

3-15-2005

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Recommended Citation

Harold J. Krent and Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. Nat'l Ass'n Admin. L. Judges. (2005)
available at <http://digitalcommons.pepperdine.edu/naalj/vol25/iss1/1>

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Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary

By Harold J. Krent* and Lindsay DuVall**

Administrative Law Judges (ALJs) across the country long have sought to ensure their independence in resolving cases brought under myriad administrative schemes at both the federal and state levels. As have many others, they have argued that impartial adjudication turns on the independence of the adjudicator.¹ Perhaps the most fundamental precept of judging is that the adjudicator be free from outside influence in decision making. Indeed, courts have held that due process demands as much.² Judges cannot resolve issues impartially if members of the legislature lobby them for a particular result or if donors threaten to withhold support, contingent upon a particular outcome of a case. At the federal level, the Article III guarantees of lifetime tenure and protection against salary diminution stand as bulwarks of decisional independence allowing removal of judges only through impeachment.³

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**J.D. Chicago-Kent College of Law '02. We would like to thank Jim Rossi for his comments on an earlier draft.

1. For purposes of this article, we use the term ALJ generically to describe *judicial officials within the administrative realm who exercise similar functions*, whether denoted ALJs, Administrative Judges, or hearing examiners. The current controversy involving transfer of Medicare ALJs from the Social Security Administration serves as a reminder of this concern for independence. <http://www.hhs.gov/medicare/appealsrpt.html>.

2. "Trial before 'an unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). Moreover, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968).

3. In two hundred years, the House of Representatives has impeached only

In light of this principle, some ALJs have vigorously combated perceived threats to their ability to reach decisions free from outside influence. They have challenged rules crafted to increase productivity, enhance uniformity of decision making, and facilitate monitoring by agency heads, as well as those that were apparently aimed at influencing outcomes. Indeed, they successfully lobbied Congress to cut funding for a federal agency designed to streamline government operations when that agency recommended changes to the Administrative Procedure Act⁴ that, in their view, jeopardized their independent status within the administrative state.⁵

In this essay, we fully accept the goal of decision making independence. Decision making independence is critical to assure litigants that judicial results are as free from external influence as possible. Rules of recusal and prohibitions of *ex parte* contacts signal to litigants that a particular decision has been reached in an unbiased fashion. Administrative law judges cannot function effectively if their decisions are viewed as the product of lobbying or graft. Moreover, the appearance of propriety may, in fact, matter as much as the reality. Litigants must have faith in the unbiased nature of the litigation.

Nonetheless, complete independence from external pressure has never been attained by Article III judges, let alone state court judges or ALJs. Norms of judicial independence have long been accommodated with other norms in our system, such as accountability, efficiency, and quality. Article III judges, for instance, cannot only be impeached, but their jurisdiction can be

thirteen judges, seven of whom have been convicted by the Senate. MARY L. VOLCANSEK ET AL., *JUDICIAL MISCONDUCT: A CROSS-NATIONAL COMPARISON* (1996).

4. 5 U.S.C. § 551 (2004).

5. See ACUS Recommendation 92-7, 1992 ACUS 28-42; Paul Verkuil et al., *The Federal Administrative Judiciary*, 1992 ACUS 779-1120. See also Alan W. Heifetz, *The Continuing Need for the Administrative Conference: Fairness, Adequacy, and Efficiency in the Administrative Process*, 8 ADMIN. L.J. AM. U. 703 (1994). Congress has recently reauthorized the Administrative Conference of the United States. See Federal Regulatory Improvement Act of 2004, Pub. L. No. 108-401, 118 Stat. 2255 (2004). Congress, however, did not at the same time appropriate any funds for that purpose. See Warren Belmar, *The Continuing Saga of the Administrative Conference of the United States: Reauthorized But Not Yet Funded*, 30 ADMIN. & REG. L. NEWS 2 (Winter 2005).

limited by Congress,⁶ and their pay can be frozen. Congress can overrule judge-made law, whether common law-making or statutory interpretation, and that prospect may shape judicial decision making. Even the power of the press can wield great influence.⁷

State judges are even less independent. Most are subject to election, and thus majoritarian forces directly constrain their decision making.⁸ Indeed, state court judges have been removed for unpopular decisions, particularly in the death penalty context,⁹ and legislatures have threatened to retaliate against judges for controversial decisions, by refusing to increase pay to keep up with inflation or otherwise cutting judicial budgets.¹⁰ States' interests in political accountability have trumped any possibility of complete judicial independence.

Some ALJs enjoy greater functional independence than state jurists. For instance, the Administrative Procedure Act (APA) at the federal level, protects ALJs from external influence. The Office of

6. Indeed, Congress within the first generation after the founding abolished the entire trial court system established by President Adams' administration. See Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31 (1998).

7. United States District Court Judge Harold Baer, a former prosecutor, was the target of vitriol after suppressing the results of a drug search. The press secretary for President Clinton warned that, if the decision were not reversed, Clinton might ask for the judge's resignation, and Clinton's opponent in the 1996 election, Senator Dole, advocated impeachment. Judge Baer subsequently reversed his decision. See Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156, 156-57 (1997) (reprinting letter from over 200 members of Congress urging President Clinton to press for Baer's ouster).

8. Judges are elected in thirty-nine of the states. See ABA, *American Bar Association Fact Sheet on Judicial Selection Methods in the States*, available at http://www.manningproductions.com/ABA263/ABA263_FactSheet.htm.

9. See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges From Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997).

10. Daniel C. Vock, *Judges 'Can't Make Guv' Fund Raises*, Chicago Daily L. Bull. March 17, 2004, at 1 (governor refused to permit cost of living increase for judiciary); Robert Robb, *Courts, Legislators on 2-Way Street*, ARIZONA REPUBLIC, April 2, 2003, at 11B (Chief Justice of Arizona Supreme Court alleged that legislature siphoned away funds from judiciary out of retaliatory motive); Deborah Fauver, *ABA Commission Recommends All Judges Be Appointed*, St. Louis Daily Rec., July 2, 2003, News (finding that legislatures have cut judicial budgets in a number of states out of retaliation for adverse decisions).

Personnel Management (OPM) limits the involvement of agencies in hiring and determines the appropriate pay level. Agency heads cannot issue performance appraisals of the ALJs, nor can they remove ALJs from office absent cause, and that finding of cause can be reviewed by another federal agency -- the Merit Systems Protection Board (MSPB).¹¹ Outside the APA, most federal statutes do not protect the independence of agency adjudicators as fully,¹² and protections for the state administrative judiciary vary. Moreover, Congress or state legislatures can cut ALJ pay or eliminate ALJ jobs altogether, and ALJs are not immune from barbs flung by the press or agency officials. Independence for all jurists may be an important goal, but complete independence is unattainable. Majoritarian institutions limit the decision making independence of the administrative judiciary.

In this essay, we focus on a closely related aspect of decision making independence that has not been addressed as fully in the literature. Any theory of decision making independence must take into account not only permissible external pressures, but also the conflict between the independence of individual administrative law judges and the interests of the administrative judiciary as a whole in ensuring appropriate conduct by judges. Individual judges in the federal and state systems have been subject to correction and discipline by groups of judges in a variety of ways.

Appellate judges in the context of particular cases and controversies long have exercised some discipline over individual judges whose acts or behavior did not conform to accepted judicial norms. Through appellate review, courts can ensure that lower court judges have neither misstated the law, nor misapplied it. Judges review lower court decisions to determine whether those judges abused their discretion in resolving cases or controversies. Moreover, *stare decisis* fundamentally limits every lower court judge's discretion in interpreting the law. The Supreme Court has chastised lower court judges for not following its precedent, even when events

11. See 5 U.S.C. §§ 3105, 7521, 5372 (2004). Indeed, the APA protections insulate ALJs far more than due process dictates. Compare *Withrow v. Larkin*, 421 U.S. 35 (1975) with *Marcello v. Bonds*, 349 U.S. 302 (1955).

12. See Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Procedures to all Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003 (2004).

seemingly have eroded prior doctrine.¹³ In addition, individual judges are subject to mandamus review from appellate courts for arbitrary determinations and, to some extent, for vindictive behavior. The independence of individual judges, therefore, is tempered by the norms and interests of the judiciary as an institution. Through appellate review and mandamus, appellate judges limit individual judges' discretion to the end not only of protecting litigants, but also of preserving the integrity of judges as a group.

Moreover, judges as a group increasingly have disciplined wayward judges outside of cases and controversies for conduct or indiscretions that cast the judiciary as a whole into disrepute. If individual judges work too slowly, ignore their responsibilities, harass litigants, or otherwise conduct themselves unprofessionally, the judiciary's reputation as a whole suffers. Misconduct off the bench may also impair the judiciary's standing in the community.

Furthermore, absent some intercession by other judges, the perceived or actual misconduct of a few may result in intervention by state legislatures or Congress that is far worse than the initial problem. As a consequence, judges have exercised supervision over the ethics and standards of individual judges, at times at the instigation of the legislature. At the federal level, the Judicial Councils Reform and Judicial Conduct and Disability Act¹⁴ in particular has facilitated the efforts of judges to "put their own house in order." The statute allows judges to be chastised and their workloads cut. Every state has established commissions, including judges and non-judges, to investigate and assess judicial performance. Individual judges thus are subject to the influence of an increasingly corporate judiciary. Those institutional efforts to shore up the integrity of the judiciary as a whole unquestionably may rob individual judges of independence. Individual judges have asserted views and manifested styles quite different from their colleagues,¹⁵

13. *See* *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (stating "[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

14. 28 U.S.C. § 351.

15. For one example, charges against the Honorable Alcee Hastings included an over reliance on law clerks and the fact that he had spoken out publicly against the government. *See supra* notes 110-11.

and review of their work by peers may chill any unconventional behavior.

The inherent tension between the independence of individual judges and the interests of the judiciary as a whole cannot be avoided. The judiciary has obligations to the profession that, at times, collide with the autonomy of individual judges. Decision making independence for judges and ALJs is a value, therefore, that must be accommodated with other values within our society. Viewed another way, ALJ independence should not extend to independence from norms of the profession.

We next address the potential clash between the independence of individual ALJs and the legitimate interests of agencies bent on adjudicating a large number of cases both fairly and expeditiously. On appeal from an ALJ, agency adjudicators review legal questions *de novo* and, in contrast to the judicial system, can also review factual determinations *de novo*. Legislatures have directed that it is for the agency to make a final decision irrespective of ALJ findings. Accordingly, the agency's legitimate institutional interest is to ensure that ALJs conform to agency policy in resolving issues, and plenary review affords the agency a potent tool in effecting that goal.

