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John Paul Jones

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ADMINISTRATIVE LAW JUDGES: PAST, PRESENT AND FUTURE

John Paul Jones ¹

Introduction

It's my Jesuit schooling, I suppose, but I feel I must begin my remarks with some attempt at defining my subject. Of course, as those who have attended law school know only too well, law professors on the whole rarely feel it necessary to ensure that their audiences have some idea about what they're talking about. In that regard, my remarks should not be taken by the rest of my readers as a sample of what law school is all about.

I've been invited to remark on the past, present, and future of the administrative law judge. Just what is an administrative law judge? If I start by considering the plain meanings of the three words, I come easily to the conclusion that an administrative law judge is one who applies administrative law to settle by some more or less formal procedure disputes between individuals and government agencies. But ALJs don't necessarily resolve cases which involve administrative law, and lots of non-ALJs do. In fact, more often than not, within agencies, ALJs forward such cases to non-ALJs for resolution, sending on only a limited record with specific findings; perhaps with, perhaps without, a suggested resolution.² Meanwhile, down at the courthouse, non-ALJs hear cases and

¹Professor of Law, University of Richmond School of Law. The text of this article is taken from his address at the annual conference and seminar of the National Association of Administrative Law Judges, held October 16-19, 1991 in Richmond, Virginia. The author wishes to thank Ellen Firsching and Jeremy Sohn, University of Richmond School of Law Class of 1993, for their hard work and critical eyes in its transformation.

[Professor Jones' address is reprinted here for its lucidity and obvious merit as a brief history of administrative adjudication in the United States. The historical perspective, however, is that of the author and, as is the case of all material published in this Journal, does not necessarily reflect the views of the Association. — Ed.]

²See *par ex.*, National Labor Relations Act, 29 U.S.C. § 160(e) (1989) (requiring federal court enforcement of injunctions under National Labor Relations Act); 1939 Pa. Laws 2329, 2358, §§ 615-16 (*de novo* judicial review of commissioner's finding on suspension of driver's license). Compare Revenue Act of 1936, Pub. L. No. 740, 49 Stat. 1648, 1740 (1936) (precluding judicial review of decisions of the commissioner of the I.R.S. on claims for tax refunds); Wash. Rev. Code § 15 Ch. 225, 51.52.115 (1951) (precluding judicial review of decisions by the Board of Industrial Insurance).

apply administrative law, albeit most of the time only after an ALJ has heard, and an agency representative has decided, a case.³

The term Administrative Law Judge certainly sounds impressive, more so than earlier titles applied to the same functionary like hearing officer,⁴ hearing examiner,⁵ or deputy commissioner.⁶ But it doesn't work to distinguish the plain-dothed judges in agencies from the black-robed judges at the courthouse. A better term, because it reaches all (or nearly all) of the group I'm thinking about and writing for, and none of the black-robed, article III or other judges who engage in administrative case deciding, is "agency judge."⁷ The title agency judge says up front that its bearer is an adjudicator directly related, if only for one case, to an administrative agency, who decides disputes involving agency law. Indeed, in light of the widespread presumption that ALJs cannot review a statute for conformity with a constitution, nor a regulation for conformity with enabling law,⁸ the title agency judge goes a lot farther toward distinguishing the limited body of law with which the person so identified is expected to deal than does the broader, potentially misleading title Administrative Law Judge.

³ Compare 5 U.S.C. § 704 (1988) with M.S.A.P.A. § 5-102 (1981).

⁴ See, *par ex*, 1913 Ohio Laws 103 § 399.

⁵ See Administrative Procedure Act, Pub. L. No. 404, 92 Stat. 183 (1946); Pub. L. No. 337, 34 Stat. 595 (1906) (establishing the Interstate Commerce Commission); Pub. L. No. 203, 38 Stat. 718 (1914) (establishing the Federal Trade Commission).

⁶ See Wis. Stat. § 203.36 (1891) (referring to insurance commissioner).

⁷ [Editor's Note: As many of our readers know, most federal Administrative Law Judges, and some state Administrative Law Judges, do wear black robes.]

