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ALJ Ethics: Conundrums, Dilemmas, and Paradoxes

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ALJ ETHICS: CONUNDRUMS, DILEMMAS, AND PARADOXES

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This symposium deals with two problems: Administrative Law Judge (ALJ) ethics and the problem of the ethical conflicts for government employees who leave government service. The ABA Ethics 2000 Commission and the Judicial Council have recently considered several changes in the ethical rules applicable to ALJs and former government lawyers. While preparing, I discovered that what I had thought was a settled issue—that ALJs were, or if they were not, should be, covered by the ABA Canons of Judicial Ethics—was unsettled for a variety of reasons. No one disputes that ALJs must be bound by, and indeed do follow, ethical norms of the legal profession. However, should those ethical norms be the same as those followed by Article III judges? The entire question of which ethical standards are, or should be, applied to ALJs is unsettled, but there are three characteristics of ALJ ethics that are clear: (1) the question of ethical norms for state ALJs is relatively neglected, (2) there are a variety of ethical codes applicable to ALJs in different states, and (3) there is disagreement over whether the Canons of Judicial Ethics should be applicable to state ALJs, at least if, or especially if, they are not part of a central ALJ panel. This article will examine whether the Canons of Judicial Ethics should be applied to ALJs. In non-ALJ central panel states, it concludes that they definitely should not be applicable; and, even in central panel states, it is not clear that the judicial canons should be applied because of the ambiguous status and history of agency adjudication and of ALJs.

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I. INDEPENDENCE

Citizens who face the government in an adjudicative proceeding involving an agency expect a fair hearing.[1] Their expectation comes from several sources. From state and federal due process clauses, we have come to believe as a society that all who are subject to government action are entitled to a "fair and impartial adjudicator."[2] This means that the hearing must be conducted by a decision maker who is neutral and unbiased[3] and that the judge should be "disinterested, impartial[,] and independent."[4] Due process is applicable to administrative hearings and judges.[5] The absence of the procedural safeguards that are available in a judicial trial has been recognized to make it even more essential for the ALJ to be impartial in order for a fair hearing to occur.[6]

> Fairness, the impression and reality that a party has been heard and understood in a forum free from bias, dishonesty or injustice, has both an objective and subjective dimension: first, objective structures must exist to guard against overreaching by the government, trickery by adverse parties, or misuse of judicial proceedings. Second, and perhaps more elusive, the litigants and the public must draw from their experiences in these systems the sense that justice has been done, that they have been heard "'at a meaningful time and in a meaningful manner.'"[7]

One source of perceived unfairness by ALJs is their ambiguous role. On the one hand, they are employees in the executive branch; on the other hand, they are said to be judicial or "quasi judicial" officers.[8]

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[1] Christopher B. McNeil, *Due Process and the Ohio Administrative Procedure Act: The Central Panel Proposal*, 23 OHIO N.U. L. REV. 783, 783 (1997).

[2] *Id.* at 783-84.

[3] *See* Miles v. Chater, 84 F.3d 1397, 1400 (11th Cir. 1996).

[4] United States v. Orbiz, 366 F. Supp. 628, 629 (D.P.R. 1973).

[5] Gibson v. Berryhill, 411 U.S. 564, 579 (1973).

[6] *See* NLRB v. Phelps, 136 F.2d 562, 563-64 (5th Cir. 1943).

[7] McNeil, *supra* note 1, at 783-84 (footnotes omitted).

[8] Hon. Edwin L. Felter, Jr., *Special Problems of State Administrative Law Judges*, 53 ADMIN. LAW. REV. 403, 403-04 (2001).

The status and role of ALJs as independent judicial officers, however, has been a "fundamental" problem in our system of government.[9] There is a widespread notion that ALJs are employees, not judges; as employees, it is thought that ALJs can be neither independent nor unbiased.[10]

The perception that status as an employee is incompatible with decisional independence has a history that dates back to the American colonies.[11] Lack of independence of judges in the American colonies was one of the causes of the American Revolution.[12] Alexander Hamilton argued forcefully in *The Federalist* that liberty could not exist under the new American Constitution unless the independence of the judiciary was guaranteed.[13] Judicial independence has two aspects. One is an individual judge's "decisional" independence, which is the power and right to decide a case free of outside influence purely on the basis of impartial and neutral principles of law, fairly applied.[14] The other is "institutional" independence, or the right of the entire judicial branch to make decisions according to law without interference by the other branches or by outside influences.[15] Hamilton argued that judicial independence can only exist when the judge is free in both the "decision making process and [in writing, or] crafting" a decision to follow her "own reason, logic, knowledge of the law, . . . and *professional ethics*."[16] Thus, it was recognized early that having

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[9] *Id.*

[10] *Id.* at 410.

[11] *Id.* at 411.

[12] Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence, in An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence* (1997), *available at* http://www.abanet.org./govaffairs/judiciary/rappa.htlm (last visited 7/23/02).

[13] "'[T]here is no liberty,' if the powers of judging be not separated from legislative and executive powers." "The complete independence of the courts of justice is peculiarly essential in a limited constitution." THE FEDERALIST NO. 78 (Alexander Hamilton).

[14] Thomas L. Cooper, *Attacks on Judicial Independence: The PBA Response*, 72 PA. B. ASS'N. Q. 60, 61 (2001).

[15] *Id.*

[16] Robert Robinson Gales, *The Peer Review Process in Administrative Adjudication*, 21 J. NAT'L ASS'N ADMIN. L. JUDGES 56, 57 (2001) (emphasis added).

applicable professional ethics was a critical component of judicial independence, fairness, and neutrality.

