PROTECTING THE ADMINISTRATIVE JUDICIARY FROM EXTERNAL PRESSURES: A CALL FOR VIGILANCE

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I. INTRODUCTION

This symposium issue of the *Drake Law Review* focuses on spending in judicial elections, with the hypothesis that there is a relationship between the amount of money spent in judicial elections and the quality of justice dispensed by the judges elected. The purported policy implication, if this hypothesis is verified, is a decrease in the quality of justice because the outcomes in particular cases could be altered. Further, such decrease in quality could inure because of a broader perception that justice and the courts may become, like the offices and decisions in the two political branches of government, a commodity: justice for sale. If the hypothesis was verified, money in judicial elections may have the effect of influencing the impartiality and independence of the judiciary.[1]

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1. While the two concepts are often combined, Professor Moliterno notes independence and impartiality are two different concepts. James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1199–1208 (2006). By impartiality, he refers to "fair-minded, neutral decisionmaking." *Id.* at 1200. Independence, which he describes as a "subset of impartiality," is "'autonomy and insusceptibility to external guidance, influence, or control.'" *Id.* at 1200, 1202–03

While this symposium focuses on the issue of spending in elections of trial and appellate judges in the state judicial branches, this Article directs attention on the administrative judiciary—administrative law judges and hearing officers housed in or under contract with executive branch agencies. This attention is warranted for three reasons. First, the administrative law judiciary is so integral to the function of the modern state that it is commonly, if not accurately, referred to as a "fourth branch of government."[2] Second, the administrative law judge is, for most litigants, the only judicial officer that the parties will see, even if they seek judicial review of the resulting administrative decision. The decisions arrived at by administrative law judges—while not precedent setting,[3] officially reported, or "high profile"—are important to the point of being potentially life-changing to the litigants involved.[4] Third, in many areas of the law, such as workers' compensation and environmental protection, the precedent-setting cases decided by appellate courts were first decided by administrative law judges, and those initial decisions set the tone for further proceedings.[5]

While the manner in which members of the administrative judiciary may vary from the manner in which judges of the judicial branches are selected and retained, and the sources of influence over the administrative judiciary are different, the attempts to influence the judgment of the administrative judiciary are no less real. This Article will briefly discuss the notions of the impartiality[6] and, to the extent it exists, the independence of the administrative judiciary.[7] This discussion will include attempts, legitimate or otherwise, to influence the judgment of administrative judiciary.

(quoting Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 159 (2003)). The Author uses Moliterno's framework throughout this Article.

2. *See, e.g.*, Daniel Manry, *Agency Exercise of Legislative Power and ALJ Veto Authority*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 421, 421 (2008) ("Administrative agencies have grown collectively into what some view as an administrative state that is the functional equivalent of a fourth branch of government." (footnote omitted)).

3. *See* Moliterno, *supra* note 1, at 1198–99.

4. *See id.* at 1231.

5. *See, e.g.*, Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 70–72, 75 (1999) (referring repeatedly to the administrative law judge's report and findings in the decision). For the underling administrative decision, see *In re* Garret F., 12 D.o.E. App. Dec. 103 (Iowa Dep't of Educ. 1994).

6. *See infra* Part II.

7. *See infra* Part III.

II. IMPARTIALITY

Impartiality is an indispensable attribute of all judges, whether the judges are housed in the executive or judicial branches.[8] Basic fairness of constitutional magnitude requires that disputes are not heard by officials with a "direct, personal, substantial, pecuniary interest" favoring a particular resolution of a dispute.[9] The due process right "to be heard"[10] would be meaningless if the *hearing* officer refused to consider anything but the outcome determined by the officer's interests. In the context of the administrative judiciary, the Supreme Court has stated that administrative hearing officers are to be "free from pressures by the parties or other officials within the agency."[11]

While the impartiality of administrative law judges is structurally facilitated,[12] that impartiality need not be judged by a standard of perfection. There are varying degrees of partiality. No judge can ever be completely impartial, because all judges are human, live in society, and have life experiences that are impossible to completely disregard. The key question is whether the limits on the officer's partiality are constitutionally tolerable.[13] For example, the mere fact that an administrative law judge in an environmental quality appeal once practiced environmental law is not, standing alone, objectionable.[14] In fact, an administrative law judge's background in the subject area is widely regarded as a good thing.[15] If,

8. *See* Moliterno, *supra* note 1, at 1197 (quoting Butz v. Economou, 438 U.S. 478, 513 (1978)); *id.* at 1201–02 (discussing the importance of impartiality).

9. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

10. Grannis v. Ordean, 234 U.S. 385, 394 (1914) (citations omitted).

11. *Butz*, 438 U.S. at 513.

12. *See id.* ("[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises . . . judgment . . . free from pressures by parties or other officials within the agency."); Moliterno, *supra* note 1, at 1200 ("All judges are in systems that foster impartiality.").

13. *See Butz*, 438 U.S. at 514 (noting the tension between "the risk of an unconstitutional act" and preserving impartiality).

14. *Cf.* Peter J. Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers Under the Individuals with Disabilities Education Act: A Checklist of the Legal Boundaries*, 83 N.D. L. REV. 109, 111–12 & n.21 (2007) (examining the occupational background of administrative hearing officers under the Individuals with Disabilities Education Act to determine whether the officers' backgrounds effected their decisions).

15. *See* MODEL STATE ADMIN. PROCEDURE ACT § 4-215(d) (1981) ("The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence.").

however, an administrative law judge was formerly counsel to a party at any stage in a current dispute, that judge may be considered intolerably partial and may not serve.[16] In a further example, if an administrative law judge publicly takes an advocacy position on a matter that may come before her, that judge may certainly and rightly be perceived as having a bias in favor of those litigants who advance that particular advocacy position in cases before her.[17]

Impartiality of administrative law judges must be carefully guarded because of the structural risks to impartiality inherent in the administrative state. First, administrative law judges are typically much less secure in their appointment and tenure than their counterparts in the judicial branch.[18] Administrative law judges are civil servants or independent contractors employed by executive branch agencies—whether a particular agency or a "central panel."[19] That lesser "job security" requires vigilance to ensure

16. *Id.* § 4-214.

17. *See, e.g.*, Stengle v. Office of Dispute Resolution, 631 F. Supp. 2d 564, 577 (M.D. Pa. 2009) (finding a hearing officer's "blog activity . . . had the potential to raise questions as to her impartiality").

18. Moliterno, *supra* note 1, at 1220–25 (discussing administrative law judges' dependence on the executive branch for appointment and continued tenure). Professor Moliterno places this analysis under his discussion of independence. *See id.* The Author suggests the considerations of selection and retention are more closely related to impartiality. If an administrative law judge has an interest in retaining her employment and her employment is contingent on the substantive outcomes of her decisions, then she has an interest in arriving at the preferred substantive outcome. She is not impartial.

19. *See, e.g.*, James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1356 (2002) ("A central panel of ALJs is a cadre of professional adjudicators who are administratively independent of the agencies whose cases they hear, and thus, they are removed from agency influence."). In states that switch from agency-based administrative law judges to central panels, which is a legitimate exercise of executive branch prerogative, the vigilance discussed in this Article requires determining the switch was made for legitimate purposes—cost control, improving professionalism, improving impartiality, for example—rather than in the hopes of obtaining more favorable outcomes. For more information on conversion to central panel systems of administrative adjudication, see generally, Ron Beal, *The Texas State Office of Administrative Hearings: Establishing Independent Adjudicators in Contested Case Proceedings While Preserving the Power of Institutional Decision-Making*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 119 (2005); Thomas E. Ewing, *Oregon's Hearing Officer Panel*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 57 (2003); Flanagan, *supra*; Duane R. Harves, *The 1981 Model State Administrative Procedure Act: The Impact on Central Panel States*, 64 W. NEW ENG. L. REV. 661 (1984); Bruce H. Johnson, *Strengthening Professionalism Within*

impartiality. Second, the atmosphere in which administrative law judges work provides additional threats to their impartiality.

> Often, one of the litigants before the administrative judge is the judge's employer. When the agency appears in the matter, one of the lawyers before the administrative judge is a co-worker, at least in some broad sense. Often, the experts for one of the litigants are co-workers of the judge; often, the administrator of one of the litigants is in control of the judge's budget.[20]

In light of these forces inherent in the administrative judiciary that press against its impartiality, agencies must safeguard the administrative judiciary so that it remains sufficiently and constitutionally impartial and can offer more protections in the interest of sound public policy.

