RESOLVED, That the American Bar Association urges Congress to ensure that all Administrative Adjudicators, whether designated as Administrative Law Judges, Administrative Judges, Immigration Judges, Administrative Appeals Judges, Hearing Officers, Presiding Officers, or any other Administrative Adjudicator who decides matters of statute, regulation, or any equivalent thereto shall be free from improper influence in decision-making, including decisional quotas or agency pressure to decide a case on any basis other than on the evidence and in accordance with duly adopted agency rules and regulations, and that their decisional independence shall be protected; and

FURTHER RESOLVED, That the American Bar Association urges all state, local, county, territorial and tribal lawmakers to ensure that their respective Administrative Adjudicators, whether designated as Administrative Law Judges, Administrative Judges, Administrative Appeals Judges, Hearing Officers, Presiding Officers, or any other Administrative Adjudicator who decides matters of statute, regulation, or any equivalent thereto shall be free from improper influence in decision-making, including decisional quotas or agency pressure to decide a case on any basis other than on the evidence and in accordance with duly adopted agency rules and regulations, and that their decisional independence shall be protected.
REPORT

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 out number ALJs more than 5:1. A burgeoning system now exists of ALJs and non-ALJ adjudicators, whose decisions are impactful and touch the lives of many individuals. Some call them the “hidden judiciary,” however, there is nothing hidden about them. They are less well known than the traditional courts of Article III at the federal level, and state equivalents, however, 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. This resolution seeks to ensure that public confidence in these less well-known adjudications will remain high.

Administrative agencies affect every aspect of American life, including matters as diverse as licensing, Social Security and Medicare matters, Veterans matters, regulatory violations and certain contractual claims and appeals. Administrative Adjudicators were created by statute to decide unresolved disputed matters where appellate rights from administrative determinations were 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.

By a variety of means, some subtle and others not so subtle, federal agencies have attempted to erode the decisional independence of Administrative Adjudicators. See discussion, infra, Section I. Whether by performance reviews, bonuses, unilateral docket management, artificial time limits, production quotas, or by myriad other ways, Administrative Adjudicators have had their decisional independence threatened. This resolution seeks to end that threat and to restore the full ability of Administrative Adjudicators to hear and decide their cases only upon the evidence of record, and pursuant to the applicable statutes, as well as the rules and regulations which were duly adopted by their respective agencies through formal rule making.

The choice of which avenue to follow to secure decisional independence is not specifically delineated because federal agencies vary in their rules and procedures and jurisdictional responsibilities. This resolution is not meant to lessen the protections already in place for a variety of Administrative Adjudicators but rather to increase protections from improper influence for all of them. Public confidence hinges on a policy of competent, objective and unbiased decisional independence. 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. As much as the traditional courts enjoy the recognition of impartiality from the governmental bodies that seek to impose actions upon the governed, so should the administrative judiciary. Both the public and each agency will benefit from a recognition of the legitimate ability of the administrative adjudicator to fairly, impartially, and dispassionately decide disputes.
based solely upon the evidence and pursuant to the applicable statutes, as well as the
duly adopted rules and regulations of that agency.

I. Current Federal Problems

Administrative Adjudicators do not enjoy the full protections of the traditional judici-
ary. In the recently revised federal system after the *Lucia*, 585 U. S. _____, 138 S.Ct.
923 (2018) decision and resultant Executive Order 13843 (July 10, 2018)
\(^1\), an ALJ ap-
pointee 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 threatens to politicize the appointments of ALJs which
were previously nonpolitical appointments made transparently after a careful and com-
petitive evaluation of qualifications and merit.

