieces on independence.<sup>93</sup> The fact that administrative judges may not be meant to be independent in the judicial, especially Article III, sense, does not mean that administrative judges are not professionals and are not playing a critical role in the delivery of justice and the application of law. Their role in delivering justice to individuals is critical. But critical roles can be played without independence. Administrative judges need not share every attribute with their Article III counterparts to be highly regarded.

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89. 345 U.S. 128 (1953).

90. *Id.* at 130.

91. *Id.* at 132 (footnote omitted) (quoting S. REP. NO. 79-752, at 6 (1945), reprinted in ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, at 187, 192 (William S. Hein & Co. 1997) (1946)).

92. *Id.* at 133.

93. See, e.g., Young, *supra* note 79.

Institutional structures say as much as the language of the rules that establish those institutions. The language of an individual statute can be the trees that obscure the forest. The structure of the entire forest reveals the intention of the drafters and institution designers. Administrative judges were not intended to be independent in the sense of that word that connotes the usual judge's attribute. They were meant to be impartial decisionmakers and advancers of agency policy, not independent ones.

Part III described the structure of judicial independence in the American system. Do administrative law judges have similar characteristics?<sup>94</sup> That is, is the independence of administrative judges such that it serves as a means to the end of judicial independence, namely, protecting impartiality, preserving integrity as a separate branch of government, and accountability? The answer, of course, is no; administrative judges are not meant to be a separate branch of government. The essential differences lie in their appointment, their removal, and especially the authority of their decisions, which makes their position in the governmental cosmos (as part of the executive branch, not an independent branch by themselves or part of the judicial branch) perfectly clear.

Administrative judges are so far less independent from various political and structural forces that they occupy positions that are different in kind from the Article III and state court judges. Administrative judges, though they judge, are not in the first instance members of the judicial branch. They are selected and renewed by a nonjudicial branch. They have insulation from the electorate in a sense, but their agency will feel change in the political climate and fortunes of political parties. But what makes administrative judges not fundamentally independent is that their very decisions are reviewed and subject to reversal on law and policy grounds by their agency, their nonjudicial branch agency.<sup>95</sup>

One might argue that administrative judges are not independent from the legislative branch because they have to follow statutes or are not independent from the executive branch because they have to follow regulations, but that imposition is no different from observing that legislation, or even lawfully adopted

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94. Overwhelmingly, ALJs themselves say that they *are* independent, though they presumably would not ascribe to themselves the same sort of independence as Article III judges are granted. Ninety percent of ALJs in a 1992 survey said that they thought "independent" described their role well. Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 287 (1994). Their opinion is undermined by their own answers to other parts of the same survey which indicate high levels of perceived interference with decisionmaking. *Id.* at 278-79.

95. See 5 U.S.C. § 557(b) (2000).

administrative regulations, “trumps” the common law and judicial power to make law. But, of course, what the administrative judge lacks is the judicial review power, the judge’s power to interpret constitutions and declare the legislation or regulation to be beyond the agency’s or legislature’s power.<sup>96</sup>

Article III courts (and analogous state courts) are different in the independence realm from administrative judges. Administrative judges do not establish precedent in the same sense that courts do. A subsequent administrative judge is free to ignore a prior decision of another administrative judge of the same “rank” in the same agency.<sup>97</sup> Courts, by contrast, make law at every turn. Even the most mundane case that seems merely to follow existing precedent or apply a statute creates a precedential data point: one more set of facts for future courts to use for comparison and contrast purposes.<sup>98</sup>

To be sure, both courts and administrative judges apply law made by others, but within quite different contexts and constraints. Administrative judges apply law created by the legislature, by the executive, by courts, and by agencies, just as courts do. But the administrative judge’s decision is reviewed by the agency, and may be reversed by it. The court’s decision is reviewed within its own branch, the legislative and executive branches having no first instance of review of judicial decisions. All that is necessary for an administrative judge’s decision to be reviewed is an appeal by a party. Since the agency is often a party, in many instances even the

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96. See, e.g., U.S. CONST. art. III; 5 U.S.C. § 556(c) (2000) (detailing powers and duties of administrative law judges under the Administrative Procedure Act); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178-80 (1803).

97. Strict obedience to precedent is not necessary, but a departure from precedent needs to be explained. “Stare decisis is not the rule in administrative adjudications. Thus, as a matter of doctrine, administrative adjudicators are not required to follow administrative precedent. Rather, administrative law has developed a degree of flexibility in its approach to caselaw. On the other hand, agencies cannot ignore their prior cases.” Koch, *supra* note 36, at 703 (footnotes omitted) (citing *Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222, 229 (3d Cir. 2003)). Specifically, the Third Circuit held that, under the APA, “reviewing courts are to ‘hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ 5 U.S.C. § 706(2). If an agency departs from its own precedent without a reasoned explanation, the agency may be said to have acted arbitrarily and capriciously.” *Id.* at 229.

98. Though most judicial opinions create precedent, judicial practices may prevent some opinions from being used for comparison or contrast purposes. See Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1483-85 (2004) (criticizing the practice of “private judging” whereby judicial opinions are not published, removed from publication, or are withdrawn pursuant to stipulation, effectively removing any precedential value the opinion may have provided).

aggrieved agency itself can institute an appeal to higher authority within the agency.<sup>99</sup>

Beyond the judicial review of a court's decision, it may be said that courts' decisions are always subject to "review" by the legislative branch: statutes that the legislature believes judges have misapplied may be amended, and new, constitutionally permissible legislation to override common law decisions may be enacted. But that "review" by other than the judicial branch is hardly the matter-of-course appeal to higher authority found in the administrative judicial setting.<sup>100</sup> To perform this review of courts, the legislature must first notice the errant decision. It must overcome inertia and the distractions of its myriad other tasks to move on the issue. It must have sufficient time in a session to act. It must garner a majority for passage. And, in the absence of a supermajority, it must have the cooperation of the executive. Even then, it must act within its constitutional parameters or the courts will have the power to check the legislative action. We regard courts, even with this form of legislative oversight, as independent of the other branches. Administrative judges, by contrast, are not independent of the agency and therefore the nonjudicial branch of which that agency is a part. High levels of job security and independent spirit notwithstanding, administrative judges' decisions are not independent: they are subject to direct review by their own agency.

Since, as we have seen, judicial independence is a means to an end, and since the means is limited by its end, what is the end of the degree of independence that administrative judges do have? We saw that there are two purposes of Article III independence: maintaining the judiciary's integrity as a third branch of government (which has the further purpose of checking the other two branches) and ensuring a lack of external pressure as a means of ensuring decisional impartiality. For administrative judges, the situation is different. Administrative judge independence is not about maintaining the integrity of a third branch of government; administrative judges are executive agents, and consequently are part of the second branch. Their independence only serves the goal of decisional impartiality, and because of its less extensive purpose, it is itself less extensive. More accurately, they lack independence,

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99. KOCH, *supra* note 38, § 11.10. However, agency staff ordinarily may not appeal the administrative review to the federal courts. *Id.*

100. Justice Powell criticized the legislature in *INS v. Chadha*, 462 U.S. 919, 960 (1983) (Powell, J., concurring), for assuming a judicial function when it reviewed an INS decision that Chadha met the statutory requirement for permanent residence in the United States. According to Justice Powell, the legislature exceeded its constitutional authority when it reviewed the agency's decision regarding the rights of a specific individual. *Id.*



and yet must be impartial.

