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Judicial Independence: Can It Be Without Article III?

Richard B. Hoffman*
and
Frank P. Cihlar**

I. INTRODUCTION: ANALYSIS OF JUDICIAL INDEPENDENCE OF ALJS AND ARTICLE I COURTS VERSUS ARTICLE III JUDICIARY

Administrative law judges ("ALJs"), administrative judges ("AJs"), and Article I judges have been relied on to render decisions in a wide variety of legal matters deemed either excessively specialized in nature or sufficiently routine to justify removal from the authority of the Article III-created judicial branch of government.¹ These assignments range from individual disability claims under Social Security to licensing of

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This Article represents only the views of the authors and does not represent the position or views of either the United States Department of Justice or the Administrative Office of the United States Courts.

1. ALJs are afforded "a degree of independence" by the Administrative Procedure Act of 1946 and other statutes and regulations governing their selection and insulation from their agencies. 1992 ACUS 29. AJs "generally lack the statutory protections guaranteed to ALJs. AJs are not statutorily exempt from performance appraisals In general, however, AJs presiding in agency adjudications in which a hearing is provided are accorded de facto protection from pressure from agency investigators and prosecutors, and . . . do not perceive themselves as significantly more subject to agency pressure than do ALJs." *Id.* The principal distinction between Article I judges and Article III federal judges serving during "good behavior"—in essence, life tenure—is just that factor; Article I judges are appointed for terms, frequently for 15 years. By and large, Article I courts and judges, like Article III courts, are subject to legislative budgetary control. ALJs and AJs, in contrast, do not submit separate budgets to the Congress.

nuclear plants. These officers process a far larger case load than United States District Court Judges, affect the rights of a larger number of citizens, and vastly outnumber active federal district court judges.² While the importance of these judicial officers is undisputed, the conundra at the heart of the concept of an administrative law judiciary persist.

First and foremost, can judges who have been appointed to effectuate overall agency policy ever attain adequate judicial independence to satisfy our basic conception of that elusive quality? Should these judges, assertedly needed to provide administratively expert decisionmaking in particular specialized areas of agency expertise, become generalists operating in the broader world of general administrative jurisprudence? Should they be governed in their conduct of cases by the standard procedures established by the Federal Rules used in all Article III courts? Finally and perhaps most critically, should they be selected on the basis of specialized experience in the particular area of agency jurisdiction in which they will adjudicate or should they bring to their task the kind of general skills and legal experience ostensibly sought in candidates for the Article III bench?

It should be emphasized that some regard ALJs—and, by implication, Article I judges, but not AJs—as imbued with the essential elements of judicial independence. An Administrative Conference of the United States report asserted, "It is now possible to say that some administrative deciders—notably ALJs—enjoy protection of tenure that render them almost as independent as their more heralded counterparts on the federal bench."³ These officials certainly occupy a unique position within their agencies. Although agency employees, who are bound by agency law and policy, and housed, serviced, and paid by the agency, ALJs enjoy judicial independence from their employing agencies, which may remove or discipline them only for good cause.

Furthermore, the agencies' power to evaluate ALJs' performance is most limited, as is the impact of any evaluation. Initially, the Office of Personnel Management ("OPM") establishes the salary level for ALJs independent of the agencies' ratings or recommendations. Further, ALJs

2. District court judges, of course, are now assisted by magistrate judges, who are "neither fish nor fowl," lacking both Article I status as well as Article III's life tenure. "Magistrate and bankruptcy judges are neither fish nor fowl, neither Article I nor Article III judges. They are non-Article III judges in the Article III judiciary. Administrative agencies present yet another example of institutions, central to United States government in 1993, but not easily fit into constitutional categories." Judith Resnik, *Rereading "The Federal Courts: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century"*, 47 VAND. L. REV. 1021, 1034 (1994).

3. Paul Verkuil ET AL., *The Federal Administrative Judiciary*, 1992 ACUS 777, 783.

need not satisfy the standard precondition to regular "step" increases in salary under which the agency head must certify that federal employees' work demonstrates "an acceptable level of competence."⁴ Moreover, the provisions for performance evaluation and performance-based removal actions that apply to all other federal agency employees specifically exempt ALJs.⁵ Finally, in case the question was directly raised, the OPM has explicitly declared that "[a]n agency shall not rate the performance of an administrative law judge."⁶

Nevertheless, these provisions have scarcely insulated ALJs from the general perception that they remain creatures subject to the control of the agencies they serve and, consequently, that any asserted judicial independence they possess is of a strictly limited variety when compared to that enjoyed by the Article III bench. In a frequently-cited critique, then-Professor Scalia rejoined that although "Congress chooses to call them judges, they [ALJs] are entirely subject to the agency on matters of law; they can be reversed by the agency on matters of fact, even where demeanor evidence is an important factor; and they can always be displaced, if the agency wishes, by providing for hearing before the agency itself or one of its members."⁷ Moreover, the agency which has employed the most ALJs—the Social Security Administration—has garnered massive criticism for its efforts to "manage" the administrative adjudication process.⁸

4. L. Hope O'Keefe, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 592-94 (1986).

5. *Id.* at 593-94. ALJs can be removed through governmental reduction-in-force (RIF) procedures. VERKUIL, *supra* note 3, at 6. Whether an Article III judge can be so removed presents the different matter of at least requiring a statute; there may well be a constitutional bar. In 1801, after President John Adams named the "Midnight Judges," duly appointed judges were displaced when their courts were abolished. The validity of the legislation, however, was never directly addressed. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 25-32 (1927) for an extended analysis of the episode and its implications.