Consider the example of the performance appraisal of administrative law judges.[21] Members of the administrative judiciary, being employees of executive branch agencies, are typically subject to the same type of performance reviews as their non-judge peers.[22] That evaluation process has the power to improve the quality and trust of the administrative judiciary; however, an evaluation process that contains intolerable elements can erode impartiality.

Whatever factors are contained in a system of performance appraisal, it is the Author's view that it is not appropriate to consider parties' satisfaction with a particular administrative law judge. As a general rule,

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an Administrative Hearing Office: The Minnesota Experience, 53 ADMIN. L. REV. 445 (2001); Edgar Young, *A State Central Panel Hearing Officer System for Wyoming*, 21 LAND & WATER L. REV. 497 (1986).

20. Moliterno, *supra* note 1, at 1195 (footnote omitted); *see also* Dan Ackman, Op-Ed., *The Price of Justice*, N.Y. TIMES, Feb. 12, 2006, at 11, *available at* http://www.nytimes.com/2006/02/12/opinion/nyregionopinions/12CIackman.html ("While the judges hear very different kinds of cases, many of them face a conflict of interest: they are supposed to make independent judgments about the agencies that pay them.").

21. *See generally* James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U. 629 (1993) (criticizing administrative law judge performance evaluations); Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 1 (1997) (discussing administrative law judge performance evaluations); L. Hope O'Keeffe, Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591 (1986) (contrasting administrative law judge performance evaluations with production standards).

22. *See* Young, *supra* note 21, at 17.

parties perceive a proceeding as fair if they prevail,[23] and prevailing is in the eye of the beholder.[24] A party who obtained relief, but less relief than sought, may still view the proceeding as unfair. Allowing the determination of whether an administrative law judge should be retained to be influenced by sentiment of party satisfaction is a threat to that judge's impartiality.

Consider the following example, albeit from a different context. The U.S. Chamber of Commerce has particular views on causes of action and remedies that should be available in America's courts.[25] It is without question that the Chamber of Commerce would limit the causes of action and relief available to consumers and workers against employers and manufacturers.[26] In pursuing its legal advocacy agenda, the Chamber of Commerce routinely rates the legal climate of each state.[27] In 2006, the Chamber of Commerce listed Iowa as among the top five states for overall legal fairness in the country based on a survey of 1,400 corporate attorneys.[28] The Iowa Judicial Branch issued a press release announcing these survey results as evidence of its fairness.[29] In the Author's view, this was unfortunate. The measures of "fairness" were the measures of the degree to which Chamber of Commerce constituents obtained relief.[30] The

23. *Cf.* Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 38–41 (1997) (discussing perceived fairness of hearings under the IDEA and noting that "[a] large majority of parents felt that the hearings were not fair and that the decisions did not accurately reflect the facts of the case").

24. *See, e.g.*, Perry A. Zirkel, *Blaming the Referee*, 37 COMMUNIQUÉ, Sept. 2008, at 11 ("[T]he decision on each issue is not necessarily completely in favor of either party, and where it is not, classifying the outcome on a multipoint scale is difficult because the weight of each issue varies in terms of not only cost but also importance to each party.").

25. *See Jobs Agenda Legal Reform*, U.S. CHAMBER OF COMMERCE, http://www.uschamber.com/legalreform (last visited Apr. 12, 2012) (stating that the "U.S. Chamber works to end lawsuit abuse and ensure that businesses receive the fair, efficient, and consistent justice system they deserve").

26. *See id.*

27. *U.S. Chamber Annual Survey Bolsters Need for Legal Reform*, U.S. CHAMBER OF COMMERCE (Mar. 8, 2005), http://www.uschamber.com/press/releases/2005/march/us-chamber-annual-survey-bolsters-need-legal-reform.

28. *Survey Gives Iowa Judges, Juries High Marks for Fairness*, IOWA JUDICIAL BRANCH (Mar. 30, 2006), http://www.iowacourts.gov/news_service/news_releases/NewsItem5/index.asp.

