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Richard L. Sippel

COLLEGIALITY AMONG ADMINISTRATIVE LAW JUDGES - AS WELL AS INDEPENDENCE - WOULD BE LOST IF JUDGES ARE EVALUATED BY CHIEF JUDGES ON POLICY CORRECTNESS

Richard L. Sippel*

An Observation

There is less pressure exerted on judges than one would think. There simply is no need for it. To adjudicate these cases, proven judges are chosen who will always conduct the trial in the desired direction and pronounce the needed sentence. WASHINGTON POST *For The Record, December 5, 1986, Verbatim Interview With An East European Judge.*

Introduction

In 1991, the former Administrative Conference of the United States (ACUS)[1] was requested by the Office Of Personnel Management (OPM) to conduct a study of the "landscape" of federal administrative adjudication.[2] The governmental study and a related survey were swiftly funded, conducted and completed. In May and August 1992, ACUS published two draft documents entitled *The Federal Administrative Judiciary* (referred to in this article as the *Study*).[3] The

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*The writer is a federal administrative law judge at the Federal Communications Commission. The views herein are his own and do not necessarily reflect the views of others.

[1]*Washington Post*, Metro Section, November 1, 1995 (ACUS was "zero funded by a Congress out to eliminate waste and red tape"). *Compare* the American Bar Association's ABA 21 ADMIN. & REG. L. NEWS, (Winter 1996, No. 2) (House-Senate conference committee voted to terminate ACUS funding, a "penny-wise, pound-foolish decision"). From 1968 to 1995, ACUS issued approximately 200 recommendations, most of which were at least partially implemented. *Id.*

[2]The Study, *The Federal Administrative Judiciary* reported that there were approximately 1,185 federal administrative law judges. Study at Appendix I. *See* Joseph J. Simeone, *The Function, Flexibility, And Future of United States Judges Of The Executive Department*, 44 ADMIN. L. REV. 159, 165 (1992) (breakdown of judges by agency and pay grade).

[3]OPM had asked that the *Study* survey agency and practitioners attitudes toward administrative law judges but only data of responding judges were reported. *See Study* at 1. Probably the weakest link in the *Study* is the absence of data on the users of APA adjudication, the parties and the practitioners.

Study was the subject of a plenary meeting of ACUS in September 1992. Final approval was given at a subsequent meeting in December 1992. *See* Recommendation 92-7 adopted by ACUS on December 10, 1992, 57 FEDERAL REGISTER, 61759 (December 29, 1992). The *Study* was published in its entirety in RECOMMENDATIONS AND REPORTS, ACUS 779 (Vol. II) (1992).

Subsequent articles have commented on, criticized and defended the substance and recommendations of the *Study*.[4] The narrow focus of this article examines the adverse effects on administrative adjudication of the *Study*'s recommendation for chief administrative law judges (*chief judges*) to evaluate administrative law judges on fidelity to agency/department policy in rulings and decisions issued under the Administrative Procedure Act (APA). The Study found that "ALJs do not often seek to effect changes in agency policy." *Study* at 924. Therefore, there has not been a statistical case made for evaluations on adherence to policy. And, as explicated below, to adopt such a system would create an unneeded tension between chief judges and administrative law judges.[5] Even worse, it appears that the ACUS recommendation may have been an attempt to gain executive control over administrative law judge adjudication which would violate both the letter and the spirit of the APA.

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[4]James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U 629, 647-653 (1994). *See also*, Charles P. Rippey, *Undermining the Administrative Procedure Act: How ACUS Threatens the Independence and Merit Selection of Federal administrative Law Judges*, JUDGES' JOURNAL (Spring 1993); Brian C. Griffin and Gary J. Edles, *An Alternative Look at the Administrative Conference's Recommendations on the Administrative Judiciary and Judge Rippey's Reply*, JUDGES' JOURNAL (Fall 1993); Ronnie A. Yoder, *A Critique of the ACUS Report on the Federal Administrative Judiciary*, 39 FEDERAL BAR NEWS & J., NO.7; Habermann, et al., *A Synopsis of the ACUS Report on the Federal Administrative Judiciary*, 39 FEDERAL BAR NEWS & J., NO.7; Edward T. Miller, *FBA Critiques ACUS Draft Report on the Federal Administrative Judiciary*, THE FEDERAL JURIST (Winter 1992).

