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[Proposed revision 7/29/19]

AMERICAN BAR ASSOCIATION

NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY
GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges all federal, state, local, county, territorial, and tribal lawmakers to ensure that their respective administrative adjudicators shall be protected in their decisional independence and shall be free from improper influence on their decision making. Improper influence includes the imposition of decisional quotas that are unreasonably high or not reasonably determined. It also includes other inappropriate agency pressure to decide a case on any basis other than on the evidence and in accordance with applicable statutes, duly adopted regulations, precedents, and official and authoritative agency guidance of general applicability.

For purposes of this resolution, the term “administrative adjudicators” includes administrative law judges, administrative judges, administrative appeals judges, hearing officers, presiding officers, and any other administrative adjudicator whose exclusive role is to decide matters that entail applying a statute, regulation, or any equivalent thereto.

REPORT [proposed revision 7/29/19]

Congress enacted the Administrative Procedure Act (APA) in 1946. This Act created Administrative Law Judges (ALJs). However, since that time the use of non-ALJs has grown significantly, and now non-ALJs outnumber ALJs by more than 5:1. The decisions of ALJs and non-ALJ adjudicators in this burgeoning system touch the lives of many individuals. Some call them the "hidden judiciary," but there is nothing hidden about them. Although they are less well known than the traditional courts of Article III at the federal level, and state equivalents, administrative adjudicators (whether called ALJs, administrative judges, immigration judges, hearing officers, presiding officers or other nomenclature) adjudicate millions of administrative matters, claims, and disputes each year competently and efficiently.

Administrative agencies affect every aspect of American life, including matters as diverse as licensing, Social Security and Medicare matters, veteran's matters, regulatory violations, and certain contractual claims and appeals. Administrative adjudicators have been created by statute to decide these and many other disputed matters where rights to appeal from administrative determinations are needed. The traditional courts would be overwhelmed if those millions of disputes also had to be decided in their courtrooms. Traditional courts have neither the time nor expertise to deal with specialized matters arising from claims or disputes within the jurisdictions of these agencies.

Public acceptance of these adjudications hinges on maintaining the decisional independence of the judges who adjudicate them. Without such a policy, no system of adjudication will enjoy the confidence, trust, and willingness of the participants to abide by administrative decisions as having been fairly determined on their merits. Just as the traditional courts enjoy safeguards that preserve their impartiality in disputes that involve governmental bodies that seek to impose actions upon the governed, so must the administrative judiciary. Both the public and each agency benefit from recognition of the legitimate ability of administrative adjudicators to fairly, impartially, and dispassionately decide these disputes.

By a variety of means, however, federal and state agencies sometimes take actions that may erode the decisional independence of administrative adjudicators. Administrative actions that have the potential to bring about that result may include performance reviews, bonuses, unilateral docket management, artificial time limits, production quotas, and other steps that may threaten decisional independence. The prevalence of such actions is subject to debate. Regardless, this resolution seeks to curtail these tendencies and to maintain the ability of administrative adjudicators to hear and decide their cases based only upon the evidence of record, and pursuant to applicable legal authorities.

This resolution is not meant to lessen the protections already in place for administrative adjudicators, but rather to endorse protections from improper influence for all of them. It pursues this goal in a manner that takes account of complexities in the issues

involved, but that also puts its emphasis on the policy of promoting competent, objective, and unbiased decisional independence.

Current circumstances underscore the importance of these issues. The independence of ALJs is under exceptional pressure today as a result of Executive Order 13,843,[1] which was issued in the wake of the Supreme Court's decision in *Lucia v. SEC*.[2] Under the executive order, an ALJ appointee is now selected by the agency department head with only the requirement that they be a licensed attorney in good standing. The previous ALJ qualifications of merit selection by the Office of Personnel Management including testing; interviews, personal references and background checks; and at least a minimum number of years of litigation experience were eliminated. This altered system, if it remains in effect,[3] threatens to politicize the appointments of ALJs, which were previously nonpolitical appointments made transparently after a careful and competitive evaluation of qualifications and merit. Although appointments are not within the scope of this resolution, this recent development underscores the need for continued attention to problems of maintaining the decisional independence of administrative adjudicators.

At the same time, federal administrative law judges currently enjoy statutory protections against tools of agency influence such as performance evaluations and pay incentives, but many other adjudicators in the federal and state agencies do not. This resolution is intended to affirm the need to ensure decisional independence and protection against inappropriate pressures at all levels of government.

