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Critical Factors of Adjudication: Language and the Adjudication Process in Executive and Judicial Branch Decisions

By Christopher B. McNeil*

* This article was written under the guidance of Professor Elizabeth A. Francis of the University of Nevada – Reno, whose insight into the role of language in the law has proved to be invaluable, and whose assistance in guiding this article is acknowledged, with my thanks. This article was first presented as part of the author's work in pursuit of the Master's Degree in the Judicial Studies Program of the UNR and National Judicial College, in Professor Francis' course "Language and the Judicial Process."

I. INTRODUCTION

In the exercise of their legislative powers, lawmakers have the power to enact statutory and regulatory schemes that anticipate adjudication of disputes arising between governmental agencies and those affected by regulatory controls. When the state legislators determine, for example, that a commercial motor vehicle driver (CDL) whose blood alcohol level (BAC) exceeds .04 percent must lose his or her license for a year, traditional notions of due process require the driver be permitted to contest the facts and law that would lead to license revocation. In fashioning a legislative scheme that meets due process requirements, lawmakers must decide how disputes between government and the governed will be resolved. Two adjudicative structures are available in these schemes: disputes may be presented to the administrative body for review through an administrative hearing before an adjudicator of the executive branch (for example, an administrative law judge (ALJ)), or they may be presented to a judge of the judicial branch of government.

Whether an ALJ or a judge of the judicial branch, whoever holds the power to make the initial findings of fact and law possesses substantial discretion and authority. Allocation of that power through legislative delegation should be made only by lawmakers who understand the significant differences between executive and judicial branch adjudicative process. When creating a statutory scheme for the protection of the public, lawmakers should be well informed about the consequences of relying on the adjudication process of either the judicial branch or the executive branch. The CDL operator, for example, facing the license loss based on operating a commercial vehicle with a .04 BAC, will demand adequate procedural controls to ensure a fair outcome. The public who shares the road with this driver, along with interest groups such as Mothers Against Drunk Driving, will insist that the process effectively carry out the intended protections of public health and safety. When choosing an adjudicative process, lawmakers should recognize the relative strengths and weaknesses of these two judicial forums. This choice will become particularly significant as federal and state lawmakers create new programs for the protection of the public pursuant to the mandate of the USA Patriot Act and the programs to be administered through the Department of Homeland Security.

A core component of any adjudicative approach is the *decision.*

Whether rendered orally from the bench at the time parties appear before a judge, or presented through written judicial opinions, or offered in the form of the highly structured writing required by most state administrative procedure acts, the decision represents a standard through which our government presents its proof that justice has been done through a fair and effective adjudication. Done well, the decision inspires trust and confidence in the legislative and regulatory schemes, and in our government's commitment to due process. Poorly presented, or produced through an inefficient or sloppy process, the decision can cast doubt on the integrity of the legislative and regulatory schemes and invites disrespect for the law, eroding the structure and purpose that led to the law in the first place.

The claim central to this analysis is that there are significant differences that must be recognized when determining who should render an initial decision in any legislative or regulatory scheme. When making the choice between the executive branch and judicial branch adjudicator, lawmakers must recognize the importance of the differences in the use of language by the executive branch and judicial branch adjudicators. The two adjudicators do not use language in the same way, and the differences in their use of language can be exploited, if properly understood and mastered, to exponentially increase the likelihood of success of a given statute or regulation. Otherwise, left unattended or ignored, language and its diverse use by the executive or judicial branch adjudicator can bring down even the soundest legislative initiative.

Within this central claim are three subordinate claims, each focusing on one of the core components of adjudication: First, there is a material difference between decisions rendered in writing and those announced at the time evidence is presented (i.e., bench decisions). Second, the audience matters: it makes a difference whether the decision is directed to the parties (as is the case in judicial branch decisions) or to an executive branch decision maker (as is the case in most administrative adjudications). Third, institutional control over the decision maker must be taken into account when determining which adjudicative path a given legislative scheme should follow. Common to each of these sub-theses is the recognition that language and the law are intimately, perhaps inextricably, intertwined. Judges of all stripes are blessed (or cursed) with society's expectation that they will articulate the boundaries between the government and the governed, and will give meaning to

cherished yet ephemeral notions of fundamental fairness and due process.

II. CRITICAL FACTORS OF ADJUDICATION: LANGUAGE AND THE ADJUDICATION PROCESS IN EXECUTIVE AND JUDICIAL BRANCH DECISIONS

A. The Role of Decisionmaking in Adjudication

1. Decisionmaking in the Context of Adjudication

Reduced to essentials, adjudication consists of the presentation of claims or a demand for relief, the presentation of evidence creating a record, adjudicative analysis, and publication of the decision, either orally or in writing. The decision consists of a holding, announcing who won supported by an analysis, through which the adjudicator resolves any disputed factual claims, and applies those facts to law. The decision represents an ending of sorts: its function is to reveal how the adjudicator resolved controverted points of fact and law to reach the holding. It need follow no particular structure: a judge could render a decision from the bench immediately after the presentation of evidence, or adjourn to reflect upon the exhibits and transcripts prior to rendering a decision. The decision also is a mid-point, serving as a launching place for appellate review. Viewed thus, the decision is the source a superior judicial tribunal will turn to most heavily when determining the sufficiency of the decision-making process of the lower tribunal.

