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## Closing an Administrative Loophole: Ethics for the Administrative Judiciary

Diana Gillis

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# **Closing an Administrative Loophole: Ethics for the Administrative Judiciary**

**By Diana Gillis\***

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## INTRODUCTION

Citizens outside of the bureaucracy often perceive a maze of lawyers and suspect that all government employees are in cahoots with one another. This sentiment is particularly prevalent where the hearing official works directly within the agency. In these cases, the agency's control structure makes ethics walls particularly important, because no apparent organizational barrier exists.<sup>1</sup>

In May of 2008, the Federal Trade Commission ("FTC") issued a complaint challenging Inova Health System Foundation's proposed acquisition of Prince William Health System.<sup>2</sup> What surprised many was that the FTC did not appoint one of the independent administrative law judges ("ALJs") assigned to the FTC to oversee adjudications, but instead appointed one of its own heads, Commissioner J. Thomas Rosch, to serve as ALJ over the matter.<sup>3</sup> The Administrative Procedure Act ("APA"), which governs all administrative agencies, including the FTC, permits an agency to either assign one of the independent ALJs, or one of its own heads, that is, a commissioner, to adjudicate a matter.<sup>4</sup> The latter, however, has rarely occurred.<sup>5</sup>

Rosch's appointment as ALJ was followed by criticism that the FTC was rigging the case to turn out in its favor.<sup>6</sup> One basis for this

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<sup>1</sup> Jeff Bush & Kristal Wiitala Knutson, *The Building and Maintenance of "Ethics Walls" in Administrative Adjudicatory Proceedings*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 8 (2004).

<sup>2</sup> Complaint, *In re Inova Health Sys. Found.* (FTC dismissed June 17, 2008) (No. 9326), available at <http://www.ftc.gov/os/adjpro/d9326/080509admincomplaint.pdf>.

<sup>3</sup> See Order Designating Administrative Law Judge, *In re Inova Health Sys. Found.* (FTC dismissed June 17, 2008) (No. 9326), available at <http://www.ftc.gov/os/adjpro/d9326/080509admincomplaint.pdf>.

<sup>4</sup> See *infra* note 48.

<sup>5</sup> See *infra* note 55.

<sup>6</sup> See *infra* note 56.

concern was that as a Commissioner, Rosch had engaged in *ex parte* discussions with the parties regarding the merits of the case.<sup>7</sup> The APA clearly permits the FTC to appoint one of its own commissioners to act as ALJ in a matter.<sup>8</sup> Doing so, however, also enables the agency to circumvent safeguards in the APA that were established to ensure that administrative hearings, much like those in typical judicial courts, would be in front of an independent and impartial decision-maker.<sup>9</sup> Establishing an ALJ code of ethics would alleviate these concerns, protect agencies from public criticism and accusations of trial rigging, and also maintain public confidence in the administrative state.

Part I will provide background information on the administrative processes of the FTC. Part II addresses the background, intents, and purposes of the APA. Part III discusses judicial ethics and codes of conduct that are relevant to the administrative system. Part IV explains the benefits an ALJ code of conduct would provide to maintaining public confidence in the administrative state. In conclusion, a code of judicial ethics for ALJs would alleviate concerns and criticisms that were generated by the provisions of the APA, and were most recently highlighted by the actions of the FTC in appointing an agency head as ALJ.

#### I. ADMINISTRATIVE PROCESS AT THE FEDERAL TRADE COMMISSION

To appreciate why assigning an FTC commissioner to act as an ALJ over a matter raises ethical concerns, one must understand the agency's processes. Established in 1914, the FTC is an independent executive regulatory agency that enforces the antitrust laws through investigations, rulemaking, and administrative adjudication.<sup>10</sup> Parties contemplating mergers or acquisitions of certain size thresholds are required by statute to report the proposed transaction to the Commission and gain approval prior to consummating the deal.<sup>11</sup>

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<sup>7</sup> See *infra* note 95.

<sup>8</sup> Administrative Procedure Act, 5 U.S.C. § 556(b)-(1) (2006).

<sup>9</sup> See *infra* note 49.

<sup>10</sup> ROBERT PITOFKY ET AL., *TRADE REGULATION CASES AND MATERIALS* 73, 75-76 (Foundation Press 5th ed. 2003).

<sup>11</sup> Clayton Act, 15 U.S.C. § 18a (2006).

Once a proposed transaction is reported, the FTC may decide to investigate further in order to determine whether the merger poses anticompetitive issues.<sup>12</sup> Following an investigation, FTC staff may recommend that the Commission challenge the proposed transaction by issuing a complaint.<sup>13</sup> The staff's recommendation memo will analyze the evidence collected and evaluate the likelihood of succeeding in adjudication.<sup>14</sup> At this stage, the parties to the transaction will typically meet with the commissioners individually and attempt to persuade each to vote against challenging the transaction.<sup>15</sup> Additionally, the parties may wish to provide white papers addressing potential competitive concerns.<sup>16</sup>

Once the parties have had the opportunity to meet with each commissioner, the commissioners will hold a meeting—which is closed to the parties—in which they discuss with the investigating staff whether to issue a complaint.<sup>17</sup> A majority of the commissioners will vote to challenge a proposed merger if they determine that there is sufficient evidence to believe that the antitrust laws will be violated by the transaction.<sup>18</sup> In a merger situation, the commissioners will then authorize staff to seek a preliminary injunction in federal court to prevent the merger from being consummated until a full case on the merits can be adjudicated at the FTC before an ALJ.<sup>19</sup> Standard procedure is for the FTC to assign the

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<sup>12</sup> See ABA SECTION OF ANTITRUST LAW, THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO FEDERAL MERGER REVIEW at 25 (Judy Whalley ed.) (1995) [hereinafter MERGER REVIEW GUIDE].

