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Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes?

W. Michael Gillette

ADMINISTRATIVE LAW JUDGES, JUDICIAL INDEPENDENCE, AND JUDICIAL REVIEW: QUI CUSTODIET IPSOS CUSTODES?

W. Michael Gillette*

This article, which is based on remarks that I gave at the 1998 and 1999 NAALJ Annual meetings, has four parts. In the first part, I review some significant themes that relate to how we have come to the present condition of administrative law in the United States and the position that administrative judges occupy in it. Next, I offer some prognostications with respect to problems that I believe that administrative law judges are going to face in the future. The third part of the article is composed of excerpts from a question and answer session at the 1998 meeting, touching on some of the problematic issues facing administrative law judges. In the conclusion to the article, I discuss some of the fundamental responsibilities of all judges: to enforce the law independently and equally with regard to all, to accord dignity to all who come before us; to be ethical, honorable, and professional in our work; and to be examples that foster public faith in the rule of law.

I. THEMES:

The Origins of Administrative Law in the U.S.

In looking at the origins of the present administrative law system in the United States, there are several themes starting about 1885, continuing through the turn of the last century with the cases of *Bi-Metallic Investment Co. v. Colorado*,[2] and *Londoner v. Denver*.[3] None of those themes would seem unfamiliar to us. However, it is

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*W. Michael Gillette (A.B. Whitman College, 1963; LL.B. Harvard Law School, 1966) is the senior Associate Justice on the Oregon Supreme Court, having served on that body since January, 1986. He taught Administrative Law for many years and has been a lecturer on that subject at the National Judicial College, Reno, Nevada, for over two decades.

[2]Bi-Metallic Investment Co. v. State Board of Equalization of Colorado, 239 U.S. 441 (1915).

[3]Londoner v. Denver, 210 U.S. 373 (1908).

important to talk about the Depression, because the rise of the administrative state as we know it was the result of the Depression. The present administrative state was the direct consequence, first, of New Deal measures that were enacted to respond to the Depression and, second, of the United States Supreme Court's response to the New Deal. The latter was just what you might expect from a group of nine older white males who had been brought up in a system which didn't have all that government activity: They thought it had to be unconstitutional.

The first decisions of the U.S. Supreme Court in response to the New Deal declared two aspects of it unconstitutional In the famous "hot oil" and "sick chicken" cases, *Panama Refining*[4] and *Schechter*,[5] the Court declared that a broad-scale delegation of authority from the Congress of the United States to administrative agencies to create rules of law which thereafter would be enforced against private parties and private businesses was unconstitutional, because it gave away too much of Congress' authority to a non-elected body. One at least can understand, on a theoretical basis, how the Supreme Court could have come to that conclusion, whether or not one agrees with it. Certainly, there was a basic political science justification for the idea. But the country's needs were dire, and the Supreme Court was not responding to them.

The *Schechter* and *Panama Refining* decisions were followed by the proposal by President Roosevelt to "pack" the Court by appointing an additional member of the Court for every member who still was sitting and who had reached a certain age. That would have meant that the Court would have increased from nine members to around 15. The Supreme Court suddenly discovered that delegation of authority to administrative agencies to engage in broad-scale rule-making that amounted to major substantive law changes was perfectly okay. And, from that day until 1995, the Supreme Court declined to strike down any delegation of power, instead taking the view that Congress could delegate virtually any power that it chose to delegate. A few examples illustrate that proposition.

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[4]Panama Refining Co. v. Ryan, 293 U.S. 388 (1933).

[5]A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

Delegation of Authority

The *Loving*[6] case is an example of how very broad the delegation doctrine has been. *Loving* involved a death penalty matter from a military court martial. Rather than define the circumstances under which the death penalty could be assessed against a member of the military who commits murder while involved in military activities, the Congress had authorized the President to define those aggravating factors. The President did so, and the question before the Court was whether it was permissible for the Congress to delegate that power to the President as Commander in Chief. The Supreme Court upheld that delegation of power.

What we used to regard as the height of delegation occurred in *Wickard v. Filburn*,[7] a 1942 case. In *Wickard*, a poor farmer was growing wheat just for himself -- he wasn't putting it in interstate commerce; he wasn't even selling it downtown; he was just growing the stuff so that he could feed his own animals. But, on account of that innocuous activity, he was viewed as declining to cooperate with federal agricultural production requirements. The Supreme Court held that he was required to comply with those requirements (which limited the amount of wheat any one farmer could grow) because, even though the grain that he grew was only for himself, the fact that he grew it meant that he didn't have to buy it from somebody else. His not buying it meant that the price of grain was lower than if he had to buy it from somebody else, and the price of grain was a matter of interstate commerce. Therefore, the Court held, the farmer was engaged in interstate commerce and the Congress' delegation of administrative control over grain prices and the enforcement of the rules respecting those prices was permissible, even against him.