6. *Id.* at 594.

7. Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 62 (1980) (citations omitted). While it might be asserted that federal district court judges too may be reversed on matters of law, through the regular operation of appellate review, this is far different from being subject to either reversal on issues of fact or displacement.

8. "[T]he agency [SSA] instituted the 'Bellmon review,' a surveillance program of judges thought to be granting too many disability claims. The effect of the Bellmon review on judicial independence was chilling." Christine M. Moore, *SSA Disability Adjudication in Crisis!* 33 JUDGES' J. (No. 3) 2, 9 (1994). It should be emphasized that this Social Security Administration process of "own-motion review" of ALJ decisions resulted from stated Congressional concern [expressed in the 1980 Social Security Disability Amendments, Pub. L. No. 96-265, known as the "Bellmon Amendment" after Senator Henry Bellmon (D-Okla.).

Furthermore, use of an OPM-ordained selection process does not itself serve to inspire confidence in the competence of the ALJs on the part of the independent practicing bar or parties to administrative proceedings. Indeed, one critical ALJ said that OPM's preparation of a new ALJ examination "may be the only instance of a primarily administrative staff made responsible for rating senior practitioners in a profession (the law) in which the raters are not trained. It is analogous to their being entrusted with selecting research scientists, architects, playwrights, ships' captains, actors, or astronauts."⁹ Finally, while ALJs may be fully independent decision makers, "once a decision is made, it is not granted the respect of automatic finality or even deference."¹⁰

While the selection process for federal district and circuit court judges is a highly politicized one, the regard in which the Article III judiciary is held stems, at least in part, from the public nature of the process. Most Article III judges have practiced law, and the confirmation process assures the legal profession an opportunity to be heard. But that regard stems, at least in equal part, from another factor: the lawyers selected for Article III judgeships tend to be chosen more for overall ability than for particular expertise. The backgrounds of the persons selected are more likely to be general rather than specialized—even in this age of the increasingly specialized practitioner. For this reason in particular, Article I judges, whose selection, while public, seldom commands attention—due to their inevitably specialized backgrounds—do not usually enjoy the same high regard. Moreover, there exists a perception that Article I courts are susceptible to political control, a concern shared by Judge Posner:

A greater drawback, at least to those who believe in the value of judicial independence from the partisan political process, is that a specialized court can be controlled by the executive and legislative

See *Association of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132 (D.D.C. 1984) for an explanation of the legislation] at the high rate of ALJ reversal of state-level denials of claims and the variance of rates among ALJs. Verkuil, *supra* note 3, at 1017 n.1225.

Cf. "[L]ooking at the administration of the disability program through the judicial symbols of the rule of law—due process hearings and judicial review—we might denounce SSA's efforts to manage the ALJ corps as the destruction of the claimant's guarantee of due process." (emphasis added). JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 222 (1983). However, Mashaw goes on to criticize this view as "wrongheaded." *Id.*

9. Jesse Etelson, *The New ALJ Examination: A Bright Shining Lie Redux*, 43 *ADMIN. L. REV.* 185, 186 (1991).

10. Verkuil *ET AL.*, *supra* note 3, at 796. Again, though the decisions of federal district court judges also may neither be final nor receive deference from peers, the authority of the federal trial bench is well-recognized and its rulings are rarely viewed in the *de novo* status often afforded the decisions of administrative law judges.

branches of government more effectively than a generalist court can be. It is easier to predict how someone will decide cases in his specialty than how he will decide cases across the board; therefore, if courts are specialized, the officials who appoint judges will be better able to use the appointments process to shape the court, and Congress will find it easier to monitor, and through the appropriations process to control the court.¹¹

Although evaluating an institution on the basis of impressions and appearances is subject to dangerous distortion, within the realm of adjudication, the appearance of justice remains a critical factor. It thus remains true that even if no solid empirical case can be assembled to buttress the hypothesis that federal judges are more competent and independent than state court judges, many observers would agree with Neuborne's bald assertion (which notably lacks such buttressing) of "the myth of parity"—whether or not it can be proven.¹² The three sectors of the administrative judiciary suffer from similar perceptions as evidenced in the foregoing discussion that they are inferior bureaucratic automatons selected through either an unduly complicated and accordingly inscrutable labyrinth or an unrelievedly political process.¹³

Even advocates of the administrative judiciary, however, acknowledge some contradictions in the chimerical concept of judicial independence as applied to the administrative judiciary. "In a real sense, the judge in the administrative process is the judge and jury, and in some nonadversary proceedings such as social security, the advocate for the claimant and at the same time the defense attorney for the government."¹⁴ Another view, from a former Attorney General, Solicitor General, and Supreme Court Justice is that ALJs and AJs "have become a veritable fourth branch of the Government, which has deranged our three-branch

11. RICHARD A. POSNER, *THE FEDERAL COURTS* 153-54 (1985).

12. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). The lack of an answer to the empirical question posed by Neuborne was confirmed by Professor Chemerinsky. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 235-37 (1988); Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991).

13. Not all would agree with this perception, of course. Loren A. Smith, then chairman of the Administrative Conference of the United States (and now Chief Judge of the United States Court of Federal Claims) declared, "the calibre of administrative law judges . . . is certainly as high as those of federal district judges . . ." *Treasury Postal Serv., and Gen. Gov't Appropriations for Fiscal Year 1984: Hearings on S. 1275 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 112 (1983) (statement of Loren A. Smith, Chairman of ACUS).

