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Judges in the Executive Branch and Judges in the Judicial Branch: Similar, Yet Distinct

Thomas G. Welshko

I. Introduction.

Administrative adjudication exists as a necessary alternative to formal adjudication in the constitutional courts. The array of cases handled by administrative law judges, hearing officers and other executive branch adjudicators would crush an already overwhelmed judiciary. However, the need for administrative adjudication to play a greater role in the administration of justice has obscured some of the differences between executive branch judges and their counterparts in the constitutional courts. For example, administrative adjudicators can determine the constitutionality of statutes, a function usually reserved for the courts. Administrative adjudicators, like constitutional judges, make credibility findings that must be given deference upon review. Discovery and motions practice, common in the courts, are expanding in the administrative setting.

Yet, as the similarities between executive branch judges and constitutional judges continue to grow, important differences remain. Executive branch judges, unlike judges in the judiciary, impose sanctions that are remedial, not punitive. The rules of evidence used in administrative hearings are more relaxed than those used in the

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1Maryland Administrative Law Judge.


3See, for example, the Rules of Procedure of the Maryland Office of Administrative Hearings, found at Code of Maryland Regulations (COMAR) 28.02.01.10 and 28.02.01.16.

federal and state courts--most prominently, the hearsay rule.\(^5\) Administrative adjudicators, unlike judges in the judiciary, also hear cases using diverse methods and in varied settings. A full, trial-type hearing is not always necessary.\(^6\) These distinctions make administrative law judges and hearing officials of all kinds particularly well-suited to provide administrative justice that is both fair and efficient.

II. Similarities.

A. Ability of Executive Branch Adjudicators to Decide Constitutional Issues.

In the past, administrative adjudicators could not decide constitutional issues. The philosophy that prevailed until recently dictated that executive branch hearing officials had to apply the law, even if they believed that a particular statutory provision violated the constitution.\(^7\) Yet, in recent years, the United States Supreme Court and other appellate courts have carved out exceptions to this general rule. The implications of this change are significant.

In *Thunder Basin Coal Co. v. Reich*,\(^8\) the United States Supreme Court addressed the issue of whether the Federal Mine Safety and Health Administration (MSHA) could decide constitutional issues. The court ruled that it did and stated the following, in pertinent part:

As for petitioner's constitutional claim, we agree that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," *Johnson v. Robison*, 415 U.S. at 398, 94 S.Ct. at 1166, quoting

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\(^7\)Buckeye Industries v. Secretary of Labor, 587 F.2d 231 (5th Cir. 1979); Tung Chi Jen v. Immigration and Naturalization Service, Los Angeles, California, 566 F.2d 1095 (9th Cir. 1977))

\(^8\)510 U.S.200 (1994)

This rule is not mandatory, however, and is perhaps of less consequence where, as here, the reviewing body is not the agency itself, but an independent commission established exclusively to adjudicate Mine Act disputes. See Secretary v. Richardson, 3 F.M.S.H.R.C. 8, 18 - 20 (1981).

The emphasis the court placed on the ability of "independent commissions" to decide constitutional issues cannot be underestimated, particularly with respect to state administrative adjudication. As more states adopt central panel hearing offices, those offices become farther removed from the agencies whose cases they hear. They are not merely arms of the executive branch in enforcing the law, but also have an interpretative function as well. In this regard, state central panels function more like courts. Consequently, under the doctrine established in Thunder Basin, they should have the greater discretion in deciding constitutional issues.

A year after the Supreme Court's decision in Thunder Basin, the Maryland Court of Appeals in Insurance Commissioner of the State of Maryland v. Equitable Life Assurance Society of the United States also ruled that administrative adjudicators have the discretion to decide constitutional issues. In that case, the Maryland Human Relations Commission and the National Organization for Women (N.O.W.) sought judicial review of the Maryland Insurance Commissioner's