After *Wickard v. Filburn*, any delegation seemed all right, through stringing out a series of inferences which made everything connected to interstate commerce. And that continued to be true until 1995, when the *Lopez*[8] case was decided. *Lopez* was a case under the "Gun Free School Zones Act of 1990." Now, one may support the

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[6]Loving v. United States, 517 U.S. 748 (1996).
[7]Wickard v. Filburn, 317 U.S. 111 (1942).
[8]United States v. Lopez, 514 U.S. 549 (1995).

concept of gun-free school zones without necessarily seeing Congress as having any role to play respecting that issue. But Congress felt that it had one, and enacted a law that provided various criminal penalties for persons who possessed a gun within a gun-free zone. When a challenge to that law reached it, the Supreme Court declared that the act was unconstitutional as exceeding Congress's interstate commerce powers. The argument was made, of course, that guns are sold in interstate commerce and ammunition is sold in interstate commerce and, therefore, where guns are used is subject to interstate commerce. That was exactly the same kind of series of inferences involved in *Wickard v. Filburn*, but this time the U.S. Supreme Court said, "Sorry, not close enough even for government work -- the act is unconstitutional."

The foregoing illustrations are offered to demonstrate that every pendulum swings to a degree, even the delegation pendulum. And why is this important to administrative law judges, who are not involved in delegation issues? The answer is that, whether you work for state or federal administrative agencies, your agency almost certainly operates on a fairly expansive delegation of authority to it from a legislature, which is simply too busy to enact all positive law and chooses, instead, to authorize agencies to create law by rule. So the idea of delegation is central to administrative law, and has been since the rise of the administrative state in the 1930s.

The rise of the administrative state -- the creation of administrative agencies with broad-scale authority, rule-making power, and so on -- has meant that it was necessary to create administrative adjudicators. That is so because, when an agency has broad-scale authority (including rule-making authority), it needs people to assist it in enforcing its rules. Hence, administrative law judges. It's not as if there weren't administrative adjudicators before the 1930s, but the number coming into existence since that time is enormous as compared to the number that existed before that time. Basically, then, administrative law judges are the children of the Depression, and your work is, in the main, the result of governmental answers offered to the Depression.

Qui custodiet ipsos custodes?

The foregoing serves as background to the specific topic that I want to address, which is captured in the Latin phrase, *Qui custodiet ipsos custodes*: "Who shall watch the watchers themselves?" What this asks is, When we set up someone to look out for us, who is going to watch over how that person does that job? Who is going to assure us that the person is doing the job that he or she is supposed to do, and in the way that it is supposed to be done? Hence the reflective question, "Who shall watch the watchers themselves?"

The question has fascinated me since I was young, because it has seemed to me to be one of those classic imponderables. In all of life we entrust other people to look after various aspects of our well-being. We have very little choice in the matter: Beginning with our parents and, as we grow older, continuing with teachers, various government officials, police officers, and the like, many others are responsible for our welfare and have the duty and authority to "watch" over us. And yet who is watching them?

The answer is: We are. You are. That is our line of work. We are those who are set up to watch the watchers. We are those whose responsibility it is to see to it that those who have been set up in position of power over us observe the laws by which we entrusted that authority to them. That is what judges do.

Judicial Independence and Judicial Review

In terms of administrative law, we conduct this exercise of watching, first, through having administrative law judges who exercise independent judgment with respect to determining the facts and then applying the law to the facts that are presented to them. Secondly, and only secondly -- not primarily -- we watch through the process that we call "judicial review," in which courts in the traditional judicial system will, if asked (and only if asked), conduct a further inquiry to ascertain whether the administrative law judges' application of the law to the facts is justified by the pertinent standards. That is what we judges in the traditional judiciary do but, as I said, our role is secondary. The

primary responsibility for watching those who have been placed over us in various government agencies belongs to administrative law judges, not to appellate courts. When so understood, it becomes clear that the entire process, not just the appellate part, is "judicial review."

As the words suggest, "judicial review" is a review, by a judge, of the propriety of a particular administrative decision. The first level of judicial review in this country is conducted by the first judge who sees a case. And who is the first judge to see a case? Very often, it is an administrative law judge. Most American judges in the traditional system -- federal or state -- don't even begin to appreciate how much administrative law judges are the first in line to see cases. There is one federal agency -- the Social Security Administration -- in which administrative law judges decide more cases in one year than are decided in all the traditional court systems of the United States combined.[9] And this is just one agency.

What does this tell us? It tells us that administrative law judges really are the first judges to be involved in watching those who have been set up over us. It is before the administrative law judge that those who have been set up over us first are required to account legally for their actions.

From the foregoing it should be clear why, when I speak of judicial review, I speak not just of what appellate courts do, but also of what administrative law judges do -- because judicial review is exactly what administrative law judges do: review the legal correctness of agency action. It may be that, in the course of what an administrative law judge does, the judge is the one who "takes" the agency's action. But the ALJ still is the legal "watchdog," the "clearinghouse," the "gatekeeper," responsible for seeing to it that there is a true, appropriate, legitimate connection between facts that exist in a particular case and the law that is applied to that case. And that is, reduced to its basics, the same job that appellate judges have.