14. Joseph J. Simeone, *The Function, Flexibility, and Future of United States Judges of the Executive Department*, 44 ADMIN. L. REV. 159, 162 (1992).

legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking."¹⁵

Different means of providing both improved stature and more clearly defined judicial independence for these judges have been proposed. Superficially, of course, from earlier, somewhat ungrandiose titles of hearing examiner or trial examiner, these officers have graduated to being administrative law judges or, in one suggested—but, as yet, unadopted—reform, would become United States Judges of the Executive Department.¹⁶ More significantly and most recently, a bill to establish a corps of ALJs independent of the agencies served, versions of which had been proposed for many years, was passed in late 1993 by the Senate.¹⁷ This proposal was the subject of bitter conflict between the ALJs, who favored its adoption, and the Administrative Conference of the United States, which opposed the measure.¹⁸

Ultimately, therefore, the judicial independence of ALJs arguably arises from: (1) the way they are placed in the bureaucratic structure and (2) the means by which these judges are selected. By examining how the administrative judicial process has evolved in these two respects in two very different structures—the Tax Court and the Social Security Administration—we explore the adequacy of the existing ways and means to determine whether two potential reforms are well-conceived to respond to the perceived need: (1) establishing the corps of ALJs and (2) drastically revamping the selection process to resemble the process employed to select Article III judges. If our analysis points more in the direction followed by the Tax Court, we are hardly alone on that course: in 1991 the Supreme Court ruled that special trial judges of the Tax Court were “inferior officers” of a constitutionally-defined “Court of Law” who must be appointed in accordance with the Appointments Clause.¹⁹ While some dispute the extent of application of that ruling to other administrative adjudicators, we favor what we see as the underlying theme of the Supreme Court’s holding: that the attributes of a “Court of Law” are appropriate in fashioning any adjudicatory body.

15. *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

16. Simeone, *supra* note 14, at 159.

17. S. 486, 103d Cong. Passed by the Senate on Nov. 19, 1993. *See also* H.R. 2586, 103d Cong.

18. The administrative law judges responded to the Administrative Conference's opposition by nearly succeeding in winning Congressional defunding of the Conference.

19. *Freytag v. Commissioner*, 501 U.S. 868, 890, 111 S. Ct. 2631, 2644-45 (1991); U.S. CONST. art. II, § 2, cl. 2.

II. THE EXPERIENCE AND EVOLUTION OF THE TAX COURT

The United States Tax Court is the paradigm of an Article I court and the quintessential specialty court. As such, it is a natural model to which to turn when examining how best to achieve a measure of judicial independence for ALJs.

The Tax Court began life in 1924 as the Board of Tax Appeals. The purpose of the Board was to ensure that in most cases a taxpayer could obtain an independent review of a tax deficiency determination before the tax was assessed. Prior to the creation of the Board, judicial review consisted of a choice of one of two types of refund suits: (1) an action against the collector of internal revenue to whom the tax was paid, or (2) an action against the United States under the Tucker Act. Either action presupposed that the tax had been assessed and paid. The Board, on the other hand, provided taxpayers with a forum in which to contest, before any additional tax was paid, any tax deficiency determined by the Bureau of Internal Revenue (as the Internal Revenue Service was then known) to be owing.

The Board itself was an outgrowth of a succession of earlier efforts to provide a measure of pre-assessment review within the Bureau of Internal Revenue itself. One of the earliest of these was the Advisory Tax Board ("ATB"). As authorized by Section 1301(d) of the Revenue Act of 1918, the ATB was composed of no more than six members appointed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.²⁰ They comprised a group of distinguished lawyers, accountants, and businessmen to whom the Commissioner could submit, upon a taxpayer's request, "any question relating to the interpretation or administration of the income, war-profits or excess profits tax laws," as to which the Board would report its findings and recommendations to the Commissioner.²¹ The ATB was initially given a two-year life, but the Commissioner was authorized to dissolve it earlier with the approval of the Secretary of the Treasury.²² This authority was in fact exercised within six months, leading some to suggest that the Commissioner may have been less than pleased with the ATB because of its "quasi-independent nature."²³

With the abolition of the ATB, the Commissioner simultaneously created the Committee on Appeals and Review, a purely internal body

20. Revenue Act of 1918, ch. 18, § 1301(d), 40 Stat. 1057, 1141.

21. *Id.* § 1301(d)(2).

22. *Id.*

23. HAROLD DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 39 (CCH 1979).

staffed by former members of the Income Tax Unit, the body within the Bureau of Internal Revenue that had general responsibility for administering the income and excess profits tax laws.²⁴ "The Committee was directly responsible to the Commissioner and could only act in an advisory capacity."²⁵ The Committee, however, acquired new prominence with the enactment of Section 250(d) of the Revenue Act of 1921.²⁶ Section 250(d) established the procedure (followed to this day) of affording a taxpayer thirty days in which to take an administrative appeal before assessment of a tax. The Committee was the body to which such appeal was taken.²⁷

The Committee was not a fact finder, however. In general, a taxpayer could not adduce evidence before the Committee that had not been considered by the Income Tax Unit; if the Committee exercised its discretion to receive new evidence, it could resubmit the case to the Income Tax Unit.²⁸ According to Dubroff, pressure to replace the Committee was the result of two factors: (1) its lack of independence from the Bureau of Internal Revenue, and (2) the nature of the proceedings.²⁹ As to the former, there was a perception that the Committee, as a creature of the Bureau of Internal Revenue, could not achieve the impartiality associated with a judicial tribunal. Moreover, since a pro-taxpayer decision precluded the Bureau from further review of the taxpayer's liability, while a taxpayer-adverse decision left the taxpayer free to pursue his judicial remedies, there was a feeling that the Committee tended to resolve doubtful questions in favor of the Government.³⁰ As for the nature of the proceedings, they were not adversarial, were not public, and did not admit new evidence.

