Uncovering the Hidden Administrative Judiciary

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Kent H. Barnett, *Some Kind of Hearing Officer*, 94 **Wash. L. Rev.** __ (forthcoming 2019), available at SSRN.

When Congress enacted the Administrative Procedure Act (APA) in 1946, it expected that what we now call Administrative Law Judges (ALJs) would preside over most federal agency evidentiary hearings. Over time, however, the number of so-called "non-ALJ" adjudicators has ballooned. As a result, non-ALJ adjudicators vastly outnumber ALJs today by a ratio of about 5:1. Yet despite the prominent role currently played by non-ALJs, very little is known about them. In a forthcoming article titled *Some Kind of Hearing Officer*, Professor Kent Barnett seeks to change that.

Professor Barnett's article does three important things. First, it begins by describing how existing due process jurisprudence has little to say about impartiality in the adjudicatory arena, leaving the task of designing optimal process largely in Congress's hands. When Congress enacted the APA in 1946, it spelled out a fairly detailed scheme to promote impartiality in the context of formal adjudicatory hearings conducted by ALJs. For example, the APA makes clear that ALJs cannot engage in prosecutorial or investigative functions. In addition, the APA generally prohibits ALJs from engaging in ex parte communications. Yet when it comes to non-ALJs, Congress did not set forth similar constraints. The end result, as Professor Barnett points out, is that Congress effectively has delegated the task of determining optimal process in informal adjudications—and, more specifically, ensuring the impartiality of adjudicators—to individual agencies. And, as one might imagine, agencies have come up with all sorts of different ways of approaching the issue of impartiality in informal adjudications.

This leads to the second important contribution that Professor Barnett makes in his forthcoming article: Professor Barnett reports some key findings of a detailed survey that he and other researchers sent to 64 federal departments, agencies, and subcomponents within them while working as consultants for the Administrative Conference of the United States (ACUS). The findings shed significant light on how different agencies have approached the question of non-ALJ impartiality. Among other things, the findings demonstrate that agencies often do not consider subject-matter expertise when hiring non-ALJ adjudicators. In addition, more than 40 percent of non-ALJ adjudicators have no required separation of functions. Furthermore, a large proportion of non-ALJ types are subject to performance reviews, and of those non-ALJ types who are subject to performance reviews, more than 70 percent are eligible for bonuses. These and the many other findings that Barnett reports are important because, as a historical matter, little data has been collected on non-ALJ adjudicators. Barnett's work, in other words, begins to pull the cover back from the administrative state's previously hidden judiciary.

Third, after reporting his findings about non-ALJs, Professor Barnett argues that much more data is needed. To this end, he proposes the use of a uniform, one-page agency disclosure form. His proposed disclosure form—which would be answered by federal agencies and then made publicly available—would provide Congress, the Executive Branch, and litigants with key information about non-ALJs' impartiality protections. The disclosure form, for example, would ask agencies to disclose, among other things: whether hiring qualifications exist for the presiding officer; whether the presiding officer is prohibited from reporting to an individual with enforcement duties; and whether the presiding official can be paid performance bonuses by the agency. According to Professor Barnett, such a disclosure form might uncover various impartiality gaps and thereby prompt agencies—or Congress—to address gaps that emerge. In addition, Professor Barnett argues that his proposed disclosure regime could help litigants to better understand the process to which they are subject, thereby recognizing their dignitary interests and improving public trust in the administrative system.

I am much less convinced than Professor Barnett is that disclosing impartiality gaps will do much to help recognize litigants' dignitary interests or improve public trust. Given that litigants may well have no choice about the process to which their claims are subjected, it seems unlikely that litigants' trust in the system will increase if they are provided with disclosure forms that document impartiality gaps. Nonetheless, I agree with Professor Barnett that disclosure would be a very good thing to the extent that it might nudge—or even perhaps "shame," as Barnett puts it—Congress and agencies to respond to significant impartiality gaps that are revealed.

It is, of course, quite possible that neither agencies nor Congress will take action to ensure more optimal process, even if Professor Barnett's recommended disclosure system is implemented and even if it reveals significant impartiality gaps. But that's a problem for a different day. For now, I agree with Professor Barnett that gathering more information—and continuing to try to shed more light on the hidden administrative judiciary—would be a good first step.

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