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Accountability in the Administrative Law Judiciary: The Right and the Wrong Kind

ACCOUNTABILITY IN THE ADMINISTRATIVE LAW JUDICIARY: THE RIGHT AND THE WRONG KIND

EDWIN L. FELTER, JR.[†]

Accountability, n. The mother of caution.

—*Ambrose Bierce, The Devil's Dictionary*

INTRODUCTION

How many forms of accountability are there in the administrative law judiciary? And, by comparison, how many forms of accountability are there in the judicial branch? Let me count the ways. This article begins with an analysis of the interplay, and mutual dependence of, judicial independence and accountability. It next illustrates how various judicial philosophies maintain different ideas about judicial accountability. Thereafter, an analysis of the importance of judicial independence to our system of justice follows.

Delving into more specific forms of judicial accountability, the article moves from accountability through “reasoned elaboration,” as an underpinning of meaningful appellate rights, to accountability through judicial review, and the requirement that lower tribunals must follow precedent in all but the most unusual instances. The article illustrates the implications of an official refusal to follow precedent, for example, the Social Security Administration’s (SSA) policy of non-acquiescence (which maintains that SSA administrative law judges need not follow precedent established by federal circuit courts of appeal outside the circuit in which the administrative law judge sits).

The next form of accountability with which this article deals is the most significant and compelling form of accountability, the accountability of judges to the controlling codes of judicial conduct in their jurisdictions, the underpinnings of which are effective complaint mechanisms to enforce those codes. For the sake of comparison to the administrative law judiciary, there is an analysis of disciplinary mechanisms for judges in state judicial branches. Also, there is an analysis of the newer phenomenon of judicial performance commissions in the states (which, in theory, exist to assist judges in improving their performance).

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Judgmental evaluations (evaluations that may result in pay raises, demotions, or even firings) are contrasted with developmental evaluations (for the purpose of self-improvement) of administrative law judges.

Lastly, inappropriate judicial performance evaluations and their negative consequences on the American values of integrity, impartiality, and judicial independence of our judges are considered.

I. JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Jane Q. Public cherishes independent judges, especially when she prevails over the establishment in court, or before an administrative law tribunal. Yet, she demands judges who are accountable. The proposition is as simple as the idea that freedom comes with certain responsibilities. Judicial independence comes with great accountability.

Judges have a great deal of power over the lives and fortunes of those who appear before them. It is not always obvious to the litigant that judges are constrained to apply the law to the facts, to obey codes of judicial conduct and, in the case of the administrative law judiciary, to meet specific performance objectives for civil servants, plus observe the rules of professional conduct for lawyers.

Perhaps the greatest source of misunderstanding (and demand for more accountability) concerning judges stems from their remoteness from the public, which is based in part on the standards of conduct contained in the code of judicial conduct.¹ Also, the process by which judges arrive at decisions in cases is sometimes mysterious to the public. In ancient times, people believed that judges were merely interpreting the divine will.² This concept evolved into the belief that judges' interpretations of the law became a sacrosanct component of our jurisprudence. The concept extended down to the trial level whereby the trial judge's findings of fact were considered to become the absolute and immutable truth concerning the facts in controversy. The findings assumed a quality of unassailable dignity, above and beyond the evidence upon which they were based. The school of judicial realism maintains that judges should not deceive themselves concerning the true nature of their findings of fact—guesses on the guesses of the witness's human and imperfect grasp of the facts.³ Judges have an obligation to avoid fueling the fires of arrogance and misunderstanding. What judges do is not by consecration into the holy order of the robe. They are technicians who apply the law to the

1. AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

2. Charles D. Reid, Jr., *Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent's Commentaries*, 5 AVE MARIA L. REV. 47, 52 (2007).

3. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE, (Princeton Univ. Press 1973).

facts and, in doing this the application of the law should be laced with human understanding, common sense, compassion, and justice.

Indeed, judges (through codes of judicial conduct) are, in fact, subject to higher standards of conduct than those applicable to lawyers, who are subject to the rules of professional conduct. Judges in the administrative law judiciary—insofar as they must be attorneys in good standing—are also subject to the rules of professional conduct for lawyers in addition to judicial ethics codes and civil service performance standards.

There is a public clamor for more accountability of judges, especially when a legally correct, but unpopular and misunderstood opinion, is released by an appeals tribunal and receives a lot of press coverage. Indeed, if judges do not ensure that accountability measures and mechanisms, meaningful to the public, are in place, interest groups, through citizen initiated constitutional amendments, will get ill-advised and inappropriate accountability measures on the ballot, and launch expensive campaigns to defeat judges whose “minds are not right,” in the opinion of a few crusaders to get-the-judges. One extreme example was South Dakota’s 2006 “Jail for Judges” initiative (J.A.I.L: Judicial Accountability Initiative Law), which would have abolished judicial immunity for South Dakota judges and made them liable in criminal and civil actions for official acts, deemed improper by dissatisfied litigants.⁴ There is no authority for the proposition that “judicial immunity” is a right protected by the U.S. Constitution. Judicial immunity, in some cases, may be statutory, or in a state constitution (within the “sovereign immunity” family), but it has mainly evolved through case law.⁵ Fortunately, South Dakota voters defeated the “Jail for Judges” measure by eighty percent, thus indicating that they valued judges who could function “without fear or favoritism.” It is hard to imagine who would want to be a judge in South Dakota if the “Jail for Judges” measure had passed.

Rebecca Love Kourlis, former Colorado Supreme Court Justice and present Executive Director for the Institute for the Advancement of the American Legal System at the University of Denver, states, “there is a buzz of public dissatisfaction about our courts, fueled at least to some extent by the perception that our courts and judges are remote and *unaccountable*.”⁶ She also states:

The willingness of judicial leaders in places like Colorado, Utah, and New Hampshire to promote accountability measures is heartening and heralds a new mind-set among judges. This new judicial attitude is also reflected in eloquent remarks by Chief Justice John Broderick of New Hampshire, who is working to export key elements of Colo-

4. S.D. CONST. amend. E (2006).

5. See *Martinez v. Winner*, 771 F.2d 424, 434 (10th Cir. 1985).

6. Rebecca Love Kourlis, Op-Ed, Guest Commentary: *Colorado Judiciary a Leader*, THE DENVER POST, June 29, 2008, at D3 (emphasis added).

rado's program to their court system. [Chief Justice Broderick observed] "Our best ally is public trust and confidence. Without it, we will lose support. . . . Sunlight and openness purify."⁷

Justice Kourlis indicates: "We have now also taken to measuring the courts, from public opinion polls, to state-by-state rankings and performance evaluations. This is a very healthy development."⁸

Although the administrative law judiciary often "flies under the radar," perhaps because administrative law has a reputation for being a boring subject, the administrative law judiciary could be especially vulnerable if an interest group, affected by a decision of the administrative law judiciary it did not like, decided to launch a campaign to make the administrative law judiciary more "accountable" to the group's preferred way of thinking about issues. The reason for the greater vulnerability would be due to the narrow and specialized subject matter with which the administrative law judiciary deals.

Indeed, some members of the public believe that administrative law judges are mere extensions of the agencies that are at odds with them. Nothing could be further from the truth. Administrative law judges stand between the agency and the person. The agency stands as another litigant before the administrative law judge, and the administrative law judge's job is to provide a fair and impartial hearing to all sides. Sometimes the agency loses and it has the right to appeal in the same manner as any other appellant.

II. JUDICIAL PHILOSOPHIES AND ACCOUNTABILITY

Colorado State Senator Mark Hillman, who the author describes as a textualist, states: "Conservatives have long decried 'activist judges' and 'judicial activism.' Those terms have a specific meaning, referring to courts that do not simply interpret the law but instead change the meaning of the law under the guise of interpretation."⁹ The Senator goes on to state: "Writing the law is the constitutional role of the legislative branch, which is elected by and accountable to the people. The role of the judiciary is to interpret, which *The American Heritage Dictionary* defines as 'to explain the meaning of.'"¹⁰ Therein lies some public misunderstanding and dissatisfaction with some high profile judicial opinions, perceived to be the product of "activist" judges. Political campaigns against these opinions add more fuel to the fires of misunderstanding.

7. *Id.*

8. Rebecca Love Kourlis, Perspective: *Do Our Courts Measure Up?*, THE DENVER POST, July 11, 2008, available at http://www.denverpost.com/search/ci_9844319.

9. Senator Mark Hillman, *The Essence of Judicial Activism*, John Jay Institute for Judicial Interpretation Journal (Mar. 15, 2004) <http://www.libertyparkusafd.org/lp/Jay/Journal/2004/The%20Essence%20of%20Judicial%20Activism.htm> (last visited Nov. 4, 2008).

10. *Id.*

Judicial philosophies, labeled as textualism¹¹ and originalism,¹² are the banners under which those calling for more judicial accountability often fly. Pragmatism¹³ (which has become the subject of public opprobrium among those clamoring for more “judicial accountability”) bears the stigma of judicial liberalism and those who appear to subscribe to this philosophy are often labeled as “judicial legislators,” or “judicial activists.” The late Justice Thurgood Marshall of the U.S. Supreme Court, in response to a question about the “original intent” of the founding fathers, reputedly indicated that the founding fathers did not contemplate the law of the air or space. Justice Marshall was considered a judicial legislator by some because he would be flexible in interpreting the law of transport for horses and buggies as applicable to aircraft and space craft.

III. JUDICIAL INDEPENDENCE: AN AMERICAN VALUE

In 2001, when I was Chair of the National Conference of the Administrative Law Judiciary of the American Bar Association, I was invited to speak at an international administrative law conference in Quebec City, the theme of which was “Universal Values in Administrative Law.”¹⁴ I decided on a presentation entitled “Judicial Independence: A Universal Value.” Part of the presentation made reference to Steven Spielberg’s 1997 movie *Amistad*, starring Djimon Hounsou as the leader of the 1839 slave rebellion on the schooner *Amistad*, and Anthony Hopkins, starring as John Quincy Adams, his lawyer. A rebellion broke out on the schooner along the coast of Cuba and the schooner was taken over by a group of captives who had earlier been kidnapped in Africa and sold

11. “Textualism” looks to the ordinary meaning of the language of the text, not merely the possible range of meaning of each of its constituent words. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 319 (1988). Justice Scalia has written:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and the most likely to have been understood by the whole Congress which voted on the words of the statute, (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by benign fiction, we assume Congress always has in mind.

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

12. “Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because the ratifiers understood themselves to be enacting must be taken to be what the public *of that time* would have understood the words to mean.” ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144 (The Free Press 1990) (emphasis added).

13. “[T]he pragmatist judge believes that constitutional interpretation involves the empathic projection of the judge’s mind and talent into the creative souls of the framers rather than slavish obeisance to the framers’ every metronome marking. In the capacious, forward-looking account of interpretation that I am calling pragmatic, the social consequences of alternative interpretations often are decisive; to the consistent originalist, if there were such a person, they would always be irrelevant.” RICHARD A. POSNER, *OVERCOMING LAW* 253 (Harvard Univ. Press 1995).