Analysts have also observed that there are three purposes for judicial independence in a constitutional democracy. First, an independent judiciary ensures the rule of law; so, everyone is subject to the same rules applied in the same fashion. The rich, powerful, or politically connected cannot avoid the operation of law against them or ensure that it will be exercised in a way that is favorable to them.[17] Second, only "laws that are constitutionally legitimate [should] . . . be enforced"; the court must be able to declare statutes enacted by the legislature invalid on the basis that they violate the constitution.[18] Third, it is important that validly enacted laws be enforced and given their full scope. This means that the executive ought not to be able to avoid enforcing laws previously validly enacted.[19] If these considerations are translated to the process that is due to litigants before administrative agencies, it means that they are entitled to have an impartial, independent judge who will: apply applicable statutes in an even handed manner, apply existing precedents in an impartial manner, and apply all applicable law without regard to personal gain or bias. The applicable professional ethics are a component of the fairness and neutrality expected of judges and help to insure that these three purposes of judicial independence are achieved or, alternately, they are an essential component of independence.

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[17] John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 366 (1999).

[18] *Id.*

19 *Id.* at 366-67.

> The worry here is that officials in the executive branch, or the current legislature itself, may interfere in the enforcement of statutes enacted by previous legislatures without bothering to go through procedural formalities. In the interest of democracy, courts must have sufficient autonomy to resist the temptations to give too much deference to current holders of economic or political power.

Id.

II. THE ROLE OF THE ALJ AND THE PROBLEM OF AMBIGUITY

This analysis of the expectation, and necessity and authority for judicial independence, has involved an examination of Article III judges. Many assume at this point in the history of administrative agencies that the status and role of the ALJ is identical to that of the Article III judge. But that is an assumption that leaves a crucial question unasked and unexamined: Is the role of the ALJ in our states the same as or different from that of the Article III judge in terms of function and independence?

As will be seen, there are several major differences. Professor Michael Asimow, in considering administrative adjudication, has observed that

> [t]he process of administrative adjudication *superficially* resembles litigation in court, but the differences between the systems are *fundamental*. Trial and appellate judges are independent and isolated and perform no tasks other than judging. In contrast, administrative adjudication is only one facet of the regulatory process by which an agency carries out a legislative mandate. In many situations, the same people who function as adjudicative decision-makers or their advisers also have responsibilities inconsistent with judging and which may result in strong policy opinions.[20]

This suggested or suspected role of the ALJ in carrying out agency policy in adjudication has been recognized to play a part in many noncentral panel adjudications.[21] Moreover, ALJs adjudicate in a vast

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[20] Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1124-25 (1992) (emphasis added).

[21] *Cf.* Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475, 488 (2001). (The delegated legistlative functions performed by the ALJ is viewed as a threat to the promise of a central panel, which is "an unbiased ALJ[,] insulated from agency control.") *Id.*

> In the absence of a central panel, most agencies are at liberty to hire their own ALJs, many of whom then become employees of the agency, subject to supervision and tenure by the agencies they serve. This arguably enables the agency to groom its ALJs for the job. The ALJ has

number of different agencies with widely diverse tasks.[22] This combination of policy influence or directedness, coupled with the staggeringly varied tasks of different agencies, suggests at least two differences between ALJs and Article III judges. First, ALJs are not impartial and neutral in the same sense as Article III judges, but frequently have a role in developing[23] and applying agency policy. Second, it is very difficult to generalize about exactly which policies ALJs promote, because they vary from agency to agency.

In addition to these differences, non-central panel ALJs, considered to be employees, exist within a bureaucratic structure and may be subject to performance evaluations.[24] It is not unusual for these performance evaluations to take into account *results*, that is, the decisions in adjudications that the ALJ has reached. Such evaluation has the potential to, or actually interferes with, independent adjudicatory decision making. It has been observed that, if the ALJ knows that she is being evaluated on the basis of case outcomes, the tendency for most normal human beings is to "look over their shoulder" and be influenced consciously or unconsciously by the superior's wishes, desires, or policies.[25] The pressure can be overt; a superior may terminate or discipline an ALJ for not deciding cases in accord with what that superior or his department desires.[26] Evaluation

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> or gains the experience needed to resolve complex administrative issues and better appreciates the mandate of the agency and the need to interpret the rule of law in a manner that is consistent with agency policy.

Id.

[22] For example, one commentator estimated that in 2001, in Maryland alone, there were twenty-eight different state agencies administering over 500 different programs and holding over 50,000 hearings per year. *See* Hon. John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419, 437 (2001). Another commentator noted that there were seventy-five different agencies acting in Minnesota. *See* Hon. Bruce H. Johnson, *Strengthening Professionalism Within an Administrative Hearing Office: The Minnesota Experience*, 53 ADMIN. L. REV. 445, 447 (2001).

[23] A good example of ALJs developing policies and rules is the NLRB in its first fifty years of existence: the agency did not promulgate a single rule. Instead, it chose to make all decisions through adjudication.

[24] *See generally* Hardwicke, *supra* note 22, at 425.

[25] *Id.* at 425-26.

[26] In *Perry v. McGinnis*, a hearing officer was terminated because he failed

practices and forms for ALJs that contain sections on "correct application" of the law by an ALJ's superior exert pressure on ALJ independence.[27] The greater the authority that an executive officer has over an ALJ, the greater the potential or actuality for loss of independence.[28] Some devices that have been used to control the results of ALJ decision making by executive employees are "hiring and firing, . . . quality control management," and production quotas imposed by the same agencies or executive branch that calls on them for judicial opinions.[29] Many of these devices involve direct interference with ALJ independence.