<sup>13</sup> See *id.* at 28.

<sup>14</sup> *Id.* at 27.

<sup>15</sup> *Id.* at 28, 224. A majority is needed to challenge a proposed transaction. *Id.* at 28.

<sup>16</sup> *Id.* at 221-22, 224.

<sup>17</sup> *Id.* at 226.

<sup>18</sup> See Federal Trade Commission Act, 15 U.S.C. § 45(b) (2006).

<sup>19</sup> MERGER REVIEW GUIDE, *supra* note 12, at 28-29. Typical procedure is for the FTC to issue an administrative complaint and immediately seek a preliminary injunction in district court. See, e.g., Press Release, Federal Trade Commission, FTC Launches Suit to Block Merger of CC and Mitchell (Nov. 25, 2008), <http://www.ftc.gov/opa/2008/11/cccmitchell.shtm>; compare Complaint, *In re CCC Holdings Inc.* (Nov. 25, 2008) (No. 9326), available at <http://www.ftc.gov/os/adjpro/d9334/081125cccmitchelladmincmpt.pdf>, with Complaint for Temporary Restraining Order and Preliminary Injunction Pursuant

matter for adjudication by one of the independent ALJs appointed by the Office of Personnel Management and detailed to the agency.<sup>20</sup> The decision of the ALJ is then subject to appeal in front of the commissioners.<sup>21</sup>

As an administrative agency, the procedures of the FTC were developed under the rubric of the APA. The APA grants FTC commissioners dual prosecutorial and adjudicative roles in determining whether mergers pose antitrust concerns – commissioners must make the decision to prosecute by issuing a complaint, and then later pass final judgment on the merits of the alleged violation after an initial decision by the ALJ.<sup>22</sup> This fusion of functions poses a problem for many. The American Bar Association's Section of Antitrust Law has noted that "[n]o thoughtful observer is entirely comfortable with the FTC's (or other agencies') combining of prosecutory and adjudicatory functions. Whenever the same people who issued a complaint later decide whether it should be dismissed, concern about at least the appearance of fairness is inevitable."<sup>23</sup> Concerns raised by this comingling of functions are typically relieved by the presence of the independent ALJ, the only individual in the entire process who is not an employee of the FTC. Further, even though the commissioners have the power to make the ultimate decision after reviewing the ALJ's determination, the commissioners typically will not have to revisit the case for years while it works its

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to Section 13(b) of the Federal Trade Commission Act, *FTC v. CCC Holdings Inc. and Aurora Equity Partners, III L.P.*, No. 1:08-cv02043 (D.D.C. Nov. 26, 2008) (demonstrating that the preliminary injunction petition was filed the day after the administrative complaint issued).

<sup>20</sup> The FTC's website notes that ALJs are "independent decision makers" appointed by the Office of Personnel Management who perform "initial adjudicative fact-finding in Commission administrative complaint proceedings." Federal Trade Commission, *About the Office of Administrative Law Judges*, <http://ftc.gov/ftc/alj.shtm> (last visited Feb. 2, 2009).

<sup>21</sup> PITOFKY ET AL., *supra* note 10, at 76.

<sup>22</sup> See PITOFKY ET AL., *supra* note 10, at 76.

<sup>23</sup> Kirkpatrick Committee, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 119 (1989). The Kirkpatrick Committee consisted of a former FTC Chairman, private lawyers, academics, and others. *Id.* at 58.

way through trial in front of the ALJ.<sup>24</sup> The implication is that they will essentially review the case anew, the specifics of the case long forgotten since the time the complaint was issued. Alternatively, changes in the law or market conditions over that extended period may guide commissioners who initially supported a complaint to alter their position.<sup>25</sup> These typical rationalizations for mixing prosecutorial and adjudicative functions are absent, however, when an agency opts to appoint one of its own commissioners to serve as ALJ. The FTC deviated from standard procedure in appointing Commissioner Rosch to serve as ALJ *In re Inova Health Systems* ("Inova"),<sup>26</sup> thereby removing the one independent decision-maker from the process.

The ethical concerns raised by assigning a commissioner as ALJ are further magnified given the circumstances under which the Commission decided to appoint Rosch. First, the FTC was on a losing streak; it had lost all of its most recent cases in federal court.<sup>27</sup> Secondly, the independent ALJs had also ruled against the FTC in several recent administrative matters.<sup>28</sup> Lastly, the *Inova* matter was a proposed hospital merger – a subject area in which the FTC has a

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<sup>24</sup> See Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts – Except When They're Not*, 59 ADMIN. L. REV. 79, 105 (2007).

<sup>25</sup> Kirkpatrick Committee, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 119 (1989).

<sup>26</sup> See *infra* note 55.

<sup>27</sup> See Deborah L. Feinstein, *Recent Trends in U.S. Merger Enforcement: Down But Not Out*, 21 ANTITRUST 74 (2007) (discussing the Commission's recent losses in *FTC v. Equitable Resources* and *FTC v. Western Ref., Inc.*); Carrie Johnson, *Whole Foods' Acquisition Clears Antitrust Hurdle*, WASH. POST, Aug. 17, 2007, at D01.