What is the justification for judicial review, whether by administrative and other trial judges or by appellate judges? For a very long time, since well before the rise of the administrative state in the 1930s, it was thought that judicial review was essential to assure that

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[9]Bernard Schwartz, ADMINISTRATIVE LAW (2nd ed.1983), at 25-26.

administrative agencies -- which after all are creatures of statute -- did no more than the creating legislation intended that the agency do. Agencies are given finite authority to accomplish certain legislative ends, and the function of judicial review -- or of judicial "check," in terms of "checks and balances" -- was to assure that this was all that agencies did.

Another way to look at the need for judicial review is that it is a normal human response to being granted power to use that power to the fullest extent to which the power exists and (perhaps) a little beyond. This has nothing to do with venality, nothing to do with evil. Rather, it has to do with the normal human tendency simply to exercise strength or authority. We are, after all, animals who tend to explore, and one of the things that we tend to explore is the limits of our own power. It follows, I submit, that it is desirable, useful, and probably even necessary that there be some independent person to place a check on the exercise of that power. Thus, judicial review.

Chevron

This brings me to the epoch-making *Chevron*[10] decision. I am not sure that anyone really saw it coming, saw that it was going to turn out to be quite the blockbuster that it turned out to be. Some recent scholarship examining the papers of Justice Marshall suggests that even some members of the court saw nothing unusual in what the court was doing in that unanimous opinion. The Court was asked in the case to determine whether an agency had the authority to adopt certain rules. It was not a contested case involving adjudication of individual rights. The Court held, with respect to the question of whether the particular agency had the right through rule-making to adopt particular rules, that there was a two-part test to be applied:

"First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the Court as well as the agency must give effect to the unambiguously-expressed intent of Congress. If, however, the Court determines Congress has not directly addressed the precise question at issue, the Court does not simply impose its own

[10]Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute."

In other words, if you cannot tell immediately what the legislature thought about the problem, or if the enactment does not simply and specifically answer the question with which you are presented, and the agency has an answer that is at least a permissible reading of the legislation, that is the end of it. You don't go looking to secondary sources of information with respect to what the legislature actually may have meant. Instead, you say, "Okay, agency, we will go along with whatever you say."

And that, I think it is fair to say, caused an uproar throughout the legal community in the United States. As well it should have done. Because what it represented was an abdication, in the minds of many, of the traditional responsibility of judges independently to examine the law to be sure that everyone understands what the law is and to assure that the agency is following the legislature's intent. Instead, the Court announced that, if the legislative's intent is not plain to begin with, then the agency gets to decide what that intent was.

This brings to mind Rudyard Kipling and one of the verses from his poem, "The Law of the Jungle":

> Because of his age and his cunning,
> Because of his gripe and his paw,
> In all that the law leaveth open,
> The word of the head wolf is law.

Remember the old line about putting the fox -- I have made a small adjustment in predator -- to watch the henhouse? There are certain conceptual difficulties, are there not, in the idea of allowing agencies to act as "wolves guarding the chickens," *i.e.*, of allowing agencies to define the limits of their own power? One can always say, if an agency acts contrary to legislative intent, that the legislature can fix it. The problem with this is that, at least since 1929 or 1930, the whole idea of delegation has been that the legislature often is too busy or too impatient actually to pay attention to what agencies do anyway, so it often takes a hands-off approach to agencies. And how much

more likely is it in the face of the *Chevron* doctrine that Congress, or a State legislature in the face of the adoption of the *Chevron* approach by a state court, is going to pay more attention to what agencies are up to than it did yesterday? I submit that there is no likelihood of this at all.

Chevron changed the balance of power between private citizens and agencies, without incorporating or giving us any reason to expect that the other checks on the agency, in the absence of particular judicial scrutiny, would step in to take their place. So the balance has been changed in a way that seems to many of us to be quite profound and very concerning.

There have been many scholarly articles written on the subject over the next few years, including one by Professor Bill Funk, who is a very thoughtful writer on the subject.[11] Lower courts have struggled with the *Chevron* doctrine. And, of course, lawyers for government agencies immediately began to cite *Chevron* to every judge that would hear it, saying, "This is our interpretation of the statute, which is ambiguous in that you can't quite tell what the legislature meant, and therefore our interpretation is the only thing that matters." And a number of Federal courts have sort of rolled over and said, "Okay, whatever you guys say must be the law." And, over the long haul, many state courts also have fallen into line with this same approach.

It is not clear to me why this is true. I can offer a theory: In my experience, most traditional judges were lawyers in the traditional system. They did not practice a lot of administrative law. They did not go before administrative agencies very much; if they had a client that had a case before an administrative agency, they found a young associate to go and do that, and stayed away from it themselves, saying, "I don't understand that area of law," or "That's not my area of expertise." So it was that, when those same lawyers became judges, their studied ignorance of administrative law came with them. They had not bothered to pay attention to it, but sometimes would find themselves in a position where they were supposed to conduct judicial review.