Some prominent scholars have recognized that judicial independence is not an all-or-nothing proposition. Burbank, in particular, has identified “the erroneous assumption that judicial independence is a monolith.”<sup>101</sup> He further specified the problem as the idea that “judicial independence has the same value, even if instrumental value, no matter what the court.”<sup>102</sup> The clear implication is that different judges will be independent in different degrees, depending on the position and function of the courts in which they function. Burbank describes it in this way:

[T]he insight that judicial independence is a means to an end (or ends) and not an end in itself suggests that the quantum and quality of independence (and accountability) enjoyed by different courts in different systems, and indeed by different courts within the same system, may not be, and perhaps should not be, the same.<sup>103</sup>

The fact that administrative judges do not share the high degree of independence granted to Article III courts is not, therefore, necessarily regrettable. It may, in fact, be a good thing, provided that the lesser independence afforded them helps achieve the end of the administrative judiciary, which is different, of course, from those of the Article III judiciary. What is that end?

The amount of independence that a judge has, or ought to have, is determined by the judge’s role; that is, it is determined by the end to be served by the judge’s activity. Since the end of administrative judge independence is impartial decisionmaking,<sup>104</sup> and not the maintenance of a separate branch of government, the amount of independence that an administrative judge has will be determined by the amount that is necessary for impartial decisionmaking. To extend this independence beyond that point would be unwise.

What passes as a demand for independence of the administrative law judge is mostly about impartiality;<sup>105</sup> administrative judges were not meant to be a check on the other branches, which is the other, and indeed primary, end of the

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101. Burbank, *supra* note 38, at 325.

102. *Id.*

103. *Id.* at 325-26.

104. *See supra* Part II.

105. 92 CONG. REC. 13, 2164 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY 295, 337 (William S. Hein & Co. 1997) (1946) (stating that the APA, which created administrative judges, “will result in a greater assurance of justice at the hands of administrative agencies”). The legislative history makes no mention of an Article III-style judiciary, but only of an impartial one.

independence of Article III judges. Indeed, administrative judges are called “judges” only in the sense that they are impartial decisionmakers.<sup>106</sup> Even before Congress began calling them judges, in the original Administrative Procedure Act, the legislative history makes use of the term in order to describe the role, and therefore the attributes, of administrative law judges. Congress decided that the “provisions [of the act] mean that presiding officers [administrative judges] will be required to conduct themselves in the manner in which people think they should—that is, as judges and not as the representatives of factions or special interests.”<sup>107</sup> Congress stressed separation from “factions or special interests,” not from the rest of the executive branch. We can see, then, that Congress intended that the provisions of the act secure a certain amount of independence for administrative judges *as a means toward impartiality of decisionmaking*, whereas for Article III judges it is a means both for impartiality and the maintenance of a separate branch of government.

That administrative judges are independent in the sense of fostering impartiality is not open to dispute.<sup>108</sup> The “[e]ssential[s] to true [judicial] independence are life tenure, salary protection, and removal for cause subject to a constitutionally adequate procedure.”<sup>109</sup> Administrative judges have a measure of all these things in order to protect their impartiality, although, as shall be discussed later, they have them to a much lesser degree than Article III judges.

Courts have affirmed the fact that administrative judges have this measure of independence which cannot be infringed. The Supreme Court and the APA have “conferred upon ALJs a right of independence, the invasion of which present[s] a justiciable controversy.”<sup>110</sup> Furthermore, while the Supreme Court has not yet

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106. See *supra* Part II.

107. 92 CONG. REC. 5, 5650 (1946), reprinted in ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY 295, 364 (William S. Hein & Co. 1997) (1946).

108. Not even, it seems, by administrative judges, who generally insist that they are *not* independent, or at least not independent enough. Studies, however, show that the vast majority of ALJs consider themselves independent at least in regard to impartiality. In one survey, only nine percent of non-Social Security ALJs and twenty-six percent of Social Security ALJs said that pressure to render decisions differently was a problem. See Koch, *supra* note 94, at 278. While these numbers are unnecessarily high, those judges who do not fall under ALJ protection found much less significant problems, indicating that it is not structural difficulties which generate this partial lack of impartiality-oriented independence. *Id.* at 278-79.

109. Larkin, *supra* note 58, at 67.

110. Elaine Golin, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532, 1542 (1995).

confirmed these appellate court decisions, many lower courts have decided administrative judge independence cases so consistently that they have, in the words of one of these courts itself, produced a “qualified right of decisional independence.”<sup>111</sup> The Second Circuit held that Congress “vested hearing examiners . . . with a limited independence from the agencies they served.”<sup>112</sup> However, even when courts have defended administrative judge independence, they have always qualified that independence. As the Second Circuit ascribed only a “limited independence” to administrative judges,<sup>113</sup> other courts have stated even more explicitly that administrative judges possess only a certain, small degree of independence. Another court has held that “[t]he ALJ’s independence is not unlimited. The ALJ is subject to the rules and regulations promulgated by the agency and is duty-bound to apply these rules.”<sup>114</sup> The courts consistently affirm that administrative judges are only partly independent.<sup>115</sup>

This lesser independence is not necessarily a bad thing; it is important to remember that “[i]ncreased judicial independence is not always better.”<sup>116</sup> Because judicial independence is a means, not an end in itself, it is only good insofar as it is conducive toward its end. The end of the administrative judge independence is impartiality, whereas the end of Article III independence includes the maintenance of a separate branch of government. How can we know, however, that the end of administrative judge independence is merely impartiality? The answer lies in the role of the administrative judge, which is determined by her place in the government. The administrative judge cannot be independent for the sake of the maintenance of the judicial branch for the simple reason that she is part of one of the other branches, the executive.<sup>117</sup>

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111. *Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980); see also Golin, *supra* note 110, at 1541-43.

112. *Nash*, 613 F.2d at 14.

113. *Id.*

114. *Stieberger v. Heckler*, 615 F. Supp. 1315, 1386 (S.D.N.Y. 1985), *vacated on other grounds by Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986).

115. See *Goodman v. Svahn*, 614 F. Supp. 726, 728 (D.D.C. 1985) (stating that no “larger right of decisional independence exists” for administrative judges beyond that granted in the APA); *Ass’n of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984) (“[T]he ALJ’s right to decisional independence is qualified.”).

116. Cross, *supra* note 56, at 195.

117. Young, *supra* note 79, at 42 (“Traditionally, the concept [of judicial independence] is seen as including both *decisional independence* . . . and *institutional or branch independence* . . . . Administrative law judges obviously do not have *branch* independence. However, if the public is to be assured of optimally neutral, impartial, and fair decisions in administrative adjudication,

Administrative judges are part of the executive branch.<sup>118</sup> This statement is obvious on its face. The administrative judge is not properly a “judge” except in the sense that he is an impartial decisionmaker;<sup>119</sup> he is definitely not a judge in the sense of being part of the judicial branch.<sup>120</sup> The failure to make this distinction—between “judge” as a decisionmaker and “judge” as a member of the judicial branch of government—is doubtlessly responsible for much of the confusion on the issue of administrative judge independence. The distinction is, however, an elementary one and necessary for any proper understanding of either administrative judges or the Article III judiciary.

