

ARTICLES

TOWARD A MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES

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INTRODUCTION

In October 2010, the Obama Administration surprised the Administrative Law Judges (ALJs) of the federal government with a proposal from the U.S. Office of Personnel Management (OPM) to eliminate the requirement that incumbent ALJs be licensed by their state bars to practice law.¹ The Notice of Public Rulemaking (NOPR) sought public comments through December 6, 2010,² and, as of this writing, a final decision from OPM is awaited. In making this proposal, the Obama Administration (through OPM) maintained the licensure requirement for applicants seeking to become ALJs, but reasoned with regard to incumbent ALJs that “the standards of ethical conduct that apply to ALJs as [f]ederal employees, and agencies’ existing authority to supervise ALJs and take actions against them in appropriate circumstances, are sufficient to ensure that ALJs are held to a high standard of conduct.”³

This announcement amounted to a sea change in the thinking of the White House and OPM about the management of Administrative Law Judge ethics. It not only reversed a longstanding position of the Bush 43 Administration on ALJ licensure requirements, but also reversed a similar policy line that appeared to be forming in the initial months of President Obama’s tenure and the appointment of his new OPM Director, John Berry. Many of my ALJ colleagues and I expected the new OPM Director to relax the restriction imposed on us in 2007 by President Bush to be “actively” licensed to practice law in our respective state bars, like attorneys, instead of being allowed to assume “judicial” or “retired” status as we had been able to do before.⁴ The Bush rules required federal ALJs not only to adhere to the codes of ethics of our respective state bars that were imposed on attorneys actively engaged in the practice of law, but also required us to meet the Continuing Legal Education (CLE) requirements and higher dues of those organizations that active attorneys met, unlike state-court judges who are exempted from such requirements. None of us expected the Obama Administration to eliminate our duty to be members of state bars altogether.

1. Programs for Specific Positions and Examinations (Miscellaneous), 75 Fed. Reg. 61,998, 61,998 (Oct. 7, 2010) (to be codified at 5 C.F.R. pt. 930). By “state bars,” I mean not only the bars of the respective states but also the bars of “the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution” as OPM rules make clear. 5 C.F.R. § 930.204(b)(1) (2011).

2. 75 Fed. Reg. at 61,998.

3. *Id.*

4. Examining System and Programs for Specific Positions and Examinations (Miscellaneous), 72 Fed. Reg. 12,947, 12,948 (Mar. 20, 2007) (codified at 5 C.F.R. § 930.204(b)(1)).

For some of us in the administrative law judiciary, the new proposal comes as a welcome relief. The Bush rule imposed not only added educational and financial burdens on ALJs, but also placed OPM, state bar associations, and ALJs in an ethical quandary. State bars have ethical codes for their “active” attorneys, and some state bars have codes of conduct for their state judiciary. None of those codes, however, cover the work of federal ALJs. It was anomalous under the Bush rule to make the federal administrative law judiciary adhere to fifty-two different state codes of ethics for the same federal job in federal agencies when members of the federal Judicial Branch, who are themselves judicial members of their respective state bars, adhere to one U.S. Judicial Code. Eliminating the licensure requirement altogether ends the quandary.

Still, some in the federal administrative law judiciary are troubled by this development. They feel that the elimination of all need for ALJs to adhere to an ethical code is not advisable. For some ALJs at least, the ethical regulations generally governing federal employees do not suffice as governing precepts for their practice; they urge broader ethical standards for their ranks, more akin to those of the federal Judicial Branch. Still others caution that the new OPM proposal, born of the Obama Administration, may disappear with the advent of some future administration.

However the final rule now being considered by OPM turns out, there will be at least some movement in the future among the many different organizations of federal Administrative Law Judges⁵ to pursue one or more of the following three options: either (i) to keep what was long the status quo before the Bush rule was implemented and what is now the case; that is, to have no applicable code of conduct at all; (ii) to advocate application to ALJs of the Code of Conduct for United States Judges (U.S. Judicial Code) that presently governs judges of the federal Judicial Branch (with the notable exception of the United States Supreme Court);⁶ or (iii) to adopt a code of conduct exclusively for Administrative Law Judges.

This Article advocates the third course. There are many aspects of the

5. At last count there were six: the National Association of Administrative Law Judges (NAALJ), the Forum of the United States Administrative Law Judges (FORUM), the National Conference of Administrative Law Judges of the American Bar Association’s Judicial Division (NCAIJ), the Federal Administrative Law Judges Conference (FALJC), the Association of Administrative Law Judges, and the American Judicature Society. See Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 321, 322 (2002).

6. CODE OF CONDUCT FOR U.S. JUDGES (Judicial Conference of the U.S. 2011); see also Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 957 n.54 (2011).

role of the federal administrative law judiciary that militate in favor of adopting a modernized ALJ code of conduct rather than merely adopting someone else's code. Indeed, ALJs have already tried to do so with no success so far. That first attempt, *The Model Code of Judicial Conduct for Federal Administrative Law Judges* (ALJ Model Code),⁷ was written in 1989 by the Judicial Administration Division of the National Conference of Administrative Law Judges of the American Bar Association. It was patterned after the then-current version of the Model Code of Judicial Conduct (ABA Model Judicial Code) that was adopted by the ABA's House of Delegates in 1972 to replace the then-half-century old Canons of Judicial Ethics. The ABA Model Judicial Code was revised by the ABA three times, in 1990, 2004, and 2007, but the ALJ Model Code did not follow suit.⁸

The U.S. Judicial Code was adopted by the Judicial Conference of the United States in 1973 and was revised in 1987, 1992, 1996, 1999, 2000, and 2009.⁹ Patterned along the lines of the ABA Model Judicial Code, the U.S. Judicial Code applies to federal circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges and magistrate judges, certain federal special masters and commissioners, and judges of the Tax Court, the Court of Appeals for Veterans' Claims, and the Court of Appeals for the Armed Forces.¹⁰ It does not apply to federal ALJs.

The ALJ Model Code remains merely a recommendation for ALJs to follow and has remained unrevised since its formulation in 1989. It has not incorporated any of the changes that the U.S. Judicial Code or the ABA Model Judicial Code has adopted since then. The federal ALJ community has not taken part in any of the changes that have been made to the ABA Model Judicial Code or the U.S. Judicial Code.

Developments affecting the federal administrative law judiciary in recent years warrant a review and revamping of the ALJ Model Code as a way to address the potentially uncomfortable void that ALJs are left with if they have no code to live by. This Article examines several aspects of the ALJ Model Code as currently drafted (that is, the 1989 version) and compares it to the U.S. Judicial Code and ABA Model Judicial Code. It also recommends changes to the ALJ Model Code that would align it more

7. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES (1989).

8. In the 2007 revision, the American Bar Association (ABA) explicitly included Administrative Law Judges within the meaning of "judge" in the ABA Model Judicial Code. See Diana Gillis, *Closing an Administrative Loophole: Ethics for the Administrative Judiciary*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 149, 160 (2011).

9. CODE OF CONDUCT FOR U.S. JUDGES intro. note, at 1 (Judicial Conference of the U.S. 2011).

10. *Id.* at 2.

closely with modern federal ALJ practice to make it more worthy of being adopted as the binding code of ethics for federal Administrative Law Judges.

I. THE ROLE AND ETHICS OF FEDERAL ADMINISTRATIVE LAW JUDGES

The administrative law judiciary of the federal government consists of a corps of adjudicators who are chosen through a competitive recruitment process to render impartial and independent decisions in administrative agency cases. As of December 2009, this corps consisted of 1,584 ALJs who are posted at the local offices of more than thirty federal agencies throughout the country.¹¹ Eighty-four percent of ALJs are posted at the Social Security Administration (SSA), deciding appeals of initial denials of claims for Social Security disability benefits.¹² The remainder render initial decisions in a wide variety of agency matters, including various labor-related matters at the U.S. Department of Labor, utility rate, licensing, and complaint cases at the Federal Energy Regulatory Commission, unfair labor practice cases at the National Labor Relations Board (NLRB), shipping pilot licensing cases at Coast Guard, intellectual property cases at the International Trade Commission, and farm price-support cases at the Department of Agriculture, to name just a few.¹³

Administrative Law Judges perform their duties pursuant to the Administrative Procedure Act (APA), enacted by Congress in 1946 to create an independent and impartial cadre of case adjudicators within federal agencies.¹⁴ ALJs are authorized by the APA to preside at the taking of evidence in hearings and render “recommended” and “initial” decisions in agency cases.¹⁵ In so doing, ALJs are empowered to administer oaths and affirmations, issue subpoenas, rule on offers of proof and receive relevant evidence, regulate the course of the hearing, and take other judicial actions.¹⁶ They are directed by the APA to perform their functions “in an impartial manner.”¹⁷ They are further instructed by the statute not to engage in *ex parte* contacts on facts at issue in cases, nor to “be responsible to or subject to the supervision or direction of an employee or agent

11. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3180–81, 3213–14 (2010) (Breyer, J., dissenting) (“My research reflects that the Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies.”).

12. *See id.* at 3213–14.

13. *Id.*

14. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

15. 5 U.S.C. §§ 554(d), 556(b)(3) (2006).

16. *Id.* § 556(c)(1)–(9).

17. *Id.* § 556(b)(3).

engaged in the performance of investigative or prosecuting functions for an agency.”¹⁸ These provisions of the APA have long been held to afford Administrative Law Judges a unique degree of independence and freedom to be impartial in creating case records that form the basis of their initial agency decisions. These initial decisions are ultimately subject to review by the agency officials, who shoulder the burdens of political pressure.¹⁹

By virtue of their quasi-judicial role, federal ALJs have been held to be responsible in disciplinary proceedings before the Merit Systems Protection Board (MSPB) for judicial behavior not in accordance with the ABA Model Judicial Code.²⁰ The application of the ABA Model Judicial Code to ALJs, however, was not by their consent; rather, the MSPB imposed it upon them involuntarily, through gradual application in the Board’s ALJ disciplinary cases. This case-by-case application by MSPB of a code of ethics designed by and for other judges, whose appointment process and duties differ significantly from the process and duties of ALJs, led to a movement among ALJs to respond with an ethical code of their own that led in 1989 to the drafting of the ALJ Model Code.

Despite the ABA Model Judicial Code’s separate origin, it was the natural inclination of the ALJ committee members who drafted the ALJ Model Code in 1989 to use that Code as a prototype for their own work. However, there has long been a debate as to whether federal Administrative Law Judges are so much like federal Article III judges that the same canons of ethics should be applied to both judiciaries.

The fact that ALJs, unlike Article III judges, are charged with furtherance of agency policy and must remain oriented to agency policy and narrower agency jurisdiction in adjudicating administrative cases has been identified as an important distinction between the two.²¹ The fact that in most judicial administrative proceedings the agency head or the commission for which the ALJ works, not the ALJ, is the “ultimate

18. *Id.* § 554(d)(1)–(2).