Of significance for this Resolution, the Supreme Court, in *Lucia*, determined
that federal ALJs were “inferior officers of the United States” under the Appointments
Clause of the United States Constitution, rather than “mere employees” of their agencies
after applying a test of the judicial functions they performed. Slip. Op., at 12. This focus
on the judicial duties performed blurs the distinctions between many federal adjudicators
and ALJs because their judicial duties and functional roles vary from agency to agency.
Further, many federal Administrative Adjudicators perform very similar roles when it
comes to administrative adjudication, regardless of position or title. Yet, as currently sit-
uated, only ALJs have the statutory protections of the APA against many traditional
means of agency influence such as performance evaluations and pay incentives. As this
report will document, even the ALJs are being subjected increasingly to improper agency
pressure and influence, despite their APA protections. The situation is even worse for
the other federal Administrative Adjudicators who are not ALJs and, as is discussed in
the following section, for state and other non-federal Administrative Adjudicators, as well.

A. Agency Interference in the Federal Sector

By a variety of means, some subtle and others not so subtle, federal agencies
have attempted to erode the decisional independence of ALJs and non-ALJ adjudi-
cators. *See discussion, infra, sections B and C.* Consequently, this resolution seeks
to increase protections for all Administrative Adjudicators from improper influence in
their decision-making. Without lessening protections already in existence, or man-
dating a specific path to implementation of defined types of protection, this resolution
reaffirms the policy of the ABA that all Administrative Adjudicators at every level of
government be free to decide cases fairly, impartially, and without fear of reprisal or
discipline, so that the public confidence in these myriad adjudications will be justified.

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\(^1\) Executive Order 13843 can be read in its entirety at the following website or URL:
https://www.bing.com/search?q=Excepting+Administrative+Law+Judges+from+the+Competitive+Ser-
vices&qs=n&form=QBLH&sp=-1&pq=&sc=0-0&sk=&cvid=AD35E3F4EC7F433F9927B4FE53F3CF49
**B. Administrative Law Judge Interference and Threats**

1. **Production Quotas** - The Social Security Administration (“SSA”) was recently exposed as pushing its ALJs to produce more and more case decisions and dispositions. See Complaint in *Association of Administrative Law Judges v. Colvin*, Case No. 1:13-cv-02925, Document #1, Filed 04/18/13 (N.D. IL), Exhibit G, Memorandum of Social Security Administration Inspector General, February 6, 2008. These quotas have been imposed arbitrarily without any objective or valid time/work process evaluation to determine realistic numbers of cases which can be properly handled by those judges, while also complying with agency rules and procedures and the due process rights of the parties involved. *Id.* Judges who have missed the numbers of required case dispositions have been punished through loss of work at home privileges, or by receiving formal written directives to produce 500-700 policy compliant decisions a year which are placed into their personnel files as the potential basis for further punitive action against them.

For example, an SSA ALJ decided to retire early when pressured by the SSA to schedule more hearings than he could prepare for ethically. Prior to becoming an ALJ in 2010, the judge served as an Air Force Judge Advocate General for 21 years, retiring as a Colonel. Since his appointment as an ALJ in 2010, he had consistently scheduled 36-42 hearings per month and had annual dispositions in excess of 400 cases, well within the median for the SSA ALJs as a whole. However, the judge was given a letter of reprimand for failing to schedule 50 hearings per month. He recognized that the agency’s emphasis on quantity, at the expense of quality, conflicted with his sense of duty and ethical obligations. As a result, the judge decided to retire a full year before early retirement eligibility and he will not be eligible for any civilian retirement benefits until 2026.

2. **Rule Making** – The SSA issued two Proposed Rules which will eradicate a fair due process hearing and harm constituents. *Id.* The first is a Proposed Rule entitled – “Setting the Matter for the Appearance of Parties and Witnesses at a Hearing.” This rule eliminates the claimant’s decision regarding whether to have an in-person hearing and instead makes this totally at the SSA’s sole discretion. Claimants should have the opportunity to be seen in person so the ALJ can better understand their physical and mental limitations. There are many fine details particular to a person which simply do not register on a video screen that can affect the outcome of a case. Claimants deserve an ALJ who understands their local challenges including access to health care and the familiarity of the type of injuries that can arise from local industries. This change would deprive millions of Americans of their right to due process and could result in hearings which are less fair and less efficient. Congress has urged the SSA to maintain its current policy, which allows claimants to choose to use video hearings on a voluntary basis or to have an in-person hearing if the party chooses to do so.

