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Kent H. Barnett

University of Georgia School of Law, khbarn@uga.edu

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Due Process vs. Administrative Law

By Kent Barnett

Wall Street Journal

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The Securities and Exchange Commission has recently come under fire for pressuring its in-house administrative-law judges to rule in its favor during agency enforcement proceedings. These are serious charges because ALJs are guaranteed independence by statute. More troubling, but largely overlooked, are the judges in federal regulatory proceedings who lack statutory independence.

They have many titles, including hearing officer, appeals officer or immigration judge. But they are often collectively referred to as administrative judges. More than 3,000 AJs -- approximately double the number of administrative-law judges -- work in numerous federal agencies, including the IRS and the Equal Employment Opportunity Commission.

Administrative judges preside over trial-like hearings that award or deny benefits or licenses, assess penalties for regulatory or statutory violations, or resolve private disputes. Agencies often appear in proceedings opposite the parties they regulate.

Significant statutory safeguards exist for administrative-law judges. Federal regulatory agencies appointing one must choose from three candidates whom another independent agency, after administering an exam, has deemed the most qualified. ALJs cannot receive bonuses or performance reviews from agencies. They cannot report to enforcement officials and generally cannot speak to agency officials about a case without the other party present. Agencies can discipline or remove them only if another independent agency determines that "good cause" exists for doing so.

Administrative judges are an entirely different matter. Federal agencies can appoint their own AJs directly and reward them with bonuses after agency-led performance reviews. Agency officials can discuss matters in dispute privately with them. Nearly all AJs lack statutory protection against arbitrary discipline or removal.

Agency control over AJs' livelihoods necessarily creates the appearance of partiality. As the Supreme Court has recognized -- most recently in *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010) -- "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."

Likewise, the Supreme Court emphasized in *Caperton v. A.T. Massey Coal* (2009) that "fears of bias can arise when . . . a man chooses the judge in his own cause." There, the court required a justice on West Virginia's Supreme Court of Appeals to recuse himself from a case in which a significant donor to his election campaign was a party.

Whether AJs are actually biased, or agencies sway them, is not the issue. Simply the appearance of partiality damages due process.

Reform is necessary, and the first step is plain. While enforcement proceedings before administrative-law judges are imperfect and can be improved, Congress should require that ALJs, or AJs with substantially similar statutory independence, preside over all agency hearings. Agencies should move to ensure the same. And they should do so before federal courts make them.