14. Edwin L. Felter, Jr., *Judicial Independence: A Universal Value*, Speech at the Council of Canadian Administrative Tribunals Fourth International Administrative Law Conference, Quebec City, Quebec (June 2001).

into slavery. The Africans were later apprehended on the vessel near Long Island, New York, by the U.S. Navy and taken into custody. Widely publicized litigation ensued. The movie depicts one lonely federal judge standing up against the administration of President Martin Van Buren (whose administration, trying to avoid a conflict between North and South, supported the property rights of those to whom the alleged slaves were consigned) and Congress. The federal judge found that the initial transport of the Africans across the Atlantic (which was not on the *Amistad*) had been illegal and the rebels were not legally slaves but free. The U.S. Supreme Court affirmed this finding on March 9, 1841, and the Africans traveled home in 1842.¹⁵ The movie presents a moving portrayal of the cherished American value of judicial independence, standing firm against the weight of public sentiment, Congress, and the presidential administration of Martin Van Buren. Indeed, without judicial independence implementation of the Civil Rights Act of 1964 may have been a long-time coming.

The decisional independence of judges, including judges in the administrative law judiciary, is the cornerstone of our constitutional system of separation of powers. Legislative bodies make the laws, based on their perceptions of the popular will, and they have the power to implement the laws through the power of appropriating monies. The executive branch enforces the laws through its police and sheriffs. The judicial branch, including the administrative law judiciary (within the executive branch), has neither the power to appropriate monies nor the police force to enforce its decrees. It has been characterized as the weakest branch of government, yet it has the last word. The judicial power lies in the public's silent and enduring agreement to abide by the decisions of the judiciary, and to treat the decisions as final unless appealed. Indeed, the judiciary's legitimacy and efficacy derives largely from the public's confidence in its fairness and fidelity to the law.¹⁶ Public confidence is essential to the judicial branch.¹⁷ To citizens of those countries where independent judiciaries are not a given, the respect Americans accord judicial decisions (whether they agree or disagree) is a great mystery. The administrative law judiciary is meant to represent a fair and impartial mechanism in the executive branch, whereby the individual person and the government agency stand on equal ground. Indeed, the administrative law judge's obligation to be decisionally independent is the same as the obligation of a judicial branch judge.

15. *United States v. Libellants & Claimants of The Schooner Amistad*, 40 U.S. 518, 597 (1841).

16. *See, e.g., Alden v. Maine*, 527 U.S. 706, 752 (1999).

17. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

The late Chief Justice William Rehnquist said that an independent judiciary is the “crown jewel of our democracy.”¹⁸ A colleague tells a story about his experience as a civil procedure consultant in Vietnam. He told his Vietnamese audience about the U.S. Supreme Court opinion that affirmed a federal judge’s decision ordering President Harry Truman to cease and desist from barring a strike of one of the nation’s largest steel companies at the beginning of the Korean War.¹⁹ A member of the audience asked if the judge was taken out and shot. My colleague replied, “No, he went on to his next docketed case.” In our system, even the President of the United States must obey court orders.

Judicial independence is a cherished international and national value. The Bangalore Principles of Judicial Conduct (2002),²⁰ Value 1, provides: “Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.”²¹

Canon 1 of the American Bar Association Model Code of Judicial Conduct (2007) states: “A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary”²² Most jurisdictions in the United States have provisions in their codes of judicial conduct concerning the independence of the judiciary similar to those in the ABA Model Code.²³

Decisional independence, especially for members of the administrative law judiciary, does not come without great accountability. Indeed, the American Bar Association felt it necessary to adopt a resolution supporting the decisional independence of administrative law judges, conditioned on the proposition that “members of the administrative [law] judiciary be held accountable under appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct.”²⁴

18. Edwin L. Felter, Jr., *Maintaining the Balance Between Judicial Independence and Judicial Accountability in Administrative Law*, 17 J. NAT’L ASS’N ADMIN. L. JUDGES 89, 93 (1997).

19. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

20. BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002) (adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002 (those countries participating included Brazil, the Czech Republic, Egypt, France, Mexico, Mozambique, The Netherlands, Norway, The Philippines, Madagascar, Hungary, Germany, Sierra Leone, United Kingdom, and the U.S.A)).

21. *Id.*; Value 1: Independence, Principle. Application 1.1 provides: “A judge shall exercise judicial function independently (emphasis added) on the basis of the judge’s assessment of the facts in accordance with a conscientious understanding of the law, free from any extraneous influences, pressures, threats, or interference, direct or indirect, from any quarter or for any reason.” *Id.*

22. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

23. *See, e.g.*, COLO. CODE OF JUDICIAL CONDUCT Canon 1 (2007) (stating “A judge should uphold the integrity and independence of the judiciary.”).

24. ABA HOUSE OF DELEGATES RES. 101B (2001) (enacted) (on file with author).

IV. ACCOUNTABILITY THROUGH “REASONED ELABORATION” AND THE RIGHT TO APPEAL

Legislative bodies make decisions, based on public comment and perceptions of the public will, without being required to support those decisions with underlying reasons (other than a prefatory statement in a bill to the effect: “In order to protect the public health, safety and welfare . . .”). Legislative decisions are reflected in bills that become laws. The executive branch, charged with enforcing those laws, may or may not be required to give reasons in support of executive branch enforcement actions (administrative law adjudications are *not* part of these enforcement actions). The policeman making an arrest is not required to articulate underlying reasons for doing so, other than stating the facts, which must establish probable cause before a court. A court then decides whether or not there was probable cause to believe that the subject committed the crime and should be bound over for trial. Because judicial branch decisions are not based on majority vote reflecting the popular will, or on a clear mandate to enforce the law, one of the forms of accountability for judicial outcomes is a requirement of “reasoned elaboration,”²⁵ applying the law to the facts and giving reasons why the judge arrived at the specific outcome in the case.

The right to appeal is another form of accountability, whereby the appeals tribunal must state reasons why the judge below was correct or incorrect. This requirement is especially visible, and more pronounced, in the administrative law judiciary, after an agency takes final agency action on the administrative law judge’s findings of fact, conclusions of law, and order. Although the ALJ functions in the executive branch, the ALJ performs a judicial function. In the judicial branch, “reasoned elaboration” may not always be formally required at the trial level. It most certainly is required at the appellate level. “Reasoned elaboration” is almost universally prescribed by a codified and formal mechanism at the first level of adjudication by the administrative law judiciary.²⁶

The Federal Administrative Procedure Act (APA),²⁷ as well as the APA of almost every state,²⁸ requires the administrative law judge to

25. “Reasoned elaboration” is the notion that the rules and guidelines involved in judicial decisionmaking are sufficient to create substantial constraint on both process and outcome, and, when properly followed, will incline courts towards the substantively best outcome. The constraints emphasized in “reasoned elaboration” are public explanation, consistency, and sensitivity to (legislative) purpose. ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 126-27, 138-42 (Cambridge Univ. Press 1998).

26. See Professor Michael Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact & Conclusions of Law*, 17 J. NAT’L ASS’N ADMIN. L. JUDGES 151, 171 (1997).

27. 5 U.S.C. § 557(c)(3) (2008) (providing “All decisions, including initial, recommended, and tentative decisions . . . shall include a statement of findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law or discretion presented on the record . . .”).

28. ALA. CODE § 41-22-15 (2008); ARIZ. REV. STAT. ANN. § 41-1063 (2008); ARK. CODE ANN. § 25-15-210 (West 2008); CAL. GOV’T CODE § 11425.50 (West 2008); CONN. GEN. STAT.

articulate findings of fact and conclusions of law that tie the findings of fact into the applicable rules, statutes, or cases, and stating the reasons for the decision. The Proposed Model State Administrative Procedure Act (2008), requires that a recommended or final order “must include separately stated findings of fact and conclusions of law on all material issues of fact, law, or discretion”²⁹ California’s Administrative Procedure Act adds one more measure of accountability in ALJ decisions: an ALJ is required to articulate reasons supporting credibility determinations.³⁰ On judicial review, the reviewing tribunal “shall give great weight to the [credibility] determination” to the extent that it “identifies the observed demeanor, manner, or attitude of the witness that supports it.”³¹

V. RIGHT TO APPEAL / ACCESS TO THE COURTS

The right of access to judicial review of executive branch actions was first clearly pronounced in *Marbury v. Madison*.³² One hundred and sixty-four years later, the U.S. Supreme Court announced a presumption of reviewability of administrative agency actions, including ALJ decisions.³³ The Federal APA and each state APA provides for judicial review of final administrative agency actions.³⁴

APA provisions for judicial review set forth appellate standards for correcting lower tribunal errors. The scrutiny of an appellate tribunal is an important accountability measure for outcomes in specific cases. In-

ANN. § 4-179 (West 2008); DEL. CODE ANN. tit. 29, § 10128 (2008); D.C. CODE § 2-509(e) (2001); FLA. STAT. ANN. § 120.57(1)(k) (West 2008); GA. CODE ANN. § 50-13-17(b) (West 2008); HAW. REV. STAT. § 91-12 (2008); IDAHO CODE ANN. § 67-5248 (2008); 5 ILL. COMP. STAT. ANN. 100/10-50(a) (West 2008); IND. CODE ANN. § 4-21.5-3-27 to -28 (West 2008); IOWA CODE ANN. § 17A.16 (West 2008); KAN. STAT. ANN. § 77-526 (2006); KY. REV. STAT. ANN. § 13B.120 (West 2008); LA. REV. STAT. ANN. § 49:958 (2008); ME. REV. STAT. ANN. tit. 5, § 9061 (2008); MD. CODE ANN., STATE GOV’T § 10-221 (West 2008); MASS. GEN. LAWS ch. 30A, § 11 (2008); MICH. COMP. LAWS § 24.285 (2008); MINN. STAT. § 14.62 (2007); N.J. STAT. ANN. § 52:14B-10(c) (West 2008); N.M. STAT. § 12-8-12 (West 2008); N.Y. A.P.A. LAW § 307 (McKinney 2007); N.C. GEN. STAT. ANN. § 150B-34 (2008); OHIO REV. CODE ANN. § 119.09 (West 2008); OKLA. STAT. ANN. tit 75, § 311 (West 2008); R.I. GEN. LAWS § 42-35-12 (2008); S.C. CODE ANN. § 1-23-350 (2007); S.D. CODIFIED LAWS § 1-26-25 (2008); TENN. CODE ANN. § 4-5-314 (2008); TEX. GOV’T CODE ANN. § 2001.141 (Vernon 2008); UTAH CODE ANN. § 63G-4-208(1) (2008); VT. STAT. ANN. tit. 3, § 812 (2007); VA. CODE ANN. § 2.2-4020 (2008); WASH. REV. CODE § 34.05.461 (LexisNexis 2008); W. VA. CODE ANN. § 29A-5-3 (LexisNexis 2008); WIS. STAT. ANN. § 227.47 (West 2008); WYO. STAT. ANN. § 16-3-110 (2008); see TEX. GOV’T CODE ANN. § 2001.058(e) (Vernon 2008) (providing that “a state agency may change a finding of fact” and must state written reasons for the legal basis of the change); see also Shelia Bailey Taylor, *The Growth and Development of a Centralized Administrative Hearing Process in Texas*, 17 J. NAT’L ASS’N ADMIN. L. JUDGES 113, 115 (1997).