⁸ See, *par ex*, *Bohn v. Waddell*, 790 P.2d 772 (Ariz. 1990); Cal. Const. Art. 3, § 3.5; *Crocker v. Dept. of Revenue*, 652 P.2d 1067 (Colo. 1982); *Caldor, Inc. v. Thornton*, 464 A.2d 785 (Conn. 1983), *aff'd*, 472 U.S. 703 (1985); *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So.2d 249 (Fla. 1987); *Wronski v. Sun Oil, Co.*, 310 N.W.2d 321, 324 (Mich. 1981); *Bd. of Pharmacy v. Walgreen Texas Weinberger*, 375 F.Supp. 1312 (D.C.N.Y. 1974), *cert. den.* in 424 U.S. 958, *reversed* 515 F.2d 57 (administrative law judge is precluded from passing upon constitutionality of procedures he is called upon to administer).

I've gotten rid of the AL because it was overly inclusive; now what am I to do about the J part, which equally misleads in all those instances where the ALJ's action is not final subject to review, but only tentative, subject to agency ratification? In such circumstances, I think the old term "master" in the sense of special master⁹ seems more accurate than judge. It connotes for me an agency representative directed to take evidence and recommend a decision to somebody else. We thus can recognize two sorts of agency representative: the judge who, for the agency at least, finally decides, and the master, who for the agency, only recommends.

O.K., so I'm here to talk about the past, present, and future of agency judges and masters. I'm going to report after digging in the ruins, looking around at today's legal landscape, and finally reading my tea leaves. What I've found is a continuing conflict between two competing but desirable aspects of case deciding: efficiency and independence. Throughout the history of administrative adjudication, institutional decisions about the job of the agency judge or master have followed from the temporary primacy of one or the other of these competing aspects.

The Confucian Adjudicating Clerk

Looking back, I came across a report of the Confucian agency judge of Imperial China.¹⁰ When the Middle Kingdom grew sufficiently large and diverse, the bureaucracy of the palace created and dispatched subordinate bureaucrats, or magistrates, to run the provinces. The magistrate enjoyed all three of what we in the west have come to distinguish as separable governmental powers: legislating, administering, and adjudicating. He enjoyed those powers over every aspect of Chinese life. Only in the rarest case would his action be reviewed by superiors in Beijing. According to Yang, the magistrate, before long, found cause to engage a clerk who was then tasked more or less

⁹"The origins of the name master comes from the masters of the old English court of chancery; the masters in chancery were permanent clerical officers of the court; one of their many duties was hearing oral testimony. In the former English equity practice, commissioners were specially appointed private persons who hear oral evidence in the county where the witnesses lived; they acted pursuant to a commission of *dedimus potestatem* on an ad hoc basis." W. Hamilton Bryson, Handbook on Virginia Civil Procedure, 310 (1989).

¹⁰C.K. Yang, "Some Characteristics of Chinese Bureaucratic Behavior," in Confucianism in Action 135-63 (1959).

exclusively with hearing cases. I'll wager two considerations prompted the magistrate to engage an adjudicating subordinate: first, a threshold of task overload, akin to that which caused the Imperial Palace to engage the magistrate in the first place; and second, an aversion to the menial, also akin to that which caused the palace to delegate management of the burghs while it concentrated on Beijing.

If Wang's account is accurate, the practice of Chinese magistrates evidences concern by those early agency chiefs for both decisional efficiency and decisional independence. A particular clerk assumed the duty of hearing cases, not just any temporarily underemployed member of the magistrate's staff. This organizational choice suggests that the magistrate desired the efficiency which comes with specialization of function, and illustrates a simple, but profound truth: those who hear lots of cases do so more efficiently than those who only hear one now and again.

Having designated an adjudicating clerk, magistrates then virtually confined them to the barracks. Adjudicating clerks were expected to make their household within the magistrate's compound, and the reason given by contemporaneous reporters for such a restriction was that it insulated the adjudicating clerk from *ex parte* contact and pressure. Of particular concern to the magistrates was insurance that the adjudicating clerk would not be compromised by the demands of relations for their own benefit or for that of their benefactors or associates. Thus, the magistrate's adjudicating clerk in a very real sense "lived at the office."