There exists other, more direct, evidence of the lack of ALJ independence. For example, in the federal arena, although ALJs have attempted to argue before the federal courts that their status is akin to Article III judges, the United States Supreme Court has rejected such claims and held that ALJs do not have the protection of permanent tenure, and they may be removed like any other government employee by a reduction in force.[30] In the same decision, the United States Supreme Court rejected the notion that ALJs are "very nearly the equivalent of [federal] judges."[31] Thus, the sole source of the claim of ALJ independence is the respective Administrative Procedure Act

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to meet a statistical quota for convictions imposed by his superiors. *See* Perry v. McGinnis, 209 F.3d 597, 606 (6th Cir. 2000). In *Hummel v. Heckler* the ALJs objected because HHS kept statistics on each ALJ on the percentage of cases in which they allowed and disallowed benefits. *See* Hummel v. Heckler, 736 F.2d 91, 94 (3d Cir. 1984). The ALJs maintained that the program was designed to discourage them from awarding benefits. *Id.*

[27] Felter, Jr., *supra* note 8, at 415.

[28] *Report of the Special Committee on Administrative Adjudication*, N.Y. STATE BAR ASS'N (1999), *reprinted in* KAREN MILLER AND JOYCE MCALISTER, N.Y. PRACTICING LAW INST., MASTERING ADMINISTRATIVE TRIALS & HEARINGS: A PRACTICAL GUIDE FOR ADMINISTRATIVE LAW JUDGES AND ATTORNEYS 611-12 (2000).

[29] Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431, 432 (1999).

[30] Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128, 142-43 (1953).

[31] *Id.* at 144 (Black, J., dissenting), *quoted in* K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95, 123 (1995).

(APA) under which the ALJ operates.[32] In analyzing the status of federal ALJs and concluding that they are not independent, even under the generous provisions of the federal APA, which seeks to grant some independence to them, the ALJ is not independent:

> Because the ALJs' office and authority are completely controlled by the will of Congress, and the ALJs are agency employees . . . , it would be illogical and inappropriate to cloak ALJs with the constitutional concept of judicial independence.
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> . . . [T]he APA which regulates the appointment, compensation, and conditions of service of the ALJs . . . [is] the sole source of ALJ independence. By enacting the APA, Congress had not only defined the precise role of ALJs in the system of federal administrative adjudication, but also determined the level of decisional independence appropriate for the performance of ALJ functions.[33]

However, there is a strong argument that in order for ALJ independence to exist, the ALJ cannot be "beholden" to the agency for which she works for compensation, tenure, and/or conditions of employment.[34] Nevertheless, except in states that have adopted a central panel approach, ALJs are part of the agencies for which they decide cases. This means that the potential for the use of all of the devices just described for actual control or pressure for particular outcomes by superiors of ALJs exist in most states.

Although this potential for direct, intentional pressure from managerial devices or political superiors is often cited as the sole or principal danger to ALJ independence, there exists another obstruction to independence and neutrality that arises from the placement of the ALJ within an agency. This is a form of potential *actual* bias or interference.[35] Because ALJs are part of an agency that possess specialized expertise, long time association with a particular agency and its personnel tends to indoctrinate or inculcate into the

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[32] K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95, 126 (1995).

[33] *Id.*

[34] Richard B. Hoffman & Frank P. Cihlar, *Judicial Independence: Can It Be Without Article III?*, 46 MERCER L. REV. 863, 864-65 (1995).

[35] Pillai, *supra* note 32, at 124-25.

ALJ "the agency culture, viewpoints, and approaches to problems."[36] Even with separation of investigatory and prosecutorial functions from judging, because ALJs can only decide the cases that are brought before them by other agency personnel, the agency hearing process is inevitably skewed in favor of agency values and policies.[37] The existence of this type of structural influence may well furnish some support for the public perception, which will be examined below, that ALJs are just another agency employee and thus, not neutral or independent, but covertly imbued with agency culture, bias, and policy.

In addition to the potential for actual pressure or control on ALJ decision and decisional processes or for ALJ acculturation or internalization of agency policy, there exists an equally harmful public perception of bias in agency adjudication that arises from the agency structure where the ALJ is part of the same agency whose cases she decides.[38] This public perception exists, because the ALJ is part of the agency that also prosecutes cases.[39] The employer-employee relationship between the agency and the ALJ creates a perception that the ALJ is biased in favor of the agency and that, therefore, members of the public do not receive a fair hearing.[40] As one ALJ put it:

> [M]any people believe that those of us who are not in a central hearing agency are biased in our adjudicative responsibilities. This belief is based on the fact that ALJs are hired, promoted, supervised, and paid by the very agency for whom we are deciding if the decisions that the agency made are correct. The public thinks this is unfair[.] . . . Our offices, staff support, equipment[,] and everything we have is provided by one of the parties in our hearings. Too often the public becomes used to being treated badly by the

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[36] *Id.* at 125. (footnote omitted).

[37] *Id.* (footnote omitted).

[38] McNeil, *supra* note 1, at 800-01.

[39] *Id.*

[40] Karen S. Lewis, Comment, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929, 929, 930-31 (1990).

