3-15-1999

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The Uniform Code of Military Justice: Impetus for Statutory Protection for Civilian Administrative Law Judges to Protect Against Agency "Command Influence"

Bruce T. Smith*
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An inherent conflict arises when an Administrative Law Judge (ALJ) sits in judgment of the actions of the very agency she relies upon for salary, administrative support and professional advancement. This conflict, by definition, threatens the impartiality of the decision-maker and impugns the credibility of the administrative adjudication process.

Various administrative agencies deal with these pitfalls in a variety of ways, but perhaps, no executive branch agency is as attentive to these threats as the United States military branches. As will be described herein, statutory and case law protects military judges from the evils of "command influence" - that tendency on the part of the agency to exert result-oriented pressure over a judge. Although military courts are unique in that they hear and decide criminal cases, the potential pressures on Executive Branch military judges are identical to those experienced by civilians who also sit upon Executive Branch administrative benches.

In Sprague v. King, 825 F. Supp. 1324 (N.D. Ill. 1993), affirmed, 23 F.3d 185 (7th Cir. 1994), cert denied, 513 U.S. 946 (1994), the court reflected that the position of ALJ was created by the Administrative Procedure Act (the "APA"), 5 U.S.C. § 701 et seq. The APA provides an opportunity for a formal hearing on the record before an impartial hearing examiner, thereby ensuring fairness and due process in federal rule-making and enforcement proceedings.

Although federal civilian ALJs are exempt by statute and by regulation from a first-year probationary period and performance

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ratings that are applied to most other federal employees, historically, agencies have devised schemes whereby control over the decision-maker was sought, utilizing the APA to provide a process for disciplining or removing ALJs "for cause." Luckily, however, a series of decisions by the Merit Systems Protection Board makes it difficult - but not impossible - for agencies to successfully bring complaints against ALJs for lack of productivity.

An issue presently involving ALJs assigned to the Social Security Administration (SSA) illustrates the problem.

THE BELLMON EXPERIENCE

Perceptions of threats to fairness and due process form the basis of a series of concerns historically expressed by the Association of Administrative Law Judges, Inc. (Association) to their sponsoring agency, the Social Security Administration (SSA).

In a 1997 open letter to the Commissioner of Social Security, the Association offered criticism of certain proposed rules regarding the "Administrative Review Process under the SSA's Appeals Council's Authority to Review Cases on its Own Motion." These proposed rule changes were made pursuant to Section 304(g) of P.L. 96-265 (1980), commonly known as the Bellmon Amendment.

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3 Lubbers, id. at 595-600.


5 http://www.aalj.org/pres-2.html


7 Section 304(g) of the Social Security Amendments of 1980 stated: "The Secretary of Health and Human Services shall implement a program of reviewing on his own motion, decisions rendered by administrative law judges as a result of hearings under Section 221(d)
The Association took exception when the group perceived that coercive action would be taken against ALJs based upon the results of random sampling of judge's decisions. Those concerns grew into litigation against the SSA, resolved in favor of the Association.8

Today, however, under proposals similar to the ones challenged by the judges in 1984, the SSA again seeks to provide "a national random sample of favorable ALJ decisions." Likewise, the Association again contends that SSA will interpret the Bellmon Amendment in a manner inconsistent with Congressional intent.9

During the 1980's, a number of ALJs were subject to a 100% review of their cases, and in one office, all ALJs were subject to a 100% review. Claimants who appeared before the ALJs under total review were subject to more scrutiny than claimants who appeared before those ALJs not targeted for review. During this time, an ALJ under Bellmon was forced to reach a higher standard of decision making, which meant that the record had to contain more medical evidence than had been previously required. As a result, cases were delayed for longer periods of time than were cases pending before ALJs who were not under Bellmon Review scrutiny.

In Phase 1 of the Bellmon Review process, a headquarters memorandum was prepared pertaining to individual ALJ Bellmon Review results. The results were developed by a statistical analysis of the individual ALJ profile (remand orders and decisions as well as defects discussed in QR (Quality Review) forms contained in an individual ALJ's file). The memorandum would request a ranking regional chief judge to "counsel" the individual ALJ in accordance with SSA policies. Records were maintained of all counselings administered to the various judges.

Three months after the initial memorandum requesting "counseling," Phase 2 dictated that individual ALJ's Bellmon Review results would be reviewed again to determine any "changed behavior."

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9 See, The Role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program, Subcommittee on Oversight of Governmental Management of the Committee of Governmental Affairs, United States Senate (October, 1983).
If there was no "changed behavior," the SSA would prepare a memorandum to the Chief ALJ describing the previous actions concerning the particular ALJ and the results of that counseling. Headquarters SSA would recommend that the Chief ALJ undertake corrective action by either repeated counseling or individual training.

