

# Dismissing Decisional Independence Suits

Jennifer Nou<sup>†</sup>

## INTRODUCTION

Administrative adjudication is poised for avulsive change. The Supreme Court recently pronounced some administrative law judges (ALJs) constitutional officers that must be appointed by the President, a department head, or a court of law.<sup>1</sup> Shortly thereafter, the Trump Administration issued an executive order paving the way for its political appointees to exert more control over ALJ hiring across the executive branch.<sup>2</sup> Its Department of Justice then issued a confidential memo attempting to weaken the standards for ALJ firing.<sup>3</sup> Whether these moves will result in more politicized decision-making remains to be seen. Agency-specific hiring practices could prioritize subject-matter expertise, but they could also facilitate ideological screening (or both).

These latest developments reflect long-running debates about agency adjudication. Chief among them is the central tension between agency management and ALJ decisional independence. On the one hand, agency heads have long sought means of ex ante control over their adjudicators, aware that their ability to review and reverse ALJ decisions ex post is a resource-limited one.<sup>4</sup> On the other hand, ALJs have often insisted on their right

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<sup>†</sup> Professor, The University of Chicago Law School. Many thanks to Saul Levmore for helpful comments. Benjamin Kloss provided excellent research assistance.

<sup>1</sup> See *Lucia v Securities and Exchange Commission*, 138 S Ct 2044, 2054 (2018).

<sup>2</sup> Executive Order 13843, 83 Fed Reg 32755 (2018). In the previous regime,

[a]lthough the agency for which an ALJ works directly appoints the ALJ, an independent agency, the Office of Personnel Management (“OPM”), limits the choice to the three highest-scoring candidates based on written examination and other scores. To certain agencies’ chagrin, the OPM does not consider candidates’ subject-matter expertise but instead seeks to hire generalists.

Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 Mo L Rev 1023, 1025 (2016) (citations omitted).

<sup>3</sup> Alison Frankel, *In Confidential Memo to Agency GCs, DOJ Signals “Aggressive” Stand on Firing ALJs* (Reuters, July 23, 2018), archived at <http://perma.cc/9Q85-JQE4>.

<sup>4</sup> See 5 USC § 500 et seq; Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment in Writing? The APA, ALJs, and SSA*, 55 Okla L Rev 203, 205 (2002) (observing that

to decisional independence, the inchoate idea that their judgments should be free from interference.<sup>5</sup> So ingrained is this conviction that ALJs have sued their own agencies to protect it.<sup>6</sup>

Some of these lawsuits have been heard by Judge Richard Posner (or “Dick” as he insists his former law clerks call him, though I’ll refer to him more formally here). Posner has long been an astute observer and critic of administrative adjudication. Over the course of his thirty-five years on the federal bench, he authored over one hundred opinions involving ALJs—almost double that number when you include immigration judges as well.<sup>7</sup> Suffice to say that Posner was not impressed.<sup>8</sup> He criticized Social Security Administration (SSA) ALJs for carelessly invoking credibility determinations and being misinformed about the facts of mental illness.<sup>9</sup> He characterized immigration adjudication as having “fallen below the minimum standards of legal justice.”<sup>10</sup> His extrajudicial writings have expressed further exasperation and suggested reforms.<sup>11</sup>

This Essay, written in commemoration of Posner’s retirement from the bench, uses his judicial opinions on decisional independence as a springboard to consider a broader question: When actors within an administrative agency disagree about the scope of their respective powers, which institution should adjudicate this dispute? The first Part discusses traditional barriers to a judicial forum that decisional independence suits face: standing and statutory preemption. It critically examines opinions that Judge

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“many agency managers see the use of agency review, even if it is de novo review, as ineffective to provide a check on the independence of the ALJ”).

<sup>5</sup> See James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 Wake Forest L Rev 1191, 1209 (2006) (“Many reliable and prominent administrative law scholars, courts, and administrative judges use the word ‘independence’ to describe administrative judges, and seem to assume that administrative judges are expected to share this attribute with judicial branch decisionmakers.”) (citations omitted).