This resolution applies to full-time adjudicators at all levels of government. It does not apply directly to part-time adjudicators. It is recognized that, in some circumstances, agencies may properly exert "influence" on such officials on the basis of their non-adjudicative duties, acting in a manner that would be inappropriate if directed at full-time adjudicators. Nevertheless, much of the reasoning behind this resolution does apply equally well to part-time adjudicators, and agencies should give careful consideration to that situation, instead of assuming without analysis that the resolution is irrelevant to such adjudicators.

I. Current Problems

Actions by administrative agencies that may erode the decisional independence of administrative adjudicators or improperly influence them can occur in a variety of ways. This report does not undertake to identify them comprehensively, but the following examples will illustrate some of the circumstances that warrant a strong statement from the ABA.

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[1] Executive Order 13,843, *Excepting Administrative Law Judges From the Competitive Service,* 83 Fed. Reg. 32,755 (July 10, 2018).

[2] 138 S. Ct. 923 (2018).

[3] Legislation that would reverse this policy is currently pending in Congress. *See* H.R. 2429, 116th Cong. (2019).

A. Production Quotas

A recurring practice that raises concerns about impairment of decisional independence is administrative agencies' use of production quotas to induce adjudicators to decide more cases in less time. Such quotas are especially suspect when they are imposed without any objective evaluation to determine the number of cases that those judges can realistically handle, while also complying with agency rules and procedures and respecting the due process rights of the parties involved. This issue arises in a number of administrative regimes.

A particularly dramatic example of current importance involves immigration judges. This situation is highlighted in a March 2019 report by the ABA Commission on Immigration.[4] The Commission expressed concern about the use of backlog-induced case completion quotas for immigration judges, which are tied to their employment evaluations. It called for greater transparency in how the immigration standards for immigration judges operate and are applied. New quotas and deadlines were imposed on those judges as of October 2018, although not on the basis of a lack of performance or efficiency on the part of those judges. These new standards directly infringe on decisional independence. An immigration judge who fails to meet those quotas and deadlines will face discipline, which can result in termination of employment. This creates pressure on the judges to rush through their decisions to protect their own jobs. Even worse, it pressures the judges to take the factor of their own continued employment into consideration while making decisions on the bench.

By way of example, immigration judges are now required to complete at least 700 cases per year. They must meet this arbitrary quota regardless of whether such number is possible or even realistic, and that quota fails to account for variation in case complexity. Consequently, the quota puts artificial pressure on immigration judges to complete cases, no matter the cost. Worse, the imposition of a quota that is artificial and unattainable is in direct conflict with the provision of due process. Although special dispensation may be granted in certain individual cases, the chilling effect of the quota remains impactful on the immigration judges. By extrapolation, the 700-case completion quota mandates that immigration judges complete 13.46 full trials per week, which equates to 2.69 full trials per day, at 2.97 hours per trial. Yet, since immigration judges also need to take time to engage in case preparation, review motions, and engage in other off-the-bench responsibilities which cuts into this allotted time, they must weigh providing fairness and due process against failure to meet this quota and possible termination.

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[4] ABA COMM'N ON IMMIGRATION, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM 15-16 (March 19, 2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf.

B. Other Improper Influence Issues

As noted above, questions concerning decisional independence and improper influence can arise in a variety of settings. The following examples are illustrative.

First, the Social Security Administration (SSA) has drafted and is expected to propose a new regulation entitled "Hearings Held by Administrative Appeals Judges of the Appeals Council" [5] This proposal has been approved for publication by the Office of Information and Regulatory Affairs[6] but has not yet been published in the Federal Register. It would revise SSA regulations to allow administrative appeals judges, who are attorney examiners from the SSA's appeals council, to hold hearings and issue decisions in disability determination cases, where currently only ALJs perform these actions. ALJs are independent, impartial adjudicators who have been extensively vetted. Attorney examiners are employees and not ALJs. As such, they receive performance appraisals and are eligible for bonuses, making them subject to agency influence when they adjudicate and make a determination. Thus, the impending rule raise serious questions as to whether adjudicators who lack the independence safeguards of ALJs will be able to accord due process to claimants.

Second, in 2012, a respected federal immigration judge of Iranian descent was ordered to recuse herself from all immigration cases involving Iranian nationals.[7] That order came from Attorney General Eric Holder's office shortly after the judge requested permission to accept an invitation to attend an event at the White House to connect with Iranian-American community leaders. The agency continued to defend its action even after the designated DOJ agency ethics officer advised the Department that the action was "inappropriate" and "discriminatory." It was only after the judge filed a lawsuit in federal court that the agency agreed to withdraw the order, pay the judge's attorneys' fees, and settle the matter amicably.[8] This judge's case vividly illustrates the need for protection of administrative judges against arbitrary interference with their ability to perform their judicial duties.