In 1923, Treasury Secretary Mellon sent a letter to the Chairman of the House Ways and Means Committee proposing the creation of a board of tax appeals within the Treasury Department, but separate from the Bureau of Internal Revenue, the members of which would be appointed by the Treasury Secretary.³¹ This proposal proved controversial in affording the Treasury Secretary too much influence over the proposed board. Consequently, Congress created the Board of Tax Appeals as an

24. *Id.*

25. *Id.*

26. Revenue Act of 1921, ch. 136, § 250(d), 42 Stat. 227, 265-66.

27. *Id.*

28. A.R.M. 219, III-1 C.B. 319-20 (1924).

29. DUBROFF, *supra* note 23, at 43-45.

30. See S. Rep. No. 52, 69th Cong., 1st Sess. 34 (1939-1 C.B. (pt. 2) 315).

31. DUBROFF, *supra* note 23, at 52-53.

“independent agency in the executive branch,” the members of which were to be appointed by the President.³²

From its inception the Board functioned like a court, although it was called a “board,” it was located in the executive, not judicial branch, and its decisions were, at first, not final. The matter of finality was early addressed. The Revenue Act of 1926 provided that decisions of the Board of Tax Appeal would be final unless appealed to the Circuit Courts of Appeal where they were reviewed on the record made before the Board.³³ The name of the Board (which had led many taxpayers to believe it was part of the Bureau of Internal Revenue) was not changed to the “Tax Court of the United States,” however, until 1942,³⁴ and it was 1969 before the Tax Court was accorded the status of an Article I or legislative court that it enjoys today.³⁵

The Tax Court may be seen not only as a model for injecting a measure of judicial independence into an administrative process, but as a remarkably successful model. The impetus for its creation was, in large measure, the desire to provide a forum for review of administrative action that was unfettered by agency control. This goal was soundly accomplished. The Tax Court is totally independent of the Internal Revenue Service and the Treasury Department. And although the nineteen members of the court are largely drawn from tax practitioners³⁶ who have had prior government experience, the Tax Court is not perceived as any more pro-government than any other federal court. Indeed, it is far and away the court of choice for taxpayers, who continue to have the option of suing for refund in United States District Court or the United States Court of Federal Claims. And while such choice is skewed in favor of the Tax Court (since it is the only forum to which a taxpayer may gain access without prepayment of an often substantial tax), the overwhelming number of annual Tax Court filings compared to

32. Revenue Act of 1924, ch. 234, § 900(k), 43 Stat. 253, 338.

33. Revenue Act of 1926, ch. 27, § 1001, 44 Stat. 9. During the period the decisions of the Board were not final, there was no provision for appellate review. A taxpayer dissatisfied with a Board decision could seek de novo review either in a District Court or in the Court of Claims.

34. Revenue Act of 1942, ch. 619, § 504, 56 Stat. 798, 957.

35. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730, *amending* I.R.C. § 7441.

36. Lawyers, all, notwithstanding the fact that in the early years of the income tax, accountants dominated the practice (as they constitute the bulk of tax advisors today) and accountants and engineers made up the bulk of the members of the old Committee on Appeals and Review.

the other two courts would seem to belie any significant concerns about pro-government bias.³⁷

Indeed, the Tax Court experience suggests that specialized courts may in fact offer the potential of greater freedom from Presidential or Congressional control than the Article III courts of more general jurisdiction.³⁸ The fact of specialization itself seems to eliminate the prospect of a great deal of political "control" from the system. While tax policy is grist for the political mills, there is no discernible "liberal" versus "conservative" or Democrat versus Republican way of deciding the vast majority of technical tax issues that come before the court. Tax cases (as opposed to tax legislation or regulations) seldom present a partisan facade. By and large, by the time a tax case reaches court, the politics have been wrung out and the only thing left for determination is the application or interpretation of a statute or regulation in a singularly unpolitical context. What remains to the politically inclined is the prospect of political patronage: a Republican President is more likely to appoint a Republican to the court than a Democrat and vice versa. But this is no more true of the Tax Court (or of any other specialized court in the federal system)³⁹ than of any of the Article III

37. In 1993, some 28,000 cases were filed in the Tax Court, down from a high of 48,000 in 1986, compared to 2, 274 tax suits in the federal district courts and 131 in the U.S. Court of Federal Claims. United States Tax Court, 1993 Fiscal Year Statistical Information 140 (1994); Administrative Office of the U.S. Courts, 1993 Annual Report of the Director: Judicial Business of the United States Courts, Tables C-2 and AI-56 and G-2A, at Ai-197 (1994). It is, we note, difficult to identify the existence of any potential bias by mere statistics. Measured by the dollars recovered, the Government prevails in the majority (51.4%) of small cases (under \$10,000 in tax) in the Tax Court. But as true in other areas, a preponderance of Government court victories may only indicate that the Government is being properly selective about the policies it pursues and the cases it brings. Indeed, a preponderance of victories by private litigants in suits against the Government in any area of the law usually results (as it should) in a re-thinking of the policy or practice that led to the litigation in the first instance. Moreover, the Government's overall recovery rate in 1993 in the Tax Court was only 18.9%, suggesting that taxpayers can expect a "fair shake" there. United States Tax Court 1993 Fiscal Year Statistical Information 142 (1994).