The decision typically will be in writing, although it is also common to find the adjudicative process brought to a conclusion without a formal written entry. What distinguishes the decision from other parts of the adjudicative process is its terminal effect: once offered by the adjudicator, the decision is intended to bring to an end the gathering and evaluation of facts, and it is designed to announce the rationale which applies those facts to the controlling law, leading to the final orders of the case, save for any appeal that may be taken.

These core components of a decision exist whether the adjudicator is a judge of the judicial branch or an executive branch adjudicator. Parenthetically, for these purposes the executive branch adjudicator includes administrative law judges, hearing examiners, hearing officers, and any operative of the government who possesses

judicial power through a legislative delegation of those powers to the executive branch. Generically and for the purposes of this article, we can refer to these adjudicators as administrative law judges or ALJs, although in many jurisdictions the term "judge" must be limited to those who draw their authority from the judicial branch of government. In Ohio, for example, executive-branch adjudicators are by statute referred to as administrative hearing examiners, and may not present themselves as judges.[1] In the disposition and resolution of claims, the judicial branch judge and the ALJ share the obligation to draw from competing claims and conflicting evidence a coherent presentation of the evidence. Upon that presentation, the adjudicator must render a decision that answers the questions posed by the parties, in a manner that lends itself to public inspection and appellate review.

2. Distinguishing the Decisionmaking Roles of the ALJ and the Judicial Branch Judge

The executive branch adjudicator is known by the limits on her or his authority. The ALJ possesses only those powers diverted from the judicial branch through the process of legislative delegation. In crafting a decision, the ALJ knows that only the judicial branch judge has been given the powers of true judicial authority. Generally, ALJs may not find a statute or regulation is unconstitutional, whereas a court of general jurisdiction is given that power of legislative oversight. ALJs typically lack the ability to enforce their decision through contempt; indeed, enforcement power, where it exists at all, is almost always indirect, its effect dependent upon the plenary powers of judicial-branch process. Further, ALJs typically lack the rights of tenure like those guaranteed under article III of the United States Constitution. Their duties, however, are "functionally comparable" to those of a judge of the judicial branch, and 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."[2] Thus, the ALJ uses the tools of the

1. *See* OHIO REV. CODE ANN. § 119.09 (Anderson 2002).
2. Butz v. Economou, 438 U.S. 478, 513 (1978).

article III judge and is entitled to some measure of independence from agency influence, but lacks the structural protection that characterizes judicial power under the Constitution.

3. The Use of Language in the Decisionmaking Process

To be effective, a judicial or administrative decision needs to accomplish two goals: it must report the adjudicator's decision and set forth the reasons justifying that decision.[3] The decision should disclose the events that gave rise to the legal controversy, the intermediate steps that preceded the decision, the nature of any controverted facts, the rationale that resolved those factual controversies (including resolutions based on credibility determinations made by the adjudicator), and the application of law to the facts so resolved.[4]

To be effective, the language used in the decision-making process must take into account the needs and expectations of the target audience. In the course of judicial adjudications, that audience is, first and foremost, the parties to the action. Whether ruling from the bench shortly after conducting a driving under the influence (DUI) trial, for example, or ruling through a written decision granting a motion for summary judgment, a trial court must craft a decision using language that will inform the parties of how it resolved all material facts and how those facts were applied to the law. An ALJ, on the other hand, will need to use language to suit not only the parties to the action but also the agency through which the ALJ is acting. This is a significant difference, because it represents a procedural step not imposed upon a judge of the judicial branch. In those cases where the decision of the ALJ is not the final agency order but is instead a recommendation that may be accepted, modified, or rejected by the agency head, the decision must be crafted in a way that lends itself to such a process of review by the agency, before an appeal is taken to a judicial-branch appellate court.

The ALJ's use of language must take into account the demands of the agency and must abide by conventions imposed upon the ALJ

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3. Sylvan Barnet & Hugo Bedau, *Current Issues and Enduring Questions, in A Lawyer's View: Steps Toward Civic Literacy* 382 (Bedford St. Martin's 2002).

4. *Id.* at 386.

through the agency or the agency's proxy in those cases where the ALJ is directed by an entity other than the agency itself.[5] Even in those cases where the ALJ's decision constitutes the final agency order, the ALJ must express his or her findings and conclusions in a way that discloses, not only to the parties but also to the agency, the rationale supporting the decision.

B. The Use of Language to Set Boundaries in the Adjudicative Process

In his seminal research on the use of language in judicial proceedings, William O'Barr described the work of the Law and Language Project at Duke University, which he and others performed between 1974 and 1982. The project examined two propositions: "(1) Linguistic variation in any setting is not random, but socially patterned; and (2) sets of rules of successful strategies and tactics exist for competitive arenas of all sorts, including trial courtrooms."[6] Through direct observation and study in a North Carolina courtroom, the author and his associates studied the use of language, primarily spoken but also written, over a ten-week period. Serendipitously, the research author was also summoned to jury service in the courtroom during this period, giving him an uncommonly close view of the use of language by jurors, over the course of two cases, both involving appeals of traffic violations.[7]

As a starting point, O'Barr confirms what lawyers and judges have long known; the form of language makes a difference and the difference can be significant in a judicial setting.[8]

> The initial working proposition is that form is, at the very least, one important component of the total message and its reception. I intend to demonstrate that form may at times be highly significant, even to the point where a change in form can alter or reverse the

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5. For example, in states having a centralized corps of ALJs who are not directly controlled by the agency.