29. *Id.*

30. *Id.* (finding Iowa ranked "in the top five states for nine of the twelve key elements making up the overall rating, including: overall treatment of tort and contract

Author believes it is inappropriate to consider these survey results as evidence of fairness. The survey's focus on particular outcomes and its limited type of respondents made it a highly unreliable measure of what it purported to measure: fairness.[31] A survey is not necessary to reveal that the Iowa Judicial Branch is fair; however, even if a survey was necessary, this particular survey would not disclose anything about the Iowa Judicial Branch's fairness.[32] Similar data are likewise inappropriate to evaluate the impartiality of the administrative judiciary.[33]

Another inappropriate measure of fairness is case outcome statistics, which have been used in a recent lawsuit alleging bias in the administrative judiciary.[34] While outcome statistics may be useful for case and policy analysis,[35] the notion that case outcome statistics are useful to evaluate the

litigation, treatment of class action suits and mass consolidation suits, punitive damages, discovery, non-economic damages, judges' impartiality, judges' competence, juries' predictability, and juries' fairness").

31. That is not to say surveys can never be evidence of fairness. If the Chamber of Commerce's survey included a broader array of attorneys, such as those who represent consumers and employees, and did not use substantive satisfaction with outcomes as a metric of fairness, it would be entitled to much greater weight as a measure of fairness. *See* Kuriloff & Goldberg, *supra* note 23, at 46 (detailing instruments to measure satisfaction of both school districts and parents in special education cases). In contrast, fairness does not seem to be the Chamber of Commerce's objective; rather, change in the law appears to be the goal. *See supra* notes 25–26 and accompanying text. For contrasting views on empirical assessment of judicial quality, *compare* Stephen J. Choi et al., *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313 (2009) (evaluating judges by considering opinion quality based on citation counts, independence, and productivity), *with* William P. Marshall, *Be Careful What You Wish For: The Problems with Using Empirical Rankings to Select Supreme Court Justices*, 78 S. CAL. L. REV. 119, 134 (2004) ("Excellence at the Supreme Court level, in short, may be more attributable to the intangible than to the quantifiable . . . ." (footnote omitted)).

32. The Author believes in more philosophical roots of analyzing fairness. *See generally* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 178 (2003) (discussing the concept of "virtue jurisprudence"—"a normative and explanatory theory of law that utilises the resources of . . . virtue ethics . . . to answer the central questions of legal theory").

33. *See* Marshall, *supra* note 31 ("Excellence at the Supreme Court level, in short, may be more attributable to the intangible than to the quantifiable . . . ." (footnote omitted)).

34. Zirkel, *supra* note 24 (discussing a class action lawsuit in California alleging bias based on case outcome statistics).

35. *See, e.g.*, Thomas A. Mayes & Perry A. Zirkel, *Special Education Tuition Reimbursement Claims: An Empirical Analysis*, 22 REMEDIAL & SPECIAL EDUC. 350,

service of judges, administrative or otherwise, is flawed. Just because an administrative law judge who hears cases under the Individuals with Disabilities Education Act (IDEA) happens to rule in favor of school districts two-thirds of the time does not mean that the judge is partial to school districts. It could be that the law substantively or procedurally favors school districts.[36] It could be that school districts have greater access to evidence[37] or to counsel. Neither is necessarily evidence that the administrative law judge is partial to school districts. The judge applies the law, regardless of which party the law inherently favors. The judge creates and examines the record made,[38] regardless of how skillfully the record is made.[39] The notion that parties are entitled to a chance of equal outcomes, rather than an equal opportunity to be heard, is antithetical to the notion of reasoned judgment. Cases should not be coin flips; case outcomes should not be random.[40] They should be the result of purposeful deliberation concerning law and fact. Studies of case outcome patterns do not purport to detect bias in the administrative judiciary,[41] and they should

354–57 (2001) (evaluating the outcomes in administrative and decisions and court cases seeking tuition reimbursement for case and policy analysis).

36. *See, e.g.*, Thomas A. Mayes et al., *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27, 37–38 (2005) (discussing standards under IDEA that substantially favor school districts).