Much ALJ conduct, however, such as civility or delay, cannot be reviewed in the context of particular cases. There is no readily available mechanism for agencies to use in monitoring this conduct.

Indeed, the APA precludes agencies from financially rewarding skilled ALJs or penalizing those they deem careless. Civil service protections in some states also limit the potential for discipline, and no apparatus has been created such as the Judicial Councils Reform and Judicial Conduct and Disability Act to oversee ALJ conduct. Nonetheless, agencies have imposed a variety of requirements and discipline on ALJs that indirectly are linked to performance in particular cases. The crucial question is whether agency discipline stems from efforts to instill professional norms or rather to interfere with decision making. Distinguishing one from the other can be quite difficult.

To shed light on the problem, we examine two relatively well known examples of monitoring by the Social Security Administration that portray the friction between regulation to skew decision making and oversight to further professional norms. Exploring the tension between individual adjudicatory independence and the integrity of the

profession will not yield firm answers to all questions. But that perspective helps explain why complete independence is normatively undesirable, and thus illuminates the necessary balance between interests of individual ALJs and the administrative judiciary as a whole.

Monitoring by the employing agency is not inevitable. In the final section, we explore alternative oversight mechanisms. No one mechanism may be right for all ALJs given the wide variation in statutory protection they currently enjoy. For some, agency oversight should become more stringent given that there may be no other way to ensure monitoring. For others, stricter monitoring by the agency could compromise independence. Alternatively, another agency, such as OPM at the federal level or an analogous state agency, instead might be entrusted with the responsibility of ensuring appropriate ALJ conduct. Whether such oversight would protect the legitimate policies of the employing agency as well as the interests of the ALJs is less clear. For another option, ALJs might enforce the professional norms on their own, using persuasion or other means to prompt other ALJs to increase their output or to pursue only the strictest ethical behavior. Vigorous self-regulation, as for judges, might forestall added agency oversight. Agencies might decide to stay their hand in light of group efforts to instill professionalism in the administrative judiciary. Ultimately, although the form of monitoring is debatable, individual ALJ independence must in some fashion be accommodated with efforts to instill professional norms within the administrative judiciary as a whole.

I. DEFINING JUDICIAL INDEPENDENCE

There is no generally accepted framework to help formulate the minimum indicia of independence for ALJs. The word “independence” itself is not a term of art. For instance, in the context of nations, independence generally refers to sovereignty. Independence neither guarantees a nation power nor economic self-sufficiency, but rather political self-determination.

In the context of the agencies that often employ ALJs, independence has a very different and limited meaning. Presidents can remove the heads of independent agencies from office only for

cause. Congress, however, can abolish the agency if it so chooses, as it did for the Administrative Conference of the United States and the Interstate Commerce Commission,¹⁶ and presidents can influence the agency's behavior in a variety of ways. As a practical matter, therefore, such agencies are neither independent from the president nor from Congress. Independence simply refers to the fact that presidents cannot remove the agency head at will.

With respect to judges, independence suggests neither sovereignty nor security in office. Rather, independence refers generally to judges' insulation from external pressures in resolving cases and controversies. The federal Constitution elevates "independence" as a preeminent value of the judiciary under Article III. Article III provides that all judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."¹⁷ The protections against removal and salary diminution have been critical to paving the way for an independent judiciary and aim at fending off congressional and executive branch pressure. As the Supreme Court summarized in *Mistretta v. United States*, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."¹⁸

Accordingly, courts in both the federal and state systems have been vigilant in setting aside judgments that have appeared to be the product of external influence. Most of the cases explore the extent to which a judge's financial interest can undermine the potential for a fair hearing.

For instance, in *Tumey v. Ohio* a village ordinance provided that the mayor, who was to preside over a hearing involving possession of intoxicating liquors, would receive costs from the fines meted.¹⁹ The Supreme Court set aside the conviction, reasoning that:

[e]very procedure which would offer a possible temptation to the average man as a judge to forget the

16. See Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. See also Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1704.

17. U.S. CONST. art. III, § 1.

18. *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

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

burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.²⁰

Similarly, in *Ward v. Village of Monroeville* the Court reversed a conviction under a statute specifying that fines were to be deposited in the village treasury.²¹ Although the mayor's compensation was not directly affected by the amount of fines imposed, the Court reasoned that an impermissible temptation exists "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court."²² In both *Tumey* and *Ward*, the potential external influence stemmed from the mayor's dual role as chief executive and judge. The executive interests in fiscal health biased the proceedings. These cases reflect the ideal of an impartial adjudication, that is the hallmark of an independent judiciary.

For administrative law judges as well, impartial adjudication is critical. Members of Congress or political appointees in the agency should not be able to meddle in individual cases and, as in *Tumey* and *Ward*, financial incentives should not prejudice the proceedings.

In *Marshall v. Jerrico* the Supreme Court explored whether an administrative agency, in adjudicating fines, could keep a percentage of the penalties collected for agency use.²³ The case arose under section 16 of the Fair Labor Standards Act,²⁴ which prescribes penalties for violation of the child labor laws. In upholding the statutory scheme, the Supreme Court distinguished the precedents in *Tumey* and *Ward*, in part on the ground that, even if the agency had a prosecutorial motive to impose fines, ALJs did not. The salaries of the ALJs were fixed, and ALJs did not directly benefit if the agency received extra monies. The independence of the ALJs thus helped

20. *Id.* at 532.

21. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

22. *Id.* at 60. See also *Connally v. Georgia*, 429 U.S. 245 (1977) (invalidating a system in which justices of the peace were paid for issuance but not for non-issuance of search warrants).

23. *Marshall v. Jerrico*, 446 U.S. 238 (1980).

24. 29 U.S.C. § 216 (2004).

insulate the agency from a challenge to its own bias.

The Supreme Court has also focused on the measure of independence that ALJs must enjoy. In *Butz v. Economou* the Court commented that 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, free from pressures by the parties or other officials within the agency.”²⁵ The *Butz* principle was put to the test in *ATX v. USDOT*, in which an airline challenged the fairness of an ALJ determination because of perceived congressional interference.²⁶ Frank Lorenzo, who had been at the helm of Eastern Airlines, sought an application from the Department of Transportation to operate a new airline.²⁷ Twenty-one members of the U.S. House of Representatives signed a letter urging the DOT to deny the license. In part because of the high salience of the application, the DOT set the matter for a formal hearing.²⁸ At the second hearing, the ALJ permitted Congressman Michael Collins, who was one of the signees of the letter, to testify against Lorenzo’s application.²⁹ Although the court stated that the congressional interference was “substantial enough to warrant close examination,”³⁰ it concluded that the testimony by itself was not probative enough to warrant reversing the decision.³¹ Despite the decision in *ATX*, even the appearance of impropriety can undermine the integrity of the system. In short, for both judges and ALJs, freedom from external influence is critical to the judicial function, even though that freedom is not absolute.

II. BALANCING JUDICIAL INDEPENDENCE WITH NORMS OF THE PROFESSION

In this section, we explore the extent to which judges should be independent from pressures imposed by their colleagues, as they are

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

26. *ATX v. USDOT*, 41 F.3d 1522 (D.C. Cir. 1994). *See also* *Pillsbury Co. v. FTC*, 354 F.2d 952, 963 (5th Cir. 1966).

27. *ATX*, 41 F.3d at 1524.

28. *Id.*

29. *Id.*

30. *Id.* at 1527.

31. *Id.* at 1528.

to a significant extent from external influence. We suggest that decision making independence for judges should not insulate judges from the norms of the profession, whether in terms of civility, competence, or avoiding conflicts of interest. We expect more out of judges than just impartiality. We expect intelligence, reasoned elaboration, and integrity. Any goal of independence must leave room for individual judges to conform to established norms of the profession.

Judges increasingly have faced pressure not only from legislatures and the electorate, but also from their colleagues. Appellate judges have long monitored lower court judges for wayward actions in the context of particular cases and controversies, and judicial groups have sanctioned individual judges for boorishness or waywardness off the bench. Judges as a group have sought to uphold the norms the profession.

The difficulty is determining how those norms should be enforced. A number of approaches are possible. For instance, judges, after appointment, could be trusted to internalize norms of the profession. Through work with other judges, they would learn the tools and ethics of the craft. Indeed, as will be discussed, the availability of mandamus and appellate review minimizes the risk of any wayward judges. When donning the robes of a judge, individuals do not always act judiciously.

Alternatively, judges as a group could attempt to enforce those norms. Through judicial councils, they could try to encourage appropriate behavior and discipline judges who stray too far from the ideal. Although there may not be a consensus as to what the appropriate norms are, councils can attempt to delineate proper from improper judicial conduct on a case-by-case basis. The tension between the institutional interest of the judiciary and the independence of a judge is apparent.

Finally, and most controversially, Congress and state legislatures could attempt to impose and enforce ethical codes or rules of conduct on judges. The line between impermissible efforts to undermine independence and laudable efforts to improve the functioning of the judiciary is difficult to ascertain. Legislatures have approached the goal of enhancing judicial performance by attempting to regulate judges directly, by assigning the task to a third party, and by

encouraging judges to regulate themselves.

A. Monitoring Through Appellate Correction and Mandamus

History suggests that judges do not always internalize the norms of the profession. Although individuals appointed or elected to the bench may grow and mature over time, they may not manifest the civility, ethics, or efficiency that the public desires. Indeed, there is no good data to suggest how much an individual's ethics or civility change with judging, whether for better or for worse.

Fortunately, there are some checks on conduct built into the judicial system. Appellate judges can superintend those colleagues who fail to conform to accepted norms in misstating or misapplying the law. The exercise of appellate review and mandamus can protect litigants as well as help ensure conformance with judicial norms, even at the cost of absolute decision making independence. Moreover, although appellate review and mandamus cannot completely ensure that lower courts apply the law fairly and accurately, these tools often serve as deterrents for judges and reassure the public that a wayward judge can be reined in by the judicial system.

Most judges within our system adjudicate disputes with efficiency and integrity. Nonetheless, aberrational cases exist. In one relatively notorious case, a judge ordered a sheriff to handcuff a coffee vendor and drag him before the court, where the judge threatened him with contempt for selling putrid coffee.³² In another, a judge ordered a teenager sterilized at her mother's instigation, neglecting even to hold a hearing.³³ In less exceptional cases, judges have applied the law in countless ways that imposed huge burdens of questionable propriety on the litigants, whether with respect to discovery orders, class certification, or time deadlines. In all of these cases, although the harm may have been inflicted before the wrong could be righted, the availability of appellate review and mandamus at least served as some recourse.

