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THE ADMINISTRATIVE JUDICIARY: ALJ'S IN HISTORICAL PERSPECTIVE

Michael Asimow¹

While I was doing research in administrative law in the UK, I made an interesting discovery. Nobody had ever heard of ALJs. The same was true in South Africa and Australia. These countries have plenty of administrative law and engage in a large volume of administrative adjudication, but they have nothing that corresponds to ALJs²--lawyers who serve as professionalized, full-time administrative trial judges. That seemed curious to me and made me wonder how the institution of the ALJ evolved in the United States.

Ann Young recently remarked in an article that the ambivalent status of ALJs vis a vis agency heads is no accident--it was planned that way.³ Certainly, the status of ALJs is peculiar: they are employed by the agencies for which they decide cases (unless they are members of a central panel), yet they have a large amount of de jure and de facto independence. They are relatively well paid and highly respected; they regard themselves as true judges and militantly protect their independent status. ALJs hear cases, find the facts, and apply the law--but their opinions are only proposed.⁴ Agency heads are free to substitute their judgment for that of the ALJ on questions of fact, law and discretion. Courts review the decisions of agency heads, not those of the ALJ. ALJs generally act like true judges; their only job is to hear cases and they usually receive no ex parte staff assistance. Yet the agency heads who have the final call at the agency level typically receive large doses of ex parte staff assistance. Those agency heads

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²In this article, unless otherwise stated, the term "ALJ" covers all administrative trial judges, whether called ALJs, administrative judges, hearing officers, referees, or other titles.

³*Judicial Independence in Administrative Adjudication: Past, Present and Future*, 38 *Judges' J.* #3, p. 16 (Summer 1999), Young, *Judicial Independence in Administrative Adjudication: Past, Present, and Future*, XIX *J.NAALJ* 117.

⁴In an increasing number of cases, especially in the states, ALJs now make the final decision at the agency level. Agency heads are out of the loop. See Rossi, *ALJ Final Orders on Appeal: Balancing Independence With Accountability*, XIX *J.NAALJ* 1.

often exercise the combined functions of rulemaking, investigation, prosecution, and adjudication.⁵ Again, I wondered how such a peculiar relationship evolved. This article is intended to give a bird's eye view of the historic development of the institution of the ALJ and the relationship between ALJs and agency heads.⁶

It all started with the railroads. After the Civil War, as the nation industrialized, the political and economic power of the railroads posed immense problems. Powerful shippers were able to negotiate favorable deals with the railroads; small farmers and less favored business interests were drastically overcharged. While there was, in theory, a judicial remedy for unfair rates, courts were unequal to the task. In other countries, railroads were nationalized, but that was never politically feasible in the U.S. A number of states responded to political pressure from disgruntled shippers by creating state agencies empowered to regulate the railroads. However, these state agencies failed miserably. The railroads resisted them tenaciously; court decisions accorded no finality to administrative rate decisions and prevented state commissions from regulating interstate rates.

Nevertheless, the model of the combined-function regulatory agency was at hand when Congress finally responded to political pressures by creating the Interstate Commerce Commission in 1887. Like the state agencies, the ICC combined functions of investigation, prosecution, and adjudication. It was independent of executive control. It was the prototype of the American federal regulatory agency--possessing all the functions and powers necessary to compel private business to operate in the public interest. The 1887 Commission was remarkably toothless and was rendered even more ineffectual by hostile court decisions. By 1920, however, with the aid of excellent

⁵Many boards and commissions, especially at the state level, engage only in adjudication; rulemaking, investigation and prosecution has been split off into different agencies.

⁶I found the following sources useful in understanding the historic trends that I have sketched here. Louis L. Jaffe, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965); Attorney General's Committee on Administrative Procedure, *FINAL REPORT: ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES* (1940) (and accompanying monographs); Paul Verkuil et. al., *THE FEDERAL ADMINISTRATIVE JUDICIARY*, 1992-2 ACUS Rec. & Rep. 777; James Landis, *THE ADMINISTRATIVE PROCESS* (1938); Ralph F. Fuchs, *The Hearing Officer Problem--Symptom and Symbol*, 40 Cornell L.Q. 281 (1955); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189 (1986).

commissioners and staff, statutory amendments, and more sympathetic judicial treatment, the Commission became a powerful, effective, and respected regulator of the railroads.

The ICC did its business through case-by-case adjudication involving specific rate disputes between shippers and carriers. Supreme Court decisions required that due process be observed in this adjudication process. Since there was a high volume of cases, many of them technical, the ICC commissioners were unable to hear the cases en banc or even by splitting up into panels. They deputized ICC staff members to serve as hearing examiners in these cases. The examiners conducted trials, made a record, and, after a time, started issuing recommended decisions. At first, those decisions were accorded little deference and considered of little importance; the ICC staff worked institutionally with the commissioners to produce the final agency decision which took the form of a detailed written precedential opinion.

In time, however, ICC hearing examiners became more professionalized and their decisions received greater deference; indeed, the examiners often worked closely with the Commissioners in producing final decisions. These ICC trial examiners were the genesis of today's ALJs.