[5]It also seriously threatens adjudicatory independence:

> The existence of such performance appraisals severely undercuts any procedural protections normally conferred in administrative hearings.[footnote omitted]

Timony, *supra* at 646.

ACUS Evaluations On Policy Correctness

The recommendation of ACUS on evaluations for administrative law judges prescribed the following:
Chief ALJs should be given the authority to:

> Conduct regular ALJ performance review based on relevant facts, including case processing guidelines, judicial comportment and demeanor, and the existence, if any of a clear disregard of a pattern of nonadherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy.[6]

To assure that evaluations were done, OPM would be empowered to conduct "regular performance review of Chief ALJs."[7] This article will argue the position that aside from the threat to adjudicative independence and the unfairness of off-the-record evaluations of persons who adjudicate cases, ACUS-type evaluations would create debilitating tensions resulting in compromise of collegiality and would raise serious questions of judicial ethics. This article also is a critique of the ACUS recommendation for evaluations by chief judges of other administrative law judges on the correctness of policy rulings and the subsequent evaluation by OPM of the chief judges on how well they make such evaluations.[8]

A "Looking Glass" Proposal For Prohibited Evaluations

In administrative adjudication, policies in general should be determinable from statutes, legislative histories, governmental rules,

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[6]Recommendations and Statements of the Administrative Conference of the United States Regarding Administrative Practice and Procedure, 57 FED. REG. 61759, 61764 (December 29, 1992).

[7]*Id* at 61764 *supra* n. 4 at 646.

[8]There is no discussion here on recommendations for procedures for the discipline or removal of administrative law judges. It is noted, however, that in disciplinary proceedings, there must be a hearing before an administrative law judge at the Merit System Protection Board and a finding of good cause. 5 U.S.C. §7521. For a critique on present procedures for discipline and removal, *see* Delbert R. Terill, Jr., *Complaint Procedures Institute By And Against Federal Administrative Law Judges Need Reform Now,* JUDGES' JOURNAL 27 (Fall 1994).

regulations, agency/departmental decisions and interpretative public releases. The *Study* concludes that agency regulations are the "primary source" of policy direction for administrative law judges. *Study* at 919. A resounding ninety six percent of the judges surveyed acknowledged that regulations are "very important" to their decision. *Id.* Therefore, there does not appear to be a need for evaluation of adjudicatory policy adherence. Admittedly, there are times when a policy may be evolving and therefore difficult for a judge to apply in a fast moving administrative adjudication. The difficulty will vary depending on the policy which may be substantive or procedural or which may be developing rather than established. In federal administrative adjudication, cases are litigated under the APA and parties and their counsel generally rely on precedent applied under principles that are akin to *stare decisis*. *See Study* at 993, 1005 (agencies can to an extent control policy and maintain decisional consistency by a system of precedents as used by the courts). Where changes in policy are taking place and precedent would not apply,[9] the parties should be able to affect the outcome through evidence, briefs and arguments which shape the case from its inception through appeals. And that is how policy questions in litigation should be decided in a true democracy. In a recent study of federal administrative law chief judges, a law professor concluded that in the tradition of adjudication in the United States, if an agency or department does not like an administrative law judge's decisions, it can "simply reverse them."[10]

By contrast, the methodology of evaluation devised by ACUS has elements of the classic, "Alice In Wonderland." The *Study* sought to give chief judges cover by shielding them from direct agency

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[9]An agency has the right to develop new policies provided that it gives a principled explanation for its change of direction. *Nat'l Black Media Coalition v. F.C.C.*, 775 F.2d 342, 355 (D.C. Cir. 1985). But an agency may not repudiate precedent simply to conform with a shifting political mood. *Id.* at 356 n.17, citing *Int'l Ladies' Garments Workers v. Donovan*, 722 F.2d 795, 828 (D.C. Cir. 1983). These are rules of interpretation applied by Article III courts in their quests to decipher the current meaning of an agency's or department's latest policy. These rules of interpretation illustrate how complex it can be and illustrate the risky business of evaluating judges for their correctness of policy interpretation and application.