19. *See, e.g.*, *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 758 (2002) (noting that ALJs are shielded from political influence under the Administrative Procedure Act (APA) such that “the role of the ALJ . . . is similar to that of an Article III judge”) (citations omitted); *Butz v. Economou*, 438 U.S. 478, 513 (1978) (“[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.”).

20. *See* *Office of Hearings & Appeals, SSA v. Whittlesey*, No. CB7521930005T1, slip op. at 16, 59 M.S.P.R. 684, 696 (M.S.P.B. Dec. 7, 1993) (“[T]he ABA Code is an appropriate guide for evaluating the conduct of administrative law judges.”); *Chocallo*, 2 M.S.P.B. 20, 63 (1980).

21. John L. Gedid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 11 WIDENER J. PUB. L. 33, 49 (2002).

factfinder” for the agency also differentiates ALJs from their Article III counterparts.²² These distinctions have prompted several state courts to decide that the canons of ethics that are applied to their judicial branches do not have to be applied to their state ALJs.²³

The federal OPM was preoccupied for many years with the ethical underpinnings of the ALJ position. For years, federal ALJ candidates were required to be members of a state bar, but incumbent ALJs were not. As a result, many federal ALJs withdrew or became “inactive” members of their state bars. In states where they could do so, they became “judicial” members of their state bars, usually without the privilege of being able to practice law in the state while they were so qualified.

In 2007, the OPM of the Bush Administration proposed “clarifications” to its regulations governing the bar membership qualifications for Administrative Law Judges.²⁴ Among OPM’s proposals was one requiring incumbent ALJs to be “active” members of their state bars, usually meaning to have the same membership status as practicing attorneys in their state, not just the nonpracticing “judicial” or “inactive” status usually reserved for state and federal judges.²⁵ The ALJs, OPM pointed out in making this proposal, “must be held to a high standard of conduct so that the integrity and independence of the administrative judiciary is preserved.”²⁶ “The purpose of a professional license,” OPM went on, “is to ensure that administrative law judges, like attorneys, remain subject to a code of professional responsibility.”²⁷

OPM pointed to its work in professionally developing the requirements for ALJ applicants and noted that its requirement for active bar membership was “based on the results of three job analyses of the administrative law judge occupation conducted by OPM’s Personnel Research Psychologists in 1990, 1999, and 2002.”²⁸ “The results of these studies show that Integrity/Honesty is fundamental for performing the duties of an administrative law judge,” OPM concluded.²⁹ Hence, OPM determined that it would “adhere to its long-standing position that an administrative law judge applicant must demonstrate he or she is an active member or has judicial status that authorizes the practice of law and

22. *See id.* at 53 n. 91 (listing cases that similarly support this proposition).

23. *Id.* at 53.

24. Examining System and Programs for Specific Positions and Examinations (Miscellaneous), 72 Fed. Reg. 12,947, 12,947 (Mar. 20, 2007).

25. *Id.* at 12,948–49, 12,955 (codified at 5 C.F.R. § 930.204(b)(1) (2011)).

26. *Id.* at 12,948.

27. *Id.*

28. *Id.*

29. *Id.*

requires adherence to his or her State's or jurisdiction's ethical requirements."³⁰

Notwithstanding the stated purposes for this rule change, which was implemented immediately and without a preceding notice-and-comment period, OPM may have had other underlying purposes for it. OPM might have viewed the rule change as a way to encourage incumbent ALJs to retire, clearing the field for newly minted judges on the ALJ Register. Whatever its purpose, the rule change was challenged in court by the Association of Administrative Law Judges, the union of federal ALJs in the SSA. As part of a litigation compromise, OPM agreed in 2008 to suspend the requirement as to incumbent ALJs "until further notice."³¹ OPM took note of "the burdens imposed by the active licensure requirement" on incumbent ALJs, recognizing in particular "the potential differences between the ethical requirements that pertain to an advocate and those requirements that pertain to someone asked to adjudicate cases impartially, and the variations in what States require as to lawyers serving as ALJs."³²

After the suspension, OPM continued to cogitate on this matter. In mid-2010, the Obama Administration OPM floated, without official publication, a modification of the 2007 rule which would require a federal ALJ to maintain a license or status requiring "adherence to an ethical code" but would defer to the rules of the applicable licensing entity as to the type of license or status appropriate for a sitting federal administrative law judge. This proposal met with mixed opinions from the ALJ community. Had it been adopted, it would have created a dilemma for federal ALJs and state bar associations.

Noticing, perhaps, the petard upon which it had hoisted itself, OPM reversed course and on October 7, 2010, published a notice of proposed rulemaking (NPRM) and request for comments in the *Federal Register*, seeking to eliminate the licensure requirement for incumbent federal ALJs altogether.³³ In so doing, OPM recognized that "the standards of ethical conduct that apply to ALJs as Federal employees, and agencies' existing authority to supervise ALJs and take actions against them in appropriate circumstances, are sufficient to ensure that ALJs are held to a high standard

30. *Id.*

31. 5 C.F.R. § 930.204(b)(2) (2011); *see also* Programs for Specific Positions and Examinations (Miscellaneous), 73 Fed. Reg. 41,235 (July 18, 2008) (furnishing notice of the Office of Personnel Management's (OPM's) intent to amend section (b)(2)).

32. Programs for Specific Positions and Examinations (Miscellaneous), 73 Fed. Reg. at 41,235.

33. Programs for Specific Positions and Examinations (Miscellaneous), 75 Fed. Reg. 61,998 (Oct. 7, 2010).

of conduct.”³⁴ Active bar membership would continue to be required for ALJs at the time of their application and appointment but not thereafter.

As of this writing, comments on the NPRM have not yet been considered by OPM, and the rule has not yet been finalized. However, some in the ALJ community are troubled and believe that the elimination of all need to adhere to an ethical code is not advisable. For some ALJs at least, the ethical regulations generally governing federal employees do not suffice as governing precepts for their practice; they urge broader ethical standards for their ranks, more akin to those of Article III judges. Still others caution that the new OPM proposal of the Obama Administration may disappear with the advent of some future administration, prompting OPM to revisit the matter yet again.

Should this urge for ethics in the federal ALJ community (or potential threat from above) persist, Administrative Law Judges may opt to press for one of three options: either (i) to keep what has long been the status quo; that is, to have no applicable code of conduct at all; (ii) to advocate adoption of the U.S. Judicial Code; or (iii) to update and adopt the ALJ Model Code. While it is a swifter course either to keep things as they are or even to opt into the existing U.S. Judicial Code, there are many aspects of the role of the federal administrative law judiciary which militate in favor of adopting a modernized ALJ Model Code instead.

II. THE CHANGING LANDSCAPE OF THE FEDERAL ADMINISTRATIVE LAW JUDICIARY

Political perceptions about federal administrative due process are always in flux, particularly when assessing the amount of “process” that is “due” in any individual case before an agency. The ALJ function is itself the product of a hard-fought compromise between New Deal-era “institutionalists” seeing a need for government employees who would adhere strictly to their agencies’ policies and implement them in every case, versus conservative “judicialists” who sought to constrain New Deal agencies like the NLRB and the Securities and Exchange Commission (SEC) within strict due process requirements that would prevent the sudden imposition of new policies with retroactive application.³⁵

In the 1970s and 1980s, a full hearing governed by the APA and conducted on the record by an Administrative Law Judge was regarded as a right to which all were entitled, regardless of the size and nature of the dispute. During the 1970s, for instance, the passage of Supplemental Security Income (SSI) legislation for disabled Americans prompted a

34. *Id.* at 61,998.

35. Gedid, *supra* note 21, at 44–45.

controversy between the SSA, which administered SSI, and the Civil Service Commission (predecessor of the modern Office of Personnel Management), which maintained the Register of candidates qualified to become ALJs, as to whether the APA applied to SSI claim cases just as it did to traditional Social Security and Medicare cases. SSA pushed for full APA coverage for all claims, whereas the Commission considered the APA not to cover SSI claims.³⁶

Congress put this controversy to rest by passing the Social Security Act Amendments of 1977,³⁷ requiring ALJs to adjudicate both types of cases on an equal footing under the APA.³⁸ The then-Chief Counsel of the House Ways and Means Committee exemplified the tenor of those times when he wrote to the head of hearings and appeals for Social Security urging the Department of Health, Education, and Welfare (within which SSA was then housed) “to accord a lowly private citizen—a welfare recipient—the same rights as the Government accords a powerful corporation in contested matters: namely, the right to appear before an Administrative Law Judge under the full rights and protection of the Administrative Procedure Act.”³⁹

The view of that era—favoring the greatest degree of due process for even the smallest case—changed markedly with the advent of more conservative presidential administrations in the 1980s and 1990s. It was noted as early as 1979 by then-University of Chicago Professor of Law Antonin Scalia that administrative law was developing “a constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking.”⁴⁰ Scalia further observed at the time that “the governmental and societal importance of adjudication has dramatically decreased.”⁴¹

By 1981, a philosophy of “small government” came on the scene. Newly sworn President Ronald Reagan intoned at his first inauguration that “government is not the solution to our problem; government is the problem.”⁴² Public opinion turned away from the notion that the solution to all problems was more government control. Favorable public ratings for

36. See Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment In Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203, 213–14 (2002) (detailing the history of the debate regarding the APA’s application to Supplemental Security Income).

37. Pub. L. No. 95-216, § 371, 91 Stat. 1509, 1559 (1977) (codified at 42 U.S.C. § 1383 note (2006)).

38. See Wolfe, *supra* note 36, at 216–20.

39. STAFF OF H. COMM. ON WAYS & MEANS, 93D CONG., REP. ON THE DISABILITY INSURANCE PROGRAM 63 (1974).

40. Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 72 (1979) (quotation marks omitted).

41. *Id.*

42. Ronald Reagan, President, Inaugural Address, PUB. PAPERS 1 (Jan. 20, 1981).

most federal agencies and departments waned in the late 1990s, according to a 2010 study by The Pew Research Center.⁴³ Most notably, the study found that public confidence in the performance of the SSA, where the vast majority of ALJs work, had declined markedly.⁴⁴

Today, the rise of the “Tea Party” movement, which decries solving every problem with “more government—top-down dictates from bureaucrats presumed to know better what you need,”⁴⁵ evidences continued evolution of the public perception of federal power and capability. Winds of change have blown considerably off course the viewpoint that an elite corps of highly paid adjudicators is the most capable of deciding all agency cases, from whether to pay the smallest Social Security claim to whether to approve the largest electric utility rate increase. This sentiment was expressed publicly by Representative (now House Speaker) John Boehner, Republican of Ohio, prior to the 2010 congressional elections; he asserted that “taxpayers are subsidizing the fattened salaries and pensions of federal bureaucrats who are out there right now making it harder to create private sector jobs.”⁴⁶ Since those elections, distrust of civil servants has been translated into action by President Obama and Congress in freezing federal employee pay and threatening to cut pay and benefits.