Through appellate review, judges can help ensure that lower court colleagues do not run amok. Erroneous constructions of the law can

32. *See Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978).

33. *Stump v. Sparkman*, 435 U.S. 349 (1978).

be overturned, as can adventurous findings of fact. Appellate review provides a means to check lower courts' performance.

Moreover, the prospect of review deters wayward conduct. To be sure, many judges likely decide cases without considering appellate review. However, concern for precedent lies at the core of the common law process. Judges must consider precedent in their rulings and, if they follow precedent, the likelihood of appellate reversal is low. In addition, some judges' interest in reputation or advancement may increase their desire to escape reversal on appeal.³⁴

For the most part, appellate review can only arise after a final decision has been entered. Lower court errors therefore can cause considerable mischief before review can be entertained, for example, by creating massive discovery obligations or delays in remedying grievous wrongs.

The availability of some interlocutory review can ameliorate the otherwise intractable problem of delay.³⁵ Despite finality requirements, appellate review restrains the potential for arbitrary or incorrect judicial decision making.

In addition to appellate review, appellate judges can at times rely on their powers of mandamus to rein in lower court judges. The writ of mandamus is an exception to the fundamental precept that only final decisions may be appealed. Mandamus is one of a number of extraordinary remedies provided for in the All Writs Statute,³⁶ and when issued by a higher court, essentially commands a judge to act or cease to act in a certain way. When a court grants a writ of mandamus, it can terminate proceedings in the lower court.³⁷

At common law, mandamus was "issued by any court of competent jurisdiction and directed to a person, officer, corporation, or inferior court to command the performance of a specific duty

34. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* (1995); Clayton P. Gillette, *The Path of the Law Today: Lock in Effects in Law and Norms*, 78 B.U. L. REV. 813 (1998) (discussing what judges maximize).

35. See, e.g., 28 U.S.C. § 1292 (b) (permitting certification by trial court of controlling issue in case for immediate review).

36. "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1970).

37. Elizabeth A. Snyder, *The Use of Extraordinary Writs for Interlocutory Appeals*, 44 TENN. L. REV. 137 (1976).

arising out of office or station, or under law.”³⁸ Traditionally, courts limited the use of mandamus to “confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it [was] its duty to do so.”³⁹ Practically, this meant that mandamus was used only in cases of “exceptional circumstances amounting to a judicial ‘usurpation of power’”⁴⁰

This narrow definition of mandamus left the court “correcting” only those clear cases of action or inaction that threatened the functioning of the legal system.⁴¹ For instance, in a Supreme Court case involving the government of Peru, the Court issued mandamus to prevent the lower court from interfering with the executive’s conduct of foreign relations.⁴² The case involved seizure of a ship for which Peru claimed ownership. The matter involved the “dignity and rights of a friendly sovereign state,” and claims that are normally settled “in the course of conduct of foreign affairs by the President and by the Department of State.”⁴³ Rather than “embarrass the executive arm of the Government in conducting foreign relations,”⁴⁴ the Court used mandamus to accept the executive determination that the vessel was immune from suit.⁴⁵ In another traditional case, *United States v. Will*, the Court issued mandamus where “it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations.”⁴⁶ The state had petitioned for mandamus to remand a murder case to state court because the state had no other means to challenge the federal district judge’s refusal to

38. *Id.* at 140.

39. *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943).

40. *Will v. United States*, 389 U.S. 90, 95 (1967).

41. See Brent D. Ward, *Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils*, 1980 BYU L. REV. 233, 238 (1980) (citing Blackstone stating, “it is the peculiar business of the Court of King’s Bench to superintend all other inferior tribunals . . . not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice”).

42. *Ex parte Republic of Peru*, 318 U.S. 578, 586 (1943). See also Ward, *supra* note 38, at 242 (discussing the power of review “where the action of the trial judge might be reviewable in some future time . . .”).

43. *Peru*, 318 U.S. at 587.

44. *Id.* at 588.

45. *Id.* at 589.

46. See *Will*, 398 U.S. at 95 (discussing *Maryland v. Soper*, 270 U.S. 9 (1925)).

remand the murder indictments.⁴⁷

Although traditionally more a method of correction than discipline, courts have broadened the scope of mandamus to encompass general supervision. The Court in *La Buy v. Howes Leather Company* held that “supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system.”⁴⁸ The Court held the appeals court justified in issuing mandamus when the trial judge failed to set trials for two cases in which he had already heard preliminary pleas and arguments.⁴⁹ Instead of setting a date, the judge referred the cases to a master, explaining that he had “an extremely congested calendar,” and that the cases were complex, needing a considerable amount of time to try.⁵⁰ The Supreme Court held that “the orders of reference were an abuse of the petitioners’ power under Rule 53(b)” and “[t]hey amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation.”⁵¹ The Court assumed a supervisory role and chastised the trial court judge for failing to follow one of the norms of the profession.

For another example of supervisory mandamus, the United States in 1977 petitioned the Tenth Circuit for mandamus to bar a particular judge from hearing any case in which the federal government was a party.⁵² The petition asserted that the judge “invents and follows his own rules, is swayed by his own preconceptions of legal procedure, and is determined that no outside force – not the arguments of counsel, not the holdings of this Court – shall interfere with the conduct of his court.”⁵³ Although the judge died before the petition

47. *Id.* at 36. For more examples of the traditional scope of mandamus, see generally Ward, *supra* note 41, at 240.

48. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957).

49. *Id.* at 253.

50. *Id.* at 254.

51. *Id.* at 256.

52. Petition of the United States for Writ of Mandamus or Prohibition and Petition for Order Reassigning Criminal Proceedings and Civil Proceedings Involving the United States, *United States v. Ritter* 540 F.2d 459 (10th Cir. 1976) (No. 77-1829) (dismissed as moot Aug. 11, 1978). See also Ward, *supra* note 41, at 232-34 (discussing the Ritter conflict).

53. Ward, *supra* note 41, at 232, 234.

was decided, a number of cases have granted mandamus in similar situations of apparent bias. In *Bell v. Chandler* the Tenth Circuit granted mandamus, compelling the disqualification of the trial judge, Stephen S. Chandler, in cases arising from the U.S. Attorney's Office.⁵⁴ The judge had disbarred U.S. Attorney Burkett and five of his Assistant U.S. Attorneys, and held them in contempt as a result of an earlier conflict.⁵⁵ Unconvinced by the judge, the appellate court granted mandamus and disqualified Judge Chandler because "the facts alleged establish the lack of likelihood that the United States can obtain a fair and impartial trial if Judge Chandler presides."⁵⁶ In yet another case involving bias, mandamus was issued to disqualify the judge in a class action suit involving asbestos-containing products in school buildings.⁵⁷ The judge refused to recuse himself after attending a conference on the hazards of asbestos that was organized at the instigation of the plaintiff and was financed by funds from the plaintiff's prior settlements.⁵⁸ In addition, most of the plaintiff's expected expert witnesses attended the conference and presented views similar to those they intended to express at trial.⁵⁹ The judge argued that he wasn't aware of the plaintiff's involvement in the conference; the court held that the appearance of partiality precluded the prospect of a fair adjudication.⁶⁰

Another case that highlights the use of mandamus for supervision involved a race-based challenge to Boston's elementary school student assignments.⁶¹ During the trial, counsel for petitioner was quoted in the Boston Herald, decrying the district court's failure to certify the class of students immediately.⁶² The judge for the case responded in a letter to the Herald, and attempted to justify the delay, stating that it was a "more complex case" than the article had suggested.⁶³ Mandamus was granted to order recusal because the

54. *Bell v. Chandler*, 569 F.2d 556 (10th Cir. 1978).

55. *Id.* at 557-58.

56. *Id.*

57. *In re School Asbestos Litigation*, 977 F.2d 764 (3rd Cir. 1992).

58. *Id.* at 770.

59. *Id.*

60. *Id.*

61. *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001).

62. *Id.* at 166.

63. *Id.*

appellate court held that, due to the circumstances, the judge's impartiality could reasonably be questioned and that it was "an abuse of discretion for the judge not to recuse herself based on an appearance of partiality...."⁶⁴

Through mandamus judges have also been ordered to comply with clearly articulated legal rules. In *Utah-Idaho Sugar Co. v. Ritter* mandamus was used to order the same Chief Judge Ritter to transfer his case because he had assigned cases for the district in contravention of an order issued by the judicial council.⁶⁵ In another case of failure to follow clearly defined rules, the court in *Maloney v. Plunkett* held that the deprivation of a statutory right to exercise peremptory challenges as a sanction for misconduct was a situation that warranted mandamus.⁶⁶ The suit involved alleged reverse discrimination and was brought by several white Chicago policemen.⁶⁷ After *voire dire*, the lower court judge discharged the selected jury, ordered the selection of a new jury, and forbade the parties from exercising peremptory challenges based on his finding that both sides had exercised previous challenges on racial grounds.⁶⁸ The court of appeals held that the judge did not give a reason "for punishing the parties in this way, other than sheer irritation at what he considered their childish and improper behavior"⁶⁹

The scope of supervisory mandamus has also been expanded to encompass an advisory role for the courts. In a negligence suit brought by passengers injured in a bus and tractor-trailer collision, the court used mandamus to review the power of the district court judge to order the mental and physical examinations of the defendant, who was only alleged to have impaired vision.⁷⁰ The Court found mandamus proper for reviewing the judge's interpretation of a Federal Rule of Procedure,⁷¹ effectively resolving an issue of first impression. Not only did the Court base its decision on a duty to

64. *Id.* at 165.

65. *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100 (10th Cir. 1972).

66. *Maloney v. Plunkett*, 854 F.2d 152 (7th Cir. 1988).

67. *Id.* at 153.

68. *Id.*

69. *Id.* at 154.

70. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

71. Fed. R. Civ. Proc. 35.

enforce the rules, but the opinion also indicates that the Court extended supervisory mandamus “to settle new and important problems.”⁷²

Although the scope of mandamus has been broadened, it still may not be used as a substitute for appeal.⁷³ Petitioners must demonstrate to the court that extraordinary circumstances exist that need immediate consideration, that adequate alternative remedies are not available,⁷⁴ and that there is a “clear and indisputable” right at issue that needs protection.⁷⁵ Although the threshold is high, ensuring that mandamus is not used as a substitute for the regular appeals process, the Supreme Court recently lessened the petitioner’s burden. In *Cheney v. United States District Court for D.C.* the Court held that the appeals court erred in precluding mandamus as a means to block a discovery order when executive privilege presented an alternate avenue of relief.⁷⁶ The Court held that, because the vice president was involved, separation of powers considerations should have informed the mandamus evaluation and “[a]ccepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch’s ability to discharge its constitutional responsibilities.”⁷⁷

Mandamus, therefore, is most often granted when an extraordinary need for supervision arises, or when a lower court has plainly exceeded its jurisdiction. Thus, like appellate review,

72. *Schlagenhauf*, 379 U.S. at 111. See also Snyder, *supra* note 37, at 150.