The second is a Proposed Rule entitled “Hearings Held by Administrative Appeals Judges of the Appeals Council” which attempts to 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. A de novo disability hearing before an ALJ is essential to due process. 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. This Proposed Rule was approved by Office of Management and Budget but has not yet been published in the Federal Register.

3. **Pressure to find in favor of employing agency** - A white paper examining agency pressure exerted on ALJs at the Securities and Exchange Commission was recently published by Lucille Gauthier. See, “Insider Trading: The Problem with the SEC’s In-House ALJs.”\(^2\) In that examination, Judge McEwen candidly stated that she felt pressure to decide cases in favor of her agency, rather than independently. The white paper went on to examine case outcomes before ALJs at the SEC over the past several years and found that the agency enjoyed much better outcomes in cases decided before its ALJs than similar cases decided in the U.S. District Courts.

It is further recognized by the drafters that in order to help ensure a qualified, independent administrative law judiciary there must be a transparent appointment process. While it is doubtful that the ALJ Competitive Service Restoration Act merit-based selection process will ever encompass the thousands of Administrative Adjudicators who are not ALJs, these judges' decisional independence must be ensured as well.

**C. Immigration Judges (Non-ALJ Adjudicator Interference)**

This resolution recognizes that decisional independence is also gained by protection from reprisal by improper means or through improper influence. The ABA Commission on Immigration recently issued statements regarding the lack of safeguards for the immigration courts from these same problems in its report of March 20, 2019. [https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf) The reasoning in that comprehensive report is consistent with this Resolution and fully applies to all Administrative Adjudicators.

The method needed to protect each group of Administrative Adjudicators is not defined here. Improper influence is not defined for each, nor should it be. Broadly speaking, it is anything extra-judicial, including outside pressure or things the adjudicator is pushed to factor into the decision other than the law, formally adopted agency rules and regulations and the evidence presented. It is precisely this improper influence which this Resolution seeks to eliminate. Such improper pressures or influence are exemplified by some non-exhaustive listed examples that have occurred to Administrative Adjudicators.

\(^2\) 67 Emory Law Journal 123 (2017)
In 2012, a respected federal immigration judge of Iranian descent, was ordered to recuse herself from all immigration cases involving Iranian nationals. Complaint, Tabbador v. Holder, et al., Case No. 2:14-cv-06309 (C.D. CA); https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf That order came from Attorney General Eric Holder's office shortly after the judge was invited to attend an event at the White House to connect with the Iranian-American community leaders. The agency continued to defend its action even after the designated DOJ agency ethics officer informed 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 offensive order, pay the judge’s attorneys’ fees, and settle the matter amicably. This judge’s case illustrates not only the need for protection of administrative judges against arbitrary conduct and interference with their ability to perform their judicial duties, but also that officials of both political parties have engaged in such actions. This overt action ordering the recusal of the judge based solely on the judge's place of national origin is an obvious discriminatory effort. More significantly, it also illustrates actions taken and pressures imposed against Administrative Adjudicators outside the proper judicial arena.

In its March 19th Report referenced above, the Commission on Immigration expressed concern about the use of backlog-induced case completion quotas for Immigration Judges which are tied to their employment evaluations, and 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 in October 2018 despite no lack of performance or efficiency by those judges, however the 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. The American Bar Association has recommended an Immigration Court model that embodies the ideals proposed by the Institute for Advancement of the American Legal System:
“These models stress judicial improvement as the primary goal, *emphasize process over outcomes*, and place a high priority on maintaining judicial integrity and independence.” (emphasis added) See ABA Resolution 101B, adopted August 6, 2001.

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, the 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 willingness to rule in the manner the agency wishes, rather than independently in compliance with the law and the evidence presented.

