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Maintaining the Balance between Judicial Independence and Judicial Accountability in Administrative Law

Edwin L. Felter Jr.

MAINTAINING THE BALANCE BETWEEN JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN ADMINISTRATIVE LAW*

Edwin L. Felter, Jr.**

Chief Justice William H. Rehnquist has said that an independent judiciary is the "crown jewel of our democracy." However, in recent times, there have been more and more attacks on the decisions of judges in specific cases, including those of administrative law judges. Throughout the United States, campaigns have been launched to oust judges whose decisions an interest group disliked; and, in some cases, those campaigns have been successful.

The right to criticize judicial decisions is safeguarded by the First Amendment, and some argue that lawyers have an obligation to criticize the courts and judicial decisions. Roger J. Miner, a judge of the U.S. Court of Appeals for the Second Circuit, has said, "In my opinion, one of the most important societal duties of lawyers is the duty to criticize the courts. It is my premise that informed criticism of the courts and their decisions is not merely a right but an ethical obligation imposed upon every member of the Bar." [1]

In a democracy, the marketplace of ideas demands an open dialogue concerning judicial decisions. Judges should be responsive to legitimate criticism, for example, by improving their legal scholarship, demeanor, etc., but should not compromise their consciences in response to public criticism. Criticism by the Bar should be done within the parameters of the Rules of Professional Conduct, in good faith and in good taste, and should never stoop to the level of personal attack. A good example of legitimate criticism is Abraham Lincoln's comment on the *Dred Scott* decision, in reply to Stephen A. Douglas' denunciation of his questioning of the decision: "We believe as much as Douglas in obedience to and respect for the judicial department of

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**Edwin L. Felter, Jr. is Director and chief Administrative Law Judge, Colorado Division of Administrative Hearings, Denver CO.

[1]Roger J. Miner, *Should Lawyers Be More Critical of Courts*? CASE AND COMMENT, 40 (May-June 1988).

government. We think its decisions on constitutional questions, when fully settled, should control not only the particular case decided, but the general policy of the country, subject to be disturbed only by amendments of the constitution, as provided in that instrument itself. More than this would be revolution. But we think the *Dred Scott* decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this."[2]

Yale law Professor Robert H. Gordon has noted another sort of criticism of the judiciary: "Everybody says 'I want judges who follow the law,' . . . but what they really mean is 'I want judges who will decide cases the way I want them decided.'"[3]

On whatever level our dialogue with the public may be, it is clear that the public will make itself heard, one way or another. The legislative and executive branches of government are more directly accountable to the voters, but judges are elected in many states, either directly or through some form of retention vote process. In the administrative judiciary, the job security of individual judges may to some degree depend on who holds office in the executive branch. Some administrative law judges have civil service or merit system status and thereby maintain greater independence. However, they are accountable by virtue of being subject to discipline under civil service provisions, and they may feel the force of public opinion in other ways.

In short, nowadays, it is insufficient to maintain that judges are only accountable to the requirement of "reasoned elaboration." Some segments of the public from time to time disagree with that "reasoned elaboration," and are demanding more accountability of judges. However, the public often does not realize that many mechanisms for accountability already exist. For example, judicial discipline commissions now exist in most jurisdictions, and judicial performance commissions, which monitor the performance of judges and report to

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[2]Speech by Abraham Lincoln at Springfield, Illinois (July 17, 1858), reprinted in 2 Collected Works of Abraham Lincoln 516 (R. Basler ed. 1953).

[3]John Gibeaut, *Taking Aim*, 82 A.B.A. JOUR. 50, 55 (November 1996).

the public, are becoming more and more prevalent. The administrative judiciary is beginning to consider such mechanisms as well.[4]

THE NEED FOR JUDICIAL INDEPENDENCE AMONG ALJs

Former Tennessee Supreme Court Justice Penny White, who knows well how high a price can be paid for judicial independence, and has spoken widely on judicial independence and courage, has recognized that administrative law judges are often "unfairly perceived as the least likely decision makers to exercise judicial independence." Observing that the administrative judicial process touches many lives, she emphasized that "there is no more essential place for the exercise of judicial courage, for the demonstration of judicial independence than in the administrative tribunals of this country where issues at the heart of the values we hold most dear are determined."[5] (In August, 1996, White lost a retention vote after various groups campaigned against her, largely on the basis of her vote in a death penalty case, remanding the case for a new sentencing hearing. *See* November 1996 *American Bar Association Journal* cover article.).