<sup>6</sup> See, for example, *Association of Administrative Law Judges v Heckler*, 594 F Supp 1132, 1133 (DDC 1984).

<sup>7</sup> Westlaw search, AU(posner) & “administrative law judge”, Feb 2019 (listing 128 cases); Westlaw search, AU(posner) & “immigration judge”, Feb 2019 (listing 78 cases).

<sup>8</sup> See Richard A. Posner, *The Federal Courts: Challenge and Reform* 265–70 (Harvard 1999) (criticizing the quality of appellate review within administrative agencies and proposing the expansion of specialized appellate review to relieve burdens on Article III courts).

<sup>9</sup> See *Martinez v Astrue*, 630 F3d 693, 694–95 (7th Cir 2011).

<sup>10</sup> *Benslimane v Gonzales*, 430 F3d 828, 830 (7th Cir 2005).

<sup>11</sup> See, for example, Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 Chi Kent L Rev 953, 961 (1997) (proposing reforms to the appellate review process within administrative agencies).

Posner has written on both issues. The second Part then assesses the reasons why federal courts are not well-placed to adjudicate decisional independence claims, which are at their root managerial questions requiring political tradeoffs. Unlike traditional separation-of-power cases, disputes between ALJs and agency heads are internal to agencies and the executive branch. This Essay thus concludes that the trend toward judicial dismissal of ALJ suits based on the Administrative Procedure Act<sup>12</sup> (APA) is a salutary one.

### I. POSNER ON DECISIONAL INDEPENDENCE

Agency adjudication is often conducted through formal trial-type proceedings presided over by ALJs. ALJs hear a range of cases—from benefit claims to securities enforcement actions to radio licensing proceedings.<sup>13</sup> Most of these ALJs reside in the Social Security Administration: in 2018, they made up about 1,600 of 2,000 ALJs in federal government.<sup>14</sup> Congress, in turn, has insulated ALJs in various ways through the APA.<sup>15</sup> Agency heads, for example, cannot fire ALJs without cause.<sup>16</sup> They cannot set ALJ pay levels, nor dock salaries without reason.<sup>17</sup> To the contrary, salaries are fairly standardized and untethered from performance reviews.<sup>18</sup> ALJs must also be assigned to cases in rotation “so far as practicable,” instead of at agency head whim.<sup>19</sup> More generally, the APA states that ALJs “may not perform duties inconsistent with their duties and responsibilities as administrative law judges.”<sup>20</sup>

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<sup>12</sup> 60 Stat 237 (1946), codified at 5 USC § 500 et seq.

<sup>13</sup> See L. Hope O’Keeffe, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence versus Employee Accountability*, 54 Geo Wash L Rev 591, 591 (1986).

<sup>14</sup> Joe Davidson, *Trump Order Risks “Politicization” of Administrative, Mostly Social Security, Judiciary* (Wash Post, July 13, 2018), online at <http://www.washingtonpost.com/news/powerpost/wp/2018/07/13/trump-order-risks-politicization-of-administrative-judiciary> (visited Feb 23, 2019) (Perma archive unavailable).

<sup>15</sup> See 5 USC §§ 5372, 7521.

<sup>16</sup> 5 USC § 7521.

<sup>17</sup> 5 USC §§ 5372, 7521.

<sup>18</sup> 5 USC § 5372. See also O’Keefe, 54 Geo Wash L Rev at 592–94 (cited in note 13).

<sup>19</sup> 5 USC § 3105.

<sup>20</sup> 5 USC § 3105.

Many cite the APA as the legal source of ALJ decisional independence.<sup>21</sup> Decisional independence is an amorphous concept reflecting the hybrid status of ALJs. On the one hand, ALJs serve a quasi-judicial function: they preside over trial-like cases. On the other hand, ALJs are policymaking subordinates within agencies.<sup>22</sup> In other words, ALJs hold adjudicatory proceedings but also reside in the lower ranks of the executive branch hierarchy. ALJ decisional independence is thus distinct from the more familiar notion of Article III judicial independence.<sup>23</sup> But how? Many have struggled for a crisp delineation, with some ultimately concluding that the notion of decisional independence is a “myth.”<sup>24</sup> In this view, independence is concerned with autonomy from other branches of government. But ALJs are subject to robust mechanisms of executive branch control, rendering the search for independence imprecise and misleading.<sup>25</sup>