[10]Russell L. Weaver, *Management Of ALJ Offices In Executive Departments And Agencies*, 47 ADMIN. L. REV. 303-336 (1995) (an ACUS funded study of chief administrative law judges in the federal system which does not recommend an evaluation of administrative law judges by chief judges).

appraisals while subjecting them to OPM evaluation or review by OPM of their appointments and renewals. The agency that employs the chief judge would not directly evaluate the chief judge on policy correctness. Rather, officials at OPM would conduct the chief judge's evaluation and then report back to the agency on whether the chief judge had properly determined the agency's policy in the chief judge's evaluations of administrative law judges. In that way (so the *Study* concludes) the chief judge remains independent of the agency. *Study* at 1031. But there is no mention of how the evaluators at OPM become sufficiently learned in the policies of over thirty agencies to correctly interpret the various policies. The logical solution would be for the OPM officials to go back to the agency for an interpretation and that would indirectly permit the agency to evaluate the chief judge on the sly[11] in violation of the APA.[12]

The *Study* would even have the APA amended to authorize (require) chief judges to "bring the charges against wayward judges." *Study* at 1025. The *Study* also would authorize chief judges to recommend "performance-based bonuses" of the kind that are available to members of the Senior Executive Service. *Study* at 1024 That stick and carrot technique would decimate the philosophy of true adjudicative independence that has been embedded in the APA since 1946.

APA Adjudication At Risk

Since its inception fifty years ago, the APA has prohibited performance appraisals of administrative law judges. 5 U.S.C. §5372. And since the enactment of the APA, Congress has twice considered and twice rejected mandatory evaluations of administrative law judges.[13] In an extreme deviation from the APA's guarantee of independence and the related prohibition of judicial evaluations, ACUS

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[11]Like the queen and king in Alice's Wonderland, the agencies acting under ACUS' recommendation could operate contrary to principles of due process and judicial independence: "'You never had fits, my dear, I think?' the King said to the Queen. 'Never!' said the Queen, furiously throwing an inkstand at the Lizard as she spoke. 'Then the words don't fit you,' said the King, looking around the Court with a smile." Carroll, ALICE IN WONDERLAND (Oxford Univ. Press, 1989) at 108.

[12]*See Study, supra* n.2 at 1025 and at 1031.

[13]Timony, *supra* n.4 at 632.

expected to have chief judges evaluate administrative law judges on the correctness of their applications of agency or departmental policy. To enhance executive control over the evaluations, ACUS recommended that chief judges serve for a term of only five years with the possibility of renewal. In that way, favorable evaluations of chief judges by OPM would become crucial to renewed appointments in that position. Thus, the inescapable conclusion arises that "[T]he Chief ALJ will not want to lose the title and extra pay of the position and will, therefore, be subject to the will of the agency." [14]

The commissioning of chief judges to review the policy correctness of other judges' decisions would, if implemented, not only destroy decisional independence, but also would adversely affect collegiality while raising questions of judicial ethics. And in the final analysis, it would become a failure in efficiency because it would require an inordinate expenditure of time which could best be put to the more productive alternative use of hearing and deciding cases.

Misperceptions Of The Work Of Administrative Law Judges

Inconclusive survey data of the *Study* "suggests" to its authors that "ALJs are inclined to resolve individual controversy as best they can and let the review stages of the adjudicative process resolve the policy questions." *Study* at 921. That speculative conclusion was reached without any analysis of how written decisions of administrative law judges are viewed by the courts, a serious omission since reviewing courts have assigned importance to the decisions of administrative law judges in the appellate review of the agency records.[15] Notwithstanding the recognized reliability of administrative law judges'

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[14]Timony, *supra* n.4 at 650.