One more characteristic of the Chinese adjudicating clerk deserves note: his education. As many of you no doubt recall from a history class, the bureaucrats of Imperial China became eligible for appointment to government posts only after successfully negotiating a standardized and national examination of their knowledge of Confucian theory and philosophy. A magistrate got to be a magistrate not because of any demonstrated skill in governing, but because of demonstrated skill in book learning. Thus, the Chinese magistrate, who wielded enormous power in his province subject to only the remote possibility of review, appears the ultimate generalist, lacking completely any functional expertise.

The opposite was true of the adjudicating clerk. Clerks did not come from the class of successful Confucian scholars but from the staff in the magistrate's compound. A good adjudicative clerk could progress to the staff of

a more powerful magistrate. His prior office would be filled by one of his apprentices, and the ex-apprentice would then select in turn his student and assistant. While the would-be magistrate studied literature and faced an examination, the would-be adjudicating clerk observed hearings and learned on the job by listening to his mentor. So, in Imperial China, a system existed centuries ago of adjudicative specialists, relatively lacking in educational credentials but exhaustingly schooled in the day-to-day work of their administrations, subject to overruling and discipline by a class of more highly educated but relatively inexperienced agency heads with no reason to take an interest in the special problems of regulatory case deciding. It strikes me that Imperial China offers a useful metaphor for considering the role of education in administrative adjudication, and I plan to return to this point later.

The Adjudicating Clerks of Chancery and the Star Chamber

In my Tom Swift time and transport machine of the mind, travel forward and westward with me to the courts of the Tudor and Stuart kings of England.¹¹ For our purposes today, the most interesting aspect of the English history of the period is the relatively mature and independent nature of the regular, or common law courts. Once, the power to decide cases had belonged to the monarch personally, as had the power to make and enforce law. All who decided cases did so as the monarch's personal stand-ins, and the monarch's power to review case decisions was virtually absolute (with only insignificant ancient exceptions). By the time of the Tudor and Stuart monarchs, however, the common law courts had, to a very large extent, successfully achieved their independence of the crown, and the verdicts of juries had achieved substantial finality. The royal view of the best interests of the realm might or might not be shared by common law judges with minds of their own. At the same time, the common law courts had matured in the fashion of courts before and since to the point where complicated rules of procedure frustrated many litigants and obstructed timely decisions for the rest. So, by the time of the Tudors, the common law courts, in the eyes of the crown at least, had grown both unmanageable and inefficient.

The royal response was to establish new tribunals, in more or less competition with the common law courts. The most significant of these was in the chancery, a secretariat or department of state in the palace. Its

¹¹ J.H. Baker, An Introduction to English Legal History 112-45 (1990).

department head, the Lord Chancellor, kept personal custody of the Great Seal of England, and, by its application, enjoyed jurisdiction over royal grants, patents, and other licenses. Disputes related to crown property and to injuries purportedly traceable to the crown were heard by adjudicating clerks in chancery, the most important of whom was the Master of the Rolls. All served at the pleasure of the Lord Chancellor, and he at the pleasure of the king. Hearing procedure differed considerably from that of the common law courts. In chancery, both presiding clerks and professional advocates were trained in the civil law prevailing throughout the European continent, and many in that court were churchmen. Many actions were maintained in Latin rather than in English. No jury held sway, and the case was resolved by an order issued, at least in theory, directly from the crown and not the court. An early hallmark of chancery, and of its less influential, but more notorious contemporary tribunal, the Star Chamber, was the absence of formal and restrictive rules of pleading or procedure.¹²

I recount this brief history of chancery because it too illustrates the competing attractions of independence and efficiency for those who create adjudicative agencies. When common law courts developed a mind of their own, the royal response was to build a new sandbox behind the palace, and install new judges subject to executive control. When common law courts became unwieldy, the answer was to go elsewhere in search of informal pleading and proof. There's a lesson of historical dynamic here, and I'll return to it shortly.

There's also a contrast to be made between Confucian and Tudor adjudicating clerks. The former, as you recall, lacked formal training, but developed professionally on the job, taking lessons from the old pros. The latter enjoyed considerable formal training in legal theory, often worked in a foreign language, and frequently took religious vows as part of their job. One distinction, perhaps relevant to this difference, is the intervening rise of the professional advocate. One could speculate that the Lord Chancellor demanded civil law and Latin proficiency from his adjudicative clerks because he wanted to be sure that the lawyers could not intimidate them. Trust me, I'll come back to this.

