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Judicial Independence in Administrative Adjudication: Past, Present, and Future*

By Ann Marshall Young

“A fine mess you’ve gotten us into now!”

Oliver Hardy to Stan Laurel

First, it was déjà vu all over again¹: Recently while researching judicial independence in administrative adjudication, it dawned on me afresh that the present contentiousness in some quarters over the proper role of administrative law judges² is really nothing new. Then, I had one of Piaget’s “Ah-Ha!” moments: As I read more about the history of our unique calling, I realized there is a *reason* for the contortions we administrative law judges seem continually to endure attempting to fulfill our jobs – ethically – as neutral decision-makers.

Our problems have never been the result of mere mistake! The ambiguities in administrative law that have caused untold thousands of hair-pulling, gut-wrenching moments of frustration for untold numbers of administrative law judges (and gotten us somewhat of a reputation for airing our dirty laundry in public) *were written into the law intentionally!* And my gut wrenched as I thought, *Am I the only one who didn’t know all this???*

*This paper is a slightly-revised version of an article originally printed in THE JUDGES’ JOURNAL, Vol. 38, No. 3 at 16 (Summer 1999). Author Ann Marshall Young, immediate past president of NAALJ, is an administrative law judge with the Tennessee Department of State, Administrative Procedures Division. She is also a member of the Executive Committee of the ABA National Conference of Administrative Law Judges (NCALJ) and chair of the NCALJ Judicial Independence Committee. All opinions stated in this article are her own and do not necessarily represent the views of her employer or of any other persons or organizations.

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¹Attributed to Lawrence “Yogi” Berra (who denied he ever said it, in his biography, YOGI – IT AIN’T OVER..., by Yogi Berra with Tom Horton, 1989).

²The term administrative law judge is generally intended in this article to encompass administrative judges, hearing examiners and other administrative adjudicators, whatever their titles.

OUR PAST: Difficult Times

It all began with the best of intentions. The rise of the administrative state – the “fourth branch” of government – was the result of sincere efforts to improve our world, in a variety of ways. With the Depression and Roosevelt’s New Deal, these efforts gained momentum. The New Dealers who developed and implemented administrative policy saw themselves as finding “good working solutions to major social and economic problems,” pragmatically, to correct unfairness.³

However, according to Emory University Law Professor George B. Shepherd, questions were raised from the start about the *manner* in which the New Dealers went about improving the world, with some asserting that the expert bureaucrats who claimed efficiency as justification for their broad powers to influence “even the details of the economy” were instead engaging in “dictatorial central planning,” contrary to the rule of law.⁴

Many challengers were sincere in their resolve to foster agency fairness to persons affected by governmental action. For there were negative impacts, and little recourse for those without political power. While many benefited, there was also pain.

Being from Tennessee I know of some of the benefits: the Works Progress Administration (WPA) that built the State park where I went swimming as a child; Eleanor Roosevelt’s pet project, the Subsistence Homestead Act, which provided many of my friends’ families with homes; and the Tennessee Valley Authority (TVA) that gave us cheap power. But, being from Tennessee, I also know about those whose homes and farms were taken and flooded to make the TVA lakes and dams, with little due process. “Wild River” in 1960, with Montgomery Clift, Jo Van Fleet and Lee Remick, directed by Elia Kazan (always with administrative law there seem to be controversial connections!), showed us the heartbreak that can occur on a human level when progress comes to one’s own neck of the woods.

³Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 449 (1986).

⁴George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996).

The Early Contenders in Administrative Law Reform

Although some were non-partisan in questioning the methods used by New Deal administrative agencies, others (the greater number according to Shepherd⁵) have been painted in a more self-interested light – as political actors and interest groups with more substantive disagreements with New Deal policies.⁶ The American Bar Association (ABA), which became the leader of the effort to reform the administrative state, has been included in this characterization – the ABA of “elite lawyers” whose Big Business clients stood to lose in a big way from some of the activities of the New Dealers, according to some commentators.⁷

Opposed to the ABA were Roosevelt’s people, including eventually a committee formed by the Attorney General and staffed by Columbia Law Professor Walter Gellhorn and Kenneth Culp Davis, who both later became known as leading authorities on administrative law. And they were hardly neutral themselves, Gellhorn having argued that Congress should impose not more but *less* procedural formality on agencies.⁸

What occurred in the years leading up to the 1946 enactment of the federal Administrative Procedure Act (APA) was, according to Shepherd, not the statesmanlike negotiation and harmonious conclusion later portrayed by many on both sides. It was instead a “pitched battle for the life of the New Deal,”⁹ and not a pretty sight. It included both proponents and opponents of reform castigating each other as communists and fascists, the administrative state as a totalitarian “Frankenstein” peopled with “bureaucrats gone mad with power,”¹⁰ agencies as being comparable to the Gestapo,¹¹ and ABA reformers as

⁵*Id.* at 1569.

