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A Return to First Principles: Rethinking ALJ Compromises

Jeffrey A. Wertkin*

INTRODUCTION

In the last century, the United States has developed into a vast and complex administrative state. The evolving apparatus that manages this state exercises elements of traditionally judicial, executive and legislative powers. Although much has been written on the sprawling bureaucracy in our separated system, one area that has not received significant attention is the position of Administrative Law Judge ("ALJ"). ALJs are vested with no less responsibility for maintaining the integrity of our federal laws than constitutionally vested judges. They preside over cases involving radio and TV broadcasting licenses; gas, electric, oil and nuclear energy allocation and rates; labor-management relations compliance; consumer product enforcement cases; corporate mergers; health and safety regulatory proceedings; securities trading regulatory proceedings; social security benefit adjustments; international trade cases; and a host of other matters.[1] Despite their broad role in the American bureaucracy, the statutory scheme governing executive branch decision makers has created an uneasy existence for the ALJ.

Since their creation, hearing examiners and ALJs have been at the heart of a conflict between contrasting approaches to executive

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1. THE ALJ HANDBOOK: AN INSIDERS GUIDE TO BECOMING AN ADMINISTRATIVE LAW JUDGE 3 (Linda P. Sutherland & Richard L. Hermann eds., 3d ed. 1997).

branch decision-making.[2] On one hand, executive branch decision-making could follow an "agency-centered" approach where regulatory conflicts are resolved by policy-driven agency experts. On the other hand, executive branch decision-making could follow a "court-centered approach" where disinterested individuals with separate powers and functions decide controverted agency issues. By enacting the Administrative Procedure Act of 1946 ("APA")[3], Congress dealt directly with this conflict and made a distinct policy choice in favor of a "court-centered" approach to administrative decision-making.[4] For decades after its enactment, scholars and federal judges implementing the APA valorized this policy choice, placing a high premium on process values and judicializing the ALJ. Corresponding to this policy shift toward a more judicialized or "court-centered" approach to agency decision-making, the ALJ position has undergone a shift away from its bureaucratic roots and toward a more traditional legal framework.

This article challenges the soundness of Congress' initial policy choice regarding the ALJ. By questioning the assumption that formalizing procedure and insulating decision makers necessarily leads to more fair and just outcomes, this paper attempts to show that choosing between alternative paradigms of decision-making involves a trade-off of process values and often represents a specific policy preference. By examining the exact nature of the court-centered and agency-centered compromises that created the ALJ and reviewing the ways in which these compromises have faltered in recent decades, this article suggests we look beyond the traditional court model for a new conception of executive branch decision-making. This is not to say that ALJs deserve any less responsibility, prestige or respect, but

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2. The APA originally used the term "hearing examiner" when referring to the special class of administrators who heard formal adjudications. Administrative Personnel, 37 Fed. Reg. 16,787 (Aug. 19, 1972); Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183 (1978). This term was first phased out by a Civil Service Commission regulation in 1972, and the APA was finally amended to substitute "administrative law judge" in 1978. Id. While I acknowledge that the symbolism of the semantics are important, the name change was not accompanied by any substantive changes and so I use these terms interchangeably unless otherwise indicated.

3. Pub. L. No. 79-404, 60 Stat. 237 (1946).

4. These concepts will be defined thoroughly in Part I, *infra*.

rather that the nature of regulatory agencies and problems suggests that we should consider embracing a different paradigm for ALJ decision-making.

Part I of this article will explore the ideological conflicts underlying executive branch decision-making in the American bureaucracy. This section will outline two opposing paradigms of executive branch decision-making: the first approach embodies "court-centered" principles, the second approach embodies "agency-centered" principles. The goal of this section is to identify the basic principles underlying each approach.

Part II will examine the debate over ALJs that accompanied the larger Congressional debate over the APA. Specifically, this section will explore the strengths and weaknesses of the arguments made by advocates of the court-centered and agency-centered approaches. Ultimately, the agency-centered approach that was employed in the first half of the century was abandoned for a court-centered approach. This section will use contemporaneous writings to explore the cleavage between these two groups and argue that the APA represents a specific policy choice by Congress of the court-centered approach over the agency-centered approach.

Part III will briefly review the various ways in which this original policy choice concerning the role of executive branch decision-makers has been reinforced by the Supreme Court and other actors since 1946. This section will also draw upon recent commentaries on agency decision-making to question the continuing viability of the original policy choice favoring the court-centered approach. Focusing on the different types of executive branch decision-makers—ALJs, Administrative Judges ("AJs"), and other agency officials—this section will highlight some of the shortcomings of the APA framework.

PART I: COURT-CENTERED AND AGENCY-CENTERED APPROACHES TO ADMINISTRATIVE DECISION-MAKING

A. Introduction

The conflict between court-centered and agency-centered approaches to executive branch decision-making began with the rise of the administrative state, was further defined by the enactment of the APA, and continues to rage among lawyers, scholars and judges. Pieces of this debate have been explored in different contexts and variously characterized as legalist versus scientific,[5] the rule of law versus bureaucratic efficiency,[6] institutional decision-making versus judicialized decision-making,[7] and adjudicative versus polycentric.[8] This section will draw together previous scholarship on this conflict into two over-arching classifications: court-centered approaches and agency-centered approaches to executive branch decision-making.

Three points are worth making before undertaking this task. First, while much has been written about the legal process and theories of adjudication in traditional courts, the focus here is on decision-making in the administrative context. Thus, I look to elucidate principles about executive branch decision-making from sources that focus on public administration rather than adjudication in traditional courts. Second, procedures and rules are rarely created for their own sake, but rather embody specific principles and are enforced in ways that maximize the underlying principle. Thus, instead of discussing specific procedures or rules, this section will focus on the principles underlying each approach and briefly mention procedures or rules usually associated with such principles. Finally, the following is not a complete list, but rather principles that appear most often in the literature. For the sake of parsimony, the principles

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5. MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 22 (1992).

6. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U.L. REV. 1557 (1996).

7. *See* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981).

8. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (originally written and circulated in 1957).

given attention are those that create the greatest conflict between the two disparate approaches to the ALJ and administrative decision-making.

B. Court-Centered Principles to Administrative Decision-Making

Court-centered principles to administrative decision-making are derived from principles of due process and formalism that exist in common law and federal courts. This section attempts to elucidate those traditional courtroom principles that advocates have expressly attached to the administrative decision-making process.

Principle One: Participation

One of the defining characteristics of the American legal system is the belief that individuals and organizations have a fundamental right to participate in decisions that affect their well-being. This participation principle is firmly established in traditional courts in the form of the Due Process Clause, which ensures the rights of litigants to call witnesses, submit evidence, and present reasoned arguments to a judge.[9] Many have argued that this principle should extend to the administrative context in the same manner. While the opportunity to speak and be heard does not require the presence of a judicial figure, judges are prominently featured as the participation principle that is extended to agency decision-making.

In 1929, Lord Hewart, former Chief Justice of the Royal Court of England, argued against the abridgement of process in cases arising out of government action.[10] Hewart grounded his argument in the principle that private property must be strictly protected from government intervention.[11] Hewart saw a contradiction between the preservation of property rights and social change and insisted that

9. *Id.* at 369 ("Adjudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments.").

10. *See* HEWART OF BURY, LORD, THE NEW DESPOTISM (1929)

11. HORWITZ, *supra* note 5, at 227.

administrative law should be derived from private law.[12] Others have recognized the legitimacy of administrative proceedings, but argued that parties to these proceedings should have the same opportunity to participate as in a civil or criminal court because administrative decisions often put private property at risk. In 1964, Charles Reich drew on the principle of private property to articulate a further justification for a court-centered approach to administrative decision-making.[13] Reich argued that the administrative state created various forms of government-created wealth in the form of subsidies, contracts, licenses, benefits, and use of public resources.[14] Since this "new" property created as many rights as traditional forms of property, Reich argued that government decisions affecting this new property should be decided by judges or judge-like adjudicators after full participation by the parties.[15] Thus, a central theme in the writings of both Hewart and Reich is that administrative law should be premised on a private law claim and evaluated by constitutionally vested judges.