37. *See, e.g.*, *id.* at 74–76 (discussing the likelihood of school districts having better access to information and better systems to organize it).

38. *See, e.g.*, Moliterno, *supra* note 1, at 1198 (noting an administrative law judge is often charged with developing the record).

39. Administrative law judges commonly have a duty to protect and develop the record in the inquisitorial model. *Id.*; *see, e.g.*, 20 C.F.R. §§ 404.944, 416.1444 (2011) (outlining the inquisitorial model employed in disability hearings under the Social Security Act). That duty is especially important in cases where one party is not represented by counsel. *See* Baker v. Emp't Appeal Bd., 551 N.W.2d 646, 648 (Iowa Ct. App. 1996) ("An administrative law judge has a duty to develop the record fully and fairly . . . . [A] lack of counsel . . . enhance[s] . . . the administrative law judge's duty to bring out the relevant facts." (citations omitted)). The duty to develop the record has never been construed to allow or require the adjudicator to raise issues not presented by the parties or otherwise assume a partisan role in the hearing. *See* Gregg v. Barnhart, 354 F.3d 710, 713 (8th Cir. 2003) (holding "an ALJ is not obliged 'to investigate a claim not presented at the time of the application for benefits and not offered at the hearing as a basis for disability'" (quoting Pena v. Chater, 76 F.3d 906, 909 (8th Cir. 1996)).

40. Zirkel, *supra* note 24 ("The underlying assumption that a 50–50 rate is the proper metric for the requisite IDEA standards of hearing officer impartiality and competence is clearly questionable for more than one reason.").

41. *See* Mayes & Zirkel, *supra* note 35, at 354 ("setting out an outcome

not be so used. If outcome patterns favor one party over another, that is a matter of changing the law, not changing the administrative law judge.

III. INDEPENDENCE

In contrast to impartiality, the question of administrative law judge independence is more nuanced. Administrative law judges are not independent in the same way as judges in the state judiciary are,[42] even if administrative law judges' perceive that they have a substantial degree of independence.[43] Their decisions are not binding precedent, even on their peers.[44] Administrative law judge interpretations of law are not binding on agencies,[45] and administrative law judges must follow applicable law, including agency policy,[46] at least to the extent that such policy is an arguably reasonable interpretation of ambiguous law.[47]

Independence simultaneously is a subset of and a means of protecting impartiality.[48] Judicial branch independence is primarily a means to check actions of the legislative and executive branches.[49] That rationale for

study's research questions, which do not include fairness of judicial officers"). In rare cases, if a particular judge's outcomes were so disproportionate that they may be explained by bias or partiality, then that might create a responsibility to inquire about that possibility. The use of outcome studies in these instances would (1) be rare because these would be extraordinary cases and (2) not be dispositive because they raise the question but do not answer it.

42. Moliterno, *supra* note 1, at 1199 (noting that unlike judges in the state judiciary, administrative law judges are bound not only by the agency's legislative rules, but also by the agency's statements and indicators of agency policy). According to Professor Moliterno, even judges in the state and federal judiciary are not completely independent. *Id.* at 1202–03.

43. *Id.* at 1211 n.94.

44. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 908 (2001).

45. *See id.*

46. *See* Moliterno, *supra* note 1, at 1199.

47. *See generally* Anuradha Vaitheswaran & Thomas A. Mayes, *The Role of Deference in Judicial Review of Agency Action: A Comparison of Federal Law, Uniform State Acts, and the Iowa APA*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 402, 425 (2007) ("A court gives 'weight' to an agency's interpretation of a statute '*only* where the law is ambiguous *and* the matter falls within the agency's expertise.'" (emphasis added) (quoting Boeing Co. v. Gelman, 10 P.3d 475, 477 (Wash. Ct. App. 2000))). This is because the legislative delegations to make rules and develop policy are to agencies and not to administrative law judges. *See* Moliterno, *supra* note 1, at 1199 ("The only true source of their authority is the agency itself . . . .").

48. Moliterno, *supra* note 1, at 1200.

49. *Id.* at 1218.

independence does not apply to judicial officers who are part of executive branch agencies.[50]

That is not to say that the administrative judiciary has no independence; rather, its independence is to be viewed within its context. If independence is a protector of impartiality[51] and some minimum degree of impartiality is a required attribute of the administrative judiciary,[52] I suggest that some amount of lawmaking independence and autonomy, albeit to a lesser degree, is necessary for the administrative judiciary.