73. *Will*, 389 U.S. at 90.

74. This requirement acts to ensure that the writ will not be used as a substitute for the regular appeals process. See *Cheney v. United States District Court*, 124 S. Ct. 2576, 2586 (2004) (citing *Ex parte Fahey*, 332 U.S. 258, 260 (1947)).

75. *United States v. Duell*, 172 U.S. 576, 582 (1899). For examples in the states, see *Phillip Morris v. Angeletti*, 752 A.2d 200 (Md. 2000); *In re Sw Bell Tel. Co.*, 35 S.W.3d 602 (Tex. 2000). See also *Mallard v. United States District Court*, 490 U.S. 296 (1988), where an attorney was appointed to a trial case that he deemed beyond his capabilities to litigate. The appellate court held that mandamus was proper to review the appointment and could be utilized to prevent a district court from usurping power. The petitioner met his burden of proving that he was entitled to mandamus by showing that the “court plainly acted beyond its ‘jurisdiction,’” as the federal statute that authorizes judges to request representation in *in forma pauperis* proceedings does “not authorize coercive appointments of counsel.” *Id.* at 309.

76. *Cheney*, 124 S. Ct. at 2576.

77. *Id.* at 2580.

mandamus has become a tool for correcting judicial error and abuse of discretion, acting as a safety valve⁷⁸ within the confines of cases and controversies.

Nonetheless, mandamus and appellate review both provide only limited avenues of oversight. Judges' conduct can be reviewed in the context of discrete cases and controversies, and then, usually only at the end of the case. Appellate judges have no roving power to uphold judicial norms. As Judge Harry Edwards concluded, "it has never been assumed that mandamus or reversal are useful tools to deal with the ongoing problems of judicial misconduct."⁷⁹

Although not traditional tools of discipline, mandamus and appellate review may serve as strong deterrents to cabin the conduct of lower court judges.⁸⁰ The very possibility of reversal may cause lower court judges to think twice before issuing a particular ruling. According to a study of chief circuit judges, both former and current chief judges rated mandamus among the more "frequently used mechanisms for judicial discipline," rating it ahead of impeachment, criminal prosecution and mechanisms outside of the case and controversy.⁸¹ Mandamus and direct reversal are "constant specters over judges; they may function as *de facto* reprimand for judicial mistakes."⁸² Through appellate review and the exercise of mandamus, appellate judges can constrain the behavior of lower court judges in particular cases and controversies.

B. Authority of Judiciary to Discipline Individual Judges

From an examination of the Constitution, one might think that any supervision and discipline of federal judges outside cases and controversies other than through impeachment would be unconstitutional. The Constitution provides only one avenue for correction: judges, like other officers of the United States, may be

78. *Maloney*, 854 F.2d at 155.

79. Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 794 (1989).

80. Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243 (1993).

81. *Id.* at 289.

82. *Id.*

impeached for “Treason, Bribery, or other high Crimes and Misdemeanors.”⁸³

Yet, that constitutional provision historically has not protected Article III judges from all discipline for their actions in a judicial capacity. Congress and the judiciary as a whole have prescribed duties that each judge must follow, and both institutions have joined in formulating standards of judicial conduct. History and contemporary doctrine both support legislative efforts to assist judges in putting their own house in order. The line between legislation facilitating the judiciary’s efforts to impose norms on judges and legislative efforts to discipline judges more directly is not entirely clear, but the more leeway permitted judges, the more likely the effort passes constitutional muster.

In the Judiciary Act of 1789⁸⁴ Congress established judicial districts, specified the times and places for sitting, prescribed an oath of office, and conferred the power on Supreme Court Justices to appoint clerks to aid in the effectuation of judicial business. Congress also invested the judiciary with the considerable power to “make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.”⁸⁵ Three years later, Congress required judges with an interest in the litigation before them to recuse themselves from the case:

And be it further enacted, That in all suits and actions in any district court of the United States, in which it shall appear that the judge of such court is, any ways, concerned in interest, or has been of counsel for either party, to cause the fact to be entered on the minutes of the court . . . [and to transfer the case].⁸⁶

Soon thereafter, Congress made it a high misdemeanor for a district or territorial judge to “engage in the practice of law.”⁸⁷ Thus, from the outset, Congress has exercised supervision over the

83. U.S. CONST. art. II, § 4.

84. 1 Stat. 73 (1789).

85. 1 Stat. 83 (1789).

86. Act of May 8, 1792, 1 Stat. 278.

87. Act of December 18, 1812, 2 Stat. 788.

qualifications and conduct of Article III judicial officers, and it has provided the judiciary with tools to regulate the practice of its own courts.

Early in the twentieth century, Congress began to formalize the role to be played by the judiciary in supervising its own affairs. In 1922, Congress provided for the formation of the Judicial Conference of Senior Judges, predecessor to the present Judicial Conference of the United States, comprised of the chief judges of each circuit.⁸⁸ Congress directed the Conference to meet annually to regulate the business of the federal courts.

Legislative efforts to enable the judiciary to monitor its own members continued with the Administrative Office Act of 1939.⁸⁹ Testimony before Congress indicated a need for greater uniformity as well as efficiency in managing the business of the courts. For example, Chief Justice Charles Evans Hughes had urged the Judicial Conference to adopt “a mechanism through which there could be a concentration of responsibility in the various Circuits . . . with power and authority to make the supervision all that is necessary to insure competence in the work of all of the judges of the various districts within the Circuit.”⁹⁰ Following the Judicial Conference recommendation, the Act created the circuit councils and empowered them to “make all necessary orders of the effective and expeditious administration of the business of the courts within [each] circuit.”⁹¹

In *Chandler v. Judicial Council* the Supreme Court addressed the exercise of such oversight authority.⁹² The Chief Judge of the Western District of Oklahoma challenged the judicial council’s removal of all cases from his calendar. Although the Court did not reach the merits of Judge Chandler’s claim that a council could not remove cases from his docket, the Court stated that there was “no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make ‘all necessary orders for the effective and expeditious administration

88. 42 Stat. 837 (1922).

89. 53 Stat. 1223 (1939).

90. Cited in Peter Graham Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203, 205 (1970).

91. 53 Stat. 1223.

92. *Chandler v. Judicial Council*, 398 U.S. 74 (1970).

of the business of the courts within [each] circuit.”⁹³ The Court sanctioned legislative efforts that encouraged judges to monitor themselves. Indeed, the opinion stressed that, as an informal manner, judges had been monitoring each other for years: “[m]any courts – including federal courts – have informal, unpublished rules which, for example, provide that when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his ‘backlog.’ . . . [B]ut if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse.”⁹⁴

At the subsequent hearings, judges testified as to the disciplinary measures previously undertaken in the *Chandler* era. For instance, colleagues prevailed upon an alcoholic judge to retire voluntarily, and induced a judge who could not bring himself to impose a prison sentence to handle only civil cases. Moreover, a chief judge who perceived a behavior problem with another judge temporarily transferred him to a place where court was never held. The Third Circuit stripped another district court judge of all criminal cases when he became suspected of corruption.⁹⁵

Moreover, under the Ethics in Government Act of 1978⁹⁶ Congress imposed financial disclosure requirements on judges. Federal judges sued to contest this obligation to comply, arguing that Congress had intruded into their independent domain. In particular, they argued that the requirement of filing personal financial statements available for public inspection intruded upon their decision making independence. Nonetheless, the Fifth Circuit Court of Appeals in *Duplantier v. United States*⁹⁷ concluded that the legislative purposes of increasing public scrutiny of judges and public

93. *Id.* at 86 n.7 (citation omitted).

94. *Id.* at 85.

95. These examples are related in H. R. Rep. No. 1313, 96th Cong., 2d Sess. (1980) (testimony of Hon. James Browning); Hearings Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House Comm. of the Judiciary, 96th Cong., 1st-2d Sess. 633 (1979-1980); Hearing on Judicial Fitness, Subcomm. On Improvements in Judicial Machinery, Senate Comm. on the Judiciary, 89th Cong., 2d Sess. Pt. 1, at 19 (1966) (statement of Chief Judge Biggs).

96. 92 Stat. 1824 (1978).

97. *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979).

confidence in the judicial process were valid. The court reasoned that “[i]f Congress has the constitutional authority to require a judge to disqualify himself from adjudicating certain issues on the ground of financial interest, 28 U.S.C. § 455(b)(4), mandating a judge to disclose his personal financial interests is *a fortiori* an objective within the constitutional authority of Congress.”⁹⁸ Indeed, the court concluded by observing that, “[i]f the Act’s provisions serve the purpose of maintaining the public’s confidence in the federal judiciary, they will have served us well, despite the fact that we know such requirements undoubtedly chip away at judicial independence.”⁹⁹

Enactment in 1980 of the Judicial Councils Reform and Judicial Conduct and Disability Act¹⁰⁰ arose from the continuing debate over the best mechanism for ensuring judicial accountability. Through the Act, Congress intended for judges to “put their own house in order”¹⁰¹ and thereby uphold the integrity of the judicial system.

To trigger the Act, any person may file a complaint with the clerk of the court of appeals, alleging either that a “circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts,” or that such judicial officer “is unable to discharge all the duties of office by reason of mental or physical disability.”¹⁰² The Act instructs the clerk of the court to transmit the complaint both to the chief judge of the circuit and to the official whose conduct is subject to the complaint.¹⁰³ If the chief judge finds that the complaint is “frivolous,” that it is “directly related to [the] merits of [a] decision or procedural ruling,” or that the matter prompting the complaint has already been resolved, he or she may issue a written order terminating the proceeding.¹⁰⁴ On the other hand, if the chief judge finds that none of the above factors exists, then he must empanel a special committee composed of “himself and equal numbers of circuit and

98. *Id.* at 668.

99. *Id.* at 673.

100. 28 U.S.C. § 351.

101. *Chandler*, 398 U.S. at 85 (internal citations omitted).

102. 28 U.S.C. § 351(a).

103. 28 U.S.C. § 351(c).