38. We say "more general" in that it is a truism, often overlooked in the debate on such matters, that the federal courts are courts of limited jurisdiction, which themselves are more "specialized" than many state courts. And many a "generalist" Federal District judge preoccupied with a steady diet of drug cases might well wonder whether who is in fact the more "specialized" when comparing his or her docket to that of a judge of the Federal Claims Court, for example, who is asked to decide everything from governmental pay matters, to Indian claims, to tax refunds, to patent issues. "Specialization" is, after all, in the eye of the beholder.

39. Who, after all, would suggest that the decisions of the Court of International Trade can be separated into discernibly "liberal" or "conservative" categories?

courts. Indeed, when is the last time a nomination to fill a vacancy on the Tax Court made the evening news?

On the rare occasion when a tax case offers the opportunity for what may be perceived as a political outcome, it is more likely to be manifested in the opinions of allegedly more independent Article III courts. A case in point (and one in which one of the authors of this Article was personally involved on behalf of the Government) is *Taxation With Representation v. Regan*,⁴⁰ in which one of the issues was whether it was a denial of equal protection to refuse to allow one tax-exempt organization the right to solicit tax-deductible contributions to engage in substantial lobbying activities, while permitting veterans organizations to do just that. In the course of the litigation, the decision of the two "conservative" judges comprising the panel majority in the D.C. Circuit was reversed by the "liberal" majority of the court sitting en banc, which was itself reversed by a unanimous Supreme Court.⁴¹ But such contretemps are rare enough in the tax area, and we are pressed to think of any comparable case involving the Tax Court. Indeed, from the paucity of such cases and their dispersion when they do occur, one might surmise that a tax litigant looking for a "political" outcome is more likely than not to seek redress in an Article III District Court than before the Tax Court. On balance then, the Tax Court model is one that offers much hope that a considerable degree of judicial independence can be injected into the administrative law through an increased utilization (and creation) of Article I specialized courts.

III. SHAKING UP SOCIAL SECURITY

The Social Security Administration's disability determination process employs the largest number of ALJs—more than 800—in the federal government in seeking to cope with an application total of approximately 3,000,000, of which approximately 500,000 cases result in requests for hearings.⁴² Besides being the biggest administrative decision making operation in the federal government, Social Security differs in kind from the remaining administrative agencies which employ ALJs. Social Security adjudication is exclusively concerned with determining benefit claims, not regulation. This factor alone explains the huge size of both its caseload and its ALJ complement.

40. 676 F.2d 715 (D.C. Cir. 1982) (*en banc*), *rev'd*, 461 U.S. 540 (1983).

41. These labels reflect the popular view of the ideological make-up of the courts at the time. Like all such labels, they are quite subjective and say nothing about the integrity of the jurists in question.

42. Moore, *supra* note 8, at 2, 6.

The agency's primary goal—wise administration of the disability trust fund—has, in the view of some observers, been accomplished through means which have diminished the adjudicative nature of the claim determination process: "(1) largely ignoring or paying only lip service to select legal standards at the initial and reconsideration determinations; and (2) failing to fund the early determination levels so that adequate development and assessment of the evidence, and training of personnel, can be done."⁴³

In addition, Social Security employs the most convoluted and bureaucratic adjudicatory process and has taken other approaches, sometimes with laudable motives, which have had the result of compromising the judicial independence of its decisionmakers. These include the policy of "nonacquiescence" and the Bellmon Review Program.⁴⁴ By refusing to acquiesce, *i.e.*, follow circuit court decisions with which the agency does not agree, Social Security has caused "an explosive growth in the number of disability cases filed in the federal courts, as well as a patchwork of case law varying from circuit to circuit."⁴⁵ The Bellmon Review Program has been described (albeit by a declared opponent of the process) as "a surveillance program of judges thought to be granting too many disability claims."⁴⁶

First consideration should be directed at the disability determination procedures as they now exist. "A claim must now pass through from [one] to [four] decisional paths within SSA to receive a favorable disability decision. The initial claim, reconsideration, administrative law judge (ALJ) hearing and Appeals Council review levels all involve multi-step uniform procedures for evidence collection, review, and decisionmaking."⁴⁷ That most claimants are unrepresented both makes the Social Security process a very different one from most regulatory ALJ proceedings and heightens the difficulty the Social Security ALJs face in maintaining a judicial posture in cases in which one side may reasonably ask for special assistance from the adjudicator.

More crucial to our consideration of judicial independence, however, is the experience Social Security has accumulated from its efforts to rationalize the process. These efforts—framed in the context of producing consistent decisions on benefit claims—bring to bear the

43. *Id.* at 3.

44. *See supra* note 8 and accompanying text for explanation of the Bellmon Review Program.

45. Moore, *supra* note 8, at 40.

46. *Id.* at 9.