Indeed, agency heads can review ALJ legal and factual determinations *de novo*. The only constraint is that ALJ factfinding remains on the record subject to judicial review.<sup>26</sup> Pursuant to internal procedures for review, agency heads can reverse ALJ determinations and even hold new proceedings to displace those held below.<sup>27</sup> Agency heads, as mentioned, now also have the ability to hire ALJs in line with their preferences.<sup>28</sup> Previously, they had been constrained by a separate process coordinated by the Office of Personnel and Management that involved competitive merit examinations.<sup>29</sup> In this sense, the balance of power has recently shifted to agency heads.

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<sup>21</sup> See, for example, *Ramspeck v Federal Trial Examiners Conference*, 345 US 128, 132 (1953) (noting that in the APA, “Congress intended to make hearing examiners ‘a special class of semi-independent subordinate hearing officers’ by vesting control of their compensation, promotion and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees”).

<sup>22</sup> See Moliterno, 41 Wake Forest L Rev at 1209 (cited in note 5).

<sup>23</sup> See *id.*

<sup>24</sup> See generally *id.*

<sup>25</sup> *Id.* at 1211 (“[W]hat makes administrative judges not fundamentally independent is that their very decisions are reviewed and subject to reversal on law and policy grounds by their agency, their nonjudicial branch agency.”).

<sup>26</sup> See *Universal Camera Corp v National Labor Relations Board*, 340 US 474, 488 (1951) (“[A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial.”); 5 USC § 706 (describing the scope of judicial review of agency actions, findings, and conclusions).

<sup>27</sup> 5 USC § 557.

<sup>28</sup> See generally Executive Order 13843, 83 Fed Reg 32755 (cited in note 2). ALJs must “possess a professional license to practice law.” *Id.* at 32756.

<sup>29</sup> See Barnett, 81 Mo L Rev at 1025 (cited in note 2).

Agencies like the SSA have also experimented with other means of oversight. But ALJs have swiftly met many of these initiatives with lawsuits filed directly against the agency.<sup>30</sup> Their unifying claim has been that these managerial efforts undermined ALJ decisional independence. In other words, the adjudicators argued in court that politically appointed administrators were attempting to skew their decision-making. Take, for example, two paradigmatic cases heard by Judge Posner: *D'Amico v Schweiker*<sup>31</sup> and *Association of Administrative Law Judges v Colvin*.<sup>32</sup> Both cases involved ALJs challenging SSA directives. In both, the ALJs lost, though for different reasons. Both resulted in opinions by Judge Posner that raised tensions with other circuits.

In *D'Amico*, the Social Security Commissioner had adopted a new policy concerning the “retroactive cessation” of disability benefits.<sup>33</sup> ALJs had previously made a factual finding regarding the date on which a disability ceased to exist. Under the new policy, however, the commissioner deemed the relevant date to be when the Social Security recipient received notice that her benefits were being terminated.<sup>34</sup> As a result, ALJs no longer possessed discretion to determine this issue. They thus sought an injunction but lost their case on the merits in district court.<sup>35</sup> On appeal, however, the immediate question for Judge Posner was whether the ALJs had standing to sue.<sup>36</sup>

Standing doctrine, of course, arises from the constitutional requirement that federal courts adjudicate only “cases” and “controversies.”<sup>37</sup> A plaintiff must show that she has suffered or will suffer an injury in fact; that the injury is fairly traceable to the defendant; and that the injury will be redressable.<sup>38</sup> Posner first gamely analyzed the alleged injury. Had the instruction threatened ALJ hours or pay, Posner observed, the ALJs would likely have standing.<sup>39</sup> The only harm they actually suffered in the case, however, was the diminishment of their discretion. While one

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<sup>30</sup> See, for example, *Nash v Califano*, 613 F2d 10, 12 (2d Cir 1980); *Heckler*, 594 F Supp at 1133.

<sup>31</sup> 698 F2d 903 (7th Cir 1983).