104. 28 U.S.C. § 352(b).

district judges of the circuit” to conduct an investigation into the matters raised in the complaint.¹⁰⁵ To do this, the committee is empowered to “conduct an investigation as extensive as it considers necessary.”¹⁰⁶ At the conclusion of the investigation, the committee must file a “comprehensive written report” with the judicial committee, which includes findings and recommendations for council action.¹⁰⁷

In reviewing the committee’s report, the judicial council may conduct any further investigation it deems necessary, and then “take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit....”¹⁰⁸ Remedies include private or public censure, a temporary order to cease assigning cases to the judge, certification of the judge as disabled, or a request that the judge retire. If the council finds that the judge has engaged in conduct “which might constitute one or more grounds for impeachment,” then it must certify that determination to the Judicial Conference.¹⁰⁹ Finally, the Conference itself can conduct an additional investigation and determine which sanction is appropriate.

Pursuant to the Act, two federal district court judges filed a complaint in March 1983, alleging that Judge Alcee Hastings had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. The complaint focused on an incident of bribery for which Judge Hastings’ alleged co-conspirator had been convicted, but for which he had been acquitted.¹¹⁰ It re-alleged the bribery count and included allegations that he had improperly delegated too much work to clerks and that he had publicly accused the United States of prosecuting him for reasons of race. Hastings attempted to quash the proceedings as unconstitutional, asserting that the Act violated separation of powers and his due process rights. The Court of Appeals for the District of

105. 28 U.S.C. § 353(a).

106. 28 U.S.C. § 353(c).

107. *Id.*

108. 28 U.S.C. § 354(a).

109. 28 U.S.C. § 354(b).

110. See discussion in *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982).

Columbia surprisingly dismissed the claim on ripeness grounds.¹¹¹ Concurring, Judge Edwards commented that, “[i]n light of our long tradition of an independent judiciary that has been largely free from legislative tampering, it is ironic that, in 1985, a member of the federal judiciary is being tried under an act of Congress that purports to define judicial misconduct and to authorize sanctions....”¹¹² To Judge Edwards, “the guarantee of independence runs to individual judges as well as to the judicial branch.”¹¹³

Some fifteen years later, the same court revisited the Act in the context of a challenge to sanctions meted after an investigation by the Fifth Circuit Judicial Council into a complaint that Judge John McBryde engaged in abusive behavior.¹¹⁴ In one instance, Judge McBryde chastised an attorney for failing to require her client personally to attend a settlement conference. The attorney was trying to shield her ten year-old client from the man who allegedly had sexually harassed her. The judge then required the attorney to attend a reading comprehension course given her failure to heed his written order about the settlement conference. The attorney complied, and the judge then challenged the veracity of her affidavit attesting that she had complied, requiring her to file a supplemental affidavit detailing an account of the hours spent in the course. The court of appeals dismissed some of Judge McBryde’s allegations as moot, and concluded with respect to an overall separation of powers challenge that “given the benefits to the judiciary from intra-branch efforts to control the self-indulgence of individual judges, we see no basis for inferring structural limits on Congress’s enabling such efforts.”¹¹⁵ In dissent, Judge Tatel would have remanded Judge McBryde’s claim that the investigation was prompted by disagreements with his judicial philosophy and thus interfered with his judicial independence.¹¹⁶ Judge Tatel echoed Judge Edwards’ earlier

111. *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985).

112. *Id.* at 1104.

113. *Id.* at 1106.

114. *See McBryde v. Committee to Review Circuit Council Conduct and Disability Orders*, 264 F.3d 52 (D.C. Cir. 2001).

115. *Id.* at 67.

116. *Id.* at 69-85.

comments: “the principle of judicial independence guarantees to individual Article III judges a degree of protection against interference with their exercise of judicial power, including interference by fellow judges.”¹¹⁷

Although there have been dissenting opinions, judicial councils and other groups increasingly have exerted pressure on individual judges to conform their conduct to the norms of the profession.¹¹⁸ This need is borne out by a recent example in which a magistrate, incensed by an attorney who failed to appear at a conference because of a conflict with another case, ordered that the attorney be brought before the court in handcuffs and chains.¹¹⁹ Other ethical lapses have been punished, as has uncivil behavior that threatened to cast a pall on the integrity of judges as a whole. As a result, the decision making independence of such judges – at least at the margins – has been undermined. Judges must run their courtrooms and decide cases under the shadow of judicial disciplinary measures. Independence has been accommodated with the judiciary’s overall interest in integrity. In a sense, judges discipline judges so that state legislatures and Congress will not have to intervene in a more heavy-handed manner.

III. INDEPENDENCE OF ALJs FROM AGENCY OVERSIGHT

As mentioned previously, the APA largely protects ALJs at the federal level from external influence. Agencies that employ ALJs cannot hire or fire them, except for cause. Nor do the agencies set

117. *Id.* at 77.

118. In this paper, we have focused on oversight of judges and ALJs to ensure conduct consistent with norms of integrity and efficiency. Evaluation of judging, however, can extend to the quality of judging as well, and there have been an increasing number of empirical efforts to assess judicial quality. See, e.g., Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141 (2002); Stephen Choi & Mitu Gulati, *A Tournament of Judges*, 92 CAL. L. REV. 299 (2004). Because any metric of quality is so closely tied to the merits of judging, this paper does not address the propriety of such assessments of ALJs. ALJs, however, are not likely to escape the same type of quality assessments now being applied to federal judges and, indeed, in some states that have adopted a central panel system, review for quality is taking place.

119. Complaint No. 88-2101 (11th Cir. Jud. Council, Oct. 9, 1990).

their pay. In addition, ex parte discussions are limited in order to prevent even the appearance of impropriety.¹²⁰ Although Congress can reduce pay for ALJs as a group or eliminate their jobs altogether, Congress cannot readily pressure any individual ALJ to reach a particular decision. The issues raised in such hearings, in any event, are unlikely to be of such salience as to attract the attention of members of Congress. Most federal administrative judges not covered by the APA enjoy comparable independence as a functional matter.¹²¹

The comparative insulation of ALJs from external influence, however, does not suggest that ALJs should also be independent from standards of behavior or performance. Studies confirm anecdotal evidence that ALJs are at least as much in need of supervision as Article III judges.¹²² There are more ALJs than judges, far less scrutiny prior to appointment, and less training upon appointment. Instances of delay and incivility are not uncommon.

ALJs, like judges, are subject to norms of the profession. The American Bar Association, for instance, has promulgated a series of guidelines with which to assess the performance of all judicial actors. Those guidelines include:

- (1) Integrity – avoidance of impropriety and appearance of impropriety, freedom from bias, impartiality;
- (2) Knowledge and understanding of the law – legally sound decisions, knowledge of substantive, procedural and evidentiary

120. 5 U.S.C. §§ 554(d), 557(d)(1) (2000).

121. ACUS Recommendation, *supra* note 5, at 983-85.

122. For an assessment of charges that ALJs awarded benefits to white claimants more than African-American claimants, see GAO, *Social Security: Racial Difference in Disability Decisions Warrants Further Investigation*, GAO/HRD 92-56 (Apr. 21, 1992). The subsequent study found that the differences stemmed from cases in which the claimants were unrepresented by counsel. See GAO, *SSA Disability Decision Making: Additional Measures Would Enhance Agency's Ability to Determine Whether Racial Bias Exists*, GAO 02-831 (Sept. 2002), available at <http://www.gao.gov/new.items/d02831.pdf>. For an assessment of ALJ performance in North Carolina, see Charles E. Daye, *Balancing Administrative Law in North Carolina: A Collection: Powers of Administrative Law Judges, Agencies and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. REV. 1571 (2001).

- law of the jurisdiction, proper application of judicial precedent;
- (3) Communication skills – clarity of bench rulings and other oral communication, quality of written opinions, sensitivity to the impact of demeanor and other non-verbal communications;
 - (4) Preparation, attentiveness and control over proceedings – courtesy to all parties, willingness to allow legally interested persons to be heard unless precluded by law;
 - (5) Managerial skills – devoting appropriate time to pending matters; discharging administrative responsibilities diligently;
 - (6) Punctuality – prompt disposition of pending matters and meeting commitments of time according to rule of court;
 - (7) Service to the profession – attendance at and participation in continuing legal education, ensuring that the court is serving the public to the best of its ability;
 - (8) Effectiveness in working with other judges – extending ideas and opinions when on multi-judge panels, soundly critiquing work of colleagues.¹²³

The ABA guidelines reflect a sensible, though hardly detailed, elaboration of judicial conduct norms.

The Model Code promulgated by the National Association of Administrative Law Judges prescribes similar rules of conduct for ALJs. For instance, the Code specifies that an ALJ is to “uphold the integrity and independence of the administrative judiciary,” “shall avoid impropriety and the appearance of impropriety in all activities,” “shall perform the duties of the office impartially and diligently,” and ensure “compliance with the code of judicial conduct.”¹²⁴

Both the ABA Code and NAALJ model code articulate widely

123. ABA Special Committee on Evaluation of Judicial Performance, *Guidelines for the Evaluation of Judicial Performance* (Aug. 1985).

124. MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES, *Cannons 1,2,3,8* (2005), *available at* <http://www.naalj.org/modelcode.html> (formatting in original omitted).

held norms of conduct for ALJs to follow at both the federal and state levels. Neither, however, suggests an appropriate enforcement mechanism for conduct that fails to satisfy the articulated norms.¹¹⁹ Several possible approaches to fill that gap exist, including the employing agency's efforts to impose norms, oversight by an agency with no direct role in the litigation, and self regulation by ALJs.

A. *Oversight by Employing Agency*

One possibility is to entrust oversight to the agency within which the ALJ operates. As with trial judges in the state and federal system, ALJs are already subject to controls stemming both from appellate review and from more specific monitoring initiatives.

In individual cases, ALJs are subject to appellate review at the instigation of disappointed claimants and, at times, to "own motion" review, or review at the behest of agency decisionmakers. As with decisions by trial judges, ALJ decisions can be overturned on both legal and factual grounds. With respect to law, ALJs must follow the legal interpretations embraced by the agency – they have no discretion to deviate from the previously set legal positions of the agency. ALJs are to apply preexisting legal rules, even though cases of first impression arise.

With respect to facts, ALJ fact-finding may also be overturned. Indeed, familiar standards of review from the state and federal court systems, such as the clearly erroneous rule, do not generally apply,¹²⁵ and agencies may, if they choose, substitute their own fact-finding, even on a cold record, for that of the ALJ.