47. SOCIAL SECURITY ADMINISTRATION, DISABILITY PROCESS REENGINEERING TEAM, DISABILITY PROCESS REDESIGN 3 (1994).

tension between the two conflicting principles in this entire analysis: consistent administration of agency policy versus decisional independence. Social Security's authority to enforce decisional consistency as well as productivity enhancement was vigorously opposed by its ALJs: the agency was upheld, but only by a finding which differentiated between "unreasonable quotas" and "reasonable goals."⁴⁸

One critique, favoring Social Security's aim of gaining administrative consistency and improved performance, described the impact of the ruling:

The court did not explain the notoriously difficult functional distinction between quotas and goals, nor did it suggest a method of distinguishing between "reasonable" and "unreasonable" quotas or goals. It also did not discuss the SSA's admonition to ALJs to delegate opinion writing to staff lawyers. Until courts address these issues, the propriety and efficacy of any agency's efforts to enhance the productivity of its ALJs remains in grave doubt, notwithstanding the Second Circuit's holding for the SSA and its acknowledgment that the agency was trying to further "[s]imple fairness to claimants awaiting benefits."⁴⁹

It can fairly be concluded that the Social Security disability claim adjudicative process presents the fundamental conundra at the heart of the administrative adjudicative process in the starkest relief. Can bureaucracy be squared with due process? Jerry Mashaw, a sympathetic analyst of the Social Security adjudicative process, has examined the contours of the tension:

We have here, of course, the traditional complaints against bureaucracy: that it tends to be narrow-minded, rigid, and insular; that somehow institutional imperatives begin to dominate program goals; that individualized concerns and dignitary values are lost; that its "expertise" systematically misdescribes reality. And at some level, of course, these complaints begin to undermine the legitimacy of administrative action, that is, they begin to assert that the agency makes policy undemocratically, is a false or misguided expert, and insulates itself from the contributions of relevantly affected interests. In the end, if the complaints are valid, the agency fails in its own terms—it fails to implement "the program" we have in mind.⁵⁰

This history of an attenuated, compromised adjudicative process has led Social Security to revisit the entire matter and propose something

48. *Nash v. Bowen*, 869 F.2d 675, 680-81 (2d Cir. 1989).

49. *Verkuil*, *supra* note 3, at 994-95.

50. *MASHAW*, *supra* note 8, at 180.

quite different for disability adjudication in the future. The process would be simplified: a disability claims manager will direct the first phase of the process and render the initial finding, an adjudication officer will oversee preparation of the record, and the ALJ will focus on conducting the appeal hearing and reaching a decision; further appeal will be taken to the federal courts, unless the Appeals Council *sua sponte* determines to afford further review.⁵¹ In sum: "The administrative appeals process will be simplified to increase the accessibility of the process."⁵²

The biggest changes in this process are the speedier nature of the procedure, to be obtained by eliminating many steps, including reconsideration at each level, and the emphasis on use of the ALJs as adjudicators instead of requiring them also to serve as record-assemblers and counselors. The new process, to be sure, still features some pronounced differences when compared with regulatory administrative proceedings: the ALJ hearing continues to be non-adversarial, which will mean "... the ALJ will still have a role in protecting both SSA interests and the claimant's interests, particularly when the claimant is unrepresented."⁵³

In essence, however, the theme of the Social Security process redesign is "to ensure that the right decision is made the first time" by providing every claimant *inter alia* with "one good hearing" in place of a seemingly endless series of bureaucratic encounters.⁵⁴ If the new process is put into effect,⁵⁵ consequently, it will serve as a test of whether the model of ALJs located within an agency can accommodate generally-accepted principles of judicial independence. Clearly, a number of the more egregious aspects of the Social Security process are likely to be

51. SOCIAL SECURITY ADMINISTRATION, *supra* note 47, at 24-25.

52. *Id.* at 24-25 and 52.

53. *Id.* at 54.

54. *Id.* at 56.

55. In the interim, the Social Security Administration has become an independent agency removed from the Department of Health and Human Services. The new process has apparently not yet been finally approved for implementation. One possible problem raised was the *sua sponte* role of the Appeals Council, which ostensibly would be empowered to seek remand of Federal District court cases in instances where the Council decided to afford the cases further review. It was not clear whether this provision would pass muster with the final judgment rule, under 42 U.S.C. § 405(g), in that cases would proceed to district court with the possibility of remand looming over them. See Social Security Administration, *supra* note 47, at 55. A further problem would be the prospect of vastly increased district court filings, which would mean that the caseload had merely been pushed out of the agency rather than resolved. For a view supporting an invigorated Appeals Council, see Robert Habermann, *Judiciary Division's Response to Reengineering*, THE FEDERAL JURIST 1, 3 (Fall 1994).

eliminated or reformed as a result of the process redesign. It remains to be determined whether the conceptual problems inherent in the existing structure will be fully resolved in the changeover.

IV. COURT OR CORPS?

The Article I court model, exemplified by the Tax Court, is not perfect; far from it, it enjoys its own form of insularity and has its own foibles. But the Tax Court has engendered a greater degree of consumer confidence than has the ALJ process. And consumer confidence, after all, is what it is all about: do users leave the process believing they have received fair treatment and a reasonable chance to be heard? The perception of justice appears more critical in this respect than justice in fact (although the two are hardly unrelated)⁵⁶ and is ultimately the mortar that holds any judicial system together. In that regard, the Article I court model has succeeded quite well; and several principles emerge as a guide to efforts to replicate that success elsewhere.