American Antecedents of the AU

¹²But the evolutionary urge of adjudicative formality can always prevail over even the best of human intentions, so, by the nineteenth century, procedural complexity had so flourished as to incapacitate chancery, and render it the subject of Dickensian satire in his novel Bleak House.

One last historical stop, barely over the horizon of the past, delivers us in our own legal landscape. Kenneth Culp Davis, asserts that American agency adjudicators can be traced back at least to the colonial era, pointing to customs officers, war department clerks considering pension claims, and ship's hull and boiler inspectors.¹³ Admittedly these fellows routinely decided cases, but whether they did so adjudicatively is a trickier question. I'm not inclined to give every inspector admission to my society of agency masters and judges. While each of these government functionaries decided cases, rarely, if ever, were they expected to explicate in writing their decisional process. What distinguishes an adjudicator from other decision making officers is the professional obligation of explaining her judgment.

On the other hand, considerable resistance to the concept of the agency judge existed in both national and state courts in America into the third quarter of the last century. When I spoke of the rivalry in Tudor England between the common law courts and those of the crown, I neglected to report that within a hundred years, the judges of the former, led by Sir Edward Coke, had succeeded, by an adroit combination of lobbying and opinionating, in reestablishing the major contours of their monopoly on case decision, and, with the inadvertent assistance of some heavy-handed judges in both chancery and Star Chamber, convinced Englishmen that there was something not quite constitutional about agents of the executive branch adjudicating the rights of Englishmen.

As a fundamental principle of state law, that prejudice against agency judges, if not agency masters survived the American Revolution and later flourished in both state and federal courts. I'll offer but three examples. In 1854, the Supreme Court of Wisconsin did its part to accelerate the outbreak of civil war by declaring unconstitutional the federal Fugitive Slave Act which provided for an administrative hearing before a Commissioner for claims by slave owners that refugees from the slave states were in fact their runaway slaves.¹⁴ The state court found that the United States Constitution did not permit the exercise of

¹³ Kenneth Culp Davis, Administrative Law Treatise 313 (1978).

¹⁴ *In re Sherman Booth*, 3 Wis. 2 (1854).

adjudicative power by agents of the Congress.¹⁵ In 1883, the Supreme Court of Florida held unconstitutional a statute empowering county commissioners to hear cases and revoke or suspend liquor licenses.¹⁶ And in 1889, the Supreme Court of Indiana declared unconstitutional a state statute creating commissioners to hear cases assigned by the Supreme Court on the ground that Indiana's constitution did not permit the exercise of adjudicative power by non-judges.¹⁷

By then, however, the tide was clearly turning in favor of agency adjudicators. In 1907, Roscoe Pound, a botanist from Nebraska perhaps more widely remembered as Dean of the Harvard Law School, could rant and rave in the *Pennsylvania Law Review* about all the state and federal courts which had turned their back on civilization by holding constitutional in more than fifty cases statutes creating agencies with adjudicative powers.¹⁸ Pound quoted the French political philosopher Montesquieu: "There is no liberty if the power of judging is not separate from the legislative power and from the executive power" and cited to a similar observation by Alexander Hamilton in the *Federalist*.¹⁹ Pound referred to annual ABA reports for the preceding decade which had identified at least ten new state laws each year affording adjudicative power to executive agencies.²⁰ Among those Pound found most pernicious were Irrigation Boards established to decide water rights cases, professional licensing boards with revocation power, and boards reviewing election contests.²¹

¹⁵*Id.* at 25-28.

¹⁶*State v. Brown*, 19 Fla. 563 (1883).

¹⁷*State ex. rel. Hovey v. Noble*, 21 N.E. 244 (1889).

¹⁸Roscoe Pound, "Executive Justice," 55 U. Pa. L. Rev. 137 (1957).

¹⁹*Id.*

²⁰*Id.* at 139.

²¹*Id.* at 141-42.