This trend in political thinking translates into a particular bias against formal adjudication of agency cases. Witness the supporting views of Justice Scalia, who noted that the process of confirming Supreme Court Justices was tending toward a “European system” of selecting professional judges composed largely of a bench of “ultimate bureaucrats.”⁴⁷ With such thinking in vogue, the federal administrative law judiciary, coming principally from the ranks of federal government attorneys, often find themselves in the critics’ crosshairs.

The very direct role that SSA has in the personal lives of so many individuals seeking disability compensation from that agency has placed its

43. See PEW RESEARCH CENTER, *THE PEOPLE AND THEIR GOVERNMENT: DISTRUST, DISCONTENT, ANGER AND PARTISAN RANCOR* 55–58 (2010), <http://people-press.org/reports/pdf/606.pdf> (detailing that favorable opinions have declined significantly for seven of the thirteen federal agencies that were included in the survey).

44. See *id.* at 58 (noting that only 36% of responders voted for excellent/good performance).

45. Dick Army & Matt Kibbe, *A Tea Party Manifesto*, WALL ST. J., Aug. 17, 2010, at A19.

46. John Boehner, House Minority Leader, Remarks on Jobs and the Economy before the City Club of Cleveland, Ohio (Aug. 24, 2010), available at <http://boehner.house.gov/News/DocumentSingle.aspx?DocumentID=203967>.

47. Jeff Jeffrey, *Scalia Is Pleased That Kagan Isn't a Judge*, NAT'L L.J. (May 26, 2010) (online at LexisNexis).

Administrative Law Judges at the center of this debate. SSA processed 2.6 million disability claims in 2008.⁴⁸ As of that year, SSA's backlog of disability claims pending before its ALJs stood at 300,000 out of a total of 760,000 pending cases.⁴⁹ In 2008, the average processing time for a disability case before an SSA ALJ stood at 510 days.⁵⁰ Although this backlog was considered to be an improvement over past years,⁵¹ the onset of the recession in 2008–2009 has been a setback for the agency. Applications for SSI benefits soared by 21% to 2.8 million from 2008 to 2009 as the economy declined.⁵²

State agencies initially consider Social Security disability claims in a process that usually lasts over 100 days, but fewer than 40% of applications are approved at that stage.⁵³ Of those who are rejected, two-thirds of them do not bother to appeal to SSA.⁵⁴ Those who do, however, go before federal ALJs, who reverse a large majority of the rejections and award the claims.⁵⁵ Applicants making their way through this appeals system frequently use legal counsel, and the success rate for people represented by counsel before ALJs is much higher than it is for people who are unrepresented.⁵⁶

ALJ productivity at this level of review is a sore spot in relations between an embattled SSA management feeling congressional pressure about the backlog and its overworked corps of ALJs.⁵⁷ The push for productivity pits the need for speedy adjudication against the equal need for careful deliberation. This tension imposes immense pressure on ALJs, who are driven by SSA management to roll cases out quickly (which usually

48. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-398, SOCIAL SECURITY DISABILITY: ADDITIONAL PERFORMANCE MEASURES AND BETTER COST ESTIMATES COULD HELP IMPROVE SSA'S EFFORTS TO ELIMINATE ITS HEARINGS BACKLOG 8 (2009).

49. *Id.* at 13.

50. *Id.* at 10.

51. *See id.* at 11 (noting that despite increases in total hearings-level claims pending, SSA data indicates that the backlog for fiscal year 2006 through 2008 has decreased).

52. Michael A. Fletcher, *Jobless Are Straining Social Security's Disability Benefits Program*, WASH. POST (Sept. 14, 2010, 3:24 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/13/AR2010091306493.html>.

53. *Id.*

54. *See id.*

55. *Id.*

56. *Id.*

57. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-14, RESULTS-ORIENTED CULTURES: OFFICE OF PERSONNEL MANAGEMENT SHOULD REVIEW ADMINISTRATIVE LAW JUDGE PROGRAM TO IMPROVE HIRING AND PERFORMANCE MANAGEMENT 18 (2010); *see also* Abrams, No. CB-7521-08-0001-T-1 (MSPB, Mar. 29, 2010) (nonprecedential decision) (recommending an ALJ's termination for failing to follow instructions to improve productivity).

translates into grants of claims) yet are haunted at the same time by the prospect that half of all applications for disability benefits could be unjustified.⁵⁸

Congress, despite passage of the APA half a century ago, persists in straying from the APA's objective of a unified, independent, and impartial administrative law judiciary. Indeed, at this point, ALJs are actually a minority among the many types of federal agency adjudicators that Congress has created to decide cases in its many programs. There are approximately 3,000 other types of federal adjudicators:⁵⁹ "immigration judges" at the Department of Justice; "hearing officers" at the Department of Agriculture's National Appeals Division; "administrative judges" on the various agency Boards of Contract Appeals, the Merit Systems Protection Board, and the Equal Employment Opportunity Commission; "administrative patent judges" and "administrative trademark judges" at the Patent and Trademark Office; "hearing officers" at the Department of Defense; "law judges" at the Board of Veterans Appeals of the Department of Veterans Affairs; and full- and part-time "administrative judges" at the Atomic and Safety Licensing Board of the Nuclear Regulatory Commission. Although these other types of adjudicators are often accorded a certain measure of independence within their agencies, it is not guaranteed by statute as it is with Administrative Law Judges under the APA.

On top of this constant political controversy, the way that the ALJ job is done is also changing. Many ALJs wear robes like other federal and state judges and hold hearings on the record between adversaries represented by counsel. But whereas ALJs once took live transcribed testimony in court and published initial decisions in legal reports, many ALJs today hold hearings by telephone and teleconference as well as in person. Many initial decisions are available to the public only on the Internet, if at all.

At the Office of Medicare Hearings and Appeals of the U.S. Department of Health and Human Services and at hearing centers of the SSA, ALJ hearings are recorded electronically and paperlessly rather than transcribed. Witnesses are heard by telephone and teleconference. At the

58. See Michael D. Chafetz, *Malingering on the Social Security Disability Consultative Exam: Predictors and Base Rates*, 22 CLINICAL NEUROPSYCHOLOGIST 529, 530 (2008) (citing a study that showed a 50% or higher rate of test failure on state Psychological Consultative Exams that test whether applicants are disabled); see also Nathan Koppel, *The Judge Who Rarely Rules "No,"* WALL ST. J. (May 19, 2011, 1:42 PM), <http://blogs.wsj.com/law/2011/05/19/the-judge-who-rarely-rules-no/> (noting that ALJ David Daugherty has awarded benefits in all but four of his last 2,000 cases).

59. John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 349-52 (1992).

Federal Energy Regulatory Commission, pleadings and exhibits are filed with agencies electronically over the Internet or on CD rather than by means of paper originals and copies delivered in person or by mail to a docket office. Initial decisions are still written as before, but they are written on computers and filed electronically. Most lawyers rely on Internet services to research those decisions rather than perusing published loose-leaf reports.

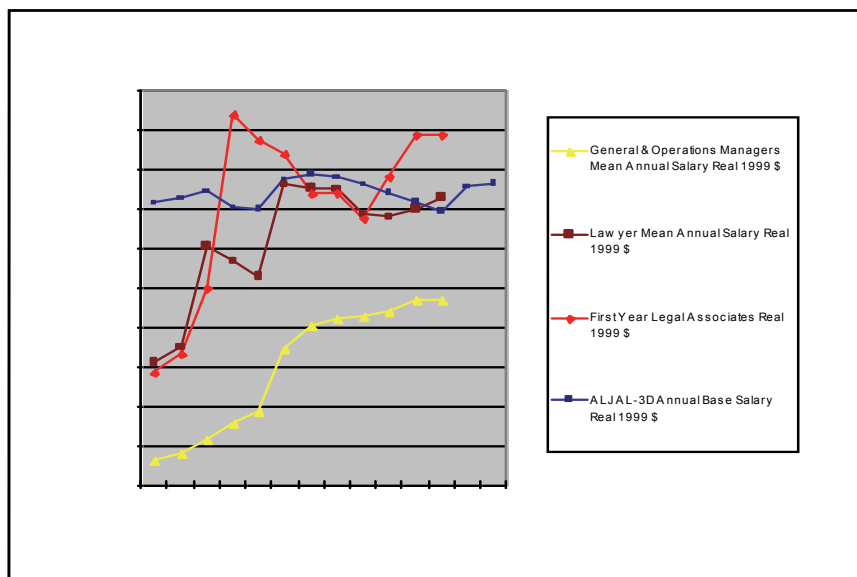
Even the very act of adjudication itself is changing. With the advent of alternative dispute resolution (ADR) in federal agencies during the 1990s, administrative cases that once required formal hearings are now handled through settlement proceedings that may be facilitated by an ALJ or a nonjudicial arbitrator or mediator. Formal fact-finding is substituted with the arm-twisting and give-and-take of settlement conferences, settlement offers, and contested or uncontested settlement agreements. No precedential decisions are made. Settlement proceedings conducted by ALJs or other neutrals are now a necessary predicate to initiating most formal administrative proceedings before the Federal Energy Regulatory Commission.⁶⁰

The framers of the APA in the 1940s believed that the adjudicators, who were then known as “hearing examiners” or “hearing commissioners” and eventually came to be known as Administrative Law Judges, should be well-paid to attract the best talent.⁶¹ That too has changed significantly since 1989, and over time has lost ground to other congressional fiscal priorities. In the 1990s and 2000s, federal ALJ pay in constant dollars did not keep up with compensation in related professions. In constant (1999) dollars, the nationwide base pay of middle-level ALJs compared with the nationwide average pay of lawyers, managers, and first-year law firm associates in firms of 251 or more lawyers took the following tracks over the period 1997–2010⁶²:

60. See 18 C.F.R. §§ 385.603–604 (2011).

61. DEPT. OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 6 (1941) (“[T]he bill proposes to improve the process of formal adjudication by bringing about a more uniformly high quality of hearing officers. This is to be achieved by creating ‘hearing commissioners’ with tenure, substantial salaries, full power to control and conduct hearings, and power to issue decisions of a considerable degree of finality.”).

62. This chart was created by referring to Bureau of Labor Statistics figures for the years 1997–2009. See *Occupational Employment Statistics*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/oes/oes_dl.htm (last updated April 25, 2012); Nat’l Ass’n for Law Placement, *How Much Do Law Firms Pay New Associates? A 14-Year Retrospective as Reported by Firms*, NALP BULLETIN, (Sept. 2009), available at <http://www.nalp.org/2009septnewassocsalaries>. Figures for federal employee pay are available from the Office of Personnel Management and published in the *Federal Register*. All figures are adjusted



As the chart shows, ALJ base pay in constant-dollar terms remained flat through these years, whereas the average real pay of lawyers and business managers rose significantly. The pay premium of middle-level ALJs over lawyers and non-lawyer managers narrowed in real-dollar terms. Even more tellingly, the real pay of entry-level associates at large law firms across the United States rose spectacularly in the late 1990s, fell in the early 2000s, and then rose strongly again after 2006, from a position considerably below the pay of middle-level ALJs to one well above it. This anomaly persists despite the fact that entry-level lawyers at law firms as a rule are at least a decade away in their careers from having the experience necessary to qualify as neophyte ALJs.