While administrative law judges are not policymakers[53] and are to follow settled law and policies of the administrative agencies,[54] it does not follow from these premises that administrative law judges have no legitimate role in law creation. Inherent in the act of deciding a case is the resolution of any unsettled or novel questions of law that may arise in that case.[55] Sometimes the settled law and policy does not cover the terrain. It would paralyze the administrative judiciary if it could not fill gaps in the settled law when necessary to decide a case. While these gap-filling rules are not precedential,[56] they are law in the broadest sense: a rule from a position of authority used to evaluate disputes and order litigants' lives.[57] While not binding in future cases and subject to revision by the agency or through judicial review, this gap-filling protolaw is entitled to some weight.[58] In addition to its role of applying agency law and policy,[59]

50. *Id.* at 1214–15.

51. *See id.* at 1200 (stating independence and impartiality are discrete concepts, but arguing independence is a subset of impartiality).

52. *See id.* at 1199 ("[A]dministrative judges . . . are required to make their decisions impartially . . . .").

53. *But see* Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693 (2005).

54. *See supra* text accompanying notes 45–47.

55. *See* Robert N. Clinton, Commentary, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society*, 67 IOWA L. REV. 711, 714 (1982) ("[J]udges often find themselves in the position of being forced to make, rather than interpret, law.").

56. *See supra* text accompanying notes 44–45.

57. *See* BLACK'S LAW DICTIONARY 884 (6th ed. 1990) (defining "law" as a "general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human, and among human authorities is that which is paramount in a political society").

58. Professor Moliterno makes the following observation about so-called "Article III" judges: "Courts, by contrast, make law at every turn. Even the most mundane case that seems merely to follow existing precedent or apply a statute creates a precedential data point: one more set of facts for future courts to use for comparison

including providing relief when an agency violates the law,[60] the administrative judiciary has the role of creating law when agency law and policy are silent, though the law is not binding in future cases and is subject to revision. The administrative judiciary must be sufficiently independent to fulfill its role—it must be able to apply law to fill in gaps in the law without external interference.

IV. IMPARTIALITY, INDEPENDENCE, MONEY, AND SPEECH

While the administrative judiciary is not subject to election and is not directly subject to the recent influx of money into political campaigns,[61] the administrative judiciary is certainly subject to other forces that are easier to quantify and that money may help procure. These have included a lawsuit challenging the administrative judiciary for failure to produce a pattern of outcomes favoring the plaintiffs[62] and a public statement asserting that the administrative judiciary's decisions are "job killers."[63]

These subtle and not-so-subtle attempts to influence the outcomes of administrative decisions implicate concerns that are different from attempts to influence the outcomes of judges in the judicial branches through election and retention campaign spending. While it is a matter of great dispute about the degree to which judicial branch judges are political or should be subject to political whims,[64] it is axiomatic that administrative

and contrast purposes." Moliterno, *supra* note 1, at 1212 (footnote omitted). If these sentences describe a characteristic of judicial independence, they should not also apply to the administrative judiciary. The same processes are at work in the administrative judiciary and entitle the administrative judiciary to some measure of independence.

59. *See id.* at 1199.

60. Manry, *supra* note 2, at 446 (stating an administrative law judge can "deem controlling agency policy at odds with a statute," even in a sibling agency).

61. Elections, campaigns, and campaign contributions may have indirect bearing on the administrative judiciary, even if its members are not directly elected. Agency heads have substantial control over the selection, evaluation, and retention of administrative law judges, including central panel administrative law judges, and are often directly elected or appointed by directly elected governors. Additionally, in *Citizens United v. FEC*, Justice Stevens expressed growing concern about the corrupting effects of "unlimited corporate money into the electoral realm." Citizens United v. FEC, 130 S. Ct. 876, 965–66 (2010) (Stevens, J., dissenting).

62. Zirkel, *supra* note 24.

63. John Kline, *Fighting Obama's Job-Killing Agenda: New Bill Can Right the Wrongs of the NLRB*, WASH. TIMES (Oct. 5, 2011), http://www.washingtontimes.com/news/2011/oct/5/fighting-obamas-job-killing-agenda-18911287/.