Plenary factual review stems from a critical difference between agency review and review by appellate courts. Legislatures have directed the agency, not the ALJ, to issue a decision reflecting the agency's position. Agencies are to interpret gaps in statutes and regulations and determine the broad frameworks within which facts are to be assessed. Congress and the state legislatures have vested such subsidiary policymaking authority in the agencies, not in the

125. 5 U.S.C. § 557(b) (2000). Even though agency heads can reverse factual findings by ALJs, they do so at the risk of creating a decision that may be overturned on judicial review.

ALJs. As the Supreme Court noted in *Chevron v. Natural Resources Defense Council*:

an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.¹²⁶

Agencies therefore review ALJ determinations in the interest of carrying out their legislatively assigned functions, formulating policy through fact-finding and law application.¹²⁷

There is some question whether ALJs must follow interpretive rules or policy statements issued by agencies, which are not binding as a matter of law. For instance, HHS issues policy circulars in the form of manuals to govern which medical procedures are appropriate for reimbursement. Other agencies issue guidance as to how they intend to interpret particular statutory terms. The logic of *Chevron* dictates that ALJs should follow such articulation of policy, although some ALJs have balked.¹²⁸ Most courts have agreed with the agencies that ALJs have no discretion to reject interpretive rules or policy statements.¹²⁹

126. 467 U.S. 837, 865-66 (1984).

127. See *NLRB v. Bell Aerospace*, 416 U.S. 267, 293 (1974) (“the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency”) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

128 ACUS Recommendation, *supra* note 5, at 1005.

129. See, e.g., *Crestview Parke Care Center v. Thompson*, 373 F.3d 743 (6th Cir. 2004); *Nelson v. Apfel*, 210 F.3d 799 (7th Cir. 2000); *Warder v. Shalala*, 149 F.3d 73 (1st Cir. 1998).

Moreover, the Supreme Court has upheld the agency's right to create presumptions arising out of particular factual contexts. In the well known case of *Republic Aviation v. NLRB*,¹³⁰ the question presented was whether an employer impermissibly discharged three employees for wearing UAW-CIO union steward buttons. The employer argued that, if it allowed employees to wear such buttons, employees would think that it implicitly favored that union, and it would thereby interfere with its employees' choice of a representative.¹³¹ The statutory touchstone is whether the employer's conduct discriminated against the employees by discharging them because of protected conduct. Motive is the linchpin. The Board created a presumption that if an employer permitted employees to wear union steward buttons, at least where there was no competing labor organization at the plant, then this did not imply an employer's recognition or support of that particular union.¹³² The Supreme Court ultimately affirmed, reasoning that, after a hearing, an agency may "infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven."¹³³ Agencies can generate rebuttable presumptions based upon the likelihood that certain facts will be evidence or not of a statutory violation.

Agencies not only can create presumptions, they can derive inferences from sets of facts based on their particular knowledge of the field. Although they cannot, on a cold record, displace ALJ credibility findings, they may reject ALJ fact-finding due to a different view of the surrounding legal terrain. The difficulty in separating credibility determinations made by the ALJ from policy inferences drawn by the agency is apparent and illustrated in the enforcement action in *Penasquitos Village, Inc. v. NLRB*.¹³⁴ The principal question concerned whether companies had wrongfully terminated two employees in derogation of their statutory rights protected under the National Labor Relations Act. The ALJ, after hearing all of the testimony, credited the testimony of the employer's

130. *Republic Aviation v. NLRB*, 324 U.S. 793 (1945).

131. *Id.* at 796.

132. *Id.*

133. *Id.* at 800.

134. *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977).

supervisor that the employees were dismissed because of the slow pace of their work. The NLRB, however, reversed the ALJ, concluding that, because the supervisor knew the employees were leaders of an organizational effort at the worksite and had not previously warned the employees, the discharge was pretextual. The court of appeals agreed that it was the agency's province to derive inferences from the facts found by an ALJ as long as the ALJ's demeanor assessment was not disturbed:

All aspects of the witness's demeanor – including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication – may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript . . . But it should be noted that the administrative law judge's opportunity to observe the witnesses' demeanor does not, by itself, require deference with regard to his or her derivative inferences.¹³⁵

In the particular case, however, a majority of the court determined that the Board's derivative inferences stemmed in part from discredited testimony, and thus concluded that the discharge of the employees should be upheld.¹³⁶ In dissent, Judge Duniway expressed fear that ALJ demeanor determinations could supplant the authority delegated to the agency to make the necessary policy inferences based on its expertise of labor law policy.¹³⁷

Consider, as well, the more recent decision in *Elliott v. CFTC*.¹³⁸ There, the issue concerned whether brokers had engaged in pre-arranged and therefore illegal trades of commodities. The ALJ sided with the brokers, relying on the testimony of the brokers and two

135. *Id.* at 1078-79.

136. *Id.* at 1078.

137. *Id.* at 1084.

138. *Elliott v. CFTC*, 202 F.3d 926 (7th Cir. 2000).

other traders. The ALJ concluded that the trades had not been pre-arranged, but rather that the market had provided only limited competition.¹³⁹ The Commodities Future Trading Commission (CFTC) reversed, relying instead on the structure and timing of the trades. From the pattern of trading, it inferred that they were pre-arranged and hence in violation of the commodities act.¹⁴⁰

On review, a divided Seventh Circuit upheld the agency. It held that the agency acted within its expertise in overturning the ALJ's fact-finding based on the inferences it drew from the patterns. In support, it provided an oversimplified example:

[A] police officer can testify that he was suspicious of a driver because he thought it unusual that a car was driving slowly and not using turn signals. The officer would be allowed to draw inferences from these facts without presenting evidence that cars usually drive faster on that particular street (much less evidence of the normal speed at which they drive). The factfinder could rely on its own experience to conclude that this sort of behavior was out of the ordinary.¹⁴¹

The agency thus can use its experience to override factual determinations made by ALJs, particularly when demeanor evidence is not determinative.

ALJs' independence, in other words, does not extend to trumping the articulated policy preferences of the agency. ALJs are bound by all policy directives promulgated by their agency. Agency review of ALJ findings as a consequence can further political control over regulatory policy. Thus, even more so than in judicial systems, agency heads can monitor ALJ decision making through vigorous review to ensure that ALJs are implementing their view of the law and appropriate policy.¹⁴²

139. *Id.* at 930.

140. *Id.* at 934.

141. *Id.* at 936.

142. As the Court of Appeals for the Second Circuit summarized, "[a]n ALJ is a creature of statute and, as such, is subordinate to the Secretary in matters of policy and interpretation of law." *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989).

Some ALJ conduct, however, may escape review in the context of particular administrative cases, just as mandamus and appellate review insufficiently monitor the conduct of Article III judges. To supplement appellate review, agencies may wish to construct mechanisms to discipline ALJs who fall behind on their dockets, abuse the litigants appearing before them, or engage in unruly behavior off the bench. A systemic bias against race in social security determinations, for instance, cannot be addressed let alone redressed in individual cases. Moreover, given that agencies often rubberstamp a substantial percentage of all ALJ determinations, misconduct may evade meaningful appellate review.

State and federal agencies adjudicate as well as enforce the laws, and thus in their adjudicative capacity have an institutional interest in maintaining the integrity of the administrative judiciary. Like the judicial councils, in other words, they oversee the conduct of ALJs to ensure that the highest standards of competence and civility are pursued.¹⁴³ Appellate review cannot suffice to ensure that ALJs are civil or efficient. Nor can agencies monitor for overall accuracy through appellate review – only the results of one case at a time can be considered. Agencies generally can remove ALJs for good cause, but the meaning of “cause” is unclear,¹⁴⁴ and the steps towards removal, cumbersome. Some other mechanism, therefore, may be necessary to permit the agencies, particularly those governed by the APA and APA-type structures, greater supervision of ALJs.

Unlike the Supreme Court or judicial councils comprised of Article III judges, agency heads typically wear two hats: they resolve administrative challenges and yet are parties to those very challenges. The decisionmaker of last resort is also the litigant. Therefore, efforts by such actors to ensure uniformity or increase productivity may mask efforts to bias the decision making of ALJs to ensure that the agency prevail more often in litigation. To that end, the APA precludes agencies from awarding merit pay¹⁴⁵ or financially

143. *See, e.g.*, *Brennan v. Department of HHS*, 787 F.2d 1559 (Fed. Cir. 1986) (upholding suspension of ALJ for insubordinate conduct); *SSA v. Boham*, 38 M.S.P.R. 540 (M.S.P.B. 1988) (upholding suspension of ALJ for insubordinate conduct).

144. *See Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 140-43 (1953).

145. 5 U.S.C. § 5372.

penalizing ALJs in order to minimize an agency's ability to provide monetary incentives for pro-agency decisions.

We highlight two examples to illustrate the range of measures that agencies have taken to constrain ALJ behavior. In both cases, understanding the tension between the independence of individual ALJs and the interests of the administrative judiciary as a whole, helps frame the propriety of the measure.

First, in response to evidence that ALJs were handling vastly different workloads, the Social Security Administration (SSA) instituted a variety of reforms in the 1970s, including prohibiting ALJs from writing their own opinions. The SSA attempted to attain greater consistency among ALJs hearing disability disputes. Some ALJs decided as many as 1440 cases per year while others decided as few as 120.¹⁴⁶ Similar problems have plagued other agencies.¹⁴⁷ Setting a goal to resolve a certain number of cases per month does, in a sense, interfere with decision making independence. The ALJ cannot spend the time he or she deems appropriate on any given case. Indeed, in *SSA v. Goodman*, the Merit Systems Protection Board (MSPB) blocked an SSA effort to remove an ALJ whose productivity, measured by the number of cases tried, lagged behind the national median.¹⁴⁸ Although the SSA had for years encouraged and then warned the ALJ to increase productivity, the MSPB was unmoved.

Similarly, in *Nash v. Bowen*, an ALJ challenged a production goal as antithetical to the ideal of decision making independence.¹⁴⁹ The court of appeals, however, rejected the claim, reasoning that a production goal "is not a prescription of how . . . an ALJ should decide a particular case."¹⁵⁰ Assuredly, an ALJ might argue that a directive to decide more cases bleeds into the merits. For example, the ALJ might need to spend less time resolving claims in favor of the Government because the reasoning in such cases is more

146. JERRY MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM, 120-21 (1978).

147. 1992 Administrative Conference of the United States Reports at 1016.

148. See *SSA v. Goodman*, 19 M.S.P.R. 321 (M.S.P.B. 1984).

149. *Nash*, 869 F.2d at 675.