> bureaucracy and it doubts that it can get fair treatment by anyone in government.[41]

Arguably, this perception is to a considerable extent justified. Now Justice Antonin Scalia, before he became a member of the United States Supreme Court at a time when he was an acknowledged expert on administrative law, observed that, although Congress has chosen to refer to them as judges, federal ALJs

> are entirely subject to the agency on matters of law; they can be reversed by the agency on matters of fact, even where demeanor evidence is an important factor; and they can always be displaced, if the agency wishes, by providing for hearing before the agency itself or one of its members.[42]

There is another perceptual problem involving the public and ALJs. Paradoxically, although the public regards the ALJs as part of the same agency and draws an adverse inference from that relationship, they also have an expectation of the ALJ, which is formed by their perception that the ALJ is in some fashion a *member of the judiciary*, even though she decides agency cases. This perception consists of the idea that ALJs and Article III judges are all judges—that is, persons that decide cases and controversies—and hence, members of the same branch of the legal system to members of the public.[43] Thus, the expectation of the public is that the ALJ will be neutral, fair, and unbiased like an Article III judge. Even though this public perception is incorrect, in the sense that ALJs are not Article III judges, members of the public expect a hearing by a judge that is unbiased in the sense of being neutral, impartial, and not concerned with application of agency policy.[44] This is because their case is being decided by a person whom they believe is a "judge" under our federal and state constitutions and under the American rule of law.

On the other hand, most persons familiar with administrative law in the United States recognize that the role of the ALJ is not the same

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[41] Hon. Edward J. Schoenbaum, *Improving Public Trust & Confidence in Administrative Adjudication: What Administrative Law Practicioners, Judges, and Academicians Can Do*, 53 ADMIN. L. REV. 575, 579 (2001).

[42] Antonin Scalia, *The ALJ Fiasco-A Reprise*, 47 U. CHI. L. REV. 57, 62 (1980) (footnotes omitted).

[43] *See generally* Johnson, *supra* note 22, at 468-70.

[44] *Id.* at 445-46.

as that of the Article III judge, and that this is the conundrum "at the heart of the concept of an administrative judiciary."[45] It has been observed that although administrative adjudications have some of the procedural characteristics of judicial proceedings, those procedures may be meaningless, because the proceeding is conducted by an agency with an interest in the proceeding—as party, as policy maker, or as collector of fines—and the proceeding is conducted by an agency employee who is supervised by that same agency.[46] Most importantly, the ALJ has an interest in the *policy* of the agency of which she is a part.[47] This policy interest of the agency ALJ may create one of the most serious actual—not merely perceptual—problems of ALJ independence and fairness:

> First and foremost, can judges who have been appointed to effectuate overall agency policy ever attain adequate judicial independence to satisfy our basic conception of that elusive quality? Should these judges, assertedly needed to provide administratively expert decision making in particular specialized areas of agency expertise, become generalists . . . governed in their conduct of cases by the standard procedures . . . used in all Article III courts?[48]

It has been persuasively argued that, in spite of the *appearance* of judicial role, the ALJ is an "integral" part of the executive branch who lacks the independent status of an Article III judge.[49]

III. HISTORICAL SOURCES OF AMBIGUITY IN THE ALJ ROLE

Part of this problem of the ALJ's role arises from the history of the ALJ and the creation of administrative procedure in the APA, which was also followed by many states. The creation of the APA involved political compromises that made the status of the ALJ wholly

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[45] Hoffman & Cihlar, *supra* note 34, at 864.

[46] *Report of the Special Committee on Administrative Adjudication*, *supra* note 28, at 510.

[47] *Id.*

[48] Hoffman & Cihlar, *supra* note 34, at 864.

[49] Lewis, *supra* note 40, at 938.

ambiguous, but that also made the ALJ an agent for accomplishing agency policy:

> In order for the New Deal to have succeeded, agencies needed to implement bold new policies that could not be hampered by any *independent* administrative law judges' decisions[,] which would conflict with the sweeping objectives of the agency's overarching agenda. The result was that the administrative adjudicative decision making process was treated as a vehicle for the implementation of agency policy.[50]

Historical analysis explains the status of the ALJ in terms that underscore the ALJ's actual, not merely perceived, subservience to agency policy:

> The rise of the administrative state--the creation of administrative agencies with broad-scale authority, rule-making power, and so on--has meant that it was necessary to create administrative adjudicators. That is so because, when an agency has broad-scale authority (including rule-making authority), *it needs people to assist it in enforcing its rules*.[51]

Giving agencies the power to adjudicate cases and the concomitant creation or evolution of the position of hearing examiner or ALJ under the APA involved an "epic political battle."[52] Several groups participated in the struggle to define the powers of the agencies and, in particular, the powers and status of the hearing examiner or administrative judge. One group has been named the "institutionalists." They believed that an ALJ's principal purpose was to put agency policy into effect.[53] Institutionalists did not believe in separation of functions.[54] They emphasized rapid, accurate, and inexpensive decisions with particular attention to the intelligent

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[50] Felter, Jr., *supra* note 8, at 404 (emphasis added).

[51] W. Michael Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes?*, 20 J. NAT'L ASS'N ADMIN. L.JUDGES 95, 98 (2000) (emphasis added).

[52] Michael Asimow, *The Administrative Judiciary: ALJs in Historical Perspective*, 19 J. NAT'L ASS'N ADMIN. LAW JUDGES 157, 160 (1999).

[53] *Id.*

[54] *Id.*

application of agency policy.[55] The institutionalists were pitted against the "judicialists," who believed 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.[56]

On the other hand, a related political struggle that involved pro-New Deal politicians and traditionalist politicians occurred at the same time.[57] Later, revisionist analysts and commentators obscured and mischaracterized the nature, and even the existence, of this contentious and hard fought New Deal political battle over the status and powers of agencies and ALJs.[58]

The primary focus of that political battle was the passage and content of the APA.[59] Central issues over which this APA political

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[55] *Id.*

[56] *Id.*

[57] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996).