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9Id. at 215
10664 A.2d 862 (Md.1995).
11Normally, the Insurance Commissioner would not have heard this case personally. COMAR 09.31.19.01B [24:6 Md. Reg. 793 (May 23, 1997)], formerly 09.30.65.05, provides for the delegation of his authority to adjudicatory hearings to Maryland's Office of Administrative Hearings. However, COMAR 09.31.19.04 [24:6 Md. Reg. 793 (May 23, 1997)], formerly 09.30.65.06, allows the Commissioner to revoke this general delegation of authority to the Office of Administrative Hearings on a case-by-case basis when "novel or unanticipated factual issues" or "significant social, fiscal or legal issues" are involved. Consequently, the Commissioner was acting as an administrative adjudicator in this instance.
determination that state statutes authorizing rate differentials based on gender for life, disability income and similar kinds of insurance discriminated on the basis of sex and, therefore, violated Article 46 of the Declaration of Rights in the Maryland Constitution. The insurer, Equitable, argued that the Commissioner lacked authority to decide the constitutionality of the statutory sections at issue. It contended that only the courts could make constitutional determinations. The Commissioner disagreed. In his opinion, he noted that Md. Ann. Code art. 48A, § 25(4)(a) (1994) required him to consider “all laws of the State’ relative to the issues before him.” Additionally, he explained that he was not making a declaration of rights, but merely applying pertinent law. He also stated that judicial review still existed as an adequate safeguard if his constitutional determinations were erroneous.\textsuperscript{12}

The Circuit Court for Baltimore City, which heard Equitable’s initial appeal, rejected the Insurance Commissioner’s view that he could rule on the constitutionality of statutes, but the Maryland Court of Appeals reinstated the Commissioner’s original holding.\textsuperscript{13} That court noted that an administrative agency had the authority to declare a statute unconstitutional as well as decide whether a statute as applied in a particular circumstance ran afoul of the state or federal constitution.\textsuperscript{14} The court wrote, in pertinent part:

Nevertheless, the lack of authority to issue a declaratory judgment or ruling on the constitutionality of a statute does not mean that an administrative agency or official, in the course of rendering a decision in a matter falling within the agency’s jurisdiction, must ignore applicable law simply because the source of the law is the state or federal constitution. The Insurance Code, Art. 48A, § 25(4)(a), in giving the Insurance Commissioner “jurisdiction to enforce by administrative action the laws of the State as they relate to the underwriting or rate setting practices of an insurer,” has no exclusion

\textsuperscript{12} 664 A.2d 868-69.
\textsuperscript{13} Id. at 870, 875.
\textsuperscript{14} Id. at 875.
for constitutional law. The Administrative Procedure Act's requirement that state administrative agencies must render conclusions of law in contested cases contains no exceptions for constitutional issues. See §§ 10-205(b)(2), 10-220, and 10-221(b) of the [Maryland] State Government Article. In fact, under both the Insurance Code and the Administrative Procedure Act, a constitutional error in an administrative decision, as well as "other error of law," is included among the grounds for judicial review of administrative decisions. Article 48A, § 40(4); § 10-222(h) of the State Government Article.\textsuperscript{15}

The court went on to say:

Finally, where a constitutional challenge to a statute, regardless of its nature, is intertwined with the need to consider evidence and render findings of fact, and where the legislature has created an administrative proceeding for such purpose, this Court has regularly taken the position that the matter should be initially resolved in the administrative proceeding. See, e.g., Gingell v. County Commissioners, supra, 249 Md. At 376-377, 239 A.2d at 904 - 905; Poe v. Baltimore City, supra, 241 Md. At 307, 311, 216 A.2d at 709, 711; Pressman v. State Tax Commission, supra, 204 Md. At 84, 102 A.2d at 824. In the present case, the particular constitutional attack on portions of the Insurance Code required an evidentiary hearing and findings of fact. First, the need to resolve the constitutional issue was dependent upon, \textit{inter alia}, evidence and findings with regard to actuarial justification. Second, we have held that, under the E.R.A., statutory classifications based on gender are generally subject to strict scrutiny, with those defending the classifications having the burden of

\textsuperscript{15}Id. at 872.
justifying them. *State v. Burning Tree County Club, Inc., supra*, 315 Md. At 295, 554 A.2d at 386. Equitable undertook to justify its gender based insurance rates on the ground that they reflected inherent physical differences between men and women. This issue obviously required an extensive evidentiary exploration which the General Assembly determined should be done by the Insurance Commissioner.