Three months after the Phase 2 corrective actions were implemented, Phase 3 would begin by yet another analysis of the judge's "behavior." If that judge under scrutiny failed to change his/her behavior, SSA would initiate action recommending that the ALJ file be turned over to the Office of Special Counsel for administrative processing through OPM for appropriate disciplinary action; which act would include either a suspension or termination action against the ALJ before the Merit Systems Protection Board.

Eventually, the United States District Court ordered the SSA to cease its Bellmon Review program, ruling that:

"The defendants' unremitting focus on allowance rates in the individual ALJ portion of the Bellmon Review Program created an untenable atmosphere of tensions and unfairness which violated the spirit of the APA, if no specific provision thereof. Defendants' insensitivity to that degree of decisional independence the APA affords to administrative law judges and the injudicious use of phrases such as 'targeting', 'goals' and 'behavior modification' could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide ....In close cases, and, in particular, where the determination of disability may have been based largely on subjective factors, as a matter of common sense, that pressure may have intruded upon the fact finding process and may have influenced some outcomes."10

The Association contended that had the Bellmon Review program been effectuated, countless judges would have been brought before the Merit Systems Protective Board, defending themselves against suspension or termination actions.

One reason for the ALJ or trial judge's feelings of uncertainty lay in the interpretation of Section 7521 of the APA, which allows

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adverse actions against an ALJ for "good cause."\textsuperscript{11} It is this nebulous term -- "good cause" -- that allows an agency the latitude to take action against a judge for failing to meet production goals or ruling adversely to administration initiatives.

The ALJ Association now contends that the revitalization of the Bellmon Review process will resurrect the evils found objectionable by the District Court, including renewed pressure on ALJs to reduce allowance rates.\textsuperscript{12}

Thus, the battle lines are drawn anew.

The Association contends that the Bellmon II Review challenges the fundamental fairness of the hearing process. The judges further claim that if ALJs begin to receive remands of allowance decisions or receive personalized feedback from the Appeals Council, the fundamental fairness of the hearing process will be questioned.

Clearly, what is needed to allay the uncertainty of "perceptions," is specific statutory protection for judges from the alleged effects of agency programs like the Bellmon Reviews.

**THE MILITARY EXPERIENCE**

Like her civilian counterpart, the Military Judge owes her Executive Branch judicial existence to the Uniform Code of Military Justice (UCMJ) and executive order. And, like her civilian counterpart, the Military Judge risks incurring the wrath of her military superiors in the event she issues an unpopular decision. But, unlike her civilian counterparts, the Military Judge has enjoyed support in the military and civilian appellate courts and in Congress to protect her from the evils of what is termed "unlawful command influence."

Article 1, UCMJ, 10 U.S.C. 801, defines a military judge as "an official of a general or special court-martial detailed in accordance with" Article 26, which reads in pertinent part:

\begin{quote}
"(b) A military judge shall be a commissioned officer of \textsuperscript{11} 5 U.S.C. § 701 et seq.\
\end{quote}

\begin{quote}
\textsuperscript{12} Although Bellmon Review Program II does not target specific ALJs, it nevertheless targets specific types of cases which "[E]xhibit problematic issues or fact patterns that increase the likelihood of error." See Proposed Section 20 CFR 404.969(b)(1).\
\end{quote}
the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member."

Basically, a military judge is a commissioned officer who also is a lawyer and certified or assigned as a military judge by the Judge Advocate General of his service.

The Uniform Code of Military Justice also describes the functions military judges perform. Article 26(a) generally says that "(t)he military judge shall preside over each open session of the court-martial to which he has been detailed." More particularly, the Code authorizes military judges to hear and determine motions on various matters. In short, a military judge does the type of things that civilian judges do.

Of great import to this discussion is the fact that neither the convening authority (military commander) nor any member of his staff is able to prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his or her performance of duty as a military judge.

Congress' intent in this regard was to provide for establishment of rules on the fitness of military judges, which "to the extent consistent with the Uniform Code of Military Justice ... should emulate the standards and procedures that govern investigation and disposition of allegations concerning judges in the civilian sector."

These protections were put in place to protect against "unlawful command influence" which has been judicially described as "the mortal enemy of military justice." United States v. Thomas, 22 M.J. 388, 393 (CMA 1986), cert. denied, 479 U.S. 1085 (1987). Indeed, even "the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial. Cf. United States v. Cruz, 25 M.J. 326 (CMA 1987)." United States v. Allen, 33 MJ at 212. Accordingly, appellate case law does not countenance -- indeed, it condemns -- the calculated carping to the judge's judicial superiors about his sentencing philosophy. Thus, the trade-off in a system in which judges lack tenure and professionally

Because command influence is the mortal enemy of military justice, (and equally the mortal enemy of a fair administrative hearing) Congress specifically prohibited such activity in Art. 37 of the Uniform Code of Military Justice, 10 U.S.C. 837; see also Art. 98, UCMJ, 10 U.S.C. 898.