6. William M. O'Barr, *Linguistic Evidence – Language, Power and Strategy in the Courtroom* (Academic Press 1982).

7. *Id.* at 58.

8. *Id.* at 2.

> impact of a message. The arena chosen for investigating this proposition is the trial courtroom.... What makes the court especially interesting is that language strategy is generally recognized by participants, although poorly understood by them. Investigating communication in the courtroom is simultaneously an opportunity to investigate the importance of form and to seek insight into the role of language in the legal process.[9]

While O'Barr's research was in the courtroom of a trial court, the points raised apply with equal vigor to the administrative forum. Adjudications conducted by the executive branch, like those of the judicial branch, rely on conventions of language and process. In an administrative license suspension hearing based on a .04 BAC, the commercial truck driver does not face a jail sentence as she would if she were before a trial court on a charge of DUI. Even so, all the parties expect the proceedings to be adversarial, and will require the court to control the gathering of evidence in a manner that protects the guaranteed constitutional rights of the driver. Generally, the administrative process is used when the government seeks to withdraw a license or deny a benefit. That being said, however, society recognizes the significant impact of the loss of an occupational license, and in turn invests the ALJ with powers and responsibilities very much like those attributed to the judicial branch courts. To the extent that the use of language facilitates or acts as a barrier to a fair trial in the DUI proceeding, it likewise will have an impact on the adversarial proceedings created to ensure fairness for the CDL operator facing an administrative license revocation.

1. The Role of Syntax, Grammar, and Colloquial Expression in Adjudication

Examining the adjudicative process from the linguist's perspective, O'Barr recognizes the effect of two types of rules: normative rules, which "reflect the public face of politics and carry strong moral valu[es]," and pragmatic rules, "the private wisdom of

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9. *Id.*

political success" not nearly so publicly acknowledged but essential to successful strategy in the courtroom.[10] Lawyers are familiar with both. Lawyers follow the Rules of Civil Procedure, Rules of Evidence, and other well-publicized normative rules that guide the court and the parties through the adjudication process. Lawyers also privately consult practitioner's manuals for effective strategies, tips, and checklists for trial practice. Hearsay offers a good example of both the normative and pragmatic rule.[11] A number of evidence rules define when an out of court statement is or is not hearsay, and further permit or exclude statements that are hearsay based upon a collective historical experience reflecting the relative reliability of such evidence.[12] However, these normative rules do not operate in a vacuum: lawyers simultaneously consider pragmatic rules, taught through experience and the culture of litigation, when they consider the merits of offering evidence even though the offer likely violates one or more of the normative rules.

> Although they are not found in any treatises on procedure, successful lawyers know many such rules. For example, it may be worthwhile to introduce evidence while knowing that it will be objected to and ruled inadmissible. Doing so may be strategically useful IN ORDER TO BRING SUCH INFORMATION TO THE ATTENTION OF THE JURY. Even though instructed to forget inadmissible evidence, lawyers know that jurors cannot and do not in fact do so. Moreover, objections of the opposition may only serve to call more attention to the material. Such are pragmatic rules of courtroom procedure.[13]

Viewed from the linguist's perspective, adjudications in administrative proceedings share many attributes found in trials before a judicial tribunal, with one notable exception, the absence of juries. Given the absence of jurors, the pragmatic rules O'Barr refers

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10. *Id.* at 5.
11. *Id.* at 5-6.
12. *Id.* at 6; *See e.g.* FED R. EVID. 803.
13. *Id.*

to are likely to shift away from addressing the needs of lay jurors in favor of attending to the sensibilities of the ALJ. This shift, from meeting the needs of jurors to meeting the expectations of ALJs, carries with it both a burden and a benefit, both of which can be drawn from a truncated review of characteristics of language and the law.

In his study of the language of the law, David Mellinkoff offers a systematic examination of the language lawyers use.[14] From a list of nine attributes of legal language identified by Mellinkoff, four attributes have particular significance when examining the use of language in decision-making. These four attributes are:

- **COMMON WORDS WITH SPECIALIZED LEGAL MEANINGS**[:] *action* for 'law suit', *instrument*, for 'legal document', *of course* for 'as a matter of right', *serve* for 'deliver legal papers', etc. . . .
- **TERMS OF ART**[:] *contributory negligence, eminent domain, garnishment, judicial notice injunction, negotiable instrument, prayer, stare decisis*, etc. . . .
- **WORDS WITH FLEXIBLE MEANINGS**[:] *adequate, approximately, clean and neat condition, extreme cruelty, obscene, promptly, satisfy, undue influence, worthless*, etc.
- **ATTEMPTS AT EXTREME PRECISION**[:] absolutes such as *all, none, irrevocable, never*; restrictions such as *and no more, and no other purpose, shall not constitute a waiver*; unlimiting phrases such as *including but not limited to, shall not be deemed to limit, nothing contained herein shall*; etc.[15]

When examining the use of language in decisions by any kind of adjudicator, each of these attributes warrants attention. Lawyers who are familiar with an agency's procedures will know, for example, that common words with specialized meanings will have different meanings depending on whether the forum is a judicial branch court

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14. David Mellinkoff, *The Language of the Law* (Boston, Little, Brown 1963) *cited in* O'Barr, *supra* note 6 at 15-20.