29. MODEL STATE ADMIN. ACT § 417(d) (Proposed Draft 2008). The corresponding provision in Colorado, for example, requires the same ingredients in an ALJ decision. See COLO. REV. STAT. § 24-4-105(14)(a) (2008).

30. CAL. GOV’T CODE § 11425.50(b) (2008).

31. *Id.*

32. 5 U.S. 137, 146 (1803).

33. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

34. 5 U.S.C. § 704 (2008); see, e.g., ARK. CODE ANN. § 25-15-212 (2008); OKLA. STAT. tit. 75, § 318 (2008).

deed, appeal is the appropriate remedy to address legal errors at lower court and administrative agency levels.

Adherence to the doctrine of *stare decisis*,³⁵ or precedent, in the Anglo-American system of jurisprudence provides another measure of judicial accountability. Once a precedent-setting court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it in all future cases, where the facts are substantially the same.³⁶ Nevertheless, when a judge commits a legal error, appeal on the merits, as opposed to judicial discipline, is usually the appropriate avenue of recourse.³⁷ Legal error, however may amount to judicial misconduct in unusual cases, making judicial discipline appropriate. Such recourse is highly sensitive because of the potential impact on decisional independence.³⁸

In *Oberholzer v. Commission on Judicial Performance*,³⁹ the California Supreme Court distinguished legal error from judicial misconduct, setting forth the following factors relevant to a finding of misconduct: repeated error, bias, abuse of authority, disregard for fundamental rights, *intentional disregard of the law*, or any purpose other than the faithful discharge of judicial duty.⁴⁰

In a highly publicized California case, Justice Anthony Kline (of an intermediate appellate court) stated in a dissenting opinion that he would decline to follow the decision of California's highest appellate court, indicating that the opinion in question was "analytically flawed and empirically unjustified," and Justice Kline opined that his dissent constituted one of the "rare instances in which a judge of an inferior court can properly refuse to acquiesce in the *precedent* established by a court of superior jurisdiction."⁴¹

Justice Kline was charged with "refusal to follow the law as established by the California Supreme Court in violation of the Code of Judicial Ethics."⁴² Ultimately, the Commission applied *Oberholzer* standards and concluded that Justice Kline's "argument for a narrow exception to

35. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990) ("To abide by, or adhere to, decided cases.").

36. *Moore v. City of Albany*, 98 N.Y. 396, 410 (1885).

37. *See, e.g., In re Quigley*, 32 N.Y.S. 828, 829 (1895); *Murtagh v. Maglio*, 195 N.Y.S.2d 900, 905 (1960); *State ex rel. Okla. Bar Ass'n v. Sullivan*, 596 P.2d 864, 869 (Okla. 1979).

38. *See* Gerald Stern, *Is Judicial Discipline in New York a Threat to Judicial Independence?*, 7 PACE L. REV. 291, 303-45 (1987).

39. 20 Cal. 4th 371 (1999).

40. *Id.* at 397-98.

41. *Morrow v. Hood Commc'ns, Inc.*, 59 Cal. App. 4th 924, 926-27 (1997) (Kline, J., dissenting) (emphasis supplied).

42. *In re Kline*, No. 151 (Cal. Comm'n on Jud. Performance August 19, 1999) (decision and order of dismissal).

the *stare decisis* principle . . . was [not] so far-fetched as to be untenable.”⁴³

Some agencies, however, have refused to adhere to *stare decisis* as a matter of policy. In the 1920s, the Internal Revenue Service created the concept of *non-acquiescence* as a method to inform taxpayers of its intention not to follow a decision of the Board of Tax Appeals, which Congress created to provide an independent tribunal to hear taxpayer appeals.⁴⁴ The Social Security Administration (SSA) follows a policy of non-acquiescence, which is that the SSA only follows the decisions of the U.S. Supreme Court and not those of the U.S. Circuit Court of Appeals unless it decides to change regulations based on a court of appeals opinion, or unless the SSA decides to acquiesce in a particular decision. Its rationale is to maintain uniformity throughout the United States.⁴⁵ This policy forces the SSA administrative law judges to choose between obeying the administrators of the SSA, or following the law as interpreted by the respective circuit court of appeals, as is ordinarily done by other litigants.⁴⁶

Anecdotally, a friend, who is a U.S. District Judge, characterizes the SSA’s policy of non-acquiescence as a “recipe for anarchy.” The author agrees and sees the policy as significantly undermining the principle of *stare decisis*, which in fact extends into the administrative law judiciary, and replacing the supremacy of the courts with the supremacy of the executive branch bureaucracy at the top of the SSA. This may be reminiscent of one of the banana belt republics of yore, where the highest court of the country was accountable to, and obeyed, the president of the republic. Originalists and textualists must concede that this is not what our founding fathers (original framers) had in mind.

VI. ACCOUNTABILITY TO CODES OF JUDICIAL CONDUCT

A code of judicial conduct provides every canon or rule necessary to make judges accountable in all respects. Administrative law judges in three central panel⁴⁷ states (Colorado, Georgia and Minnesota) are officially subject to the code of judicial conduct for the respective state’s

43. *Id.*

44. Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471, 474 n.5, 478 n.17 (1986).

45. *See* Ass’n of Admin. Law Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1139 (D.D.C. 1984).

46. Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U. L. REV. 1, 8-10 & n.60 (1987). For a thorough discussion of the predicament of ALJs at the SSA, see Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims*, 23 J. NAT’L ASS’N ADMIN. L. JUDGES 267 (2003).

47. A “central panel” is an independent agency in which a jurisdiction’s adjudications are centralized. Central Panels are best described as an executive branch judiciary.

judicial branch.⁴⁸ Several states provide that the rules of professional conduct for attorneys apply to the ALJs.⁴⁹ Other states have adopted their own codes of judicial conduct, patterned after the ABA Model Code of Judicial Conduct for State Administrative Law Judges.⁵⁰

Members of a state administrative law judiciary, who are civil servants, are subject to their respective constitutional provisions, statutes, and rules dealing with performance of duties by state employees, and providing sanctions for misconduct. In Colorado, for instance, members of the administrative law judiciary are appointed to their positions under the State Personnel System, which is in the state constitution.⁵¹ According to the Colorado Constitution:

A person certified to any class or position in the personnel system may be dismissed, suspended, or otherwise disciplined by the appointing authority upon written findings of failure to comply with *standards* of efficient service or competence, or for *willful misconduct*, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude⁵²

By virtue of the fact that the judicial branch code of judicial conduct applies to the administrative law judges in Colorado's central panel,⁵³ it follows that a breach of the code of judicial conduct would be either "failure to comply with standards" or "willful misconduct" under the constitutional state personnel system and, if proven after notice and a hearing, the ALJ could ultimately be dismissed, suspended, or otherwise disciplined for a violation of the code of judicial conduct.

The American Bar Association Model Code of Judicial Conduct (2007) notes: "Each jurisdiction should consider the characteristics of particular positions within the administrative law judiciary in adopting, adapting, applying, and enforcing the Code for the administrative law

48. COLO. REV. STAT. § 24-30-1003(4)(a) (2008); GA. CODE ANN. § 50-13-40(c) (2008) (subjecting ALJs by virtue of the chief administrative law judge's adoption of a rule); MINN. STAT. ANN. § 14.48(d) (2007).

49. COLO. OFFICE ADMIN. CTS., *Comparison of Central Panel States Chart*, Table B (2003) (citing Arizona, California, Michigan, Missouri, North Carolina, North Dakota, and South Carolina) (on file with author).

50. See LA. REV. STAT. ANN. § 49:996 (2008); MD. CODE ANN., STATE GOV'T § 9-1604(a)(9) (2008) (stating that the Chief Administrative Law Judge is required to develop a code of professional responsibility for administrative law judges); N.J. STAT. ANN. § 52:14F-5 (2008); TENN. CODE ANN. § 4-5-321(a)(4)(b) (2008); TEX. GOV'T CODE ANN. § 2003.022(d)(3) (2008) (emulating the ABA Model Code for State ALJs).

51. COLO. CONST. art. XII, § 13, cl. 8; see also *Dep't of Insts. v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994) (en banc).

52. COLO. CONST. art. XII, § 13, cl. 8 (emphasis added); see also COLO. REV. STAT. § 24-50-125(1) (2008).

53. COLO. OFFICE ADMIN. CTS., *supra* note 49.

judiciary.”⁵⁴ The ABA Federal ALJ Model Code and the ABA State ALJ Model Code are both endorsed by the ABA National Conference of the Administrative Law Judiciary.⁵⁵

The U.S. Court of Appeals for the Ninth Circuit addressed the applicability of the ABA’s Model Code for Federal administrative law judges and found that the Code is not binding on those judges within the Social Security Administration because the SSA had not specifically adopted it as binding.⁵⁶

For the purposes of this article, reference is made to the ABA Model Code of Judicial Conduct (2007) to illustrate tenets of conduct in typical codes of judicial conduct. Also, the Bangalore Principles of Judicial Conduct (2002)⁵⁷ set forth fundamental principles of judicial conduct.

The ABA Model Code sets forth four principal canons: (1) “A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid the appearance of impropriety”; (2) “A judge shall perform the duties of judicial office impartially, *competently*, and *diligently*”; (3) “A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office”; and (4) A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.⁵⁸ The canons, which state overarching principles of judicial ethics, are broken down into *rules*, which are enforceable in judicial disciplinary actions.⁵⁹

The Bangalore Principles of Judicial Conduct present six judicial ethics values: (1) Independence; (2) Impartiality; (3) Integrity; (4) Propriety; (5) Equality; and (6) Competence and Diligence. These values are broken down into tenets, referred to as “Application,” which deal with more specific mandates relating to the specific “Value.”⁶⁰

The Bangalore Principles, the ABA Model Code, and all other codes of judicial conduct set forth a comprehensive set of performance standards for judicial branch and executive branch judges (administrative law judges). An examination of the enforceable rules under the ABA

54. MODEL CODE OF JUDICIAL CONDUCT Application, pt. VI, cmt. n.1 (2007); *see, e.g.*, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES (1989); MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES (1995).

55. MODEL CODE OF JUDICIAL CONDUCT Application, pt. VI, cmt. n.1 (2007); MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES (1989); MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES (1995).

56. *Lowry v. Barnhart*, 329 F.3d 1019, 1023-24 (9th Cir. 2003).

57. *See* BANGALORE PRINCIPLES OF JUDICIAL CONDUCT, Values, *supra* note 20.

58. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007); MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2007) (emphasis supplied); MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2007); MODEL CODE OF JUDICIAL CONDUCT Canon 4 (2007).

59. MODEL CODE OF JUDICIAL CONDUCT Scope, para. 2 (2007).

60. *See* BANGALORE PRINCIPLES OF JUDICIAL CONDUCT, Values, *supra* note 20.

Model Code illustrate that no other performance standards are necessary in order to achieve a high degree of judicial accountability.

For those administrative law judges who are not subject to a code of judicial conduct, but only to the rules of professional conduct for lawyers (assuming a law license is necessary to serve), the code of judicial conduct is the only yardstick available to hold a lawyer and administrative law judge accountable for misconduct of a purely judicial nature. Indeed, judicial misconduct, when there is no adopted code of judicial conduct, would amount to "conduct that is prejudicial to the administration of justice,"⁶¹ under the rules of professional conduct for attorneys.

