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Striking a Balance: Administrative Law Judge Independence and Accountability

By R. Terrence Harders

Modern administrative litigation reveals a number of considerations for all concerned. From the establishment of a customs service and a disability pension board for Revolutionary War veterans in 1789, American regulatory law and its consequent adjudication have grown steadily through the intervening years. In the decade before World War I, “[t]he focus changed from enabling organized action to injecting more public management or supervision of affairs and providing more sustained, specialized means of defining and enforcing public policy.”¹

The dawn of the New Deal era in the first half of this century brought a proliferation of government agencies and another growth spurt of administrative adjudication to enforce regulatory compliance. As administrative litigation grew from the rare occurrence in early American history to the ubiquitous influence that it is in modern everyday life, the need for a system of administrative enforcement and administrative decisions on individual rights and privileges, which can be seen to be fair and even-handed, has increased. The American Bar Association (ABA) formed a special committee on administrative law as the volume of federal administrative litigation under the New Deal was exploding onto the scene in 1934. The ABA complained at the time that “the judicial branch . . . is being . . . undermined” by administrative adjudication. The ABA’s committee, in turn, condemned “(a) the combination of judicial with executive or legislative functions; (b) the fact that the tenure of administrative judges is insecure; and (c) the lack of effective independent review or judicial control over administrative decisions.”² By 1938, the committee had identified what it termed “‘ten tendencies’ of administrative agencies.” The committee included, among others, the tendencies “to decide without a hearing, to hear one side only, to decide on evidence not

¹KENNETH CULP DAVIS & RICHARD J. PIERCE, JR. ADMINISTRATIVE LAW TREATISE, 8 (3d ed. 1994)(Quoting JAMES WILLARD HEARST, LAW AND SOCIAL ORDER IN THE UNITED STATES, 35-41(1977)).

²*Id.* (Quoting 61 A.B.A.R. 720 (1936)).

produced, [and] to make decisions on the basis of preformed opinions and prejudice, etc.”³ Though the ABA committee’s recommendation that Congress establish an Article-III administrative court to replace virtually all agency rulings has not to come to pass, such was the context in which the federal Administrative Procedure Act (APA) arose after World War II.

The APA has served as the model from which federal administrative process springs and which many states have copied to a lesser or greater extent. The drafters of that act expressly balanced a perceived need for public confidence in administrative adjudications not subject to political and other outside influences and the vigorously asserted interest of agencies to ensure effective production from all of its employees, including administrative adjudicators. Nevertheless, in the years following the act’s passage, the status of agency hearing officers continued to be a source of controversy. The ABA Administrative and Regulatory Practice Section is starting a five-year review of the APA after its fifty years to see what changes should be made, perhaps based on the experience of the several states.

In the early 1950s, former President Herbert Hoover was appointed to head a Commission on Organization of the Executive Branch of the Government (hereinafter Hoover Commission) to address problems still existing under the APA. A task force of the Hoover Commission in its second incarnation once again raised the possibility of establishing a federal administrative court to take over the adjudication then being carried out by various agencies. The subject of administrative agency adjudication remained a part of the larger debate on the reform of administrative process through the 1960s. Rather than to remove adjudicatory authority from the agencies, however, Congress in 1976 amended the APA to allow that the United States be named as defendant and that judgments other than for money damages could be brought before agency adjudicators.⁴ Professors Davis and Pierce explain that the recognition in the past twenty years that the formulation of public policy is a political function has served to provide impetus for greater presidential and congressional attention to activities of administrative agencies. Significantly, they cite that each of the past

³*Id.* (Quoting 63 A.B.A.R. 331, 346(1938)).

⁴*Id.* at 22.

five presidents has attempted to exert increasing controls over administrative agencies.⁵

I am mindful that an active debate about the degree of independence appropriate for administrative law judges continues within and among the NAALJ and other professional organizations and that, in fact, some question whether there is any need for an independent administrative judiciary, though the movement which sought to replace it with an Article-III administrative court seems to have expired. Much of the steam that drove that movement originated in the notion that, under the Constitution, administrative agencies could not adjudicate common-law claims. The Supreme Court's 1986 decision upholding the adjudicatory power of the Commodity Futures Trading Commission essentially wrote paid to such attempts.⁶ The Court expressly reasserted in its decision of that case its refusal "to adopt formalistic and unbending rules" with respect to legislative actions to delegate adjudicatory functions to administrative officers.⁷ There remains, however, the question of how such adjudicatory powers are apportioned within the agencies and to what extent agency officials who make rules and enforce them may take part in or influence the judging of disputes. A 1986 note in the *George Washington Law Review* contains the following astute observation:

[F]rom the perspective of the agency, the right to review ALJ's decisions [on appeal] supplies insufficient control. Review permits only an after-the-fact correction of a single decision, and, though dislike of reversal undoubtedly shapes ALJs' decisions, it does not normally modify behavior as effectively as the choice between conforming to a given norm and suffering direct adverse consequences.⁸

Accordingly, many non-judicial—and to be fair, some judicial—agency

⁵*Id.* at 24-25.

⁶*Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986).

⁷478 U.S. at 851.

⁸L. Hope O'Keeffe, Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 594 (1986).

officials take issue with the very premise that administrative adjudicators need or deserve any independence from direction, control, and discipline of the agencies they serve. Administrative adjudicators are, to those who take this tack, nothing more than employees whose job it is to help the agency make decisions with respect to individual cases arising under statutes and regulations over which the agency has charge, either by making decisions on the agency's behalf or by gathering and reporting facts and recommending a result to those who make the agency's decisions. Under this view, the administrative adjudicator's function is not much, if any, more judicial than state employees who administer driving tests. The agency needs someone to make decisions on entitlement, responsibilities, and infractions, and the administrative law judge performs that task. He or she does nothing more or less than that.

Striking a proper balance requires that we understand the function and role of the courts, administrative agencies, and administrative adjudicators. The role of the judicial branch in American government is to provide a check to the political branches. This is true both in the federal government, where judges have life tenure and salary protection, and in the state governments, whether judges face partisan or retention election. The executive and legislature are designed to respond to the political winds blowing through the jurisdiction; the judicial branch serves as a windscreen by requiring that the other branches operate within the bounds set by the state or federal constitution and other properly established laws. Therefore, an attack on the courts strikes at the heart of the system of checks and balances upon which American democratic government was founded. Executive agency administrative decisions are then subject to review in the courts. It must therefore be admitted that a consideration of the need for administrative law judge independence does not take on the same gravity as that for judicial independence in the courts.

Though all of the branches at least arguably establish government policy, it is generally accepted that the political branches, the executive and the legislature, are the most appropriate venues for setting policy. Administrative agencies, in accordance with mandates and guidance from the legislature, tune and shape policy through rule-making and decision-making. To the extent that administrative law judges, in deciding cases concerning enforcement and disputes, pass on

the validity of agency statutory interpretation and rules, administrative law judges take upon themselves the role of the courts and stand, potentially at least, in the way of agency policy-making. A general disagreement on statutory interpretation between top agency officials and the adjudicators who make decisions for the agency could, if the adjudicators were truly independent, block agency policy-making without review in the judicial branch. The different place and overall role of administrative adjudicators from that of judges in the judicial branch are what make the contemplation of their independence and accountability a thornier issue.

Judicial-branch judges in most American jurisdictions have varying degrees of insulation from adverse action resulting from their decisions in analyzing government action and interpreting the law. Were it otherwise the judicial branch's checks and balances on the political branches would wax and wane in accordance with the whim of the person or entity which had the power to act against judges in reaction to their judgments. The same thing can naturally be said of administrative law judges, but their function as decision-makers for the executive agencies changes the context of the debate about their independence and accountability. Other employees in the executive branch are subject to adverse action if they do not perform their duties in accordance with the external and internal policies of the agency. Virtually all of them enjoy legal safeguards which protect them from arbitrary, vindictive, or illegal adverse action. For those who see administrative adjudicators as making decisions in a similar fashion to that of other agency employees, there is no reason that administrative adjudicators should enjoy any higher degree of protection.

However, the argument that an ALJ is merely making a decision on behalf of the agency does not lead ineluctably to a conclusion that the ALJ need not be independent of influences apart from duly enacted and applicable law and rationally determined facts. We must not lose sight, though, of the reason that some measure of independence is desirable and appropriate. The independence of administrative law judges is not for the benefit of the individual who happens to occupy that office. Rather it is a way of serving an important public interest. The public can properly expect that judges in the judicial branch will ensure that facts will be determined from lawfully admitted evidence and that courts' rulings will apply to those facts only laws which are

enacted and enforced in accordance with the constitutions and other superior authority. The public has a similar interest in having confidence that agency decisions will also be based on a rational application of known law and articulated facts. Nor is this conclusion weakened by the assertion that the agency head has the authority and indeed the duty to formulate and carry out the agency's policies. American notions of law and due process require that such binding policy be publicly recorded and announced before it can be applied or imposed.