150. *Id.* at 680-81.

straightforward. In order to meet a production goal, therefore, the ALJ might be tempted to favor the government in a close case. But, in the absence of any such connection between the number of cases decided and the merits of the case, a production goal does not seem problematic. Federal and state judges similarly share an interest in evening the workload. For instance, federal judges long have been chastised for not deciding their fair share of cases.¹⁵¹ A judge who works more slowly than his or her peers may impose a greater workload on them and delay justice for litigants. The administrative judiciary as a whole has a legitimate interest in ensuring that judges discharge a roughly equivalent amount of work. The production goal dispute represents a relatively straightforward example of when the interests of the administrative judiciary as a whole outweigh the decision making independence of particular ALJs.¹⁵²

Agency efforts to impose goals closely tied to case outcomes, however, are more suspect. Another example of agency efforts to constrain behavior can be seen by examining the SSA's response to Congress's concern over proliferation of social security disability claims. The SSA announced in 1980 that its Appeals Council would review the decisions of ALJs whose allowance rates of claims were significantly higher than a national random sample. The agency provided two reasons for targeting ALJs whose allowance rates exceeded the national median as opposed to those with allowance rates below the median. First, given that claimants, not the agency, appealed adverse determinations by the ALJs, review by the Appeals Council would restore some balance to the process by ensuring that the agency did not ultimately have to pay more in benefits than Congress had intended. Second, the Appeals Council had previously determined that it agreed more with ALJs whose allowance rate fell beneath the national median than those whose rate exceeded the median. As a result of the review, ALJs were put on notice that they would likely be subject to review if their allowance rates exceeded the national median. Indeed, an SSA memorandum warned that other steps would be taken if ALJ allowance rates continued to be much

151. *Chandler*, 398 U.S. at 85.

152. Similarly, the decision making independence of ALJs is not compromised when agencies require them to attend a program of instruction designed to aid their judicial demeanor and their decision making accuracy. *Stephens v. M.S.P.B.*, 986 F.2d 493 (Fed. Cir. 1993).

higher than the national median.

Targeting particular ALJs for review unquestionably can compromise decisional independence, and the SSA program likely was enacted for that end. Directing all ALJs to adhere closer to the national allowance rate resembles a curve familiar in most law school examinations. If Congress had determined that each ALJ was to allow a certain percentage of claims – not an inconceivable notion¹⁵³ – then SSA’s own motion review of wayward ALJs would be entirely consistent with the congressional design. SSA oversight would ensure that ALJs did not deviate from a curve, much like law administrators attempt to rein in faculty. Congress, however, directed each claim to be assessed on its merits. The idea of a curve originated with the agency, not Congress. The agency’s targeting, therefore, coupled with the threat of further action if the allowance rates did not go down,¹⁵⁴ cannot readily be seen as an effort to promote uniform standards.¹⁵⁵ This is not to suggest that the SSA lacked legitimate institutional interests in corralling ALJs who manifested anti-government bias. In the *Chandler* and *Ritter* cases, judges utilized mandamus to address very similar concerns. The administrative judiciary similarly is vitally interested in ensuring that ALJ recommendations be as accurate as possible. However, the SSA should have pursued a goal of accuracy in a more evenhanded fashion that avoided the deleterious impact on decisional independence. It could have continued targeting ALJs who consistently misapplied the law for discipline, or it could have suggested, without mandating, percentage ranges of grants for particular types of disability claims based on national or regional averages. Whether such efforts would have been effective is open to question.

Agencies currently exercise some oversight over ALJs. Through both appellate review and other mechanisms, agencies attempt to

153. Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481 (1990); 1992 Administrative Conference of the United States Reports at 1009.

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

155. See *Harrison v. Coffman*, 35 F. Supp. 2d 722 (E.D. Ark. 1999) (refusing to dismiss First Amendment claim by ALJ who alleged dismissal based on impartial decision making).

ensure that ALJs follow the norms of the profession. That goal is entirely appropriate. Agencies governed by APA-type structures, however have little means at their disposal to discipline wayward ALJs.¹⁵⁶ Any such efforts could, in any event, be problematic, because efforts to instill professionalism within ALJ ranks may mask efforts to bias decision making. Given that most agencies face a conflict of interest in monitoring ALJs, it is worthwhile to consider alternative oversight mechanisms.

B. External Agency Oversight

As one alternative, a separate agency could exercise the oversight that the employing agencies often do now. Given most agencies' self interest in the outcome of administrative proceedings, transferring oversight efforts to a different governmental entity might reduce the potential for impaired decisional independence. OPM, for example, currently sets pay rates and could be charged by Congress with greater monitoring responsibilities at the federal level. It could work with various agencies to set production quotas or minimize decision making errors in order to help achieve consistency and quality. The outside agency's independence from the adjudication might minimize the potential threat – or at least the appearance of a threat – to decisional independence. That independence would reassure litigants that meaningful oversight existed.

California was the first state to create an independent agency to monitor and discipline judges, establishing the Commission on Judicial Performance in 1960.¹⁵⁷ Although it has rulemaking authority over matters of judicial discipline, the majority of its members are not lawyers although, as is typical in other states, judges are represented on the Commission. In a sense, therefore, the

156. SSA's efforts to combat credible charges of race discrimination in awarding claims, for instance, consisted principally of diversity sensitivity training. *See supra* note 122, at 14. SSA also afforded claimants the opportunity to lodge complaints against particular ALJs, but there was no way to police against any systemic bias in awarding claims. The GAO report concluded that greater steps needed to be taken, but did not recognize the limited power that the agency in fact wielded over the ALJs in terms of their performance. *Id.* at 18-19.

157. *See generally* Sambhav N. Sankar, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233 (2000).

Commission acts as an outside agency to assess the conduct of state judges. It can act in response to a complaint or on its own initiative.¹⁵⁸

The Commission can dismiss a complaint or conduct a staff inquiry to determine if a preliminary investigation is warranted. Based on that investigation, the Commission can issue a private or public sanction. The Commission will schedule a more open, formal proceeding if the preliminary investigation warrants it, or if the judge under investigation requests it. At the conclusion of a formal hearing, the Commission may dismiss the proceedings, censure the judge, remove the judge or call for retirement. All Commission decisions can be reviewed by the California Supreme Court.

The Commission's efforts, however, may not comport with norms of the profession. Indeed, in one notable case, the Commission investigated a judge for departing from precedent.¹⁵⁹ Justice Kline on the California Court of Appeals dissented in a case¹⁶⁰ that applied a prior rule of the California Supreme Court¹⁶¹ sanctioning a practice of stipulated reversals, under which an appellate court is directed to order reversal of a trial court judgment after the parties agree to a monetary settlement. Justice Kline believed that the practice violated the integrity of the judiciary, and thus was "disruptive of judicial institutions" by seeming to countenance the sale of judgments.¹⁶² Nonetheless, the Commission later charged that the very call for integrity itself was grounds for sanction. Needless to say, it would be very difficult for judges to maintain independence if an outside agency could assess whether a judge followed precedent and could discipline the judge for any unwarranted departures.¹⁶³ Rather, a disappointed litigant's ability to appeal an adverse decision should

158. *See generally id.*

159. *Id.* at 1234.

160. *See generally* *Morrow v. Hood Communications, Inc.*, 69 Cal. Rptr. 2d 489 (Cal. Ct. App. 1997).

161. *See generally* *Neary v. Regents of the University of California*, 834 P.2d 119 (Cal. 1992).

162. *Id.*

163. New York's commission has also reviewed allegations of conflict of interest and bias, both of which generally can be assessed within the confines of case and controversies. *See Report of the Ad Hoc Committee on Judicial Conduct*, 54 THE RECORD 598, exhibit B (1999).

provide sufficient protection to keep judges in line. Only if a judge's failure to follow precedent is pervasive (as The Department of Health and Human Services alleged about ALJs in the disability context), would discipline outside of appellate review or mandamus be appropriate. The incident suggests that an outside commission may not be fully aware of the pressures and needs of the judiciary.¹⁶⁴ Thus, although the Commission may ensure greater monitoring and make judges more politically accountable, there is little guarantee that judges will become more "professional" as a result.

Moreover, the investigations carried out by state judicial commissions raise serious questions about safeguarding judicial independence. In over 40 states, the judicial commissions combine the power to both investigate and then sanction the judge – a so-called one tier system.¹⁶⁵ Investigators enjoy the subpoena power, and the investigations have ranged broadly, including judges' drinking habits,¹⁶⁶ sexual practices,¹⁶⁷ and bank accounts.¹⁶⁸ Rules of evidence do not apply in most investigations, allowing hearsay and other information to be considered by the investigators.¹⁶⁹

In most jurisdictions, judges need not receive specific notice of

164. Nearly 25% of those responding to a survey by the New York City Bar Association reported that Commission staff had been rude and demeaning to judges subject to the charges. Additionally, almost 50% of respondents described "at least one aspect of the Commission's procedures as being 'unfair.'" See Report, *supra* note 163, at 609.

165. See Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 KY. L. J. 811 (1988). For cases upholding the one-tier system from due process challenge, see *Keiser v. Bell*, 332 F. Supp. 608 (E.D. Pa. 1971); see also *In re Brown*, 512 S.W.2d 317 (Tex. 1974).

166. *In re Ageter*, 353 N.W.2d 908 (Minn. 1984) (permitting investigation into drinking habits off the bench).

167. *Id.* (holding that investigation into affair impermissibly intruded upon judge's privacy).

168. See, e.g., *Nichols v. Council on Judicial Complaints*, 615 P.2d 280 (Okla. 1980) (upholding bank records); *In re New York State Comm'n on Judicial Conduct v. Doe*, 459 N.E.2d 850 (N.Y. 1984) (broader investigation into financial records upheld).

169. Compare *In re Whitaker*, 463 So.2d 1291 (La. 1985) (holding that informal rules governed the proceedings that could include allegations of misconduct before going on the bench); with *In re Dalessandro*, 397 A.2d 743 (Pa. 1979) (strictly following rules of evidence).

the charges against them.¹⁷⁰ One judge, for instance, attempted to vacate a sanction based on the lack of notice. He asserted that a charge alleging “improper consumption of alcoholic beverages, and instances of discourtesies to female attorneys, such as calling them lawyerettes and asking why they did not wear neckties,”¹⁷¹ was insufficient to allow him to present evidence on his own behalf. The commission concluded that the charges were specific enough. Indeed, most jurisdictions only allow judges limited discovery¹⁷² and do not allow the judges to confront their accusers.¹⁷³ And, judges must use their own money to hire lawyers should they wish to contest subpoenas or challenge the commission’s assessment. The state commissions have not always acted in a manner respectful of the rights of the judges charged with misconduct.