⁶ Shepherd notes that efforts to constrain agencies based more on substantive disagreements than on concerns over procedural fairness came from both liberals and conservatives, starting even prior to the New Deal. *Id.* at 1567.

⁷*Id.* at 1560 *et seq.*; Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI. KENT L. REV. 1119 (1997).

⁸Shepherd, *supra* note 4, 90 NW. U. L. REV. at 1598, quoting from Gellhorn, FEDERAL ADMINISTRATIVE PROCEEDINGS 78-81 (1941).

⁹ Shepherd, *Id.* at 1560.

¹⁰*Id.* at 1609.

¹¹*Id.* at 1610.

“hysterical”¹² supporters of a “lawyers’ emergency relief bill”¹³ that would create “a judicial fascisti.”¹⁴

This rancor, which Shepherd convincingly establishes through meticulous examination of original source materials, resulted from many factors, including the widespread uncertainty of the time, when many believed that communism and fascism were actually possible in this country.¹⁵ The very future of our nation and form of government were considered to be at stake.¹⁶ Political and economic issues involving redistribution of wealth versus a laissez-faire business atmosphere were of concern, as were questions of the allocation of power between the branches of government. And for some, the pivotal questions involved whether, how, and to what extent due process and the rule of law would apply in the administrative state.

In short, many held strong views, had a lot at stake from many perspectives, and were at odds on many issues.

Early Administrative Adjudicators and Judicial Independence

In the midst of this hostile combat over administrative reform, the prototype for the modern-day administrative law judge was conceived, later to be born in what Shepherd calls the “cease-fire armistice”¹⁷ of the 1946 federal APA. The first Model State Administrative Procedure Act was produced the same year.¹⁸

Talk of judicial independence had come early in the fighting of the previous two decades, with the initial proposals for reform indeed focusing on the idea of an administrative court.¹⁹ Sadly, all too often, from the beginning, administrative law judges who have taken their duty to be independent decision-makers seriously and presumed to act “judicial” have been viewed negatively: if not as poor cousins of indeterminate breeding who put on airs, then as undeserving pretenders

¹²*Id.* at 1596.

¹³*Id.* at 1613.

¹⁴*Id.* at 1614.

¹⁵*Id.* at 1559.

¹⁶*Id.* at 1606.

¹⁷*Id.* at 1560-61.

¹⁸Although State APA’s vary widely, historically the scholarship and caselaw on administrative law has tended to be based largely on the Federal APA, and the same issues seem consistently to arise in all jurisdictions.

¹⁹Shepherd, *supra* note 4, 90 NW. L. REV. at 1565, 1566.

to the coveted bench of the judicial branch, inclined to frustrate agencies trying to implement important public policy. Walter Gellhorn himself later complained of “‘Hearing officers’ . . . puffed up into ‘Hearing Commissioners’ and . . . later . . . into Administrative law judges who sometimes flaunt their robes a bit too obtrusively for my taste.”²⁰

Every administrative law judge (and they are legion) who has ever heard the words “real judge” uttered to differentiate his or her chaff from others’ wheat recognizes this reticence to accord unequivocal respect to our profession. And while we don’t want to seem defensive, I think this ambivalence should be recognized for what it is, in the present colloquy about judicial independence, for several reasons.

First, this barely acknowledged view of administrative law judges seems, if subtly, often to serve as “permission” to be less committed to the concept of judicial independence in the context of administrative adjudication than with regard to the judicial branch. Second, it not surprisingly creates a level of defensiveness in administrative law judges, which in turn, as it is perceived by the rest of the legal community, exacerbates the problem of lukewarm support for judicial independence in administrative adjudication. Third, it is one of the factors in discussions about judicial independence that often cause the focus to shift from the public interest to the interests of judges, when in truth, “independence is not for the personal benefit of the judges but rather for the protection of the people, whose rights only an independent judge can preserve.”²¹

Finally, I think this equivocal approach to judicial independence in administrative adjudication contains lessons with regard to the discussion about judicial independence generally. For in those pitched battles over administrative reform, the resentments spilled over as well onto the judicial branch. In 1939, for example, Gellhorn expressed the view that an ABA-sponsored reform bill would, in its judicial review provisions, establish “judicial overlordship” and be an “arrogant

²⁰Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 232 (1986).