<sup>32</sup> 777 F3d 402 (7th Cir 2015).

<sup>33</sup> *D'Amico*, 698 F2d at 904.

<sup>34</sup> See *id* at 905.

<sup>35</sup> *Id* at 904.

<sup>36</sup> *Id* at 905.

<sup>37</sup> US Const Art III, § 2.

<sup>38</sup> *Lujan v Defenders of Wildlife*, 504 US 555, 560–61 (1992).

<sup>39</sup> *D'Amico*, 698 F2d at 905.

might have thought that was the end of the matter—no standing here—Posner continued: “Discretion is power.”<sup>40</sup> Thus, a “reduction in discretion is a reduction in an important though nonpecuniary form of compensation for a judge.”<sup>41</sup> In other words, Posner tantalizingly suggested that diminished discretion alone might be enough to confer standing.

Posner’s ultimate approach, however, was characteristically pragmatic.<sup>42</sup> Standing doctrine, in his view, serves many purposes. One important function is to allow judges to screen out suits better pursued by a different party. “Better” can mean having the right incentives for vigorous litigation,<sup>43</sup> but it can also refer to other considerations. In this case, Posner expressed concern about the broader consequences of allowing ALJs to bring suit—in particular, the threats to the appearance and reality of impartiality that would result. Because benefit cessation would no longer be retroactive, the new SSA policy would ultimately help Social Security benefit recipients. The ALJs argued, however, that it could result in beneficiary harms as well.<sup>44</sup> If that were the case, Posner concluded, beneficiaries would then be the appropriate party to bring the case and not the ALJs themselves. ALJs, by contrast, should remain neutral “umpires” between beneficiaries and the SSA.<sup>45</sup>

Judge Posner’s observations, however, elide some of the unique features of social security benefit adjudication. Unlike some agencies, the SSA adjudicatory process is “inquisitorial”—that is, nonadversarial.<sup>46</sup> The government is not represented by counsel, and SSA claimants often are not as well. Even when they are, the ALJ directly questions the claimant and witnesses. The ALJ also has a large investigatory role in obtaining evidence from doctors and vocational experts.<sup>47</sup> In this manner, “the ALJ not

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<sup>40</sup> *Id.* at 905.

<sup>41</sup> *Id.*

<sup>42</sup> For additional analysis of Judge Posner’s approach to standing doctrine, see generally Eugene Kontorovich, *Posner’s Pragmatic Justiciability Jurisprudence: The Triumph of Possibility over Probability*, 86 U Chi L Rev 1117 (2019).

<sup>43</sup> *D’Amico*, 698 F2d at 905–06.

<sup>44</sup> *Id.* at 906.

<sup>45</sup> *Id.*

<sup>46</sup> See Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Colum L Rev 1289, 1301–02 (1997).

<sup>47</sup> See *id.* at 1303.

only decides the case, but also has both the authority and the responsibility to investigate the facts and develop the record.”<sup>48</sup> As a result, SSA ALJs are hardly “umpires” between the agency and claimants, but rather adopt a more active factfinding function.<sup>49</sup> Allowing them to bring suit in this case would thus not necessarily threaten their adjudicatory role, which is already heavy-handed. Moreover, ALJs are arguably well-positioned to understand the impact of policy changes on the adjudicatory process.

Perhaps in recognition of this reality, Posner allowed that there may be circumstances in which ALJs should be granted standing to safeguard their decisional independence. Specifically, he proposed a distinction between “housekeeping” and “substantive” directives, the former of which can be challenged by ALJs while the latter cannot.<sup>50</sup> Housekeeping measures, in his view, are those that do “not put the judicial officer who sues to enjoin it in the position of taking sides in controversies that he is supposed to adjudicate impartially.”<sup>51</sup> Substantive directives by contrast are those that do.