[58] *Id.* The APA's history, briefly stated, was of the following nature:

> Since the time of the APA's adoption, and even before, some commentators have suggested that the APA was universally beloved legislation. They have argued that, although various factions initially disagreed about the APA's virtues, the factions unanimously approved the bill once they discovered its excellence. They suggest that the bill was so carefully and scientifically drafted that to know it was to admire it. . . . This widely held perception of the APA's history is inaccurate.

Id.

[59] *Id.* at 1558-60. Professor Shepherd writes,

> the fight over the APA was a pitched political battle for the life of the New Deal. The more than a decade of political combat that preceded the adoption of the APA was one of the major political struggles in the war between supporters and opponents of the New Deal. Republicans and Southern Democrats sought to crush New Deal programs by means of administrative controls on agencies. Every legislator, both Roosevelt Democrats and conservatives, recognized that a central purpose of the proponents of administrative reform was to constrain liberal New Deal agencies, especially the National Labor Relations Board and Securities

contest was fought involved: the power of agencies to adjudicate and the related role, powers, and status of administrative judges.[60] It came as a surprise to this writer to learn that in this political struggle the ABA strongly opposed changes that gave the agencies the power to adjudicate.[61] The outcome of this long political struggle, which

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and Exchange Commission.

Id. at 1560.

[60] *Id.* Professor Shepherd describes the ABA proposal as opposed to the New Deal in the following terms:

> In its 1937 report for the ABA summer meeting, the ABA Special Committee on Administrative Law . . . offered a much stricter bill. The bill proposed to reform agency procedure and to provide additional judicial review of agency decisions. The bill's approach led, after nine years of debate and modification, to the Administrative Procedure Act. More immediately, the bill was the direct progenitor of the Walter-Logan bill, which would split the country in 1940. . . . The bill constrained agencies in three ways. *First, the bill controlled agency adjudication —agency adjudication was an agency's resolution of disputes about the application of the agency's rules to specific individuals.*
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> These provisions were constraining. The bill's procedural requirements applied regardless of an adjudication's nature—regardless of whether the matter was large or small, complicated or simple. The requirements of a three-member board and a written record and findings were the only substantial new requirements. Nonetheless, the requirements both for several adjudicators, where one had served before, and for formal proceedings would have burdened and slowed agencies substantially. Matters that agencies previously resolved informally and quickly might now receive formal hearings.

Id. at 1582-83 (emphasis added).

61 *Id.* at 1571. Professor Shepherd writes,

> Even the committee's definition of an administrative tribunal suggests the committee's views: "[I]t is something that looks like a court and acts like a court but somehow escapes being classified as a court whenever you attempt to impose any limitations on its power."
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> The committee argued with special vigor that agencies violated constitutionally required separations that were essential to the success of American government. The ABA opposed the combination, which had occurred in many agencies, of legislative, executive, and judicial functions: many agencies would establish rules, enforce them, and adjudicate violations. The agencies upset the delicate constitutional balance, because they conducted much adjudicative activity that

continued until the APA was enacted after the Second World War, was that neither side was able to triumph in the sense of having its conception of the power of agencies to adjudicate and the role and status of the ALJ incorporated into the APA. Ultimately, a compromise—the version of the APA actually enacted—was reached. In large part because it was such a compromise, the APA is deliberately ambiguous:

> [T]he parties intentionally included ambiguous provisions that courts would later interpret. Each party then hoped that the courts would resolve the ambiguities in the party's [own] favor. Instead of agreeing on specific provisions, the parties agreed to a game of roulette in which the courts spun the wheel. The roulette wheel insulated the parties from their constituents' ire. If a party lost the statutory roulette, the party could assert to constituents that the party had bargained hard and achieved the constituents' goals. The party could blame the unfavorable outcome on loose-cannon, activist courts.[62]

Two particular areas of APA compromise were agency adjudication and the role and status of hearing examiners.[63] This adjudication compromise was reached between proponents of a status for hearing examiners as an integral part of executive branch enforcement and those who thought that the adjudication model should be formal, with the hearing examiner being wholly neutral, like an Article III judge.[64] The existence and extent of the compromise is obvious in one of the legislative reports that accompanied a proposed bill that became the APA. That report stated that the object of Congress in enacting the APA was to create hearing examiners who are "a special class of semi-*independent subordinate* hearing officers."[65]

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otherwise would have occurred in the courts.

Id. (quoting 1933 A.B.A. ANN. REP. 199) (statement of committee Chairman Louis G. Caldwell).

[62] *Id.* at 1665.

[63] Bybee, *supra* note 29, at 443.

[64] *Id.*

[65] *Ramspeck*, 345 U.S. at 132 (quoting S. DOC. NO. 79-248, *reprinted in* ADMIN. PROC. ACT, 79TH CONG., LEGISLATIVE HISTORY OF THE ADMIN. PROC. ACT, 192 (1946) (emphasis added).

It has been observed that there is irony in the juxtaposition of the terms "independent" and "subordinate"; these terms are also clear indications of compromise.[66] The compromise reached in the APA left the status of the ALJ unresolved, subject to varying interpretations, and unclear.

What did each side to the APA compromise receive? The pro-New Deal group received hearing examiners, who were agency employees subordinate to agency heads who retained the power to make final decisions and the power to make many decisions informally without adjudication with an ALJ presiding.[67] On the other hand, the anti-New Deal traditionalists received some due process protections, internal separation of functions, and some tenure protection for ALJs.[68] It has been observed that on the subject of the role and status of the ALJ, the APA is purposely vague, because the parties were not able to reach agreement on any concept or language that was plain and unambiguous.[69] It has also been observed that placing the ALJs within the agency whose cases are heard by the ALJ, instead of creating a separate administrative court or creating an independent corps of ALJs, created the "paradox of independent adjudicators in a situation where questions might be raised about their independence."[70]

Thus, questions about the status of ALJs and the public perception of their potential lack of independence are not mere coincidences, nor are they entirely without factual support: there is historical and political evidence that the APA purposely left the status of adjudication and the status of the ALJ ambiguous. Paradoxically, this ambiguity involved investing ALJs with characteristics and attributes of both an executive branch employee *and* an Article III judge.