Alternative justifications for the participation principle often emphasize the "intangible benefits" of participation in the administrative process. For example, in his 1970 book *Defending the Environment*, Joseph Sax discussed the virtues of making available a judicial forum open to public participation.[16] According to Sax, the level of participation allowed in administrative proceedings "is a measure of the willingness of government to subject itself to challenge on the merits of decisions made by public officials; to accept the possibility that the ordinary citizen may have useful ideas to contribute to the effectuation of the public interest."[17] In this articulation of the participation principle, executive branch decision makers are not reified experts, but arbiters whose decisions benefit from the input of litigating parties.

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12. *Id.* at 227-28.
13. Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).
14. *Id.* at 734-37.
15. *Id.* at 783-85.
16. JOSEPH L. SAX, DEFENDING THE ENVIRONMENT (1970).
17. *Id.* at 57.

Similarly, Barry Boyer argued that private litigants may gain some emotional satisfaction from participating in administrative decision-making processes: "private litigants may gain satisfaction from having the right to force agencies to come forward and formally justify their positions, and there may even be psychological benefits in the 'battle atmosphere' of adversary litigation."[18] Boyer's argument suggests that the presence of judges, rather than experts, may imbue the system with legitimacy from the perspective of the litigants.

Principle Two: Objectivity/Impartiality

The Supreme Court has held that the Due Process Clause of the Constitution requires that an impartial and detached judge preside over judicial proceedings.[19] In the legal process conception of adjudication, the judge acts as an impartial arbiter[20] who brings an "uncommitted mind" to the hearing.[21] The objectivity/impartiality principle is based on the notion that such requirements are necessary to maintain public confidence in the integrity of the judicial system.[22] The logic follows that the judiciary could not function as a viable institution in a democracy if the public lost faith in the impartiality or objectivity of its judges.[23] Traditional courts have dealt with the

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18. Barry B. Boyer, *Alternatives to Administrative Trial-type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 148 (1972) (citing Sax, *supra* note 16). This article by Barry Boyer, an attorney advisor to the Office of Legal Counsel in the Department of Justice, originated as a staff report to the Chairman of the Administrative Conference of the United States. *Id.* at 111.

19. Ward v. Vill. of Monroeville, 409 U.S. 57, 61-62 (1972); *see also* In re Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

20. *See* Fuller, *supra* note 8, at 365.

21. *Id.* at 386.

22. *See* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J. dissenting). Since the judiciary possesses "neither the purse or the sword," the proper functioning of the judiciary depends on the willingness of members of society to follow its mandates. *Id.*

23. Ignoring the impartiality principle "invite[s] votes which are influenced more strongly by general predilections in the area of law involved than they are by lawyer-like examination of the precise issues presented for decision." Henry M.

principle by trying to insulate judges from undue influences through rules regarding judicial appointments, disqualifications for bias, and in granting Article III federal judges life tenure.

The court-centered approach has sought to extend the objectivity/impartiality principle to administrative proceedings. Roscoe Pound argued that the relationship between an agency and an executive branch decision maker causes undue influence and makes it very difficult for the decision maker to remain unbiased in fact and in appearance.[24] In an article advocating the independence of ALJs, Karen Kauper has noted that the issue of impartiality is especially acute in administrative proceedings because the simple association between executive branch decision-makers and an agency will cause decision makers to likely develop or adopt the agency viewpoint and approach to problems.[25] Specifically, Kauper argued that the quality of decision-making suffers from the long association of each ALJ with one agency: "Adjudicators hearing the same type of cases for any length of time may rely on their own preconceptions of a problem to decide a case."[26] Thus, both Pound and Kauper assert that bias damages the administrative system, and they suggest a severance of the relationship between ALJs and agencies.[27]

Principle Three: Accuracy

Accuracy is a central dilemma for the judiciary because of the difficulty in verifying whether or not a certain outcome is accurate.[28]

Hart, Jr., *Foreword: The Time Chart of the Justices,* 73 HARV. L. REV. 84, 124 (1959).

24. ROSCOE POUND, JURISPRUDENCE 442-43 (1959).

25. Karen Y. Kauper, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute*, 18 U. MICH. J.L. REFORM. 537, 544 (1985).

26. *Id.* at 546.

27. Writing on separation of functions, Asimow states: "A true believer in judicialized forms . . . might recommend that adjudication be conducted exclusively by persons with no other agency responsibilities- ideally by a separate administrative court." Asimow, *supra* note 7, at 759.

28. John Allison succinctly makes the point: "a decision maker can never know with certainty that a decision is normatively accurate." John R. Allison, *Combinations of Decision-Making Functions, Ex Parte Communications, and*

To overcome the accuracy dilemma, courts rely on procedures to achieve the maximum level of confidence in each outcome. Noting that accuracy is impossible to measure, John Allison suggested a model for approximating accuracy: "the greatest degree of confidence is achieved by designing and consistently applying procedures that seem most likely to produce accurate results."[29] Thus, the quest for accuracy in federal courts is coextensive with the creation of procedural rules aimed at reassuring affected constituencies. The Supreme Court has used this approach to the accuracy principle to guide its determination on appropriate due process,[30] and renowned legal scholars such as Henry Hart and Albert Sacks have also drawn an explicit connection between sound procedures and wise decisions.[31]

Some scholars argue that the same accuracy dilemma that exists in the federal courts exists in administrative law contexts. For these authors, extending the accuracy principle to the administrative context means insisting that certain procedural safeguards be applied to all executive branch decision-making bodies. For example, Allison noted that even in administrative contexts, "carefully conceived and applied procedure is the best proxy for substantive decision accuracy."[32] Similarly, Barry Boyer noted that the use of trial-type hearings in an administrative context can make an important contribution to the accuracy of decisions reached at later

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Related Biasing Influencs: A Process-Value Analysis, 1993 UTAH L. REV. 1135, 1149 (1993). Allison notes the same statement holds true for "positive" accuracy (referring to the "fact-finding" aspects of decision-making) as it does for "normative" accuracy (referring to the "developing or applying norm" aspects of decision-making. *Id.* at 1148-89.

29. *Id.* at 1149.

30. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (deciding due process cases based on the risk of "erroneous deprivation" of life, liberty or property). *See also* Allison, *supra* note 28, at 1148-51.

31. A procedure that "'is soundly adapted to the type of power to be exercised is conducive to well-informed and wise decisions. An unsound procedure invites ill-informed and unwise ones.'" William N. Eskridge and Phillip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2044 (1994) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 173 (tent. ed. 1958)).

32. Allison, *supra* note 28, at 1149.

stages of the proceeding or in the larger arena of general legislative policy formation.[33] Implicit in all these arguments is the presumption that relying on procedural requirements, rather than relying on the inherent wisdom of the decision makers, is most likely to ensure accurate results.

Principle Four: Reasoned Elaboration

The final principle of the court-centered approach to administrative decision-making is derived from Hart and Sacks' theory of "reasoned elaboration."[34] Since legislative statutes often give general or vague directives, an official applying a "general directive arrangement must elaborate the arrangement in a way which is consistent with the other established applications of it and must do so in a way which best serves the principles and policies it expresses."[35] According to Hart and Sacks, the notion of reasoned elaboration is a critical part of the legal process because it ensures that officials do not simply interpret ambiguous language to reflect their own political values.[36]

Advocates of the court-centered approach have argued that judicial review should play the same legitimizing role in administrative law that the Legal Process School's notion of "reasoned elaboration" once held out for traditional courts. In 1965, Louis Jaffe argued strongly for the availability of judicial review of administrative decisions.[37] Later, the articulation of the "hard-look doctrine" by the Supreme Court imported the reasoned elaboration

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33. Boyer, *supra* note 18, at 144. Boyer illustrates this point by reference to the 1957 licensing amendments to the Atomic Energy Act requiring hearings regardless of whether any parties or interveners were opposing issuance of the license. Despite the objection that a trial-type hearing in the absence of disputed facts or issues is a doctrinal and logical absurdity, Boyer notes a strong belief that these hearings could improve the quality of the ultimate decision. *Id.*

34. Eskridge and Frickey, *supra* note 31.

35. *Id.* at 2043.