Cases have held that the exercise of command influence tends to deprive service members of their constitutional rights. If the target is the military judge, then the tendency is to deprive the accused of his right to a forum where impartiality is not impaired because the court personnel have a personal interest in not incurring reprisals by the convening authority due to a failure to reach his intended result. Cf. Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); United States v. Accordino, 20 M.J. 102 (C.M.A.1985).

Cannot the same be said in regard to the world of civilian administrative hearings?

Indeed, the sanctity of the military legal system demands that judges be held accountable for their actions. However, in the Manual for Courts-Martial, 1995, Part II, Rules For Courts-Martial, Chapter I., General Provisions Rule 109, professional supervision of military judges and counsel, the President provided, inter alia, that judges could be disciplined or removed for "unfitness" - but that "unfitness" should be construed broadly, including, for example, matters relating to the incompetence, impartiality, and misconduct of the judge. The military is adroit, however, to ensure that "Erroneous decisions of a judge are not subject to investigation under this rule. Challenges to these decisions are more appropriately left to the appellate process."

A full reading of the Rule provides insight which would be of aid to civilian ALJs:

Rule 109 provides in part:

“(a) In general. Each Judge Advocate General is responsible for the professional supervision and discipline of military trial and appellate military judges,
judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual. To discharge this responsibility each Judge Advocate General may prescribe rules of professional conduct not inconsistent with this rule or this Manual. Rules of professional conduct promulgated pursuant to this rule may include sanctions for violations of such rules. Sanctions may include but are not limited to indefinite suspension from practice in courts-martial and in the Courts of Criminal Appeals. Such suspensions may only be imposed by the Judge Advocate General of the armed service of such courts. Prior to imposing any discipline under this rule, the subject of the proposed action must be provided notice and an opportunity to be heard. The Judge Advocate General concerned may upon good cause shown modify or revoke suspension. Procedures to investigate complaints against military trial judges and appellate military judges are contained in subsection (c) of this rule.

(b) Action after suspension or disbarment. When a Judge Advocate General suspends a person from practice or the Court of Appeals for the Armed Forces disbars a person, any Judge Advocate General may suspend that person from practice upon written notice and opportunity to be heard in writing.

(c) Investigation of judges.

(1) "In general. These rules and procedures promulgated pursuant to Article 6a are established to investigate and dispose of charges, allegations, or information pertaining to the fitness of a military trial judge or appellate military judge to perform the duties of the judge's office."

(2) "Policy. Allegations of judicial misconduct or unfitness shall be investigated pursuant to the
procedures of this rule and appropriate action shall be taken. Judicial misconduct includes any act or omission that may serve to demonstrate unfitness for further duty as a judge, including, but not limited to violations of applicable ethical standards. The term "unfitness" should be construed broadly, including, for example, matters relating to the incompetence, impartiality, and misconduct of the judge. Erroneous decisions of a judge are not subject to investigation under this rule. Challenges to these decisions are more appropriately left to the appellate process.”

(3) “Complaints. Complaints concerning a military trial judge or appellate military judge will be forwarded to the Judge Advocate General of the service concerned or to a person designated by the Judge Advocate General concerned to receive such complaints. Discussion.”

Complaints need not be made in any specific form, but if possible complaints should be made under oath. Complaints may be made by judges, lawyers, a party, court personnel, members of the general public or members of the military community. Reports in the news media relating to the conduct of a judge may also form the basis of a complaint. An individual designated to receive complaints under this subsection should have judicial experience. The chief trial judge of a service may be designated to receive complaints against military trial judges.

The analysis to the rule, indicates that the rule is largely patterned after the pertinent sections of the American Bar Association's Model Standards Relating to Judicial Discipline and Disability Retirement (1978), and the procedures dealing with the investigation of complaints against federal judges contained in 28 U.S.C. 372 (1988). 13

Clearly, civilian ALJs would benefit from statutory protection that they be held accountable only for matters relating to the incompetence, impartiality, and misconduct of the judge. Under the current APA standard, ALJs can be sanctioned for any one of an uncountable, ambiguous "good causes."

It is this ambiguity which must be specifically addressed by Congress to ensure public and professional perceptions of a fair administrative adjudication process. Therefore, it is incumbent upon

(CMA 1991).