The ICC served as the model for the Federal Trade Commission which emerged in 1914 to deal with the problem of monopoly. FTC examiners (who often were also the investigators) conducted hearings and worked closely with the agency heads in producing final decisions. During the New Deal of the 1930's, a large number of new independent, combined-function agencies emerged to deal with the actual and perceived causes of the great depression. The idea was that agencies would exercise their expertise to solve the problems that the market had failed to solve. The ICC and FTC served as the model for this kind of agency (as well as many regulatory agencies being formed at the state level).

By this time, regulation by federal combined-functions agencies had become extremely controversial. Most everyone respected the ICC (or at least conceded its inevitability), but the new agencies were another story. New Deal agencies started muscling in on the kind of business decisions that had always been free of regulation and propelled by market forces---labor relations, corporate finance, communications, banking, agriculture, pricing and output decisions of all kinds. The

volume of administrative adjudication increased rapidly. In addition to resentment about regulation in general, there was a great deal of quite justified skepticism about the fairness of agency decisionmaking. Agencies had no internal separation of functions and agency heads seemed to the private sector to be biased against them. Even supporters of the New Deal questioned the way that agency adjudication was conducted. For a time, the Supreme Court had stood as a bulwark against the New Deal; beginning in 1937, however, the Court abandoned most efforts to block the administrative state by invalidating programs or upgrading agency procedures. The struggle over administrative procedure led eventually to enactment of the federal APA in 1946.⁷ The epic political battle can be understood as involving two separate struggles.

One struggle was between institutionalists and judicialists. An institutionalist believes that the primary function of administrative adjudication is to formulate and apply public policy. The process for producing an agency adjudicatory decision should resemble a corporation's decision to produce a new product. Decisionmakers should be free to talk to anyone who can contribute; every member of the staff should participate in making the decision in whatever way seems appropriate; there should be no separation of functions. An institutionalist is concerned with producing accurate and consistent decisions quickly and efficiently. The emphasis is on fitting each decision into a wise application of regulatory policy. Due process and judicial review, in this view, are necessary evils.

A judicialist has a wholly different orientation. The judicialist believes that the emphasis should be on fairness and due process for the private party. The model should be civil litigation in court. Adjudication should apply existing policy, not make new policy with retroactive application. There should be a rigid separation between prosecution and judging, even if this means the process is less efficient and may not produce a decision that implements consistent agency policy. Judicial review is essential and courts should have broad powers. Needless to say, avid New Dealers tended to be

⁷Scholars of this period are indebted to George B. Shepard's illuminating treatment of the origins of the APA. *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw.U. L. Rev. 1557 (1996).

institutionalists; opponents of the New Deal tended to be judicialists.

A second struggle was overtly political. Proponents of the New Deal believed that government regulation by expert agencies was the only salvation for the economy. Opponents believed that government interference with free markets was catastrophically wrong, would make the Depression worse, and would lead to socialism or fascism. These views translated directly into views on administrative procedure. Proponents of regulation favored streamlined agency procedures with little attention to due process, separation of functions, or judicial review. Opponents of regulation favored detailed administrative procedure codes and intensive judicial review in order to slow down and encumber the regulatory process as much as possible.

The Judicialist/New Deal opponent coalition, strongly supported by the ABA, first attempted to adopt legislation for an administrative court, but this got nowhere. Ultimately, the coalition succeeded in passing the Walter-Logan Bill of 1940 which would have drastically inhibited the regulatory process in New Deal agencies. Walter-Logan required more intrusive judicial review and would have rigidified the adjudication process (for example, it required three-person panels to conduct adjudication). President Roosevelt vetoed the bill.

Meanwhile, in 1939 Roosevelt appointed the Attorney General's Committee on Administrative Procedure, hoping that it would suggest moderate reforms. That Committee's 1940 report provided extensive monographs on the administrative process, replacing superheated political rhetoric with solid empirical information on how agencies actually functioned. The majority report of the Attorney General's Committee recommended quite modest reforms to the adjudication process. It rejected a central panel, but it recommended upgrading the status of hearing officers. A minority report would have gone much further in regulating the adjudicatory process.

The administrative procedure battles were set aside during World War II, but revived afterwards. Roosevelt realized he had to agree to reform; conservatives realized that any solution had to be acceptable to Roosevelt. In a historic compromise, the APA emerged from Congress in 1946 and served as the model for state APAs in the years to come. Virtually every word in the Act represented a hard-fought compromise. Historians of the APA have observed that the unanimous votes that produced the APA were highly misleading.

Nobody was happy with the Bill, but all sides felt they were better off with the bill than with the status quo.

Who got what in the APA compromise? From the point of view of institutionalists/New Deal supporters:

- The New Deal combined-function independent agencies survived. Adjudication was not separated from rulemaking, investigation, and prosecution.
- Hearing examiners remained employees of the agency for which they decided cases; there was no central panel. Agency heads retained power to make final agency decisions.
- A great deal of federal administrative adjudication remained outside the APA structure (so called informal adjudication, including most benefactory programs).
- Judicial review remained subject to sharp limitations such as the requirement of exhaustion of remedies and limited scope of review of factual and discretionary decisions.