36. *Id.*

37. LOUIS L. JAFFE, JUDICAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965). "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid." *Id.*

principle from the traditional courtroom setting.[38] Under "hard look review," even if an agency exercised discretion within statutory bounds and considered all the right factors, federal courts can reverse if the agency's decision was unreasonable—if the agency made a "clear error of judgment."[39]

> Hard-look review compares the agency's stated rationale for a decision with supporting or opposing data and policy views gathered by the agency in the administrative record. Hard-look review thus embodies the principle of reasoned elaboration by encouraging the executive branch decision-maker to articulate the connection between his or her decision, the available evidence, and the policy behind the organic statute.[40]

C. Agency-Centered Approach to Administrative Decision-Making

Principle One: Knowledge, Wisdom and Expertise

The bedrock principle of the agency-centered approach is that administrators, rather than judges, should make decisions because administrators have superior knowledge, wisdom and expertise in any given area. The first scholars to advance this expertise theory were part of what Morton Horwitz has called the "scientific tradition."[41] In contrast to traditional ideas of legality and the rule of law, the development of a scientific or expertise justification of administrative power achieved prominence in the Progressive era.[42]

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38. Motor Vehicle Mrfs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51-57 (1983).

39. Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

40. *Id.*

41. HORWITZ, *supra* note 5, at 222. Among those scholars in the Progressive tradition, Horwitz identifies Woodrow Wilson, James Landis, John Dickinson, and Frank Goodnow as the most influential. *Id. at* 222-25.

42. *Id.* at 224. The Progressive era in American history spans roughly from 1900-1917, and it was characterized by political active pressure groups with reformist agendas all competing for the reshaping of American society. *See generally,* RICHARD HOFSTADTER, THE AGE OF REFORM (1955).

The Progressive movement was highly skeptical of the competence of courts to perform the important tasks of social engineering that were gaining momentum in the years leading up to the New Deal.[43] While skeptical of the courts, Progressive thinkers had a strong admiration for professional skill and put their faith in the wisdom of experts in effectuating administrative law.[44]

Following on the Progressives' high opinion of bureaucracy, James Landis compared the development of the administrative state in the twentieth century with the rise of the system of equity in the seventeenth century.[45] Landis argued that many people opposed the rise of equity courts for the same reason that people feared the rise of the administrative state: both seem threatening because they place "alien hands upon the sacred ark of the covenant."[46] Landis suggested that the fear of the administrative state is short-sighted and based only on "our own inadequate and myopic vision."[47] By looking beyond the parochial prejudices of legal formalism, Landis argued, the rise in administrative law can be seen as a response to the popular desires of the citizenry for more "knowledge . . . wisdom and . . . expertness" in the handling of claims.[48] In this way, Landis concluded that the growth of the American administrative state in the twentieth century fulfilled the same need that the British courts of equity fulfilled in the seventeenth century.[49]

In *The Administrative Process*, Landis put forth a comprehensive articulation of what can be called the knowledge, wisdom, and expertise principle.[50] Landis argued that specialized knowledge was

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43. HORWITZ, *supra* note 5, at 225.

44. *Id.*

45. James Landis, *The Challenge to Traditional Law in the Rise of Administrative Law*, 13 MISS. L.J. 724, 731 (1940-41).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (Yale University Press 1938) (hereinafter *Administrative Process*).

important due to the complexity of regulating certain industries.[51] Since administrators possessed this special expertise developed from their experience in regulating and from their ability to draw on their staff of technicians, Landis argued that agency judgments commanded significant deference. Thus, the knowledge, wisdom, and expertise principle holds that administrative decisions deserve deference from the judiciary because administrators possess special expertise not possessed by the public, courts, or the legislature.

Principle Two: Flexibility

A central tension in administrative decision-making exists between the drive to empower the bureaucracy to meet its congressional and public mandates and the drive to curtail agency discretion through procedures that structure adjudication. Advocates of the agency-centered approach argue that certain types of formal process requirements can undermine effective administration by limiting the flexibility of agencies. Investigating the limits of process-oriented adjudication, Lon Fuller emphasized the unsuitability of the adjudicative model to address complex, open-ended issues, or what he defines as "polycentric" issues. In a polycentric problem:

> [O]ne can never fix the value for a variable (X) and then reason to optimal values for other variables (Y and Z), because the choice of values for Y and Z might alter the value of X, which in turn might change the optimal values for Y and Z- and so on. Accordingly, the only way to solve a polycentric problem is to consider the effects on all variables at once and search for an equilibrium.[52]

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51. *Id.* at 22. "[T]he art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy." *Id.* at 23-24.

52. Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation*, 75 B.U.L. Rev. 1273, 1314 (1995).

In other words, the nature of process-oriented adjudication makes it ill-suited to handle certain types of problems.

Advocates of the agency-centered approach stress that this search for an equilibrium position conflicts with court-centered process restrictions on decision-makers. In stark contrast to the procedural requirements articulated by Hart and Sacks,[53] Kenneth Culp Davis has argued that executive branch decision makers need the flexibility to consult privately with their own experts, and it is appropriate for supervising judges, and agency supervisors to oversee the work of administrative law judges on an *ex parte* basis.[54] Similarly, Michael Asimow noted that strict rules about *ex parte* communications and exclusive record rules inhibit candid and much-needed advice from experts but also cause substantial delay.[55] Thus, the flexibility principle is a central feature of the agency-centered approach, prompting advocates to resist attempts to restrict bureaucratic discretion.

Principle Three: Efficiency

The efficiency principle holds that decision-making objectives should be attained at the least possible cost to avoid waste of scarce resources. As a general rule, trial procedures are expensive. Even proponents of the court-centered approach acknowledge that litigation "is relatively extravagant in the time it is willing to invest in letting interested persons state, be tested on, and restate their positions."[56] However, this problem is even more acute when confronting complex or polycentric issues in an administrative context. Boyer noted that both regulators and industry representatives have complained about the various inefficiencies of

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53. See *supra*, note 31.

54. *See* KENNETH CULP DAVIS, 1 ADMINISTRATIVE LAW TREATISE, 2d Ed., 1.8, 27-28. Davis called the prohibition against ex parte prohibitions in the original APA an "extreme provision". *Id.*

55. *See* Asimow, *supra* note 7, at 779. To be fair, Asimow also acknowledges that strict separation has value and concludes that "the problem of separation of functions will never disappear." *Id.* at 804.

56. SAX, *supra* note 16, at 221.

the adjudicative hearing.[57] Former commissioners have complained that "issues will be litigated in a trial-type proceeding with a whole apparatus of devices which can be manipulated to produce years-long delay,"[58] and industry representatives have complained that "trial procedures can be used by public interveners to increase enormously the cost and complexity of the proceedings."[59] The efficiency principle holds that a simplification of procedure would substantially reduce the costs by reducing the amount of time and resources an agency has to invest in the decision-making process. Clearly, a tension exists between the efficiency principle and other principles such as the participation and accuracy principles. Many of those scholars advocating an agency-centered approach seem to elevate the efficiency principle above other concerns.

Principle Four: Consistency

Before discussing the consistency principle, it is important to explain how the agency-centered approach counters the court-centered accuracy principle. Several scholars have been highly critical of the argument that trial-type procedures help ensure accurate results in an administrative setting. Roger Noll explained that as regulation has developed, agencies have behaved more like neutral, passive judges of conflicts in regulated industry.[60] Noll suggested that the adoption of these procedural safeguards in the name of accuracy actually serve to affect the flow of information to the passive decision-maker.[61] In other words, these procedures give the regulated industry the advantage of controlling the flow of information, which in turn give an impression of the regulatory environment that is overly favorable to regulated industry.[62] Similarly, Boyer noted the difficulty of importing the accuracy principle to administrative decision-making.[63] The fact that trial-type

57. Boyer, *supra* note 18, at 146.

58. *Id.* at 146 n.130.

59. *Id.* at 146.