As unemployment worsened after 2008, the level of federal pay actually started to look good to outsiders and was raised by some conservative politicians as a rallying cry for cutting government “waste.” House Speaker (then Congressman) John Boehner claimed during the 2010 election season that “Federal employees now make on average *more than double* what private sector workers take in.”⁶³ While the notion is often lost on such critics that the depressed level of private pay and benefits during the Great Recession of 2008 and thereafter is not something to aspire to, the advent of bad economic times has justified the arguments of those who fight to cut government pay, even if good times return. As a result, President Obama and Congress have frozen the pay of federal ALJs for 2011 and 2012 along

according to the Consumer Price Index (CPI-U).

63. Boehner, *supra* note 46.

with all other federal employees, and as of this writing, are widely expected to extend the freeze into 2013. Unlike other federal employees, however, ALJs have no opportunity to earn bonuses, and the upper limit of their pay scale is capped at \$165,300 per year.

Although there are certainly other professions whose relative pay understates the importance of their jobs in public life (public school teachers come to mind), the message that society has sent to those entering the work world by flattening real wages for such jobs and reducing their levels in relation to comparable jobs is clear—these jobs are not valued as highly as investment bankers, Wall Street lawyers, doctors, movie stars, and corporate CEOs. The administrative law judiciary, like their Article III judicial peers, have petitioned Congress frequently to address this imbalance. Whether Congress listens or not (and it has been a while since it had last seen fit to do so), the long-run trend is that the ranks of ALJs will be filled less by highly qualified candidates and more by less qualified ones.

III. TOWARD A MODERNIZED ALJ MODEL CODE

There is a longstanding view among the administrative law judiciary that a code of judicial conduct must be applied to them. Doing so countervails the antagonistic public perception, arising from negative attitudes toward government in general, that agency adjudication is often biased or that adjudicators often do not take their role seriously enough. While it would be easy to just let things slide as they are now, with no applicable code of conduct in place, it is probably shortsighted to do so as the public continues to sour on the efficacy and efficiency of their government. It would also be shortsighted for Administrative Law Judges merely to adopt the U.S. Judicial Code wholesale, because it is designed for adjudicators who fill a different role in our system and in our society.

The better option, given the course of change in the modern work of ALJs and the trend in public perceptions of government work, would be to update the 1989 ALJ Model Code to fit a more production-oriented, high-tech, less-formal model of administrative adjudication, and to seek its adoption by all relevant federal agencies. Public expectations of judicial conduct in general have changed. The work of Administrative Law Judges sets them apart from their judicial peers in fulfilling those expectations, and their ethical code should be tailored accordingly.

If the ALJ Model Code as it is currently worded (that is, in its 1989 form) or the current U.S. Judicial Code were applied to all federal ALJs now, both would impose burdens that may be appropriate for Article III judges but have no real place in an ALJ role. There are provisions of the ALJ Model Code and the U.S. Judicial Code that, because of their origin in the

ABA Model Judicial Code, (i) do not really pertain to ALJs; (ii) create conflicts with other laws that do pertain to ALJs; (iii) impose restraints on ALJs' lives that are more fitting for jurists who appear in the public spotlight more often than ALJs do; or (iv) ignore the modern reality of ALJ work. Avoiding the appearance of impropriety is important, as the U.S. Judicial Code requires of Article III judges.⁶⁴ Yet a code of ethics that restrains the life of a federal ALJ outside of the job, or that hamstrings how an ALJ interacts with the community or earns a living outside of judicial duties, is unnecessary for what is essentially a far less public role than that of a presidentially appointed, Senate-confirmed federal district court judge or federal court of appeals judge. Therefore, instead of having ALJs simply adopt the U.S. Judicial Code wholesale, the wiser course would be for the ALJ Model Code to be modernized and adapted into a format that is more realistic and reasonable for Administrative Law Judges to live by.

A. *Unnecessary Canons*

Among the canons of the 1989 ALJ Model Code that could be eliminated in whole or in part are those that are unnecessary in view of federal statutes and regulations that already cover ALJs in their capacity as federal employees. These canons, in light of OPM's recent proposal to eliminate licensure requirements due, in large part, to the fact that "the standards of ethical conduct that apply to ALJs as Federal employees . . . are sufficient to ensure that ALJs are held to a high standard of conduct,"⁶⁵ should be readily recognized by the administrative law judiciary as unnecessary for the conduct of their jobs. These include Canons 2(B),⁶⁶ 5(C),⁶⁷ and 7(A),⁶⁸ which impose rules that are already covered by existing

64. CODE OF CONDUCT FOR U.S. JUDGES Canon 2, at 3 (Judicial Conference of the United States 2011).

65. Programs for Specific Positions and Examinations (Miscellaneous), 75 Fed. Reg. 61,998, 61,998 (Oct. 7, 2010).

66. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 2(B), at 6 (1989) ("An administrative law judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of the office to advance the private interests of others, nor convey or permit others to convey the impression that they are in a special position of influence. A judge should not testify voluntarily as a character witness.").

67. *Id.* Canon 5(C)(1), at 17–18 ("An administrative law judge should refrain from financial and business dealings that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit the judge's judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the agency in which the judge serves.").

68. *Id.* Canon 7(A)(1)–(3), at 23.

(1) An administrative law judge should not solicit funds for or pay an assessment to a

federal statutes and regulations. ALJs, by virtue of their federal employment, are subject to 5 C.F.R. Part 2635, the “Standards of Ethical Conduct for Employees of the Executive Branch,” and its underlying statutes. These provisions apply to independent agencies as well as to the Executive Branch departments.⁶⁹

These laws make the foregoing Canons superfluous. If imposed on ALJs as a matter of law, the present ALJ Model Code could create conflicts with these existing laws, triggering unintended consequences.

One actual example calls into question Canon 2(B)’s provision in the Code of Judicial Conduct that “A judge should not . . . convey or permit others to convey the impression that they are in a special position to influence the judge.”⁷⁰ In *Chisolm v. Transouth Financial Corp.*,⁷¹ the U.S. District Court for the Eastern District of Virginia, Norfolk Division, applied this Canon to prohibit itself from allowing a retired U.S. district court judge from appearing before it as counsel for a defendant, even though he had nothing to do with the case while he was a sitting judge.⁷² Although the retired jurist was not barred as a then-practicing attorney from acting as counsel by his state bar rules of conduct, the court took it upon itself to

political organization or candidate.

(2) An administrative law judge should resign from office when the judge becomes a candidate either in a party primary or in a general election except that the judge may continue to hold office, while being a candidate for election to or serving as a delegate in a state constitutional convention, if otherwise permitted by law to do so.

(3) An administrative law judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

69. 5 U.S.C. § 105 (2006). Among these provisions are: 5 C.F.R. § 2635.702 (2011) (“An employee shall not use his public office for his own private gain . . . or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity”); *id.* § 2635.502 (“Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household . . . and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter”); *id.* § 2635.402 (“An employee is prohibited . . . from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him . . . has a financial interest”); 5 U.S.C. § 7323 (“[A]n employee may not . . . use his official authority or influence for the purpose of interfering with or affecting the result of an election; . . . knowingly solicit, accept, or receive a political contribution from any person . . . [or] run for the nomination or as a candidate for election to a partisan political office”).

70. CODE OF CONDUCT FOR U.S. JUDGES Canon 2(B), at 3 (Judicial Conference of the United States 2011).

71. No. 2:93cv632, 2000 U.S. Dist. LEXIS 8483 (E.D. Va. May 12, 2000).

72. *Id.* at *12.

disqualify him as a matter of *its own* ethics. Citing a 1998 Opinion of the Committee on Codes of Conduct, the district court noted that, “In such cases . . . the judge sitting in the case has an affirmative obligation . . . to take appropriate steps to disqualify the former judge as counsel.”⁷³ The court permitted his firm, however, to continue representing the defendant.⁷⁴

Typically, under federal employee ethics rules, a presiding ALJ facing such a scenario might consider recusing himself or herself from hearing a case, particularly where there is a “covered relationship” between the ALJ and the counsel representing one party, if “the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.”⁷⁵ “Covered relationships” do not typically include an ALJ’s former judicial colleagues at the agency or at previous agencies, except where the sitting ALJ was once an employee or subordinate of the former ALJ now acting as a party’s counsel.⁷⁶ The presiding ALJ could seek a waiver of the regulation from his or her agency to hear the case.⁷⁷ By contrast, Canon 2(B) as applied in *Chisolm* could turn this well-settled regulatory structure on its head if applied to ALJs by pitting the ALJ’s sense of ethical duty under the Code of Judicial Conduct against his or her agency’s prerogative to waive such concerns when others take priority, such as constraints in reassigning the matter to other ALJs or when adjustments may be made that would reduce or eliminate the likelihood that a reasonable person would question the presiding ALJ’s impartiality.⁷⁸

The provision in Canon 2(B) that an ALJ “should not testify voluntarily as a character witness” is the same as Canon 2(B) in the U.S. Judicial Code.⁷⁹ It is meant to guard against injecting the prestige of judicial office into a proceeding in which the judge testifies. It does not shield a judge from testifying as a character witness in response to an official summons.⁸⁰

Here, too, the applicability of this rule as an ethical concern for ALJs is debatable. It would make more sense as a rule of evidence than a rule of ethics, and has, in fact, been applied in conjunction with them. One

73. *Id.* at *13 (citing COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., ADVISORY OP. NO. 70: DISQUALIFICATION WHEN FORMER JUDGE APPEARS AS COUNSEL (1998)). This opinion was substantially revised in June 2009.

74. *Id.* at *18–*20.

75. 5 C.F.R. § 2635.502(a) (2011).

76. *Id.* § 2635.502(b)(1)(iv).

77. *Id.* § 2635.502(d).

78. *Id.* § 2635.502(d)(1)–(6).

79. Compare CODE OF CONDUCT FOR U.S. JUDGES Canon 2(B), at 3 (Judicial Conference of the United States 2011), with MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 2(B), at 6 (1989).