Administrative law judges who are licensed attorneys may be subject to three separate legal schemes of accountability and discipline: the code of judicial conduct; the rules of professional responsibility for lawyers; and, civil service rules concerning ethical and efficient standards of public service. If certain administrative law judges are neither lawyers nor civil servants, they will be subject to internal standards developed by their respective organizations, and potentially to political accountability, depending on how politically responsive their employing agencies are on adjudication issues. The administrative law judges, however, may dodge the bullet of political accountability depending upon the good graces of their supervisors and their appointing authorities.

In Colorado for instance, a certified civil servant may be "dismissed, suspended, or otherwise disciplined . . . upon written findings of failure to comply with standards of efficient service or competence, or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude . . ." ⁶² Violation of the code of judicial conduct in the performance of judicial duties qualifies as a violation of the civil service provisions. For misconduct of a purely judicial nature, attorney regulation systems and state appointing authorities that are responsible for dealing with civil servant misconduct and discipline, if appropriate, will use the code of judicial conduct as a yardstick, whether or not it has officially been made applicable.

VII. AN EFFECTIVE COMPLAINT SYSTEM IS NECESSARY FOR ACCOUNTABILITY

Accountability to "reasoned elaboration," appeals on the merits, codes of judicial conduct, and performance codes will only be meaningful if an effective enforcement mechanism to address misconduct exists. Such mechanisms exist for the federal judiciary, and for the judiciary of

61. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (1980).

62. COLO. CONST. art. XII, § 13(8); COLO. REV. STAT. § 24-50-125(1) (2007).

every state in the U.S.⁶³ One hundred years ago, the only way to remove a federal, Article III, judge was through impeachment and conviction by Congress.⁶⁴ Now, there is a mechanism for the discipline of errant federal judges.⁶⁵ State administrative law judges who are civil servants are accountable to their respective state performance codes. These performance codes derive authority either from the state constitution or from statutory law.

Federal administrative law judges, who are under the Federal Administrative Procedure Act (APA), are independent of the agencies over whose adjudications they preside. The Office of Personnel Management prescribes their pay without regard to agency evaluations.⁶⁶ A federal agency *cannot* take disciplinary action against a federal ALJ, who is under the Federal APA. The agency stands in the position of a party litigant (complainant), and it must establish that good cause for discipline exists through a formal adjudicatory proceeding before the Merit System Protection Board (MSPB), an independent agency that has its own independent administrative law judges. The MSPB then may impose discipline, if appropriate.⁶⁷

State administrative law judges are treated as “employees” on the one hand, and as “judicial officers” on the other hand.⁶⁸ These individuals either work in an agency or in an independent central panel.⁶⁹ With the exception of New Jersey (the Governor appoints each ALJ) and South Carolina (the House of Burgesses appoints each ALJ), the Chief ALJ or Director of the central panel is usually the appointing authority with the duty of hiring and firing ALJs.⁷⁰ The power to hire and fire administrative law judges for the central panel of the District of Columbia is in its Commission on Selection and Tenure of Administrative Law Judges.⁷¹ In central panel states, where the judges are civil servants, the chief’s (appointing authority’s) firing decisions are subject to appeal to a state civil service commission, which frequently has its own independent

63. American Judicature Society, http://www.ajs.org/ethics/eth_conduct-orgs.asp (last visited Oct. 18, 2008).

64. See Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006).

65. See Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364 (2008).

66. 5 U.S.C. § 5372 (2008).

67. 5 U.S.C. § 3105 (2008).

68. See Edwin L. Felner, Jr., *Special Problems of State Administrative Law Judges*, 53 ADMIN. L. REV. 403 (2001).

69. See Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75 (1994) (describing central panels as operating in complete independence from agencies). At present there are 25 state central panels (Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Iowa, Louisiana, Massachusetts, Maryland, Maine, Michigan, Minnesota, Missouri, North Carolina, North Dakota, New Jersey, Oregon, South Carolina, South Dakota, Tennessee, Texas, Washington, Wisconsin, and Wyoming), and three city central panels (Chicago, New York City and Washington, D.C.) COLO. OFFICE ADMIN. CTS., Comparison of OAC to Other Central Panels, Table A (on file with author).

70. COLO. OFFICE ADMIN. CTS., *supra* note 69.

71. D.C. CODE § 2-1831.11 (2008).

administrative law judges.⁷² In jurisdictions without central panels, administrative law judges are generally hired and fired by the agency or by the agency's general counsel. In these jurisdictions, if the agency employees are civil servants, the administrative law judges in the agency are generally civil servants.

State administrative law judges who are civil servants are ordinarily accountable through "judgmental" performance evaluations, which could result in a firing, demotion, pay raise or promotion.⁷³ "Judgmental evaluations" count in terms of pay, status, tenure, promotion, demotion or firing, and they have been a fact of life for state administrative law judges, who are civil servants, for a long time. "Developmental evaluations" cannot affect pay, status, tenure, promotion, demotion, or firing. They are for the edification and improvement of the judge being evaluated. Developmental evaluations are becoming more and more prevalent for the judicial branch with the establishment of twenty state judicial performance evaluation programs,⁷⁴ which are discussed in more detail below. The results of developmental evaluations in the judicial branch, as structured and analyzed below, can have career-ending consequences for the judicial branch judges evaluated.

With the exception of the District of Columbia Office of Administrative Hearings (where performance evaluations are done by a commission⁷⁵), the chief administrative law judge usually ratifies the one-on-one performance evaluation of a supervisory judge. Potential flaws, and potential inappropriate influences on judicial independence, are noted in an article indicating that the goals of any system are often difficult to meet because of inherent weaknesses of human beings.⁷⁶ Alexander Hamilton noted in the Federalist papers that "in the general course of human nature, a power over a man's subsistence amounts to a power over his will."⁷⁷ In contrast, judicial branch performance evaluations may have less potential for being flawed because they are done by commissions that are appointed in a manner similar to the method of appointment for judicial discipline commissions, and members of the commissions presumably end up being accountable to each other.

Colorado's central panel of the administrative law judiciary sets forth a detailed system for the handling of complaints against administra-

72. Felter, *supra* note 68, at 406 (including California, Colorado, Florida, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Washington, and Wisconsin).

73. See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 55.

74. Rebecca Kourlis, Op-Ed., *Colorado Judiciary a Leader*, THE DENVER POST, June 29, 2008, at D3.

75. D.C. CODE, *supra* note 71.

76. See Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 1 (1997).

77. THE FEDERALIST No. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

tive law judges on its website.⁷⁸ Section II (b) of the policy states: "Complaints about a particular judge must be in writing, and must be addressed to the Office Director (Chief Judge)."⁷⁹ Section III (a) provides: "In no instance shall the complaint be disclosed to the judge during the pendency of the matter in question."⁸⁰ Section III (c) states:

Following the final conclusion of the matter, the Chief Judge shall discuss the complaint with the judge (this includes an investigation, if necessary) to determine whether it is well grounded and whether any changes are warranted. Complaints found to be both warranted and serious may be made a part of the judge's personnel file (inherently included in such a finding is the potential of discipline, up to and including termination from employment).⁸¹

VIII. DISCIPLINE IN THE JUDICIAL BRANCHES OF THE STATES

State judicial discipline commissions are housed within the judicial branch of government. These commissions ordinarily do not have jurisdiction or authority over administrative law judges because they are in the executive branch of government. The creators of the commissions implicitly recognized a constitutional separation of powers problem if the power to hire and fire executive branch employees (administrative law judges), outside of the context of an appeal, were bestowed on a judicial discipline commission. Other than those discussed herein, there are additional judicial discipline commissions at the state level.⁸²

78. Colorado Office of Administrative Courts Homepage, <http://www.colorado.gov/dpa/oac/DirectorsPolicies.htm> (last visited Oct. 18, 2008).

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* Florida Judicial Qualifications Commission, http://www.floridasupremecourt.org/pub_info/jqc.shtml; Georgia Judicial Qualifications Commission, <http://www.georgiacourts.org/agencies/jqc/>; Indiana Judicial Qualifications Commission, <http://www.in.gov/judiciary/jud-qual/about.html>; Iowa Judicial Qualifications Commission, http://www.judicial.state.ia.us/Self_Help/Complaints/About_Judges/index.asp; Kansas Commission on Judicial Qualifications, <http://www.kscourts.org/Appellate-Clerk/General/commission-on-judicial-qualifications/default.asp>; Kentucky Judicial Conduct Commission, <http://courts.ky.gov/jcc/>; Maryland Commission on Judicial Disabilities, <http://www.mdcourts.gov/cjd/about.html>; Missouri Commission on Retirement, Removal, and Discipline of Judges, <http://www.courts.mo.gov/SUP/index.nsf/0/d9e62cc0dfa6cf1f86256620005b4f38?OpenDocument>; Montana Judicial Standards Commission, <http://courts.mt.gov/supreme/boards/jsc.asp>; Nebraska Commission on Judicial Qualifications, <http://www.supremecourt.ne.gov>; New Hampshire Judicial Conduct Committee, <http://www.courts.state.nh.us/committees/judconductcomm/index.htm>; New York State Commission on Judicial Conduct, <http://www.scjc.state.ny.us/Legal%20Authorities/legal.htm>; Ohio Board of Commissioners on Grievances and Discipline, www.sconet.state.oh.us/boc/; Oregon Commission on Judicial Fitness and Disability, www.ojd.state.or.us/aboutus/cjfd/index.htm; Rhode Island Commission on Judicial Tenure & Discipline, www.courts.state.ri.us/supreme/jtd/defaultjtd.htm; South Carolina Commission on Judicial Conduct, www.judicial.state.sc.us/discounsel/commissionJC.cfm; South Dakota Judicial Qualifications Commission, <http://www.sdjudicial.com/index.asp?category=jqc&nav=0>; Tennessee Court of the Judiciary, www.tsc.state.tn.us/OPINIONS/TSC/RULES/TNRulesOfCourt/ctjudindex.htm; Texas State Commission on Judicial Conduct, <http://www.scjc.state.tx.us/>; Utah Judicial Conduct Commission,

Common threads of similarity run through judicial discipline mechanisms in the states. Most commissions are creatures of their respective state constitutions and their members are appointed by a constitutionally prescribed mix of individuals, e.g., the chief justice, the governor, the attorney general, the bar association.

In some cases, the commissions have the power to remove judges from the bench or impose other discipline. In other cases, the commissions make recommendations for removal or discipline to the highest court of the state. In all cases, the commissions function as tribunals that deal with complaints against judges. They are constituted to function in a manner similar to an attorney discipline system, i.e., receiving complaints, handling the complaints informally, conducting "probable cause" proceedings, and conducting full blown hearings on the merits where the judge is afforded the full panoply of due process rights, including the right to be represented by counsel, the right to discovery, and the right to have the charging authority prove the allegations against the judge by a recognized standard of proof, ordinarily by "clear and convincing evidence."