²¹See *An Independent Judiciary – Report of the Commission on Separation of Powers and Judicial Independence*, American Bar Association, July 4, 1997, at iii.

assumption of power” by the judicial branch.²² In 1940, he said:

The judiciary has by myriad ways sought to foster the illusion that it alone is capable of governing justly and dispassionately, that the entrusting of responsibilities to the administrative agencies is fraught with danger unless their exercise is ultimately subject to judicial supervision, and that the supremacy of law is synonymous with the supremacy of the judges. . . .

[The country should] carefully and constantly eschew [the belief] that the capacity to govern justly lies only beneath the black robes of the judges, and that to them, the wise and good fathers, we must turn hopefully for true guidance through the mazes of the law. That belief, I submit, may do more than merely produce poor government – it may also eventually produce chaos and thus destroy faith in government itself.²³

Gellhorn’s more recent observation that “[j]udges are not alone in knowing how to go about obtaining information and acting upon it fairly,”²⁴ reveals a fundamentally different world-view than that held by most judges, for whom I suggest the major concern is not *who* acts, but rather *what the process is* for resolving disputes not otherwise successfully resolved.

Professor Richard Pierce further illustrates this philosophically different “take” on judicial decision-making in an article in which he

²²Shepherd, *supra* note 4, 90 NW. L. REV. at 1597.

²³*Id.* at 1597-98, quoting from Walter Gellhorn, *The Improvement of Public Administration*, in 2 NAT. LAW. GUILD Q. 20, 23 (1940). For a contrasting view of the role of the judicial branch in reviewing agency interpretation of regulatory statutes, see Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

It is noted that Gellhorn’s view of the dangers posed by judges is in stark contrast to those who fear the ramifications of encroaching on judicial independence. One of the earliest of those to warn that the then-“secret tendency to diminish the judicial power” in the United States would “sooner or later be attended with fatal consequences” was Alexis De Tocqueville, who predicted “that it will be found out at some future period that by . . . lessening the independence of the judiciary . . . not only the judicial power, but the democratic republic itself” would be harmed. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 1840, THE HENRY REEVE TEXT, Part I, at 278. (Phillips Bradley ed., Alfred A. Knopf, 1945).

²⁴Gellhorn, *supra* note 20, 72 Va. L. Rev. at 232.

supports the Social Security Administration's efforts in the 1980s to mandate the proportions of administrative law judge decisions granting and denying benefits, and implicitly challenges the concepts of due process and the rule of law:

Judges control the judicial decisionmaking process. The identification of weaknesses in that process, or alternatives that perform better in some contexts, threatens their self-image. Many are unwilling to admit that, in some contexts, judicial decisionmaking is absurdly expensive, highly subjective, and rife with inconsistency. Moreover, initiatives like the SSA's efforts to control the conduct of its Administrative law judges strike far too close to federal judges' own turf. What if some institution actually began to monitor the productivity and inter-judge consistency of the federal bench? What if such an investigation detected major differences in productivity and large inconsistencies in outcomes? If the SSA can exercise control over the productivity and consistency of its Administrative law judges, perhaps some institution has the power to exercise analogous control over federal judges. In short, federal judges are biased decisionmakers when they draw lines between permissible political control of agency policymaking and impermissible bias in agency decisionmaking.²⁵

Whether these examples are of a piece with the hostility against judges and judicial independence addressed by Penny J. White in her article in this issue [of the *Judges Journal*, i.e. vol. 38, No. 3 at 4], they seem significant, coming as they do from respected members of the academic community. They illustrate the pervasiveness of anti-judge sentiment, whatever its source and however civilized it is. And if "real" judges have been deemed appropriate targets of resentment, then the unfortunate administrative law judge, born out of strife and wrenched from both sides in the battles over administrative reform that have continued since then, has hardly stood a chance of escaping unscathed.