This distinction is chiefly relevant in that it makes perfectly clear that when dealing with the Article III judiciary and the administrative judiciary, one is dealing with two entirely separate bodies with two distinct roles. The administrative judiciary is not simply a part of the “American judiciary;” it is an executive judiciary, part of the executive branch and designed to serve the ends of the executive branch, to administer. The Article III judiciary, on the other hand, is a separate branch of government and fulfills a very different role.

The role of the Article III judiciary is to exist as an independent branch of government, able to strike down the unconstitutional actions of the other two branches. This is the kind of independence which makes the American (Article III) judiciary distinct. Many scholars have held this opinion. Cross has asserted that judicial independence is “freedom from control or pressure by the other political branches of government.”<sup>121</sup> He cited a number of prominent cases to that effect, stating that the purpose of judicial independence is to help balance the courts against the elected

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it is necessary that administrative law judges have *decisional independence*.”).

118. Except for those in independent agencies. See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 257 (1994).

119. See Young, *supra* note 79, at 42.

120. This would be true even if a separate corps were established for administrative judges. While they would appear then to be a body distinct from the executive, in reality they would still be a part of it, since their decisions would not only still be reviewable and reversible by the agencies, but also subject to judicial review, not in the way a lower court’s decision is reviewable, but in the way that an *executive* action is reviewable. See Felter, *supra* note 83, at 22 (“Whether ALJs work directly for agencies or are in more independent ‘central panels’ of ALJs where they are not directly under any single agency, they act on behalf of those agencies. As such, they are often expected to help achieve agency objectives.”).

121. Cross, *supra* note 56, at 195.

branches.<sup>122</sup>

Kaufman, in his thorough article on judicial independence, argued in another way for the same meaning of the term:

Judicial independence is not a cliché conjured up by those who seek to prevent encroachments by the other branches of government. The term is one of art, defined to achieve the essential objective of the separation of powers that justice be rendered without fear or bias, and free of prejudice.<sup>123</sup>

Kaufman's article traced the history of the judiciary in England and America and determined that the Framers, by founding an independent judiciary, intended to rectify the mistake of the English Constitution, which placed the judiciary under the control of Parliament and, therefore, subject to pressures from the Parliament.<sup>124</sup> He observed that the Framers rejected several plans for the judiciary that "would have prevented the judiciary from effectively checking legislative violations of the constitutional framework,"<sup>125</sup> which, he contended, is the purpose of judicial independence. If the judiciary were not independent, he argued, "the Constitution's promise of a government of limited powers could be broken with utter impunity"<sup>126</sup> because "the legislative and executive powers" would not be "kept within the limits prescribed by [the Constitution]."<sup>127</sup>

The purpose of judicial independence, then, according to Kaufman, is to maintain a judiciary which can impartially pass judgment *upon the actions of the other branches*. This last phrase is the most important element of independence; indeed, Kaufman wrote that "[i]t is this additional step [of making the judiciary independent of the legislative and executive powers], inconceivable in England, that made the American Constitution truly revolutionary."<sup>128</sup> Judicial independence for Kaufman is for the purpose of checking the other branches.<sup>129</sup> Independence in the Article III judiciary is therefore defined by the role which is given to Article III judges: passing judgment upon the actions of the other two branches.

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122. See *id.* at 196.

123. Kaufman, *Essence of Judicial Independence*, *supra* note 38, at 701.

124. *Id.* at 672-87.

125. *Id.* at 686.

126. *Id.* at 687.

127. *Id.* at 686-87.

128. *Id.* at 687.

129. See also Geyh, *supra* note 38, at 162 (stating that the purpose of judicial independence is "to facilitate impartial decisionmaking and preserve the integrity of the judiciary as a separate branch of government").

The role of administrative judges, on the other hand, entails neither the same purpose nor the same powers. In his article on the debates about administrative judges, Justice Scalia argued that administrative judges and Article III judges perform fundamentally different roles in society. Article III judges have “authority to overrule the actions of the two elected branches. No such power inheres in the presiding officers at administrative hearings, even if Congress chooses to call them judges.”<sup>130</sup> So Article III judges perform a role in society which demands an independence that administrative judges do not and cannot have:<sup>131</sup> they make decisions which can override the actions of the other two political branches. Administrative judges, on the other hand, are part of one of those two branches; their decisions are subject to a judicial review not like a lower court’s decision, but like other *executive* actions.<sup>132</sup>

Because of their role as an executive judiciary, they cannot have a very extensive independence. It is important to remember that “[w]hether any executive branch agency can actually be completely independent is problematic.”<sup>133</sup> Are administrative judges, however, truly part of the executive branch? Or are they a fast-developing split from the executive, soon to be absorbed into the judiciary? The answer is certainly the former. Despite the safeguards given to administrative judges to assure their decisional independence (i.e., their impartiality) from the executive branch, they are still unquestionably part of that branch,<sup>134</sup> which is proven by their complete dependence upon their agencies. That dependence is manifested in at least four distinct ways: first, by their appointment

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130. Scalia, *supra* note 86, at 61-62.

131. Some administrative judges even acknowledge this fact openly. See, e.g., Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, 17 J. NAT’L ASS’N ADMIN. L. JUDGES 1, 29 (1997) (“ALJs may not have the same level of authority, power, or practical independence as judicial branch judges.”).

132. Judicial review of administrative judge decisions is arguably identical to that of any other executive act. While it maintains certain aspects of normal judicial review, such as a certain degree of deference in matters of fact, when judges remand administrative judge decisions they are not remanding them as they would to a lower court; they are rejecting an executive action and requiring that its consideration be repeated. See 5 U.S.C. § 706 (2000) (explaining judicial review of administrative actions).

133. Allen C. Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 80-81 (1994).

134. While this fact is obvious, scholars, including administrative law scholars, have occasionally found it necessary to point it out. See, e.g., Young, *supra* note 131, at 16 (“[T]he obvious fact that the two groups are formally in different branches of government, even if ‘functionally comparable.’”) (footnote omitted).

to office; second, by their evaluation while in office; third, by their removal from office; and fourth, by the permanency of their decisions relative to their agencies.

A. *Administrative Judge Dependence in Appointment*

As regards their appointment, administrative judges are completely dependent, of course, upon the will of the executive, whereas the appointment of Article III judges is tempered by “the Advice and Consent of the Senate.”<sup>135</sup> Administrative judges are appointed by their agencies, which are instructed to appoint “as many administrative law judges as are necessary for proceedings.”<sup>136</sup> The officials who do the appointing, however, are all appointed—and removed—by the president and the president alone. The advice and consent of the Senate is entirely unnecessary, rendering administrative judges completely, and obviously, dependent upon the executive branch. With the necessity of Senate confirmation, the dependence on the executive for the Article III judiciary is weakened and diluted. The threat of Senate refusal or even of a minority filibuster restrains the extent to which the executive controls the views and nature of the judicial appointees.