In appropriate cases, a commission may also provide for diversion of a judge with mental or substance abuse problems. Ordinarily, the proceedings are confidential until and unless public discipline is imposed. The unwritten, inherent reasons for the confidentiality are that it would not be good to air the dirty linen of the judiciary in public on a frequent basis because of the great potential of eroding the public confidence and independent and competent judiciary.⁸³

IX. JUDICIAL PERFORMANCE EVALUATIONS IN THE ADMINISTRATIVE LAW JUDICIARY: ANOTHER FORM OF ACCOUNTABILITY

Judicial performance evaluations for administrative law judges, who are civil servants, are ordinarily performed by a supervisory ALJ. Using Colorado as an example, primarily as a concession to the shortness of life, there are three principal tools for the measurement of performance and the accountability of Colorado administrative law judges. These tools include: (1) "judgmental" performance evaluations mandated by the State Personnel System; (2) an annual, anonymous ALJ performance survey; and, (3) a "quality assurance review" program (a developmental, confidential peer process for the review of decisions).

<http://jcc.utah.gov/aboutus.html>; Vermont Judicial Conduct Board, www.vermontjudiciary.org/Committees/boards/jcbcomplaint.htm; Virginia Judicial Inquiry & Review Commission, www.courts.state.va.us/jirc/main.htm; Washington State Commission on Judicial Conduct, www.cjc.state.wa.us; West Virginia Judicial Investigation Commission, <http://www.state.wv.us/wvsca/JIC/geninfo.htm>; Wisconsin Judicial Commission, <http://www.wicourts.gov/about/committees/judicialcommission/index.htm>; Wyoming Commission on Judicial Conduct & Ethics, <http://judicialconduct-wy.us/const.php> (all websites listed supra last visited Oct. 17, 2008).

83. See Appendix *infra*, at pp. 24-28.

A. Judgmental Evaluations of ALJs

Performance criteria for administrative law judges in the Office of Administrative Courts (Administrative Courts) are included on a standard form prescribed by the State Department of Personnel and Administration.⁸⁴ There are general criteria for all employees of the Department,⁸⁵ designated as core competencies (communication, customer service/interpersonal skills, and credibility/accountability/job knowledge).⁸⁶ Adherence to the code of judicial conduct is measured under the “Core Competency” standards.⁸⁷ Next, there are specific performance measurement standards for administrative law judges, including “decision quality,”⁸⁸ “quality of hearings”⁸⁹ (“conducting hearings effectively and fairly”), and “timeliness of decisions.”⁹⁰

There are three levels of rating in the Department’s and Administrative Court’s Performance Management System: (1) exceptional; (2) successful; and (3) needs improvement (“needs improvement” is tantamount to an unsatisfactory rating). An overall “exceptional” rating results in a non-base building cash bonus for the year (usually \$500). An overall “successful” rating results in the maximum base building cost-of-living increase for the professional class of which administrative law judges are a part. An overall “needs improvement” rating may result in a “corrective action,” and if the ALJ does not meet the goals of the corrective action in the time specified in the corrective action for meeting those goals, it may result in dismissal from state service.⁹¹

B. Developmental, Anonymous Performance Surveys of ALJs

Besides the “judgmental” performance evaluations of ALJs in Colorado, the Integrated Document Solutions (IDS) Unit of the State Department of Personnel and Administration conducts an anonymous, “developmental” survey of each ALJ, sending out questionnaires to 2,000 people, selected by IDS, who appeared or were otherwise present before an administrative law judge for the year surveyed.⁹² Neither the OAC nor the Department of Personnel and Administration have access to or know the names of those surveyed; and, they do not have access to the process until the process is completed.⁹³ Respondents to the survey are asked to

84. COLO. OFFICE ADMIN. CTS., Performance Management Form (on file with author).

85. The Colorado Office of Administrative Courts is a division of the State department of Personnel and Administration. See Colorado Department of Personnel & Administration, Office of Administrative Courts, <http://www.colorado.gov/dpa/oac/> (last visited Oct. 18, 2008).

86. COLO. OFFICE ADMIN. CTS., *supra* note 84, at 1 (on file with author).

87. See Appendix *infra* at 28.

88. *Id.* at 29.

89. *Id.* at 30.

90. *Id.* at 3 (on file with author).

91. *Id.* at 4 (on file with author).

92. *Id.*

93. *Id.*

grade each ALJ from "A" to "F" (fail) in a number of different performance areas.

Respondents to the IDS Survey are asked to grade each ALJ, from "A" to "F", in the following categories: (1) explaining the proceedings, and what's going on in the hearing; (2) being prepared for the hearing and familiar with the case; (3) treating all participants with courtesy and respect; (4) providing adequate time for both sides to present their case ("allowing the questioning of witnesses without excessively or unnecessarily interrupting them"); (5) maintaining appropriate control over proceedings; (6) conducting proceedings in a neutral manner; (7) demonstrating knowledge of the applicable law; (8) applying rules of procedure and evidence appropriately; (9) timeliness of ruling on motions and other pre-hearing matters; (10) being clear and understandable; (11) showing an understanding of the issues in the case; (12) addressing all of the legal and factual issues in the case; (13) giving reasons for decision; (14) timeliness in issuing post-hearing decision; and, (15) doing a good job overall. Respondents are then encouraged to make written, anonymous comments on the administrative law judges' strengths and weaknesses.⁹⁴

C. The Quality Assurance Review Program

An additional accountability measure in the Colorado Office of Administrative Courts involves a "developmental" and confidential "Quality Assurance Review (QAR)" of decisions by peers. The QAR program is collegial and non-binding. Judges periodically submit up to six decisions a year to a colleague for a quality review. There are seven factors on the QAR Checklist: (1) appropriate title for decision; (2) clarity of language; (3) clarity of format; (4) grammar; (5) findings of fact support conclusions of law; (6) findings of fact properly distinguished from conclusions of law; and, (7) legal reasoning and citations to authority.⁹⁵

X. PERFORMANCE EVALUATIONS OF JUDGES IN THE JUDICIAL BRANCH

Originally, judicial performance evaluations were performed by bar associations for the purpose of imparting meaningful information on a judge's performance to the voting public. These evaluations were "developmental" (non-binding) and the results were for the judge's and the public's edification so the under performing judge could develop better judicial attributes. Now, many states have established official judicial performance evaluation commissions, often constituted in a manner quite similar to the manner judicial discipline commissions are constituted. These commissions have taken the place of bar association surveys, but they have far more clout. A judge with problem surveys is generally

94. COLO. OFFICE ADMIN. CTS., Performance Survey (on file with author).

95. COLO. OFFICE ADMIN. CTS., Quality Assurance Review Program (on file with author).

required to meet with the commission and address the problems indicated. One example of how a judicial performance commission functions was a situation where the public survey revealed that a judge, who shall remain unnamed, had an anger problem. The commission met with the judge and gave him an opportunity to respond. After the meeting, the commission and the judge agreed that the judge would attend anger management classes. This fact later appeared in the local newspaper, not because there was a leak, but because the commission's actions, for the most part, are deemed a matter of public record. In most instances, the outcomes are made public.

XI. INAPPROPRIATE JUDICIAL PERFORMANCE EVALUATIONS

Despite (1) the widespread existence of constraints on judicial behavior, both public and private, (2) judicial discipline mechanisms and criteria for discipline, and (3) judicial evaluation mechanisms and criteria for evaluations, most of which is available to the public in order that it may make informed decisions on the retention or reelection of judges, there continues to be a public clamor for more accountability. The public sometimes does not seem to be quite sure of what kind of accountability they mean, or of what precise problems require more accountability. They just seem to know that those "darned judges go against the public will, make unreasonable decisions, and are accountable to no one the way legislators and other elected officials are accountable."

The U.S. Supreme Court opinion in *Republican Party of Minnesota v. White*⁹⁶ opened the door to the potential of more inappropriate judicial accountability measures. Essentially, the U.S. Supreme Court held that the "announce clause" in the Minnesota Supreme Court's canon of judicial conduct, which prohibited candidates for judicial election from *announcing* their views on disputed legal or political issues, violated the First Amendment to the U.S. Constitution.⁹⁷ Although an application of *Republican Party of Minnesota v. White* is limited to judicial election and reelection campaigns, the U.S. Supreme Court effectively determined that the First Amendment trumps state codes of judicial conduct concerning extra-judicial statements of judges in their campaigns.⁹⁸

James Bopp, Jr., a Terre Haute, Indiana lawyer, who successfully argued *Republican Party of Minnesota v. White* before the U.S. Supreme Court, is on a crusade to eliminate prohibitions "against judicial candidates making 'pledges,' 'promises' or 'commitments' on controversies or issues that are inconsistent with impartiality on the bench."⁹⁹ Mr. Bopp is also challenging judicial canons that prohibit "partisan political activi-

96. 536 U.S. 765 (2002).

97. *Id.* at 788.

98. *Id.*

99. Terry Carter, *The Big Bopper: This Terre Haute Lawyer is Exploding the Cannons of Judicial Campaign Ethics*, 92 A.B.A. J. 30, 32-33 (Nov. 2008).

ties and direct solicitation of campaign funds” by judicial “candidates.” He states, “While his clients want to know a candidate’s personal values on issues such as abortion, they expect judges to follow the facts and law wherever they lead.”¹⁰⁰ According to Mr. Bopp, “judicial candidates can be prohibited from saying ‘I’ll throw all drunk drivers in jail’ or ‘I’ll overturn *Roe v. Wade* if given the chance”¹⁰¹

Mr. Bopp’s argument is disingenuous. It maintains that unless the judge announces a clear-cut pre-judgment, outright, e.g., “I’ll overturn *Roe v. Wade* as soon as I get a chance,” the judge can publicly express whatever controversial views he so desires without exposure to any consequences. Presumably, a logical extension of Mr. Bopp’s argument is that the First Amendment trumps the ABA Model Code of Judicial Conduct (2007), and its state counterparts, which provide that a judge should *not* “participate in activities that will lead to frequent disqualification of the judge.”¹⁰² The underlying rationale of the argument would also appear to be at odds with the judicial ethics value of “helping one’s colleagues with their caseloads.”

Indeed, it is not that difficult to imagine the loneliest judge on the bench, who has received substantial reelection contributions from the Right-to-Life Committee, The Sons of Italy, and MADD (Mothers Against Drunk Driving) and who, in the exercise of her First Amendment right to speak publicly about controversial issues, says that she has very strong feelings against abortion, stem cell research, political demonstrators against our patriotic Columbus Day Parade, drunk drivers, and others. Thereafter, she gets a rash of cases involving any one or more of these controversial issues. The judge is then faced with motions to disqualify herself. Arguably, she could deny the motions, stating that, despite the political contributions and despite the public announcement of her strongly held views, she will be fair and impartial because she never said that she would rule against abortion clinics, drunk drivers, criminals, or Native American demonstrators at the Columbus Day Parade.

An appeals court may, however, reverse her on the basis that she should have disqualified herself; thus, the parties would have to go back to square one with another judge. Based on this scenario, the lonely judge could wind up being not very busy, and her colleagues would have to shoulder the added load resulting from her frequent disqualifications, triggered by the reversal of her previous refusal to disqualify herself.

Nevertheless, under Mr. Bopp’s inherent argument, the First Amendment may trump the judge’s ethical obligation to “cooperate with other judges and court officials in the administration of court busi-

100. *Id.* at 33.