What marks the appearance of the American agency master at the national level is a federal statute in 1906 establishing twelve permanent positions in the Interstate Commerce Commission with the title "special examiner."²² The ICC itself was only nineteen years old when its commissioners persuaded Congress that (like Chinese magistrates) they needed the authority to delegate case deciding to subordinate specialists. By 1941, the attorney general could say:

No one in the Commission has power to substitute his judgment for that of the examiner in the preparation of the proposed report. If the examiner chooses to depart from all the precedents established by Commission decisions, he is free to do so and no one can stop him. The examiner's position in this respect is like that of the trial judge; the appellate court can reverse the trial judge, but cannot interfere in the making of his initial decision.²³

From the turn of the century through the new deal to the present, the growth in the number of administrative agencies, state and federal with adjudicative powers has been abundant to say the least. As I come over the historical horizon into the present, I begin to report a familiar story, largely but not completely federal. The federal Administrative Procedure Act of 1946²⁴ afforded agency masters and agency judges considerably greater independence, limiting the discretion of their agencies in hearing officer selection and largely eliminating it with respect to hearing officer compensation and discipline, and permitting their removal only for good cause. The trend toward greater independence and enhanced prestige continued in 1978, when amendments to the federal APA changed the "hearing officer" into the "administrative law judge."²⁵

²²Pub. L. No. 337, 34 Stat. 595 (1906).

²³Davis, *supra* note 11, at 314 (quoting Att'y Gen. Comm. Ad. Proc. Monograph, ICC 27 (1941)).

²⁴Pub. L. No. 404, 60 Stat. 237 (1946).

²⁵Pub. L. No. 95-251, 92 Stat. 183 (1978).

Contemporary Challenges for the Professional Adjudicator

Since then, two unsuccessful attempts to limit the independence of federal agency masters and judges deserve at least passing notice. The first was a pair of legislative proposals to establish a system of performance review for ALJs, in order to hold them accountable for their adjudicative performance, and thus to enhance bureaucratic efficiency. After the Civil Service Reform Act of 1978,²⁶ most federal employees are subject to discipline for unacceptable performance—but not ALJs, who were explicitly excepted from the act.²⁷ But bills introduced in 1979²⁸ and 1980²⁹ would have authorized ALJ performance assessment in either the Office of Personnel Management or the Administrative Conference of the United States. Both expired with the final adjournment of the 96th Congress.

The second attempt to put a tighter rein on ALJs occurred in the federal agency employing the greatest number of agency judges and masters, the Social Security Administration. Beginning in the late seventies, SSA asserted the authority to demand of ALJs conformance to quotas or goals.³⁰ Perhaps the most notorious phase of this campaign was known as the Bellmon Review Program. While that particular effort has been abandoned, the yearning of SSA to assert decisional production controls remains palpable. The pendulum of agency adjudication philosophy continues its motion between independence and efficiency.

²⁶Pub. L. No. 95-454, 92 Stat. 1111 (1978).

²⁷5 U.S.C. § 4301(2)(D) (1982).

²⁸See S. 755, 96th Cong., 1st Sess. (1979) (vesting responsibilities in a peer review panel under O.P.M.'s aegis).

²⁹See S. 262, 96th Cong., 1st Sess. § 209(b)(1) (1980) (vesting performance evaluation responsibilities in ACUS review panels composed of ALJs from agencies other than that of the reviewed ALJ); H.R. 6788, 96th Cong., 2nd Sess. (1980) (vesting responsibility in a presidentially appointed ACUS Performance Review Board).

³⁰See generally, D. Coffey, *Judges, Bureaucrats, and the Question of Independence: A Study of the Social Security Administration Hearing Process* (1985).

The modern history of state agency judges and agency masters is more difficult to chart. Certainly, the two most important milestones have been the publication of Model State Administrative Procedure Acts in 1961 and 1981,³¹ and the provision in the latter of the central panel for administrative law judges.³² The two statutes have asserted a strong but welcome influence on state law that has produced a convergence welcome more for what it says about our common notions of due process and government in the open than for what assistance it affords interstate administrative practice.