Consequently, the circuit court erred in holding that the Insurance Commissioner lacks authority to decide whether portions of the Insurance Code are unconstitutional.\(^16\)

Maryland’s Court of Appeals concluded that administrative agencies are empowered--indeed, obligated--to decide constitutional issues in administrative proceedings, and can also declare an entire statute unconstitutional. This function is no longer solely reserved for the courts.

I was faced with deciding a constitutional issue in a case I heard for the Maryland Department of the Environment. In *Erb v. Maryland Dept. of Environment*, a property owner raised objections to a statutory/regulatory scheme which allegedly allowed the taking of his private property without just compensation in violation of 5th and 14th Amendments to the United States Constitution, citing *Lucas v. South Carolina Coastal Council*.\(^17\) I ruled that the *Lucas* case was inapplicable to the Appellant’s case because the Maryland Department of the Environment was simply exercising its traditional police powers and that this exercise did not violate the 5th and 14th Amendments. The Maryland Court of Appeals upheld my ruling and adopted my reasoning in deciding *Erb* on appeal.\(^18\) My authority to address constitutional issues was not called into question.

B. Deference Must be Given to the Decisions of

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\(^{16}\)Id. at 876.

\(^{17}\)505 U.S. 1003 (1992).

Administrative Adjudicators.

The courts and other reviewing bodies must give "due deference" to the findings of fact made by administrative adjudicators. Reviewers of administrative decisions cannot pick and choose what facts they will accept or reject. When reviewed, administrative adjudicators' decisions are, therefore, becoming less subject to attack, like those of the constitutional courts.

In Maryland, proposed findings of fact by Hearing Officers (before the advent of the Office of Administrative Hearings) and by Administrative Law Judges (after the creation of the Office of Administrative Hearings) were subject to change by the Secretary of Personnel's designee. It was the Secretary's designee's practice to review transcripts or tape recordings and second-guess an administrative law judge's credibility determinations. One of my decisions was overturned in this way. That case involved a prison correctional officer whom management accused of failing to lock a cell door according to required practice. The respondent correctional officer testified that she had locked the door, but a mechanical failure had caused it to open by itself. Several other correctional officers testified that similar mechanical malfunctions had caused other locks to fail in this way, resulting in several cell doors coming open by themselves. Nevertheless, management's witness, the institutional maintenance supervisor, testified that the locks were working properly. I found the respondent correctional officer and her witnesses credible and overturned her disciplinary suspension in my proposed decision.

However, on appeal, the Designee of the Secretary of Personnel reviewed the tape recording of the hearing and reinstated the original suspension. She did so, stating that I made incorrect credibility determinations.

The ability of a reviewing body to change an administrative law judge's decision, particularly based on credibility findings, was severely restricted in Anderson v. Department of Public Safety and Correctional Services. Citing Universal Camera Corp. v. National Labor Rel. Bd., the Anderson decision made it clear that an agency

20623 A.2d 198 (Md. 1993).
21340 U.S. 474 (1951).
can only reverse a decision of a lower level adjudicator when his or her findings are clearly erroneous and that “the agency should give appropriate deference to the opportunity of the examiner to observe the demeanor of the witnesses.”

Cases like Anderson illustrate that the decisions of administrative law judges and those of other executive branch adjudicators cannot be reversed simply because a reviewing body believes the result should have been different.

C. Discovery and Motions’ Practice.

The acceptance of the use of discovery and more formalized motions practice in central panel hearing agency states also illustrates the growing similarity between administrative adjudicators and judges in the judiciary. Prior to the creation of the Office of Administrative Hearings in Maryland, discovery and a substantial motions practice for administrative proceedings were almost unknown. Only certain agencies, such as the Maryland Commission on Human Relations, had provisions for pre-hearing discovery and expansive motions practice.

Now, Maryland has limited discovery under COMAR 28.02.01.10 and a provision for motions practice under COMAR 28.02.01.16. Documents must be made available by a party for inspection and copying. Motions in limine, for summary decision, for dismissal and for sequestration of witnesses are common under the state’s central panel structure.