Whether, however, any one model is appropriate for the entire range of administrative proceedings remains uncertain. The particular provisions for claims determination matters, which, if the activity of all of the Social Security Administration and much of the Department of Labor ALJ complements is considered, comprise the bulk of ALJ adjudication, may not need to be the same ones fashioned for regulatory administrative proceedings. One middle ground worthy of further consideration is the use in appropriate circumstances—in this instance, enforcement—of an independent commission on the order of the Occupational Safety and Health Review Commission. Enforcement proceedings are instituted by the Department of Labor before ALJs who are employees of the commission. The commission members, who review the ALJ rulings, are presidential appointees for fixed terms. Further review is had in the United States Courts of Appeals.⁵⁷ The experience

56. The constitutional status of both Article I courts and administrative agencies engaged in adjudication has never been entirely clear, although a recent analyst observed, "Today, the familiar roles of legislative courts and administrative agencies render a return to 'article III literalism' virtually unthinkable." Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 916-17 (1988). In assessing how these adjudicative bodies may pass constitutional muster in their provision of justice, however, Fallon urges adherence to an appellate review theory, *i.e.*, appellate review by an Article III court must be provided for these bodies to exercise their authority constitutionally. *Id.* at 992. The key issues for Fallon are what issues must be subject to such review and what is the scope of the review.

57. To be sure, the Commission's adjudicatory authority as compared with enforcement and policymaking powers is limited. The Supreme Court has held that the Secretary of Labor exercises the final policymaking authority within the Department: "... we think

and evolution of the Tax Court demonstrate, however, that the principles we now propose are equally applicable to either claims determination or regulatory proceedings.

The first of these is independence. The reviewing body must not only seem to be, but must in fact be free of command influence. Whether we are talking about an Article I court or a corps of ALJs afloat within the executive branch is beside the point. As the Tax Court example indicates, that determination need not be made at the outset. What is important is that the court/corps not be part of the agency on whose actions it is to sit in judgment. More specifically, the members of such a body cannot be beholden to the agency in matters of compensation, tenure, or conditions of employment. This means it should be free to formulate and advance its own budget before the relevant Congressional authorizing and appropriating committees. This means its personnel should not be evaluated by agency officials.

We have previously reviewed the history of agency efforts to delimit ALJ independence in the Social Security Administration. At present, the Department of Labor has instituted proceedings to demote and suspend its Chief ALJ.⁵⁸ This proceeding, arising in an agency which conducts both claims determination and regulatory matters before ALJs, indicates how readily issues of judicial independence seem to appear even in agencies with generally strong histories of affording their ALJs a high degree of independence. Moreover, this matter points up another aspect of judicial independence in that the agency is represented in the proceeding by the same legal office which presents the department's cases before the agency's ALJs, *i.e.*, the judge is being prosecuted by a party always appearing before the judge in litigation.⁵⁹

Our conclusion as to the necessity of either an Article I court or an ALJ corps to provide sufficient judicial independence stands in contrast to the Administrative Conference of the United States' position, presented most extensively in its report on the federal administrative judiciary.⁶⁰ The report specified four goals for agency adjudication:

the more plausible inference is that Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory power typically exercised by a court in the agency-review context." *Martin v. Occupational Safety & Health Review Comm.*, 499 U.S. 144, 154 (1991).

58. *United States Dep't of Labor v. Litt*, MSPB No. CB 7521-94-0014-T-1. More recently, the Labor Department dropped all charges against its Chief ALJ in return for his resignation as Chief Judge and subsequent retirement. Frank Swoboda, *Prominent Chief Judge Agrees to Give Up Post*, WASHINGTON POST, Mar. 16, 1995, at A19.

59. *Id.*

60. Verkuil, *supra* note 3. The resulting ACUS recommendation hardly discusses the issue at all. 1992 ACUS 28-42.

specialized expertise, less formal and less expensive means, higher degree of interdecisional consistency, and agency control of policy components.⁶¹ The latter three goals are clearly attainable through the court or corps model; the role specialized expertise should play would be determined by the particular organizational scheme of either the corps—the most recent bill passed by the Senate provided for eight specialized divisions⁶²—or the structure by which judges would be assigned in an administrative court. With respect to the fourth goal of agency control of policy, the extent of authority an agency should exercise regarding matters subject to adjudication would appear to be highly debatable, especially if we accept Fallon's appellate review theory,⁶³ by which all agency adjudicative rulings would be subject to ultimate appellate review by an Article III tribunal in any event.

The general and laudable trend toward increased responsiveness in government and the effort to ensure high performance through effective evaluation has remained in a state of constant tension with the concept of judicial independence. Although the Administrative Conference appeared to assume that evaluation of judicial performance had won acceptance in both concept and practice in the Article III federal courts,⁶⁴ this is far from the case. And the history of somewhat crude efforts to institute evaluation schemes for ALJs has proven unsuccessful to date. In contrasting the generally unproductive federal experience with state use of central panels of AJs, Rich pointed to the state experience as instructive:

The federal experience with the evaluation of administrative law judges has not been a good one [In the states] the sensitive job of evaluating performance is directed by an individual [the director of the central panel] who has day-to-day supervisory contact with the administrative law judges. Through utilization of both the evaluator's