Posner then invoked this distinction to distinguish a Second Circuit case that granted an ALJ standing.<sup>52</sup> There, an ALJ sued after the SSA implemented a number of new measures. The most prominent was the SSA’s Peer Review Program. The program gave ALJs instructions regarding hearing and opinion length, evidentiary sufficiency, and use of expert testimony.<sup>53</sup> In addition, agency leaders expected ALJs to produce a specified number of decisions per year.<sup>54</sup> They also demanded an average fifty percent reversal rate across the agency.<sup>55</sup> In Posner’s view, these peer review and production quotas were housekeeping matters rather than substantive ones. That is, they did not adversely affect or benefit claimants.<sup>56</sup> ALJs would therefore be more likely to have standing to challenge these measures.

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<sup>48</sup> *Id.* at 1302.

<sup>49</sup> *Washington v Commissioner of Social Security*, 906 F3d 1353, 1356 (11th Cir 2018) (“In processing disability claims, the ALJs do not simply act as umpires calling balls and strikes. They are by law investigators of the facts, and are tasked not only with the obligation to consider the reasons offered by both sides, but also with actively developing the record in the case.”).

<sup>50</sup> *D’Amico*, 698 F2d at 907.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 906–07, citing *Nash*, 613 F2d at 11.

<sup>53</sup> See *Nash*, 613 F2d at 12–13.

<sup>54</sup> See *id.* at 13.

<sup>55</sup> See *id.*

<sup>56</sup> See *D’Amico*, 698 F2d at 907.

Posner had an opportunity to address these issues more directly in a subsequent Seventh Circuit case that also involved a production quota. In *Colvin*,<sup>57</sup> the SSA's Chief Administrative Law Judge had circulated a letter calling on each ALJ to "manage their docket in such a way that they w[ould] be able to issue 500–700 legally sufficient decisions a year."<sup>58</sup> Three administrative law judges and their union sued to enjoin the measure on the grounds that it threatened their decisional independence.<sup>59</sup> Because benefit awards were not judicially appealable and thus took less time to award than to deny, the alleged effect of the policy was to induce ALJs to award more benefits. In other words, the "quota" arguably "alter[ed] the administrative law judges' preferred ratio of grants to denials of benefits."<sup>60</sup> In so doing, the new measure threatened ALJ decisional independence.

It is first worth noting the irony of how a production goal must have appeared to a judge who has authored over 3,300 legal opinions as well as dozens of books and articles on topics ranging from literary theory<sup>61</sup> to the financial crisis.<sup>62</sup> Nevertheless, Judge Posner was sympathetic to the ALJs' perceived harm. Unlike in *D'Amico*, however, Posner did not analyze ALJ standing explicitly. Presumably, the production quota was a housekeeping measure, despite the ALJs' argument that the policy favored Social Security beneficiaries. Perhaps Posner also felt no need to address standing because he dismissed the suit on other grounds.<sup>63</sup> Specifically, he found that the APA's protections extended only to *intentional* attempts by agency managers to interfere with ALJ decisions.<sup>64</sup> They did "not extend to the incidental consequences of a bona fide

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<sup>57</sup> *Colvin*, 777 F3d at 403.

<sup>58</sup> Complaint, *Association of Administrative Law Judges v Colvin*, No 13-02925, \*13 (ND Ill filed Apr 8, 2013).

<sup>59</sup> *Colvin*, 777 F3d at 403.

<sup>60</sup> *Id* at 404.

<sup>61</sup> See generally Richard A. Posner, *Law and Literature* (Harvard 3d ed 2009).

<sup>62</sup> See generally Richard A. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* (Harvard 2009).

<sup>63</sup> Indeed, one way to understand Posner's decision is as a finding that there was no legal injury for the purposes of standing since the APA did not intend to protect ALJs against good-faith production quotas. See *Colvin*, 777 F3d at 404 ("[T]he Act does not prohibit an increase in a production quote unless the increase violates a prohibition listed in 5 U.S.C. § 2302(b), and the increase challenged in this case does not.").