Another subtle aspect of influencing administrative adjudication results is the arbitrary assignment of resources to any particular judge. By assigning insufficient resources to assist an adjudicator, an agency significantly curtails that judge's ability to efficiently and properly work up, review, and rule fairly on the question brought before the judge. Here, too, the judge gets the message that his or her job is made easier or more difficult by their

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[5] 83 Fed. Reg. 57,970 (Nov. 16, 2018) (Unified Agenda listing of the anticipated rulemaking).

[6] OIRA Conclusion of EO 12866 Review in RIN 0960-AI25, https://www.reginfo.gov/public/do/eoDetails?rrid=128809.

[7] *See* Complaint, Tabbador v. Holder, Case No. 2:14-cv-06309 (C.D. Cal., Aug. 12, 2014). The complaint and other documents related to the case are available in Tabbador v. Holder et al. Resource Page, https://www.cooley.com/news/insight/2015/tabaddor-resource-page (site maintained by Cooley LLP).

[8] See Settlement Agreement, Tabbador v. Lynch, Nov. 3, 2015 (available at the same site)

willingness to rule in the manner the agency wishes, rather than independently in compliance with the law and the evidence presented. The prevalence of this practice is uncertain, but to the extent it does occur on an arbitrary basis, it falls within the range of situations at which this resolution is directed.

II. This Resolution

This resolution calls on legislators at all levels of government to ensure that the decisional independence of administrative adjudicators will be preserved and that these adjudicators will be protected from inappropriate pressure to decide cases on grounds other than the evidence and applicable legal authorities.

As can be seen from the above examples, a variety of administrative actions, both subtle and overt, can raise questions about the potential for interference with the judge's decisional independence. This resolution discourages such actions through its opposition to all forms of improper influence. Although the resolution mentions quotas, it should not be narrowly read to *only* include such things. Other factors that are not expressly mentioned, but that are also a potential source of improper influence, include withholding (or granting) of bonuses, favorable (or unfavorable) performance evaluations, and promotions.

A. Production Quotas

Regarding the issue of decisional quotas, it is recognized that agencies must be free to employ bona fide performance measurement criteria in managing the job performance of agency officials, as well as employees, including administrative adjudicators. Indeed, the courts have held, apparently without exception, that reasonable productivity goals are permissible and do not infringe on the decisional independence of the adjudicator.[9] The cases distinguish, in this regard, between requirements that are designed to ameliorate backlogs and requirements that pressures adjudicators to rule in the agency's favor. The latter are impermissible,[10] but the former have been uniformly upheld.

However, productivity goals, like other legitimate management tools, should not be abused, nor used as a pretext for interfering with the decisional independence of administrative adjudicators. A leading decision in this area, *Nash v. Bowen*, distinguished between "reasonable goals" and "unreasonable quotas."[11] This resolution builds upon that distinction by identifying limits on the use of decisional goals.

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[9] Ass'n of Admin. Law Judges v. Colvin, 777 F.3d 402, 404-05 (7th Cir. 2015); Sannier v. MSPB, 931 F.3d 856, 858 (Fed. Cir. 1991); Nash v. Bowen, 869 F.2d 675, 680-81 (2d Cir. 1989); *cf*. Abrams v. SSA, 703 F.3d 538 (Fed. Cir. 2012) (upholding discipline of judge for failing to comply with instructions related to productivity). *See also* ABA SECT. OF ADMIN. LAW AND REG. PRAC., A GUIDE TO FEDERAL AGENCY ADJUDICATION 215 (2d ed. 2012) (hereinafter ADJUDICATION GUIDE).

[10] *Nash*, 869 F.3d at 681; ADJUDICATION GUIDE, *supra*, at 216-17.

[11] *Nash*, 869 F.3d at 680.

First, this resolution provides that any decisional quotas must not be "unreasonably high." That criterion is framed in general terms, but it sets forth an appropriate benchmark by which the propriety of productivity goals in specific contexts can be evaluated. For example, the analysis of the ABA Commission on Immigration, discussed above, would seem to make a compelling case that the productivity requirements currently imposed on immigration judges are unreasonably high and operate as an improper influence on those judges.