²⁵Richard Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 486 (1990); see also Kenneth Culp Davis and Richard J. Pierce, Jr., *ADMINISTRATIVE LAW TREATISE*, 3d. Ed., §9.10, at 103.

Then, as now, administrative law has been a subject of controversy, and administrative law judges and the issue of judicial independence are often at the center of it. As White proposes, such matters must be addressed by first learning about the source of problems.²⁶

The APA – A Bitter Compromise

According to Shepherd, the 1946 Federal APA was a “bitter compromise of [a] fierce political battle”²⁷ largely won by the Roosevelt administration, whose interpretations have prevailed, providing “agencies with broad freedom, limited only by relatively weak procedural requirements.”²⁸ Professor Martin Shapiro agrees that the New Dealers largely won the battle, observing that the compromise “engenders the basic tensions that plague administrative law today.”²⁹

The act contained many parts that were *intentionally* ambiguous (and have been modified only to a minor extent since 1946³⁰). The parties were unable to reach agreement on any specific, clear provisions that would have resolved the ambiguity,³¹ and continued to disagree after passage. Among agencies it was said that “there is practically universal opinion that the bill, if actually enforced, will wreck federal administration.”³² On the other side, as one overly optimistic congressman commented, “I am hopeful that the Committee on the Judiciary within a short time will bring in a much broader bill that will guarantee real justice to all the people, and assure that justice will be done in all proceedings, that whether a man be poor or rich, equal justice will be meted out.”³³

And yet, in 1986, Gellhorn and Davis characterized the APA as “obvious triumph of truth over ignorance” and opposition to the New

²⁶See Penny J. White, *Judicial Independence: Second Steps*, 38 JUDGES' JOURNAL No. 3, at 4 (Summer 1999).

²⁷Shepherd, *supra* note 4, 90 NW. L. REV. at 1681.

²⁸*Id.* at 1682, 1559.

²⁹Shapiro, *supra* note 3 at 453.

³⁰See Shepherd, *supra* note 4, 90 NW. L. REV. at 1558; see also Shapiro, *supra* note 3 at 448.

³¹*Id.* at 1665.

³²*Id.* at 1674, citing Frederick F. Blachly & Miriam E. Oatman, *Sabotage of the Administrative Process*, 6 PUB. ADMIN. REV. 213, 226-27, n.1 (1946).

³³Shepherd, *supra* note 4, 90 NW. L. REV. at 1671-72, citing Rep. Sabath in 1946.

Deal as “hysterical.”³⁴ Shepherd notes the tendency they and others have had to transform principled disagreement with the New Deal into “silly rantings,” observing that the “New Deal victors belittled their slain conservative foes, although conservatives fought bravely and fairly.”³⁵

The context for the APA’s passage, after years of fighting, was an atmosphere perhaps of battle fatigue. Since 1937 there had been wrangling and stalemate, in which conservatives could defeat liberal proposals but Roosevelt could successfully veto conservative initiatives.³⁶ Then there was the real war, during which both sides of the reform debate agreed to postpone the ultimate fight in order to support the war effort.

In the end, the bill that led to the APA was produced and refined not through public debate in Congress, but through private, off-the-record negotiations. Thus there was no legislative history in the ordinary sense. Instead, interested parties attempted to create legislative history that would favor their respective points of view by writing reports and introducing them into the Congressional record, hoping that future courts would rely on them in interpreting the Act.³⁷ Shepherd characterizes what occurred in the following way:

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.³⁸

Thus the seeds for whatever controversy and confusion presently exist among those interested in administrative law were sown at the

³⁴*Id.* at 1560, 1682, citing Kenneth C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 514-15 (1986). Shepherd notes also, at 1596, that Davis, in his *ADMINISTRATIVE LAW TREATISE* 29 (1958), speaks with pride of the work of the Attorney General’s committee, nowhere mentioning his own role in the committee.

³⁵Shepherd, *supra* note 4, 90 NW. L. REV. at 1682.

³⁶*Id.* at 1675.

³⁷*Id.* at 1662-65.

³⁸*Id.* at 1665.

birth of the modern administrative state, in an atmosphere of acrimony. And the subject of judicial independence *per se* is likewise fraught with acrimony. However, although these realities present definite challenges, our future may be different, *if* those among the administrative law community who view administrative law judges as somehow having the responsibility of advancing agency agendas, on the one hand, and those administrative law judges and others who support strong requirements and protections of independent decision-making, on the other (and all those in between), can learn to communicate more effectively with each other. For, simplistic though it may seem, perhaps it is possible that, as the warden in “Cool Hand Luke” observed, part of what we may have here is “a failure to communicate.”