With the exception of a few renegades like me who actually like the subject and had practiced in the area a bit, who had worked with it

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[11] William F. Funk, *To Preserve Meaningful Judicial Review*, in Symposium: *The Future of the American Administrative Process*, 49 ADMIN. L. REV. 171 (1997).

as appellate lawyers and therefore felt immodestly that we have some grasp of it, most judges have just "stayed away" from administrative law. Therefore, when the *Chevron* doctrine came along, one readily can understand how a lot of state judges would have said, "Whew, the U.S. Supreme court says it is okay just to sort of wash our hands of this responsibility, and that feels good, so let's do it."

Paradoxically, what happened is that, in announcing the *Chevron* doctrine, the Supreme Court managed to renew the debate over what the purpose of judicial review is. Because the Court in essence had chosen not to conduct any meaningful judicial review in that case, the question became, "What good does judicial review do, anyway?" Put another (and more fundamental) way, "What is the proper role of the judiciary, vis-a-vis the executive branch in this area of government activity?" And here, three schools of thought have emerged.

Three Schools of Thought on Judicial Review

I will use a division originally used by Professor Funk, taking responsibility for any misunderstanding of his theory. One view is represented by Justice Breyer, who in his book[12] has taken the interesting view that many administrative agencies are primarily technocratic in nature and that judicial review of their work is counter-productive, because the issues before the agencies are too technical for judges to understand. Obviously, Justice Breyer was talking only about certain types of agencies, such as those involved in public utilities, for example, and his theory would not apply to "mass justice" agencies. Nonetheless, if the doctrine applies anywhere, to some extent it has to apply everywhere. And, as soon as you begin to try to apply it everywhere, it's clearly not right.

Most of the decisions that most administrative agencies and most administrative law judges have to make may be slightly technical, but they are technical only in the sense that you may have to have an expert testify with respect to the technical answer. But you are not a potted palm, your brain is not mush; you are perfectly capable of

[12] *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993).

analyzing the technical questions and answering them. And, if you are capable of it, why isn't Justice Breyer? This is an avoidance technique, it has nothing to do with the inability of judges to do the work. If judges can't do this, if judges can't understand the technicalities of the work that administrative agencies do, then we had better quit. Because agencies are the ones that have an impact on private citizens. Agencies *are* government, from the point of view of most private citizens.

The second view on the Supreme Court is that of Justice Scalia. Antonin Scalia's theory is that judicial review exists only for protecting individual rights; it does not exist to assure agency fidelity to law. Agency fidelity to law is assured by the oath of members of the executive branch to obey the law -- they will look out for themselves! But Scalia does have a good point to make, at least with respect to making regulations, although what he says is less true with respect to contested cases. When an agency is making regulations, he argues, the choice of what regulation to enact is a political choice, and should be deferred to on that ground.

It is true that an agency's decision to enact regulation A or not to enact regulation B is a political choice of much the same kind that the Congress makes when it chooses one public policy over another. And, because it is a political choice, Scalia argues, the process is -- and it should be -- pretty much beyond the reach of the judiciary. It's not the judiciary's business -- not yours or mine -- to review political policy choices for the validity of the choice; that is not our line of work. And he is right about that, to a certain degree.

To illustrate: Administration A is responsible for appointing the head of Agency X. Head of Agency X, through rulemaking, directs the creation of a series of rules which lie well within the agency's power to promulgate and which are consistent with the policy objectives of Administration A. Administration B is elected, from the other political party, and a new administrator is appointed for Agency X. The new administrator rescinds the old rules and creates new rules which further the policy objectives of Administration B -- policy objectives which were advertised and which the voters knew about when they voted for Administration B. Both of the sets of rules, although they reach different conclusions under a broad range of circumstances, are perfectly within the agency's power to enact, *i.e.*, they are within the range of policy choices that the agency may, in its discretion, choose to

implement.

What is the proper role of courts in all of that? In my view, none. The agency's choice and the agency's change of direction are perfectly valid things for the agency to do. And, to the extent that Scalia is making that point, he's fine. It's just that he doesn't quit there. He tends to begin to view virtually everything as a sort of agency political choice. But when you get down to the point of whether Fred gets Social Security benefits or not, that's not much of a political choice, especially to Fred! And so great care has to be exercised in accepting the Scalia approach.

The third approach, with which I am happy to associate myself, I will call the Funk approach. That approach holds that agencies exist to carry out the law and that the role of judicial review is to assure that agencies keep within the bounds of the law. That's what we are supposed to do. That's what judicial review is supposed to be about. Thus, to the extent that courts now excuse themselves from the duty of carrying out that particular exercise, courts have abandoned their traditional function and indeed have thrown those who are subject to administrative agency jurisdiction to the wolves -- including the "head wolf."