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[66] Bybee, *supra* note 29, at 443.

[67] Asimow, *supra* note 52, at 162.

[68] *Id.*

[69] Ann Marshall Young, *Judicial Independence in Administrative Adjudication: Past, Present and Future*, 1999 JUDGES' J. 16, 20.

[70] Russell L. Weaver, *Management of ALJ Offices in Executive Departments and Agencies*, 47 ADMIN. L. REV. 303, 306 (1995).

IV. AMBIGUOUS ALJ ROLE AND STATUS CREATES ETHICAL PROBLEMS

The ambiguity that arose from this political compromise created ethical problems with respect to ALJs. We expect our judges to be neutral, fair, and unbiased. Our canons of judicial ethics require this of our judges. However, it has frequently been observed that judges cannot perform the judicial function without independence and without a set of ethics that require neutrality.[71] State and federal constitutional due process clauses define the procedure that must be followed to constitute a fair trial, and ethics rules and canons define the concept of fairness in terms of the neutrality and freedom from preconceived notions or bias of the decision maker. There is no question that canons of ethics require this from Article III judges,[72] but is it required of ALJs? Given the differences in role and status in non-central panel states, can the same ethical freedom from bias be required of ALJs? Should the ALJ be subject to the canons of judicial ethics?

The answer to these questions appears to be frequently, "No." Is it possible or helpful to impose the same requirements of neutrality by imposing the same ethical rules or canons on ALJs as are imposed on Article III judges? It would seem that, in order to answer that question, the duties and place in the governmental structure of Article III judges and ALJs should be compared. If the roles and structural status of the two types of judges are significantly different, that may pose a problem with imposing the same ethical obligations on both. This in turn leads to a set of inquiries regarding the role and status of ALJs.

What are the duties of the ALJ? The ALJ is charged with furtherance of agency policy and must remain oriented to agency policy in adjudicating.[73] Further, the ALJ has a narrower jurisdiction

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[71] For instance, Ann Marshall Young states: "I propose the term *functional decisional independence* to refer to the way an administrative law judge performs the adjudicatory function (judging) on a day- to-day basis. Ethical rules require judges to perform this function in a manner that is neutral, impartial, and independent of inappropriate influences." *See* Young, *supra* note 69, at 42.

[72] The discussion that follows focuses upon state ALJs, not federal ALJs.

[73] *See supra* notes 22-23 and accompanying text.

or focus; she is a specialist as distinguished from a generalist decision maker.[74] ALJs operating in connection with different agencies have widely diverse and varied statutory tasks. Unlike Article III judges, ALJs exist within a bureaucratic structure; they are employees over whom there is actual or apparent executive authority.[75] Even where there are ineffect provisions for internal ALJ independence, there is an inherent conflict between the perceived need for independence and the need to evaluate and to make the performance of ALJs uniform and consistent with agency policy.[76] In fact, one view of the ALJ was that he was not and could not be an independent judicial officer because,

> [i]n order for the New Deal to have succeeded, agencies needed to implement bold new policies that could not be hampered by any independent administrative law judges' decisions[,] which would conflict with the sweeping objectives of the agency's overarching agenda. The result was that the administrative adjudicative decision making process was treated as a vehicle for the implementation of agency policy.[77]

This position has been recognized more recently. Several leading commentators advocate executive performance evaluation of agency adjudicators as one of the best ways to achieve consistency, scientific decision making, and quality control.[78] This position appears to be

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[74]*See generally* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 346 (1991). (Professor Harold Bruff has thoughtfully examined the differences between attributes of Article III courts, specialized Article I courts, and agency adjudication.)

[75] Felter, Jr., *supra* note 8, at 411.

[76] There is a "conflict between the need for decisional independence of ALJs and the need of agencies to control the efficiency and productivity of administrative adjudication." *See, e.g.*, Hon. James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U. 629, 637 (1993). Judge Timony catalogues a substantial number of leading modern American administrative law scholars who, believe that independence of ALJs is not as productive of reasoned and uniform decisions as an "'internally managed system[,]'" where performance evaluation of ALJ superiors insure consistency of decisions. *Id.* (quoting Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1358 n.69 (1992)).

[77] Felter, Jr., *supra* note 8, at 404.

[78] Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1358 n.69 (1992); *see also* Richard J. Pierce, Jr., *Political*

based upon the idea that ALJs are subordinate employees. Another leading analyst has observed that, in the federal arena, there is increasing use of non-ALJ judges within the agencies.[79] In fact, in the federal arena, there has been a "drift away from" the use of ALJs by agencies wherever possible.[80] One of the reasons assigned for this movement away from ALJs is an agency attempt to avoid even the possibility of ALJs' freedom from executive control.[81] All of these differences and ambiguities have led many experts examining the problem of ALJ status to conclude that there are "essential differences" between the duties and position of ALJs and Article III judges that prevent ALJs from being viewed as having "bona fide judicial status."[82]

V. PRESENT STATUS OF ALJ ETHICAL RULES AND CANONS

It is not true, as some believe, that state ALJs are subject to the Canons of Judicial Ethics.[83] Subjecting ALJs to appropriate ethical codes or canons will have the effect of helping to insure ALJ independence and the appearance of independence.[84] At the present time, it is often not clear to which ethical codes ALJs are subject, and there are wide variances among agencies within states as well as wide

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Control Versus Impermissible Bias in Agency Decision making: Lessons from Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 509-13 (1990).