[15]Patricia M. Wald, *Some Thoughts On Beginnings And Ends: Court Of Appeals Review Of Administrative Law Judges' Findings And Opinions* 67 WASH. UNIV. L.Q. 661, 664 (1989). *See also Universal Camera v. NLRB*, 340 U.S. 474, 496 (1951) (positive recognition by Supreme Court of the findings of administrative law judges); *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 527-28 (3rd Cir. 1981) (the high qualifications of administrative law judges merit respect); and *Pennzoil Co. v. F.E.R.C.*, 789 F.2d 1128, 1135 (5th Cir. 1986) (credibility findings of ALJs are entitled to special weight and evidence supporting a conclusion is likely to be less substantial when the ALJs conclusion differs from that of the agency).

decisions, the *Study* assumes that administrative law judges regularly fail to apply, or fail to apply correctly, the relevant policy in cases that they adjudicate. However, the primary fault is not ascribed to the judges. The *Study* concludes that a substantial part of the "problem" lies with the failures of agencies to articulate adequately their policies. While acknowledging that inadequate policy articulation lies at the heart of the problem, ACUS still would have chief judges review administrative law judges for any "clear disregard of or pattern of nonadherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy." *Study* Recommendation, *supra*. The professional viability of chief judges and administrative law judges would depend ultimately on a bureaucratic evaluation of the correctness of policy interpretations which would be performed indirectly by the agency or department whose policy is in issue.

The Historically Accepted Method Of Review

The legal process of the United States empowers reviewing authorities to reverse erroneous rulings of administrative law judges.[16] Also, there is a constant element of accountability in that the orders and decisions of federal administrative law judges are published (at least locally) and are subject to review within the agency or department (5 U.S.C. §557). If the decision is affirmed or adopted by the agency, it is ultimately appealable to an Article III court.[17] *See Study* at 1004 (an agency is authorized to review any initial or recommended decision of a person who presides in an APA adjudication). Thus, the checks and balances of the traditional review process, and the fact that peers,

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[16]Usually, there is provision for a *de novo* review within an agency or department. 5 U.S.C. §557. Setting aside an agency decision is required when it is found by a federal appellate court to not be supported by substantial evidence or to be arbitrary and capricious or for an abuse of discretion or for otherwise not acting in accordance with law. 5 U.S.C. §706. *See generally Gellhorn & Boyer,* ADMINISTRATIVE LAW AND PROCESS (2d Ed. 1981) at 56-62. *See also Steadman v. S.E.C.,* 450 U.S. 91 (1981).

[17]In that sense, there is no "hidden judiciary" such as is the case with administrative judges who are not selected through the merit selection system and whose independence is not protected by the APA. *Cf. e.g.*, Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus On Our Invisible Judiciary*, 31 ADMIN. L. REV. 109 (1981). Thomas C. Mans, *Selecting The Hidden Judiciary*, 63 JUDICATURE 60 (1979); Alice Klement, *Hidden Judiciary Fights Back*, NAT'L L.J., Sept., 24, 1979, at 18.

the bar and the public see all, influences trial judges to try to get it right in the first instance, i.e., to rule in accord with current policy. The *Study* concluded based on selected literature that the current system is not sufficient because the mere review of administrative law judges' decisions, as provided for by the APA, "does not normally modify behavior as effectively as the choice between conforming to a given norm and suffering direct adverse consequences." *Study* at 1013.[18] Thus, it is more behavior modification of administrative law judges than correctness of policy interpretation which was the goal of the ACUS model. Evaluations of the kind envisioned by ACUS that aim to achieve uniform adherence to policy could be used systematically to fashion non-independent judges. Certainly, any system of administrative adjudication where administrative law judges may suffer "direct consequences" beyond reversal or remand for being perceived in an evaluation as failing to meet a "given norm" would mark a substantial retreat from the independence of judges that is expected by parties and their counsel under the APA. Over time, it could lead to "proven judges" akin to those in totalitarian governments. Ultimately, it would forever silence collegiality which has been a hallmark among APA appointed administrative adjudicators since 1946.

An Impossible Standard To Apply Evenly

A natural tension would be created when a chief judge and other judges in the same agency are applying the same policy at or about the same time in litigated cases. Under the ACUS model, chief judges would have an incentive to retain personal interpretations because they would ultimately be evaluated by OPM on the correctness of their evaluations of how other judges had applied the same policy. As a

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[18] *See* L. Hope O'Keefe, *Note, Administrative Law Judges, Performance Evaluations and Production Standards: Judicial Independence Versus Employee Accountability,* 54 GEO.WASH L. REV. 591 (1986) accorded great weight by the *Study. See Study* at 1011 n.1198 (this well researched *Note* was represented as being very helpful in preparing the Study's analysis on performance evaluations for administrative law judges). The *Note* concluded that freedom of administrative law judges from performance evaluations by their employing agencies is an "integral aspect of that independence." 54 GEO. WASH. L. REV. at 626-27. That conclusion of O'Keefe would not qualify as support for the ACUS recommendation on evaluations.

