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THE ADMINISTRATIVE HEARING OFFICER AND THE NATIONAL APPEALS DIVISION OF THE UNITED STATES DEPARTMENT OF AGRICULTURE: A BRIEF HISTORY, A CONTEMPORARY PERSPECTIVE, AND SOME THOUGHTS FOR THE FUTURE

©1999 by Christopher B. McNeil, Esq.*

- 1. Obtaining A Sense of Perspective: Understanding the nature of our job is the first step at accomplishing its objectives.**

I want to thank the Director for those kind introductory comments, but if I was sitting where you are today I might well ask Why did they invite this guy to speak to hearing officers of the National Appeals Division? I'm a hearing examiner for the State of Ohio, I'm not connected in any way to the Department of Agriculture, and before accepting the Director's invitation I had never met anyone from the Department. I know I wasn't chosen because of my experiences in Kansas, because I didn't tell them about those experiences, so they don't know that I completed my undergraduate and law degrees in one of America's best agricultural settings, in Lawrence, Kansas; that I began my practice in a four-room farmhouse sitting on the edge of 80 acres of soybeans in Olathe, Kansas, clerking for a small law firm in Kansas City, Kansas, whose clients would meet us for lunch at the Hereford House at 20th and Main in Kansas City, Missouri; those clients included farmers who, in the early 1980s, were keenly aware of the vagaries of nature and the incomprehensible behavior of governments, and who knew that bankruptcy was never more than one or two planting seasons from their door.

And for sure I wasn't chosen because of my comprehensive knowledge of the agricultural system, because I haven't got it. My legal training is in criminal defense as a public defender in Junction City, Kansas, home of the Big Red One, our country's First Infantry

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Division; it's as a managing attorney for a small Kansas City, Kansas, law firm specializing in the needs of lower to middle class mid-westerners needing wills and divorces; it's as a bureaucrat, paternity litigator and prosecutor in child support enforcement under the Uniform Reciprocal Enforcement of Support act, it's as an Assistant Ohio Attorney General, serving the business and governmental boards and commissions of the state as a lead regulatory prosecutor, and in its present incarnation, it's as an administrative hearing examiner for state regulatory and professional boards in Ohio.

So my credentials are indeed limited: Instead of *being* the expert in agricultural law, I find myself making a presentation to a group made up of about one-third of the nation's best-informed agricultural adjudicators, people who have made it their life's business and profession to understand how our nation's agricultural systems operate, and who understand – from having lived it – the important and often complex role played by our federal, state and local governments in those systems.

So maybe the reason I've been allowed to meet with you today is not because I'm an expert on farming or agricultural law, but instead it's because the Department and the National Appeals Division saw the need for someone outside the Division to poke around a little and report an outsider's view. My task was to study and then teach what I can about the role of the hearing officer in the Department's National Appeals Division. So, over the past few months I've taken the opportunity to learn about the Division, to see how it fits in the bureaucratic hierarchy here at the Department, and how the Department helps advance the agricultural policies set by our Congress and our President. Before I go any further I want to make an editorial comment, because I've just now referred to the Division as fitting into a bureaucratic hierarchy, and I want to make plain my intentions when using that term. It's pretty common when we see or hear the use of the word bureaucracy that it's in a negative or pejorative sense, you know, like "it was a bureaucratic nightmare" or "the bureaucracy is just too entrenched to work properly". . . that sort of thing. I don't think of us in a negative way, and I don't use the term bureaucrat in a negative way. As a group, we've taken on the responsibility of carrying out congressional mandates, to the best of our ability, and I'm proud to serve in this capacity. I suspect each of you share in that pride, and as

such will not read into my use of bureaucratic a negative meaning, because none is intended.

As I learned more about the role of the Division, by examining the events that led to its creation and its later evolution to its present form, I found this to be an excellent example of how the executive branch of our federal government can break away from entrenched approaches of governing, and can evolve to a system that is better equipped to provide the services called for by its enabling legislation. Taking what I've learned in that effort, I've attempted to identify some of the unique characteristics of the Division and its approach to administrative adjudications. After identifying what the Division is and what it does, and who the men and women are who make up the Division, and after seeing how you carry out your role as executive adjudicators, some thoughts come to mind that I hope might be of use as you make this collective effort to reflect on the role of the administrative hearing officer in the National Appeals Division.

I've called this presentation a "brief history, a contemporary perspective, and some thoughts for the future" of the National Appeals Division and of its administrative hearing officers. To set the stage for the presentation I would ask each of you a question, and I'll choose three of you to provide answers. I teach a legal research and writing course to first year students at Capital University Law School, and I know the best answers typically come from the people who arrive late and tend to sit in the back of the room, so I'll probably pick on some of you in the last row to answer this question:

- a. Pop quiz: What's the most recent official act you completed for the Division?