15. O'Barr, *supra* note 6, at 16-17 (quoting Mellinkoff , *supra* note 14, at 11-29) (emphasis added in bold) (bullet points added). Terms of art are "[t]echnical words and phrases whose meanings are seldom disputed in the law." O'Barr, *supra* note 6, at 17 n.1.

or an administrative proceeding. A "hearing" in court will likely be something less than the entire evidentiary process; whereas the same term in the context of an agency proceeding is likely to be the one and only opportunity for the presentation of evidence. Similarly, terms of art and words having flexible meanings, developed in courts of general jurisdiction, often evolve over long periods of time. In contrast, the rulemaking process permits an agency to codify and thereby greatly shorten the time needed to turn words having a generally accepted "street" meaning into terms of art. Given the more specialized nature of agency proceedings, the tendency towards such specialized use of words is both understandable and unavoidable. Any attorney seeking to operate in an administrative forum is thus obligated to seek out and master the lexicon of the agency and its adjudicative forum.

2. Codes and Specialized Language

One characteristic of the use of language reported on by O'Barr is the use of specialized language by attorneys, most notably when addressing the finder of fact - typically the jury. These special forms of communication, all spoken, appear to meet specific needs of the jury: (1) formal legal language, like that used by a judge when instructing the jury or used by the lawyers when making motions to the court; (2) standard English, generally labeled as "correct" English and akin to what is taught as the standard in American classrooms; (3) colloquial English, matching more closely everyday, ordinary English in lexicon and syntax and lacking many of the formalities found in standard English; and (4) subcultural English, which O'Barr describes as "language spoken by segments of the society who differ in speech style and mannerisms from the larger community; in the case of the particular courts studied in North Carolina, these varieties include Black English and the dialect of English spoken by poorly educated whites."[16]

A lawyer's skill in her use of such language varieties is a benchmark for professional success in court. Colloquial English may be used, for example, when introducing a cause to the jury, in an attempt to "emulate the speech styles of 'ordinary folks'" and

16. O'Barr, *supra* note 6, at 25.

engender a measure of trust between the lawyer and members of the jury.[17] The lawyer may then change her style when dealing with hostile expert witnesses to emphasize differences in the use of language that would serve as a barrier between the expert and the jury.[18]

In administrative proceedings, where there is no jury to cater to, both the ALJ and the participants can anticipate a less diverse and more predictable fact-finder; at least with the ALJ-driven administrative forum, there is only one fact-finder, reducing the need to appeal to the syntactical sensibilities of six to twelve lay jurors. Furthermore, agency proceedings characteristically involve a relatively narrow and specialized subject area, inviting a more precise and carefully crafted exchange among the parties during the gathering of evidence. When compared to judicial proceedings, administrative hearings offer the potential for a hearing that is briefer, more clearly presented, and less likely to be influenced by distractions like colloquial expression designed to pander to the interests of local jurors.

3. Inclusion and Exclusion in Adjudications

Two of the significant differences between the decisions rendered by ALJs and those rendered by courts of the judicial branch are, first, the power to require a written decision by the ALJ, and second, the ability to control what is included and excluded from the written product. In contrast, the judicial branch adjudicator may dispose of cases with little more than an announcement from the bench, followed by a pro forma entry showing nothing more than the name of the prevailing party. The court need offer neither oral nor written explanation for its decision, and can leave to the parties the task of journalizing the outcome of the case.

As a product of the legislative delegation of authority, the administrative forum can be created so as to require a written decision in every instance where a final order is produced. Furthermore, state administrative procedure acts (i.e., the codification of procedural rules and standards by which the ALJ operates an

17. *Id.* at 25-26.
18. *Id.*

adjudicative forum) will typically mandate a format for such decisions, requiring separate sections reporting factual findings, legal conclusions, an analysis, and a recommendation. Either by broad legislation affecting all agency decisions or through more narrow regulations tailored for specific agencies, lawmakers and executive officers can insist on a transparent written product that sets forth the controlling facts and law. There is no comparable power in either the legislative or executive branches of government, by which courts of the judicial branch may be compelled to expose their rationale or decision-making process. While it is true that many judicial-branch courts operate under a set of formal rules controlling the decision-making process, the source for such rules is typically the judicial branch, itself, acting through the highest court of the state and not the legislative or executive branch.

This legislative power with respect to administrative adjudications – the ability to impose minimum standards of performance and require evaluation of the quality of the adjudicative process – may be of particular significance when lawmakers seek to implement new regulations or seek more effective enforcement of existing laws. Consider, for example, the process when a state seeks to enforce DUI laws that include an administrative license revocation for all drivers who either fail or refuse to submit to a roadside sobriety test. The DUI law itself is criminal in nature, and adjudications leading to a criminal conviction are the exclusive domain of courts of the judicial branch. The administrative license suspension or revocation proceeding, on the other hand, may be delegated to the executive branch adjudicator. In doing so, lawmakers may carefully circumscribe and limit the scope of what may be included in the ALJ's report, and in doing so, lawmakers also may limit the scope of what may be introduced during the evidentiary hearing. In administrative license revocation proceedings in Georgia, for example, the legislature has expressly limited the scope of the administrative hearing in administrative license suspension cases to a consideration of six factors (including whether the person refused the test, whether the test had been properly administered, etc.).[19] In this way, the legislative branch can give clear and effective direction to the executive branch adjudicator, narrowly defining the scope of

19. GA. CODE ANN. § 40-5-67.1(g)(2)(A)-(F) (2001).

evidentiary proceedings, in a way that promises an efficient fact-finding process while, at the same time, satisfying all constitutional requirements including the requirement of due process.