<sup>28</sup> See Press Release, Federal Trade Commission, ALJ Issues Initial Decision Dismissing Complaint Against Michigan Realtors' Group (Dec. 13, 2007), [www.ftc.gov/opa/2007/12/alj/shtm](http://www.ftc.gov/opa/2007/12/alj/shtm); Press Release, Federal Trade Commission, Initial Decision Released in Rambus Case (Fed. 24, 2004), [www.ftc.gov/opa/2004/02/rambusid.shtm](http://www.ftc.gov/opa/2004/02/rambusid.shtm); Press Release, Federal Trade Commission, Administrative Law Judge Dismisses Complaint Against Unocal for Alleged Anticompetitive Practices Related to Card Gasoline (Nov. 26, 2003), [www.ftc.gov/opa/2003/11/unionoil.shtm](http://www.ftc.gov/opa/2003/11/unionoil.shtm); Press Release, Federal Trade Commission, Administrative Law Judge Dismisses FTC Allegations of Anticompetitive Conduct by Schering-plough and Upsher-Smith (July 2, 2002), [www.ftc.gov/opa/2002/07/schering.shtm](http://www.ftc.gov/opa/2002/07/schering.shtm).

particularly bad record.<sup>29</sup> In assigning Commissioner Rosch to be ALJ, the public was given the impression that the FTC was doing all it could to ensure a win this time around, at the expense of a fair and impartial hearing for the parties. Significantly, the APA explicitly permits the FTC to take this course of action.

## II. ADJUDICATION IN THE ADMINISTRATIVE STATE

The APA was created as a direct reaction to the economic and social damages caused by the Great Depression.<sup>30</sup> The government expanded the breadth and depth of the administrative state in order to assert greater control, via administrative agencies, over the economy.<sup>31</sup> The speed with which the administrative system grew alarmed many Americans,<sup>32</sup> and the response to this concern was passage of the APA.<sup>33</sup> The APA was drafted to give structure to the many powers that had been delegated to administrative agencies, including the powers of investigation, prosecution, and adjudication.<sup>34</sup> From the drafting stages of the APA, the comingling of these functions within a single entity has been critiqued as counter to the separation of powers doctrine.

The administrative state has been labeled the "headless fourth branch of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers."<sup>35</sup> President Franklin

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<sup>29</sup> See, e.g., *FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045 (8th Cir. 1999); *FTC v. Butterworth Health Corp.*, 1997-2 Trade Cas. (CCH) ¶ 71, 863 (6th Cir. 1997); *FTC v. Freeman Hosp.*, 911 F. Supp. 1213 (W.D. Mo. 1995), *aff'd*, 69 F.3d 260 (8th Cir. 1995).

<sup>30</sup> 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, 95-96 (2000).

<sup>31</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1561-62 (1996).

<sup>32</sup> KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE AMERICAN POLITICAL SYSTEM* 177 (West Publishing Co. 1982).

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*; Philip Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652 (1965).

<sup>35</sup> Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 450 (2006) (quoting The President's



Roosevelt's Committee on Administrative Management (1937) noted that under the administrative system, "[t]he same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness."<sup>36</sup> In 1938, the American Bar Association's Committee on Administrative Law went so far as to compare the administrative system with Soviet dictatorship due to its broad, centralizing powers.<sup>37</sup> Roosevelt's Committee recommended a complete division within an agency of judicial and investigative/prosecutory functions.<sup>38</sup> Members of the Attorney General's Committee on Administrative Procedure also advocated for a separation of functions, concerned that "investigators, if allowed to participate [in adjudication], would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal."<sup>39</sup> Congress' final version of the APA, however, opted against such a divide.

While Congress acknowledged that the commingling of investigative, prosecutory, and adjudicative functions was "plainly undesirable," it concluded that an adequate solution would be an "internal division of labor" between investigators and prosecutors on the one hand, and adjudicators on the other.<sup>40</sup> The APA, therefore, provides for an internal separation, within the agency, of adjudicative and investigative/prosecutory functions, by prohibiting an agency official involved in the investigation or prosecution of a matter from

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Comm. on Admin. Mgmt, *Report of the Committee with Studies of Administrative Management in the Federal Government* 40 (1937)).

<sup>36</sup> SENATE COMM. ON THE JUDICIARY, 9TH CONG., ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79TH CONG., S. DOC. NO. 248, at 241-42 (Comm. Print 1946) [hereinafter APA LEGISLATIVE HISTORY] (quoting COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES 40 (1937)).

<sup>37</sup> Jeffrey A. Wertkin, *A Return to First Principles: Rethinking ALJ Compromises*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 365, 385 (2002) (quoting *Report of the Special Committee on Administrative Law*, 1938 A.B.A. ANN. REP. 343 (1938)).

<sup>38</sup> APA LEGISLATIVE HISTORY, *supra* note 36, at 242.

<sup>39</sup> ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 1st Sess., at 56 (1941) [hereinafter ATTORNEY GENERAL'S REPORT].