B. *Administrative Judge Dependence in Evaluation*

The evaluation process of administrative judges is so contrary to independence that Article III judges would never tolerate the system being applied to themselves nor would Article III permit them to suffer such a system. Administrative judges are evaluated, and therefore often promoted, by a system similar to “a supervisor evaluating a subordinate employee in a traditional management-by-objectives context, or at least contains aspects of such a process.”<sup>137</sup> This method, however, “would no doubt be considered anathema in the judicial branch”<sup>138</sup> because of its threat to judicial independence: “[I]t never was contemplated that ALJs would be [similarly] immune from any performance reviews.”<sup>139</sup> In fact, in the years immediately following the passage of the APA, the Civil Service Commission made evaluations of hearing examiners which resulted in the retention of only seventy percent of currently employed examiners.<sup>140</sup>

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135. U.S. CONST. art. II, § 2, cl. 2.

136. 5 U.S.C. § 3105 (2000).

137. Young, *supra* note 131, at 17.

138. *Id.*

139. Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589, 592 (1993).

140. See Ralph F. Fuchs, *The Hearing Examiner Fiasco Under the*

After the Commission had absorbed an enormous amount of flak and endured many lawsuits from those examiners, it reversed many of its decisions<sup>141</sup> and the evaluation of administrative judges was entirely abandoned.<sup>142</sup> However, despite the difficulties of the process, it is clear that by current law administrative judges are subject to performance evaluations by the executive branch,<sup>143</sup> which shows their reduced independence relative to Article III judges.

### C. *Administrative Judge Dependence in Removal*

The process for removal of administrative judges, too, is much more political than that of Article III judges, though it, too, provides protection to a certain extent. Disciplinary removals for both types of judges must meet the same standard: they can only be removed for "good cause."<sup>144</sup> Article III judges, however, can only be removed by "the blunderbuss of accountability devices, the impeachment process,"<sup>145</sup> for failure to meet the "good Behaviour"<sup>146</sup> standard, which is an extraordinarily complex procedure and is almost never undertaken.<sup>147</sup> Administrative judges, however, can be acted against "for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board."<sup>148</sup> A number of factors make this removal very different from that of an Article III judge. The Merit Systems Protection Board ("MSPB") consists of only three members, who are appointed, like Article III judges, "by the President, by and with the advice and consent of the Senate."<sup>149</sup> Three members are more easily persuaded, for good or bad reasons, than the large body of the Senate. Furthermore, while decisions of the MSPB are sometimes subject to judicial review, they are never put into the political

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*Administrative Procedure Act*, 63 HARV. L. REV. 737, 753 (1950).

141. *Id.* at 753-56.

142. *See* Lubbers, *supra* note 139, at 593.

143. *See* Nash v. Bowen, 869 F.2d 675, 681 (2d Cir. 1989). It is also true, however, that "the agency won the right to bring charges against low producing ALJs but was handed a virtually insurmountable burden of proof." Lubbers, *supra* note 139, at 599-600.

144. 5 U.S.C. § 7521(a) (2000).

145. Geyh, *supra* note 38, at 163.

146. U.S. CONST. art. III, § 1.

147. *See* Jason J. Vicente, *Impeachment: A Constitutional Primer*, 3 TEX. REV. L. & POL. 117, 133-41 (1998) (discussing impeachment proceedings against twelve judges, including John Pickering, Samuel Chase, and Walter Nixon, among others).

148. 5 U.S.C. § 7521(a). This specific process applies only to ALJs. *Id.*

149. 5 U.S.C. § 1201; *see also* U.S. CONST. art. II, § 2, cl. 2 (providing that the president "shall have Power . . . [to] nominate, and by and with the Advice and Consent of the Senate, [to] appoint . . . Judges of the Supreme Court").



process, making removal of an administrative judge much more subject to arbitrariness.<sup>150</sup>

This is not to say, however, that administrative judges can be removed arbitrarily or easily. Most federal employees can be removed under a much less exacting standard; the decision to remove can be “only for such cause as will promote the efficiency of the service.”<sup>151</sup> Federal employees are also entitled to a more minimal procedure than administrative judges.<sup>152</sup> Furthermore, the MSPB demands “a high threshold of proof in agency actions against ALJs.”<sup>153</sup> These combined factors have led some scholars to the result that “ALJs [have] essentially the same protections that the Constitution gives Article III judges.”<sup>154</sup> This, however, is not quite true. Justice Scalia has noted this similarity in protections given to Article III judges and administrative judges, but would not equate the two. While Article III judges are almost entirely independent in tenure and salary (except for that mostly illusory threat, impeachment), administrative judges are only “largely independent in matters of tenure and compensation.”<sup>155</sup> Their tenure and salary

150. It is true, however, that this avenue has been taken so rarely that it could arguably be considered a dead letter. That opinion, however, does not seem reflected by the facts. As recently as 1999, suit was brought and won dismissing an administrative judge for good cause. See *Carr v. SSA*, 185 F.3d 1318 (Fed. Cir. 1999). Furthermore, though lost, another case was brought in 1984 to remove an administrative judge, which establishes that no one denies the ability of the MSPB to so remove. See *SSA Dep’t of Health and Human Servs. v. Glover*, 23 M.S.P.R. 57 (1984). Finally, in 1980, another case was brought and won for removal of an administrative judge. See *In re Chocallo*, 2 M.S.P.B. 20, 1 M.S.P.R. 605 (1980). So while it is true that only twenty-four cases have been brought for removal of an administrative judge for good cause, and only five of these have been won, this statistic does not invalidate the fact that the standard is both viable and less stringent than that governing Article III judges. For the statistics, see Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. NAT’L ASS’N ADMIN. L. JUDGES 1, 116 (2004).

151. 5 U.S.C. § 7513(a) (2000).

152. See *id.* § 7513(b)-(d). An employee is entitled to thirty days notice, unless the agency has reason to believe that said employee has committed a crime that carries a jail sentence; at least seven days in which to respond; to be represented by an attorney; and to be given a written decision justifying his removal at the earliest possible date. *Id.* § 7513(b). The agency *may* provide a hearing. *Id.* § 7513(c). The employee is entitled to appeal to the Merit Systems Protection Board under 5 U.S.C. § 7701. *Id.* § 7513(d). It can easily be seen that the administrative judge enjoys substantially more protection, even beyond the standard for removal. See *supra* text accompanying notes 147-48 for the protections afforded to administrative judges.

153. Golin, *supra* note 110, at 1538.

154. *Id.*

155. Scalia, *supra* note 86, at 59 (quoting H.R. REP. NO. 79-1980, at 46 (1946), reprinted in ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY 235,

are still much more easily adjusted or removed than are those of any Article III judge. Administrative judges are not, therefore, as independent as Article III judges in the protections given them against arbitrary removal, though they are more protected than the average federal employee.