Now let me ask any of you, Where did the authority come from that gave you the power to do that act?

If you had to explain the source of that authority to students in the eighth grade, to students who have been taught the rudiments about the separation of powers in our federal and state governments, of the legislative, the judicial, and the executive branches of government, what would you tell them? I ask these questions because the source of our authority as public servants makes all the difference in the world. One of the central constitutional principals supporting our democratic

and judicial systems is the notion that the **people** hold all the power not expressly given to our governing authorities, and of those powers given to our government, the **states** hold all powers not expressly reserved by our federal Constitution to the federal government. Although to most of us mere mortals the federal government seems huge, almost omnipresent and omnipotent, the bottom line is the federal government is one of limited powers, with all the residual and reserve powers vested in either the individual states or in the people. The implication of this is that if we believe there is a power held by a federal entity, that power must find its source in one of the three branches of our federal government: the executive, legislative, or judicial.

So when I asked about the last time you completed an official act, I was asking about the use of power in the federal government. What I hope to do over the next hour or so is offer some suggestions about the nature of that power: I want to talk about what the power is, where it comes from, what some of its limitations are, and how it can best be put to use. To do this, I want to take this somewhat abstract notion, governmental power, and place it in the context of a very real and tangible commodity: your job. Because as I understand it, over the next four days, the Division, through its Director, hopes that this presentation and those that follow it will help each of you continue to provide outstanding service to the farmers, the agricultural world and to all Americans. I will have accomplished my goal if I leave you with a better understanding of the nature of the executive adjudicator and maybe a better understanding of the nature of your role in American jurisprudence.

This, by the way, isn't the first time I've had the opportunity to talk about the role of the executive adjudicator. Some of you here were also in Denver in the fall of 1997 when I was introduced as the 1997 recipient of the National Association of Administrative Law Judges Fellowship. Mine was one of a series of fellowships bestowed by the National Administrative Law Foundation, all aimed at improving the public and professional awareness of the role of the administrative adjudicator. When I appeared before the men and women of the National Association of Administrative Law Judges in Denver, my task was a little bit different, because then I was speaking to an audience that consisted of non-lawyer hearing officers, as well as federal Administrative Law Judges, in-house hearing officers, state hearing

examiners, virtually the full range of persons who share one common attribute: they serve the executive branch of government, hear evidence, make findings of fact based on evidence presented to them, and in short are executive adjudicators. I'll continue to use that term, administrative or executive adjudicators, because it draws upon the single most important blend of attributes of the administrative judiciary: we're a special breed of government officials, trained to *fulfil a role* traditionally reserved to the **judicial** branch, but created as part of a mandate *conferred by the legislative* branch, and *carried out by the executive* branch.

Whenever one attempts to describe the role of an administrative adjudicator it probably helps to learn a little about just what it is the adjudicator does: what kind of conflicts are brought to her attention? Who are the people who appear before him? What kind of relief are the litigants seeking, and who is it that is supposed to give that relief? I recall reading the report issued in a case involving three farm partnerships, each operated as partnerships in Texas, and each having some overlapping of partners; in fact, one person was a partner in each of the three partnerships. You could tell it was a family-run farm. One of the three partnerships became more than 90 days delinquent on farm loans, and obtained protection under a Chapter 12 bankruptcy. That partnership had ceased to function in the same year it obtained relief in bankruptcy, but the other two partnerships continued to operate. About nine years later, the Farm Service Agency sent the defunct partnership a notice of intent to offset. True to its word, the Agency then offset payments that were due under the Production Flexibility Contract and under the Conservation Reserve Program, but the offset was imposed against the other two partnerships, even though those partnerships were not a party to the delinquent debt owed by the now-defunct partnership.

The scene is set, making it a little easier to describe the role of our administrative adjudicator: he or she (I believe it's a he in this case) is asked to consider the claims of the two partnerships against which the Farm Service Agency took offsets based on the debt of a third partnership. He gathers facts, even though the Agency had the opportunity to gather facts beforehand; the Division's hearing officer is not bound by those facts, but can require the agency to deliver its records for the purpose of permitting the Division's examination into the matter. The two appealing partnerships can expect the Division's

hearing officer to control the introduction of evidence using some, but not all, of the tools traditionally used by judges: the adjudicator directs the flow of the inquiry, charting out who will speak and in what order, directing pre-hearing conferences aimed at making the hearing time more productive, issuing subpoenas to compel the appearance of witnesses and the production of documentary evidence, and presiding over the taking of testimony, ruling on evidentiary objections and deciding what evidence is appropriate given the issues before him. The hearing officer brings to this setting a substantial background in the subject matter: he knows the programs administered by the Farm Service Agency, knows the difference between payments due under the Production Flexibility Contract and those due under the Conservation Reserve Program, and knows that his job is to control the proceeding so that both the partnerships and the Agency leave feeling confident that their respective positions have been fairly heard and will be impartially reported on.