In contrast to those who see no need for administrative law judge independence are those who suggest that administrative law judges should be subject to evaluation, guidance, and discipline, if at all, only from other judicial officers, either within the agency or in a central hearing organization of some kind. The United States Army, for instance, has a separate command structure for its military judges, who preside over courts-martial. Many, if not most, of those judges, once so designated and assigned, spend the rest of their careers in that command and are never directly evaluated or disciplined by anyone other than another judge.

Military judges are, however, regularly evaluated on the performance of their duties as are all Army officers. Judge Young and Judge Felter have made strong arguments in the pages of this journal that any system of ranking or preferment has measurably negative effects upon the productivity, quality, and of course independent thought of ALJs.⁹ Judge Young has described the need for a system, with all the trappings of due process, by which incompetent or unethical judges can be disciplined or removed; however, she has argued that factors which put individual judges above or below their peers will unavoidably encourage behaviors which maximize one's appraisal and speed one's advancement without regard to the merits of individual parties or legal nuances.¹⁰

Still others suggest that administrative law judges should be

⁹Ann Marshall Young, *Evaluation of ALJ's: Premises, Means, and Ends*, 17 J. NAALJ 1 (Spring 1997); Edwin L. Felter, Jr., *Maintaining the Balance between Judicial Independence and Judicial Accountability in Administrative Law*, 17 J. NAALJ 89 (1997).

¹⁰Ann Marshall Young, *Evaluation of ALJ's: Premises, Means, and Ends*, 17 J. NAALJ 1, 55 (1997).

absolutely free from influences outside established substantive, procedural, and evidentiary rules duly promulgated. A party appearing in an administrative proceeding should, according to this school of thought, be confident that the judge who will make the decision in his or her dispute has no interests or influences of any kind which will interfere with a full and fair hearing and an objective adjudication of the matter. However, merely freeing the administrative adjudicator from adverse action imposed by the agency does not necessarily lead to the goals expressed. The great fifteenth and sixteenth century thinker, Desiderius Erasmus, proclaimed that we cannot have a civilized society unless we have civilized individuals. So, a system of administrative adjudication does not become visibly fair because the administrative adjudicators have no external fetters. A sound system of administrative litigation must have competent, disinterested adjudicators with integrity, and perhaps more importantly, the members of society must feel that the system has integrity and does not play favorites among parties and that the decision-makers do not act on whim. Unless those who come into contact with the administrative judicial system see its workings as sensible in light of the law and facts and sensitive to the mix of interests to be served, society at large will not trust administrative law judges to give them justice.

Several things bear upon the reality of integrity and fairness and upon its perception by the public. The consideration of unpublished or informal agency goals or agency objectives, however they may be labeled and however they may be expressed, poses a troubling question in the context of administrative litigation. As noted above, the decision-maker in an administrative dispute must have the ability and the integrity to weigh the evidence effectively and to apply the law, whether it be statutory, regulatory, or decisional, to the facts the admissible evidence shows. Unless the agency has published its policy goals in accordance with established rule-making procedures, one must question whether the agency can have any such goals which an administrative law judge can rightly take into consideration. To the extent that administrative agencies jealously guard their ability to control the work of administrative law judges through supervision, discipline, and evaluation of their work product in order to reach unpublished agency goals or to enact unpublished agency policy, those agencies engage in rule-making in the shadows, hiding from other

participants in the process in what manner they intend to interpret and enforce the published law.¹¹

The effort to control the process in this manner is almost inescapably self-defeating. Those subject to the law of the agency will be dissatisfied with a system which they believe is subject to manipulation by the agency, which is often a party in fact, if not in law. Parties have often expressed their sense of futility in having a hearing with an administrative law judge who is an employee of the very agency with which they have disputes. Many assume under the best of circumstances that they cannot get effective review under such a system. When further review within an agency does not consistently conform to published precedent, the problem intensifies. As Judge Felter has put it, the achievement of agency goals is "best done in an atmosphere where judicial independence is not called into question."¹²

We have examined and considered the concept of administrative law judge independence; let us now turn our attention more closely to the balancing concept of accountability. One can with equal vigor assert that the achievement of agency goals is best done in an atmosphere in which the competence and integrity of administrative law judges is also not subject to serious question. The members of the administrative judiciary, in every jurisdiction and in every agency, owe a duty to themselves, to their agencies, and to the public at large to insist of themselves and of their colleagues work of the highest caliber and ethics which give no hint of improper dealing or unfair consideration of the rights and responsibilities of the parties who come before them. To the extent that the administrative judiciary does not police itself it becomes subject or risks discipline imposed from without. Administrative law judges, in other words, should be the first to call to account their peers who fall short and risk the respect and public support for the administrative judiciary.