Maryland is not alone in allowing expanded discovery. Many central panel states’ discovery provisions are even more extensive than Maryland’s. In Florida, Minnesota, New Jersey North

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22Id., 623 A.2d at 212.
23Recent federal cases also support the principle cited in Anderson. See 3-E Company, Inc. v. National Labor Relations Board, 26 F.3rd 1 (1st. Cir. 1994).
24Formerly COMAR 14.03.10.07G, K and J(2).
25COMAR 28.02.01.10A.
26Maryland’s discovery provisions are actually among the most restrictive as compared with other central panel states.
Carolina, and several other states, administrative discovery parallels that of the state courts of general jurisdiction. In fact, these states' administrative procedure acts or rules of procedure often do not set out specific discovery rules, but cross reference each respective states' rules of civil procedure. Some states, like Minnesota, do clarify their administrative rules of procedure by allowing parties to demand that opposing parties provide the names and addresses of all witnesses who will be testifying at the hearing. Parties can also seek "any relevant written or recorded-statement made by the party or by witnesses on behalf of a party." If a party refuses to provide the information sought by the opposing party, a motion to compel discovery can be made to the presiding administrative law judge. If the administrative law judge grants the moving party's motion, the opposing party must produce the requested material or face sanctions, such as being unable to present evidence concerning the subject matter of the information sought during discovery.

Similarly, the use of motions, other than motions to dismiss, was rare in the administrative setting. It is now common. The Maryland Office of Administrative Hearings now permits the use of the motion for summary decision. As in a court proceeding, a party in an administrative hearing can move for "summary judgment" if the material facts in the case are not in dispute and the moving party is entitled to judgment as a matter of law. This differs considerably from the practice of the individual agencies before the advent of the Office of Administrative Hearings. Typically, all parties had to agree to dismiss a case before the hearing examiner could dismiss a case or grant a "summary decision."

32This is in conformance with § 4-210 of the Uniform Law Commissioners' Model State Administrative Procedure Act (1981, 1996-97 Revised Edition).
35Id.
37See COMAR 28.02.01.16C.
38To a limited extent, individual agencies in Maryland have still retained this rule. The Maryland Department of Labor, Licensing & Regulation will still not permit dismissal of a case without the concurrence of all parties. See COMAR 09.01.03.04.
Other central panel states also allow for motions' practice. Again, Florida, Minnesota, New Jersey, North Carolina and Tennessee allow for motions' practice and the scheduling of in-person or telephonic pre-hearing conferences to address each party's arguments with regard to the merits of the motion.

III. Differences.

Because of the growing similarities between judicial and administrative adjudicatory functions, one might conclude that administrative adjudication serves no purpose. It is simply mimicking the court system and, therefore, could be abolished. This is not true. There are still many differences between adjudication in the administrative setting and adjudication in court, differences which illustrate why administrative adjudication is an important adjunct to adjudication by the courts. These differences make administrative adjudication practical and indispensable.

A. Administrative Adjudicators Impose Remedial Sanctions.

One of the most prominent differences between administrative and court adjudication is that administrative adjudicators impose sanctions that are essentially corrective or remedial in nature, rather than punitive. The case of Maryland v. Jones illustrates the important, but different function, served by administrative adjudication.

The defendant in Jones relied on the United States Supreme Court's holdings in United States v. Halper and Department of Revenue of Montana v. Kurth Ranch in an attempt to persuade the Maryland Court of Appeals to uphold the trial court's nullification of

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45 666 A.2d 128 (Md. 1995).
his conviction for driving while intoxicated. Both Halper and Kurth Ranch held that the imposition of civil penalties in conjunction with criminal penalties arising from the same set of circumstances can constitute double jeopardy where the civil penalties are punitive and serve no remedial purpose.

The Jones case held that the imposition of a driver's license suspension under the administrative *per se* law, Md. Code Ann., Transp. II § 16-205.1 (1992 & Supp. 1997), for drivers who have a breath alcohol test result of 0.10% or more is a remedial penalty, not a punitive sanction. Therefore, suspending the license of a defendant-driver for a 0.10% or greater alcohol test result at an administrative hearing, then subsequently trying him for driving while intoxicated in criminal court, does not constitute double jeopardy under the 6th and 14th Amendments of the United States Constitution.