As it turns out, the controlling authority which the hearing officer cited required that the appellants, in this case the two viable partnerships, meet a burden of proving, by at least a preponderance of evidence, that the decision of the Farm Service Agency was erroneous. That standard came straight from that section of the United States Code and the Code of Federal Regulations which created the current version of the National Appeals Division. Also from the CFRs, although not from the Division's section of the CFRs, came the standard that the hearing officer used to answer the central question: can an offset be used against one party in order to collect the debt of another entity? The conclusion reached by the hearing officer, based on this law, was no, because the regulation described procedures for offsetting that did not include using an offset to collect the debt of another entity. The analysis also extended to whether there had been proper notice of the intention to offset: from the record before him, the evidence established that the agency sent notice only to the defunct partnership, and not to the partnerships operated by the two viable partnerships. The hearing officer found that there was no record of the two viable partnerships getting notice, and no record of any previous appeal determination on the issue of the offset, and as such he found the two viable partnerships could indeed appeal the Agency's offset of payments due.

With this brief example to guide us, consider the role of the hearing officer as he completed the official acts required under the statutes that created the National Appeals Division. First, what is the source of the hearing officer's authority in the National Appeals Division, and how does that authority differ from the authority of judges of the judicial branch?

If I were to make this presentation to the first year students in my class on legal reasoning at Capital University, I'd begin by trying to assure them I was not about to recite a history of the development of the administrative state or the intent of the Framers of our country's constitution when Article III was drafted. Instead, I'd explain that the difference comes down to two of their most pressing concerns, and two things they are most intimately familiar with: the significant difference between Article III judges and administrative adjudicators can be reduced to two key words: time and money. Once they heard those words, they'd relax, because they know all about the notions of time and money. My guess is that each of you do, as well.

To understand how the role of the executive adjudicator differs from that of an article III type of judge, it helps to narrow our focus a bit. First, recall that the reference to an article III type of judge is one that arises because article III of the United States Constitution provides for the appointment of federal judges. The preeminent characteristic of this provision is that it attempts to assure the creation of an independent judiciary. How does it do so? It offers time, and money. This is the well-spring, from which the promise of eternal employment flows. Article III, section one of the Constitution provides that "the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."² The next sentence specifies that the judges of both "the supreme and inferior" courts shall enjoy life tenure and that their salaries may not be diminished during their continuance in office.³ This brings us to our first distinction: at the federal level, the article III judge enjoys the safeguards of life tenure and undiminished salary.

The two salient article III characteristics of lifetime tenure and undiminished salary, are significant. The public perception of justice

²U.S. Constitution Article III, § 1.

³U.S. Constitution Article III, § 1.

requires both accountability from our courts and judicial independence. Justice Blackmun, writing in *Freytag v. Comm. of Internal Revenue*, makes the point that the concern over judicial independence was an integral part of our constitutional architecture.⁴ In a case that reviews the structure of the United States Tax Court and centers on whether the Chief Judge of that court may make appointments for special trial judges, Justice Blackmun recalls the notion of how the separation of governmental powers is expected to preserve judicial independence.⁵ He observed how the Appointments Clause in Article II of the Constitution limits congressional discretion to vest power to appoint "inferior Officers" to three sources: "the President alone," "the Heads of Departments," and "the Courts of Law."⁶

In *Freytag*, Petitioners argued that a special trial judge (in this case a tax hearing examiner) is an "inferior Officer," and also contend that the Chief Judge of the Tax Court does not fall within any of the Constitution's three repositories of the appointment power.⁷ The Court was not persuaded, and Justice Blackmun explained that "The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political."⁸ Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch.⁹ There is thus a constitutional limitation imposed on the selection of article III judges: the limitations restrict Congress and the President from attempting to upset the balance of authority between the three branches of government. Were the political branches of our federal government to try to staff article III courts to further a political ideology, they would be confronted by an existing cadre of more than 700 article-III judges who enjoy life tenure. They would also have to mobilize a combination of political continuity, executive determination, the absence of strong resistance in the Senate, and a large number of vacancies. In contrast, one commentator has written, "'stacking' a commission with a small number of members who enjoy limited terms is considerably easier,

⁴501 U.S. 868 (1991).