80. CODE OF CONDUCT FOR U.S. JUDGES Canon 2(B) cmt., at 4.

federal district court cited the ABA Model Code version of Canon 2(B) to disallow a bankruptcy judge from offering supportive testimony for a defendant in a later case brought by the trustee of the bankruptcy estate.⁸¹ The court found, *inter alia*, that such testimony would be needlessly cumulative and unduly prejudicial to the plaintiff “because the testimony of Judge Phillips will clearly put his prior judicial position and the power and authority he had as a judicial officer in support of Vaughn.”⁸² Also, in addition to finding that the testimony would violate the Canon of judicial ethics, the district court ruled that it would violate Federal Rules of Evidence 402, 403, and 605 because it was irrelevant, because “its probative value is substantially outweighed by the danger of undue prejudice,” and because the evidentiary rule against a judge testifying at the trial over which he presides “should apply to the presiding judge of the underlying trial where facts, rulings and performance of the attorneys are the key issues in this pending case.”⁸³

Certainly, the testimony of an ALJ who heard an underlying case should not be permitted in a related case as a matter of evidentiary rule. However, Canon 2(B) sweeps more broadly than that; it disallows an ALJ’s voluntary character testimony in *any* case, whether the ALJ is related to the case or not. Moreover, the rule may be defeated simply by the issuance of a summons, which is always a wise precaution for a litigator to take with most witnesses. Character testimony is most often submitted for the purpose of establishing or impeaching a party’s reputation for truthfulness in the community.⁸⁴ Hence, the testimony of an ALJ, whose job requires credibility determinations as a matter of routine, would naturally be entitled to a high degree of credence by a judge or a jury, but would still be subject to establishing a foundation for the ALJ’s knowledge of the individual and that individual’s reputation for truthfulness.⁸⁵ If such testimony must be treated as prejudicial *per se*, then, it should be dealt with as a prophylactic rule of evidence, not as a matter of ethics that is left up to the conscience of the individual ALJ.

In another case, a federal court of appeals heard the appeal of an income tax evasion proceeding in which a state court judge was upbraided by the presiding federal district court judge before he was called to testify under

81. *Chiasson v. Vaughn*, No. 08-121-FJP-SCR, 2009 U.S. Dist. LEXIS 3300, at *4–*5 (M.D. La. Jan. 7, 2009).

82. *Id.* at *3.

83. *Id.* at *3–*4.

84. *See, e.g.*, Edward J. Imwinkelried, EVIDENTIARY FOUNDATIONS 115–16, 140–41 (3d ed. 1995).

85. *Cf. id.*

subpoena as a character witness for the defendant physician.⁸⁶ The federal trial judge considered the state court judge's testimony to be a violation of the Code of Judicial Conduct even though it was under subpoena. The presiding judge left the decision whether to testify up to the state judge and the latter promptly chose not to. The defendant thereupon appealed on the ground that he was deprived by the trial court from offering valuable character testimony. The Fifth Circuit sustained the district court, however, stating:

As a practical matter, Judge Armitage's testimony as a character witness would have had to have been "voluntary," subpoena or no subpoena. [Defendant] Callahan could issue a summons which would command the witness' appearance, but he could not by dint of the subpoena force the witness to speak well of him. The decision on whether to commend a defendant's character will always be "voluntary" in that sense. Obviously, Callahan would not have subpoenaed Judge Armitage unless he expected the Judge's cooperation. Nothing the trial judge said barred Judge Armitage from reaching his own decision on whether he wished to lend the prestige of his office to Callahan's defense. *Although we do not approve of the trial court's actions in scrutinizing the Judge's decision*, the fact that the decision was finally left solely to the witness prevented the mistake from rising to the level of reversible error.⁸⁷

Even though Judge Armitage's testimony under subpoena would have passed the ethical test, in the view of the Fifth Circuit, the Canon became the vehicle by which to squelch the testimony. The testifying judge chose to avoid the witness stand, notwithstanding the subpoena, and the appellate court upheld the lower court's treatment of him. Dealing with this problem under the Rules of Evidence would have been less messy.

In sum, a bad rule makes bad law. As a canon of ethics, the rule against judges testifying as character witnesses does little if anything to prevent wrongful behavior on a judge's part, since the judge can still be called upon to testify under subpoena. More appropriate would be to turn it into a rule of evidence that bars an ALJ's testimony in instances where it bears on the truthfulness of a party or witness. As the district court noted in *Chiasson v. Vaughn*,⁸⁸ there are other generally applicable rules of evidence that can be applied readily to bar such judicial testimony; the Canons of Judicial

86. *United States v. Callahan*, 588 F.2d 1078 (5th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979).

87. *Id.* at 1088 (emphasis added).

88. No. 08-121-FJP-SCR, 2009 U.S. Dist. LEXIS 3300, at *3-*4 (M.D. La. Jan. 7, 2009).

Conduct are not needed either to trump those rules or to amplify them. It follows *a fortiori* that it need not be applied to ALJs.

B. *Inapplicable Canons*

There are some canons in the ALJ Model Code that should be removed because they impose legal impediments that are not applicable to ALJs. Among these is Canon 3(C),⁸⁹ which treats disqualification for reasons including a judge's financial interest.

Canon 3(C), according to the ALJ Model Code, "is derived, without substantial modification, from 28 U.S.C. 455, as amended in 1974."⁹⁰ That statute was itself amended by Congress in 1978 and 1988 without a comparable amendment to the ALJ Model Code. In the 1978 amendment, Bankruptcy Court Trustees were removed from the provisions of 28 U.S.C.

89. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 3(C), at 11–13 (1989). The Canon reads in part:

- (1) An administrative law judge should disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances when
 - (a) the judge has a personal bias or prejudice concerning the proceeding;
 - (b) in private practice the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
 - (c) the judge has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
 - (d) the judge knows that he or she, individually or as a fiduciary, or his or her spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
 - (e) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) is acting as a lawyer in the proceeding;
 - (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) is to the judge's knowledge likely to be a material witness in the proceeding.
- (2) A judge should inform himself or herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the personal financial interests of his or her spouse and minor children residing in the judge's household.

90. *Id.* Canon 3(C) cmt., at 13.

455.⁹¹ In the 1988 amendment, a subsection was added to the statute allowing judges to avoid disqualification by divesting the interest that provides the grounds for disqualification.⁹²

The provision applicable to all federal employees that is comparable to the financial interest portion of Canon 3(C) is 5 C.F.R. § 2635.402.⁹³ That regulation, derived from a criminal statute,⁹⁴ prohibits a federal employee “from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.”⁹⁵ The general provision also has a section that allows the employee to cure the conflict by divestiture of the financial interest.⁹⁶

Canon 3(C) does something that the general rule of 5 C.F.R. § 2635.402 and its underlying statute, 18 U.S.C. 208(a), do not do: It specifically defines the term “financial interest.”⁹⁷ It is defined as “a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant” in a party in a case, but does not include certain specific types of relationships, such as passive ownership in an investment fund.⁹⁸ The “however small” criterion is significantly different from the general employee provision because it bars a judge from obtaining the waiver from the disqualification rule that is available to all other federal employees if, in the written opinion of the designated agency ethics officer, “the employee’s financial interest in the particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such employee.”⁹⁹ This criterion also differs from the general *de minimis* exemption available to federal employees for matters involving specific parties in which the employee’s disqualifying financial interest (or that of his or her spouse or minor children) consists of

91. Act of Nov. 6, 1978, Pub. L. No. 95-598, § 214, 92 Stat. 2549, 2661 (amending subsections (a) and (e) of § 455 of title 28 of the United States Code).

92. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1007, 102 Stat. 4642, 4667 (1988) (adding subsection (f) to § 455 of title 28 of the United States Code).

93. See generally 5 C.F.R. § 2635.402 (2011).

94. 18 U.S.C. § 208(a) (2006).

95. 5 C.F.R. § 2635.402(a) (2011); see also *id.* § 2635.402(b)(2) (listing the employee’s spouse, minor child, general partner, organization in which the employee serves as officer, director, trustee, general partner or employee, or a prospective employer as persons who are disqualified because of an imputed financial interest).

96. *Id.* § 2635.402(e).

97. See MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 3(C)(3)(c), at 13 (1989).

98. *Id.* Canon 3(C)(3)(c)(i)–(iv), at 13.

99. 5 C.F.R. § 2635.402(d)(2)(ii).

publicly traded securities issued by one or more entities affected by the matter, or long-term federal government or municipal securities, and the aggregate market value of the holdings of the employee (including spouse and minor children) in the securities of all entities does not exceed \$15,000.¹⁰⁰

Hence, the ALJ Model Code has the potential to exclude an ALJ from hearing a case because of a *de minimis* stock ownership in a party in the case, even though any other federal employee making similar decisions about that party on behalf of the agency could obtain an exemption from the rule or would be exempt by regulation. One could be of two minds on this scenario. On the one hand, the rule tends to enhance the reality and public perception of ALJ impartiality and independence by applying a “zero tolerance” rule for financial interest. On the other hand, the rule is not updated to permit divestiture of the interest as a solution, and can hamstring an agency when using its scarce corps of ALJs to the fullest extent. In this regard, the rule does not specify that parties themselves, including the private parties, can waive the rule.

Another aspect of Canon 3(C) that differs substantially from the federal rule on conflict of interest is that it speaks of *long past* interests as well as *present* interests of the judge and his or her relatives and colleagues, whereas the general federal rule speaks only of *immediate past* or present interests of an employee’s relatives and colleagues. Canon 3(C) requires judicial recusal in instances where “in private practice the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.”¹⁰¹

The analogous provision applicable to all federal employees is 5 C.F.R. § 2635.502.¹⁰² It states that an employee should not participate in a matter in which the employee “knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.”¹⁰³ A “covered relationship” includes “[a]ny person for whom the employee has, *within the last year*, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.”¹⁰⁴

100. *Id.* § 2640.202(a).

101. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 3(C)(1)(b), at 11 (1989).

102. *See generally* 5 C.F.R. § 2635.502.

103. *Id.* § 2635.502(a).

104. *Id.* § 2635.502(b)(1)(iv) (emphasis added).

Hence, an ALJ who worked in a law firm ten years ago would be barred under Canon 3(C) from hearing a case that he or a partner in his firm worked on back then, whereas under the general federal rule he would not. Moreover, an ALJ following this part of Canon 3(C) would not be able to avail himself of the waiver provisions of 5 C.F.R. § 2635.502(d), which would allow the designated agency ethics official to “authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations.”¹⁰⁵ Again, this aspect of Canon 3(C) may be viewed by some as enhancing ALJ independence and impartiality, and may be viewed by others as an unnecessary constraint on agency efficiency.

C. *Overly Intrusive Canons*

There are items in the Model Code that should be removed or refashioned because they intrude too much into the personal liberty and privacy of ALJs. These include the Commentary to Canon 2,¹⁰⁶ which concerns membership in exclusionary organizations; Canon 4,¹⁰⁷ which discusses participation in “quasi-judicial” organizations; Canon 5,¹⁰⁸

105. *Id.* § 2635.502(d).

106. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 2 cmt., at 7 (1989) (“It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.”).