Chevron has created a profound shift in thinking with respect to the role of judicial review. Perhaps that has had one good effect, in that it has created new discussions with respect to what judicial review is all about in the first place -- a topic we had sort of fallen into a comfortable silence about. So I am not going to tell you that *Chevron* has been all bad, because it has not. But it sits there. To the extent that it's being limited by some courts, it is a slightly wounded lion, but it still has claws. And it represents an idea which, carried to its logical extreme, is profoundly dangerous -- for you, for me, and for the people we serve.

And so, as I have looked back over the development in the law, although there are other themes, I have realized that there is no getting away from *Chevron*. And in terms of developments in administrative law, that which started 14 years ago with *Chevron* is still alive and well. And therefore, whether a wounded beast or a perfectly healthy one, it needs to be kept very closely in check.

At the same time, there has arisen an interesting and (if anything) opposing trend from (where else?) California. I turn to that next.

The California Alternative on Judicial Review

The California alternative on judicial review actually is reasonably old; the first case involving that approach was decided in 1974, ten years before *Chevron.* The California Courts of Appeal particularly are following the approach: the so-called "vested right leads to independent judgment" standard of review.

In California, the degree of scrutiny that is provided on judicial review is a function of the degree to which the particular right that is involved in a case is "vested". To give one example: Suppose you want to open a new tavern in Costa Mesa, California. You bought the land, which is just sitting there. You want to set up a tavern; you need a conditional use permit from the City of Costa Mesa to build your tavern. The city denies you the permit, based on evidence from some people in the neighborhood that their experience with other taverns has been that there is rowdy behavior outside them that disturbs the tranquility of the neighborhood. Under California law, the way that you challenge the city's decision is to go into Superior Court, seeking an affirmative writ of mandamus that directs the city to issue you the permit.

In this case, the Superior Court judge would ask, did the city hear evidence that there would be an adverse impact? If the answer is yes, the court then would ask, did the city believe that testimony? If the answer is again yes, the court would deny mandamus, ruling that the city is entitled to make that decision.

But suppose that, instead, you buy an existing tavern, which already has a conditional use permit that must be renewed from time to time. You put in a little money to update the place and apply for a renewal of the permit. There are objections from the neighbors about all the bad things that happen there at 2:00 in the morning. If the city denies the permit, and you go to the same Superior Court, the judge conducts a different kind of review: a "vested rights and independent judgment" review. First, the judge determines whether you have a "vested right" in the tavern or in the conditional use. The answer to that question is that, because the tavern already existed and was being operated on the spot, you have a vested right to continue doing that. The question then becomes, does the evidence justify denial of the conditional use permit, based upon the judge's independent review and

evaluation of the evidence?

The case is called *Goat Hill Tavern v. The City of Costa Mesa.*[13] The Superior Court concluded that there was not sufficient justification for denying the permit. The California Court of Appeals agreed that the trial judge's reevaluation of the evidence and conclusion was proper, and held that the tavern had to be granted a license.

The foregoing is not the way in which this kind of work traditionally is done. Essentially, what California has done is eliminate the usefulness of the administrative adjudication process, choosing simply to transfer that process back to the Superior Court. This is revolutionary or, if you prefer, counter-revolutionary. Because that's the way business used to be done, 50 or 60 or 70 years ago. And California has gone back to it. Is their anything wrong with that? To my mind, there are at least a couple of things that are very wrong with it.

First, the California approach does violence to the concept of the substantial evidence standard, to which the California courts purport to be paying attention. But this is academic. The more significant point is that it trashes the administrative law and adjudication process. It makes that process nugatory. The process becomes one that you have to go through but that has no meaning, unless the person with the vested right wins. If the person with the vested right loses, he or she then goes to Superior Court and gets to try the case, to a certain degree, over again. The Superior Court proceeding may be on the record, with no new evidence taken, but the proceeding still is a profoundly different one than we are accustomed to. If you were an administrative law judge involved in that process, you had applied the law carefully and correctly to the evidence that you had heard, you had made findings of credibility and findings of historical fact with respect to the evidence that you had heard, and then it turned out that none of the effort counted, wouldn't you be a little annoyed?

In terms of a waste of public resources, I find this disconcerting. And I find even more disconcerting the explanation that was given in the *Costa Mesa* case by the California appellate court. The court said, "The right [the vested right to the conditional use permit] is sufficiently

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[13] 8 Cal. Rptr. 2d 385 (Cal. App. 4 Dist. 1992).

personal, vested and important to preclude its extinction by a non-judicial body." And apparently their view of a "non-judicial body" would include you because, in another California appellate case called *Cooper v. Kizer*,[14] there was the same ruling with respect to a claim for medical benefits in a classic contested case of the kind with which all of us are familiar.

So we see that, in addition to the *Chevron* doctrine, which (in my view) abdicates judicial responsibility, there also is a fascinating and intrusive approach that is being used elsewhere that effectively negates your efforts as adjudicators. Feast or famine. Total deference, or none.