101. *Id.*

102. MODEL CODE OF JUDICIAL CONDUCT Canon 3.1(B) (2007).

ness.”¹⁰³ Indeed, one can imagine judicial campaign rhetoric, reminiscent of the movie *Hang ‘Em High*, starring Clint Eastwood and Pat Hingle, stating, “elect me and I’ll string ‘em up high” (regardless of any considerations or factors contained in the Probation Department’s presentence report, or other considerations concerning the imposition of an appropriate sentence based on the facts and the law).

Mr. Bopp is forcing the issue of judges’ views on controversial political issues with the use of interest-group questionnaires being sent to judges up for retention or re-election, and to their challengers. The message behind the questionnaires is “judge, you can no longer hide behind the code of judicial conduct, in light of the U.S. Supreme Court’s decision in *Republican Party of Minnesota v. White*, and if you decline to answer what my client constituency wants to know, it’ll most likely cost you their votes.”¹⁰⁴

The receipt of the political questionnaire forces a different kind of accountability, such as: Is the respondent-judge the interest group’s kind of judge? The other side of the controversy concerning the controversial political issue may have a problem with the judge’s fairness and impartiality on that issue.

CONCLUSION

The central question is whether we truly want judges who are politically accountable to the political clamor of the moment. If so, it may be better to have a legislative body, which represents constituencies of the public, vote on the resolution of specific controversies between litigants. Legislators are better suited to withstand the slings and arrows of public opinion. And, if they are wrong they can be tossed out of office in the next regular election. This is not what the founding fathers intended when they set up a system of separate but equal branches of government, with checks and balances. Indeed, the real strength of the United States is embedded in the legal mechanisms designed to respect the rights of minorities, no matter how unpopular or repugnant to the majority the exercise of those rights may be.

Indeed, if we could read the deepest hopes and values in the hearts of people in this country, we would find evidence that the judicial independence of their judges is a cherished value. We may find that Jane Q. Citizen believes that she has a chance to win against big government or big business or, in the case of administrative law, the big agency. We may also find an appreciation of the fact that judges are far more accountable than any other public official in the legislative or executive branch of government. We may find an appreciation of the proposition

103. *Id.* at Canon 2.5(B).

104. *See* Carter, *supra* note 99, at 34.

that “with great responsibility comes great accountability.” The isolated horror stories in the press, concerning a few cases of extreme judicial misbehavior, and what happens to the misbehaving judges, illustrate that judges are accountable. Things do not end well for these judges.

Judges themselves must constantly create, develop and implement accountability measures and mechanisms that demonstrate to the public the high degree of accountability to which they are subject. Like Caesar’s wife, they must at all times be above reproach, not only refraining from improprieties, but avoiding even the *appearance* of impropriety, despite the fact that they are human beings and heir to the frailties of the flesh.¹⁰⁵ The continued well-being of our system of government is dependent upon independent judges who are accountable to “reasoned elaboration,” (i.e., giving reasons for their decisions); to being appealed and reversed if they make a legally wrong decisions; and to an appropriate code of judicial conduct that ensures that their conduct is above reproach; that they are fair and impartial to all; and, that they dispatch judicial business in a timely fashion. Judges have a continuing mission to educate the public that it is in their best interests to make sure that inappropriate judicial accountability measures are clarified so the public that cherishes judicial independence can see the measures for what they are, to get judges who are bought and paid for by one interest group or another.¹⁰⁶ By the same token, judges have an obligation to constantly demonstrate to the public that they are accountable to fairness, propriety, and the rule of law.

APPENDIX

This appendix expands on the discussions in three of this article’s sections: “Discipline in the Judicial Branches of the States”¹⁰⁷; “Judgmental Evaluation of ALJs”¹⁰⁸; and “Performance Evaluations of Judges in the Judicial Branch.”¹⁰⁹

First, “Discipline in the Judicial Branches of the States” provides an overview of eighteen states’ mechanisms for judicial discipline, and includes citations for interested readers.

Second, “Judgmental Evaluation of ALJs” gives a full account of the criteria used by the Office of Administrative Courts for judgmental

105. See MODEL CODE OF JUDICIAL CONDUCT Canon 1.2, which states: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” When faced with removing “the appearance of Impropriety” language from the Rule, the National Conference of State Chief Justices voted to leave it in. See Mark I. Harrison, *The 2007 Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 257, 262 (2007).

106. See JUDGE RICHARD FRUIN, JUDICIAL OUTREACH ON A SHOESTRING: A WORKING MANUAL (Judicial Division, ABA 1999).

107. See discussion *supra* Part VIII.

108. See discussion *supra* Part IX.A.

109. See discussion *supra* Part X.

evaluations. Because of the difficulty of obtaining the source for these criteria (it is on file with the author), the pertinent parts of its text are included here.

Finally, “Performance Evaluations of Judges in the Judicial Branch” discusses, in greater depth than the main text, Colorado’s performance evaluation system for judges in the judicial branch, and then surveys thirteen other states’ judicial performance evaluation mechanisms.

A. Discipline in the Judicial Branches of the States

The Constitution of the State of Alabama establishes a Court of the Judiciary, consisting of one appellate judge, two judges of circuit courts, one district judge, two members of the state bar, two non-lawyers appointed by the Governor, and one person appointed by the Lieutenant Governor.¹¹⁰ The Court of the Judiciary has authority, after notice and public hearing:

- (1) to remove from office, suspend without pay, or censure a judge, or apply such other sanction . . . for violation of a Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or
- (2) to suspend with or without pay, or to retire a judge who is physically or mentally unable to perform his or her duties.¹¹¹

The Alaska Commission on Judicial Conduct consists of three judge members, three attorney members and three public members.¹¹² Under the Commission’s Rules of Procedure, Rule 15 (a), the Commission may recommend a full range of sanctions, up to and including removal from office, to the Supreme Court of Alaska.¹¹³

The Arizona Commission on Judicial Conduct was created in 1970.¹¹⁴ It consists of eleven members with diverse backgrounds. Six judge members are appointed by the state supreme court: two from the court of appeals, two from the superior court, one from a justice court, and one from a municipal court.¹¹⁵ Two attorney members are appointed by the board of governors of the State Bar of Arizona. Three public members who cannot be attorneys, or active or retired judges, are appointed by the governor and confirmed by the state senate.¹¹⁶ The Com-

110. ALA. CONST. art. VI, § 157.

111. *Id.*

112. Alaska Comm’n on Judicial Conduct, <http://www.ajc.state.ak.us/CONDUCT.htm> (last visited Oct. 18).

113. Alaska Judicial Conduct Comm’n Rules, <http://www.state.ak.us/courts/jcc.htm#15> (last visited Oct 18).

114. Arizona Comm’n on Judicial Conduct, http://www.supreme.state.az.us/ethics/Commission_on_Judicial_Conduct_Overview.htm (last visited Oct. 18, 2008).

115. ARIZ. CONST. art. 6.1 § 1.

116. Arizona Comm’n on Judicial Conduct, http://www.supreme.state.az.us/ethics/Commission_on_Judicial_Conduct_Overview.htm (last visited Oct. 18, 2008).

mission enabling provisions explicitly state that it “does not have jurisdiction over court employees, *administrative law judges* or federal judges.”¹¹⁷ The commission may reprimand an Arizona judicial branch judge informally for violating the Code of Judicial Conduct, or in some cases, the commission may file formal charges and hold a public hearing to consider evidence about the judge’s conduct. If it finds that the judge committed misconduct, the commission can recommend that the state supreme court censure, suspend without pay, or remove the judge from office.¹¹⁸

The Judicial Discipline and Disability Commission of Arkansas may reprimand or censure a judge or, after notice and hearing and by majority vote, may recommend to the supreme court that a judge or justice be suspended, with or without pay, or be removed. Through silence, the Commission has jurisdiction and authority over constitutional judges but not over administrative law judges. In a hearing involving a justice of the Arkansas Supreme Court, all justices shall be disqualified from participation.¹¹⁹

The California Commission on Judicial Performance¹²⁰ hears cases involving judicial misconduct,¹²¹ handles judicial disability retirement applications,¹²² and is responsible for enforcement of the restrictions on judges’ receipt of gifts and honoraria.¹²³ It has jurisdiction over California constitutional judges.

The Colorado Commission on Judicial Discipline consists of two judges of district courts and two judges of county courts, each selected by the supreme court; two licensed attorneys appointed by the governor with the advice and consent of the state senate; and four citizens, none of whom shall be a judge, active or retired nor admitted to practice law, appointed by the governor with the consent of the senate.¹²⁴ By virtue of its constitutional status, the Commission has jurisdiction over constitutional judges but not over executive branch statutory judges (administrative law judges). The Commission may order a formal hearing concerning discipline and, if the charges are substantiated, may recommend to the Colorado Supreme Court removal, retirement, suspension, censure, reprimand, or discipline.¹²⁵

117. *Id.*

118. *Id.*

119. ARK. CONST. Amend. 66(a), (c).

120. CAL. CONST. art. VI, §§ 8, 18-18.1 18.5; CAL. GOV’T CODE §§ 68701-68756 (West 2008).

121. CAL. CONST. art. VI, § 18 (i).

122. CAL. GOV’T CODE §§ 75060-75064.

123. CAL. CIV. PROC. § 170.9.

124. COLO. CONST. art. VI, § 23(3)(a).

125. *Id.* § 23(3)(e).

In Connecticut, the Judicial Review Council was created by statute.¹²⁶ It has jurisdiction of judicial officers, including state referees, within the judicial branch.¹²⁷ The Commission has the authority to recommend removal of a judge to the Connecticut Supreme Court.¹²⁸

The Judiciary Commission of Louisiana has jurisdiction over justices and judges of all courts, including commissioners, magistrates, justices of the peace, and mayors performing judicial functions.¹²⁹

The Michigan Judicial Tenure Commission “strives to hold state judges, magistrates, and referees accountable for their misconduct without jeopardizing or compromising the essential independence of the judiciary. The basis for Commission action is a violation of the Code of Judicial Conduct or Rules of Professional Conduct”¹³⁰

The Massachusetts Commission on Judicial Conduct has jurisdiction over all judges in the judicial branch. Grounds for discipline include, *inter alia*,

(c) willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute; (d) conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, whether conduct in office or outside judicial duties, that brings the judicial office into disrepute; or (e) any conduct that constitutes a violation of the codes of judicial conduct or professional responsibility.¹³¹

A majority of the Commission members may recommend discipline to the supreme judicial court, up to and including removal from office.¹³²

Minnesota’s 1971 Legislature created a Board on Judicial Standards to assist the Supreme Court¹³³ and to implement the constitutional removal or discipline of judges for cause.¹³⁴ The Minnesota Supreme Court has adopted the Minnesota Code of Judicial Conduct that applies, by statute, to Minnesota’s central panel of the administrative law judiciary.¹³⁵

The Mississippi Commission on Judicial Performance may recommend to the state supreme court a public censure or reprimand through removal from office for misconduct including, *inter alia*,

126. CONN. GEN. STAT. § 51-51g (2008).

127. *Id.* § 51-51h.

128. *Id.* § 51-51j.

129. LA. CONST. art. V, § 25.

130. MICH. CONST. art. 6, § 30; MICH. CT. R. 9.200.

131. MASS. GEN. LAWS ch. 211C § 2 (2008).

132. *Id.* § 7 (10).