107. *Id.* Canon 4, at 14–15. The Canon reads:

An administrative law judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities, if in doing so doubt is not cast on the capacity to decide impartially any issue that may come before the judge:

- A. Speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.
- B. May appear at a public hearing before an executive or legislative body or official and may otherwise consult with an executive or legislative body or official, unless otherwise prohibited by law.
- C. May serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

108. *Id.* Canon 5, at 16–17. The Canon reads:

- A. Avocational Activities. An administrative law judge may write, lecture, teach, and speak on non-legal subjects, and engage in the art, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity

treating extra-judicial civic and avocational activities; and Canon 6,¹⁰⁹ involving remuneration for these activities.

1. *Exclusionary Organizations*

The commentary to Canon 2 regarding membership in organizations that “invidiously discriminate” was not raised to the level of a “canon” by the authors of the 1984 ABA Report that recommended its inclusion in the ABA Model Judicial Code.¹¹⁰ Following suit, the authors of the ALJ Model Code kept it as commentary as well. In the 1990 revision of the ABA Model Judicial Code, however, the commentary was elevated to canon

of the office or interfere with the performance of judicial duties.

B. **CIVIC AND CHARITABLE ACTIVITIES.** An administrative law judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

- (1) An administrative law judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before any agency in which the judge serves.
- (2) An administrative law judge should not use or permit the use of the prestige of the judge’s office for the purpose of soliciting funds for any educational, religious, charitable, fraternal, or civic organization, but the judge may be listed as an officer, director, or trustee of such an organization. The judge should not be a speaker or the guest of honor at an organization’s fund raising events, but may attend such events.
- (3) An administrative law judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

109. *Id.* Canon 6, at 22. The Canon reads:

An administrative law judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in the judge’s judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

- A. **Compensation.** Compensation should not exceed a reasonable amount nor should it exceed what a person who is not an administrative law judge would receive for the same activity.
- B. **Expense Reimbursement.** Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the administrative law judge and, where appropriate to the occasion, by the judge’s spouse. Any payment in excess of such an amount is compensation.

110. *See* Lynne Reaves, *Judges and Bias: Club Resolution Watered Down*, A.B.A.J., Oct. 1984, at 34, 34 (noting that the wording “leaves the door open” for membership in some private organizations, and cites a Jewish community center or a Polish American Society as examples).

level as Canon 2(C) and expanded to include organizations that discriminated on the basis of gender, ethnicity, or sexual orientation. The ALJ Model Code did not follow suit. This Canon is now Rule 3.6 of Canon 3 of the current ABA Model Judicial Code and Canon 2(C) of the U.S. Judicial Code.¹¹¹

Code commentary on this rule has expanded over the years. The ALJ Model Code repeats the commentary of the original 1984 amendment to the ABA Model Judicial Code by stating that membership in such organizations “may give rise to perceptions by minorities, women, and others, that the judge’s impartiality is impaired.”¹¹² Deciding whether an organization engages in invidious discrimination, however, is deemed by the ALJ Model Code commentary to be “a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization’s current membership rolls but rather depends on the history of the organization’s selection of members and other relevant factors.”¹¹³ As with the original ABA Model Judicial Code, the ALJ Model Code leaves it to the conscience of each judge to decide whether the organization in question practices invidious discrimination.

In the 1990 revisions to the ABA Model Judicial Code, the “other relevant factors” commentary was expanded to include “whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.”¹¹⁴ In this revision, the choice of whether to quit the organization or not was no longer left to the conscience of individual judges; instead, the Code was revised to state that “When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge *must* resign immediately from the organization.”¹¹⁵ One exception was allowed: “A judge’s membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.”¹¹⁶

Originally, ethical considerations about judicial membership in organizations stemmed from the concern that a judge’s membership might be seen as “personal, direct advocacy to the public of the policy positions

111. See CODE OF CONDUCT FOR U.S. JUDGES Canon 2(C), at 3 (Judicial Conference of the United States 2011); ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.6 (2010).

112. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 2 cmt., at 7 (1989).

113. *Id.*

114. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 2 (2010).

115. *Id.* cmt. 3 (emphasis added).

116. *Id.* cmt. 4.

advanced by the organization” that “might reasonably be seen as impairing the judge’s capacity to decide impartially any issue that may come before the judge.”¹¹⁷ This was considered especially true of organizations that litigated before the judge.¹¹⁸ By contrast, the principal concern during the 1990 ABA Model Judicial Code revision and thereafter fixed on gender discrimination. Complaints from political factions about memberships of nominees to the U.S. Supreme Court in a variety of organizations were the impetus behind these changes. In 1987, Justice Anthony Kennedy was criticized during his nomination for his membership in a San Francisco club that excluded women. He subsequently resigned from the club, prompting in large part the 1990 Code reforms.¹¹⁹

Accusations of membership in gender-discriminatory clubs did not remain an exclusive indictment of male nominees. In 2009, Justice Sonya Sotomayor resigned from an elite all-women’s club during her nomination fight after Republicans questioned her participation in it, although she did not believe the club to practice “invidious discrimination.”¹²⁰ Other female Supreme Court Justices have also had to defend their membership in single-gender clubs, both during their nomination proceedings and at other times.¹²¹

The inherent ambiguity of this standard and its entanglement with politics raise legitimate questions about whether it is necessary or expedient to apply to ALJs, who for the most part practice outside of the political sphere and the public eye. Certainly the provision of the 1990 revisions that a judge must resign from an organization when he or she “learns” that it is discriminatory is open to question, because it seems from the experience of Supreme Court nominees that the “learning” element turns more on whether someone powerful in politics or the media has called the judicial nominee’s membership into question than whether the judicial nominee has determined, personally and independently after analyzing

117. COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., ADVISORY OP. NO. 82: JOINING ORGANIZATIONS (1998). This opinion was substantially revised in June 2009 and no longer contains such language.

118. COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., ADVISORY OP. NO. 40: SERVICE ON GOVERNING BOARD OF NONPROFIT ORGANIZATION THAT TENDS TO BECOME INVOLVED IN COURT PROCEEDINGS (1998). This opinion was substantially revised in June 2009.

119. Paul Marcotte, *Judicial Code Re-Examined*, A.B.A. J., Apr. 1, 1988, at 152.

120. Mark Sherman, *Sotomayor Quits Belizean Grove*, HUFFINGTON POST (June 19, 2009, 10:40 PM), http://www.huffingtonpost.com/2009/06/19/sotomayor-quits-belizean-n_218307.html.

121. *Id.* (noting that former Supreme Court Justice Sandra Day O’Connor and current Supreme Court Justice Ruth Bader Ginsburg have, at different times, been involved in all-women groups).

objective facts, that quitting the organization is warranted.

In some respects, this rule suggests a *lack* of independence and impartiality on a judge's part because it makes a judge more susceptible to political pressures than perhaps ought to be. In that regard, there is a particular danger in imposing the stringent rule of the 2007 ABA Model Judicial Code on ALJs because of their positions within agencies of the Executive Branch rather than the independent Judicial Branch. Such agencies are themselves very sensitive to politics because their executives are politically appointed and their budgets are approved by Congress. It is not inconceivable that an ALJ's membership in an organization that is considered by a faction of the party in power to be invidiously discriminatory could be called into question by agency managers to temper the ALJ's independence and impartiality, or to serve as a "litmus test" of the ALJ's political bona fides.

The commingling of religion and politics in public life, notwithstanding our constitutional prohibition against government entanglement with religion, raises an additional concern about this provision as it applies to ALJs. Almost every religion in America takes a political stand of some kind. A judge's membership in an organized religion alone may be enough to raise questions about his or her social or political views, regardless of how the judge decides cases. The fact that the 2007 revisions to the ABA Model Judicial Code state in commentary that "A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule" is helpful, but, in view of the context in which it appears in the rule, not much comfort.¹²²

Taken as a whole, the entwining of this rule with politics and the media suggests that it is better applied solely to judicial positions that require election or Senate confirmation rather than to Administrative Law Judges, who come from broader walks of life and lead less publicity-conscious lives and careers. Thus, the rule as it was promulgated in the 1989 ALJ Model Code, wherein the decision to quit organizations suspected of invidious discrimination is left to the conscience of each individual judge rather than to ethical fiat, is best left as it is.

2. *Legal and Civic Organizations*

Canon 4 of the ALJ Model Code governs an ALJ's participation outside of his or her job in so-called "quasi-judicial activities," the Code's term for endeavors having to do with "the law, the legal system, and the

122. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 4 (2010).

administration of justice.”¹²³ This covers a wide range of organizations, such as the various state bar associations, the American Bar Association and its committees, The Federalist Society, the American Association for Justice (formerly the Association of Trial Lawyers of America), the American Inns of Court, the Federal Administrative Law Judges Conference, the Forum of the United States Administrative Law Judges, the Association of Administrative Law Judges, and the like.

Under Canon 4 of the ALJ Model Code, ALJs are free to engage in the activities of these organizations by speaking, writing, lecturing, and teaching, as well as serving as members, officers, and directors, so long as “doubt is not cast on the capacity to decide impartially any issue that may come before the judge.”¹²⁴ ALJs are also permitted to assist such organizations by raising funds and participating in their management and investment. They may also make recommendations to public and private fund-granting agencies on projects that such organizations sponsor.

Canon 5 of the ALJ Model Code concerns outside activities that are “non-legal” in nature, such as “the arts, sports, and other social and recreational activities.”¹²⁵ Canon 5 requires an ALJ’s participation in these pursuits, such as educational, religious, charitable, fraternal, or civic organizations, to be more limited in nature. The organization cannot be one that is “conducted for the economic or political advantage of its members.”¹²⁶ The ALJ may serve as an officer, director, trustee, or non-legal advisor of such an organization, but not if it “will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before any agency in which the judge serves.”¹²⁷ The ALJ may not solicit funds for such an organization, nor give it investment advice, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions, and may be listed as an officer, director, or trustee of the organization.¹²⁸ The ALJ may not be a speaker or guest of honor at the organization’s fund-raising events, but may attend such events.

In the changes to the ABA Model Judicial Code that were made after the ALJ Model Code was adopted in 1989, Canons 4 and 5 were reorganized into what is now Canon 3 of the ABA Model Judicial Code. Now, organizations having to do with “the law, the legal system, or the

123. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 4, at 14 (1989).

124. *Id.*

125. *Id.* Canon 5(A), at 16.

126. *Id.* Canon 5(B), at 16.

127. *Id.* Canon 5(B)(1), at 16.