<sup>40</sup> APA LEGISLATIVE HISTORY, *supra* note 36, at 24-25.

also adjudicating the matter as an ALJ.<sup>41</sup> The APA established further safeguards to ensure a degree of ALJ independence from the agency so that the ALJ would be able to freely make decisions and not be under the thumb of the agency. For example: agencies must assign ALJs in rotation<sup>42</sup> to "prevent[] an agency from disfavoring [a particular ALJ] by rendering him inactive,"<sup>43</sup> ALJ compensation is outside of agency control,<sup>44</sup> and ALJs are exempt from agency performance evaluation and removal.<sup>45</sup> In *Butz v. Economou*, the Supreme Court noted that administrative adjudication is "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."<sup>46</sup>

Though the APA includes these provisions to guard ALJ independence from agency control, it simultaneously grants agencies the means for asserting control over adjudicative outcomes. For example, ALJ judgments are only initial decisions, subject to review by the agency itself.<sup>47</sup> Further, the agency can altogether avoid ALJ protections in the APA by appointing one of its own agency heads to serve as ALJ in a case,<sup>48</sup> as was effectively done by the FTC in appointing Commissioner Rosch. This exception creates a loophole through which agency heads can avoid the safeguards contemplated by the drafters of the APA for typical ALJs – most importantly, the separation of investigative/prosecutory and adjudicatory functions.<sup>49</sup>

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<sup>41</sup> See Administrative Procedure Act, 5 U.S.C. § 554(d) (2006).

<sup>42</sup> *Id.* at § 3105.

<sup>43</sup> APA LEGISLATIVE HISTORY, *supra* note 36, at 280.

<sup>44</sup> The Office of Personal Management establishes ALJ compensation. See Administrative Procedure Act, 5 U.S.C. § 5372 (2006).

<sup>45</sup> Administrative Procedure Act, 5 U.S.C. §§ 4301(2) (noting that ALJs are not employees of the agency), 4302, 4303 (2006).

<sup>46</sup> *Butz v. Economou*, 438 U.S. 478, 513 (1978).

<sup>47</sup> Administrative Procedure Act, 5 U.S.C. § 557(b) (2006).

<sup>48</sup> *Id.* at § 556(b) (the agency, i.e., commissioners, may oversee an administrative hearing); *Id.* at § 554(d)(2) (noting that agency heads are not subject to restrictions on performing investigative/prosecutory functions and decisionmaking).

<sup>49</sup> *Id.* at § 554(d)(2) (2006). Section 554(d)(2) provides: "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review," but this does not apply "to

In the APA, Congress has created a role for ALJs that is simultaneously independent from and subservient to, the agency to which the ALJ is assigned; thereby leading to a confusing existence for the ALJ and agency adjudication. Moreover, ALJs, and the administrative trials over which they preside, are created by Congressional delegation, which means that although ALJs perform many of the functions of traditional judges within the judicial branch,<sup>50</sup> they lie outside of the ethical regulations of the American Bar Association's *Model Code of Judicial Conduct* ("*Model Code*").<sup>51</sup>

The problem created by this situation can be summarized by the famous Latin quotation: *Qui custodiet ipsos custodes?* – who shall watch the watchers?<sup>52</sup> In other words, who shall oversee administrative agencies, and serve as a check on their power? A code of ethics for ALJs would provide such a check, help ensure fairness in the administrative process, and prevent agency abuse of power in administrative adjudication. If the FTC had to follow standard judicial ethics, Rosch likely would not have been appointed ALJ in the *Inova* matter. Additionally, an enforceable code of ethics would assure the public that the FTC was not behaving unfairly.

### III. AN ETHICAL CODE FOR ALJS

Since the APA was passed, the breadth of the administrative state has further increased, becoming indispensable to American governance.<sup>53</sup> This is precisely why the public must continue to have

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the agency or a member or members of the body comprising the agency." *Id.* at § 554(d)(2)(C).

<sup>50</sup> See *Butz*, 438 U.S. at 513 (holding that ALJs are entitled to the same judicial immunity as Article III judges because the administrative adjudicative process "shares enough of the characteristics of the judicial process."). Also, in 1972, the Civil Service Commission changed the title of ALJs from "hearing examiner" to "administrative law judge," the implication was clear: the role of ALJs was "not solely to hear or examine, but also to judge" like Article III judges. See Karen S. Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929, 930, 940 (1990).

<sup>51</sup> Lewis, *supra* note 50, at 929-30, 936.

<sup>52</sup> See Gillette, *supra* note 30, at 99.

<sup>53</sup> For example, "[i]n 2001, Congress passed 24 major statutes and 112 other public laws. By contrast, in that year, cabinet departments, the Executive Office of the President, and independent agencies promulgated 70 significant rules and 3,383

confidence in the system. The ethical safeguards provided for by the APA that protect ALJ independence and impartiality do not apply when an agency appoints one of its own agency heads to the role of ALJ,<sup>54</sup> as the FTC did in appointing Commissioner Rosch. The result of this departure from precedent<sup>55</sup> has been a blow to the public's confidence in the activities of the Commission.<sup>56</sup> Absent Congressional amendment of the APA that would prohibit an agency official from investigating, prosecuting, and then making the initial adjudicative decision in a matter, this poses a major problem for observers who value separation of powers, adjudicative fairness, and transparency. Therefore, all ALJs should be subject to ethical obligations that would limit the fusion of these functions. Specifically, ALJs should uphold the ethical obligations of fairness,

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other rules." Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 892 (2008) (footnotes omitted). See also Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1131 (2006) (showing that adjudicative proceedings have shifted from courts to administrative agencies by noting that more than 500,000 evidentiary proceedings took place in a mere four federal agencies (Social Security Administration, Equal Employment Opportunity Commission, Immigration and Naturalization Service, and Department of Veterans' Affairs) in 2001); Morrison, *supra* note 24, at 101 (comparing the number of cases in front of the Federal District Courts in 2005 with those in front of the National Labor Relations Board: in the 92 U.S. District Courts, 322,848 civil cases were filed, 338,314 terminated, and a trial was held in 5,294; the NLRB alone received 24,720 unfair labor practice charges, and filed 1,373 complaints, "if all the NLRB cases set for hearing were tried, that would constitute more than 25% of all federal civil trials – and this is just from one agency . . .").