Furthermore, the MSPB is not the only path to removal of administrative judges; many other methods for removing them are available. First, an administrative judge can be suspended or removed by the head of an agency (who is an executive appointee) “when he considers that action necessary in the interests of national security.”<sup>156</sup> After a certain, very minimal, required procedure,<sup>157</sup> the decision of the agency is final,<sup>158</sup> and it is not subject to judicial review except insofar as such review is necessary to ensure compliance with that minimal procedure.<sup>159</sup> Second, an administrative judge can be removed by a “reduction-in-force,” which is simply a reduction in the federal workforce, the requirements of which are set by the Office of Personnel Management, an executive agency.<sup>160</sup> This is nothing like the tenure protections afforded to Article III judges.<sup>161</sup> Even if these methods

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280 (William S. Hein & Co. 1997) (1946)) (emphasis added). See also S. REP. NO. 79-752, at 29 (1945), reprinted in ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY 189, 215 (William S. Hein & Co. 1997) (1946) (explaining that “the tenure and compensation requirements” of the bill were “designed to make examiners largely independent”) (emphasis added).

156. 5 U.S.C. § 7532(a) (2000). This provision is not affected by the limitation on removal in § 7521(a); see *id.* § 7521(b)(A).

157. All that is required is that the suspended or removed employee, if he “has a permanent or indefinite appointment,” “has completed his probationary or trial period,” and “is a citizen of the United States,” is that he be told in writing of the charges against him within thirty days, that he be given the opportunity to answer the charges within thirty days of being told in writing, that he be given a hearing by an agency authority (the same agency that has suspended or removed him), if he so requests, that the head of the agency review the decision, and that he be given the head of the agency’s decision in writing. *Id.* § 7532(c). This is hardly the sort of constant checks given to those who would impeach Article III justices, even when they appear to be national security risks.

158. *Id.* § 7532(b).

159. See, e.g., *Bailey v. Richardson*, 182 F.2d 46, 64 (1950), *aff’d* 341 U.S. 918 (1951).

160. 5 U.S.C. § 3502. This provision is also not affected by the limitation on removal in § 7521(a). See *id.* § 7521(b)(B).

161. It is true that “[t]he prohibition against removal except for good cause, after hearing, has been broadly construed,” and that “the APA is to be given a generous interpretation in light of the over-riding objective of hearing officer independence,” but that does not change the fact that the protections granted to administrative judges by the APA are nothing like that granted to judges by the Constitution of 1789. Bernard Schwartz, *Adjudication and the Administrative*

and constraints are rarely employed, they remove the institutional structures supporting independence of action by administrative judges.

*D. Administrative Judge Dependence in Finality*

Most fundamentally, administrative judges are subservient to their agencies in the permanency of their decisions. Except in the limited manner outlined by the constitutional separation of powers doctrine, genuinely independent judges in the courts are immune from executive override; administrative judges are not only subject to it, but also often require executive affirmation in order for their decisions to be final.<sup>162</sup> Clearly, they are not as independent as Article III judges in this respect.

Judges in the judicial branch are independent in the sense that their decisions are final. Of course, they are subject to review, but only from within the judicial branch. Even if the legislature chooses to pass a statute to override judicial precedent, the decisions of the courts in those particular cases cannot be altered; their decisions are truly independent of the other two branches. Judges under Article III thus have the greatest possible amount of independence short of an absolute authority; administrative judges, on the other hand, are crucially dependent, both in that their decisions often require executive affirmation and in that they are always subject to executive review.

The APA allows the agency to affirm, alter, or completely override the decision of the administrative judge.<sup>163</sup> The Act provides that “[w]hen the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings,”<sup>164</sup> which seems to imply independence. However, the Act further specifies that this is the case “unless there is an appeal to, or review on motion of, the agency within time provided by rule.”<sup>165</sup> The appeal can be made by either party in the dispute; indeed, often one of the parties is the agency itself, and it can appeal the decision to itself.<sup>166</sup> Upon appeal, the agency “has all

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*Procedure Act*, 32 TULSA L.J. 203, 211 (1996) (footnote omitted).

162. Of course, an appeal or motion must come first. See *infra* notes 163-68 and accompanying text.

163. See 5 U.S.C. § 557.

164. *Id.* § 557(b).

165. *Id.*

166. See, e.g., Kenneth Nickolai, *Strengthening the Skills of Administrative Law Judges*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 263, 265 (2000) (“[J]udges [are] employed by the agency whose actions they are often reviewing.”); Schwartz, *supra* note 161, at 204-05 (stating that the agency is often “the opposite party”).

the powers which it would have in making the initial decision,”<sup>167</sup> meaning that it can conduct, if it so wishes, a completely de novo review of the administrative judge’s initial decision. Indeed, one court has held that “[o]n matters of law and policy . . . ALJs are entirely subject to the agency.”<sup>168</sup>

Most Article III judges are, indeed, subject to being overruled by a higher authority. However, Article III judges can only be overruled within the judicial branch; administrative judges can be overruled by the agency.<sup>169</sup> Furthermore, Article III judges can only be overruled in findings of fact when they are clearly erroneous, whereas to apply this rule to agencies reviewing administrative judges’ decisions “goes too far.”<sup>170</sup> An agency has “the power of ruling on facts and policies in the first instance.”<sup>171</sup> It is clear that, under the APA, “[t]he powers of an agency reviewing an initial or recommended decision of its examiner are greater than those of an appellate court reviewing the decision of a trial judge.”<sup>172</sup> While the administrative judge’s findings are certainly given significant weight,<sup>173</sup> none of them, not even the factual determinations, are binding on the agency in review.<sup>174</sup> The agency is omnipotent when it comes to administrative judge decisions.<sup>175</sup>

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167. 5 U.S.C. § 557(b).

168. *Ass’n of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984).

169. *See, e.g., Reyes v. Bowen*, 845 F.2d 242, 244 (10th Cir. 1988) (“The Secretary may review any decision of an ALJ, and the Secretary, acting through the Appeals Council, makes the final judicially reviewable decision in a given case.”).

170. *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 364 (1955).

171. *Id.*

172. *NLRB v. A.P.W. Prods. Co.*, 316 F.2d 899, 904 (2d Cir. 1963).

173. Though not as much weight as a trial judge’s are given by a superior court. While the “clearly erroneous” standard must be met before an appellate judge can reverse a trial judge’s finding of fact, the agency need only meet the “substantial evidence” test that the administrative judge was wrong. *See* 5 U.S.C. § 706(2)(E) (2000); FED. R. CIV. P. 52(a). There are, however, a few additional and relatively unburdensome strictures which must be observed by the overruling agency. For example, “it is well settled that administrative agencies must give reasons for their decisions,” and “[i]f the Appeals Council rejects the ALJ’s decision, it must fully articulate its reasons.” *Reyes*, 845 F.2d at 244-45. Also, courts in review give such rejections heightened scrutiny. *Id.* at 245; *see also Aylett v. Sec’y of Hous. & Urban Dev.*, 54 F.3d 1560, 1565 (10th Cir. 1995); *Bechtel Const. Co. v. Sec’y of Labor*, 50 F.3d 926, 933 (11th Cir. 1995). Also, “[s]tates generally have adopted a similar position either by statute or case law.” Flanagan, *supra* note 2, at 1368 (footnotes omitted).