<sup>64</sup> *Id* at 404 (stating that the ALJs' "argument would have merit if the Social Security Administration had imposed the quota because it wanted a higher rate of benefits awards").



production quota.”<sup>65</sup> Because the SSA production quota was imposed in good faith, the ALJ’s claim lacked merit.<sup>66</sup>

In reaching this conclusion, Posner expressly called into doubt a contrary decision in the DC Circuit.<sup>67</sup> That court held that any perceived threat to decisional independence—intentional or not—was exclusively governed by the Civil Service Reform Act<sup>68</sup> (CSRA).<sup>69</sup> Decisional independence claims affected ALJ “working conditions” as specified in the CSRA.<sup>70</sup> They therefore had to be adjudicated through a time-consuming process involving the Merit Systems Protection Board (MSPB) with appeal only to the Federal Circuit.<sup>71</sup> In Posner’s view, by contrast, the CSRA did not necessarily preempt an APA claim against intentional infringements of decisional independence. In particular, Posner was struck that ALJs would have no remedy under the CSRA.<sup>72</sup> As a result, Posner was eager to preserve a channel for ALJs to challenge intentional efforts to undermine their independence based on the APA alone.

Taken together, *Colvin* and *D’Amico* illustrate Posner’s broader approach to ALJ decisional independence suits against the SSA. First, he attempted to distinguish between housekeeping and substantive measures pursued by administrators. The former category refers to managerial efforts that do not skew adjudicatory outcomes, while the latter do have such effect. ALJs, in Posner’s view, have standing to sue over agency directives that are housekeeping in nature. Of those suits, Posner then found a basis in the APA for striking down housekeeping measures when there is evidence of intent to influence adjudicatory outcomes. In other words, when politically appointed agency heads attempt to change the results of adjudications *ex ante*, instead of reviewing them *ex post*, ALJs have a potentially meritorious decisional independence case in court.

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<sup>65</sup> *Id.* at 405–06.

<sup>66</sup> *See id.*

<sup>67</sup> *See Colvin*, 777 F3d at 405, citing *Mahoney v Donovan*, 721 F3d 633 (DC Cir 2013).

<sup>68</sup> Pub L No 95-454, 92 Stat 1111 (1978), codified at 5 USC § 1101 et seq.

<sup>69</sup> *See Mahoney*, 721 F3d at 638.

<sup>70</sup> 5 USC § 2302(a)(2)(A)(xii).

<sup>71</sup> 5 USC § 2302(a)(2)(A)(xii). *See also Mahoney*, 721 F3d at 635–36.

<sup>72</sup> *Association of Administrative Law Judges v Colvin*, 777 F3d at 404.

## II. AGAINST JUDICIAL REVIEW

Judge Posner's efforts to ensure that intentional threats to ALJ decisional independence can be heard in a judicial forum are consistent with his broader attempts to improve administrative adjudication. After all, less substantive control over ALJ decision-making by political appointees is more likely to result in higher quality expert dispositions. Elsewhere, for example, Judge Posner in a scholarly capacity has suggested the need for more internal review within agencies as well as a more specialized external Article I tribunal to oversee appeals before further review in an Article III court on questions of law.<sup>73</sup> His proposal sought to address what he perceived to be a process that resulted in "perfunctory" and often "boilerplate" administrative opinions.<sup>74</sup> It is unsurprising, then, that internal agency efforts to reduce the quality of adjudicatory output even further would be met with Posnerian hostility.

This Part, however, critically evaluates Judge Posner's approach to allowing decisional independence suits in court. It argues that his analysis illustrates some of the pitfalls of judicial efforts to manage administrative agencies. In the absence of clearer statutory constraints, questions about the appropriate balance of power within agencies are better left as political, rather than legal, questions. In other words, actors like Congress are better institutions to check intra-executive-branch dynamics and address the difficult tradeoffs presented by the concept of decisional independence.

As an initial matter, Judge Posner's attempt to distinguish between "housekeeping" and "substantive" directives is likely to be unworkable in practice. Given the dynamics of mass adjudication, many seeming "housekeeping" measures are bound to have a substantive impact on adjudicatory outcomes. Social Security awards are not appealable, whereas denials are. ALJs are therefore indeed more likely to grant SSA claims when under increased pressure to dispose of cases more quickly (as they pointed out in *Colvin*). In addition, prescribed agency-wide reversal rates are likely to influence adjudicatory outcomes directly, despite being characterized as housekeeping measures by Posner in *D'Amico*. In short, line-drawing based on whether a managerial effort will impact a substantive outcome is likely to prove quixotic.