C. Structural Controls Over the Adjudicative Process

If one accepts as true the proposition that lawmakers have the ability to control the decision-making process to some extent by electing to use executive branch adjudicators instead of judges of the judicial branch, then the next logical question concerns the limits on this ability. Not all adjudications, of course, can be presented to the executive branch. Administrative law has developed in such a way as to suggest that administrative adjudications will generally be limited to the review of government-based licensing and entitlement decisions. The short version of this doctrine is that if the government bestowed a benefit or license and seeks to alter it (or deny it in the first instance), then it makes sense to permit the executive branch of government to have the first opportunity to consider claims challenging the government's decision.

A fundamental principle limiting lawmakers in the creation of administrative adjudicative bodies is that generally the legislative branch may not confer Article III judicial power on an adjudicator of the executive branch.[20] A more thorough discussion on this point would be beyond the scope of the topic, but it should suffice for these purposes to state that agency adjudication generally can replace adjudication by a judicial branch court when "public rights" are involved as the Supreme Court explained in one case: "[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible . . ." [21] Assuming, then, that the statutory or regulatory scheme is one well suited for adjudication in either the judicial branch or executive branch forum, the discussion next should consider requirements relative to both forums.

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20. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

21. Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 454 (1977), *quoted in* Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE 125 (4th ed. 2002).

1. The Need for Judicial Independence in the Deliberative and Writing Processes

When crafting a decision based upon an adversarial proceeding, an adjudicator – whether judicial or executive – must be free to do so in a manner that both *is* fair and *appears to be* fair. The need for independence in the deliberative and writing process is reflected in due process jurisprudence, a fact that should signal the need for some further explanation and definition. This is so because due process is not a fixed concept, but is instead expressed in terms of relativity: process that is due in some instances surpasses that which is due in others.[22] Applied here, the degree of independence called for in the decision-making process in some cases, particularly those wholly within the province of the judicial branch, is substantially greater than the measure of independence called for in others.

At issue, and providing the tension that sometimes arises between the ALJ and the agency using the ALJ, are the conflicting interests of independent decision-making sought by the ALJ and the agency's interest in consistent and prompt adjudication. As Professor Pierce describes it:

> Like federal judges, ALJs enjoy a high degree of independence from the agencies in which they adjudicate disputes. Their resulting insulation from policymakers and the political forces that constantly buffet an agency furthers the due process value of ensuring adjudication by unbiased, neutral decision-makers. The concept of due process, or fundamental fairness, embodies more than one value, however. Most people, including most or all Supreme Court Justices, recognize at least two other important values under the general heading 'fundamental fairness.' An individual is entitled to *prompt* adjudication of a dispute involving her interests in "life, liberty, or

22. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (articulating a three-part balancing test to determine due process minima); *see e.g.*, Van Harken v. City of Chicago, 103 F.3d 1346, 1351 (7th Cir. 1997) (applying the test in *Mathews* using a cost-benefit analysis to determine whether due process rights were violated in city parking ticket adjudications).

> property." An individual also is entitled to have her case resolved in a manner consistent with the resolution of cases involving similarly situated individuals. Consistency in resolution of adjudicatory disputes is an important due process value. If all individuals in a large class are judged by the same standard, the risk that the government will arbitrarily single out an individual for harsh treatment disappears.[23]

The ability of the government to maintain a process of adjudication that provides for timely and consistent decisions is a key factor in deciding to use executive rather than judicial branch decision-makers. Once it puts into place an unbiased decision maker, the legislature should have some confidence that the process will result in consistent decisions rendered in a prompt fashion. By the same token, lawmakers should also have some degree of confidence that the executive branch adjudicator will be properly trained and adequately supervised, so that the quality of the ALJ's decision-making is consistently high. No comparable system of quality control exists with respect to judges of the judicial branch; at least not any emanating from either the executive branch or the legislative branch. Judicial branch judges are accountable to the electorate in those jurisdictions where judges are elected, and are subject to impeachment, but otherwise are structurally and fundamentally insulated against overreaching by the other branches of government.

2. Controls Over the Judicial Writer: Structural, Political, and Practical

It should perhaps come as no surprise that judges of all stripes, including ALJs, tend to regard controls over their writing and their decision-making with great suspicion and oftentimes with deep resentment. Some say it is better to permit the ALJ to write poorly, ignore the law, and defy the agencies that use their services, than permit the agencies to impose *ex parte* restrictions on the ALJ's independence in the decision-making process. As one ALJ put it:

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23. Pierce, *supra* note 21, at 691.