OUR PRESENT: Progress Through Better Communication

When I was fortunate enough to travel to China last year with a group of women judges, I learned much about communication. My primary focus in our meetings with women judges there was on discerning how independent they are as judges.³⁹ I saw parallels between their judicial system, which is highly bureaucratized with multiple levels of supervision, and parts of our administrative adjudicatory system. I learned, for example, that their *ex parte* rule is limited to communications with parties, and allows, as some administrative adjudication offices here allow, *ex parte* communications from persons other than parties (such as supervisors or governmental officials) – a clear route to potential inappropriate influence.

I also learned from my Chinese friends how important “face” can be in communicating. I perceived that whenever *they* perceived that any of the Americans were *telling* them what to do, they instinctively drew back, even if the signs of it were barely visible. But when we were able to establish ties of identification and friendship with each other, we were able to talk fairly directly about serious issues. This lesson from their wisdom may assist us in better communicating with each other on historically difficult issues of independence in administrative adjudication.

³⁹See Ann Marshall Young, *Not So Far Away: Visiting with Women Judges in China*, 38 JUDGES' JOURNAL No. 1, at 44 (Winter 1999).

Progress has been made on this front. The ABA Section of Administrative Law and Regulatory Practice, whose membership includes many from the academic and agency communities, and the National Conference of Administrative Law Judges (NCALJ) have co-sponsored several programs featuring discussion of judicial independence issues, including one in February 1997 on the ABA Model Act Creating a State Central Hearing Agency, and one in January 1998 on health law issues, with a segment on judicial independence in administrative adjudication. Also, in October 1998, the administrative law section held a telephone call-in CLE program⁴⁰ on administrative law, which included a lively discussion on the independence of administrative law judges. Additional cooperative programs on the state central panel concept and on the future of the APA, including a segment on an independent judiciary, are planned for this summer's Annual Meeting and for a joint administrative law/NCALJ meeting this October. The ABA Special Committee on Judicial Independence is also co-sponsoring an Annual Meeting program in Atlanta with NCALJ, *Judicial Independence in Administrative Adjudication: Right or Duty?*

These cooperative efforts, along with growing professional and personal interaction among the two communities, bode well for a possible rapprochement that is less a compromising of deeply-held values than a realization that our interests lie closer together than we previously imagined.

Understanding the Sources of Our Differences

To achieve better communication and understanding between us, I suggest we first closely examine the sources of our differences, in order to define the issues more precisely. Then, by considering these issues in a practical, real-world context, at the level of what actually occurs in different types of cases, we can better determine whether our interests may in fact coincide – much as parties in mediation are encouraged to approach each other not from the standpoint of “positions,” but from the starting point of practical interests. What is it that you and I want to achieve? Is it possible that some of our separate interests overlap with each other? And how, practically speaking, can we both fulfill as much

⁴⁰See *Menu for Success*, 84 ABA JOURNAL (October 1998) 48.

as possible of what we want to achieve, without compromising vital interests?

Observation suggests the root of much communication difficulty in the administrative law community is a fundamental difference in world views. Just as it has been shown that one's personality type can influence one's judging,⁴¹ there seem to be basic differences in philosophy among the players in the continuing struggles over administrative adjudication – not only on complex legal issues but also on such elemental issues as how people operate and what motivates them in their actions, and on the nature of power and how it plays into the equation. We speak in different languages, but often don't realize it, and therefore don't make the special effort necessary to understand each other. In China I had the benefit of a talented translator secure enough to ask questions and discuss points when uncertain of particular meanings, and persistent enough to struggle to find accurate translations. We must do this for ourselves.

One area of difference is over the value of the litigation process as a means of deciding important issues. Some place more importance on the rights-protection aspects of this last-resort means of resolving disputes, developed over centuries through the common law. Others prefer a more bureaucratic model that allows for greater discretion, without the restraints inherent in litigation with judicial review – and greater ability to control the actions of administrative law judges.