Had Maryland's Court of Appeals accepted the defendant's double jeopardy argument in Jones, the very idea of a central panel administrative hearing agency in Maryland would no longer be viable. The Motor Vehicle Administration would have had to forgo suspending licenses for breath alcohol concentrations of 0.10% or more. Other agencies, such as the Maryland Insurance Administration, Home Improvement Commission, Real Estate Commission and Department of the Environment would have been similarly affected. The state would either have had to choose between seeking administrative sanctions (civil fines, license or permit revocations) or criminal penalties, or more likely, the entire process would have had to be given to the courts so all of these actions could be adjudicated simultaneously. This would have had the effect of clogging court dockets further and, consequently, delaying the imposition of license suspensions and other civil penalties to the detriment of the public good.

The Maryland's Court of Appeals' decision in Jones conforms with those of other state appellate courts that have addressed the double jeopardy issue with regard to alcohol-related driving offenses. The

466 A.2d at 142.
49Id. at 141 - 143.
appellate courts of Alaska,\textsuperscript{50} Colorado,\textsuperscript{51} and Florida\textsuperscript{52} have determined that double jeopardy does not preclude the imposition of criminal penalties for driving while intoxicated or driving while under the influence of alcohol, if a driver has been suspended for an alcohol test result violation arising from the same incident.

Appellate courts have also found \textit{Halper} and \textit{Kurth Ranch} inapplicable to inmate disciplinary cases. \textit{United States v. Newby}\textsuperscript{53} held that prosecuting inmates criminally for the same misconduct that was the subject of institutional disciplinary proceedings did not constitute double jeopardy under \textit{Halper}. As in \textit{Jones}, the United State Court of Appeals for the Third Circuit, ruled that the civil penalty, specifically, the loss of inmate good conduct time, was not "so divorced from any remedial goal" that it could be considered a second punishment under the 6th Amendment.\textsuperscript{54}

B. Evidence.

The strict rules of evidence that are applicable in the courts are not applicable in the administrative setting. It would be cumbersome to compare all the evidentiary rules of the various central panel state hearing agencies with those of the court systems in each state. Nevertheless, it is useful to examine the hearsay rule because it is applied so much more loosely in administrative hearings. Hearsay is generally acceptable in administrative hearings, while it is still generally excluded in the courtroom. The Federal Rules of Evidence are now used as a model that most state courts follow in promulgating their own rules of evidence. Federal Rule of Evidence 802 (1997) succinctly states the hearsay rule:

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

\textsuperscript{52}Freeman v. State of Florida, 611 So.2d 1260 (Fla. App. 2 Dist. 1992)
\textsuperscript{53}11 F.3d 1143 (3rd Cir. 1993).
\textsuperscript{54}11 F.3d at 1145, quoting Halper, 490 U.S. at 443.
Rule 803 then goes on to list 24 exceptions to the general hearsay rule that all law students must learn in their first or second year of law school. These include the "present sense impression," "excited utterance," "recorded recollection," "records of regularly conducted activity," "reputation in the community" and "ancient documents" exceptions, just to name a few. In short, the admissibility of hearsay evidence in court is still very much restricted.

The contested case provisions of Maryland’s Administrative Procedure Act take a different approach to hearsay. Md. Code Ann., State Gov’t § 10-213(b) and (c) (1995) state:

(b) The presiding officer may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence.

(c) Evidence may not be excluded solely on the basis that it is hearsay.55

As these subsections indicate, the hearsay rule is greatly relaxed in the administrative setting. Nonetheless, any hearsay evidence presented must still be credible. Fairchild Hiller Corp. v. Supervisor of Assessments56; Kade v. Charles H. Hickey, Jr. School.57 In Kade, the Maryland Court of Special Appeals overturned an action by the State Department of Personnel to suspend a teacher at a school for juvenile offenders for alleged misconduct. The disciplinary suspension was based entirely on anonymous notes written by the appellant-teacher’s co-workers and students at the school, detailing his alleged misconduct. The notes were undated; the circumstances of their authorship were also unknown. In reversing the teacher’s disciplinary suspension, the court emphasized that hearsay, while admissible, must have some reliability.

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55Language similar to that used in these subsections also appears in § 4-212(a) of the Uniform Law Commissioners’ Model State Administrative Procedure Act (1981, 1996-97 Revised Edition).
The anonymous notes supposedly scrawled by co-workers and juvenile offenders were so unreliable that they had no probative value and could not serve as the basis by which to suspend a state worker from his employment.