> Ex parte input by the agency, also known as subsequent review or approval, of the decision by the agency prior to issuance is considered inappropriate control of the decision-making process presenting a false pretense of due process . . . . The zealously independent administrative adjudicator believes he or she should be free to be wrong, biased, inconsistent, illogical, inarticulate, and incomplete. Furthermore, these types of adjudicators believe that they should be free to ignore facts, law, and policy.
>
> To these adjudicators, errors or disagreements should be resolved during an open agency appellate review process, much as it is with 'real judges,' and not through, what they see as, pre-issuance 'quality control,' decisional interference.[24]

Given the role language plays in decision-making, and given the importance of effective communication in the decision (and, for that matter, in the adjudication process as a whole), it seems particularly important that lawmakers give some thought to the degree of control that will be exercised over the use of language by executive branch adjudicators.

3. Legislative Oversight of the Judicial Process Through Language and Codes

When fashioning regulatory schemes, like the creation of an administrative license revocation based upon the refusal to take roadside field sobriety tests or refusal to blow into an alcohol breath analyzer, lawmakers should be alert to the different philosophies attendant to the role of the ALJ, particularly with respect to the decision-making process. If the adjudicator appointed to carry out a regulatory scheme envisions herself as invested with judicial power like that of the judicial branch judge, then the results may include

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24. Robert Robinson Gales, *The Peer Review Process in Administrative Adjudication*, 21 J. NAALJ 56, 57 (2001).

some unintended and potentially counter-productive consequences. An ALJ who construes her position as the functional equivalent of a court of general jurisdiction, for example, may elect to disregard agency interpretation of policy despite a clear and on-the-record articulation of that policy during the evidentiary hearing. This may lead to the creation of an adjudicator who is accountable to no one, particularly where the ALJ's tenure is assured either through civil service protection or the benefits of a collective bargaining agreement. If the ALJ is not subject to performance evaluations like those traditionally used to evaluate civil servants, then he or she will operate without any real measure of accountability, at which point due process – the participant's expectation in a result that is based on consistent application of agency policy and law – is indeed threatened.

The divergence of thought on this point has some of the characteristics of a typical labor-management dispute, with one philosophy (the ALJ judicial model of decision-making) railing against the concept of quality control, and the countervailing philosophy (the institutional model) seeking to ensure prompt and consistent decision-making in furtherance of the legislative scheme. Professor Asimow described these divergent views this way:

> One struggle was between institutionalists and judicialists. An institutionalist believes that the primary function of administrative adjudication is to formulate and apply public policy. The process for producing an agency adjudicatory decision should resemble a corporation's decision to produce a new product. Decision makers should be free to talk to anyone who can contribute; every member of the staff should participate in making the decision in whatever way seems appropriate; there should be no separation of functions. An institutionalist is concerned with producing accurate and consistent decisions quickly and efficiently. The emphasis is on fitting each decision into a wise application of regulatory policy. Due process and judicial review, in this view, are necessary evils.
>
> A judicialist has a wholly different orientation. The

> judicialist believes that the emphasis should be on fairness and due process for the private party. The model should be civil litigation in court. Adjudication should apply existing policy, not make new policy with retroactive application. There should be a rigid separation between prosecution and judging, even if this means the process is less efficient and may not produce a decision that implements consistent agency policy. Judicial review is essential and courts should have broad powers. [25]

It would thus appear to be incumbent upon our legislators to evaluate the relative benefits and costs associated with the use of adjudicators who are part of the executive branch yet seek the independence that otherwise is reserved for the judicial branch. Underlying this issue is the question of accountability. If insulated against removal from office by civil service protections or by the terms of a collective bargaining agreement, and if appointed through a process in which the public had no direct role, then the ALJ will be largely unaccountable, and may engage in decision-making unchecked by any branch of government. The due process goals of providing a forum presided over by an impartial adjudicator would be met in this case, but there would be no assurance that the other due process requirements of a consistent and prompt process would exist.

D. Public Perception of the Adjudicative Process

In his research into the use of language in the adjudicative process, O'Barr and his team examined the role of language and its impact on the public.[26] Among the findings were discussions about two dynamics frequently encountered in proceedings held in both judicial and executive-branch adjudications. One of these was the role of silence or the suppression of speech, and another was the use of language in making credibility determinations. As anthropologists, O'Barr and his team were particularly interested in

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25. Michael Asimow, *The Administrative Judiciary: ALJs in Historical Perspective*, 20 J. NAALJ 157, 160 (2000).

26. O'Barr, *supra* note 6.

examining what O'Barr referred to as four specific styles of courtroom speech: powerful versus powerless speech, narrative versus fragmented history, hypercorrection, and simultaneous speech.[27] While O'Barr's findings generally go beyond the scope of this analysis, there is cause to consider his analysis of the role of silence and credibility determinations by the fact finder (either a jury or the trial court judge in a bench trial). The public's perception of these two phenomena, and the trial court's ability to control them (and avoid being controlled by them), may be useful in describing critical roles of language in the adjudicative process.

1. Interpretation, Exclusion, and Misperception Through the Use of Language in Adjudication

An essential element of adjudication, according to O'Barr, is interpretation:

> Interpretation is central to the business of the court. A court exists, among other purposes, to interpret the issues that bring people before it. It resolves in the verdict the multiple versions of the facts as reported by witnesses. It decides in the end who wins, overriding all individual opinions on the matter as well as the contending positions of the two sides. In doing this, the court interprets. Finally, lest anyone not wish to abide by the official interpretation, the court can command enforcement by the state of its interpretation and all decisions subsequent to it (fines, jail terms, monetary awards, and so on).
>
> But this is not the only kind of interpretation that occurs in court. In testifying, witnesses interpret. They report recollections, and in doing so interpret the past. Lawyers interpret at critical points in the trial: Opening remarks and summations are interpretations – suggested interpretations lawyers hope will be accepted by the decision makers. The jury also

27. *Id.* at 61.