60. ROGER NOLL, REFORMING REGULATION 80 (1971).

61. *Id.*

62. *Id.*

63. Boyer, *supra* note 18, at 144.

procedures casts the decision-maker into a passive "umpire" role causes two interrelated problems in the administrative context: (1) such procedures can contribute to the agencies' "relative indifference to long-range future effects of their decisions;"[64] and (2) it "makes it likely that the immediate, highly vocal claims of the regulated industry will prevail over the diffuse, long-range and unrepresented interests of affected segments of the public."[65]

In rejecting the notion that due process requirements serve to enhance accuracy in the administrative context, the agency-centered approach turns to the consistency principle. Writing in the context of social security disability cases, both Jerry Mashaw and Richard Pierce note that consistency is the best proxy for accuracy.[66] Consistent agency determinations are vital for the effectuation of polycentric agency goals. An example of an agency-centered approach is what Mashaw calls the "bureaucratic rationality" model of administrative decision-making.[67] In this model, the overriding principles are efficient and consistent implementation of centrally-formulated policies.[68] To ensure consistency, agency heads cannot rely on appeals by rejected claimants,[69] but should employ an aggressive quality assurance program whereby a sample of ALJ decisions are reviewed and graded on a variety of measures.[70] Thus,

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64. *Id.*

65. *Id.*

66. *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Matthews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 44 (1976) ("[T]he nearest approximation to an index of accuracy is consistent adjudication: if like cases are being treated alike by state agencies, then claimants are at least receiving formal justice through the existing procedures."); Richard J. Pierce, Jr., *Political Control versus Impermissible Bias in Agency Decision-making: Lessons from* Chevron *and* Mr. Stretta, 57 U. CHI. L. REV. 481, 510 (1990) ("[C]onsistency is a good measure, and perhaps the only measure, of accuracy in this context...").

67. MASHAW, BUREAUCRATIC JUSTICE 25-26 (1983).

68. *Id.*

69. This would exclude review of questionable awards to nondeserving claimants.

70. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

in the agency- centered approach, the ability to hold executive branch decision-makers accountable for their decisions is vital.[71]

Accuracy and consistency principles have often clashed in federal cases about administrative procedure, with judges predictably opposing encroachments on the court-centered principles.[72] Richard Pierce argues that federal judges oppose efforts to control the conduct of ALJs because such efforts "strike far too close to federal judges' own turf."[73] He continues, if "the [Social Security Administration] can exercise control over the productivity and consistency of its ALJs, perhaps some institution has the power to exercise analogous control over federal judges."[74]

D. Conclusion

This section has outlined four central principles of the court-centered and agency-centered approaches to administrative decision-making. Conceptually, it may be helpful to think of court-centered and agency-centered approaches as endpoints on an ideological spectrum. Thus, the procedures and structures that make up a decision-making system can be more or less court-centered depending on which of the aforementioned principles are more or less sophisticated. Accordingly, the principles underlying each approach are not mutually exclusive, but offer several points of overlap that can potentially cause conflict. The main ideological divergences in the court-centered and agency-centered approaches can be summed up as follows: (1) participation versus efficiency; (2) knowledge, wisdom, and expertise versus impartiality/independence;

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71. It is important not to confuse the flexibility principle with the consistency principle. At first blush, it might seem that constraining ALJs to promote consistency would impair their ability to act in a flexible way. However, the flexibility principle comes into play at a different point in the administrative process. For example, the Social Security Administration should have the flexibility to structure decision-making in the way it sees fit, and then be able to hold its ALJs to a high level of consistency. If it turns out that procedures are not furthering agency policies or goals, the SSA retains the flexibility to adjust such procedures.

72. *See infra* notes 115.

73. Pierce, *supra* note 66, at 486.

74. *Id.*

(3) accuracy versus consistency; and (4) reasoned elaboration versus flexibility. In all four cases, procedures enacted to promote one principle would likely have a diluting effect on the other principle.

This section has hopefully imparted a strong sense of the court-centered and agency-centered approaches, enabling the reader to distinguish procedures that promote specific principles and ultimately a court-centered or agency-centered approach to administrative decision-making. The next section will highlight these conflicts in the context of the administrative reform movement leading to the enactment of the APA.

PART II: THE APA AND THE CONFLICT OVER ALJS: COURT-CENTERED VERSUS AGENCY-CENTERED APPROACHES

A. Introduction: Two Major Ideological Conflicts over the ALJ

After its enactment, conventional wisdom held that the Administrative Procedure Act became law as a result of ideological consensus. In 1986, Gellhorn and Davis characterized the APA as an "obvious triumph of truth over ignorance," while characterizing opposition to the New Deal as "hysterical."[75] In fact, recent scholarship has persuasively argued that the APA was the result of extensive political and ideological wrangling. George Shepherd offers a comprehensive account of the political struggle between the New Deal advocates and the anti-New Dealers over the nature of administrative government and the content of an administrative procedure reform bill. He argues that the fight over the APA was a "pitched political battle for the life of the New Deal."[76] Similarly, James Brazier reviews the political history leading up to the enactment of the APA, with a special emphasis on the differences between the Walter-Logan Bill[77] and the final APA bill as enacted.[78]

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75. Kenneth C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 514-15 (1986).

76. Shepherd, *supra* note 6, at 1560.

77. In 1939, Representative Francis Walter and Senator Mills Logan introduced similar bills in both chambers, which together became known as the

Building on previous scholarship, this section seeks to utilize the new theoretical categories to examine the debate over Administrative Law Judges.

In the period leading up to the enactment of the APA, two principal ideological conflicts emerged over the proper scope and configuration of the executive branch decision-maker. The first disagreement was over who should make the decisions, agency experts or judges. The agency-centered advocates favored scientists and experts under the umbrella of a centralized agency, while the court-centered approach favored judges or independent decision-makers with a strict separation of judicial and enforcement powers. A second disagreement was over the neutrality of the advocate. Agency-centered advocates argued to maintain the existing decision-making model in which a high level of coordination occurred to ensure that adjudicative outcomes match policy preferences, while the court-centered approach favored an impartial and independent adjudicator immune from agency oversight and uninfluenced by the political character of the agency. This section will consider these disagreements in turn.

B. Who Decides—Judges or Agency Experts?

Court-Centered Approach

Drawing on the participation and accuracy principles, advocates of the court-centered approach argued that administrative decisions should be made by constitutionally vested judges, or in the alternative, by decision-makers with the same status and protection as constitutionally vested judges. The early court-centered position, advocated by members of what Horwitz has called the "Legalist" tradition, argued that only a constitutionally vested judge should

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Walter-Logan Bill. *See* H.R. 6324, 76th Cong., (3d Sess. 1939); S. 915, 76th Cong., (1939).

78. James E. Brazier, *An Anti-New Dealer Legacy: The Administrative Procedure Act*, 8 J. OF POL. HIST. 206 (1996).

make administrative decisions.[79] The English scholar A.V. Dicey posited an irreconcilable conflict between the traditional ideal of the rule of law and the emergence of a modern system of administrative regulation.[80] Dicey used the participation principle to justify his court-centered approach, linking the growth of administration with the decline of individualism.[81] Dicey argued against the existence of regulatory agencies, and ultimately against any notion of separate executive branch decision-makers.[82]

As the scope of government intervention grew, some advocates of the court-centered approach grudgingly accepted that constitutional courts alone could not control administrative activity, and instead argued for the strict separation of decision-making functions from the rest of the agency. Court-centered proposals sought to remove decisional control from experts and social scientists in favor of legally trained officials well versed in accuracy enhancing procedures. Established in 1933, the American Bar Association's Special Committee on Administrative Law ("ABA Committee") took this position and presented several bills to create a separate administrative court.[83] In 1936, the ABA Committee offered a bill for a new administrative court that was introduced in the House by Emanuel Celler and in the Senate by Mills Logan.[84] The Logan-Celler Bill ("Bill") consolidated existing specialty courts and brought

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79. *See* HORWITZ, *supra* note 5, at 225. Horwitz identified A.V. Dicey, Roscoe Pound, and Friedrich von Hayek as scholars firmly rooted in the "legalist tradition." *Id.* at 225-30.

80. ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1982) (1915).

81. *See* HORWITZ, *supra* note 5, at 226.

82. *See* DICEY, *supra* note 80, at 213-67. Dicey proudly pointed out that "*droit administraif*" was an expression that did not have an equivalent in the English language and commented, "the want of a name arises at bottom from our non-recognition of the thing itself." *Id.* at 215. *See also* HORWITZ, *supra* note 5, at 225-26.

83. In 1935, then chairman of the Committee, Louis Caldwell, stated: "A man should not be judge in his own case and the combination of prosecutor and judge in these tribunals must be relentlessly exposed and combated." *Proceedings of the Fifty-Eighth Annual Meeting of the A.B.A.* (Third Session), 1935 A.B.A. ANN. REP. 141-42 (1935).