Second, this resolution also states that any decisional quota imposed on administrative adjudicators should be "reasonably determined." In other words, regardless of whether a prescribed level is found to be intrinsically too high, the agency should not arrive at it in an arbitrary fashion. Essentially, this is a specific application of the general norm in administrative law that agency action should be reached "within the bounds of reasoned decision-making."[12] The criterion should discourage agencies from imposing goals that are plucked out of the air with no support for, or explanation of, the reasons for that choice. Like "unreasonably high," this criterion is phrased in general terms, in part because of the wide range of regulatory schemes and levels of government to which it will apply. In some contexts, there would be grounds for a strong argument that any reasonable determination should rest on a systematic time-and-effort study. In other contexts, where fewer implementation resources are available, a goal based on the administrator's experience in the relevant program, suitably explained, might be considered sufficient. Again, this resolution, despite its generality, offers a benchmark by which agencies can be guided as they make decisions in particular circumstances.

B. Other Improper Influence Issues

Apart from the issue of decisional quotas, this resolution urges lawmakers to ensure that adjudicators are protected from other inappropriate pressure to decide a case on any basis other than on the evidence and in accordance with applicable statutes, duly adopted regulations, precedents, and official and authoritative agency guidance of general applicability."

This resolution does not specifically delineate what kinds of pressure are "inappropriate," in part because it applies at all levels of government, and administrative agencies vary greatly in their rules, procedures, and jurisdictional responsibilities. The general principle that it articulates can, however, serve as a starting point for consideration of how that criterion applies in particular contexts. Agency actions that affect administrative adjudicators, such as performance appraisals, awards of bonuses, and allocations of resources, can be scrutinized from this vantage point.

This resolution does address the kinds of legal authorities that administrative adjudicators should be expected to apply to the evidence, unimpeded by "inappropriate pressure." Its premise that adjudicators should apply relevant statutes and duly adopted regulations is self-explanatory. The reference to precedents recognizes that agencies often

[12] Dep't of Commerce v. New York, 139 S. Ct. 2551, 2569 (2019); *see id.* at 2585 (separate opinion of Breyer, J.) (similar).

enunciate major elements of their programs through adjudicative precedents. (In some agencies, however, some categories of adjudicative decisions are considered nonprecedential, meaning that no one, including the adjudicator, is necessarily expected to adhere to it.)

The term "guidance" is commonly used in administrative law to mean what have traditionally been called interpretive rules and general statements of policy.[13] Courts have ruled that, in general, administrative law judges and other administrative adjudicators must adhere to such pronouncements, and the expectation that they will do so is not an infringement of their decisional independence.[14] It follows that such an expectation of adherence is not "inappropriate pressure."

However, this resolution articulates some limitations on that proposition. By its terms, it applies only to agency guidance of "general applicability." This caveat is designed to prevent agencies from using narrow directives to put pressure on disfavored adjudicators. If the document is written to apply to all circumstances within the agency's sphere of responsibility where it is relevant, the potential for abuse should be reduced.

Another apprehension about guidance is that an agency might take the position that an administrator is bound by a casual pronouncement written by a lower-level official who does not necessarily speak for the agency as a whole. In order to avoid encouraging such arguments, this resolution specifies that a guidance document need not serve as a limitation on an adjudicator's decisional independence unless it is "official and authoritative."[15]

III. **Conclusion**

The framers of the Constitution recognized that one sure means of achieving true judicial independence was to isolate removal from the appointing authority and to eliminate pay and incentives for performance.[16] Their wisdom still applies today. It is now fully embodied in the Article III court system.[17] Similarly, the drafters of the Administra-

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[13] 5 U.S.C. § 553(b)(A).

[14] *See, e.g.,* CropLife America v. EPA, 329 F.3d 876, 882 (D.C. Cir. 2003); Warder v. Shalala, 149 F.3d 73, 82 (1st Cir. 1998); Iran Air v. Kugelman, 996 F.2d 1253, 1260 (D.C. Cir. 1993); Asmussen v. Comm'r, N.H. Dep't of Public Safety, 766 A.2d 678, 692-93 (N.H. 2000).

[15] *Cf*. Kisor v. Wilkie, 139 S. Ct. 2400, 2416-17 (2019) (drawing a similar distinction for purposes of explaining what kinds of agency regulatory interpretations may be entitled to judicial deference).

[16] THE FEDERALIST NOS. 78, 79 (Alexander Hamilton).

[17] U.S. CONST. art. III, § 1.

tive Procedure Act believed that only a "good cause" removal standard could truly be effective in ensuring administrative law judges true decisional independence and thus build public confidence in the administrative process and system.[18]

It is the mission of the American Bar Association *to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.*[19] This resolution seeks to further the mission by ensuring that administrative justice is delivered to all and that all decisions are based on legitimate concerns for the evidence or lack of evidence, and not based on improper external pressures on the administrative adjudicator.