128. *Id.* Canon 5(B)(2), (3), at 17.

administration of justice” as well as organizations constituting “educational, religious, charitable, fraternal, or civic organizations not conducted for profit” are treated under a single Rule—3.7.¹²⁹ A judge subject to the ABA Model Judicial Code may now fundraise for both types of organizations,¹³⁰ manage their investments,¹³¹ solicit contributions for them from other judges that he or she does not supervise,¹³² and serve as an officer, director, trustee, or non-legal advisor of such organizations.¹³³ Also, the judge may now appear or speak at, receive an award or other recognition at, be featured on the program of, and permit his or her title to be used in connection with, an event of both such organizations; “but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice.”¹³⁴ Furthermore, a judge may solicit memberships and grants only for the law-related organizations.¹³⁵

The U.S. Judicial Code maintains the separation of provisions for “law-related activities” on the one hand and “civic and charitable activities” on the other.¹³⁶ Its restrictions are the same as those of the updated ABA Model Judicial Code except in one significant respect: while a judge may assist a “law-related organization” in the management and investment of its funds,¹³⁷ the judge may not do so for a “civic and charitable organization.”¹³⁸

Although the updated ABA Model Judicial Code and the U.S. Judicial Code have liberalized the freedom of judges to participate in non-legal, apolitical, and non-profit charitable and civic organizations, they still lay out a rather confusing roadmap for what can and cannot be done. Certainly the older, unrevised ALJ Model Code is even more crabbed, particularly regarding such matters as soliciting contributions, appearing as a guest of honor at a fund-raising dinner, or being a board member.

It is extremely difficult, if not impossible, to think of any charitable organization that would hold a dinner that would *not* be for the purpose of fund-raising. The ALJ Model Code precludes ALJs from being honored at

129. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(1) (2010).

130. *Id.* R. 3.7(A)(1)–(2).

131. *Id.* R. 3.7(A)(1).

132. *Id.* R. 3.7(A)(2).

133. *Id.* R. 3.7(A)(6).

134. *Id.* R. 3.7(A)(4).

135. *Id.* R. 3.7(A)(3), (5).

136. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A)–(B), at 11–12 (Judicial Conference of the United States 2011).

137. *Id.* Canon 4(A)(3), at 12.

138. *Id.* Canon 4(B)(2), at 12.

any such event even though other judges are not. Nor is it possible to think of any nonprofit board of directors meeting that would not discuss or vote on the organization's investments; under the ALJ Model Code, an ALJ-director would be forced to refrain from discussion and voting on such issues even though the ABA Model Judicial Code would not present such a restraint. It is certainly not the case these days that educational, religious, charitable, fraternal, and civic organizations refrain from engaging in lobbying activities at the local, state, or federal level in furtherance of the "political advantage" of their members; under the ALJ Model Code, ALJs would be precluded from participating in any organization that engages in such activities.

Federal law is very specific regarding the extent of political activity in which an ALJ may be engaged. Under the Hatch Act,¹³⁹ a federal ALJ may not knowingly solicit, accept, or receive a political contribution from any person;¹⁴⁰ be a candidate for nomination or election to a partisan political office;¹⁴¹ or engage in partisan political management or partisan political campaigns.¹⁴² In practice, the Hatch Act forbids an ALJ from, among other things, campaigning for or against a candidate in partisan elections, making campaign speeches, collecting contributions or selling tickets to political fund-raising functions, distributing partisan campaign material, organizing or managing political rallies or meetings, holding office in political clubs or parties, hosting or inviting anyone to a political fundraiser, or accepting or receiving donations for a political party, candidate, or group.¹⁴³

While the Hatch Act walls off ALJs from engaging in politics, there is no basis to preclude ALJs from engaging in the activities of apolitical groups that have nothing to do with the judge's adjudicatory function for a federal agency. A particularly overbroad aspect of Canon 5 of the ALJ Model Code is that it limits an ALJ's ability to participate in non-legal, nonprofit organizational activities in fields that do not fall within the subject matter of the ALJ's agency. This may make sense for Article III judges whose caseload can come from almost any walk of life, but it makes no sense for ALJs who decide cases in only one particular statutory field. Why, for instance, should it be a breach of a Code of Conduct for an ALJ at the Federal Energy Regulatory Commission, who hears nothing but electric

139. 5 U.S.C. § 7323 (2006).

140. *Id.* § 7323(a)(2).

141. *Id.* § 7323(a)(3).

142. *Id.* § 7323(b)(2)(A).

143. *Further Restricted Employees—Political Restrictions and Prohibited Activities*, U.S. OFFICE OF SPECIAL COUNSEL, <http://www.osc.gov/haFederalFurtherRestrictionandActivities.htm> (last updated Apr. 23, 2012).

transmission and gas or oil pipeline rate cases, to be able to participate as a full voting member of the board of directors of the National Alliance on Mental Illness (NAMI), a nonprofit organization that engages in public education and lobbying for mental health, to appear as a speaker or guest of honor at its fund-raising dinners, and to assist in soliciting contributions from the general public? Certainly NAMI is not an entity that “will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before any agency in which the judge serves,”¹⁴⁴ nor would the ALJ’s service in NAMI “detract from the dignity of the office or interfere with the performance of judicial duties.”¹⁴⁵

It is well-recognized by the ALJ Model Code, as it is in the ABA Model Judicial Code, that “[c]omplete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the society in which he or she lives.”¹⁴⁶ In that spirit, the ALJ Model Code should recognize that ALJs are a diverse group of individuals who have much to offer the community as a whole, and they should be able to do so to the fullest extent not in conflict with the particular issues that come before them in their own administrative agency cases.

3. *Compensation from Legal and Civic Organizations*

Canon 6 governs any compensation that an Administrative Law Judge may receive from working for legal and non-legal civic organizations of the type covered by Canons 4 and 5. The ALJ Model Code admonishes that such compensation “should not exceed a reasonable amount” nor be more than what a non-ALJ would receive for the same activity.¹⁴⁷ It also requires that expense reimbursements “should be limited to the actual cost of travel, food and lodging reasonably incurred” by the ALJ “and, where appropriate to the occasion, by the judge’s spouse.”¹⁴⁸ Additionally, the Code directs

144. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 5(B)(1), at 16 (1989).

145. *Id.* Canon 5(A), at 16.

146. *Id.* Canon 5(A) cmt., at 16; *see also* CODE OF CONDUCT FOR U.S. JUDGES Canon 4 cmt., at 15 (Judicial Conference of the United States 2011) (stating the same proposition almost identically); ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.1 cmt. 2 (2010) (“Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.”).

147. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 6(A), at 22 (1989).

148. *Id.* Canon 6(B), at 22.

that “[a]ny payment in excess of such an amount is compensation.”¹⁴⁹

This provision is the same as Canon 4(H) of the U.S. Judicial Code.¹⁵⁰ In the ABA Model Judicial Code, it was transformed in 2007 into Rules 3.12, 3.14, and 3.15 of Canon 3. Rule 3.12 is the general language of previous codes that such compensation may be accepted by the judge “unless such acceptance would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”¹⁵¹ Rule 3.14 goes into more depth than before about what types of expenses are acceptable, adding to the original wording “other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items.”¹⁵² Spousal expenses are also expanded to include the expenses of a judge’s “domestic partner[] or guest.”¹⁵³

The ABA Model Judicial Code has long had extensive reporting requirements for judicial compensation and expense reimbursements when received from legal and non-legal civic organizations.¹⁵⁴ These reporting requirements have been excluded from the ALJ Model Code because ALJs must comply with the Ethics in Government Act provisions concerning the filing of public financial reports.¹⁵⁵

In view of the lack of an exclusively judicial financial reporting requirement, and in light of the extensive rules and reporting requirements applicable to ALJs together with all senior federal employees, there is no reason why Canon 6 needs to be in the ALJ Model Code at all. Certainly it is outdated, as the reference in the ABA Model Judicial Code to the expenses of a judge’s domestic partner or guest as well as a spouse suggests. Certainly it is financially imprecise, since it refers to all expense reimbursements over “actual cost[s] . . . reasonably incurred” as “compensation” and does not account for actual expenses over “travel, food and lodging” that are now recognized by the ABA Model Judicial Code as reimbursable expenses and certainly should not be deemed as pure “compensation” to the receiving ALJ. Perhaps most arbitrary and capricious about the rule is its requirement that such compensation and

149. *Id.*

150. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(H), at 14 (2011).

151. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.12 (2010).

152. *Id.* R. 3.14(A).

153. *Id.* R. 3.14(B).

154. *See, e.g.*, CODE OF CONDUCT FOR U.S. JUDGES Canon 4(H)(3), at 14 (Judicial Conference of the United States 2011) (noting that a judge should make required financial disclosures, including disclosure of gifts and other things of value); ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.15 (2010) (stating that reporting requirements should include compensation for extrajudicial activities, gifts, and reimbursement of expenses).

155. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 6 cmt., at 23 (1989).

expenses must be reasonable when there is no definition of what “reasonable” is.

D. Canons Contrary to Modern Practice

There are items in the ALJ Model Code that should be removed as contrary to modern practice. These include Canon 3’s limitation on cameras in the courtroom¹⁵⁶ and Canon 5’s treatment of arbitration,¹⁵⁷ the practice of law,¹⁵⁸ and extrajudicial appointments.¹⁵⁹

1. Cameras in the Courtroom

Concerning the prohibition on cameras in the courtroom in Canon 3(A)(7), the Medicare Office of Hearings and Appeals and the SSA now hold hearings by teleconference. Telecommunications have become an increasingly-used technology in administrative proceedings. Witnesses and counsel are now not only beamed into hearings, but hearings are also beamed out to audiences worldwide. The days of intrusive journalistic practices, when flashbulb-popping cameras would disrupt crowded court proceedings, are long gone. There should be no ethical presumption as to whether cameras should be allowed in a particular proceeding or not; it should be strictly a matter for the ALJ to decide on advice of counsel for the individual parties in the case.

2. Alternative Dispute Resolution

Canon 5(E) of the ALJ Model Code was promulgated prior to the passage of the Alternative Dispute Resolution Act (ADRA) in 1990.¹⁶⁰

156. *Id.* Canon 3(A)(7), at 10 (“A judge should prohibit broadcasting, televising, recording or photographing in hearing rooms and areas immediately adjacent thereto during sessions of court, or recesses between sessions, except that under rules prescribed by an appropriate authority, a judge may authorize broadcasting, televising, recording and photographing of proceedings in hearing rooms and areas immediately adjacent thereto consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice.”).

157. *Id.* Canon 5(E), at 21 (“An administrative law judge should not act as an arbitrator or mediator.”).

158. *Id.* Canon 5(F), at 21 (“An administrative law judge should not practice law.”).

159. *Id.* Canon 5(G), at 21 (“An administrative law judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters which may come before the judge.”).

160. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified as amended at 5 U.S.C. § 571–84 (2006)).

That Act states that “administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes.”¹⁶¹ The Act further states that “alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious,” and that “such alternative means can lead to more creative, efficient, and sensible outcomes” in federal administrative proceedings.¹⁶² Accordingly, the Act requires federal agencies to “adopt a policy that addresses the use of alternative means of dispute resolution and case management.”¹⁶³

Consistent with the passage of ADRA, the ABA updated its Model Judicial Code to provide that a judge could not act as an arbitrator or a mediator “unless expressly authorized by law.”¹⁶⁴ The U.S. Judicial Code does the same.¹⁶⁵ As for ALJs, at least one agency, the Federal Energy Regulatory Commission, has initiated alternative dispute resolution procedures pursuant to ADRA in which ALJs participate as settlement judges.¹⁶⁶ When FERC initiates administrative proceedings, it usually first authorizes the use of settlement procedures before initiating a formal hearing before an ALJ.¹⁶⁷ The ALJs acting as settlement judges attempt to arrive at a settlement agreement among the parties in lieu of formal litigation, either in whole or in part as to some issues. The program has been highly successful and has resulted in a large number of settlements, even in complex, multiparty cases.