84. *See* S. 3787, 74th Cong. (1936); H.R. 12,297, 74th Cong. (1936).

agency jurisdiction of licenses under the purview of an administrative court staffed by lawyers or judges with extensive legal backgrounds.[85] The proposal reaffirmed the ABA Committee's commitment to removing experts and social scientists from the decision-making process: "It is precisely this forbidden commingling of the essentially different powers of government in the same hands that is today the identifying badge of an administrative agency."[86]

In 1938, Roscoe Pound became chairman of the American Bar Association's Committee on Administrative Law and began his assault on the combination of agency functions, or what he called administrative absolutism.[87] Pound's approach was to decentralize agency structure.[88] In July of 1938, the ABA released a report comparing the runaway administrative state with the Soviet Union dictatorship:

> The ideal of administrative absolutism is a highly centralized administration set up under complete control of the executive for the time being, relieved of judicial review and making its own rules. This sort of regime is urged today by those who deny that there is such a thing as law.[89]

Perhaps the boldest variation on the separation of powers theme was a legislative proposal in which hearings would be presided over by "a lawyer learned in the law" appointed by the "United States district judge for the district in which the person involved in the controversy resides."[90] The Bill included a provision that the lawyer-

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85. The Bill combined the Court of Claims, The Board of Tax Appeals, the Customs Court, and the Court of Customs and Patent Appeals. *See* Shepherd, *supra* note 6, at 1578.

86. *Report of the Special Committee on Administrative Law*, 1936 A.B.A. Ann. Rep. 721 (1936).

87. Roscoe Pound, *Administrative Law: Its Growth, Procedure and Significance*, 7 U. PITT. L. REV. 269 (1941).

88. *Id.*

89. *Report of the Special Committee on Administrative Law*, 1938 A.B.A. Ann. Rep. 343 (1938).

90. S. 918 § 708(a), 77th Cong. (1941).

judge should be "an experienced lawyer of not less than ten year's practice at the bar,"[91] reinforcing the court-centered notion that only those with extensive legal training should preside over administrative controversies.

Other important groups weighed in on the separation of functions question. In 1937, the President's Committee on Administrative Management recommended that independent commissions be completely separated into administrative and judicial sections.[92] Further, a minority of the Attorney General's Committee on Administrative Procedure suggested splitting agency functions in a number of circumstances, such as cases where a private party faces off against the government.[93] In a letter to Attorney General Robert Jackson, included as an addendum to the Committee's final report, Justice Lawrence Groner argued that all controversial adjudications should be referred to commissioners who are wholly independent of the agency.[94] Groner suggested that only a wholly independent board, with a composition similar to the Board of Tax Appeals, could create a truly judicial atmosphere and therein a workable state of administrative review.[95] Finally, responding to the Attorney General's committee report, John Foster Dulles defended the position that courts did indeed possess the wisdom, knowledge or expertise to regulate satisfactorily. Arguing that certain types of administrative cases should be heard by judges, Dulles wrote:

> A society which relies primarily upon juries to find the facts determinative of life or death, which finds courts acceptable to decide the intricacies of patent cases, can scarcely object to the use of the court to

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91. *Id.*

92. PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES 40 (1937). For a critique of the report, *see* Louis L. Jaffe, *Invective and Investigation in Administrative Law*, 52. HARV. L. REV. 1201, 1236-42 (1939).

93. United States Attorney General's Committee on Administrative Procedure, Final Report, S. Doc. No. 77-8, at 203-09 (1st Sess. 1941) [hereinafter *Attorney General's Committee Report*].

94. *Id.*

95. *Id.* at 248-250.

> determine the presence or absence of facts of the kind which . . . would come before them.[96]

Agency-Centered Approach

Advocates of the agency-centered approach argued that expert administrators, informed by a full staff and coordinated under a centralized agency structure, were more qualified than judges to make administrative decisions. This approach was the status quo in the newly minted regulatory agencies of the 1920s and 1930s. In most controverted cases there was little separation of judicial, investigative, and enforcing functions, and in some cases, an administrator with little or no legal training performed all three functions.[97] For example, Lloyd Musolf cited a 1923 report from the Federal Trade Commission ("FTC") revealing that hearing examiners often received their assignments from the same official who directed the investigations.[98] Other reports from the period indicate that in a number of formal proceedings before FTC commissioners, agency counsel, rather than the examiner, wrote the factual report that was eventually submitted to the Commission.[99] Musolf further noted that in the Office of Indian Affairs or the Social Security Board, it was not uncommon for the same person to examine witnesses and decide the case.[100]

As the agency-centered position came under fire in the late 1930s, James Landis articulated perhaps the most persuasive defense of entrusting expert administrators with decision-making power.[101]

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96. John Foster Dulles, *The Effect In Practice of the Report on Administrative Procedure*, 41 COLUM. L. REV. 617, 623 (1941).

97. *See* LLOYD MUSOLF, FEDERAL EXAMINERS AND THE CONFLICT OF LAW AND ADMINISTRATION 83 (1953) (describing in detail the experience of Charles W. Whittemore, a trial examiner for the National Labor Relations Board with no formal legal training, who presided over an unfair practices case in South Carolina). *Id.* at 13-22 (from a personal interview with Whittemore on January 30, 1948).

98. *Id.* at 83.

99. *Id.*

100. *Id.*

101. *See* LANDIS, *supra* note 45, at 724-31; *Administrative Process*, *supra* note 50, at 15-45.

Landis argued that the expertise needed for competent regulation cannot come from judges or independent decision-makers. Such expertise "springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem."[102] Similarly, Walter Gellhorn argued against the notion "that the capacity to govern justly lies only beneath the black robes of the judges, and that to them, the wise and good fathers, we must turn hopefully for true guidance through the mazes of the law."[103] Gellhorn rejected the court-centered fear of entrusting responsibilities to the administrative agencies, arguing that such a fear not only produces poor government, but ultimately may produce chaos and destroy faith in government itself.[104] Thus, the agency-centered approach was highly critical of the claim that only judges should make decisions, and opposed attempts to decentralize agency decision-making.

Some agency-centered advocates agreed that investigative and decision-making responsibilities should be separated, but stopped well short of removing agency experts from the process. In defense of this position, the Attorney General's Committee Report noted that decision-makers often have to make sense of vague statutory language.[105] Because this responsibility often involves a considerable amount of discretion, the Committee suggested that to "divorce entirely the investigating and enforcing arm from the deciding arm, may well impart additional confusion to this process."[106] Recognizing that the process of regulating requires consistency in approach, the majority of the Attorney General's Committee argued against the complete separation of decision-making functions.[107]

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102. *Administrative Process*, *supra* note 50, at 23.

103. *See* SHEPHERD, *supra* note 6, at 1598 (quoting Walter Gellhorn, *The Improvement of Public Administration*, 2 NAT. L. GUILD Q. 20, 23 (1940)).

104. *Id.*

105. "[T]he statutory prohibitions which administrative agencies are commonly called upon to enforce are not and cannot be as clear . . . as a . . . bill of sale." *Attorney General's Committee Report*, *supra* note 93, at 59.

106. *Id.*

107. *Id.*

The APA Compromise

With the creation of a special class of administrators called "hearing examiners," the APA marked a decisive victory for the court-centered approach. The APA approach was to divide administrative decisions into "rules" and "orders." Rules are "designed to implement, interpret, or prescribe law or policy,"[108] while orders are "the whole or part of a final disposition . . . of an agency in a matter other than rulemaking but including licensing."[109] In this conception, agency experts make rules while a new set of hearing examiners issue orders. APA hearing examiners were clearly intended to be outside the circle of expert administrators comprising the agency as their compensation, promotion and tenure; they were placed in the control of the Civil Service Commission.[110] The court-centered approach also won an important victory by considerably decreasing the amount of interaction between agency experts and an ALJ. First, the APA affirmatively separates investigative and adjudicative responsibilities. Section 554 states that an "employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . ."[111] Second, the APA prohibits ALJs from consulting *ex parte* with any person on any fact in issue unless all parties are notified and given an opportunity to participate in those discussions.[112]

The APA did contain some important concessions to the agency-centered approach, the foremost concession relating to agency structure. The APA rejected the external separation of adjudicative functions outside the agency and instead adopted an internal separation.[113] Under this internal separation scheme, the ALJ plays only an intermediate role in the decision-making process while the

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108. 5 U.S.C.A. § 551(4) (West Supp. 2002).