In the long run, I find the California approach the more worrisome. The siren song of mixing in too much, of substituting one's own judgement for that of the ALJ, is one that is very difficult to resist. Even the most well-meaning courts, ones who think that they have some grasp of the scope and function of judicial review, may from time to time find themselves mixing in more than they ought to do, or, without recognizing it, reevaluating evidence more than they ought to do, in order to accomplish an end which truly is not the court's business.

II. PROGNOSTICATIONS:

Central Panels and Judicial Independence

When I look into the future, here is what I see: First, central panels are a coming thing. I did not expect that Oregon would have the good sense to create one (and predicted we would not in my 1998 speech), but we have just done so this past year, as have other states in the past several years. I think that, in the long run, the proven track record of central panels, both in terms of saving money and of adjudicating efficiently the administrative questions that come before them, is going to make central panels the usual choice of the states. I say this with optimism, but I have to note at the same time that sometimes we are our own worst enemy, and by "we" I mean judges as a whole -- traditional judges and administrative law judges.

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[14]282 Cal. Rptr. 492 (Cal. App. 2 Dist. 1991).

An illustration of this is the case of *Pastrana v. Chager*,[15] a 1996 case from the federal district court in Puerto Rico. In *Pastrana*, a federal district judge was reviewing an administrative law judge's decision. The federal district judge found, correctly, that the administrative law judge had made remarks that demonstrated that the administrative law judge was not hearing the case fairly. So the case was reversed and remanded to a new hearing. That's fine. But the federal district judge didn't stop there. Instead, the judge affirmatively criticized the administrative law judge and suggested that the administrative law judge ought to be disciplined.

There are enough people outside the judiciary who want to attack the independence of the judiciary. We don't need to be shooting at each other. Ordinarily, it is not the business of any appellate judge to recommend, to control, or to direct the disciplining of anybody. The fact that a judge didn't try a case the way that I, as an appellate judge, determine that it should have been tried, or didn't behave as well as I think the judge should have, does not clothe me with authority to discipline. There are procedures for doing that, and sometimes those procedures lead to a recommendation that a judge be disciplined or removed, but the rest of us need to have faith in those procedures. To take gratuitous shots at a defenseless administrative law judge is itself close to indefensible.

From the foregoing, you can see that, while I am confident that some states will adopt central panels, I have an ongoing concern about the needs of judicial independence. We must recognize that, even if a central panel is created, there are still any number of ways in which judicial independence can be compromised, through budgetary and other threats, inappropriate oversight, *ex parte* communications, and the like. It is important always to be on guard against such potential avenues for compromising independence, even with a central panel.

Land Use and Administrative Law Judges

The second prediction that I offer, and I am confident about this to a high degree -- so I may be especially wrong -- has to do with the

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[15]917 F. Supp. 103 (D. Puerto Rico 1996).

decisions by the United States Supreme Court in the last 10 years involving land use, and the rigor with which local government land use choices that limit the uses that owners may make of private property are being scrutinized. Such decisions[16] suggest to me that land use is going to turn out to be a very hot topic, and not just for those of you who ordinarily deal with land use questions. As I watch what's going on in the creative minds of lawyers around Oregon and the cases that I read from elsewhere, lawyers are finding wonderful ways to work independent constitutional questions into areas where you never would have suspected them to arise.

Let me give you an example of a kind of traditional administrative law problem, unrelated to land use, that suddenly could take on important land use implications. Suppose a public employee is opposed to his agency taking a particular action with respect to certain private property, because the employee feels that for the agency to do that amounts to a taking of that private property. The employee complains; his or her boss fires the employee for insubordination.

You are the judge who is sitting on the employee's termination case, determining whether the firing was for cause or not. The agency's argument is that it is insubordination to criticize publicly the agency's choice to do what it did. The answer is that the property owner may have had the constitutional right not to have the agency do what it did, and the employee may have had an independent constitutional right (as well as a civic duty) to speak up. You can see how as administrative law judges you could get caught up in this.

My point is that land use is a hot button. The U.S. Supreme Court seems to feel that we've been a little cavalier with private property and it's about time that we started paying more attention to the interests of the individuals that are being lost with increasing government regulation of land use. That may be right -- I don't necessarily disagree with it as an abstract proposition -- but I do think that it is going to give rise to some fascinating and unexpected new cases touching on land use issues.

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[16]*See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994), Nolan v. California Coastal Comm'n, 483 U.S. 825 (1987).

Due Process

I want to note as well that, while I think that there is going to be a revolution on the issue of due process in some direction, I cannot tell where due process is going at the moment. My uncertainty arises out of the fact that, at the same time the Supreme Court appears to feel that there is a substantive due process right to more than some land owners are receiving these days, the Court seems also to be profoundly uninterested in the traditional kinds of due process considerations that led to the decision in *Matthews v. Eldridge*,[17] and the many cases that came after it. Those of us who have grown up with the idea that the question to be asked, when an individual is faced with losing a license or something else that the government offers, is not whether the person gets a hearing but, rather, what kind of hearing and when, may need to rethink this. Because the Supreme Court has been reaching conclusions lately that no hearing at all is required with respect to some kinds of cases, based on a cost-benefit analysis. The Court, under the whip hand of Justice Scalia, is fiercely interested in the idea of cost-benefit analysis in terms of the meaning of constitutional rights. Because of that, I think that there is a revolution coming with respect both to the scope of one's right to due process and to the nature of the process that has to be provided.