result, the ACUS proposal presents a myriad of real-world questions for which the Study provides no answers or guidance. For example, will chief judges be permitted or required to compare the range of interpretations among all judges addressing the same issue? How would that affect case assignments?[19] Will an administrative law judge who addresses a policy *ab initio* be at risk of a negative evaluation if his or her initial analysis differs from the later analysis of the reviewing chief judge regardless of the correctness of the ruling? The Study answers in the affirmative if there is shown to be a "clear disregard" or a "pattern of nonadherence" to "properly articulated policy." Consider the uncertainty that standard creates in the application of a new or evolving policy, such as one involving prompt decisions, limited discovery, or encouragement of settlements. In these as well as in other areas, there may be a change affected or a nuance applied to an existing regulation or policy through an administrative adjudication which avoids the formal requirements of notice and comment. *See Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 412-13 (7th Cir. 1987), citing *Motor Vehicle Mfgrs v. State Farm*, 103 S. Ct. 2856, 2866, 2874 (1983). The court in *Bowen* highlighted the predicament: "a question is debatable when it could be decided in different ways by reasonable people." The court then noted that there are 13 circuit courts of appeals and more than 500 district judges. 832 F.2d at 412. Certainly, different administrative law judges also should be allowed to differ on a policy's application as reasonable people without being subjected to negative performance evaluations.

An Elusive Standard For Evaluation

Agencies and departments can expect that administrative law judges who are hearing assigned cases, whether employed directly by

[19]The APA provides that cases shall be assigned to administrative law judges "in rotation so far as practicable." 5 U.S.C. §3105. Professor Weaver found that most administrative law judges "view chief judges as their colleagues and peers and trust them to recognize the realities of the situation in assigning cases." Weaver, *supra* n. 10 at 322. That trust would be lost under a regimen of ACUS evaluations.

the agency or department or on loan for the purpose of the case,[20] will do their utmost to apply correctly policy changes that are evolving. Yet under the ACUS proposal, there are situations where such devotion to duty would place a judge in jeopardy of receiving a negative evaluation by a chief judge. For example, it is a basic proposition of due process that a judge may not go outside of the record in determining any substantive, procedural or evidentiary issue because the right to a trial-type hearing necessarily includes knowledge by the parties of the factors considered by the judge.[21] Assume that an agency found in the course of deciding an interlocutory appeal that an administrative law judge's reference to a proposed policy change or modification that was then under consideration by the agency did not constitute an extra-judicial source for which the judge could be disqualified. If the judge were to be evaluated soon after the ruling wherein the policy was interpreted prospectively, what standard does the chief judge apply on whether the administrative law judge made the correct ruling? As the policy gets closer to adoption, will the same standard apply for all judges who are evaluated by the same chief judge even though the cases are different? If the judge was found to be wrong, at what point can the argument be asserted that the policy was prospective and therefore not yet "properly articulated?" How can the evaluation standard be uniform when there is no standard prescribed or suggested by ACUS for situations where there will be different outcomes in different cases based on different facts that are decided at different times in the course of the policy's development?

Would the APA be amended to insure that there will be no *ex parte* direction from a chief judge while a case is *sub judice*? Are judges to be left to the fates in hoping to receive a reasoned evaluation?

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[20]As contemplated by the APA [5 U.S.C. §3344], there is a loan program under which OPM details judges to hear cases at departments/agencies which have no need for a full time administrative law judge (e.g., U.S. Customs Service and the Bureau of Alcohol, Tobacco and Firearms). In FY 1992, there were a total of 327 cases heard and decided by borrowed judges. (Statistics prepared by OPM's Office of Administrative Law Judges). *See Study* at 966 (loan program and transfers of judges among agencies are ample testimony to the capability of judges to handle a variety of cases). The *Study* did not address the evaluation by chief judges or by anyone else of those judges who hear and decide cases on a loan assignment.

[21]*See*Gellhorn & Boyer, ADMINISTRATIVE LAW AND PROCESS, *supra* note 16 at 218.