Another difference is between a belief that human beings require continuing oversight, evaluation, and supervision in order to perform their duties well,⁴² and the view that any adjudicator held out to be neutral and impartial *must* operate from a position of autonomy. It is argued at times that the former model, although it limits independence, provides for desired and necessary accountability. In the latter model, there can be accountability in the sense that incompetent work or misconduct may lead to reprimand, discipline or even removal, but one is responsible for performing well on one's own on a day-to-day basis, without ongoing supervision and evaluation; thus there is more

⁴¹John W. Kennedy, Jr., *Personality Type and Judicial Decision Making*, 37 JUDGES' JOURNAL No. 3, at 5 (Summer 1998).

⁴²See text accompanying note 25 above.

independence.⁴³

There are also differences over what the true effects of continuing oversight, evaluation, and supervision are. Do they truly serve to improve performance, or can they instead compromise not only quality of performance but also independent thinking, as research by some behavioral economists has shown⁴⁴? Such issues obviously have relevance in a judicial context, in which independent decision-making is a positive value, tied closely to the concept of judicial impartiality, so much so for some as to essentially equate the two.⁴⁵

And yet, to those who are not so enthusiastic about the concept of judicial independence, particularly with regard to administrative law judges, such independence and the procedural protections that foster it can impede the government in achieving positive progress, by setting up hoops and roadblocks that seem to bear little relationship to substantive goals. Control also appears to be an issue. And all these issues are related to the little matter of *ego*. Ego, as in “black robe fever” for one side of the argument, and as in a “need to control,” on the other side.

The Rule of Law, Due Process, and *Ex Parte* Communications

Another area of confusion and differing viewpoints has to do with the meaning of the rule of law and procedural due process.⁴⁶ I suggest that the rule of law, defined by Black’s Law Dictionary as providing “that decisions should be made by the application of known principles or laws without the intervention of discretion in their application,”⁴⁷ encompasses two cardinal legal concepts:

⁴³See Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, XVII J. NAALJ 1 (Spring 1997); Edwin L. Felter, Jr., *Maintaining the Balance Between Judicial Independence and Accountability in Administrative Law*, 38 JUDGES’ JOURNAL 22, 54 (Winter, 1997).

⁴⁴See Young, *supra* note 43, especially at 33 *et seq.*

⁴⁵For example, in the Tennessee Bar Association’s campaign against efforts to oust judges viewed by some as “soft on crime,” the word “impartiality” was consciously used instead “independence,” as the latter was viewed by some as being too controversial.

⁴⁶See, for example, Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L. J. 455, 494 (1986); and Cynthia R. Farina, *Conceiving Due Process*, 3 YALE. J. OF LAW & FEMINISM 189 (1991), for two contrasting views on the subject.

⁴⁷BLACK’S LAW DICTIONARY, Sixth Edition 1990, at 1332.

(A) The due process concept of “notice,” which provides that persons should be judged based only on information of which they are adequately made aware and to which they are given meaningful opportunity to respond; and

(B) The concept of “equal justice under the law,” which provides that discretion in judging should be minimized in favor of neutral, across-the-board application of laws and rules under which similarly situated persons are treated similarly, without regard to characteristics such as race, national origin, etc.

From a pragmatic standpoint, neither of these principles can be effectively fulfilled without also fulfilling the other: Notice and opportunity to respond mean little if a judge is biased, and decision-making cannot be truly unbiased without giving parties notice of all information and factors on which a decision is to be based, and meaningful opportunity to respond and be heard. Absent such notice and opportunity to respond, a judge may easily be biased in favor of behind-the-scenes experts and advisors, without the countervailing effect of a response to advice that may contain implicit, but unrecognized, value judgments.⁴⁸ Codes of judicial conduct, including the 1990 ABA Model Code, address both issues in various provisions.

To prevent administrative law judges from being influenced by factors not known by parties, all codes of conduct and all administrative procedure acts contain provisions relating to *ex parte* communications. Such provisions prohibit judges, with certain narrow exceptions, from participating in any communications or receipt of information about a case outside the presence of all parties.

And yet, some do not go along with the *ex parte* prohibitions in all particulars, arguing among other things that administrative decision-makers need the flexibility to consult privately with their own experts, and that it is appropriate for supervising judges, and even agency supervisors, to oversee the work of administrative law judges on an *ex*

⁴⁸See Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 281 (1986), in which the possibility of value judgments entering into expert advice when statutes leave room for interpretation, and the need to disclose such advice and subject it to scrutiny and review, are discussed.

parte basis.⁴⁹ Those who advocate such oversight include some who believe that administrative law judges are in effect extensions of agencies responsible for implementing agency policy, and therefore, not only should agency personnel have the flexibility to influence their decisions, but also that administrative law judges *should* be biased in favor of agency points of view.