As a matter of interest, in recognition of the foregoing, my court may have fired a shot across the Supreme Court's bow. I am the author for my court of a decision called *Noble v. Board of Parole*,[18] in which the issue was whether a particular state process by which a person was labeled a predatory sex offender comported with due process. The conclusion of the case was that the particular process being followed by the state did not meet the requirements of due process. The question, however, is an extremely close one under Supreme Court precedent and what I was doing in writing the opinion was saying that precedents can be read either way and this is the way that I think they work. The State notified my court that it intended to seek certiorari, so maybe I

[17] 424 U.S. 319 (1976).
[18] 327 Or. 485, 964 P. 2d 990 (1998).

have caused trouble.[19]

The Judge's Job

We all are in this together. Inescapably, administrative law and the administrative state impinge on the public more and more often as there are more and more of us. And it seems to me that when driver's licenses, house remodeling, vacations at the beach or the mountains, clean air and water, and cigarettes are all impacted by administrative regulations, the high likelihood is that *you* as an administrative law judge are going to be the person whom the public encounters, *you* are going to be the person who is seen as a reflection of the reliability of the rule of law, and *you* are going to be the person who is conducting that pivotal, first level of judicial review to determine whether an administrative agency really is carrying out its functions within the limits of the law. That's what you do. As an appellate judge, I will be re-examining your conclusions -- second-guessing you, if you will -- but that's all. It primarily is your job to conduct that judicial review, not mine. And, when I do "second-guess" you, I shall try to remember that I am supposed to confine myself to the same legal questions that you were asked, and that I simply am taking one more look at them.

III. QUESTIONS and ANSWERS

Now, I don't want to deny you the chance to throw a brickbat or two at me, so I will take some questions.

Question: In a situation where the agency has not promulgated a rule with respect to its interpretation of a statute, but instead takes an action and announces its interpretation in the course of a contested case, in a situation in which there was no prior opportunity for an affected person to know what the interpretation of the statute was going to be, does *Chevron* apply? Are we still supposed to defer where we have an unambiguous statute?

Answer: The answer to the first part of that question is yes, a

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[19]Not enough, apparently. The State did not seek certiorari. But, for a view contrary to Noble from an Oregon federal district court judge, *see* Hadsell v. Kelly, 1999 WL 1038732 (D. Or. 1999).

reviewing court would defer, insofar as the agency is using adjudication rather than rule-making to interpret the statutes that govern it. This is the way courts are looking at it, not distinguishing between rule-making cases, as *Chevron* was, and adjudication cases in which interpretations are announced in orders. The answer to the second part of the question (in my view) is: If the statute is unambiguous, there is nothing to defer to.

Question: Can an agency put an unpublished policy before an ALJ in the course of a case, and then expect the ALJ to follow it?

Answer: Well, they do it. I hope that the ALJ will then make a record, giving the other side an opportunity to respond and to object, if the other side wishes to do so, and thereafter proceed based upon what appears to be the validity of the objection, if any. If interjection of the unpublished policy is not objected to, it's not a problem; if it is, then you have to deal with the legal objection that's made. Somewhat closer to the bone is the question of what you do if you think that the agency is trying impermissibly to interfere with the way in which you are conducting your work. I suppose you need to make a record with respect to that, too, which takes more than a little courage. But I don't know any other way to deal with it.

Question: To follow up, what I have in mind is not a minute or minor policy matter, but a policy matter that goes to the heart generically of the existence of the agency. That is to say, it goes to the purposes for which it was created. And those goals and purposes are not necessarily statutorily defined.

Answer: If this is a real case, then I don't want to appear to be prepared to rule on it. And I bet dollars to doughnuts that it's real. Let me tell you what matters to me at the second judicial review -- remember that, as I have said, you are the first level. What matters to me at the second level is that at the first level the law that was to be applied was known, was accessible, to all of God's children who were taking part in the case, at a time when they had an opportunity to proceed under a fair understanding of that law. In other words, I want to be assured that the rules of the game were not switched in mid-stream. That's what matters to me. It's a matter of notice. It's a matter of a *fair* hearing.

If an agency has strong views with respect to what its purposes are and, therefore, with respect to the way in which its particular cases

ought to be conducted, the agency is perfectly entitled to have those. It's just that the other side -- assuming that the particular case involves a true adversarial proceeding between the agency and an individual -- is entitled to notice, and an opportunity to prepare evidence or otherwise to meet the particular agency's choices or perception of its legal responsibilities.