174. *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494-97 (1951).

175. Indeed, one state administrative judge considered this omnipotence to

In effect, administrative judges were originally merely agents of the commission or board at the top of the agency. Such agents were needed to handle the business of the agency when it grew beyond the capacity of the board or commission members. Agencies retain all their powers when reviewing administrative judge decisions, as if they had presided over the hearing in the first instance.<sup>176</sup> Many “decisions” of administrative judges are mere suggestions or recommendations to the agency.<sup>177</sup> Article III judges are under no such authority.

Indeed, this particular facet of administrative judge independence receives wide support from all communities, including some administrative judges.<sup>178</sup> Administrative judges, unlike Article III judges, exist in order to further the policies of the executive branch, specifically the agency for which they judge, through the impartial adjudication of disputes. Allowing administrative judges final authority over policy and perhaps even over fact findings, however, would thwart that end. Flanagan argues that granting final authority “will significantly alter state contested case adjudication by creating inconsistencies between the agencies’ articulated policies and the results achieved through contested case litigation and will adversely affect the agency’s enforcement of its statutory mandate.”<sup>179</sup> Administrative judges would be rendered capable of deciding cases in contradiction with the stated policies of the executive branch.

While it is undeniable that sometimes such decisions must be made, it is definitely arguable that administrative judges are the proper people to make them.<sup>180</sup> It is the purpose of the Article III courts to pass judgment on the lawfulness of executive policies; it is the purpose of the administrative judiciary to pass judgments in

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be indispensable:

If the ALJ exercises true judicial independence and chooses from among these conflicting analytical approaches without regard to the direction of the executive administration, then the electoral mandate—the voice of the people through which the executive officer obtained her or his office—will not be realized and indeed the ALJ will elevate the position to that of a sovereign.

McNeil, *supra* note 85, at 520.

176. 5 U.S.C. § 557(b).

177. *Id.* § 554(d).

178. *See, e.g.,* McNeil, *supra* note 85, at 515.

179. Flanagan, *supra* note 2, at 1362.

180. *See id.* at 1398 (“[A]gency review produces results that are supported by the law and the facts.”). Considering that at least seventy-five percent of ALJ decisions are adopted entirely by the agency, *id.* at 1365, one might think that finality would be superfluous; however, the desire for Article III independence is not so easily satiated.

order to further them. Such authority is irreconcilable with their role as an executive judiciary;<sup>181</sup> furthermore, there is reliable evidence that it will produce uncertainty in the law and a loss in accountability, and will nullify agency experience in applying the law and agency discretion in applying its own rules.<sup>182</sup>

Would uniting all administrative judges into a central panel serve to achieve genuine or Article III independence among administrative judges? The central panel proposal is enthusiastically supported by administrative judges themselves, who often denounce the present system as depriving administrative judges of their due independence. Palmer, for example, stated that “[t]he 40 years that have passed since the enactment of the APA have revealed the ALJ system to have many strengths but the subordination of the administrative judiciary to agency dominion has proven to be its one intrinsic flaw which now requires remedy.”<sup>183</sup> What is that remedy? Palmer would propose the central panel solution to attempts by agencies to control their administrative judges.<sup>184</sup> Many states have such a central panel in place already, and Palmer says that “[e]ach state has reported the new system to be a complete success.”<sup>185</sup> Nor are administrative judges the first to make this proposal with such enthusiasm.

A substantial minority of the Committee which proposed the APA to Congress supported a central panel: “Instead of establishing the examiners as an independent corps, as recommended in the minority report, the responsibility for protecting critical elements in the employment of hearing examiners was entrusted to the Civil Service Commission.”<sup>186</sup> Also, “[t]he Judicial Administration

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181. See, e.g., Jim Rossi, *ALJ Final Orders on Appeal: Balancing Independence with Accountability*, 19 J. NAT’L ASS’N ADMIN. L. JUDGES 1, 2 (1999) (“ALJ finality . . . risks undermining core executive branch functions and thwarting accountability norms.”). Indeed, Rossi even questions the constitutionality of the idea. *Id.* at 10. (“[T]he cases are decidedly unhelpful in addressing whether delegation of final order authority to an ALJ outside of a politically accountable agency is constitutional.”).

182. See Flanagan, *supra* note 2, at 1399-1411. Flanagan defends these views extensively and ably, and his article has never received an adequate response from anyone of an opposing outlook. His final conclusion—that “the executive department has lost some of its ability to enforce the law,” *id.* at 1410, because of ALJ finality—is another cogent and unanswered argument in favor of continuing the present system of agency review.

183. Victor W. Palmer, *The Administrative Procedure Act: After 40 Years, Still Searching for Independence*, JUDGES’ J., Winter 1987, at 34, 39.

184. *Id.*

185. *Id.*

186. *Id.* at 37; see also Fuchs, *supra* note 140, at 739 (“[C]orps of highly responsible hearing officers [was] originally put forward by the Attorney

Division passed a resolution in 1983 favoring the passage of legislation to establish federal administrative law judges as an independent corps.<sup>187</sup> More recently, a 1992 Administrative Conference of the United States study recommended against the central panel approach for the federal administrative judiciary.<sup>188</sup> Other scholars have considered the central panel proposal as only one way of implementing the ultimate goal of ensuring “[w]hat is important,” which “is that the court/corps not be part of the agency on whose actions it is to sit in judgment.”<sup>189</sup> The hunger of administrative judges for the additional independence that a central corps would grant them and that of legal authorities for a more independent administrative judiciary is obvious. Would the increased independence of a central panel ultimately affect the nature of independence enjoyed by administrative judges? Not really.

Administrative judges perform a certain role in government, and the organization used to achieve that role would not change the central fact of agency review of administrative judge decisions. Even administrative judges themselves recognize this fact; Felter stated it explicitly, arguing that “[w]hether ALJs work directly for agencies or are in more independent ‘central panels’ of ALJs where they are not directly under any single agency, they act on behalf of those agencies,” and that therefore “they are often expected to help achieve agency objectives.”<sup>190</sup> While the central panel may or may not increase the impartiality of administrative judges, which would be conducive to their role and therefore a positive change in the organization of the administrative judiciary, it would not render them independent in a way comparable to that of Article III judges.

There is, in fact, significant evidence in support of the proposal of many administrative judges that a central panel would increase the efficiency of administrative adjudication as well as the impartiality of administrative adjudicators.<sup>191</sup> Indeed, “[t]he basic

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General’s Committee.”).

187. Palmer, *supra* note 183, at 39.

188. PAUL R. VERKUIL ET AL., ADMIN. CONF. OF THE U.S., THE FEDERAL ADMINISTRATIVE JUDICIARY 1059 (1992).

189. Hoffman & Cihlar, *supra* note 2, at 878; see also Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 568 (2001) (“[T]he central panel promotes independence . . . [b]y removing ALJs from the managerial auspices of the agencies whose matters they adjudicate . . .”).