Will OPM be required by the Congress to issue "guidelines" for evaluating administrative law judges on how they must apply agency policy? These are substantial questions which the Study does not address. The correct prediction of an expected outcome becomes even more elusive should the judge who receives a negative evaluation later turn out to have been correct after appeals are taken through the agency/department or after court review. Yet at the time of evaluation, the chief judge could conclude that the judge was in "clear disregard" of a "properly articulated policy" even though a proposed change to the policy was in its embryo stage and the rulings made were interlocutory in fast-moving, trial-type hearings. The permutations of this hypothetical can be applied beyond the above illustration. Such a plethora of possible outcomes at different stages of a policy's development makes clear the folly of having chief judges evaluate administrative law judges on the correctness of their *ad hoc* applications of policy.

An Inefficient System Of Adjudication

Moreover, there follows a resulting adjudicatory inefficiency by way of a negative incentive. For if the ACUS Study was accurate in finding that administrative law judges avoid making policy choices (a conclusion rejected by this writer as speculative and misleading) thus leaving the policy issue for higher authorities to sort out, (*Study* at 924-925) administrative law judges would be encouraged to be even more reluctant to rule on policy questions at hearings knowing that they will be evaluated on policy correctness. This would be a logical outcome even with a limitation on negative evaluations to situations where there is found by a reviewing chief judge to be a "clear disregard" or a "pattern of nonadherence" to "properly articulated policy."[22] But when is there a clear disregard? And would not a forthright chief judge caution any judge who made a one-time error in policy (as such error might be perceived by the reviewer) so that the judge will get it right

[22]Recommendations, *supra* at 57 FED. REG. 61759, 61764. A "pattern of nonadherence" is difficult to establish and it becomes highly subjective to reach a "clear disregard" and a "properly articulated policy" which are subjective standards that could be used to reign in a judge who was perceived to be overly independent.

the next time rather than wait for a "pattern of nonadherence" to develop? If a chief judge should permit a pattern to develop, would not the chief judge be susceptible to an unfavorable review at OPM? Would it be unethical for a chief judge to allow a judge to lapse into a pattern of nonadherence so that there would be a basis for an adverse evaluation? Certainly, at a minimum, counsel appearing in cases where judges are being evaluated on their policy rulings should be entitled to know that the policy is ultimately being ascertained by the chief judge. Should counsel also be entitled to discovery? What would be the scope of permissible discovery? Might there not be situations where an administrative law judge thinks it to be in her or his best interest to "screen" in advance with the chief judge an application of a policy so that the judge would be sure to "get it right" at hearing? Suppose there is disagreement under that last scenario - can a chief judge "order" an administrative law judge to follow the chief judge's interpretation or run the risk of an adverse evaluation? Must a judge who receives such an order in the midst of a hearing announce forthwith to counsel that the law of the case on the policy issue has been set *ex judice* by the chief judge and that therefore counsel's arguments submitted on the issue will not be worth considering? That is no way to conduct adjudication.

Judicial Ethics At Risk

Canon 3.A(4) of the Model Code provides:

> An administrative law judge should accord to all persons who are legally interested in a proceeding, or their lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider *ex parte* or other communications as to substantive matters concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding if notice is given to the parties of the person consulted and the substance of the advice, and the parties are afforded a reasonable opportunity to respond.

A related Commentary instructs that the proscription against

communications does not preclude a judge from consulting with other judges or with other subordinate personnel whose function is to assist the judges in adjudicative matters. *Id.* That concession to the *ex parte* prohibition specifically conditions the discussion of issues with equals or subordinates. Must there now be a prohibition of the acceptable practice of discussing current cases with chief judges as colleagues who through longevity and experience could be among the best resources for a trial judge on a particular question of practice or procedure? An experienced jurist has concluded that there is no violation of the presumption of Model Code against *ex parte* contacts when a judge confers with another judge "of the same level" on a pending issue. C.T. Harhut, *Ex Parte Communication Initiated By A Presiding Judge*, 68 TEMP. L. REV. 673, at 681, 695 (1994). "[I]t is the public's perception of impropriety and fairness that establishes the norm for judicial conduct". Id. at 695.[23] It seems evident that continuing "collegial" contacts with chief judges who were formerly colleagues but who now would be evaluating the judge initiating the *ex parte* contact would be perceived as at least improper if not outrageous.