Nor can agency officials be expected to stand idly by while an admittedly few administrative law judges, either through laziness or

¹¹The problem has grown particularly acute as proceedings have shifted increasingly to the adjudication of claims against the agencies which employ the administrative law judges. See, e.g., Victor W. Palmer, *The Administrative Procedure Act: After 40 Years, Still Searching for Independence*, JUDGES' J., Winter 1987, 34 at 37-38.

¹²Edwin L. Felter, Jr., *Maintaining the Balance between Judicial Independence and Judicial Accountability in Administrative Law*, 17 J. NAALJ 89, 93 (1997).

incompetence, turn out inadequate work, either in volume or quality. Officials in the political branches are, by design, answerable to the public. While there is some wisdom to the assertion that the job of adjudicating cases cannot be objectively measured, it is too easy an assertion to make. The interest in accountability is, as is the interest in independence, grounded in serving the public good. The rights of the parties should be subject to the whims of the ALJ no more than to those of the agency. Accordingly, there ought to be formal accountability for administrative law judges as there is for other public officers and employees. It does not follow, however, that the kind and degree of accountability must be identical to that imposed on other public servants.

The United States Supreme Court has acknowledged that the function of the administrative adjudicator has much in common with that of the members of the judicial branch.¹³ Certainly those who come before administrative law judges recognize that the deciding of disputes, the prescribing of duties, and the recognition of entitlement affects them in much the same way that litigation plays out in courts of law. The paradoxical position of the administrative adjudicator is that the agency wants to control him or her and parties want him or her to make decisions which are supported by the known law and facts for the same reason: adjudication in the agency affects the policies of the agency.

Finally, while the caliber, training, and ethics of administrative law judges must be high, other staffing considerations affect how the system works and how those outside the agency view it. To be capable of effective judgment of regulatory and other administrative matters, those who judge must deliver a product of high quality. Correspondingly, those who come into contact with administrative litigation are more likely to think highly of the system if results are swift and clearly understood. Administrative law judges can and do enhance each other's professionalism through peer education and publication of scholarly articles, but equipment and paraprofessional staffing can be more visible and more immediately helpful. Staffing has a great deal to do with whether administrative adjudication is seen

¹³Butz v. Economou, 438 U.S. 478, 513 (1978).

as competent and responsive. Clerical staffing makes an immeasurable difference in the perceptions of the public, since the staff interacts more directly with participants in the process and ensures the immensely important factor of timeliness. Adequate recording and transcription and word-processing capability and providing adequate legal research tools and staffing ensure the prompt, accurate, and meaningfully reviewable decision of administrative cases.

The improvement of an administrative judicial system and the maintenance of those improvements also require legislative and executive commitments. The legislature must commit itself to a “good government” approach to the concerns of those inside and outside the field of administrative litigation. Reform of existing laws and rule-making authority to improve the accomplishment of administrative adjudication should be seen as a legislative priority. Both legislators and non-judicial administrators must commit themselves to keeping hands off the day-to-day adjudicatory operations. Frequent attempts by agency officials to make *ex parte* contact with adjudicators, however innocent the intent, give rise to the appearance of interference in the outcome.

Perceptions of incompetence, indifference, and bias arise from sources other than *ex parte* contacts and agency evaluation of administrative law judges. The administrative judicial process itself can affect the ability of its judges to make informed and timely decisions. The extent to which there is an orderly and even-handed discovery process allows the administrative law judge to have as much reliable evidence as is feasible for an administrative proceeding. Similarly, it must be clear whether the administrative law judge has subpoena power in any real sense. Not only the issuance of subpoenas but also their enforcement must be efficient and effective. The system can easily handle enforcement of subpoenas against parties; appropriate sanctions can be applied through the adjudicative process. ALJs normally have authority to impose sanctions such as estoppel or dismissal in such cases to give force to their judicial acts. However, when nonparties are involved, most often neither the money amounts at stake, the parties involved, nor the perceived gravity of administrative adjudication is sufficient to induce police or prosecutors to enforce an administrative law judge’s subpoena. To have authority to issue subpoenas is of questionable value, if there is no mechanism to

enforce them. Unenforceable subpoenas work ultimately to degrade the system as repeat players learn that they can simply ignore them. In turn, parties who seek the subpoena feel that the system does not work, especially if the ultimate outcome is not in their favor.