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<sup>73</sup> Posner, *Federal Courts* at 266 (cited in note 8).

<sup>74</sup> *Id.* at 265.

More broadly, inquiries into decisional independence are in significant tension with courts' general hesitation to get involved with the day-to-day management of federal agencies.<sup>75</sup> Administrative law judges are executive branch actors, even if they carry out quasi-adjudicative functions.<sup>76</sup> Suits brought by ALJs against their superiors are intrabranch disputes that raise broader justiciability concerns.<sup>77</sup> Judicial review of agency management decisions, in other words, raises potential separation-of-power concerns absent clearer legislative specification.

Moreover, federal judges often lack the appropriate context for assessing the impacts of agency-wide initiatives. They usually lack managerial experience themselves and also lack access to aggregate empirical data that might shed light on the extent to which such efforts are justified. Professors Jonah Gelbach and David Marcus, however, suggest just the opposite perspective. In their view, courts should engage in “[p]roblem-oriented oversight” over administrative adjudication.<sup>78</sup> Problem-oriented oversight involves federal courts that “use various tools at their disposal to hold agencies accountable,” rather than simply correcting errors or applying precedents.<sup>79</sup> They argue that courts are well-placed “[t]o identify patterns and thus potential problems” and further suggest that courts “use problem definitions to map data gathered from decisions.”<sup>80</sup>

To be sure, Gelbach and Marcus’s analysis focuses on the substantive review of administrative adjudication, as opposed to claims regarding decisional independence, but their lessons may be applied more broadly. Consistent with this orientation, for ex-

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<sup>75</sup> See *Collins v City of Harker Heights*, 503 US 115, 128 (1992) (“[T]he administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces.”).

<sup>76</sup> See Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum L Rev 1163, 1212 (2013) (“Agency adjudication, just as much as agency rulemaking, is an exercise of the ‘executive power’ under Article II.”).

<sup>77</sup> Morton Rosenberg, *Congress’s Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive*, 57 Geo Wash L Rev 627, 679 (1989) (noting that “in dealing with cases in which the government is apparently ‘suing itself,’ the courts have had to satisfy themselves that the controversy before them is ‘justiciable,’ that is, a genuine controversy between the parties to the suit, and that the controversy is appropriate for judicial resolution”), citing *Baker v Carr*, 369 US 186, 217 (1962).

<sup>78</sup> Jonah B. Gelbach and David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 Tex L Rev 1097, 1141 (2018).

<sup>79</sup> Id at 1101.

<sup>80</sup> Id at 1141.

ample, perhaps courts could track the number of decisional independence suits filed against particular administrators across different circuits. Such determinations may help to shed light on when managerial efforts have become unduly heavy-handed. Institutions like the Judicial Conference or the Administrative Office of the Courts could coordinate these efforts.<sup>81</sup>

Federal courts, however, review only a sliver of agency adjudications, which may give them a skewed perspective on realities on the ground.<sup>82</sup> More problematic in the decisional independence context is the inability to establish the optimal balance between adjudicator independence and managerial control. In this regard, recall Judge Posner's suggestion in *Colvin* that APA suits should remain available to ALJs who allege intentional violations of decisional independence. Besides lacking a basis in the text of the APA itself, the possibility raises the specter of requiring federal judges to evaluate the motivations of agency managers. Was a peer review system in fact motivated by quality-control concerns or attempts to influence adjudicatory outcomes? Was a production quota due to backlogs or a probeneficiary bias? Intent-based inquiries, particularly involving public actors, raise notorious judicial difficulties regarding the appropriate evidentiary standards.<sup>83</sup>

Skepticism about judicial review of decisional independence suits absent clear statutory specifications does not imply that no check on ALJ interference is desirable—simply that other monitors may be superior. For example, it is worth considering more specialized institutions that would review decisional independence claims with greater expertise and experience regarding internal agency conflicts. Under the CSRA, for example, ALJs can challenge certain adverse employer actions before the Merit Systems Protection Board with appeal to the Federal Circuit.<sup>84</sup> The Merit Systems Protection Board is a three-member agency with jurisdiction over a range of government personnel matters. The

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<sup>81</sup> See Jennifer Nou, *Agency Coordinators outside of the Executive Branch*, 128 Harv L Rev F 64, 70 (2015).