> interprets in rendering its verdict. It decides and announces publicly which version, or suggested interpretation, it accepts. Thus the trial process is in effect a movement from multiple interpretations to a single, officially sanctioned one.[28]

In this regard, ALJs perform the same duties as the judicial branch judge with respect to the facts presented. It is their common task to interpret the testimony of witnesses and weigh the relative persuasive power of competing factual allegations. Unlike the judicial branch court, however, the ALJ is obliged to abide by the interpretation of agency regulations, provided those interpretations are made a part of the record. This is in contrast with the role of the judicial branch adjudicator, whose duties include evaluation of the constitutionality of statutory and regulatory enactments when called upon by the parties to make such a determination.

One example of the role of interpretation is the role of the adjudicator in response to silence. Consider O'Barr's observation about silence:

> Silence is not a style in the same sense as powerless speech, fragmented testimony, or hypercorrection. Yet it is like all of them. It too means something. Why is one witness slow in responding? Why does another not respond at all? Silence occasions these kinds of questions, and they are similar ones to those raised by other testimony styles . . . .
>
> Although it may seem at times that fascination with silence and how it works in court is the motivating force, it will become clear that the real reason we focus on it is to discover the complex ways in which the court as an institution and the individuals who make it up attempt to influence and manage the meaning of silence. In many ways, it is a more interesting case than any style of speaking per se – for

28. *Id.* at 97.

> in silence lies greater ambiguity and hence more opportunity to manage its meaning.[29]

In the administrative forum, where no jury is present, the adjudicator can interpret silence with a measure of skill (like that of the trial court, in a bench trial), beyond that of the ad hoc jury. When the executive adjudicator engages in such an interpretation, moreover, she must articulate having done so within a written report. Although in some instances jurors may be obliged to render special verdict findings, most of their work takes place in the confines of a jury deliberation room. Usually the nature of their deliberation is not subject to the light of day except for the answer to the ultimate question (e.g., a defendant's guilt or innocence). As O'Barr noted, jurors may well construe, however inappropriately, a criminal defendant's decision not to testify as a sign of the defendant's guilt:

> It is a further principle of American law that a defendant's decision not to testify—to remain silent—shall not create any presumption against the defendant. Note that this principle concerns how silence is to be interpreted. It cannot, for example, be argued that a defendant's refusing to testify is an admission that he or she has something to hide. Rather, the burden is on the State to prove its case without any assistance from a defendant who decides not to testify. What private meanings may be attached, for example, by jurors to the fact that a defendant does not take the witness stand remain unknown. It is probable, however, that some jurors may —despite the warning of the court—consider the fact that a defendant remains silent to be a negative factor.[30]

In contrast to the jury's secret deliberations, which give rise to the probability identified by O'Barr, the ALJ's decision-making process is patently expressed in their written report and recommendation. In

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29. *Id.* at 98.
30. *Id.*

this way, the administrative forum offers an advantage over a jury trial forum by providing more transparent and arguably fairer decisions.

2. Credibility Determinations

As already noted, central to the decision-making process is the act of interpretation. One of the fundamental tasks of the adjudicator is to interpret conflicting testimony with respect to material facts, and from the testimony make determinations based on the relative credibility of the witnesses. If this process is transparent and appears to be fair, the public's perception of the process will be favorable. If, on the other hand, the finder of fact makes credibility determinations that defy logic and common experience, and if the finder of fact is then not required to reveal the bases for these determinations (as is the case with jury determinations in criminal proceedings), then public confidence in the adjudicative process will suffer.

O'Barr makes the point that credibility determinations are an essential part of the decision-making process, and that such determinations are made based on "demeanor evidence," including "style, paralinguistic cues, and nonverbal behavior" in reaching a decision about a witness's credibility.[31] Given their advanced education, familiarity with the subject matter, forensic ability, and experience, ALJs can perform the required credibility determinations with uncommon skill. And, provided that they make a written record of having done so, the resulting interpretations will be affirmed. O'Barr relates the case of an administrative hearing examiner presiding over a case before the National Labor Relations Board in which the hearing examiner expressed his belief in the testimony of one party over that of another.[32] The court of appeals, in affirming the Board's order, noted the role of the agency adjudicator in making credibility determinations: "Repeatedly, the courts have said that, since observation of such 'demeanor evidence' is open to a trier of the facts, when witnesses testify orally in his presence, and since

31. John M. Conley, *The Law, appearing in* William M. O'Barr, *Linguistic Evidence: Language, Power, and Strategy in the Courtroom* 42 (Academic Press 1982).