⁵*Id.* at 878.

⁶*Id.* at 877, 878.

⁷*Id.* at 878.

⁸*Id.*

⁹*Id.*

especially at its creation, when all seats are vacant.”

I mention this characteristic of the creation of article III judgeships because of the difference between creating such a judgeship and creating the position of an administrative law judge or an administrative hearing officer. Our Constitution intentionally concentrates independent judicial power with the article III judge, as a means to deliberately limit the number of adjudicators having that power. This keeps one executive administration, or one or two sessions of Congress, from packing the judicial system with independent adjudicators who obtain their positions during that particular administration. You have only to reflect on our recent past Congresses and Presidents to imagine how different our judicial system would be if either branch was able to create large numbers of independent judgeships whenever they found sufficient votes in Congress to accomplish this mission. But that doesn't happen with article III judgeships. It can, however, happen with the executive adjudicator, and for proof I need look no further than the men and women assembled here today.

The political reality of our position as members of the administrative judiciary is that we attain our positions not through the process of constitutional appointment, but instead by virtue of a delegation of both legislative and executive authority. We do not generally enjoy the gift of unlimited time in office, but instead are in many cases wholly dependent upon the good will of the executive office we serve. We almost certainly do not enjoy protection against the diminishment of our salaries. You can't just fire a federal judge: only by an impeachment conviction can one be removed from office. That's simply not the case with those of us who chose careers as executive adjudicators.

It is not by happenstance or chance that administrative adjudicators reach the bench by means other than constitutional appointment. In the evolution of our collective court, we have gotten to where we are today because those who preceded us served a need that was different than the need met by article III judges. As administrative adjudicators, we don't do the same thing as judges of the judicial branch of government, although we use many of the same tools. Consider the genesis of what is generally recognized as the first of our modern administrative agencies, the Interstate Commerce Commission.

The ICC was established by Congress under the powers of Article I, and has as its enabling authority the power to administer statutory schemes of federal regulation. Characteristic of the administrative state, its authority was over disputes involving public rights -- things like public transit licenses, railroad rights of way and the like; and an article III court (here I'm referring specifically to the federal district court) reviewed the ICC's decisions on a de novo basis, so that even after the agency made its own fact finding decisions, the federal district court could and would review all of those facts all over again. In its formative years, the notion was because there was this level of review and scrutiny by an article III court, that the administrative bench need not be independent at all, given that the scope of its authority was limited to resolving public rights disputes arising from the implementation of legislation, and given that an article III court would review any decision made by the executive adjudicator. The whole point of the traditional "public rights" analysis has often been that no judicial involvement at all was required -- executive determination alone would suffice. This meant that the executive adjudicator did not have to be very "judge-like," and could be very much an integral part of the executive branch, not at all independent of the branch being served.

In considering our heritage as administrative adjudicators, we should note that by the 1930s the administrative court was entrenched and expanding, sharing much of the same apparent authority as that possessed by article III courts, but still without the constitutional protection of life tenure and undiminished salary. In the 1932 case cited as the fountainhead of this trend, the Supreme Court upheld Congress' decision to vest responsibility for deciding cases under the Longshoremen's and Harbor Workers' Compensation Act in an administrative agency. The Court in *Crowell v. Benson* assumed that public rights disputes may not require **judicial** decision at either the original or appellate level.¹⁰ Even in private rights cases, *Crowell* held, an administrative tribunal may make findings of fact and render an initial decision of legal and constitutional questions, as long as there is a adequate review in a constitutional court.¹¹ In order for these administrative adjudicators to be permitted in a private rights case, the

¹⁰285 U.S. 22, 50 (1932).

¹¹Id. at 50.

Court required that the “essential attributes” of the judicial decision must remain in an article III enforcement court, with the administrative agency or other non-article III adjudicator functioning less as an independent decision-maker than as an adjunct to the court.¹²

Thus, at the threshold of the New Deal, we see the Court’s ratification of the administrative judiciary, even over the private rights of citizens, particularly in the case of regulatory agencies which restrict private activity, and typically possess the power to lay down rules, to determine whether private parties have violated the law, and to prescribe sanctions. When we add to this the welfare or entitlement agencies created to dispense public funds through entitlement programs, we have what has become familiar to us as the administrative state. The benefits from the evolution of the Fourth Branch are tangible and significant.

In my article on the difference between an executive adjudicator and an article III judge, I note that one commentator suggests there are four important values that support permitting the use of non-article III tribunals in place of constitutional courts.¹³ Each of these may make it easier to understand why we as administrative adjudicators are not expected to behave, in all ways, like judges of the article III judiciary.