133. MINN. STAT. §§ 490A.01-.02 (2008).

134. MINN. CONST. art. 6, § 9.

135. MINN. STAT. § 14.48 (3)(d).

(c) willful and persistent failure to perform . . . duties; (d) habitual intemperance in the use of alcohol or other drugs; or (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute; and may retire involuntarily any justice or judge for physical or mental disability seriously interfering with the performance of his duties, which disability is likely to become of a permanent character.¹³⁶

The website of the Nevada Commission on Judicial Discipline states that it does not have the authority to consider complaints concerning legal errors, alleged to have been made by a judge: "That is the role of the Appellate Court system."¹³⁷

The Judicial Standards Commission of New Mexico¹³⁸ conducts hearings on judicial misconduct complaints and may recommend to the Supreme Court removal from office or retirement of a judge or magistrate.

North Carolina's constitution provides for the impeachment of judges,¹³⁹ but statutory law provides for the investigation and resolution of inquiries concerning the qualification or conduct of any judge, including the procedure for discipline before the Judicial Standards Commission.¹⁴⁰

The Oklahoma Council on Judicial Complaints has jurisdiction over all persons subject to the Code of Judicial Conduct, including state, municipal and administrative law judges.¹⁴¹ If any part of the administrative law judiciary in Oklahoma were subject to the Code of Judicial Conduct, by statute, the judicial branch would ostensibly have jurisdiction and authority to remove an ALJ serving in the executive branch. Such a situation would appear to violate the constitutional separation of powers doctrine, whereby the judicial branch commission would be in the position of functioning as the ultimate appointing authority for executive branch ALJ found culpable of misconduct.

The Pennsylvania Judicial Conduct Board as part of the judiciary is an independent entity having its own constitutional and statutory provisions regarding proceedings.¹⁴²

The website of the Washington State Commission on Judicial Conduct states:

136. MISS. CONST. art. VI, § 177A.

137. State of Nevada Comm'n on Judicial Discipline, Purpose of the Commission, <http://judicial.state.nv.us/purposenjdc3new.htm> (last visited Oct. 18, 2008); see NEV. CONST. art. VI, § 21(5); NEV. REV. STAT. § 1.4677 (2008).

138. N.M. CONST., art. VI, § 32; see also N.M. STAT §§ 34-10-1 to -4 (2008).

139. N.C. CONST. art. IV, §§ 4, 17.

140. N.C. STAT. §§ 7A-374.1 to -378 (2008).

141. Oklahoma Bar Ass'n, Oklahoma Council on Judicial Complaints, <http://www.okbar.org/public/judges/council.htm> (last visited Oct. 18, 2008).

142. PA. CONST. art. V, § 18; see 42 PA. CONS. STAT. §§ 2101-2106 (2008).

All fifty states and the District of Columbia have judicial conduct agencies to receive and investigate allegations of judicial misconduct. These agencies only act on complaints involving judicial misconduct and disability. *They do not serve as appellate courts reviewing judges' rulings.*¹⁴³

B. Judgmental Evaluations of ALJs

The criteria for “quality of decisions” includes three principal groupings: (1) “well reasoned;” (2) “well written;” and (3) “supported by applicable law.” “Well reasoned” includes “conclusions are supported by applicable law;” and “reasoning employed is understandable, logical and persuasive.”¹⁴⁴ “Well written” includes eleven criteria:

- (1) rationale for decision is clear and understandable; (2) paragraphs and sentences are properly structured; (3) paragraphs and sentences are logically related to each other and in an order which lends itself to a clear understanding of the discussion; (4) decision employs correct grammar and spelling; (5) format of decision assists the reader to understand the conclusions reached and their underlying rationale; (6) specific findings of fact are made and cover all material factual areas; (7) decision deals with all significant arguments raised by the parties (to the extent determinable from the four corners of the decision); (8) decision avoids use of intemperate or injudicious language or language that indicates bias; (9) findings of fact are properly distinguished from conclusions of law; (10) issues are understandable; and, (11) title of decision is appropriate.¹⁴⁵

The general criterion of “supported by applicable law” includes: (1) “relevant or controlling statutes, judicial and administrative decisions, and regulations are considered;” and (2) “authorities cited support the propositions for which they are cited.”¹⁴⁶

The criteria for “conducting hearings effectively and fairly are divided into six major groupings: (1) “opening remarks in merits hearings;” (2) “control of proceedings/demeanor;” (3) “handling of exhibits;” (4) “questioning of witnesses;” (5) “ruling on motions and objections;” and (6) “closing the hearing.”¹⁴⁷ The “opening remarks” grouping is broken down into ten criteria: (1) identifies case; (2) permits parties/counsel to enter appearances or identifies them; (3) allows opportunity for preliminary matters or questions; (4) allows opportunity for opening statements; (5) identifies self; (6) states date; (7) defines issues;

143. Washington State Comm’n on Judicial Conduct, Background, http://www.cjc.state.wa.us/About_CJC/background.htm (last visited Oct. 18, 2008) (emphasis added).

144. COLO. OFFICE ADMIN. CTS., *supra* note 84, at 1 (on file with author).

145. *Id.* (on file with author).

146. COLO. OFFICE ADMIN. CTS., *supra* note 84, at 4 (on file with author).

147. *Id.* at 5 (on file with author).

(8) indicates party bearing burden of proof; (9) describes hearing procedures; and, (10) explains and seeks waiver of right to counsel, if appropriate.¹⁴⁸

The “control of proceedings/demeanor” grouping is broken down into eleven criteria:

(1) begins hearing promptly at beginning of day and after recesses (or explains any unavoidable delay); (2) controls hearing in firm but fair manner, including interactions of participants; (3) evidences familiarity with file and adequate preparation; (4) permits off-the-record discussions only when justified and makes record of discussions; (5) treats litigants, counsel and witnesses with respect and courtesy; (6) provides appropriate explanations/guidance to self-represented litigants; (7) uses *no* intemperate or injudicious language or language that indicates bias; (8) shows *no* favoritism to one party over another; (9) makes effort to make parties and witnesses feel at ease; (10) accommodates special needs of participants; and (11) is attentive to proceedings.¹⁴⁹

The “handling of exhibits” grouping is broken down into five criteria:

(1) ensures exhibits are marked and identified; (2) ensures copy of exhibits available to other party; (3) makes supportable rulings on admissibility of exhibits; (4) has system of recording exhibits admitted or excluded; and (5) collects/receives all exhibits offered and not withdrawn.¹⁵⁰

The “questioning of witnesses” grouping includes five criteria:

(1) administers oath; (2) permits cross, redirect, and re-cross of witnesses; (3) offers opportunity for rebuttal and surrebuttal; (4) limits number of own questions, asks questions that do not reflect bias, only questions when necessary (to clarify), avoids questions that reflect advocacy; and (5) encourages efficient examination of witnesses, when appropriate.¹⁵¹

The “ruling on motions and objections” grouping sets forth two criteria: (1) rules on all motions and objections; and (2) rulings are supportable.¹⁵² The “closing the hearing” is a criterion that is defined as: “Offers the opportunity for closing statements in merits hearings and indicates procedure for issuance of the decision.”¹⁵³

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. COLO. OFFICE ADMIN. CTS., *supra* note 84, at 5.

153. *Id.*

The “timeliness of decisions” criterion is described as follows: “To issue decisions, dispositive orders and orders upon remand within the time limits set forth by statute, regulation or Office of Administrative Courts policy.”¹⁵⁴ To receive an “exceptional” performance rating, in this category, for any given performance year, an ALJ must issue “no unexcused late orders, a majority of decisions were issued ahead of time, and the judge had a higher than average workload.”¹⁵⁵ For a “successful” rating, an ALJ is required to have “issued no more than two unexcused late orders” for the performance year.¹⁵⁶ An ALJ who “issued three or more unexcused late orders” would receive a “needs improvement” rating.¹⁵⁷

C. Performance Evaluations of Judges in the Judicial Branch

1. Colorado

Colorado first established judicial performance evaluation commissions in 1988.¹⁵⁸ The Colorado General Assembly created a state commission on judicial performance¹⁵⁹ to develop techniques for evaluating judges and to make recommendations concerning the retention of justices of the Supreme Court, and judges of the court of appeals.¹⁶⁰ The Colorado Legislature also created commissions on judicial performance for each judicial district in the state.¹⁶¹ These district commissions are empowered to interview judges and other appropriate persons, accept information and documentation from interested parties, conduct public hearings,¹⁶² and make recommendations on the retention of district and county court judges.¹⁶³

The 2008 Colorado General Assembly established an Office of Judicial Performance Evaluation in the Judicial Department.¹⁶⁴ This new law spells out explicit review duties of the commissions, including the review of decisions.¹⁶⁵ It also details performance criteria upon which judges are reviewed.¹⁶⁶ The criteria for the state commission and the district commissions are as follows:

- (a) integrity, including but not limited to whether: (I) the justice or judge avoids impropriety or the appearance of impropriety; (II) the

154. *Id.*

155. *Id.*

156. *Id.*

157. COLO. OFFICE ADMIN. CTS., *supra* note 84, at 5.

158. COLO. REV. STAT. § 13-5.5-102 (2008).

159. *Id.* § 13-5.5-103.

160. *Id.* § 13-5.5-106.

161. *Id.* § 13-5.5-104.

162. *Id.* § 13-5.5-105.

163. COLO. REV. STAT. § 13-5.5-106.

164. *Id.* § 13-5.5-101.5.

165. *Id.* § 13-5.5-103(1)(a) – (q).

166. *Id.* § 13-5.5-105.5.

justice or judge displays fairness and impartiality toward all participants; and (III) the justice or judge avoids ex parte communications; (b) legal knowledge, including but not limited to whether: (I) . . . opinions are well-reasoned and demonstrate an understanding of substantive law and the relevant rules of procedure and evidence; (II) . . . opinions demonstrate attentiveness to factual and legal issues before the court; and (III) . . . opinions adhere to precedent or clearly explain the legal basis for departure from precedent: (c) communication skills, including but not limited to whether: (I) . . . opinions are clearly written and understandable, and (II) . . . questions or statements during oral arguments are clearly stated and understandable; (d) judicial temperament, including but not limited to whether: (I) . . . demonstrates courtesy toward attorneys, litigants, court staff, and others in the courtroom; and (II) . . . maintains appropriate decorum in the courtroom; (e) administrative performance, including but not limited to whether: (I) . . . demonstrates preparation for oral argument, attentiveness, and appropriate control over judicial proceedings; (II) . . . manages workload effectively; (III) . . . issues opinions in a timely manner and without unnecessary delay, and (IV) participates in a proportionate share of the court's workload; (f) service to legal profession and the public by participating in service-oriented efforts designed to educate the public about the legal system and to improve the legal system.¹⁶⁷

A few differences in the stated criteria for the district commissions include: Subsection (b) (III) "the judge appropriately applies statutes, judicial precedent, and other sources of legal authority"; Subsection (c) (II) "the judge's oral presentations are clearly stated and understandable and the judge clearly explains all oral decisions; and (III) the judge clearly presents information to the jury"; Subsection (d) (II) "the judge maintains and requires order, punctuality, and decorum in the courtroom"; Subsection (e) (II) "the judge uses court time efficiently . . . (IV) the judge effectively manages cases . . . (V) the judge takes responsibility for more than his or her own caseload and is willing to assist other judges, and (VI) the judge understands and complies with directives of the Colorado Supreme Court."¹⁶⁸

2. Other States

Based on available information, judicial branch performance evaluation (as opposed to judicial discipline) mechanisms are discussed for several (twelve) but not all twenty of the states having such mechanisms.¹⁶⁹

167. *Id.* § 13-5.5-105.5(1)(a) – (f), (2)(a) – (f).