With respect to your role, your role is to be the intermediary. You're the gate-keeper. If the agency has made a legal choice, proper notice has been give to the other side, and the legal choice lies within the agency's authority, then it's your job to enforce it. But it's your job first to decide whether the agency's legal choice does lie within the agency's authority. That's the inescapable minimum. It's always upsetting to have the people who are supposed to behave with scrupulous fairness appear to be trying to steal a march. Reviewing courts don't like it, and I know that you don't either, but the way in which the question is put to me implies that the questioner feels that this could be happening. If that is so, then what is called for more than anything else is the hardest thing for any of us to summon, and that is the courage to look the people we work with every day in the eye and say, "You don't get to do this, because I won't let you."

To answer another follow-up question, in applying a rule of law, a judge may be moved as much by what one perceives to be the spirit that lies behind the law as the letter of the law itself. And one's fact-finding function cannot avoid being influenced to some degree by that perception. I have no difficulty with that, so long as the sprit that one perceives is consonant with the wording of the law. As soon as it contradicts that wording, however, what the judge actually is saying is, "I know better what the law means (or ought to mean) than what the words of the law say." Bad choice. Being imbued with the actual spirit and purposes for which your agency exists is fine, but the one thing we cannot let it do is have any influence on how we see the facts. The facts are whatever they are, and the legal consequences that flow from them flow only from them after we decide what the facts are. The facts are not what they are because the law is what it is; the facts are what they are, period.

Question: With the move toward a central panel in Oregon, there was some discussion yesterday about whether that would affect the ALJ's duty to ensure the development of a full and fair record.

What are your thoughts on that?

Answer: I do not see a change. My initial reaction is that this would not be affected by whether the judge works for the particular agency or works for the central panel. It seems to me that the obligation, to the extent that it exists, exists without regard to who signs the checks.

Question: Given the fact that some ALJs in some jurisdictions are not attorneys, and given the fact that most supreme courts have jurisdiction over the discipline of attorneys only, what is the effect and interaction between a supreme court and the administrative agencies with respect to the application of the canons of judicial ethics and other considerations of that kind?

Answer: To the extent that a lawyer is performing administrative law judge functions, the disciplinary process by which administrative law judges are disciplined for cause is a matter that will be reviewed, *i.e.*, given a second-level form of judicial review, only when the internal disciplinary process is finished. As I suggested with respect to the case from Puerto Rico, it's not the function of supreme courts to step in immediately and rebuke a lawyer *qua* lawyer with respect to what that lawyer was doing as an administrative law judge. It may have reason to do so later, but the primary responsibility lies within whatever agency is responsible for disciplining administrative law judges, without regard to whether they are law-trained or not.

The use of the canons of judicial ethics as a standard by which the disciplinary process is carried out is a separate issue. If the disciplining agency wishes to use those, and if the claim is that there has been a violation of them, fine. Then the disciplining authority can take the action that it deems appropriate, based upon whatever violation it finds, and the court's involvement (if any) will come by way of the usual form of judicial review. In any such review, we certainly will be applying a familiar body of law, but we will be doing so solely to determine whether that body of law has been applied correctly by the disciplining agency.

IV. CONCLUSION: THE RESPONSIBILITIES OF JUDGES

I commend NAALJ and those who attend these annual meetings. It means a great deal to me, and to a great many others who

think about administrative law and care about it. Just a glance at your programs tells us what you think the purpose of an organization like this really is. The emphasis here is on education, ethics, and professionalism, just as it ought to be. Because you are judges in just the same way that I am a judge. You have, if anything, far more impact that I do, on individuals. I may make decisions that have a more general impact on all the people of Oregon whom I serve. But you have an impact one at a time on individuals who will not forget you, whereas most of those who are affected by the opinions that I write don't even know who I am. I have the benefit of an anonymity that you do not; for most citizens, the law wears your face. The fact that you want to be professional in what you do is a profound compliment to you, and a profoundly moving and encouraging development for me.

The public will believe in, will have faith in, the rule of law only if the judges whom the public sees appear to have those basic qualities that we all want to see in those who are responsible for justice: (1) judges who work diligently and selflessly to find the truth; (2) judges who treat all before them with a generous and equal dignity; (3) judges who seek to understand the law and who are fearless in their willingness to follow it; and (4) judges who take their work, but not necessarily themselves, seriously. Only if we have those qualities will the public believe in us. And only if the public believes in us do we have any true hope of succeeding.

Faith in the rule of law can be fostered by an honorable and a professional judiciary, which is the kind that you and your association are trying to create. It just as easily can be destroyed by a dishonorable or unprofessional judiciary, and that is the kind that we always can have with us, if we are careless enough to permit it.

I began this talk by noting the wonderful Latin quotation, "*Qui custodiet ipsos custodes*?" I close by offering you this answer, in which I hope all of you will join: "*Nos, in quas manus leges commissae sunt, custodes custodiemus.*" "We, into whose hands the law has been entrusted, we shall watch the watchers." Please remember those words, and the high ideals that they represent. As a member of the judiciary, I pledge to you that I will strive to set an example that will justify all reasonable men and woman in believing in the rule of law. I expect nothing less, and I know I will see nothing less, from you.