109. 5 U.S.C.A. § 551(6) (West Supp. 2002).

110. *See* 5 U.S.C.A. §§ 5372, 7521 (West Supp. 2002). *See also* Ramspeck v. Fed. Trial Exam'r Conference, 345 U.S. 128, 132 (1953).

111. 5 U.S.C.A. § 554(d) (West Supp. 2002).

112. 5 U.S.C.A. § 554 (West Supp. 2002).

113. *Id.*

agency is the final decision-maker.[114] The APA further grants to the agency broad discretion to overrule the ALJ: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."[115] Recognizing the need for flexibility, Congress did not extend the prohibition against the participation of agency members in both prosecuting and judging to cases involving licenses, rate-making, or for any case in which an agency member presides.[116] Other sections of the APA contain exceptions to the constraints of formal adjudication by an ALJ. Section 554 exempts certain types of decisions from the constraints of a formal adjudication by an ALJ,[117] supporting the flexibility principle by giving agency heads some discretion in choosing who will decide a certain type of case.

The APA's conception of the ALJ's role thus involves a curious mixture of autonomy and subservience. ALJs act independently in all significant respects during the course of the decision-making process, but once their decisions are made, they are not granted the respect of finality. While APA provisions dividing rules and orders emphasize court-centered principles of participation and accuracy in agency adjudication, provisions granting agency review emphasize agency-centered principles of expertise and consistency. This

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114. *Id.*

115. 5 U.S.C.A. §577(b) (West Supp. 2002); *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 492 (1951) (rejecting the argument that agency officials can only reject an examiner's findings if they are clearly erroneous: "Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required."); FCC v. Allentown Broad. Corp., 349 U.S. 358, 364-65 (1955) (rejecting the Court of Appeals' conclusion that a Board can only overrule an Examiner's findings where there is a "very substantial preponderance in the testimony as recorded." Citing the Administrative Procedure Act, the majority found that "this attitude goes too far."). It is important not to confuse ALJs (or hearing examiners) with members of quasi-independent agency appeal boards that review ALJ enforcement opinions.

116. 5 U.S.C.A. § 554(d)(2)(A)-(C) (West Supp. 2002).

117. 5 U.S.C.A. § 554(a)(2)-(4) (West Supp. 2002). These include the selection or tenure of an employee, determinations resting solely on inspections, tests or elections, and conduct relating to military and foreign affairs. Id.

compromise, and the one discussed in the next section, has helped create an uneasy existence for the ALJ.

C. Decision-Maker Neutrality

Court-Centered Approach

Advocates of the court-centered approach favored an impartial and independent adjudicator immune from agency oversight and uninfluenced by the political character of the agency. Under the court-centered approach, parties to an administrative proceeding are not only entitled to a hearing before a judge without a pecuniary interest, but also a judge who is impartial and objective. Under this conception, a decision-maker who presides over a hearing with a "committed mind" has prejudiced the litigants and thus violated due process. This point is best illustrated in three judicial opinions involving allegations of bias in NLRB decisions. In *Inland Steel Co. v. Nat'l Labor Relations Bd.*,[118] the circuit court took the position that bias is prejudice *per se*.[119] In *Montgomery Ward & Co. v. Nat'l Labor Relations Bd.*,[120] although prejudice was shown, the court intimated there was no necessity to do so, as the partiality of the examiner was sufficient to support a reversal.[121] In *Bethlehem Steel Co. v. Nat'l Labor Relations Bd.*,[122] Justice Stephens summed up the court-centered argument in his dissent: "The bias itself is prejudice, because the Due Process Clause of the Fifth Amendment to the Constitution guarantees a fair hearing and there can be no fair hearing before a biased officer."[123]

Court-centered advocates doubted the capacity of executive branch decision-makers to render impartial and objective decisions.

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118. Inland Steel Co. v. Nat'l Labor Relations Bd., 109 F.2d 9 (7th Cir. 1940).
119. *Id.* at 20.
120. Montgomery Ward & Co. v. Nat'l Labor Relations Bd., 904 F.2d 1156 (7th Cir. 1990).
121. *Id.* at 1166.
122. Bethlehem Steel Co. v. Nat'l Labor Relations Bd., 120 F.2d 641 (D.C. Cir. 1941).
123. 120 F.2d at 659.

One of those most critical was ABA president Joseph Henderson who quipped, "those who sit in administrative determination . . . are likely to be conscientiously unconscious of what the lawyer soon learns; namely, that there are two sides to most cases."[124] Since it is difficult to show bias, court-centered proposals were aimed to help ensure impartiality and objectivity. The Attorney General's Committee Report recommended that hearing examiners be given the power to administer oaths, examine witnesses and take testimony.[125] The Committee believed that granting these powers directly to the hearing examiner, rather than vesting them in the agency, would avoid the perception of the examiner as a mere figurehead for a partial agency: "Parties have a sound desire to make their arguments and present their evidence, not to a monitor, but to the officer who must in the first instance decide or recommend the decision."[126] Backers of the court-centered approach also believed that reasoned elaboration would further secure decision-maker neutrality. The Attorney General's Committee aimed at formalizing examiners' decisions by requiring them to be in writing, explain the reasoning behind the findings and conclusions, be served on the parties for comment, and be part of the record.[127] The Attorney General's Committee Report listed separate justifications for each one of these requirements: (1) "The requirement of an opinion provides considerable assurance that the case will be thought through by the deciding authority"; (2) "the exposure of reasoning to public scrutiny and criticism is healthy"; (3) "the parties to a proceeding will be better satisfied if they are enabled to know the bases of the decision affecting them"; and (4) "opinions enable the private interests concerned, and the bar that advises them, to obtain additional guidance for their future conduct."[128] Although some agencies were already abiding by these types of requirements, placing the requirements in the statute "did tend to exalt the examiner by regularizing an elaborate form for his decision and by lessening the flexibility of agency control over it."[129]

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124. Joseph W. Henderson, *Lawyers Urge Judicial Curbs on Administrative Abuses*, 29 A.B.A. Journal 681, 683 (1943).

125. *Attorney General's Committee Report*, *supra* note 93, at 46.

126. *Id.*

127. *Id.*

128. *Id.* at 30.

129. MUSOLF, *supra* note 97, at 109-10.

Agency-centered Approach

In contrast, the agency-centered approach de-emphasized the value of decision-maker neutrality in favor of more effective administration of controversial laws. In articulating the agency-centered approach, A.H. Feller rejected the premise that federal courts are particularly neutral.[130] Feller argued that one of the "profound" reasons for the creation of administrative agencies was to get the enforcement of laws with social and economic impact out of the conservatively biased courts.[131] Feller emphasized that effective enforcement of controversial policy requires a coordinated approach: "Not only must there be coordination of information, there must also be a coordination of regulatory policy, litigation policy, and *adjudication policy*."[132] The notion that there can be such a think as "adjudication policy" is a uniquely agency-centered approach to the problem of decision-making in the administrative context.

Echoes of Feller's "adjudication policy" idea can be found in other contemporaneous agency-centered writings. James Landis asserted: "Partisanship or zeal on the part of administrative tribunals in behalf of the rights they are created to protect is as much expected of them as zeal on the part of judges in the defense of that body of rights we are pleased to call our liberties."[133] Even President Roosevelt's veto of the Walter-Logan bill included a strong implication that administrative tribunals may favor certain policy outcomes "wherever a series of controversies exist between a powerful and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal."[134] Thus,

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130. A.H. Feller, *Administrative Law Investigation Comes of Age*, 41 COLUM. L. REV. 589, 599 (1941).

131. *Id.* "When the administrative process is under fire, we hear much of the bias of the administrators, forgetting that the creation of the more controversial of these agencies was brought about by an explicit fear of the judiciary." *Id.*

132. *Id.* at 600 [emphasis added].

133. James M. Landis, *Symposium on Administrative Law*, 9 AM. L. SCH. REV. 18 (1938-1942).

134. *Congressional Record*, 76th Cong., 3d Sess. (18 December 1940).

the agency-centered approach did not see a contradiction between elements of fairness and a conscious effort to interpret and apply agencies' rules in a manner sympathetic to the purposes of Congress.