Ten states, however, have adopted a two-tier judicial commission system. In those jurisdictions, the commissions act like investigators and present charges for formal adjudication in front of a different group of judges. In the two-tier system, fears for runaway investigations are minimized because judges can always clear their names during the formal adjudication. Rules of evidence are followed and cross-examination is permitted.

The two-tiered approach, however, presents a blunt tool in cases in which incivility or excessive delay is alleged. Full investigative power is arguably not needed to assess whether the judge is behind on his or her docket or whether he or she is too brusque. The question in such cases is whether judges can alter their behavior without sacrificing their decision making independence. A visit from colleagues likely will suffice. Moreover, in all cases brought before a two-tiered review system, judges still may be subject to a humiliating and expensive investigative phase. Although the two-tier system protects judges from unwarranted sanctions, it does nothing to

170. *McCartney v. Commission on Judicial Qualifications*, 526 P.2d 268 (Cal. 1974); *Sharpe v. State ex rel. Oklahoma Bar Ass’n*, 448 P.2d 301 (Okla. Ct. App. 1968).

171. *In re Kirby*, 354 N.W.2d 410 (Minn. 1984).

172. *See generally, In re Coruzzi*, 472 A.2d 546 (N.J. 1984); *In re Del Rio*, 256 N.W.2d 727 (Mich. 1977).

173. *See generally, In re Sawyer*, 594 P.2d 805 (Ore. 1979); *Whitaker*, 463 So. 2d 1291 (La. 1985); *In re Wiremen*, 367 N.E. 1368 (Ind. 1977).

prevent harmful investigations, and adds expense to the oversight process.

Furthermore, oversight of ALJs by a separate agency would generate considerable administrative costs. New machinery would have to be set in motion to monitor the performance of ALJs, and the costs in terms of resources would not be minimal. Vesting an agency with these additional duties likely would be costly, and the investigations and subsequent adjudication would add expense as well.

In addition, an independent agency such as OPM is not as acquainted with the body of law that is to be adjudicated as is the employing agency. Such a lack of expertise might have programmatic as well as financial costs. For instance, in the *Penasquitos Village* case discussed earlier, an agency other than the NLRB might not have been equipped to determine whether the ALJ's factual determinations impermissibly favored the employer – only an agency equipped with detailed knowledge of the workplace may be positioned to make that assessment. Similarly, the CFTC in *Elliott* determined that the pattern of the trades reflected pre-arrangement despite the ALJ fact-finding. Moreover, an outside agency may be ill prepared to determine whether an ALJ departed from an agency interpretive rule. Thus, an outside agency, in determining whether some disciplinary course is appropriate in the face of repeated anti-employer or anti-government bias, might not be able to assess the propriety of the ALJ fact-finding.

Similarly, an outside agency may not have been able to understand and respond to the challenges confronting adjudication of disability claims arising out of the Social Security Administration. It may not have understood the importance of expediting the process by prohibiting ALJs from writing their own opinions. If the outside agency includes ALJs, as the state judicial commissions include judges, then the chances of such clash of cultures diminish.

In short, a legislative decision to empower a separate agency to oversee conduct of ALJs may protect the independent decision making of ALJs, at least more than if the employing agency were vested with the responsibility to monitor. At the same time, however, the norms imposed by the independent agency may neither comport with the professional norms of ALJs nor with the policies preferred by the agency, and the new layer of bureaucracy likely imposes

substantial costs on taxpayers.

C. Self-Regulation

Finally, if ALJs themselves pursued self-regulation more actively, the need for external review might diminish. Presently, neither the ABA nor the NAALJ has taken any steps to encourage ALJs to oversee compliance with judicial conduct.

The Judicial Councils model presents a paradigm. Through the councils, judges have banded together to impose professional norms on their colleagues. Although Congress has facilitated the councils' work, judges control the process at each step. They determine whether to investigate a particular complaint, how wide of an investigation to launch and, if sanctionable conduct is found, what remedy to impose. The proceedings, for the most part, remain confidential.¹⁷⁴ Peer discipline can be more effective if at least the beginning stages of investigations are not played out in public – judges can put their own house in order. Although individual judges have questioned the propriety of an investigation or two, the councils have handled thousands of complaints with little controversy. And, the very presence of the councils has seemingly dissuaded Congress from imposing additional disciplinary or oversight measures. Judges' oversight of each other has helped bolster judicial professionalism, even at some cost to the independence of individual judges. Just as legislatures needed to encourage judges to regulate themselves more effectively, so might legislation be needed to facilitate the efforts of ALJs to regulate themselves.

Self-regulation in the medical profession provides another helpful example of oversight from within. Criminal and civil law constrain physician conduct, but largely leave regulation to groups of concerned physicians. Fellow medical professionals control certification of physicians, as well as create and enforce a code of ethics.¹⁷⁵

174. All matters remain confidential except for public reprimand or referral to the House of Representatives. 28 U.S.C. § 372(c)(14) (2005).

175. Criton A. Constantinides, *Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions*, 25 GA. L. REV. 1327, 1333 (1991).

The American Medical Association's Code of Medical Ethics¹⁷⁶ gives the Council on Ethical and Judicial Affairs the authority to investigate and discipline the ethical conduct of AMA members and applicants.¹⁷⁷ Not only can sanctions include expulsion, suspension or censure of a member, but they may also be reported to the appropriate governmental body or state board of medical examiners. The board may then act on the findings of the council. In addition, many medical professional associations have adopted all or parts of the Code and hold their members to its ethical standards.¹⁷⁸

Council members are colleagues that are nominated by the AMA president for a single seven-year term.¹⁷⁹ Because they are not concerned about reappointment, they are largely insulated from the political process, and there is consequently less concern for bias than if the profession were monitored by bureaucrats. The system of self-regulation allows those who know the medical profession best, the doctors, to keep order.

As with physicians, ALJs have different specialties and work in very different situations. Challenges to ALJ conduct may turn on unique circumstances of the various administrative realms in which they work. Yet, self-regulation is possible and, as with physicians, may lead to great professionalization. In APA-type contexts, self-regulation may benefit the public because there is so little that agencies can do to monitor ALJs directly.¹⁸⁰ In contexts in which ALJs are less independent, self regulation may persuade monitoring agencies to stay their hand to permit greater independence.

Indeed, the emergence of central panels¹⁸¹ may facilitate the drive for self-regulation. In roughly thirty states, some ALJ functions have been pulled together under one administrative unit headed by a chief

176. American Medical Association, *at* <http://www.ama-assn.org/ama/pub/category/2503.html> (last visited Apr. 28, 2005).

177. Code of Medical Ethics, E-9.04. Any conduct that could be criminal must be reported to the California State Board.

178. Constantinides, *supra* note 175, at 1334.

179. David Orentlicher, *The Influence of a Professional Organization on Physician Behavior*, 57 ALB. L. REV. 583, 588 (1994).

180. The Department of Labor introduced peer review among its ALJs even though the consequences of a bad review was likely only damaged pride. 1992 Administrative Conference of the United States Reports at 1025.

181. See Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 20 J.NAALJ 157, 164 (2000).

ALJ. The structures of such central panels differ. In some, ALJs receive civil service protection and therefore oversight efforts by a chief ALJ may run aground at any effort to impose sanctions. The Model Act itself embraces civil service protections for individual ALJs.¹⁸² In Texas and other states, however, the chief ALJ enjoys plenary removal authority over ALJs on the panel. The chief ALJ can (and should), therefore, articulate standards of conduct that all ALJs should follow, and the Model Act provides that the chief ALJ should “establish and implement standards” for ALJs.¹⁸³ Chief ALJs can discipline any subordinate ALJ whose conduct falls below the norm. The risk that Chief ALJs do not represent the interests of ALJs as a whole exists, but mechanisms may emerge to make the heads of central panels accountable in part to the ALJs within their jurisdictions. Like the judicial councils, therefore, the central panel structure might, over time, establish disciplinary systems that will help ensure professionalism among ALJs without jeopardizing decision making independence or increasing administrative costs significantly.

In New Jersey, the New Jersey Office of Administrative Law charted a system to assess performance of ALJs. The information collected from attorneys and others is then used by the Governor in determining whether to rehire ALJs.¹⁸⁴ Even without a power to remove or discipline ALJs, therefore, central office oversight has the potential to shape conduct by demanding and investigating any lapses from previously articulated standards of conduct.

Thus, in addition to efforts to foster competent performance, the Chief ALJ in at least some states can encourage civility, promptness, and ethical standards by threat of monetary or other sanction. Where a panel does not exist, ALJs – with statutory authorization -- could convene to consider complaints against their peers. Self-regulation may facilitate professionalism within ALJ ranks and forestall agency or outside commission efforts to impose greater discipline on the administrative judiciary. This is not to suggest that the path to self-

182. See 17 J.NAALJ 313-22 (1997) (Model Act, 1-6(a)(3)).

183. Model Act, 1-5(a)(5).

184. See Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589 (1994).

regulation will be without obstacles, but the effort may well be worth it to attain great professionalization and respect in the long run.

IV. CONCLUSION

Decision making independence is as critical for ALJs as it is for state and federal judges. If the appearance of impartiality is not maintained, faith in the administrative system of adjudication will erode.

Yet, complete independence is unattainable. There are always some external pressures. Article III judges face potential impeachment and restriction of their jurisdiction, and most state judges face the prospect of defeat at the polls. ALJs stand to lose their jobs or pay if Congress loses faith in their efficacy.

Independence from pressures within the judiciary is both unattainable and normatively unattractive. Judges as a group have a legitimate interest in upholding the integrity of their profession. Through appellate review and mandamus, they check abusive practices of lower court judges. And, through discipline meted out through judicial councils, they can censure conduct that threatens to erode public confidence in the judiciary.

ALJs as well should not be independent of professional norms. Those norms can be set by agencies that act both as adjudicators and law enforcers. That dual role, however, breeds skepticisms about whether a particular oversight measure is designed to instill professionalism – quality, civility, efficiency – or to advance the agency's financial interest as a party.

Other options exist. A different agency, such as OPM at the federal level, may discharge oversight activities instead of the employing agency. That supervision would avoid any direct conflict of interest. Nonetheless, the California experience suggests that the outside agency may neither understand the norms of judging nor adequately grasp the policies followed by the employing agency. ALJs alternatively should attempt to regulate their own conduct. That effort to ensure professionalism within their own ranks may reassure the public and, at the same time, forestall the employing agencies from adopting oversight measures that smack of self-interest. The trend toward central panels should facilitate experimentation with different modes of self-regulation.

In short, some accommodation between decisional independence and the legitimate interests of the administrative adjudicators as a group must be made. Decision making independence should be pursued, but in shades of gray.