Professor Weaver found that many administrative law judges view chief judges as their peers, particularly where chief judges continue to hear cases. Weaver, *supra* n.10 at 316. On the other hand, informal ex parte discussions with superior officials, who would be evaluating performances on the issues for which advice or comment is sought, would contaminate the desired collegiality. Ultimately, it would be necessary to amend the Model Code to prohibit such informal *ex parte* contacts should the ACUS recommendation ever be adopted and incorporated into the APA, a deleterious result that raises an ethical consideration neither recognized nor addressed by the ACUS Study.

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[23]Judge Harhut's article utilized statistical data which he obtained from survey questions to fellow judges. He reported that "[a]n overwhelming majority of the judges believed collegiality among judges should be encouraged." He also cites to proceedings of the American Political Sciences Association where Judge Ginsberg, now Justice Ginsberg, stated that "[j]udges should share ideas and experiences" and emphasized that a "judge should be able to talk with somebody about working out a particular problem." Mark I. Bernsetein, *Expert Testimony in Pennsylvania*, 68 TEMP. L. REV. at 699, (1995). A debilitating relationship between chief judges and judges would be directly counterproductive to Justice Ginsberg's admonition to share information through collegiality.

Reasonable And Ethical Alternatives Exist

A less extreme procedure for evaluating administrative law judges was approved by the ABA's Board of Governors in 1979. The ABA would assign the evaluations of administrative law judges to an outside administrator who was not employed by the judge 's agency or department. The standards for the evaluations by such a disinterested person would be developed and adopted by a panel composed by a majority of administrative law judges. The proper application of an agency's policy is not contemplated by the ABA as a standard for evaluation. In stark contrast to the ACUS recommendation, under the ABA's model a chief judge would not be the final arbiter of the standards and a chief judge would have no role in the evaluations.

Federal legislation which was introduced in the 104th Congress, but failed to pass (H.R. 1802 and its companion S. 486), would have created a federal Corps of Administrative Law Judges. The Corps would have a governing council comprised of chief judges representing eight divisions based on regulatory specialties. The council would function under a Chief Judge of the Corps who would be appointed by the President of the United States. There would be a structured program for the improvement of judicial performance pursuant to ABA guidelines. In keeping with the ABA's 1979 policy, there would be no direct participation of chief judges in evaluations. The ABA supports the Corps legislation.[24]

Thus, there are suggested methods of performance evaluation systems[25] which, if evenly and properly employed, should not conflict

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[24]*Statement of John T. Miller, Jr. On Behalf of the American Bar Association Before the Subcommittee on Commercial and Administrative Law, Committee of the Judiciary House of Representatives In Support of H.R. 1802, Reorganization of the Federal Administrative Judiciary Act*, July 26, 1995. The Corps legislation would, *inter alia*, provide for the improvement of administrative law judges' performance pursuant to the American Bar Association's Guidelines for the Evaluation of Judicial Performance. But to make it work, the chief judge of a Corps should be a "practical [person] who will administer the administrative judicial process with understanding and common sense." *Remarks of Chief Administrative Law Judge, John W. Hardwicke, State of Maryland, on Maryland's Experience with its Administrative Law Judge Corps*, July 1995. The federal Corps is not supported by all federal administrative law judges. Some have concerns about the loss of agency/departmental expertise. The federal Corps legislation is in for a rough ride.

[25]This preoccupation with evaluation is not universal. Government officials other than administrative law judges are excluded by statute from evaluations at the Central Intelligence Agency and the State Department. *See Study* at 1011 n.1197. In a judicial context,

with APA independence. *See* Timony, *supra n.4* at 641-644.[26] And if there must be evaluations, there should be a system designed by a committee of peers and lawyers who practice in the specialty. But without a Corps, such a system would need to take into account the fact that there are agencies with small numbers of judges. Therefore, the committees of peers probably would need to involve all agencies which leaves open the question of the expertise of the peers to evaluate a policy. In another alternative which would involve less bureaucracy, lawyers could simply be surveyed by questionnaires and, with certain protections of confidentiality, the results could be transmitted to individual administrative law judges for educational purposes. Most importantly, none of these methods involve the destruction of collegiality among chief judges and administrative law judges or facially run afoul of the Model Code.