To the extent that members of the bar practice before an administrative tribunal, they should be encouraged, if not required, to be conversant with the procedural and substantive provisions of the applicable statutes and rules. Another thing that distinguishes administrative litigation from that in the courts today is their higher volume of *pro se* practice. Those who represent themselves often do not understand either the procedural formalities or legal niceties of the litigation. Easily accessible assistance in preparing their presentations in advance of hearing make it easier for the judge to unravel the evidentiary knots and for *pro se* participants to appreciate understand and respect what the judge is doing. The agency or department which has responsibility for the litigation should emphasize to all involved that swift, fair, and impartial administration is paramount.

Those who dispense administrative justice in the future are likely to face even greater challenges in an increasing volume of cases and ever-greater demands for speed in disposition. To function effectively in the face of those challenges, administrative law judges will need an organization which at once insulates them from improper outside influences and holds them accountable for the volume and quality of their work. Supervision of adjudicators by agency or department officials whose acts or decisions are the subject of litigation virtually guarantees that the system of administrative litigation will be seen as biased and unreliable. A separate administrative judicial agency with a strictly judicial chain of control and review helps to modify this perception. Similarly administrative law judge decisions must remain subject to review, as are the decisions of courts. Whether review is strictly of the record or is a *de novo* proceeding, the reviewing tribunal must consist of members whose qualifications, ethical restraints, and disinterest in the outcome are at least equal to those whose decisions they are reviewing. Final review of administrative judicial decisions in the courts, meanwhile, reinforces the integrity and professionalism of administrative case adjudication.

The most important element in the balance of administrative judicial independence and accountability is the administrative law judge

himself or herself. Administrative law judges must expect to be held to the highest professional and ethical standards by the executive branch, the courts, their peers, and the public. As Judge Ann Marshall Young put it, "it is important for judges to become as aware as possible of our own biases, prejudices, propensities, and ways of knowing and thinking, in order to avoid allowing these to improperly influence outcomes in the cases that come before us."¹⁴ As those who do not effectively govern themselves invite government from without, administrative law judges must demand the highest standards of themselves and their colleagues. There is an understandable human reaction to view criticism of peers as criticism of the entire system and its adjudicators. This reaction must be resisted; administrative law judges should be as prepared to handle complaints against their colleagues as they handle other disputes, weighing the available evidence and deciding the issue as impartially as possible. Within each jurisdiction, an active peer review organ can help to ensure those who are most knowledgeable and experienced in administrative litigation resolve complaints against ALJs, but as Judge Young's remark implies, it cannot take the place of self-examination and self-discipline. Once again, education plays a crucial role. ALJs can more easily continue, as they have for decades, to meet high professional and ethical standards if they have access to education and professional scholarship on the substantive, procedural, and ethical issues with which they are faced every day.

The volume of administrative litigation has grown immensely in recent decades, and the press of cases is likely to continue to increase with each passing year. The need to upgrade the administrative judicial system is urgent. Society has a right to expect that the administrative adjudication of cases, which has become such a large portion of litigation overall, will come from impartial judges who are at the same time subject to appropriate review.

The values and standards of American justice should be evident at all levels of American jurisprudence and in all fields in which the government imposes public policy. In adjudicating private rights and interests in the context of public policy, we cannot ensure that those

¹⁴Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, 17 J.N.A.A.L.J. 1, 25(1997).

values and standards are upheld while the professional fate of decision-makers is subject to the whim of a party-in-interest. Having said that, one must equally recognize that administrative litigation cannot prosper if there is no check on the adjudicators.

In conclusion, it is in the interests of agency officials, of administrative law judges, of the courts, of the legislatures, and, in particular, of the public that administrative law judges are seen to exercise reasoned judgment governed only by inferences drawn from evidence properly offered and admitted and by laws duly enacted and published. Working together, those who have direct responsibility for the various systems of administrative adjudication can continue the process of improving how disputes and rights are determined in the administrative agencies which has been underway for the past sixty-five years.