The central panel idea has, by my last count, caught on in ten states and the Big Apple.³³ It is under active legislative consideration in several other states, including my own, Virginia. Our budget problems form the most obvious barrier to its adoption, despite the fact that states which have already adopted the central panel approach report savings directly traceable to its adoption. The essence of the concept is that, by statute, the agency judge and agency master are delivered from the various regulatory and assistance agencies of state or city government and gathered together in an office of administrative hearings, a fire station of their own. There they sit until the bell rings and they are dispatched to conduct a hearing. The regulatory or assistance agency charged with conducting the hearing has little or no control over recruiting, individual assignment, retention, or compensation. In some central panels, there is no sub-specialization; the same administrative law judge may hear a nurse's license revocation case one day and a public utility rate case the next. In other states, subject matter and/or geographic range permit sub-specialization of the central panel judges. Most, but not all, central panel ALJs enjoy some form of job protection or civil service status. Most, but not all, central panel ALJs are

³¹Model State Administrative Procedure Act, 1961 Act; Model State Administrative Procedure Act, 1981 Act.

³²M.S.A.P.A., 1981 Act § 4-301.

³³California, Colorado, Florida, New Jersey, Maine, Massachusetts, Minnesota, Missouri, Tennessee, Washington; See Malcolm Rich, The Central Panel System and the Decisionmaking Independence of Administrative Law Judges: Lessons for a Proposed Federal Program, 6 W. New Eng. L. Rev. 643 (1984), and Malcolm Rich and Wayne Brucar, The Central Panel System for Administrative Law Judges: A Survey of Seven States (1983), reprinted in II Journal of the National Association of Administrative Law Judges, No. 2, p. 39.

lawyers. A little gem of a study on the first eight state central panels has been published by Malcolm Rich and Wayne Brucar.³⁴ I recommend it for details.

One other noteworthy state law development. Two states, Maine and Missouri, have gone to the extreme of taxing the power of final decision away from their administrative agencies entirely and placing it in an administrative court of limited jurisdiction.³⁵ In these states, the ALJ is unquestionably an agency judge and not just an agency master, because her decision is final-subject only to appellate review in the administrative court. Senator Norris tried the same thing at the federal level in 1929 when he sponsored a bill to create a United States Court of Administrative Justice.³⁶ That bill failed, as did several attempts by Senator Logan to do the same thing in the 1940s,³⁷ and the Hoover Commission's proposal for an Administrative Court of the United States in 1955.³⁸

For five years, Senator Howell Heflin has been urging a central panel for federal administrative law judges. The current form of his proposal is found in Senate Bill 826.³⁹ He proposes something called the United States Administrative Law Judge Corps. His bill incorporates the ideas of the National

³⁴ *Id.*

³⁵ Mo. Ann. Stat. § 621.045 (Vernon 1988); Me. Rev. Stat. Ann. tit. 4, § 1151 (West 1964).

³⁶ S. 5154, 70th Cong., 2d Sess. (1939).

³⁷ S. 915, H.R. 6324, 76th Cong., 1st Sess. (1939). See Victor W. Palmer and Edwin Bernstein, Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill, 6 W. New Eng. L. Rev. 673, 676 (1984).

³⁸ Comm'n on Organization of the Executive Branch of the Government, 84th Cong., 1st Sess., Report to the Congress Vol. VI, at 84 (1955).

³⁹ S. 826, 102nd Cong., 1st Sess. (1991).

Conference of Administrative Law Judges (ABA), and is endorsed by, among other groups, the Administrative Conference of the United States.⁴⁰

The Heflin bill provides for Presidential appointment of a Chief ALJ with the advice and consent of the Senate, and divides the corps of ALJs into seven functional divisions. One division would handle communications, transportation, and energy cases; another labor relations; a third, health and benefits. ALJs presently employed by agencies like the Department of Transportation, the NLRB, or Social Security would be transferred by the new law into the appropriate division of the corps. A council made up of the chief ALJ and the seven division heads would do the hiring of new ALJs, choosing from among candidates screened by the Office of Personnel Management. Performance evaluation would occur, but through a system of peer review at the hands of other ALJs.