<sup>54</sup> Administrative Procedure Act, 5 U.S.C. § 554(d)(2) (2006).

<sup>55</sup> See, e.g., Robert C. Jones & Aimee E. DeFilippo, *FTC Hospital Merger Challenges: Is a "Fast-Track" Administrative Trial the Answer to the FTC's Federal Court Woes?*, THE ANTITRUST SOURCE, Dec. 2008, at 11-12, available at [www.antitrustsource.com](http://www.antitrustsource.com) ("The *Inova* case represented the first time the FTC has taken the extraordinary step of designating a sitting Commissioner as the presiding ALJ in an FTC administrative proceeding."); Steven C. Sunshine & John R. Seward, *FTC Tactics Could Complicate Health Care Mergers*, NAT'L L. J., Aug. 11, 2008 ("[FTC] took the highly unusual step of appointing Rosch as the ALJ").

<sup>56</sup> See, e.g., Neal R. Stoll & Shepard Goldfein, *Antitrust Trade and Practice: The 'Worst' and the 'Best Antitrust Persons in the World'*, N.Y. L.J., Sept. 16, 2008, at col. 1 ("The gold-medal winner of our 'Worst Antitrust Person in the World,' by a huge margin, is the Federal Trade Commission. Within a period of three months, not once but twice, in order to preempt the judiciary's involvement in a challenged merger, the commission appointed itself as the administrative law judge . . .").

impartiality, and avoiding the appearance of impropriety, so that the public may continue to have confidence in the administrative state. A code of ethics would assure the public that ALJs were deciding issues independently and ethically.

The ABA recently acknowledged that ALJs should be included amongst judicial branch judges and governed by the *Model Code*.<sup>57</sup> ALJs had been excluded from the definition of "judges" in the original 1990 *Model Code*.<sup>58</sup> In 2007, the ABA amended the *Model Code* to explicitly include ALJs.<sup>59</sup> The rationale for this modification was what others had long noted: ALJs "perform essentially the same function" as judicial branch judges.<sup>60</sup> However, individual jurisdictions have the discretion to decide whether to adopt the *Model Code* for its ALJs,<sup>61</sup> which several states have recently done.<sup>62</sup> The inclusion of ALJs within the *Model Code* and initial adoption by several states points to a growing consensus that the status quo can no longer stand – ALJs are too similar to Article III judges and should therefore be subject to a judicial code of ethics. The specific

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<sup>57</sup> See MODEL CODE OF JUDICIAL CONDUCT application I(B) (2007) [hereinafter MODEL CODE] (noting that members of the "administrative law judiciary" are now included within the meaning of "judge" under the *Model Code*).

<sup>58</sup> See MODEL CODE (1990) application A, 25 n3, 25-26; REPORTER'S EXPLANATION OF CHANGES 4, available at [http://www.abanet.org/judiciaethics/approved\\_MCJC.html](http://www.abanet.org/judiciaethics/approved_MCJC.html) (nothing that "[t]he most significant substantive change [to the 1990 *Model Code*] brings within the definition of 'judges' . . . 'members of the administrative law judiciary'").

<sup>59</sup> MODEL CODE application I(B); MODEL CODE, *Reporter's Explanation of Changes* at 4, available at <http://www.ajs.org/ethics/pdfs/ABA2007modelcodeasapproved.pdf>.

<sup>60</sup> MODEL CODE, *Reporter's Explanation of Changes* at 14, available at <http://www.ajs.org/ethics/pdfs/ABA2007modelcodeasapproved.pdf>.

<sup>61</sup> MODEL CODE application I(B) n.1 (noting that members of the "administrative law judiciary" are now included within the meaning of "judge" under the *Model Code*, but that "[e]ach jurisdiction should consider the characteristics of particular positions within the administrative law judiciary in adopting, adapting, applying, and enforcing the Code for the administrative law judiciary"). *Id.* The Ninth Circuit has held that the ABA's *Model Code* is not binding on Social Security Administration ALJs because the SSA had not adopted the Code. *Lowry v. Barnhart*, 329 F.3d 1019, 1023-24 (9th Cir. 2003).

<sup>62</sup> The states that have adopted model codes include Louisiana, Maryland, New Jersey, Tennessee, and Texas. Edwin L. Felter, Jr., *Accountability in the Administrative Law Judiciary: The Right and Wrong Kind*, 86 DENY. U. L. REV. 157, 168 n.50 (2008).

rules that are important for maintaining public confidence in the administrative adjudicative system focus on preserving the mainstays of the American legal system: judicial independence, fairness, and impartiality.<sup>63</sup>

The first important group of rules regards the independence of judges in making adjudicative decisions. The *Model Code* states that judges "should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence."<sup>64</sup> Canons 1 and 2 of the *Model Code* aim to guide judges in accomplishing these goals.