Conclusion

Recall that none of the relevant legislation since the adoption of the APA in 1946, wherein lies the charter of administrative law judge independence, provides for any system of evaluations of administrative law judges. Evaluations by chief judges would no doubt be rejected. The concept of chief judges preferring charges against and awarding performance bonuses to administrative law judges would be dead on arrival. Hopefully, the issue will not reappear in any future proposed legislation. The evaluation process recommended by ACUS would cut off meaningful dialogue among judges. And it would ignore the recognition by the United States Supreme Court of the similarity of the work of federal administrative law judges to the trial work of United States district judges.[27] Evaluations by chief judges would be to many jurists the antithesis of collegial relationships among judges. The Chief Justice of the United States allows that his fellow justices defer to him on matters of law "not in the slightest."[28] And the great jurist Learned Hand viewed his role as Chief Judge of the Second Circuit as being first

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the recommendation for U.S. District Court Judges is one of accountability for the status of dockets, not evaluations. *See* Final Report of the Civil Justice Reform Act Advisory Group for the United States District Court for the District of Columbia (August 1993).

[26]In an earlier ACUS sponsored article on evaluation, an authority on the subject suggested a panel from "bench, bar, groups, and relevant sections of academia." Victor Rosenblum, *Evaluation Of Administrative Law Judges: Aspects of Purpose, Policy and Feasibility* (1983), cited by Judge Timony, *supra n.5* at 630 n. 4.

[27]Butz v. Economou, 438 U.S. 478, 513-14 (1978).

[28]82 A.B.A. J. 46 (October 1996).

on matters of law "not in the slightest."[28] And the great jurist Learned Hand viewed his role as Chief Judge of the Second Circuit as being first "to decide cases" and, secondarily, to "foster harmonious collegial relations through informal measures."[29] There is no such historical or current personage of similar high caliber to which the *Study* refers as authority for a newly created role of chief judges as the appraisers, indicters and rewarders of other administrative law judges.

The administrative law judge community should be mindful that the ACUS *Study* was funded, researched, prepared and published as an official governmental report of a federal agency. It was commenced without any advance consultation of the chief judges or of the administrative law judges who are the subject of the *Study*. Nor was the practicing bar surveyed on how they compare independent administrative law judges with agency adjudicators who do not have APA independence. After cooperating in the survey, the federal administrative law judge community found that its historical independence had been placed in harms way and that chief judges were being set up for term appointments with renewals dependent upon OPM (and indirectly agency) approval of how well they evaluate other judges. The timely article of Professor Weaver on the true role of chief judges which was published on the heels of the *Study* communicated the value of collegiality. And it makes no mention of the *Study's* recommendation for evaluation.[30] The historical context of independence of administrative law judges under the APA as articulated in Judge Timony's article demonstrates how extreme a deviation from the norm would be ACUS' evaluation scheme. In view of such authorities and in recognition of the inherent value of collegiality, the ACUS recommendation for evaluations should not be seen again.[31]

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[28]82 A.B.A. J. 46 (October 1996).

[29]Gerald Gunther, LEARNED HAND: THE MAN AND THE JUDGE (1994) at 514.

[30]The Weaver article, which was commissioned by ACUS before the *Study* Draft became public, appeared shortly after the ACUS Study, focused almost exclusively on the role of chief judges, and was ultimately published as an ACUS funded work in August 1993. But ACUS decided not to use Professor Weaver's highly relevant article as the basis for a recommendation.

[31]The ABA's Section on Administrative Law and Regulatory Practice, which has had a "close and mutually supportive relationship with ACUS," expects that ACUS will be reestablished. *See* 21ADMIN. & REG. L. NEWS, *supra* n.1 at n.2. ACUS evolved as the executive branch's "permanent agency for the study and improvement of the efficiency and fairness of the federal administrative process." *Id.* For a detailed description of ACUS and its political origin, *see* article by ACUS general counsel, Gary J. Edles, *In Defense Of A Micro Agency: A Look At The Administrative Conference Of the United States,* THE PUBLIC LAWYER, Winter 1995.