The passage of ADRA and its impact on federal agency practice renders Canon 5(E) obsolete as it is currently written. Administrative Law Judges are particularly well-suited to act as arbitrators and mediators in government cases as well as in a variety of non-governmental settings, especially in areas that do not fall within the jurisdiction of their own agencies. For example, nothing should prevent a FERC ALJ from acting as an arbitrator in a patent dispute or an NLRB ALJ from acting as a mediator in a non-labor construction contract dispute. The expertise of Administrative Law Judges in resolving disputes does not have to be limited to the sphere of their own agencies.

161. 5 U.S.C. § 571 (congressional findings).

162. *Id.*

163. *Id.* § 571 note (promotion of alternative means of dispute resolution).

164. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.9 (2010).

165. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A)(4), at 12 (Judicial Conference of the United States 2011).

166. 18 C.F.R. §§ 385.603–.605 (2011).

167. *Id.* § 385.603(c)–(d).

3. *Practice of Law*

Canon 5(F) of the Model ALJ Code forbids an ALJ from practicing law. The ABA Model Judicial Code has been revised in this respect to provide that a judge “may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the judge’s family, but is prohibited from serving as the family member’s lawyer in any forum.”¹⁶⁸ The U.S. Judicial Code provides the same.¹⁶⁹

As there is no official code of ethics that applies to federal ALJs at present, and in the wake of OPM’s 2010 NPRM to drop licensure requirements for incumbent ALJs,¹⁷⁰ ALJs are free to practice law outside of their government jobs so long as they comply with the ethical requirements that apply to all federal employees.¹⁷¹ Those rules mandate that such outside employment must not conflict with the employee’s official duties, meaning that it must not be “prohibited by statute or by an agency supplemental regulation” and that it must not “require the employee’s disqualification from matters so central or critical to the performance of his official duties that the employee’s ability to perform the duties of his position would be materially impaired.”¹⁷² Also, the employee must seek the permission of the agency he or she works for in order to engage in such outside work, if required by that agency’s own regulations.¹⁷³ But with those caveats, ALJs may represent others, appear in courts as counsel and *pro se*, represent family members, and conduct legal business outside of government, so long as their bar licenses permit them to do so.

Given this flexibility, federal Administrative Law Judges should give serious consideration to whether it really makes sense to impose what is essentially the trade restraint of Canon 5(F) of the ALJ Model Code upon themselves. The Canon is already outdated in view of the ABA Model Judicial Code and the U.S. Judicial Code, which permit judges to engage in family practice and act *pro se* at the very least. By eliminating the licensure requirement entirely for incumbents, OPM is at least suggesting that it would not be averse to allowing ALJs to “moonlight” as outside attorneys.

More pointedly, ALJs, like federal employees in general, have good cause to feel resentful toward the current crop of politicians and pundits

168. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.10 (2010).

169. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A)(5), at 12 (Judicial Conference of the United States 2011).

170. Programs for Specific Positions and Examinations (Miscellaneous), 75 Fed. Reg. 61,998 (Oct. 7, 2010) (to be codified at 5 C.F.R. pt. 930).

171. 5 C.F.R. §§ 2635.802–.803 (2011).

172. *Id.* § 2635.802(a)–(b).

173. *Id.* § 2635.803.

who bash the well-deserved, and by no means excessive, pay and benefits of federal ALJs for their own political advantage. If those influential personages are so aghast at the fact that ALJs make their living off of public funds,¹⁷⁴ then they should have no problem at all if ALJs offer their skills elsewhere for private remuneration. With a two-year (and potentially, a three-year) pay freeze now in place and talk of furloughs and cuts so in vogue in the halls of Congress, allowing an ALJ to hold down a part-time job as an attorney in a field outside of his or her agency's jurisdiction would at least allow the ALJ to make up the difference that pay cuts and years of flat pay impose. Moreover, if the pay freeze becomes permanent in the future and locks ALJs into a fixed salary that cannot be augmented by step increases or bonuses,¹⁷⁵ outside employment will be the only means available to an ALJ for keeping up with the cost of living.

Moonlighting is not an alien concept in government service. Legislators in many states (e.g., Alaska, California, Louisiana, New York, Washington, and others) are permitted to engage in law practice outside of their representative duties, notwithstanding the appearance of power and influence that their political roles accord them. In recent years, the New York City Bar became concerned about potential conflicts of interest between state and client presented by the over 17% of their state legislators who are also attorneys.¹⁷⁶ The Bar seeks reforms in the financial disclosure law for legislators, requiring attorney-legislators to disclose sources and amounts of outside income, including the identity of paying clients, a description of the services rendered, and the types of fee arrangements entered into.¹⁷⁷

Federal ALJs are required to file annual public financial disclosures on

174. Such talk brings to mind the well-known scene in the movie *Casablanca* when Claude Rains, playing Captain Reynaud, whistles Rick Blaine's Café Americain to a halt, pronouncing that he is "shocked, shocked" to find that there is gambling going on in the establishment; whereupon the croupier hands the Captain his winnings on the former's way out the door, to the latter's polite thanks. *CASABLANCA* (Warner Bros. Pictures 1942).

175. The pay freeze implemented for calendar year 2011 does not affect step increases or bonuses. However, ALJs are barred by statute from receiving bonuses and their step increases are capped by the Executive Level III salary level, which is itself frozen. Hence, unlike other federal employees whose frozen pay can be mitigated by step increases and bonuses, the frozen pay of ALJs cannot be.

176. N.Y.C. BAR, REPORT ON LEGISLATION BY THE COMMITTEE ON STATE AFFAIRS, THE COMMITTEE ON GOVERNMENT ETHICS AND THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY: REFORMING NEW YORK STATE'S FINANCIAL DISCLOSURE REQUIREMENTS FOR ATTORNEY-LEGISLATORS 2 (2010), <http://www.nycbar.org/pdf/report/uploads/20071850-ReformingNYSFinancialDisclosureRequirements.pdf>.

177. *Id.* at 4.

the Office of Government Ethics' Form SF 278,¹⁷⁸ which requires disclosure of the identity of outside organizations worked for, their type, the position being held, and income over \$5,000 per year earned from the firm and from any one named client.¹⁷⁹ The designated ethics officials of each agency are tasked with reviewing these forms and using the information they contain to enforce the ethics laws. If a federal ALJ is engaged in an outside law practice, it would have to be publicly disclosed on the form, and most of the details sought by the New York City Bar for state attorney-legislators are already required.¹⁸⁰

4. *Extrajudicial Appointments*

Finally, Canon 5(G) of the ALJ Model Code prohibits an ALJ's membership on governmental panels "concerned with issues of fact or policy on matters which may come before the judge."¹⁸¹ The ALJ Model Code recognizes in its commentary that "[v]aluable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments."¹⁸² However, the ALJ Model Code warns, "The appropriateness of conferring these assignments on judges must be assessed . . . in light of the demands on judicial manpower created by today's crowded dockets and the need to protect judges from involvement in extra-judicial matters that may prove to be controversial."¹⁸³

Rule 3.4 of the ABA Model Judicial Code now says, "A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice."¹⁸⁴ The U.S. Judicial Code goes even further, stating in Canon 4(F) that:

A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any

178. See 5 C.F.R. §§ 2634.201–202 (mandating filing and listing parties that must file disclosure forms, which explicitly includes ALJs).

179. U.S. OFFICE OF GOV'T ETHICS, OGE FORM 278 11 (2011), [http://oge.gov/Forms-Library/OGE-Form-278-Automated-\(PDF\)/](http://oge.gov/Forms-Library/OGE-Form-278-Automated-(PDF)/).

180. See generally *id.*

181. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 5(G), at 21 (1989).

182. *Id.* Canon 5(G) cmt., at 21.

183. *Id.* at 21–22.

184. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.4 (2010).

event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary.¹⁸⁵

Clearly, the ABA and the federal judiciary have recognized that judges play valuable and vital roles as advisors on government panels concerned with "the law, the legal system, or the administration of justice." Federal ALJs, no doubt, would do so as well. It is commonplace among other federal employees who are asked by their agencies or other branches of the federal government to sit on special boards and committees to help decide policy questions. They do so willingly even though they, like ALJs, have crowded dockets.

It makes little sense to prohibit ALJs from serving extrajudicially on government advisory panels just because they are busy people. Chief ALJs already sit on the management committees of many federal agencies by virtue of their supervisory positions. So long as individual cases that are pending before the ALJ are not affected by such participation, the advice and counsel of ALJs on governmental panels and boards, particularly those that concern "the law, the legal system, or the administration of justice," should be welcomed and encouraged.

One wrinkle that arises in this change is in the arena of remuneration for extra work. Often, federal employees who volunteer for agency-sponsored policy committees and panels can look forward to bonuses and awards for such work. ALJs, unlike other federal employees, are forbidden from receiving bonuses or awards of any kind outside of their fixed salaries.¹⁸⁶ In light of this prohibition, the ALJ Model Code's rule against extrajudicial appointments appropriately protects those who do not wish to be pressured into performing extra work for no pay, but at the same time it unfairly shackles ALJs who genuinely *want* to volunteer for such work, even at no extra pay.

It would be more appropriate for the government to give consideration to the notion that Administrative Law Judges who perform such work should be able to receive special remuneration for working on extrajudicial government boards and committees as an exception to the overall prohibition on ALJ bonuses and awards. To avoid the appearance that doing so would turn into a disguised form of award for "performance," which is anathema to the independence and impartiality of the federal administrative law judiciary, such additional remuneration could perhaps be fixed by law at a standard rate.

185. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(F), at 14 (Judicial Conference of the U.S. 2011).

186. 5 C.F.R. § 930.206(b) (2011).

CONCLUSION

The purpose of this Article was to recommend changes to the ALJ Model Code that would align it more closely with modern federal ALJ practice and make it worthy of being adopted as the binding code of ethics for federal ALJs in the modern age. It is not the purpose of this Article to recommend the actual adoption of any code of ethics, because in the author's view ALJs have performed their duties just fine without having any of the current model and adopted codes applied to them directly. However, the gradual adherence of other federal judicial appointees to codes of ethics (with the notable exception of the U.S. Supreme Court), and the stance of the Merit Systems Protection Board that ALJs should adhere to *some* code of ethics, makes the coming of the day ever nearer that a federal ALJ Code of Ethics will be adopted or imposed. In view of the coming of that day, federal Administrative Law Judges should get ready by studying the subject now and bringing the models they have in line with what they really do.