Canon 1 focuses on a judge's obligation to always act and appear independent and impartial: "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."<sup>65</sup> As the comments to the Rule state, the test for the appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge . . . engaged in . . . conduct that reflects adversely on the judge's . . . impartiality."<sup>66</sup> Decisional independence rests on granting judges the ability to uphold the rule of law without coercion or intimidation that "could cause judges to disregard the law and implement the preferences of those who threaten or control them."<sup>67</sup> Canon 1 essentially recognizes that for the rule of law to be credible, the decision-maker must be neutral and free from even the appearance of outside influence.

Independence is also the central principle embodied by Canon 2, which mandates that judges impartially carry out their duties.<sup>68</sup> Judges must recuse themselves when "impartiality might reasonably be questioned."<sup>69</sup> A judge must recuse himself when he has "personal knowledge of facts that are in dispute"<sup>70</sup> or "lacks actual knowledge

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<sup>63</sup> MODEL CODE pmbl. (1).

<sup>64</sup> MODEL CODE pmbl. (2).

<sup>65</sup> MODEL CODE Canon 1.

<sup>66</sup> MODEL CODE R. 1.2 cmt. 5.

<sup>67</sup> Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters For Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1259-60 (2008).

<sup>68</sup> MODEL CODE Canon 2.

<sup>69</sup> MODEL CODE R. 2.11(A).

<sup>70</sup> MODEL CODE R. 2.11(A)(1).

of the facts . . . [but] a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge."<sup>71</sup> To this end, ex parte communications between the judge and a party are explicitly prohibited.<sup>72</sup> An ex parte communication occurs "between counsel and the court when opposing counsel is not present."<sup>73</sup> The prohibition "is aimed at averting external influence upon the decision-maker without all parties being present,"<sup>74</sup> given that "contemporaneous opportunities to be heard in response to an opposing party's factual and legal assertions" is a fundamental tenet of a fair trial.<sup>75</sup> Without the presence of opposing counsel to rebut allegations, the judge may hear information that would not be allowed in the courtroom and/or the judge's impartiality may be tainted.

The *Model Code's* focus on maintaining judicial independence and avoiding even the appearance of impropriety are intended to preserve public confidence in the adjudicative system. In a democracy, a "government of the people, by the people, and for the people rises or falls with the will and consent of the governed" and "[t]he public will not support institutions in which they have no confidence."<sup>76</sup> Provisions in the APA largely alleviate the concerns that the *Model Code* addresses, at least when an independent ALJ is assigned to adjudicate a case.<sup>77</sup> The APA's allowance of agencies to appoint one of their own heads to serve as ALJ, however, removes these safeguards.<sup>78</sup> Therefore, in order to maintain public confidence in the administrative system, ALJs should be subject to the ethical obligations of the *Model Code*.

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<sup>71</sup> *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61 (1988).

<sup>72</sup> MODEL CODE R. 2.9(A).

<sup>73</sup> BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>74</sup> Judith K. Meierhenry, *The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings*, 36 S.D. L. REV. 551, 565 (1991).

<sup>75</sup> James E. Molitemo, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1201 (2006).

<sup>76</sup> ABA Commission on the 21st Century Judiciary, *Justice in Jeopardy*, at 10 (July 2003), available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf>.

<sup>77</sup> See *supra* text accompanying notes 40-46.

<sup>78</sup> See *supra* text accompanying note 49.

#### IV. THE ETHICAL ISSUES OF APPOINTING AN AGENCY HEAD AS ALJ: THE FTC EXAMPLE

The *Inova* matter illustrates the need to apply ethical standards to ALJs, particularly agency-head ALJs. An agency head acting as ALJ inherently heightens concerns of adjudicator independence and impartiality; not only is the head an employee of the agency (as opposed to independent ALJs), but also presumably has a vested interest in the outcomes of cases the Commission votes to pursue. To complicate things further, agency heads are likely to have had ex parte communications with the parties,<sup>79</sup> which threaten impartiality and fairness to the parties. The standard argument legitimizing ALJs within the administrative system – that ALJs "stand between the agency and the person . . . to provide a fair and impartial hearing"<sup>80</sup> – will not hold when the ALJ is an individual who is in charge of the agency.

Congress included clear provisions in the APA to give ALJs a certain level of independence from the employing agency by "deliberately limit[ing] agencies' authority [over an ALJ] in order to ensure that . . . ALJs would exercise the fullest possible independent judgment."<sup>81</sup> ALJ decisions are very influential in the agency's final determination, as "most [ALJ] rulings are given considerable weight by the agency and become final agency decisions," and "[s]ince the presiding ALJ controls discovery, the admissibility of evidence, and the conduct of the hearing, he directly affects the record upon which the ultimate agency decision will be based."<sup>82</sup> The APA loophole permitting agency heads to conduct administrative adjudications appears to enable agencies to circumvent the procedures established to maintain independence in administrative adjudications. Despite the fact that initial ALJ decisions are subject to agency review anyway,<sup>83</sup>

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<sup>79</sup> See *supra* text accompanying notes 15-16.

<sup>80</sup> Felter, *supra* note 62, at 160.

<sup>81</sup> L. Hope O'Keefe, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 599 (1986).

<sup>82</sup> Lewis, *supra* note 50, at 944.

<sup>83</sup> Administrative Procedure Act, 5 U.S.C. § 557(b) (2006); see also Lewis, *supra* note 50, at 947.



using an agency head to make the initial decision eliminates *any* independent review.