Respectfully submitted,

Judson Scott
Chair, National Conference of the Administrative Law Judiciary
August 2019

[18] 5 U.S.C. § 7521 (2012).

[19] Statement of ABA President Bob Carlson, dated March 20, 2019.

GENERAL INFORMATION FORM

Submitting Entity: National Conference of the Administrative Law Judiciary

Submitted By: Judge Judson Scott, Chair, National Conference of the Administrative Law Judiciary

1. Summary of Resolution(s).

   This resolution seeks to restore public confidence in both state and federal administrative tribunals by strengthening and preserving their ability to render fair and impartial decisions in agency proceedings. One of the cornerstones of traditional judicial independence is the inability to remove a judge based upon the judge's decision or actions related to official actions. For example, only in very limited circumstances may a federal Article III judge be removed, and only then by impeachment charges passed by the House of Representatives and trial in the Senate. The Administrative Procedures Act found at 5 USC 551 (*et seq*) seeks to afford the Administrative Law Judiciary (ALJs) protection from influence by allowing removal only for limited circumstances confirmed after hearing by the Merit Systems Protection Board. Only the federal ALJs currently enjoy this insulation from official interference. There are thousands more in the federal and state administrative judiciaries who carry the same general responsibilities as ALJs, but don't enjoy the similar protections. These adjudicators go by various names, but all conduct similar fact gathering functions, are appointed in similar fashion as ALJs and issue decisions that can become final agency actions. This resolution does not delineate a certain method of ensuring insulation, and does not seek to lessen any entity protections they currently have, but rather, it seeks increased insulation for the Administrative Adjudicators who currently find their decisional independence threatened by a variety of subtle/not so subtle means by their agencies.

2. Approval by Submitting Entity.

   Yes, this Resolution has been approved by the Executive Committee of NCALJ on March 13, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously?

   No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   Currently, policy exists in the ABA calling for adoption of the principles of judicial independence and fair and impartial courts. (*See* 07A110D). While that resolution clearly called for a fair and independent judiciary, it was focused on the Article III courts, stating that the judiciary is a separate and co-equal branch of government.

This new Resolution seeks to bring the principles of fair administrative adjudication into line with those of Article III adjudication.

Next, in 2019 NCALJ is recognizing the importance of a strong and independent state administrative law judiciary and reaffirmed the ABA's opposition to any weakening of the authority of the ALJs in any state that used a central panel model of appointing judges through the introduction of a proposed resolution. The resolution recognized that it "should support the judicial independence and authority granted to the central panel administrative law judges…". Again, this Resolution recognizes the importance of decisional independence and freedom from improper influence for State Central Panel ALJs.

This Resolution addresses the need for the administrative judiciary to be independent and free from improper influence, recognizing the same concerns have plagued other adjudicatory systems also need to be eliminated in the administrative adjudication arena.

This proposed Resolution brings Administrative Adjudicators under the same umbrella as all other adjudicators to avoid the pitfalls that improper pressure and influence can have on the ability to adjudicate fairly and maintain public trust.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

   Not Applicable

6. Status of H.R. 2429, the ALJ Competitive Service Restoration Act, 116th Congress (2019-2020).

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   Support passage of current federal legislative efforts and encourage development of other means to ensure administrative judicial independence. For example, but not by way of limitation, reaffirming the APA, creation of a federal central panel, and recognition of an independent court status for federal Administrative Adjudicators.

8. Cost to the Association. (Both direct and indirect costs)

   Passage of this resolution will not bear any costs for the Association.

9. Disclosure of Interest. (If applicable)

   Not Applicable

10. Referrals.

ABA entities contacted include: Judicial Division, Section of Litigation, TIPS, Civil Rights and Social Justice, GPSLD, Section of Administrative Law and Regulatory Practice, and Commission on Immigration.

11. Contact Name and Address Information.

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12. Who will present this resolution in the House?

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution encourages federal, state, and local governments to take all measures to maximize the ability of all Administrative Adjudicators to render decisions, freely, fairly, and independent of agency interference.

2. Summary of the Issue that the Resolution Addresses

All persons appearing before an Administrative Adjudicator are entitled to a fair and impartial hearing that fully comports with the requirements of due process. Any outside considerations that could impact the Administrative Adjudicator's independent decision-making in a given case, whether they be job incentives, personal allegiances, or otherwise, are anathema to the judges' constitutional duties. These resolutions seek to address those fundamental concerns.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The resolution will encourage Congress and state, territory, tribal, and local governments to take steps to insulate the administrative judiciary from improper influences from their employing agencies.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None.