Others believe that any taint of improper influence is removed if it is a chief or supervising judge who initiates *ex parte* communication with subordinate judges, for example, to control quality of work. However, it has been noted that such a bureaucratic judicial model can limit judicial autonomy as compared to non-hierarchical judicial models that enhance autonomy, and that inappropriate exercise of power by superior members of a judicial bureaucracy has often been a feature of authoritarian regimes.⁵⁰

Finding Interests in Common

Some of the above differences are chasms apart, and may be difficult to bridge. However, at a minimum I suggest they need to be articulated in plain terms, in the clear light of day, where they can be examined openly and straightforwardly. Once these fundamental world-view issues are out in the open, it may be possible, by hypothetical consideration of them using real-world examples, to discern new patterns and consider new ways of looking at things. And by putting oneself in the position of an *other* – litigant, advocate, administrator, judge or professor – one may truly, perhaps for the first time clearly, see the impact of one's own view of things.⁵¹

Due to space considerations, I will discuss only a couple of examples, on subjects that seem to be particular “sticking points” in administrative law. First, both past and present commentators have

⁴⁹One who argued vociferously against the *ex parte* prohibitions in the original APA, calling it an “extreme provision,” was Kenneth Culp Davis. See 1 ADMINISTRATIVE LAW TREATISE, 2d Ed., §1.8, at 27-28.

⁵⁰See Donald W. Jackson, *Judicial Independence in Cross-National Perspective*, ABA Div. for Pub. Educ. Teaching Resource Bulletin No. 6, JUDICIAL INDEPENDENCE – ESSAYS, BIBLIOGRAPHY, AND DISCUSSION GUIDE, at 8 *et seq.*

⁵¹One might refer to this as applying the “Golden Rule” to law. For a more sophisticated discussion of how personal values can affect judging, see Paul L. Biderman, *Of Vulcans and Values: Judicial Decision-Making and Implications for Judicial Education*, 47 JUV. & FAM. CT. J 61 (1996).

observed that although some kinds of administrative adjudication, involving accusatory allegations of wrongdoing that require fact-intensive decisions, are appropriate for application of strict *ex parte* and exclusive record rules, others are not.⁵² The latter involve environmental regulation, various forms of rate-making, and other areas involving a need for agency expertise, and possible public participation. UCLA Law Professor Michael Asimow argues among other things that strict rules in these cases inhibit candid and much-needed advice from experts and cause substantial delay, and recommends a different model for “nonaccusatory” adjudication.⁵³

It has also been argued that such strict rules should not be applied to procedural matters such as continuances,⁵⁴ in contrast to ABA Model Code of Judicial Conduct Canon 3B(7), which directs one to whether a communication would give a party a procedural or tactical advantage, and requires disclosure.⁵⁵ Others disagree with less stringent application of the *ex parte* requirements in these situations, advocating consistent adherence to the canon, based on due process considerations, judicial independence, perceptions of fairness, and avoidance of the negative effects of less than as-open-as-possible government.

I suggest the practical concerns of agencies can be accommodated, while at the same time complying strictly with the canon and protecting parties’ due process interests, judicial independence, public perceptions of fairness, and open government. These concerns can all be addressed through such available means as protective orders, limited intervention, concentration on narrowing issues pre-hearing, expedited discovery, improved conflict management, expanded availability of voluntary mediation, *ex parte*

⁵²See Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 779 *et seq.*, 788 *et seq.* (1981); John Foster Dulles, *The Effect in Practice of the Report on Administrative Procedure*, 41 COLUM. L. REV. 617, 621 (1941).

⁵³Asimow, *supra* note 52 at 794-797.

⁵⁴Such arguments were made in the negotiations leading up to the final draft of the ABA Model Act Creating a State Central Hearing Agency, adopted February 3, 1997; in the end, the subject was not addressed and the issue was left to be resolved according to existing or future state provisions on *ex parte* communications.