However, Kade also reinforced the notion that reliable hearsay evidence is admissible in administrative hearings. "Indeed," the court noted, "if hearsay is found to be credible and probative, it may be the sole basis for a decision of an administrative body."

C. Flexible Due Process.

The adherence to concept of flexible due process in the administrative setting is an important characteristic that distinguishes administrative adjudicators from constitutional judges. United States Circuit Judge Henry J. Friendly originated this concept in his famous article, "Some Kind of Hearing," which only a year after its publication, influenced the United States Supreme Court in writing its decision in Matthews v. Eldridge.

The term flexible due process, at first, may seem redundant. The word "due" itself, after all, suggests that legal process can vary from situation to situation. Yet, upon closer examination, the word flexible is indeed necessary to emphasize the extraordinary ability of the administrative hearing process to adapt to particular case types and settings.

The methods for conducting administrative proceedings in Maryland, for instance, are diverse. In child abuse and neglect proceedings, administrative law judges hear oral argument from the parties without taking evidence from the parties. The administrative law judge's decision is based on his or her review of these arguments in light of the record of abuse or neglect already compiled by the local department of social services. However, the party accused of the alleged abuse or neglect has the opportunity to submit written material.

59 123 U. Pa. L. Rev. 1261 (1975)
up to 60 days in advance of the scheduled date of the oral argument to refute information contained in the record. In Child Support Administration cases (tax intercept and credit reporting), record reviews without the presentation of testimony are permitted.\textsuperscript{62} Motor Vehicle Administration hearings in Maryland are one-party hearings. The appellant-driver presents his case before the administrative law judge. The Motor Vehicle Administration is unrepresented.

By contrast, some hearings in Maryland can be complex. Hearings for the Maryland Home Improvement Commission and Maryland Real Estate Commission can involve four parties: the Commission, a claimant who is making a claim against either the Maryland Home Improvement or Real Estate Guaranty Fund based on the Respondent’s misconduct, the Respondent and the Guaranty Fund. I once conducted a hearing for the Maryland Real Estate Commission involving six parties—three co-respondents (a broker, associate broker and a sales agent), the Commission, the claimant, and the Guaranty Fund.\textsuperscript{63} Pre-hearing conferences to sort out complex legal and scientific issues are always necessary for hearings conducted for the Maryland Department of the Environment, Department of Natural Resources and Board of Physician Quality Assurance.

The sites used to hold administrative proceedings in Maryland are also varied. They range from manager’s offices at the local departments of social services for public assistance hearings and mental health facilities for involuntary admission hearings to true courtroom-like settings that are used for more complex cases.

The wide variety in the methods for conducting hearings illustrates how the flexible due process concept allows for adaption of a set of procedures for each particular case type and, therefore, promotes efficiency in the adjudicatory process. It would make little sense to conduct Motor Vehicle Administration, Department of Natural Resources and Real Estate Commission hearings in the same way. By altering hearing procedures to fit the requirements of each case type, parties and the government alike benefit from lower costs and diminished need for legal counsel to be present when less-complex

\textsuperscript{62}Md. Code Ann., Fam. Law § 10-113 (Supp. 1996) and COMAR 07.07.02.

\textsuperscript{63}Maryland Real Estate Commission v. Rosko; Claim of Ziolkowski, 88-RE-087 (1990).
issues are involved. However, complex procedures can be put in place for more complex hearings when such procedures and the participation of legal counsel are needed to ensure fairness.

IV. Conclusion.

While recent trends suggest that the work of administrative law judges and other administrative adjudicators is becoming more similar to that of the constitutional judiciary, salient differences remain. These differences exist because administrative adjudication has a different purpose in our system of government. As appellate cases such as Jones illustrate, there would be no need for executive branch adjudication if it served the same purpose as adjudication in the courts. Without relaxed rules of evidence, such as the hearsay rule, administrative proceedings would no longer be user-friendly; they would assume all the trappings of full-blown trials in court. The concept of flexible due process allows the administrative process to be tailored to the subject matter of a particular case. Rigidly applied due process, such as found in the courts, would stifle what has become a fair and efficient means of providing administrative justice.