The Heflin bill adroitly balances efficiency and independence. The ALJ is finally out from under the agency, but, in exchange, she becomes accountable for her work product and habits. It sounds great to me, but fails to get three cheers from the federal ALJs themselves. The SSA bunch, not surprisingly, thinks it's a great idea, but the ALJs of other agencies don't.⁴¹ Some of the nay sayers make it clear enough that they are uninterested in throwing in their lot with the gang from SSA, which by sheer number would dominate the corps. Judge Zankel of the NLRB offered some less self-serving reasons for withholding his support from the bill in an article produced for a symposium at the Western New England School of Law; they boil down to the conclusion that it ain't broke, so it don't need fixin'. You can find his and the other papers on the notion of a central panel reproduced in Volume 6 of Western New England's Law Review.

The present landscape contains another interesting idea working its way to the surface of federal bureaucratic consciousness: uniform procedures in formal hearings at the various federal agencies. The Administrative Conference of the United States is sponsoring a working group of ALJs, members of the bar,

⁴⁰[And this Association—Ed.]

⁴¹See Norman Zankel, "A Unified Corps of Federal Administrative Law Judges is Not Needed," 6 W. New Eng. L. Rev. 723 (1984); Debra Cassens Moss, "Judges Under Fire: ALJ Independence at Issue," ABA Journal, Nov. 1991, at 58-59. (reprinted *infra*, p. 35)

and others in an effort to develop a set of model procedures for future adoption by federal agencies conducting formal hearings. The draft outline includes rules for such issues as time computation, intervention, discovery, settlement, evidence, motions, and so on. An interesting aspect of the endeavor is that the Conference and the working group expect only to produce model rules, recommended for agency acceptance, not legislatively mandated.

Only a few states have attempted to standardize hearing procedures. Indeed, as far back as 1942, a Commission to Study Administrative Adjudication in the State of New York under Robert Benjamin took the position that standardized procedures would be inefficient in light of the vast differences among agency adjudicative systems.⁴² Among the states which have standardized formal hearing procedures, the central panel states comprise a clear majority.

Uniform procedures, however, need not be inextricably linked with the central panel, although the bill before Virginia's General Assembly provided for both,⁴³ and the Heflin bill empowers the corps to make regulations "appropriate for the efficient conduct of the business of the corps."⁴⁴ If the Heflin bill becomes law and the Administrative Law Judge Corps becomes a reality, the model rules will be there for adoption by the corps. If the Heflin bill fails, the model rules will still be there for adoption by each agency on its own. They may not be joined at the hip but uniform hearing procedures seem to me likely to inspire the most ardent support from ALJs moving from one agency to another as case assignments dictate.

So the present contains two interesting frontal systems moving across the expanse of federal administrative law. Both reflect reforms already in place in several states. But when the elephant moves, everybody pays attention, so the success of the Heflin bill and the Conference's model rules project is bound to have ramifications outside Washington. Details at eleven.

⁴²Commission to Study Administrative Adjudication (1942).

⁴³*Supra* note 32, at .

⁴⁴S. 826, *supra* note 38, at § 598(c)(6)(d)(5).

Back to the Future

What's left is my promise to look into the future. I have two predictions I'd like to make, one based on a relatively unknown case in the federal district court over in Charlottesville, and the other purely on my own intuition about the status imperatives of bureaucratic life.

First, let me call to your attention Judge Michael's decision in *Mowbray v. Kozlowski*.⁴⁵ In that case, the Mowbrays challenged Virginia's Medicaid eligibility regulations, arguing that they conflicted with the federal Social Security Act⁴⁶ they were supposed to implement. The court agreed, but what I found most interesting was another issue raised by the Mowbrays. They claimed that their right to procedural due process under the United States Constitution had been violated by Virginia's Medicaid Eligibility Appeals Board, which had refused to hear their arguments that the regulations applied to deny them benefits were invalid by virtue of their conflict with Social Security Act. The Board had ruled that it lacked jurisdiction to entertain attacks on the regulations it was established to enforce. Everybody in Judge Michael's court seemed to agree that this was a settled principle of administrative law, but that didn't stop Judge Michael from concluding that it nevertheless noted a due process violation. Judge Michael wrote:

It is true that administrative process, plus judicial review, may equal Due Process. Thus it is possible that a system could be set up such that an agency could prevent argument on federal law and require the appellant to pursue review in federal or state court on the issue of the legality of the state rule. While possible, it is not the most efficient allocation of resources. Allowing appellants to raise the issue before the state agency gives the state the first crack at considering the issue and perhaps bringing state regulations into compliance. A hearing officer is not bound to accept the appellant's argument; however, making the agency aware of a potential conflict may

⁴⁵724 F. Supp. 404 (W.D. Va. 1989), rev'd on other grounds, 914 F.2d 593 (1990).