From the point of view of judicialists/New Deal opponents:

- An array of due-process like protections were provided for formal adjudication.
- The APA imposed internal separation of functions, preventing adversaries from taking part in adjudication (albeit with considerable exceptions).
- Hearing examiners were granted an array of protections. Agencies lost control over the hiring, evaluation, compensation, and termination of their judges. The judges could not be supervised by prosecutors, were to be full-time judges, were protected from ex parte contact, and were assigned cases in rotation. They issued proposed decisions which became final unless the agency heads took over the case.
- Rulemaking was subject for the first time to mandatory notice and comment requirements (again with significant exceptions).
- Access to judicial review was assured in most cases.

Thus both sides got something from the APA, but neither side was pleased. New Deal proponents predicted that the administrative process would be negatively affected by the new array of judicial-type provisions. New Deal opponents lamented that they still had to contend with the same old combined-function agencies that seemed so biased against business. Neither, perhaps, foresaw that the APA would turn out to be the Magna Charta for the administrative state, legitimizing the process of rulemaking and adjudication, and remaining fundamentally unchanged up to the end of the century.

For purposes of this article, the big story of the APA is that it transformed the disrespected crew of agency hearing examiners into the highly respected and highly protected corps of ALJs we know today. This occurred, I believe, because the New Dealers insisted on preserving the combined-function agency. Agencies like the NLRB and the SEC must, they thought, continue to make the rules, investigate, prosecute, and adjudicate. All right, the opponents countered, at least let's elevate the status of the front-line decisionmaker--the hearing examiner. Let's go as far as we can toward making the person who hears the witnesses into a true judge. Thus the array of independence-protecting provisions in the APA. Well, the proponents countered, if we have to live with judicializing the hearing examiner function, let's make sure that the agency heads get the final call on *all* issues of fact, law, and discretion. And thus the key provision in the APA emerged: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision..."⁸

In my view, none of this would have happened if the APA had gone the route of separating the adjudicating function from the rulemaking and adversary functions or if it had endorsed a central panel of administrative judges. If adjudication were conducted in a separate agency, or in an administrative court of some kind, the various elaborate protections for hearing examiner independence in the APA would have been unnecessary and superfluous. The adjudicating agency or administrative court would have hired and evaluated its own ALJs and assigned them to cases as it saw fit; since that agency would

⁸APA §557(b).

not be engaged in law enforcement, there would be little need to construct elaborate protections of the judges' independence. Thus the ironic effect of the decision to preserve combined-function agencies was to spawn the administrative judiciary as we know it today.

In this highly abbreviated historic survey, only a few more events are worth mentioning. The status of hearing examiners was sharply elevated, and the status of agency heads sharply diminished, by the *Universal Camera*⁹ decision in 1951. In *Universal Camera*, there was a credibility dispute between A and B concerning the reasons for discharging an employee. The hearing examiner believed A. The agency heads believed B. The Supreme Court held that courts review the agency head decision, not that of the ALJ. Nevertheless, the fact that the ALJ believed a witness that the agency heads disbelieved is a minus factor in applying the substantial evidence test. As a result, agency heads became much less likely to substitute their judgment on credibility questions for that of a hearing examiner. The hearing examiner's proposed decision became far more significant than it was before.

The next event worth mentioning was the 1972 decision by the Civil Service Commission (later codified by legislation) that renamed federal hearing examiners as ALJs. This very welcome improvement in status only recognized what had already occurred: the APA's independence-protecting provisions had already transformed the federal administrative judiciary into a highly independent, highly professionalized judicial corps.

The final event I'll mention is the trend toward central panels in the states. About half the states now have stripped at least some of their agencies of their captive judges, moving the judges into a separate agency. Central panels have some very important advantages, particularly in giving private parties the sense their cases are being heard by an independent judge. This trend is gathering momentum, something like freedom of information or sunshine laws did a generation ago. The way things are going, the vast majority of the states will undoubtedly have central panels in the next twenty years. Ultimately, the federal government will have to fall into line. Perhaps

⁹*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

when the federal central panel finally emerges, the APA provisions relating to the ALJs (particularly those relating to hiring, specialization, and evaluation) can also be re-considered.

The ALJ emerges out of this long history as the result of a series of compromises unique to the U.S. First came the combined-function regulatory agencies which became necessary because essential industries remained in private rather than governmental hands. Those agencies mostly made policy through case-by-case adjudication. As a result, they ultimately found it necessary to delegate the function of conducting hearings to hearing examiners. Next came the titanic struggle over the APA and the New Deal. The historic compromise that emerged retained combined-function agencies but it also produced the provisions protecting the independence of the person conducting the hearings. Today, those very independent people, whom we know as ALJs, are the face of justice for the vast array of private citizens embroiled in administrative disputes with state or federal agencies.