The remainder of the Rule 109 procedure includes:

(4) Initial action upon receipt of a complaint. Upon receipt, a complaint will be screened by the Judge Advocate General concerned or by the individual designated in subsection (c)(3) of this rule to receive complaints. An initial inquiry is necessary if the complaint, taken as true, would constitute judicial misconduct or unfitness for further service as a judge. Prior to the commencement of an initial inquiry, the Judge Advocate General concerned shall be notified that a complaint has been filed and that an initial inquiry will be conducted. The Judge Advocate General concerned may temporarily suspend the subject of a complaint from performing judicial duties pending the outcome of any inquiry or investigation conducted pursuant to this rule. Such inquiries or investigations shall be conducted with reasonable promptness. Discussion Complaints under this subsection will be treated with confidentiality. Confidentiality protects the subject judge and the judiciary when a complaint is not substantiated. Confidentiality also encourages the reporting of allegations of judicial misconduct or unfitness and permits complaints to be screened with the full cooperation of others. Complaints containing allegations of criminality should be referred to the appropriate criminal investigative agency in accordance with Appendix 3 of this Manual.

(5) Initial inquiry.

(A) In general. An initial inquiry is necessary to determine if the complaint is substantiated. A complaint is substantiated upon finding that it is more likely than not that the subject judge has engaged in judicial misconduct or is otherwise unfit for further service as a judge.

(B) Responsibility to conduct initial inquiry. The Judge Advocate General concerned, or the person designated to receive complaints under subsection (c)(3) of this rule will conduct or order an initial inquiry. The individual designated to conduct the inquiry should, if practicable, be senior to the subject of the complaint. If the subject of the complaint is a military trial judge, the individual designated to conduct the initial inquiry should, if practicable, be a military trial judge or an individual with experience as a military trial judge. If the subject of the complaint is an appellate military judge, the individual designated to conduct the inquiry should, if practicable, have experience as an appellate military judge. Discussion To avoid the type of conflict prohibited in Article 66(g), the Judge Advocate General's designee should not ordinarily be a member of the same Court of Criminal Appeals as the subject of the complaint. If practicable, a former appellate military judge should be designated.

(C) Due process. During the initial inquiry, the subject of the complaint will, at a minimum,
be given notice and an opportunity to be heard.

(D) Action following the initial inquiry. If the complaint is not substantiated pursuant to subsection (c)(5)(A) of this rule, the complaint shall be dismissed as unfounded. If the complaint is substantiated, minor professional disciplinary action may be taken or the complaint may be forwarded, with findings and recommendations, to the Judge Advocate General concerned. Minor professional disciplinary action is defined as counseling or the issuance of an oral or written admonition or reprimand. The Judge Advocate General concerned will be notified prior to taking minor professional disciplinary action or dismissing a complaint as unfounded.

(6) Action by the Judge Advocate General.

(A) In general. The Judge Advocates General are responsible for the professional supervision and discipline of military trial and appellate military judges under their jurisdiction. Upon receipt of findings and recommendations required by subsection (c)(5) of this rule the Judge Advocate General concerned will take appropriate action.

(B) Appropriate actions. The Judge Advocate General concerned may dismiss the complaint, order an additional inquiry, appoint an ethics commission to consider the complaint, refer the matter to another appropriate investigative agency or take appropriate professional disciplinary action pursuant to the rules of professional conduct prescribed by the Judge Advocate General under subsection (a) of this rule. Any decision of the Judge Advocate General, under this rule, is final and is not subject to appeal. Discussion The discretionary reassignment of military trial judges or appellate military judges to meet the needs of the service is not professional disciplinary action.

(C) Standard of proof. Prior to taking professional disciplinary action, other than minor disciplinary action as defined in subsection (c)(5) of this rule, the Judge Advocate General concerned shall find, in writing, that the subject of the complaint engaged in judicial misconduct or is otherwise unfit for continued service as a military judge, and that such misconduct or unfitness is established by clear and convincing evidence.

(D) Due process. Prior to taking final action on the complaint, the Judge Advocate General concerned will ensure that the subject of the complaint is, at a minimum, given notice and an opportunity to be heard.

(7) The Ethics Commission.

(A) Membership. If appointed pursuant to subsection (c)(6)(B) of this rule, an ethics commission shall consist of at least three members. If the subject of the complaint is a military trial judge, the commission should include one or more military trial judges or individuals with experience as a military trial judge. If the subject of the complaint is an appellate military judge, the commission should include one or more individuals with experience as an appellate military judge. Members of the commission should, if practicable, be senior to the subject of the complaint.

(B) Duties. The commission will perform those duties assigned by the Judge Advocate General
administrative law judges to seek legislative redress to ensure they be held accountable only for matters relating to profession incompetence, impartiality or misconduct.

Concerned. Normally, the commission will provide an opinion as to whether the subject's acts or omissions constitute judicial misconduct or unfitness. If the commission determines that the affected judge engaged in judicial misconduct or is unfit for continued judicial service, the commission may be required to recommend an appropriate disposition to The Judge Advocate General concerned. Discussion The Judge Advocate General concerned may appoint an ad hoc or a standing commission.

(8) Rules of procedure. The Secretary of Defense or the Secretary of the service concerned may establish additional procedures consistent with this rule and Article 6a.