⁴⁶42 U.S.C. § 1901 (1988), as amended 42 U.S.C. § 1396.

well prevent the expense of litigation and encourage thoughtful, internal review.

Now, after you think about it a moment, you'll find all sorts of holes in Judge Michael's reasoning. First, if due process doesn't require it (and he agrees it doesn't), then the state and its ALJ are free to withhold a hearing as to the underlying legality of the rules the ALJ has been told to apply. Second, even if the ALJ refuses to rule on the validity of the regulation, the issue is nevertheless preserved in the record and therefore is just as loudly brought to the attention of the agency which then has the first opportunity to correct its mistake as Judge Michael prefers. So, even if he hadn't prefaced his remarks on this point with the admission that they were dictum, Judge Michael would still be vulnerable to a cranky appellate court.

But the idea really does reach out and grab ya, doesn't it—the idea that there is really no good reason for an ALJ to refuse to consider the validity of the regulation or even the statute she's been assigned to administer? Sure, due process and preemption can be described as subtle areas of Constitutional law, but they are child's play in comparison with regulatory thickets like those to be found in the SSA, so there is no inherent obstacle. If the only justification for saying save it for a reviewing court is the administrative convenience of keeping it simple for the ALJ, how can that outweigh making it more burdensome for the assistance applicant?

Watch this space for future developments. I predict that in our lifetime courts will begin to insist that a party before an ALJ be entitled to raise all claims which she may later raise on appeal. The courts will no doubt articulate a basis for this demand by reference to due process and abstention doctrine, but what will really drive the new case law will be the reviewing court's self interest—having the constitutional and statutory challenges aired in the administrative hearing, resolved by the ALJ, and ratified by the agency means less work for the reviewing court.

Predicting that ALJs will have to become Constitutional scholars allows me to segue nicely into my second prediction and final remarks. While the future status of the ALJ will continue to depend on the pendular motion of organizational policy between adjudicative independence versus administrative efficiency, I have little doubt that the barriers to entry into the corps will continue to rise. Expect bar membership to appear with greater frequency among the prerequisites for assignment as an ALJ. First, the output of law schools

guarantees a plentiful supply of trained lawyers, and trained lawyers are appearing with ever greater regularity in front of the ALJ. Second, the market is in decline, and lawyer legislators can be expected to take care of their own.

I do not think that a law degree, much less bar membership, is a necessary prerequisite for adequate or even superior performance as an ALJ. After all, how much of what law school teaches transfers to the hearing process? Some of Administrative Law, some of Evidence, some of Trial Procedure, and a bunch of Legal Writing. But Administrative Law is almost always overwhelmingly about federal law and only a little bit about the formal adjudication aspect of it. Most of Evidence is rules which have no place in a hearing without a jury, and the same is true about trial practice. Even if Judge Michael's view prevails, only a small portion of Constitutional Law touches on procedural due process. When I add it up by course content and credit hour, I figure I'm talking one semester of law school transferrable to administrative adjudication. Five semesters of the rule against perpetuities, public stock offerings, community property division, and my tax exempt basis in the proceeds from a sale don't seem too important to an ALJ.

You might give me the process speech, about how sitting in those other classes nevertheless develops a lawyer's mind and a lawyer's pen. Even if I agree, it seems that the burden on those requiring law school is to show that three years at more than 10,000 a year is the most efficient way to train somebody for a different job entirely. But, nobody is presently offering an alternative program for training ALJs as ALJs instead of training ALJs as lawyers first, so the law schools win by default, and those intent on making all ALJs lawyers are bound to win. But what if there were a national academy for ALJs, like there is for law enforcement agents? Couldn't it teach fundamental presiding skills in a year or less to ALJs with backgrounds other than law? And do it both better and cheaper?

When it opens for its first class, will someone stop by the bookstore and buy me a sweatshirt? Thank you.