168. COLO. REV. STAT. § 13-5.5-105.5.

169. Alaska, Arizona, California, [Colorado has been discussed at length], Connecticut, Hawaii, Kansas, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, Rhode Island, Utah, Washington, and Wisconsin.

Arizona's Commission on Judicial Performance review has thirty-four members appointed by the Supreme Court, who are: (1) public members; (2) attorneys; (3) judges; and, (4) legislators.¹⁷⁰ The duties of the Commission are:

(1)(a) to develop, review and recommend amendments on written performance standards, to be approved by the Supreme Court; (b) to formulate policies and procedures for collecting information and conducting reviews; and to create and supervise a program of periodic review of the performance of each judge and justice who is subject to the merit selection system; (2) to identify key areas where improvement is needed and work with the Committee on Judicial Education and Training to prioritize areas and offer required courses to meet educational needs; and, (3) to request public comment and hold public hearings on the performance of all judges and justices subject to retention.¹⁷¹

The California Commission on Judicial Performance consists of one judge of a court of appeal and two judges of superior courts, each appointed by the Supreme Court; two members of the State Bar of California, who have practiced law for ten years, each appointed by the Governor; and six citizens who are not judges, retired judges, or attorneys, two of whom are appointed by the Governor; two by the Senate Committee on Rules; and two by the Speaker of the Assembly.¹⁷²

The Connecticut Judicial Selection Committee¹⁷³ is charged with making a performance evaluation of any judge made by the Judicial Department available to members of the legislative joint standing committee on the judiciary prior to any public hearing on the nomination of any such judge and to the members of the Judicial Selection Commission.¹⁷⁴

The Supreme Court of Hawaii has established a Judicial Performance Program. Its stated goal is “. . . the periodic evaluation of a judge's performance is a reliable method to promote judicial excellence and competence.”¹⁷⁵ “All full-time, part-time and specially appointed justices and judges are subject to the exclusive evaluation processes of the supreme court and the special committee to be appointed by the Chief Justice”¹⁷⁶

The Kansas Commission on Judicial Performance is charged with implementing the following functions: (1) “creating surveys of court users who have directly observed judges' or justices' performance or

170. ARIZ. JUD. PERF. REV. R. 2 (2006), available at <http://azjudges.info/about/procedure.cfm>.

171. *Id.* at 2(g)(1)(a) – (g)(3).

172. CAL. CONST. art. VI, § 8.

173. CONN. GEN. STAT. § 51-44a (2008).

174. *Id.*

175. HAW. SUP. CT. R. 19.1 (1996), available at <http://www.state.hi.us/jud/ctrules/rsch.htm>.

176. HAW. SUP. CT. R. 19.2 (2002), available at <http://www.state.hi.us/jud/ctrules/rsch.htm>.

interacted with” judges or justices, including attorneys, litigants, jurors or other persons the Commission deems appropriate (“the surveys shall ask those surveyed to evaluate the” judge’s “*ability, integrity, impartiality, communication skills, professionalism, temperament and administrative capacity suitable to the jurisdiction and level of court*”); (2) developing “clear, measurable performance standards upon which the survey questions are based”; (3) developing dissemination plans; (4) protecting “confidentiality when the judicial performance evaluation is used only for self-improvement”; (5) making “the judicial performance evaluation results widely available when they are to be used to assist voters in evaluating the performance of judges and justices subject to retention elections”; (6) making “public recommendations regarding whether or not to retain judges or justices subject to retention elections”; (7) developing “a procedure for judges and justices to receive and respond to survey results before such results are made public”; and, (8) establishing “a mechanism to incorporate evaluation results in designing judicial education programs.”¹⁷⁷

A majority of the Supreme Judicial Court of Massachusetts itself, in consultation with the chief justice, is responsible for the performance evaluation program for judges in Massachusetts.¹⁷⁸ The program includes, but is not limited to, a questionnaire to be designed and implemented by the supreme judicial court and given to attorneys, parties, and jurors appearing before a judge so they may evaluate the judge.¹⁷⁹ The questionnaire “shall include, but not be limited to, questions relative to the judge’s performance, demeanor, judicial management skills, legal ability, attentiveness, bias and degree of preparedness.”¹⁸⁰ Massachusetts further provides for a similar performance evaluation system for all *civil service employees*, which would include administrative magistrates in Massachusetts’ central panel.¹⁸¹

The chief justice and a majority of the New Hampshire Supreme Court, in consultation with the administrative judges (judicial branch) of the superior, district, and probate courts, are responsible for designing and implementing by court rule, a program for performance evaluation of judges.¹⁸² The program includes a questionnaire and a self-evaluation form to be completed by the judge. The questionnaire includes questions relative to “the judge’s performance, temperament and demeanor, judicial management skills, legal knowledge, attentiveness, bias and objectivity, and degree of preparedness.”¹⁸³ “Upon consideration of nomina-

177. KAN. STAT. § 20-3204 (a)-(e) (2006), *amended* by 2008 Kan. Sess. Laws Ch. 145 (H.B. No. 2642).

178. MASS. GEN. LAWS ch. 211 § 26 (2008).

179. *Id.* § 26A.

180. *Id.*

181. *See id.* ch. 31 § 6A.

182. N.H. REV. STAT. § 490:32(I) (2008).

183. *Id.* § 490:32(II).

tion for another judicial appointment,” a judge’s performance evaluation is made available to the governor upon request.¹⁸⁴

The administrative judge (a judicial branch judge with administrative duties) of a superior court is charged with evaluating each justice and marital master a minimum of once every three years.¹⁸⁵ The administrative judge of a district court and a probate court must evaluate judges of those courts a minimum of once every three years.¹⁸⁶

The judicial evaluation process in New Hampshire consists of: (1) a “review of complaints about the judge”; (2) a review of the completed questionnaires; (3) a review of the self-evaluation completed by the judge; (4) a summary of the results of the evaluation, “which identifies any judicial performance standard that has not been met and sets forth the steps the judge” must take to improve performance; (5) a meeting between the person performing the evaluation and the judge to discuss the results of the evaluation to advise “whether the judge has met the applicable performance standards and, if not, to identify the steps the judge” must take to improve performance; and “within 30 days of the meeting,” the judge “may submit a written response to the evaluation.”¹⁸⁷

If performance standards have not been met by a New Hampshire judge and the judge “has failed to take steps to improve the performance specified in the evaluation summary, the chief justice or the administrative judge” of the court on which the judge “serves may take steps to correct non-compliance, including administrative discipline,” and “whatever other steps are necessary to ensure compliance.”¹⁸⁸

The judicial performance evaluation process is confidential¹⁸⁹ unless and until the judge “fails to meet performance standards for two consecutive” evaluations, the judge “is deemed to have waived any right to confidentiality,” and the results of the evaluation are made public, “with the exception of the identity of persons furnishing information about the judge.”¹⁹⁰

New Jersey’s central panel, the Office of Administrative Law, charges the director and chief administrative law judge with developing and implementing a program of judicial evaluation, focusing on three principal areas of judicial performance: Competence; productivity; and, demeanor.¹⁹¹ The evaluations consider:

184. *Id.* §490:32(V)(b).

185. N.H. SUP. CT. Rule 56(II)(A) (2008).

186. *Id.*

187. *Id.* at 56(II)(B).

188. *Id.* at 56(II)(D)(3).

189. *Id.* at 56(IV)(A).

190. *Id.* at 56(IV)(B)(3).

191. N.J. STAT. § 52:14F-5.s (2008).

[I]ndustry and promptness in adhering to schedules, making rulings and rendering decisions; tolerance, courtesy, patience, attentiveness, and self-control in dealing with litigants, witnesses and counsel, and in presiding over contested cases; legal skills and knowledge of the law and new legal developments; analytical talents and writing abilities; settlement skills; quantity, nature and quality of caseload disposition; and, impartiality and conscientiousness.¹⁹²

The New Mexico Judicial Performance Evaluation Commission, in evaluating a judge's performance, may consider: (1) "an analysis of a judge's results from completed surveys"; (2) "a review of a judge's workload, conformance with judicial time standards, the number of excusals and recusals, cases pending and cases completed"; (3) "any findings and recommendations of the Judicial Standards Commission and Supreme Court on extrajudicial conduct that reflected adversely on the judiciary"; (4) surveys; (5) interviews; and, (6) "any other information deemed appropriate by the commission."¹⁹³

The criteria for evaluation in New Mexico are:

(A) integrity and impartiality:

(1) the judge's conduct is free from impropriety or the appearance of impropriety; (2) the judge makes findings of fact and interpretation of law without regard for *the possibility of public criticism*; (3) the judge treats all parties equally and fairly regardless of race, national or ethnic origin, religion, gender, social or economic status or disability; (4) the judge's behavior is consistent and free from the appearance of favoritism; (5) the outcome of cases is not prejudged; and, (6) the judge's actions and decisions display basic fairness and justice;

(B) knowledge and understanding of the law:

(1) the applicable rules of procedure; (2) the rules of evidence; (3) substantive law; and, (4) the ability to understand the facts presented and apply the law to those facts;

(C) communication skills:

(1) the sensitivity of the judge to the *impact of the judge's nonverbal communications*; (2) the courtesy and fairness displayed to all parties and participants in proceedings; (3) whether the judge's verbal communications are clear, complete and logical; and (4) whether a judge's written communications are clear, complete and logical;

192. *Id.*

193. N.M.R. PERF. EVAL. COMM. Rule 28-301(A)-(F) (2008).

(D) case management:

(1) discharging responsibilities diligently; (2) meeting time commitments and acting as promptly and efficiently as possible in scheduling and disposition of cases; (3) considering the availability of settlement and alternative resolution processes and the cost of litigation; (4) punctuality and efficient use of time; and (5) maintenance or proper control over the courtroom.¹⁹⁴

The New Mexico Commission may conduct interviews with persons who have appeared before a judge on a regular basis; observe a judge in the performance of duty in the courtroom; and evaluate statistical information on a judge.¹⁹⁵

Rhode Island has a Judicial Performance Evaluation Committee, appointed by the Supreme Court, to develop and administer, under the court's supervision, "a program for the *continuing* evaluation of judicial performance."¹⁹⁶

Utah has a Standing Committee on Judicial Performance Evaluation that uses "professionally recognized methods of data collection that may include surveys, onsite visits, caseload management data and personal interviews."¹⁹⁷

The Supreme Court of Virginia is responsible for establishing and maintaining "a judicial performance evaluation program that will provide a self-improvement mechanism for judges and a source of information for the reelection process."¹⁹⁸

194. *Id.* at 28-401(A)-(D).

195. *Id.* at 28-204 (F)-(H).

196. R.I. SUP. CT. art. VI, Rule 4.1(a) (2008).

197. UT. R. J. ADMIN RULE 2-106.05(1) (2008).

198. VA. CODE § 17.1-100 (2008).