32. *Id.*

such observation is not open to a reviewing tribunal, the fact-trier's findings, to the extent that they comprise direct or 'testimonial' inferences, are ordinarily unreviewable."[33]

Not only is it significant that the hearing examiner be given the power to make testimonial inferences, O'Barr notes that once such an interpretation is made, reviewing courts are ill-equipped to set those decisions aside: "Thus, the hearing officer, as the trier of fact (the jury analog), had a right to consider demeanor evidence. Since the reviewing court had no opportunity to view the demeanor in question, findings based on it would not be altered."[34] The significance of this delegation of adjudicative authority is substantial, in large part because the public has invested its faith in the ALJ to make key assessments of credibility, based on all available linguistic cues, cues that are beyond the reach of appellate courts (and thus are not likely to be rejected on appeal). As O'Barr explains:

> Demeanor evidence continues to be recognized by the law as valid evidence. But because of the very nature of such evidence, it is all but impossible for an appellate court to review the weight given to demeanor evidence by the trier of fact. The only applicable rule is that the trier of fact may use demeanor evidence; there are no rules limiting the way in which it may be used. Judge Jerome Frank, who wrote the [*Dinon Coal Co.*] opinion, commented: 'This lack of rules ('un-ruliness'), with its concomitant wide discretion in the fact-trier, yields inherent difficulties not surmountable by a reviewing court, regardless of whether the fact-trier be a judge, a jury, or a trial examiner.' The court concluded, in essence, that demeanor of witnesses is so significant that it cannot be disregarded, but the nature of this significance is so obscure that no rules can be established for assessing such evidence. Thus, an

33. *Id.* at 43, quoting Nat'l Labor Relations Bd. v. Dinon Coal Co., 201 F.2d 484, 487 (2d Cir. 1952).

34. *Id.*

> element at the very center of the functioning of the legal system is outside the law's control.[35]

In the hands of a jury, these determinations must be made, but remain a mystery unless individual jurors elect to relate their experiences after the trial. On the other hand, an ALJ's evaluation of witnesses' relative credibility is presented through the written report of the adjudicator. If as O'Barr suggests, the process of making credibility determinations is both "at the very center of the functioning of the legal system" and at the same time "outside the law's control" when performed by a jury or a judge in a bench trial, then the administrative approach requiring a written articulation of the factors that led to a rejection of one version of the facts over another would seem to better serve the public interest.

E. In Conclusion: Key Factors that Should Help Determine the Allocation of Authority to Render Adjudication as Between the ALJ and the Judicial Branch Judge

When lawmakers determine a legislative scheme should include the adjudication of rights by an impartial decision-maker, a key question must be whether the fact finder will be part of the independent judicial branch of government or part of the executive branch. As noted above, not all legislative schemes lend themselves to the use of an ALJ, but for those schemes that implicate public rights, some thought should be given to making an informed choice of adjudicator.

A review of the studies of the use of language helps identify some of the key factors to be considered when electing between a judicial branch judge and an ALJ. These factors include: the relative need for independent decision-making, the relative due process rights of review, and the need for accountability in the decision-making process.

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35. *Id.* at 43-44 (quoting 201 F.2d at 490).

1. The Relative Need for Independent Decisionmaking

The use of an independent judicial officer of the judicial branch of government represents society's investment in the paramount form of adjudication. Tested throughout our nation's history, the judicial branch of government has proven its fierce determination to remain unalterably committed to independence in the adjudicative process. As a society, however, we have recognized the need to preserve our limited judicial resources. Public rights may well be determined in the first instance by executive-branch adjudicators, so as to conserve judicial resources.

Not all decisions require the infrastructure of trials conducted in the judicial branch. To the extent that a decision-making process involves a check on governmental action, the administrative forum, with its structured written reporting, may better serve both the government, because of its efficiency and dispatch, and the governed, because of its transparency.

2. Due Process and the Relative Rights of Review

As Judge Posner noted, although "the use of cost-benefit analysis to determine due process is not to every constitutional scholar's or judge's taste . . . it is the analysis prescribed by the Supreme Court . . . ."[36] However, given that such an analysis is the law, lawmakers should not feel constrained when considering adjudicative schemes to not provide the full panoply of rights to all with claims concerning public rights. "The due process clause is not a straightjacket, preventing state governments from experimenting with more efficient methods of delivering governmental services . . . ."[37]

Given the significant role of the spoken and written word in the adjudicative process, a key consideration when designing a legislative scheme involving public rights should be whether enforcement of the law is better served with a written articulation of the fact finder's rationale or without it. Along these same lines, the choice must be made between using the independent judiciary as a fact-finder of first instance, or to permit the findings of fact to be

36. Van Harken v. City of Chicago, 103 F.3d 1346, 1351 (7th Cir. 1997).

37 *Id.*

rendered while the matter is still within the original jurisdiction of the agency, reserving independent judicial review until the executive branch has exhausted its decision-making apparatus.

3. Accountability in the Decisionmaking Process

The ultimate consideration for governmental action, it would seem, is whether the process will lead to results that not only are fair but also appear to be fair to all who are exposed to the process. Inextricably entwined in this notion of fairness is the expectation that the adjudicator be accountable for her decision-making. The requirement that the decision maker reduce the analysis of the case to writing is a significant factor, and should be regarded as such when crafting regulatory schemes. Also lending itself to greater accountability is the requirement that the adjudicator maintain a familiarity with the tools of effective communication: clear writing skills, active listening skills, and the effective use of verbal and nonverbal communication in controlling the process of gathering evidence and rendering decisions. Procedural and presentational styles make a difference, as O'Barr suggests in his evaluation of linguistic evidence, and those differences can be exploited by making an informed choice of adjudicators when creating legislative or regulatory schemes.[38]

38. O'Barr, *supra* note 6, at xii.