<sup>82</sup> See Gelbach and Marcus, 96 Tex L Rev at 1100 (cited in note 78) (reporting that “[t]he federal courts review only a tiny fraction of the cases agency adjudicators decide—only 3% of SSA ALJ decisions, for example, and only about .03% of decisions by the Office of Medicare Hearings and Appeals”) (citations omitted).

<sup>83</sup> This point is also emphasized by Judge Kenneth Ripple's concurrence in *Colvin*. See *Colvin*, 777 F3d at 406 (Ripple concurring).

<sup>84</sup> *Mahoney*, 721 F3d at 634–35.

Federal Circuit (until recently) also reviewed whistleblower suits from employees claiming agency retaliation.<sup>85</sup>

In the final analysis, the ideal monitor for protecting ALJ decisional independence may ultimately be Congress itself.<sup>86</sup> Indeed, Congress has been relatively active over the years reforming agency adjudication.<sup>87</sup> As an institution, Congress is also better placed to receive testimony from ALJs and other observers about the effects of managerial initiatives without the restrictions of the judicial forum. After all, the concept of decisional independence is currently more rooted in conventions and norms<sup>88</sup> than in any clearly defined constitutional or statutory source. As a result, the most effective checks are likely to be political rather than legal.

### CONCLUSION

This Essay has critically evaluated Posner's analytical framework for allowing decisional independence suits to be heard in court. It has questioned whether the APA should be read to protect against bad faith managerial decisions. In the absence of clearer statutory specifications, the judiciary's role in policing decisional independence should arguably be a limited one. While Posner himself has studied how judges supervise their own staff,<sup>89</sup> judges as a whole are ill suited to the task of evaluating managerial motive. There is thus a more robust role for Congress to specify the contours of decisional independence.

Nevertheless, Judge Posner's opinions on decisional independence offer many enduring insights. Among them are his pointed refusals to romanticize the judiciary<sup>90</sup> and quasi-judicial officers by extension. In *Colvin*, for example, he analogized ALJs to

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<sup>85</sup> 5 USC §§ 7521, 7703(a)–(b)(1). Congress recently passed legislation that expanded jurisdiction over such suits to any US court of appeals. All Circuit Review Act, Pub L No 115-195, 132 Stat 1510 (2018), codified at 5 USC § 7703. See Michael Ellis, *All Circuit Review Act Passed into Law* (Whistleblower Protection Blog, July 16, 2018), archived at <http://perma.cc/V96J-S4MV>.

<sup>86</sup> See Harold J. Krent, *Presidential Control of Adjudication within the Executive Branch*, 65 Case W Res L Rev 1083, 1101 (2015).

<sup>87</sup> See, for example, Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 Admin L Rev 1, 14–31 (1997) (providing a history of Congressional reforms to the agency adjudicatory system).

<sup>88</sup> See generally Vermeule, 113 Colum L Rev 1163 (cited in note 76).

<sup>89</sup> See generally, for example, G. Mitu Gulati and Richard A. Posner, *The Management of Staff by Federal Court of Appeal Judges*, 69 Vand L Rev 479 (2016).

<sup>90</sup> See, for example, Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges 5* (Harvard 2013) (seeking to present a “realistic model of judicial behavior” that conceives of judges as participants in the labor market).

workers “on a poultry processing assembly line.”<sup>91</sup> His point was that the production of opinions is subject to the same resource and time constraints as other job-related tasks.

Consistent with this view—that judges are not mythical diviners of the law—is how Judge Posner himself worked with his law clerks. We had the privilege of being invited to share our perspectives in chambers, even if contrarian, in the hopes that doing so would refine his thinking. In countless ways, including his willingness to reconsider his views through argument, Judge Posner was a model jurist. His unwavering sense of independence may very well have informed his perspectives on the administrative judiciary—and his desire to hold it to the same high standards to which he held himself.

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<sup>91</sup> *Colvin*, 777 F3d at 404–05.