61. Verkuil, *supra* note 3, at 1042.

62. S. 486, 103d Cong., *supra* note 27.

63. Fallon, *supra* note 56, at 992.

64. See Verkuil, *supra* note 3, at 1027. "Evaluation of judicial performance is hardly a new or radical idea. Evaluation programs exist at both the federal and state court levels . . ." *Id.* "The federal judiciary has also shown interest in judicial evaluation." *Id.* at 1029. The report then cites a report of a pilot judicial evaluation project in the Central District of Illinois. *Id.* at n. 1268. (DARLENE R. DAVIS, *THE JUDICIAL EVALUATION PILOT PROJECT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE JUDICIAL BRANCH* (Federal Judicial Center, 1991)). It might be noted in passing, however, that the interest most frequently shown by the federal courts in judicial evaluation is reflected in emphasizing the dangers to judicial independence posed by any ongoing judicial evaluation program of Article III judges and the long-expressed opposition of the federal judiciary to any method of judicial discipline other than impeachment as prescribed by the Constitution.

judgment and the collection of standardized forms, the system provides the opportunity for an informed decision that will be accepted by the administrative law judges as being factual and objective.⁶⁵

Judicial evaluation in any event may prove a chimera. It appears to be purchasable only at the price of judicial independence. This is too valuable a coin to pay and public confidence might rather be engendered by accentuating independence of the type manifested by the Article I courts.

The second principle has to do with selection. How are the members of the body selected? One aspect of the selection process is appointment. Who makes the decision? Although our preference would be for Presidential appointment, here perception is probably at odds with reality. We are not concerned about allowing the agency head to make the appointments. Although concerns about agency influence caused Congress to reject Secretary Mellon's proposal to allow the Treasury Secretary to appoint the judges of the Board of Tax Appeals (now the Tax Court), it early on became apparent that the Secretary of the Treasury could well have much to say about such appointments so long as any President chose to seek his advice. In any event, the question of who appoints the judges is less important than assuring that they thereafter are not answerable to the agency head and are free to act independently.

Nor are overt political ties a concern. Our process for selecting appointees to the federal bench is as politicized a process as one can imagine, yet has served us quite well. We see nothing to be feared from the political process.

The more important aspect of selection has to do with qualification, and on this specific issue, much has been said to little effect. What types of people should be appointed? Selection should not be dictated by a candidate's prior experience, at least not in the sense that experience with the agency should be a prerequisite to service. If there is one clear fault with the current system of selecting ALJs, it is that too large a premium is placed on work before the agency. While agency experience should surely not be disqualifying, nor should it be a requirement. The Article III bench is filled with people of varied backgrounds and experiences, who are asked to address (by and large, with considerable success) an array of legal issues, many of which they may not have seen before. Reflect, if you will, on how few of our federal judges had any

65. Malcolm C. Rich, *The Central Panel System and the Decisionmaking Independence of Administrative Law Judges: Lessons for a Proposed Federal Program*, 6 W. NEW ENG. L. REV. 643, 653-56 (1984).

experience with criminal law, for example, before taking the bench. Despite the challenge an appointee faces in gaining competence in what are frequently highly technical realms, the likelihood that outstanding general qualifications will produce more excellence on the administrative judicial bench than would preference for either agency employees or outside specialist practitioners in the particular field reinforces our belief in the credo: "Draft the best athlete available." The stretch should be for the best lawyer to be found, not necessarily the one with most agency experience.

While the Administrative Conference has lauded the present selection system—"It is one of the few attempts to incorporate true 'merit selection' processes for judges in our legal system."⁶⁶—and recommended only modifications, including streamlining the examination process, elimination or reduction of veterans preference, easing use of specialized experience in the rating process, and creating a separate register for Social Security ALJs,⁶⁷ one commentator, an ALJ, rejoined: "By permitting agency selection from anyone in the top half of the register, ACUS proposes a serious departure from the standards of merit selection."⁶⁸ To the extent, however, that the ALJs are critical of permitting the agency leadership a greater voice in selection of the ALJs, whether by agency or by a grouping in the event of a corps being formed, we reiterate our view that expanding the range of selection is the most appropriate course to gaining an administrative judiciary which is both

66. Verkuil, *supra* note 3, at 954. We have not examined the assertedly deleterious impact on the overall quality of the ALJ selection process of the requirement of absolute veterans' preference. See 5 U.S.C. § 2108 et seq. The Administrative Conference has posited that if the preference remains supportable at any level, it should not be maintained for ALJ selection since it should only extend to entry-level positions and, in fact, rarely is considered as a factor in promotions, which, arguably, characterize ALJ selections. VERKUIL, *supra* note 3, at 119. On a more practical level, the ALJ examination procedure's emphasis of minute differences in rating point scores—sometimes separating successful candidates from the unsuccessful by hundredths of points—is rendered largely irrelevant by five or ten point deviations caused by application of the preference. For the purposes of our analysis, however, it is sufficient to note that resolution of the veterans' preference issue should be accomplished across the whole of government; there exists little reason for maintaining it in individual sectors such as ALJ selection.

67. *Id.* at 955.

68. Charles P. Rippey, *Undermining the Administrative Procedure Act: How ACUS Threatens the Independence and Merit Selection of Federal Administrative Law Judges*, 32 JUDGES' J. (No.2) 12 (1993).

outstandingly able and fiercely independent.⁶⁹

69. We recognize that this sets us apart from both the Administrative Conference and the ALJs, who have been engaged in open warfare on these issues for some time. *See, e.g.*, Rippey, *supra* note 68 and Steny H. Hoyer, *Dry Subject, Hot Fight*, WASH. POST, July 17, 1993, at A16. The unanimity of our opponents may lend support to our independent position on this aspect of administrative adjudicatory independence.