The need for judicial independence in the administrative judiciary is at least as pressing as the need for judicial independence in the judicial branch. The administrative judiciary must deal with an added factor. It involves accommodating legitimate agency objectives without compromising judicial independence. Whether ALJs work directly for agencies or are in more independent "central panels" of ALJs, not directly under any one agency, they act on behalf of agencies. As such, they are often expected to help achieve agency objectives.

This must, however, be done within the framework of judicial independence. In order to ensure necessary independence, once an agency refers a case to an independent administrative law judge, it must totally relinquish control over the case during the adjudication phase of

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[4]See, for example, James P. Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W. NEW ENG. L. REV. 807, 819 (1989).

[5]Speech of Former Tennessee Supreme Court Justice Penny J. White at the 1996 Annual Meeting and Conference of the National Association of Administrative Law Judges, Nashville, Tennessee, (November 9, 1996).

the matter (except where the agency, by statute, may legitimately limit the scope of the referral).[6]

There are many ways in which both direct and subtle pressures and influences may be exerted on administrative law judges in the performance of their work. Some of these were considered by a panel at the recent meeting of the National Association of Administrative Law Judges in Nashville, Tennessee, on the subject of "Due Process, Ex Parte Communications, and the Tension Between Independent Decision-Making and Administrative concerns."[7] Justice White, along with administrative law judges from around the country and representatives of academia, state agencies, the Tennessee Court of the Judiciary and Tennessee Board of Professional Responsibility counsel, addressed this subject in the context of the following issues: unwritten agency policies, calls for consistency in ALJ decisions, *ex parte* communications on "procedural" issues, requests for informal advisory opinions, interactions with agency counsel, assistance in decision-making, evaluations, reductions in force, and special problems with high-volume caseloads.

To address but one of these examples in this article, an agency may be entitled to have deference given to its rules, but a problem arises when unwritten or written policies outside the scope of appropriate rule-making are involved. The fact that such policies are generally best known in-house only, raises an issue of notice to parties whose case may be affected by such unpromulgated policies. Therefore, administrative law judges must resist pressure to go along with inappropriate agency policies of which parties have no notice.[8]

Administrative law judges have the opportunity, if not the duty, to fulfill a very important educational function concerning judicial independence, with agencies, agency lawyers and the public. Through

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[6]Model Act Creating a State Central Hearing Agency, unanimously adopted by the House of Delegates, American Bar Association (February, 1997).

[7]See infra Yoder-Hardwicke dialogue, XVII J. NAALJ at 92 (1997).

[8]It is recognized that under *Chevron*, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984), federal interpretative rulings may be accorded deference. However the Administrative Conference of the United States has recommended that "informal expressions should not be accorded the same weight as definitive agency interpretations." Transcript: Forty-second session of the Administrative Conference of the United States, 53 U. Pitt. L. Rev. 857, 875 (1992).

their roles as fair and neutral decision-makers, and through seminars and other contacts, administrative law judges can demonstrate that it is in both the agencies' and the public's long term best interest to have an adjudication system that is independent and above reproach.

To achieve this, it is important to avoid a cozy relationship between administrative law judges and agencies. Inappropriate *ex parte* contacts with agencies are just as taboo as inappropriate *ex parte* contacts with litigants or others. Some have argued that the demands of "agency expertise" require a close relationship between the agency and the administrative law judge adjudicating its cases. However, agency expertise should be presented through expert witnesses in the context of the hearing.[9]

When agencies disagree with decisions of administrative law judges, there are appropriate and inappropriate ways to proceed. Putting pressure on the ALJs to change decisions is obviously inappropriate. Decisions may be appealed and reviewed through the procedures set forth in administrative procedures acts. Statutes and rules may be amended, to address perceived problems in the law. Agencies also need to devote the resources necessary to train its investigative and litigation staffs, so that they can effectively present cases before administrative law judges.

THE BEST WAY TO ACHIEVE AGENCY OBJECTIVES

The best way for an agency to achieve desired objectives is for the agency to have high enforcement credibility in the community it regulates. This is best done in an atmosphere where judicial independence is not called into question. It involves thorough and professional investigations by agency staff. It also involves skilled agency lawyers who are thoroughly prepared; who have the ability to play on a level playing field; who do not need special concessions from the system; and who have the good judgment, and credibility level, to settle the weaker cases in the best interests of the public.

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[9]John Hardwicke, Chief Administrative Law Judge of Maryland, *The Central Hearing Agency: Theory and Implementation in Maryland* XIV J. NAALJ 5 59-67.

To paraphrase Chief Justice Rehnquist, the "crown jewel" of an administrative agency's credibility is a fair and impartial adjudication mechanism that is above reproach. This mechanism is peopled by solid and intelligent administrative law judges who have the moral fiber to be true to their consciences and the good sense to render intelligent decisions in conformity with the law, and support staff who are trained to operate by the highest ethical standards.