64. *See, e.g.*, Sandra Day O'Connor, *Foreword*, 60 DRAKE L. REV. 677 (2012); Sandra Day O'Connor, Justice, United States Supreme Court, Keynote

law judges are part of the executive branch,[65] a distinctly political branch of government.[66] Administrative law judges are part of a political branch, yet they are to be neutral, impartial finders of fact and appliers of law.[67] The influx of money into the political process—and, by inevitable extension, into the executive branches of government—heightens already existing threats to impartiality of the administrative judiciary.[68] In the Author's view, the influence of campaign contributions on the impartiality of the administrative judiciary and other well-financed attempts to influence the decision-making of the administrative judiciary appear to be threats, while less overt, that are just as real as the threat to judicial branch impartiality posed by increasingly costly and politicized judicial election and retention campaigns.

While administrative law judges and judges housed in the judicial branches are subject to differing outside influences, the potential harms posed by those influences are similar in quality, if not necessarily degree—loss of impartiality and loss of independence.[69] If external pressure groups reduce officers of the administrative judiciary and of the judicial branch to "rubber stamps" of the approved positions of the pressure groups,[70] then

Address at the Seattle University Judicial Independence Conference (Sept. 14, 2009), *in* 33 SEATTLE U. L. REV. 559, 564 (2010) [hereinafter O'Connor Keynote Address] ("Several studies have shown that roughly 70% of the public believes that judges are influenced by campaign contributions, and more than one-quarter of the judges themselves think campaign contributions affect their decisions.").

65. *See supra* text accompanying note 18.

66. *See, e.g.*, William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 506 (2008) (noting views on the legitimacy of presidential power tend to be directly related to the approval or disapproval of the current president's policies, which demonstrates the political nature of the executive branch).

67. *See* Moliterno, *supra* note 1, at 1199.

68. *See* O'Connor Keynote Address, *supra* note 64 (noting multiple studies have indicated the public and at least one-quarter of judges believe campaign contributions affect their decisions).

69. *See* Moliterno, *supra* note 1, at 1199.

70. City of Moorhead v. Minn. Pub. Utils. Comm'n, 343 N.W.2d 843, 846 (Minn. 1984) ("We have consistently stressed the importance of agencies employing their expertise to reach *independent* decisions and not to simply 'rubber stamp' the findings of a hearing examiner." (emphasis added) (citing People for Envtl. Enlightenment and Responsibility (PEER) Inc. v. Minn. Envtl. Quality Council, 266 N.W.2d 858, 873 (Minn. 1978))); *see also* Delgado v. Bowen, 782 F.2d 79, 82 (7th Cir. 1986) (stating courts must be more than "'*uncritical* rubber stamps'" of agency decisions (emphasis added) (quoting Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984))).

why call these officers "judges" at all?[71] The irony would be too cruel. Taking away the power to exercise professional judgment and compelling administrative law judges to act in a certain way, regardless of where the law and the evidence would or could lead, turns the administrative adjudication process into an expensive charade. If an outside interest group wants to influence the result in cases decided by the administrative judiciary, it could do four things. First, it could provide direct assistance to a party to a case, such as by providing co-counsel. Second, it could participate in a case as amicus curiae, should the agency's rules permit such participation.[72] Third, it could seek to change the law that the administrative judiciary applies,[73] which would then be bound by the changed law.[74] Fourth, it could rigorously comply with the law, thus avoiding adverse administrative law judge rulings.[75] Change the law and trust the administrative judiciary to follow it. Do not change the judge.[76]

The exercise of external influence over judicial officers is often cloaked in a "free speech" justification. Campaign contributions are exercises of political speech.[77] Criticism of judicial decisions is also at the heart of the Free Speech Clause's protection.[78] By no means is it suggested that the judiciary should be immune from criticism.[79] Criticism of a

71. *See* Moliterno, *supra* note 1, at 1199 ("[A]dministrative judges are judges in that they are impartial decisionmakers . . . .").