[79] *See generally* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 263-65 (1992).

[80] Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 70-72 (1996). One commentator asked:

> Why has this occurred? Why have most agencies (with congressional endorsement) voted with their feet by running away from the ALJ program? In my opinion, it is because of a perception that, compared to non-ALJ adjudicators, ALJs are less desirable because of their cost, restrictions on their selection, and their effective immunity from performance management.

Id. at 72.

[81] *Id.* at 73.

[82] Lewis, *supra* note 40, at 947.

[83] Felter, Jr., *supra* note 8, at 408.

[84] *Id.*

variances from state to state.[85] Although some states have applied the Canons of Judicial Ethics to ALJs, many others have not.[86] The important question remains mostly unasked and unanswered: Although there can be no doubt that ALJs should be subject to ethical rules or canons, should they be subject to the same ethical rules as Article III judges? Some analysts have argued that different ethical canons should be applied to ALJs with regard to ex parte contacts because the function of the ALJ is different from the Article III judge.[87] These experts argue that some types of agency action, for example, environmental regulation, which require agency expertise and ex parte contact, ought not to be as rigidly circumscribed as it is in the Canons of Judicial Ethics.[88] At least one court has recognized that the status of an ALJ and that of the Article III judge are so different that the same canons of ethics should not be applied to the ALJ as to the judge:

> [t]he applicable . . . standards for disqualification of administrative adjudicators do not rise to the heights of those prescribed for judicial disqualification. . . . The canons of judicial ethics go far toward cloistering those who become judges, the ultimate arbiters of constitutional and statutory rights, from all extraneous influences that could even remotely be deemed to affect their decisions. Such a rarefied atmosphere of impartiality cannot practically be achieved where the person[] [is] acting as [an] administrative adjudicator[][.][89]

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[85] *Id.* at 409.

[86] Lewis, *supra* note 40, at 953.

[87] Young, *supra* note 69, at 40.

[88] *Id.* (citing Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 796-97 (1981)). Professor Asimow argues that there is an entire category of cases that are decided by ALJs that he names "individualized, nonaccusatory decision making[,]" such as, for instance, a licensing proceeding in which the rigid separation of function followed in the criminal model of litigation. *Id.* at 797. Agencies that decide these types of cases have modified separation of functions. *Id.* at 796-97. Proceedings of this type would also require that the strict canon of judicial ethics, that forbids ex parte contacts, be relaxed.

[89] Petrowski v. Norwich Free Acad., 506 A.2d 139, 142-43 (Conn. 1986).

The argument has been attempted, and the issue squarely litigated, of whether the same degree of impartiality is required of an ALJ as of an Article III judge.[90] The courts have concluded that applicable state canons of ethics and state and federal due process do not require the same canons of ethics to apply to ALJs as are applied to Article III judges.[91] The bases for these decisions are several. Courts deciding due process claims have recognized that due process does not require the same standard for Article III judges and ALJs because their status, role, and functions are different.[92] The avoidance of the appearance of bias standard is particularly unsuitable in administrative proceedings.[93] Another court noted that in most judicial administrative proceedings the board or commission, not the ALJ, is the "ultimate factfinder."[94] It was also persuasively argued in the same case that, "by no means" is an ethics rule that is suitable for an Article III judge suitable for an ALJ, because many agencies were created in order to escape "'supposed biases'" of the judiciary and/or in order to achieve administration of a particular program in accordance with the

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[90] In *Transportation General v. Department of Insurance*, the order granting appeal limited the issue as follows: "'[i]n the circumstances of this case, did the Appellate Court properly affirm the trial court's determination that the insurance commissioner need not have disqualified himself as the administrative hearing officer even though the commissioner had earlier participated in settlement negotiations between the parties?'" Transp. Gen., Inc. v. Ins. Dep't., 670 A.2d 1302, 1303 n.2 (Conn. 1996). *See also*, Schweiker v. McClure, 456 U.S. 188 (1982); Lopez v. Henry Phipps Plaza S., Inc., 498 F.2d 937, 944 (2d Cir. 1974).

[91] *See* Transp. Gen., Inc. v. Dep't of Ins., 670 A.2d 1302, 1303 n.2 (Conn. 1996). *See also* Maxwell v. Civil Serv. Comm'n, 707 P.2d 322 (Ariz. Ct. App. 1985); Gai v. City of Selma, 79 Cal. Rptr. 2d 910 (Cal. Ct. App. 1998); Burrell v. City of L. A., 257 Cal. Rptr. 427 (Cal. Ct. App. 1989); Swafford v. Tanner, 349 S.E.2d 498 (Ga. Ct. App. 1986); Ryan v. Landek, 512 N.E.2d 1 (Ill. App. Ct. 1987); Kollar v. Civil City, 695 N.E.2d 616 (Ind. Ct. App. 1998); Malone v. Civil Serv. Comm'n, 646 N.E.2d 150 (Mass. App. Ct. 1995); Goldsmith v. De Buono, 665 N.Y.S.2d 727 (N.Y. App. Div. 1997); Chase v. R.I. Dep't of Human Servs., No. C.A. 90-7717, 1992 WL 813661 (R.I. Super. Dec. 16, 1992); Malone & Hyde, Inc. v. Tenn. Dep't of Revenue, No. 01-A-01-9302-CH00056, 1993 WL 295023 (Tenn. Ct. App. Aug. 4, 1993); Barker v. State, Dep't of Licensing, No. 16555-8-111, 1998 WL 177590 (Wash. Ct. App. April 16, 1998).