190. Felter, *supra* note 83, at 22.

191. Interestingly enough, Justice Scalia admitted the possible truth of this statement in his famous piece on the administrative judiciary, in which he comes down somewhat ambivalently, but more negatively than positively, on

purpose of the central panel system is to give ALJs a certain amount of independence from the agencies over whose proceedings they preside,<sup>192</sup> which will presumably ensure an impartiality which is unachievable when they are employees of the agencies. Further claimed benefits include “the likelihood of fairness, in fact, the appearance of fairness, case management and workload efficiencies, cost efficiencies, decisional independence, [and] protection of hearing officers.”<sup>193</sup> The idea can, from the perspective of most administrative judges, only be praised, and its effects would be universally beneficial.

In fact, many states have already implemented a central panel for their administrative judiciaries, and the results seem to be uniformly positive. Hoberg notes that “[t]he general consensus is that central panel systems have worked well in the states.”<sup>194</sup> One commentator argued that a central panel increases professionalism, or at least the appearance of professionalism, among administrative judges;<sup>195</sup> another, remarking about Oregon’s recent establishment of a central panel, appeared to believe the measure to be the final realization of Utopia: “This [the central panel] is not simply good government. It is best government.”<sup>196</sup> But does the central panel really serve the ends of executive adjudication?

This issue is tied very closely to that of administrative judge judicial independence, just as is the issue of administrative judge finality discussed earlier.<sup>197</sup> “Both central panels and ALJ finality are intimately related to ALJ independence,”<sup>198</sup> since both are an attempt to distance the administrative judge from the agency—and, ultimately, the executive branch—of which she is a part. Flanagan argues that “[t]he rationale for central panels, whether in state or federal government, is the desire for the institutional independence

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the central panel proposal. “The problem of improper influence,” he argues, “would also be solved by implementing proposals for establishment of a unified ALJ corps, headed by an independent administrator.” Scalia, *supra* note 86, at 79 (footnote omitted). He also, however, makes another observation: that the central panel is only valuable insofar as it does not alter the role of the administrative judiciary. *Id.*

192. Hoberg, *supra* note 133, at 76.

193. *Id.*

194. *Id.* at 78.

195. See generally Bruce H. Johnson, *Strengthening Professionalism Within an Administrative Hearing Office: The Minnesota Experience*, 53 ADMIN. L. REV. 445 (2001) (explaining how the Office of Hearing Examiners has strengthened the professional standing of Minnesota’s administrative judiciary).

196. Thomas E. Ewing, *Oregon’s Hearing Officer Panel*, 23 J. NAT’L ASS’N ADMIN. L. JUDGES 57, 89 (2003).

197. See *supra* text accompanying notes 162-68.

198. Flanagan, *supra* note 2, at 1382.



of ALJs.”<sup>199</sup> In other words, the central panel is an attempt to transform administrative judges from being administrative law judges to being essentially equivalent to Article III judges, passing judgment upon the executive branch and free to advance or hinder executive policies as they see fit.<sup>200</sup> While central panels vary greatly in their organization,<sup>201</sup> and, therefore, in the degree of such separation they permit,<sup>202</sup> insofar as they further the rupture of the administrative judiciary from the executive branch, they are an undesirable development in the law.

A primary symptom of this severance by central panels of administrative judges from their executive adjudicative role is the power they are sometimes given to enter final decisions, with the agency having no power of review. While it is true that “ALJ independence in the central panel structure does not require ALJ finality,”<sup>203</sup> many people support the central panel for the specific purpose of achieving this finality. According to the Model Act, an administrative judge can sometimes issue a final decision and sometimes initial decisions;<sup>204</sup> under the current federal APA, however, they can issue only initial decisions.<sup>205</sup> Does this power to make final decisions alter the role of the administrative judge as an executive judiciary? Essentially, such a power transforms the administrative judge into a carbon copy of an Article III judge, able to render judgments on the actions of the executive branch without

199. *Id.*

200. See Rossi, *supra* note 181, at 10 (“ALJ finality risks thwarting agency accountability, leaving law and policy decisions in the hands of ALJs.”) (emphasis added). While Rossi here is not speaking precisely about central panels themselves, ALJ finality is seen only within the central panel model. *Id.* at 3-5.

201. See, e.g., Allen C. Hoberg, *Ten Years Later: The Progress of State Central Panels*, 21 J. NAT’L ASS’N ADMIN. L. JUDGES 235, 236-44 (2001) (comparing central panel organizations in Maryland, North Dakota, and Texas); Hoberg, *supra* note 133, at 78-89 (examining central panel organizations in a number of states); McNeil, *supra* note 85, at 483-94 (discussing various aspects of the central panels of several states).

202. In fact, some organizations of central panels allow no such separation. See, e.g., Flanagan, *supra* note 2, at 1383 (“ALJ independence in the central panel structure does not require ALJ finality.”). However, it is also clear that “providing ALJs institutional independence [through the central panel] makes the argument for ALJ finality more appealing,” *id.*, and it is the extent to which this is true that ought to govern our decision about whether or not to implement the central panel proposal, see *infra* text accompanying note 211.

203. Flanagan, *supra* note 2, at 1383.

204. McNeil, *supra* note 85, at 497.

205. Unless there is no appeal; whenever there is, or when the agency simply decides that it would like to review, the initial decision is not final until the agency confirms it. See 5 U.S.C. § 557(b) (2000).

any review from that branch. That is not the role for which administrative judges were created.<sup>206</sup>

Perhaps, however, justice can only be served feasibly by granting judicial authority to administrative judges. The core of this debate is the role of administrative judges in advancing agency policy. If administrative judges are part of the executive branch meant to advance agency policy, then naturally they cannot pass judgments that remake that policy, and their independence only extends to the protection of their role of advancing that policy; if, on the other hand, they are not part of the executive branch and not meant to advance agency policy, then what role is left to them but the judicial one, judging the executive as they see fit? While administrative judges are certainly charged with the impartial administration of justice, they are charged with that administration *in accordance with the policies of the executive and the particular agency*. If they were meant to be independent of the executive branch, Congress would have established administrative courts in the judicial branch, which is certainly within its power.<sup>207</sup> The fact that it instead established executive courts indicates that it had something else in mind. These executive courts are meant to administer justice impartially, and they do so for a massive number of Americans, far more than does the judicial branch itself.<sup>208</sup> The judicial branch could have been expanded to encompass the same

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206. See, e.g., Pat McCarran, *Foreword to ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY III* (William S. Hein & Co. 1997) (1946) (stating that the Administrative Procedure Act was “intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority”). Nowhere is any mention made of giving administrative judges judicial-branch authority; they are intended to be “invested with executive authority,” and therefore part of the executive branch, nothing more. See also Flanagan, *supra* note 2, at 1388, who makes an excellent argument worthy of quoting in its entirety:

Another argument made in support of ALJ finality is that it protects ALJ independence. The argument that ALJ finality enhances ALJ independence is true, in the sense that final order authority does make the ALJ completely independent of the agency. The argument, however, confuses the means with the end. ALJ independence is an important factor in administrative adjudication when it eliminates improper agency influence, but certainly, it is not the purpose of agency adjudication to make ALJs independent.