As can be seen from these examples, both subtle and overt efforts are made to affect the judge’s decision-making ability. This resolution discourages efforts to interfere by condemning all forms of improper influence. Although the resolution mentions quotas, the resolution should not be so narrowly read to *only* include such things. As the examples illustrate, wide-ranging agency abuse can take many shapes. Other factors not mentioned, but also recognized as improper influence include withholding (or granting) of bonuses, favorable (or unfavorable) performance evaluations, and promotions. Report of the ABA Section of Administrative Law on proposed changes to the Administrative Procedure Act (February 2005).

II. Corrective Efforts and Remaining Problems at the State Level

Many states have now moved to a central panel model for both selection and assignment of ALJs to adjudicate agency disputes. This expanding system brings the Administrative Adjudicators under a single administrative organization and then assigns or details them to the state agencies which require their judicial services. The method of assignment varies, but the common benefits are reduced cost by eliminating redundant judicial administration, improved public perception of transparency, judicial independence and fairness and improved judicial satisfaction. The number of jurisdictions which have adopted central panel systems continues to steadily increase and the benefits of that system are perceived and now numbers about 35 states and local jurisdictions.

There are many different types of central panel organizations. Some states do not use the central panel judges to decide all state agency disputes. Others use the central panel to assign judges to the differing agencies so that the adjudicator is not perceived to be an employee of the state agency involved in the dispute. Some also use the central panel to examine and qualify potential administrative adjudicator candidates to depoliticize the selection, much like the role the federal Office of Personnel Management previously had in the selection of candidates for federal ALJs. The point is that *all* state and local central panels recognize on some level that separation of the adjudicator from the agency builds trust and confidence in the public so that the litigants are far more likely to accept the decision of the judge.
Unfortunately, the state administrative systems are subject to many of the same pressures and problems detailed above. Additional problems are denial of final decision authority to their Administrative Adjudicators so that the judge’s decision becomes a recommendation to the agency head who can independently decide whether to follow it or make his or her own independent decision. There may be some reasons to reserve the final authority to prevent erroneous decisions, however it is widely perceived that this causes the perception that the judge’s decision is not independent. It is recognized that an appellate system to review the judge’s decision offers a more objective and transparent method of addressing judicial errors, while preserving confidence in the independence of that decision-making process. Although those which have adopted the central panel system have mitigated many of these problems, improper pressure and influences upon their Administrative Adjudicators remain and support the expansion of this Resolution to also encompass state, local, territorial and tribal Administrative Adjudicators.

Additionally, good cause removal requirement protections in many states also help insulate their administrative judiciary from arbitrary action or reprisal for unpopular decisions.

This resolution recognizes the need for a strong ABA policy statement to speak against improper agency incursions into the qualified decisional independence of Administrative Adjudicators. Application of this Resolution to state and local administrative adjudication will also provide a strong tool to combat related erosion of adjudicative independence through performance reviews, production quotas, arbitrary discipline, pay bonuses, and other direct and indirect efforts to affect the work performance of their administrative judiciary.

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. Alexander Hamilton, Federalist No. 78, 521-30, (28 May 1788), Section 2, The framers felt, as did the drafters of the Administrative Procedure Act, that only "good cause removal" could truly be effective in ensuring the adjudicator true decisional independence and thus build public confidence in the judicial process and system. Id.; 72 VA. L. REV. 219, 232 (1986). Their wisdom still applies today. It is now fully embodied in the Article III court system.

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. Statement of ABA President Bob Carlson, dated March 20, 2019. 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 external pressures on the administrative adjudicator.
Respectfully submitted,

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


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.**

Administrative Law and Regulatory Practice Section  
Civil Rights and Social Justice Section  
Commission on Immigration  
Government and Public Sector Lawyers Division  
Judicial Division  
Litigation Section  
Tort Trial and Insurance Practice Section

11. **Contact Name and Address Information.**

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12. **Who will present this resolution in the House?**

Hon. Dean Metry  
Delegate to the House of Delegates  
National Conference of the Administrative Law Judiciary  
601 25th Street  
Galveston, TX 77550  
dean.c.metry@uscg.mil
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.