HOW TO ACHIEVE JUDICIAL ACCOUNTABILITY WITHOUT ENCROACHING ON JUDICIAL INDEPENDENCE

The first prerequisite to achieving judicial independence is having an efficient system: "Justice delayed is justice denied." The system must provide fair and intelligent case management methods, timely hearings and timely decisions. Of no less importance to demonstrating judicial accountability is having a quality adjudication system that puts out quality products (decisions). In an era when perceptions can be more compelling than reality, these two prerequisites are indispensable.

Another important method of demonstrating accountability in the administrative judiciary is to have an appropriate judicial disciplinary mechanism, and a complaint handling system, that safeguard the due process rights of both the public and accused judges.

In administrative law judge circles, one of the most controversial issues, especially among federal administrative law judges, involves performance evaluations of administrative law judges. Some perceive performance evaluations as a threat to judicial independence. In many jurisdictions, chief judges and supervisors are obliged, by statute, to do performance evaluations of administrative law judges. In a central panel milieu, performance evaluations should arguably be less threatening than in a situation where the judge works for the agency whose cases the judge adjudicates. However, problems can arise in any performance evaluation system that ranks judges based

on subjective criteria.[10] And indeed, there are few if any truly objective criteria on which to evaluate judges.

The danger of evaluations encroaching upon judicial independence must be acknowledged. Evaluators must try to steer clear of influencing outcomes in cases or categories of cases, either directly or indirectly. It should also be recognized that performance evaluations, which make distinctions between the good, the not-so-good, the superb, and the better, can unintentionally and subtly foster inappropriate judicial competition for high ratings, which can be at odds with independent decision-making.

It is appropriate to have some form of observation and feedback, along with a strong and ongoing training program, in order to encourage and maintain a high performance level among ALJs. Developmental judicial evaluation surveys (that are confidential as to each individual judge but made public overall and/or in specific areas) can also add a measure of credibility to the idea of accountability in the administrative judiciary.

Judges should be disciplined when they violate appropriate standards of competence and conduct, including Canons of Judicial Conduct, which enjoin all judges to be free from improper influences; to expeditiously handle their caseloads; to be fair and impartial to both sides; and to keep abreast of current developments in the law.

Having a meaningful complaint-handling system (concerning judges and support staff), which is tastefully publicized without encouraging all manner of frivolous complaints, is another important tool in demonstrating accountability. The public must know that there is meaningful recourse for cases of inappropriate judicial conduct. The public must be assured that its complaints are taken seriously and handled promptly, and that complainants will be notified of the resolution of complaints in a timely fashion.

It is also very important for the administrative judiciary to take steps to enhance the positive image and credibility of its judges. Sensitivity/humility training is an appropriate prescription for cases of

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[10] *See infra, Evaluation of Administrative Law Judges: Premises, Means, and Ends,* by Judge Ann M. Young, for a comprehensive discussion of the issue of performance evaluation of ALSs, XVII J. NAALJ 1 (Spring 1997).

judicial arrogance. Judicial arrogance (a/k/a "black robe fever," "judgitis" or, worst of all, a "terminal case of judicial megalomania") is a significant public frustration in the area of judicial accountability. In these cases, perceptions overshadow, and replace, actual fact. The judge can be fair and render an appropriate and well-reasoned decision, but if the judge projects arrogance, one of the parties will, most likely, walk away believing the judge was **not** fair.

In the case of non-central panel administrative law judges, a well-publicized and meaningful Chinese wall must be erected between the judges, the agency and its lawyers. Preferably, the judges should be housed in a location different from the agency staff. The author hastens to add that housing at a different location alone is not sufficient to satisfy an informed observer that he or she will receive a fair and impartial hearing by an independent judge.

Accountability in the administrative judiciary can be a tricky proposition. How are administrative law judges accountable to the agency? To whom are administrative law judges actually accountable? There is one answer. Fundamentally, the administrative law judge is accountable to the public -- in the same way that judicial branch judges are -- to handle cases fairly, impartially and expeditiously.

Although under fire, judicial independence is more likely to be accepted as a given in the judicial branch. In the administrative judiciary, judicial independence is sometimes a principle that must be fought for. It can only be maintained by educating the public and demonstrating its value. The public will accept the judicial independence of the administrative judiciary upon a demonstration that its judges are accountable. It is imperative for the administrative judiciary to craft meaningful, and ethically appropriate, accountability measures for itself. If it does not do so, vocal segments of the interested public may fashion inappropriate accountability measures for the administrative judiciary.