In order to carry out an adjudication policy, agency heads must have a means to manage ALJs. Based on this view, Feller suggested two important ways to configure the ALJ so as to secure the advantages of institutional cooperation. First, he suggested that ALJs should be appointed by the agency, and such an appointment should be revocable based on "a reasoned statement by the agency that the hearing commissioner has, over the period of a time, consistently refused to follow the policies laid down by the agency head."[135] Second, he suggested that the agency head should be able to give hearing examiners directions on the conduct of ongoing hearings and on rulings on admissibility of evidence and points of law.[136] Effectuation of these proposals would give agency officials the tools to maintain a high level of coordination to ensure that ALJ decisions matched agency policy preferences.[137]

The APA Compromise

In addressing the issue of decision-maker neutrality, the APA strongly affirmed court-centered principles by limiting the ability of agencies to coordinate administrative decisions. Several provisions of the APA sought to remove all management control over ALJs. First, the APA adopted the civil service system of indefinite tenure so that ALJs were not required to face reappointment proceedings.[138] Second, the bill prohibited agency control over compensation.[139] The

135. Feller, *supra* note 130, at 603.

136. *Id.*

137. The Attorney General's Committee recommended that an Office of Administrative Procedure be created to appoint examiners, exercise general supervisory powers, and remove examiners after a for-cause hearing. *Attorney General's Committee Report, supra* note 93, at 46. The Committee also recommended a seven-year fixed term. Id. Although these recommendations are not particularly agency-centered, they are more in line with agency-centered principles than the statutory scheme of the APA.

138. 60 Stat. 244 (1946); 5 U.S.C.A. § 3105

139. *Id.*

APA mandated that the Civil Service Commission set the salary rating for ALJs independently of agencies' ratings or recommendations.[140] Third, agencies may not choose which judge hears a case, but rather agencies must assign cases in rotation.[141] Fourth, and most significant, the Act specifically exempts ALJs from the provisions for performance evaluation and performance-based removal actions that apply to all other federal agency employees.[142] The statutory scheme did include one concession to the agency-approach. Section 11 of the APA stated: "there shall be appointed by and for each agency as many *qualified* and *competent* examiners as may be necessary for proceedings pursuant to sections 7 and 8."[143] The scheme was interpreted by the Civil Service Commission to give agencies the ability to decide which examiners are qualified and competent.

The APA compromise over the evaluation of ALJs was neatly summed up by Congressman Francis Walter:

> Section 11 recognizes that agencies have a proper part to play in the selection of examiners in order to secure personnel of the requisite qualifications. However, once selected, under this bill the examiners are made independent in tenure and compensation by utilizing and strengthening the existing machinery of the Civil Service commission.[144]

D. Conclusion

We have seen that in two key areas relevant to ALJs, proponents of the court-centered approach won significant victories over proponents of the agency-centered approach. Contrary to conventional wisdom, adoption of the court-centered approach by

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140. 60 Stat. 244 (1946). The Office of Personnel Management currently has this role. 5 U.S.C.A. § 5372.

141. 60 Stat. 244 (1946); 5 U.S.C.A. § 3105.

142. 60 Stat. 244 (1946); 5 U.S.C.A. §§ 4301(2)(D), 4302, 4303.

143. 60 Stat. 244 (1946) [emphasis added].

144. 92 Cong. Rec. 5655 (1946).

Congress was not obvious or without serious and persuasive opposing arguments. The next section will briefly examine recent developments of the ALJ and reevaluate agency-centered arguments in light of these developments.

PART III: RETHINKING THE INITIAL COMPROMISE

Having outlined how two disputes between advocates of the court-centered and agency-centered approaches were reconciled in passage of the APA, this section will reevaluate these initial policy choices with the benefit of over fifty years of hindsight. This section will briefly review the implications of these initial policy choices in order to reveal how they have led to an uneasy existence for the ALJ.

A. Who Decides—Judges or Experts?

Changes Since 1946

Since the enactment of the APA, court-centered principles have been fortified on several fronts. First, the Supreme Court has reviewed the ALJ model and consistently reinforced principles of participation, impartiality/objectivity, accuracy and reasoned elaboration. In *Wong Song v. McGrath,*[145] one of the first cases dealing with the ALJ, the Court held that the Due Process Clause and organic statutes could require the presence of APA hearing examiners.[146] Although this case was reversed by legislative action that rejected the use of ALJs as presiding officers in immigration and deportation cases,[147] it indicates the Supreme Court's strong preference for a court-centered approach to administrative decision-makers. The Supreme Court has also reinforced the notion that ALJs should look and act more like judges than experts. In *Butz v. Economou*, the Court indicated: "There can be little doubt that the role of the . . . administrative law judge is 'functionally comparable' to that of a [constitutional] judge. His powers are often, if not

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145. 339 U.S. 33 (1950).

146. *Id.* at 34.

147. Ardestani v. I.N.S., 502 U.S. 129

generally, comparable to those of a trial judge . . . ."[148] Two years after *Butz*, the Supreme Court further observed that the independent ALJ is one whose "impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime."[149]

Second, staffing requirements as enforced by the Office of Personnel Management ("OPM") has restricted the Office to formally trained lawyers with extensive experience in traditional courtrooms.[150] To be selected as an ALJ, one must compete nationally in a merit-based selection process administered by the OPM.[151] Candidates must demonstrate at least seven years of significant litigation experience and submit multiple references that inquire into judicial demeanor, capability and integrity.[152] A personal interview is followed by a six-hour essay examination, in which the prospective candidate must demonstrate his or her analytical and writing skills.[153]

The Uneasy Existence of the ALJ

Although the Supreme Court has generally supported the APA's initial compromise that decision-makers should resemble judges rather than experts, agencies have reacted by severely limiting the occasions in which an ALJ participates in the administrative process. Agencies generally use two methods to avoid using an ALJ: (1) favoring rulemaking over adjudication wherever possible, and (2) using non-ALJ hearing officials.

Using the first method, agency officials go to great lengths to act by issuing rules rather than issuing orders. Justice Scalia has described this development of administrative law as a "constant and accelerating flight away from individualized, adjudicatory

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

149. Marshall v. Jerrico, Inc., 446 U.S. 238, 250 (1980).

150. THE ALJ HANDBOOK: AN INSIDERS GUIDE TO BECOMING AN ADMINISTRATIVE LAW JUDGE 8-11 (1997).

151. *Id.*

152. *Id.*

153. *Id.*

proceedings to generalized disposition through rulemaking."[154] This development has particularly negative implications for regulatory schemes that were designed by Congress to rely to a considerable extent on trial-type hearings.[155]

The second method used by agencies involves the use of administrative judges ("AJs"). AJs are accorded varying levels of independence depending on the agency and the type of adjudications. Generally, however, AJs lack the statutory protections granted to ALJs. For example, AJs are not statutorily exempt from performance appraisals, and regularly undergo such appraisals by the agencies for which they work.[156] Jeffrey Lubbers uses empirical data to chart the "drift away from ALJs" that has occurred at the federal level.[157] Relying on Office of Personnel Management data, Lubbers charts the decline of the government-wide use of ALJs, finding that the number of ALJs in the Federal Government has leveled off in the past decade, and has actually decreased outside of the Social Security Administration.[158] This decrease is not because agencies have stopped adjudicating, but because they have limited their reliance on ALJs.[159]

Lubbers identifies three reasons why many government agencies are running away from the ALJ program: cost, restrictions on selection, and their effective immunity from performance management.[160] These reasons correspond to the efficiency and consistency principles of the agency-centered approach: "Agency

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154. Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376 (1978).

155. William F. Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38-39 (1975).

156. PAUL VERKUIL, DANIEL GIFFORD, CHARLES KOCH, RICHARD PIERCE & JEFFREY LUBBERS, THE FEDERAL ADMINISTRATIVE JUDICIARY, 179-80 (1992) [hereinafter *Judiciary*].

157. Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 70 (1996). Lubbers notes that non-ALJ adjudicators are "sprouting faster than tulips in Holland." *Id.* at 70 [hereinafter *Quest*].

158. *Id.*

159. *Id.* at 71.