72. *See, e.g.*, 825 KY. ADMIN. REGS. 1:020 § 3 (2011) (allowing amici curiae in mine safety appeals); 43 TEX. ADMIN. CODE § 215.311 (West 2011) (allowing amicus briefs to be filed in motor vehicle distribution appeals).

73. *See, e.g.*, Kline, *supra* note 63 (detailing Representative Kline's efforts to pass the Workforce Democracy and Fairness Act to reverse policies that he believed had been advanced by the National Labor Relations Board to the detriment of industry).

74. *See supra* text accompanying notes 44–47.

75. *See* Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993) (holding school officials who conform with the mandate of IDEA "need not worry about reimbursement of claims").

76. Zirkel, *supra* note 24 (stating litigants should avoid blaming "referees"—administrative law judges—for losses or perceived losses in IDEA litigation).

77. Citizens United v. FEC, 130 S. Ct. 876, 897–900 (2010) (equating expenditure bans to bans on free speech).

78. *See* Bridges v. California, 314 U.S. 252, 273 (1941) (holding newspaper criticisms of the court were protected free speech).

79. The Author has published such criticism in the past. *See, e.g.*, Thomas A. Mayes, *Denying Special Education in Adult Correctional Facilities: A Brief Critique of* Tunstall v. Bergeson, 2003 BYU EDUC. & L.J. 193, 194 (2003) ("Essentially, denying special education to incarcerated youth with disabilities, ages eighteen to twenty-one, [as the Washington Supreme Court did in *Tunstall*], runs contrary to the language, and

decision, however, is not a call to replace the decision maker. Robust discussions of the decisions made by judicial officers are a healthy and treasured aspect of free society.

When a robust discussion erodes the structure of the judicial branch or the administrative judiciary, a line is crossed. The criticism stops being about the merits of the decision and starts to corrupt the decision-making process. We are all entitled to speak about decisions made by the administrative judiciary.[80] But we are not entitled to speak so loudly that the administrative judiciary does not hear adverse parties. Adverse parties have a due process interest "to be heard."[81] If the administrative judiciary was structurally unable to protect an adverse party's right to be heard over well-financed and otherwise-protected speech, then what point is served by pretending that the administrative judiciary dispenses justice? The administrative judiciary needs protections from well-financed attempts to place a thumb on the judicial scales.

The notion of resolving conflicts between one litigant's right to speech and other litigants' constitutional rights is not a novel concept. Two examples demonstrate this point. The Supreme Court has recognized that pretrial publicity may deny a criminal defendant a constitutionally tolerable trial.[82] Additionally, the Supreme Court has noted that ex parte contacts between trial judges and jurors may violate a defendant's right to counsel under the Sixth Amendment.[83] While the administrative judiciary is a legitimate subject of critique, which is protected by the First Amendment, that critique cannot work to deprive others of their constitutionally protected interests. While the First Amendment must be considered whenever inquiring as to what protections from external forces are to be provided to the administrative judiciary, the First Amendment cannot act as an excuse for refusing to undertake such an inquiry. While

structure of the IDEA.")

80. The Author himself has published criticism about such decisions. *See id.*

81. *Cf.* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972) (holding an opportunity to be heard is essential when a "'person's good name, reputation, honor, or integrity is at stake'" (citations omitted)).

82. *See* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences.").

83. *See* Rushen v. Spain, 464 U.S. 114, 117–18 (1983). In light of its important constitutional roots, the rule against ex parte communications is included in the Model State Administrative Procedure Act. MODEL STATE ADMIN. PROCEDURE ACT § 4-213 (1981).

the First Amendment protects a robust "marketplace of ideas,"[84] justice must never become a commodity in that market.[85] Balance is required.

V. CONCLUSION

The administrative judiciary is particularly susceptible to external forces, especially those with lots of money at their disposal, perhaps more so than officers of the judicial branch. At some point, such pressures become constitutionally intolerable. Where that point is and what must be done when that point is reached is not clear. What is clear, however, is that failing to ask and answer these questions will result in a slow but inevitable evaporation of the administrative judiciary's power to justly decide disputes before it.

84. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

85. *See, e.g.*, Sandra Day O'Connor, *Justice For Sale*, WALL ST. J., Nov. 15, 2007, at A25.