Communications with agency heads by staff and the parties, independently of one another, is common procedure at the FTC when commissioners are determining whether to issue a complaint.<sup>84</sup> Staff members attempt to convince the agency heads that the case should proceed, while the parties argue the opposite. This decision requires the agency heads to consider the merits of the case and likelihood of Commission success. Commissioner Rosch himself has recognized the substantive importance of these conversations:

I think it's incumbent on [FTC heads] to require a detailed description not only of the 'story' that will or could be told in litigation and of the facts underlying that story, but of the *way* that story will be told – *i.e.*, whether it will be told principally through the documents or statements of the respondents, through customers or competitors, through an industry expert or through economists . . . . Only then can we evaluate whether a challenge would be worth the resources that would have to be spent.<sup>85</sup>

Typically, these *ex parte* communications between the commissioners and the parties are less of a concern because the administrative trial will be overseen by an independent ALJ.<sup>86</sup> But when an agency head who has engaged in detailed communications with the parties is subsequently appointed ALJ, those discussions retroactively become inappropriate *ex parte* communications. This risks the ALJ's impartiality, or at the very least, creates the appearance of impropriety.<sup>87</sup> In the *Inova* matter, the fact that

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<sup>84</sup> See *supra* text accompanying notes 15-17.

<sup>85</sup> J. Thomas Rosch, *A Peek Inside: One Commissioner's Perspective on the Commission's Roles as Prosecutor and Judge*, Remarks at the NERA 2008 Antitrust & Trade Regulation Seminar (July 3, 2008), *available at* <http://www.ftc.gov/speeches/rosch/080703nera.pdf>, at 8-9.

<sup>86</sup> Federal Trade Commission, *supra* text accompanying note 20.

<sup>87</sup> *Id.*; see also Respondent's Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge, 2, *In re Inova Health Sys. Found.* (FTC dismissed June 17, 2008) (No. 9326), *available at*

Commissioner Rosch abstained from participating in the Commission vote to issue the complaint<sup>88</sup> is evidence of the Commission's concern with overtly mixing prosecutorial and adjudicative functions – that is, of giving the appearance of impropriety and lack of judicial independence. However, as the parties pointed out, the same concerns are present either way: "there is no meaningful line between the final act of voting out the complaint and participating in the investigation until the very brink of that vote."<sup>89</sup>

In *Grolier Inc. v. F.T.C.*,<sup>90</sup> the ALJ appointed by the Commission had many connections to the case at bar. First, he had previously served as an attorney advisor to one of the commissioners that had been involved with investigating the matter and who had communications with Grolier representatives.<sup>91</sup> While Grolier argued that the ALJ should recuse himself from the matter, the attorney advisor-turned-ALJ refused to do so, alleging that he did not recall working on the matter while serving as an attorney advisor.<sup>92</sup> On appeal, Grolier claimed that the ALJ had engaged in ex parte communications in his role as attorney advisor and failure to disqualify him violated the APA provision precluding an employee of the agency who has engaged in investigative or prosecutory functions in a case from serving as ALJ.<sup>93</sup> The Ninth Circuit agreed with Grolier and determined that the relevant APA provision was intended to prevent agency employees (other than agency heads) who

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<http://ftc.gov/os/adjpro/d9326/080523respmorecuseroschasalj.pdf> (arguing that Rosch's appointment creates an appearance of impropriety).

<sup>88</sup> Press Release, Federal Trade Commission, *FTC and Virginia Attorney General Seek to Block Inova Health System Foundation's Acquisition of Prince William Health System* (May 9, 2008), available at <http://www.ftc.gov/opa/2008/05/inova.shtm>.

<sup>89</sup> See Respondent's Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge, 2-3, *In re Inova Health Sys. Found.* (FTC dismissed June 17, 2008) (No. 9326), available at <http://ftc.gov/os/adjpro/d9326/080523respmorecuseroschasalj.pdf> (arguing "there is no meaningful line between the final act of voting out the complaint and participating in the investigation until the very brink of that vote").

<sup>90</sup> *Grolier Inc. v. F.T.C.*, 615 F.2d 1215 (9th Cir. 1980).

<sup>91</sup> *Id.* at 1217.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

were exposed to ex parte information during an investigation from then serving as ALJ in the matter.<sup>94</sup>

In the *Inova* matter, Commissioner Rosch unquestionably engaged in ex parte communications with both investigating staff and Inova's counsel.<sup>95</sup> Rosch's own understanding of such communications required that they include material facts and arguments that would be developed at trial.<sup>96</sup> If one of Commissioner Rosch's attorney advisors were to have been appointed ALJ and was present during these ex parte communications, the APA would force recusal on the attorney advisor, as the court determined in *Grolier*.<sup>97</sup> It is logically inconsistent that Commissioner Rosch himself would be permitted to adjudicate the matter, but his attorney advisor would not. The concerns of judicial independence and impartiality are present in each scenario.

Canon 2 of the *Model Code* would require Commissioner Rosch to disqualify himself from serving as the adjudicator in the *Inova* matter because these ex parte communications provided him with knowledge of the facts and arguments of the case, and even if he had not gained actual knowledge from the ex parte communications, reasonable minds would expect that material elements of the case had been discussed, given standard Commission procedures.<sup>98</sup> Additionally, Canon 1 of the *Model Code* calls on adjudicators to avoid all conduct that would create a perception in reasonable minds that the adjudicator was less than impartial.<sup>99</sup>

If ALJs, including agency head ALJs, were subject to the *Model Code*, the FTC and Commissioner Rosch could have taken steps to enable Rosch to adjudicate the matter without compromising public confidence in the system. The FTC could have, for example,

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<sup>94</sup> *Id.* at 1220-21. The court also recognized that if the Commissioner himself had been assigned ALJ, he would have been exempt from section 554(d)'s prohibition. *See id.* at 1220.