160. *Id.*

managers obviously have great incentive to opt for using hearing officers who can be selected strategically, who are easier to manage, and who can be procured at bargain rates."[161] Lubbers also indicates that similar types of determinations made in different agencies are being made by different types of decision-makers.[162] Lubbers notes that there are about 80 AJs who serve on Boards of Contract Appeals in about a dozen agencies, that the Department of Veterans Affairs has a fifty-five member staff reviewing benefits decisions (but no ALJs), and that the Equal Employment Opportunity Commission uses 95 to 100 AJs (but no ALJs).[163] Thus, while disability benefits adjudications at the SSA are handled by ALJs, non-ALJ decision-makers preside over disability benefits adjudications at the Department of Veterans Affairs.[164] Moreover, Lubbers notes that in some contexts, "non-ALJ adjudicators preside over cases in which extremely important issues of personal liberty are potentially at stake, such as deportation proceedings and security clearance cases."[165]

Thus, despite the commitment to court-centered principles in the original APA, agencies have found various ways to subvert the statutory scheme. Efforts to promote agency-centered principles in spite of the APA has contributed to the uneasy existence of ALJs and raised several questions about the initial compromise. Does the original statutory compromise still hold relevance for the administration of the modern regulatory state? Are there alternative schemes that would better reflect the exigencies of agency decision-making?

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161. *Id.* at 73-74.

162. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation For ALJs,* 7 ADMIN. L.J. AM. U. 589, 605 (1994).

163. *Quest, supra* note 157, at 71-72.

164. *Judiciary, supra* note 156, at 615.

165. *Id.*

B. Decision-Maker Neutrality

Developments Since 1946

The Supreme Court has consistently interpreted the APA in a way that emphasizes the court-centered approach to judicial neutrality. In *Ramspeck v. Federal Trial Examiners Conference,*[166] the majority noted that under the APA, ALJs were no longer "mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations."[167] Similarly, in *Butz v. Economou,*[168] the Court granted ALJs absolute immunity from tort suits based on their judicial act, reasoning that an ALJ performs a role "'functionally comparable' to a judge."[169] These two Supreme Court opinions have significantly affected the way lower courts, practitioners, and scholars think about ALJs.

Congress in 1979 and 1980 considered several legislative proposals that would provide for the evaluation of ALJ performance.[170] These proposals did not attempt to amend the APA, but placed the responsibility for performing evaluations outside the employing agency.[171] In rejecting the proposals, a joint report of the Senate Government Affairs and Judicial Committees referred to the impartiality/objectivity principle: "The existence of an evaluation system would make it impossible for ALJs to retain their objectivity

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166. Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953).

167. *Id.* at 131.

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

169. *Id.* at 513-14.

170. L. Hope O'Keeffe, *Admininstrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability,* 54 GEO. WASH. L. REV. 591, 602 (1986); S. 262, 96th Cong. (2d Sess. 1980) (performance evaluated at least once every 10 years); H.R. 6768, 96th Cong. (2d Sess. 1980) (performance evaluated at least once every 6 years); and S. 755, 96th Cong. (2d 1980) (appointment for 7 to 10 year term with reappointment based on performance evaluation).

171. *Id.* at 602.

or an appearance of objectivity . . . [t]he fear of discipline would inevitably mix into decision-making."[172]

The Uneasy Existence of the ALJ

An examination of the neutrality question reveals an important element of the ALJ's uneasy existence. While Congress and the courts stress the impartiality/objectivity and accuracy principles, agencies seek to emphasize the consistency principles. Thus, despite the statutory provisions proscribing agencies' ratings of ALJ performance, agency heads "face strong pressures to curb ALJs who deviate from desired norms."[173] Hope O'Keeffe observed that agency managers are "frustrated by the delicate balance inherent in managing a group of critical employees charged with implementing an agency's policy but nevertheless supposedly independent of the agency."[174] Although the APA authorizes agencies to review ALJs decisions, such after-the-fact correction of a single decision supplies insufficient control.[175] O'Keeffe remarked that agencies, therefore, "gaze lustfully at the forbidden fruit of performance evaluation."[176]

Richard Pierce noted this frustration in the SSA where agency managers have attempted to reduce variation in ALJ reversal rates of disability awards.[177] Federal judges have consistently held that the SSA attempts to control ALJs through the use of "management science" were unlawful.[178] According to Pierce, the rejection of

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172. *Id.* at 600 (quoting JOINT REPORT OF COMM. ON GOVERNMENT AFFAIRS AND COMM. ON THE JUDICIARY, REFORM OF FEDERAL REGULATION, S. RES. NO. 1018, 96th Cong. (2d Sess., pt. 2, at 70-71 (1980)).

173. *Id.* at 594.

174. *Id.*

175. *Id.*

176. *Id.* at 595.

177. Pierce, *supra* note 66, at 513.

178. *Id.* at 483-84. The cases holding that the SSA unlawfully attempted to control ALJ decisions include: Heckler v. Day, 467 U.S. 104 (1984); W.C. v. Bowen, 807 F.2d 1502, 1504 (9th Cir. 1987), *reh'g denied* and *opinion amended*, 819 F.2d 237 (9th Cir. 1987); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980); Ass'n of Admin. Law Judges v. Heckler, 594 F.Supp. 1132, 1141-43 (D.D.C. 1984); Gulan v. Heckler, 583 F.Supp. 1010, 1018 (N.D. Ill. 1984) (stating "[t]here is no room in our system of justice for Nazi or Soviet-type misuse and abuse of judges,

these agency initiatives is an indication that judges are "abysmally ignorant of the techniques involved in bureaucratic decision-making, scientific decision-making, management science, quality control, and statistics."[179]

Further manifestations of the uneasy position of ALJs are cited in a report submitted to the Administrative Conference of the United States ("ACUS").[180] To improve the current system, the report recommended several changes to the existing statutory scheme.[181] Some of the changes include: (1) converting many AJs to ALJs without going through competitive selection; (2) lowering standards for ALJ selection to obtain more women and minority ALJs; (3) eliminating litigation experience as a qualification; and (4) providing for annual performance reviews of ALJs by the Chief ALJ, who could issue reprimands and recommend disciplinary proceedings.[182]

For those advocating a court-centered approach, the functions of executive branch decision-makers, namely presiding at hearings and reporting their findings, seem too familiar to the functions of traditional judges to abandon an approach based on traditional court values. However, this approach seems incompatible to advocates of the agency-centered approach, who see examiners as contributing to the overall competency and expertise to the task of policy formation. Despite the tensions between management control and decider independence that characterizes the ALJ's existence, several proposals for performance evaluations have failed.[183] For some, the

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and no ALJ should be exposed or succumb to such pressure."); Salling v. Bowen, 641 F.Supp. 1046, 1056 (W.D. Va. 1986) (stating that "[t]his court finds that [the review constitutes] simply nothing more or less than an attempt by the bureaucracy to control the independence of the ALJs."). James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN L.J. AM. U. 629, n.41 (1994).

179. *See* Pierce, *supra* note 66, at 516.

180. PAUL VERKUIL, DANIEL GIFFORD, CHARLES KOCH, RICHARD PIERCE & JEFFREY LUBBERS, THE FEDERAL ADMINISTRATIVE JUDICIARY 183-85 (1992).

181. *Id.*

182. *Id.*

183. O'Keeffe, *supra* note 170, at 593-99.

political lessons are clear: "Management techniques are no match for claims of independence."[184]

CONCLUSION

The foregoing analysis of the ALJ has examined the nature of the dispute between two opposing ideological approaches and considered how original compromises between these two camps have led to an uneasy existence for the ALJ. The ALJ seems condemned to this uneasy existence for the foreseeable future as changes in administrative decision-making have been rendered virtually academic by the force of the court-centered approach. The Legal Process school has influenced the legal profession to such a degree that it seems self-evident to many of today's administrative lawyers and judges that the best method to resolve conflicts before an administrative agency is to "judicialize" agency decision-making processes. One explanation is that the power of court-centered symbols is matched by an inability among administrators to create effective agency-centered symbols.[185] To combat this court-centered hegemony, it is imperative to return to the first principles of the agency-centered approach and construct a justification for administrative reform build on this solid ground. This paper's exposition of the agency-centered approach is thus an important step toward a theory of administrative law that embraces alternative schemes and models of administrative decision-making.

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184. Paul Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1355 (1992).

185. Musolf, *supra* note 97, at 177 (wondering whether ALJs are the ultimate victim of this imbalance in symbolization).