[92] *Petrowski*, 506 A.2d at 143.

[93] *Gai*, 79 Cal. Rptr. 2d at 913.

[94] Andrews v. Agric. Labor Relations Bd., 623 P.2d 151, 157 (Cal. 1981).

"'desired point of view or bias.'"[95] This is a powerful and accurate argument that relates to some of the reasons discussed earlier for the creation of agencies.[96] ALJs are responsible for the accomplishment of an agency task and, because of that responsibility, they cannot be entirely impartial. Several California cases have suggested that if the same standards were applicable to judges and ALJs, then litigants could "wreak havoc with the orderly administration of dispute-resolving tribunals."[97] Several other cases have recognized that the legislature has, in some types of situations, created agencies with hearing examiners that conduct adjudicative hearings without the presence of any prosecutor or attorney representing the government.[98] In those situations, one court held that, if the ALJ assumes an active role as both partial prosecutor and adjudicator, there is no violation of the state's ethics rules or of due process.[99] Another state supreme court held that an "active" role for the ALJ created by the legislature to deal with the serious problem of drunk driving was justified by the purpose of the legislature in saving time and costs in this problem area.[100] It is obvious that in this class of cases, the role of the hearing examiner or ALJ is not neutral and impartial as it is in a hearing in an Article III court.[101] It is also true that the legislature had a valid constitutional purpose in enacting the implied consent statutes involved in these cases.[102] One justification for permitting the hearing examiners to fill a more active role is that the scope of the proceeding is limited to one object: revocation or suspension of a driver's license

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[95] *Id.* at 159 (Newman, J., concurring) (citations omitted). This is an explicit recognition of the duty of the ALJ to further agency policy and not to be neutral. *Id.* (Newman, J., concurring).

[96] *See supra* notes 50-56 and accompanying text.

[97] *Andrews*, 623 P.2d at 157; *Gai*, 79 Cal. Rptr. 2d at 913.

[98] Martin v. Super. Ct., 660 P.2d 859, 861 (Ariz. 1983); Stream v. Heckers, 519 P.2d 336, 338 (Colo. 1974).

[99] *Stream*, 519 P.2d at 338.

[100] *Martin*, 660 P.2d at 862.

[101] If the reader has any doubt about this assertion, she is asked to consider whether a federal district court judge or a common pleas court judge would consider proceeding with either a civil or a criminal trial without the presence of a lawyer representing the government.

[102] *See generally Martin*, 660 P.2d at 861-62; *Stream*, 519 P.2d at 337.

when the driver has refused to take a sobriety test.[103] At the same time, that very limited purpose also illustrates the very great differences between the functions discharged by an ALJ and those discharged by an Article III judge.

VI. CONCLUSION

When considering the ethical canons, especially the judicial canons of ethics, that are, or ought to be, applicable to ALJs, it is essential to consider the role and status of the ALJ and of administrative adjudication. In deciding which ethical standards should be applicable to ALJs, there should be a careful examination of the ALJ's exact role and function. As has been seen, the role, function, and purpose of the ALJ differs in many cases from those of Article III judges. Moreover, in non-central panel states, ALJs are probably not as independent as Article III judges. During the New Deal, the creation of agencies and the APA was a bitterly contested political battle that neither side won. As has been seen, one side in this struggle maintained a position that the ALJ should be entirely under executive control and not independent. This position viewed agencies, and ALJs, as entities created to accomplish particular legislative purposes that were not successfully achieved by existing structures and branches of government. So the notion was that the object or purpose of the agency, and of the ALJ, was to accomplish a particular policy. When the federal APA was adopted, it contained provisions that left the status of ALJs ambiguous.[104] Consequently, as one commentator has remarked, administrative adjudication only "superficially resembles" litigation in an Article III court.[105] Under most APAs, the ALJ is responsible for the accomplishment of a narrower range of duties. She is a specialist and an expert, and she is charged with the accomplishment of agency policy. The ALJ exists, at least in non-central panel states, in a bureaucratic matrix and culture of a particular agency. This may mean that there are overt and covert pressures that interfere with true independence. These pressures are sources of

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[103] *Stream*, 519 P.2d at 337.

[104] APA Act of 1946, Pub. L. No. 404, c. 324, 60 Stat. 237 (repealed 1966).

[105] *See* Asimow, *supra* note 20, at 1124.

actual lack of ALJ independence, and not merely public perception of lack of independence. Finally, the courts have concluded, by analogy, that for due process purposes, ALJs are not the equivalent of Article III judges.[106] Thus, ALJs can perform functions not discharged by Article III judges. The ALJ may not be required to be truly neutral, and may actually discharge his duties in a situation where he must assume part of the burden normally carried by the prosecutor or lawyer representing the government. In some cases courts have recognized that the legislature was probably correct in imposing different ethical standards on ALJs than those imposed on Article III judges.

All of the preceding analysis is directed at raising a question about the ethical canons applicable to ALJs. As has been seen, there are legitimate questions created by the ambiguous role and status of the ALJ, especially in the states. The legal profession and the legislatures should examine and clarify the ethical standards applicable to ALJs. Most importantly, in examining that question, they should not automatically assume that the applicable ethical standards for ALJs should be the same as for Article III judges. There should first be careful study and analysis of the similarities and dissimilarities between the independence, status, role, and function of the ALJ and the Article III judge and consideration of whether the differences justify different ethical standards. This symposium is a start in examining the problem of which standards and canons of ethics should be applicable to ALJs.

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[106] *See generally Ramspeck*, 345 U.S. at 132.