<sup>95</sup> Respondent's Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge, 2, *In re Inova Health Sys. Found.* (FTC dismissed June 17, 2008) (No. 9326), available at <http://ftc.gov/os/adjpro/d9326/080523respmorecuseroschasalj.pdf>.

<sup>96</sup> *See* Rosch, *supra* note 85.

<sup>97</sup> *See Grolier*, 615 F.2d at 1218-21.

<sup>98</sup> *See supra* text accompanying notes 68-75, 95.

<sup>99</sup> *See* MODEL CODE R. 1.2 cmt. 5.

prevented Rosch from receiving the staff recommendation memo or meeting with the parties *ex parte*.

Adopting the *Model Code* for ALJs could have prevented the problems that arose in the *Inova* case. The purpose of the *Model Code* is to "promote public confidence in the integrity" of the adjudicative system.<sup>100</sup> This confidence will be necessary for the administrative state to survive with the support of the public: "The legal system will endure only so long as members of society continue to believe that our courts endeavor to provide untainted, unbiased forums in which justice may be found and done."<sup>101</sup> An administrative trial, as an adjudicative forum, requires the same confidence. An ethical code of conduct for ALJs should be adopted for all ALJs in order to maintain public confidence in the administrative adjudicative system. The ethical loopholes available in the APA necessitate these external ethical requirements.

#### CONCLUSION

As early as 1947, the Department of Justice noted that the "entire usefulness of [an administrative] agency may be destroyed . . . if the public loses confidence in [the] fairness" of ALJs.<sup>102</sup> In 1965, Former FTC Commissioner Philip Elman said that "[i]mprovements in the fairness of agency adjudication will not come until agency members frankly acknowledge, and conscientiously seek to avoid, the dangers inherent in the fusion of functions within the administrative process."<sup>103</sup> In 1977, the DC Circuit observed: "[i]ndeed, such confidence as the public and the courts have in the integrity of the FTC and other agencies' adjudicative processes may be said to rest, in great part on their effort and success in keeping separate [investigative and adjudicative] functions."<sup>104</sup> Yet again in 1989, the American Bar Association concluded that while the FTC should

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<sup>100</sup> Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 58 (2000).

<sup>101</sup> *Tennant v. Marion Health Care Foundation, Inc.*, 459 S.E.2d 374, 384 (W. Va. 1995).

<sup>102</sup> ATTORNEY GENERAL'S REPORT, *supra* note 39 at 47.

<sup>103</sup> Elman, *supra* note 34, at 655.

<sup>104</sup> *FTC v. Atlantic Richfield Company*, 567 F.2d 96, 102 (D.C. Cir. 1977).

continue to possess both prosecutory and adjudicative roles, it did not do so "without some uneasiness" and recognition of the "awkwardness" of such a process, to which the FTC should be "sensitive."<sup>105</sup> Given the breadth of the administrative state, and the wide effect that FTC actions have on American consumers,<sup>106</sup> as well as the persistent concern expressed by the public, agencies, and all levels of government regarding the comingling of investigative, prosecutory, and adjudicative functions within an agency, ALJs – most importantly, agency head ALJs – should be required to follow an ethical code of conduct.

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<sup>105</sup> Kirkpatrick Committee Report, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 122-23 (1989).

<sup>106</sup> If the FTC is concerned about asserting control over its administrative mandate as an expert policy-maker in antitrust law, there are other options available that do not raise questions of legal ethics and undermine the administrative state. Problems with the slow speed of administrative trials can be remedied with rulemaking. Indeed, months after the first assignment of Commissioner Rosch as ALJ occurred, the FTC took this very step. *FTC 16 CFR Parts 3 and 4 Rules of Practice, Proposed Rule*, October 7, 2008, available at <http://www.ftc.gov/os/2008/09/P072104nprmt3.pdf>). If ALJ lack of expertise in antitrust law is a concern, measures could be employed to appoint experienced antitrust attorneys to serve as the Commission's independent ALJs. See Federal Trade Commission, *Into Our 2nd Century*, July 29, 2008, Rick Parker, 103-04). Finally, if the concern is that the federal courts are applying antitrust law incorrectly, the FTC is already empowered to exercise its administrative adjudication authority in such a case. For example, the FTC recently initiated adjudication over a consummated hospital merger, alleging that the merger resulted in antitrust violations. Following an administrative trial, the Commission found the merger did result in violations and was able to require remedial measures. See Press Release, Federal Trade Commission, *FTC Challenges Hospital Merger That Allegedly Led to Anticompetitive Price Increases* (Feb. 10, 2004) (available at <http://www.ftc.gov/opa/2004/02/enh.shtm>); Press Release, Federal Trade Commission, *FTC Issues Final Opinion and Order to Restore the Competition Lost in Evanston Northwestern Healthcare Corporation's Acquisition of Highland Park Hospital* (Apr. 28, 2008) (available at <http://www.ftc.gov/opa/2008/04/evanston.shtm>).