*Id.* (footnotes omitted).

207. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

208. See, e.g., O’Keeffe, *supra* note 2, at 591 (“ALJs process a larger case load than United States district judges and affect the rights of a larger number of citizens . . . .”) (footnote omitted).

volume of cases, and the need for an executive judiciary could have been thereby eliminated. Such a judiciary, however, serves purposes beyond simply the administration of justice; it also helps further executive goals by administering justice according to the interpretations of the executive branch. If administrative judges are not kept subject to agency interpretations of the law—as they are so kept by the mechanism of agency review<sup>209</sup>—then they have ceased to be an executive judiciary, and one of the most useful bodies in the administrative state has reformed itself out of existence.

Having corps of administrative judges dedicated to adjudication *according to the policies of the executive branch* may be an excellent mechanism for ensuring the furtherance of the goals of one of the political branches of government, the branch which chose those administrative judges with precisely that purpose in mind. Through their impartial decisionmaking, administrative judges are a unique and invaluable part of the executive process, and the Article III judiciary remains in place to halt any abuses of executive authority that administrative judges might inadvertently assist.<sup>210</sup> To sever administrative judges from this role, therefore, is to destroy their particular genius; it is to transform the immensely useful executive judiciary into a largely redundant copy of the Article III courts. This does not, of course, condemn the proposal to create a central panel of

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209. Theoretically, at least. But the fact is that administrative judges, and even their non-protected counterparts in the federal system, often do not apply themselves to their duty of furthering the agency's policy choices. See Koch, *supra* note 94, at 282-84. This only reinforces the need to avoid exacerbating the situation further by giving administrative judges yet another reason to consider themselves unbound by agency policy.

210. McNeil argues that, since administrative judges are bound to further executive policies and not to pass judgment on them (arguing that being the role of the judicial branch), administrative judges have "not been invested with judicial authority independent of the agency head, and as such, must follow the mandate of the agency head and construe the law consistent with the agency's interpretation of the law (even if . . . the agency head was wrong in his or her construction of the law)." McNeil, *supra* note 85, at 515. Therefore, an administrative judge may be furthering some kind of injustice against his own inclination. However, the decision about whether that particular agency policy or interpretation of the law is contrary to justice belongs, in our system of government, to the judiciary; the administrative judge, being a member of the executive branch, is not competent to pass judgment on it, and is, therefore, bound to follow it. Professional ethics is about role, and the administrative judge must adhere to his role as an *executive*, not judicial, adjudicator; the judicial branch will do its job, and the executive, including the administrative judge, will do its. Those who worry about such adjudication furthering injustice, therefore, should remember that executive actions are subject to judicial review whether they are done directly by the President himself or indirectly through administrative judges following agency policies.

administrative judges; it only dictates care in its formation to secure the position of administrative judges as, essentially, servants of the agencies. Justice Scalia notes the possibility that “the unified corps would make a fundamental change in the perceived role of the administrative law judge as the ‘front line’ of the agency itself rather than an impartial outsider; and it is that issue which should probably control the fate of the proposal.”<sup>211</sup> Administrative judges are too important in their current role for them to abandon it and adopt another. Their lack of judicial-style independence is perhaps its own asset to fulfilling the administrative judiciary’s proper role.

Even in central panel states,<sup>212</sup> much the same may be said. True, in such states, the judges will feel less a part of any particular agency and its internal hierarchy. But the central fact of review remains: central panel administrative judges’ decisions are also reviewed directly by agencies, often case-party agencies. This is the key fact that largely deprives administrative judges of the judicial independence trait.

In reality, nothing is fundamentally changed with the institution of the central panel concept. The administrative judiciary simply becomes a judiciary within the executive branch/administrative state. This feature may further serve to insulate the administrative judge in an impartiality sense, but the administrative judge remains a member of the executive branch, fully subject to override by the agency.

Administrative judges are understandably zealous to protect their degree of independence, but in their zeal they often neglect their obvious dependence relative to the judicial branch. Indeed, sometimes they even claim to have *more* independence than Article III judges, or at least as much. Some administrative judges have claimed that “[t]he need for judicial independence in the administrative judiciary is just as pressing as the need for judicial independence in the judicial branch.”<sup>213</sup> Independence is the “gold standard” for a judiciary. Emerging judiciaries around the globe are aspiring to its promise to reform governing structures. It is natural

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211. Scalia, *supra* note 86, at 79.

212. See ARIZ. REV. STAT. ANN. § 41-1092.01 (2004); GA. CODE ANN. § 50-13-40 (2006); MD. CODE ANN., STATE GOV’T § 9-1602 (LexisNexis 2004); TEX. GOV’T CODE ANN. § 2003.021 (Vernon 2000); Yvette N. Diamond, *OAH—What’s It All About?*, MD. B.J., Jan./Feb. 2006, at 4, 6 (describing Maryland’s Office of Administrative Hearings as “a centralized panel of ALJs in a separate and independent agency under the executive branch of the Maryland state government”). See generally James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 IND. L. REV. 401 (2005); Flanagan, *supra* note 2.

213. Felter, *supra* note 83, at 22.

for administrative judges to claim it. But, “[t]o call for the ALJ to aspire to judicial independence . . . offers real potential for the loss of public trust and confidence in the administrative adjudicative process”<sup>214</sup> because the public would no longer be able to rely on administrative judge fidelity to agency goals and policies.<sup>215</sup> While this role of furthering agency policies may not be as glamorous as that of the Article III judiciary, it defines the essential quality of administrative judges’ work that makes them indispensable to the administration of justice.

#### CONCLUSION

There is no need for the defensiveness exhibited in a variety of administrative judge-written pieces on independence. The fact that administrative judges may not be meant to be independent in the judicial, especially Article III, sense, does not mean that administrative judges are not professionals, and are not playing a critical role in the delivery of justice and the application of law. Their role in delivering justice to individuals is critical. But critical roles can be played without independence. Administrative judges need not share every attribute with courts to be highly regarded.

It is no criticism or slander to administrative judges to say that they are not meant to be independent in the judicial sense. Administrative judges are not meant to be checks on out-of-bounds exercises of legislative and executive power. They are, however, meant to deliver, impartially, a tremendous measure of front-line justice to individuals. In this regard, their work certainly exceeds that of Article III judges and perhaps that of state court judges as well. This is the distinction of administrative judges worth defending against the encroachments of claims of judicial independence.

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214. McNeil, *supra* note 85, at 514.

215. McNeil provides a lengthy argument about the importance of ALJ fidelity to executive policies which would be compromised by granting them Article III-type independence. *Id.* at 512-14. That administrative judges are, at least to a certain degree, bound to promote agency policies does not seem open to question. *See, e.g.*, Lubbers, *supra* note 139, at 592 (asserting that administrative judges are “a group of critical employees charged with implementing an agency’s policy but nevertheless supposedly independent of the agency”) (quoting O’Keeffe, *supra* note 2, at 594)).