⁵⁵See Jeffrey M. Shaman, Steven Lubet, and James J. Alfini, JUDICIAL CONDUCT AND ETHICS, Ch. 5 (2nd Ed. 1995). For Shaman *et al* it is implicit that administrative law judges are subject to the same ethical requirements as judicial branch judges. See, e.g., §4.25 at 144.

handling of appropriate scheduling and administrative matters followed by disclosure as required by Canon 3B(7), and others. We have much work to do, but there are a multitude of flexible options for addressing practical concerns within an enlightened view of the litigation process, which protect the rights of parties *and* the public interest.

Proposed Definitions of Judicial Independence for Administrative Law Judges

On the subject of judicial independence, which weaves through all the issues and problems discussed above, I offer as a starting point some definitions, as much controversy may result from frequent use of the term without any explicit definition of what it means. This may be especially true with the administrative judiciary, whose unfortunate omission from much of the discussion about judicial independence may be due not only to general unfamiliarity with administrative law and adjudication among the larger legal community, but also to confusion over what judicial independence means in this context.

Traditionally, the concept is seen as including both *decisional independence*, which refers to the independence of individual judges “to perform the judicial function subject to no authority but the law, [with the protection of] job tenure, adequate compensation and security”; and *institutional or branch independence*, which refers to the independence of the judicial branch as a separate branch of government.⁵⁶

Administrative law judges obviously do not have *branch independence*. However, if the public is to be assured of optimally neutral, impartial, and fair decisions in administrative adjudication, it is necessary that administrative law judges have *decisional independence*. Moreover, there are other means of providing a measure of *institutional independence* with regard to administrative adjudication: about half the states have established “central panels” of administrative law judges who are separated from the agencies for whom they conduct hearings,⁵⁷ and in the past there have been efforts

⁵⁶*Id.*

⁵⁷Although such entities generally provide for greater independence from inappropriate agency influence, how they are structured and managed is critical to avoiding the potential for more concentrated inappropriate pressures that were previously spread among multiple offices serving various agencies. See the ABA Model Act, *supra* note 54, for an

to establish a similar corps of federal administrative law judges.

Decisional independence has two aspects: one more internal, relating to how an individual chooses to function as a judge, and one more external, having to do with practical circumstances that may enhance or constrain independent and impartial judicial functioning.

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. Administrative law judges must be governed by no-less-stringent ethical rules than those governing judicial branch judges, if they are to be held out and expected to perform as truly neutral, impartial decision-makers, in the public interest.

I propose the term *practical decisional independence* to refer to the institutional structures and management practices relating to job status and security that insulate administrative law judges from inappropriate influences and thereby encourage them to function independently and impartially. In order to achieve this effectively, the job must be viewed as a judicial rather than a bureaucratic position; judges must be selected, disciplined and removed according to standards and procedures that ensure competence and protect due process; and their working conditions, continuing education, and job status must enhance rather than impede autonomy and independence.

OUR FUTURE . . .

In this day of public questioning of all things legal, it behooves all of us in the legal arena to work together to revitalize public confidence in the law, for our common future in the new millennium. To omit administrative adjudication from this endeavor would be to ignore large numbers of the public⁵⁸ whose views of the legal system are, and will

example of how to structure such an office.

⁵⁸According to Oregon Supreme Court Justice W. Michael Gillette, in a speech given at the 1998 Annual Meeting of the National Association of Administrative Law Judges, administrative law judges hear more cases per year than all Federal and all State judicial branch judges combined.

continue to be, informed by its effects.⁵⁹ Unless we ensure the public truly impartial and independent decision-making in administrative adjudication, from both a functional and practical standpoint, we are excluding many from the promise of neutrality in our system of law, and inviting their cynicism and resentment.

Administrative adjudication offers unique benefits, including less formality, more flexibility, and the resulting ability to achieve more timely and efficient resolution of cases. These benefits will be enhanced, and the public interest better served, by *requiring* administrative law judges to function as truly impartial, independent decision-makers as a professional and ethical responsibility, and by *ensuring* this through appropriate practical institutional structures and management practices.

Progress is being made. We are beginning to learn each other's languages. We need to continue to talk, and to listen. Perhaps, instead of the "fine mess" we have sometimes found ourselves in, a new dawn is breaking in the world of administrative adjudication – in which judicial independence comes to be widely accepted, not as a matter of power and ego, but as a fundamental duty and prerequisite to fair and effective decision-making.

⁵⁹See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI. KENT L. REV. 987, 1028-29 (1997), and sources cited therein, on psychologists' suggestions that public respect for government and the law depends as much or more on how fair the process is as on substantive outcomes.