First, as administrative hearing officers, we are expected to have an interest in making the best use of expertise to implement a substantive regulatory agenda. Unlike article III judges, who can perform only adjudicative functions, agencies and legislative courts can apply their expertise not only to adjudication but also to rule-making, administration, and reporting to the legislature, the President or Governor, and other decision makers. Mixing adjudicative with administrative and rulemaking helps to adapt adjudication to the implementation of regulatory powers in a way that might not be possible within a scheme of strict separation of powers.

Second, as administrative hearing officers, we have an interest in attaining reasonable efficiency and order in the performance of basic governmental functions. We were created by Congress and by our state general assemblies to provide a prompt and accessible alternative to the

¹²Id. At 51.

¹³18 J.N.A.A.L.J. 1 (Spring 1998).

judicial process. Consider the range of governmental functions that one might argue should be brought to article III courts, functions like those performed by the taxing, welfare, employment services authorities. And then consider the nightmare that bringing these cases would create if the administrative court were removed.

A third interest is one that hits at the heart of many of us, and can be the source of serious concern. The establishment of non-article III tribunals leads, **by design**, to a greater flexibility by the tribunal to changing needs and political priorities. Congress can experiment with the creation of ALJ positions, or with the creation of positions possessing some but not all of the attributes of the ALJ position (like the administrative hearing officer) all as a means for accommodating a particular legislative agenda. As it does so, Congress can also call for adjudicative reviews by persons lacking life tenure, and then as the need arises can terminate the experiment without ever having created unremovable and underutilized article III judge positions. The obvious implication here, one ratified by court decisions from the Supreme Court on down, is that the administrative judiciary does not have the structural independence given to the article III judiciary – to the contrary, Congress has created the administrative judiciary, controls the scope of its mandate, can terminate the positions of its administrative adjudicators, and needs no constitutional mandate to do so.

On a more positive note, the fourth reason for the vitality of the administrative judiciary is the belief in the proposition that nonjudicial proceedings can produce fairer and more consistent results than those realized through ad hoc judicial determinations. At the federal level, for example, commentators have noted that **judicial** determinations -- those from article III-type courts, about whether a person should be considered disabled for Social Security purposes tend to be less consistent and equitable than judgments based on bureaucratic rules that reflect statistical regularities and likelihoods.

These characteristics and benefits inure to both the state and the federal administrative bench. Over time, they have been the impetus for an entrenched and interwoven legal culture that looks to us and to article III courts for assurance that the benefits of adjudication by non-article III courts outweigh the costs associated with the loss of an independent adjudicator. And thus we come to the first of three areas where this assembled body can and should take note of its collective

role in society. The appointment of an administrative adjudicator is accomplished by a wide variety of vehicles, where some are selected through organized applications like those used by the Office of Personnel Management in the selection of Social Security ALJs; at the other end of the spectrum, there are those holding the title of ALJ or hearing examiner who are screened by the agency they serve, hired by the agency, evaluated by the agency, subject to discipline by the agency, and rewarded by the agency. This latter approach carries with it the very real aura of dependence, not independence. As we have heard in the past, the public looks at this captive ALJ and asks “how can I expect to win this case when the [agency] is my accuser, prosecutor, and judge?” One commentator wrote that this statement exemplifies the public perception of administrative law judges being biased and partial to their employing agencies.

The answer for the parties appearing before the National Appeals Division is that there is now a structural separation between the agencies and Division hearing officers. The separation is not complete, however: Congress has elected not to separate the Division from the Department entirely; rather, it retained in the Department the administrative adjudicator, choosing only to separate the adjudicator from the individual agencies. This choice by Congress forces us to recognize that the hearing officers of the National Appeals Division are, by design, not independent of the Department. And it's equally important to recognize that the absence of independence is one of the essential elements that sets us apart from our judicial colleagues both at the federal district court level and in state courts throughout the country. While we must strive to be impartial in our adjudications, to suggest that a hearing officer of the National Appeals Division is independent of the Department is simply not supported by the law as it has been written. Congress intended the Division to provide its services through the auspices of the Department. Contrast this to the successful implementation in a majority of our states, where a corps of hearing examiners or administrative law judges is created as an entity unto itself – the central panel of hearing examiners recommended by the Model Act Creating a State Central Hearing Agency, adopted by the House of Delegates for the American Bar Association in 1997. Under the central hearing agency plan, a cadre of hearing examiners or administrative law

judges is created as a stand-alone department of state government. Panel adjudicators then preside over agency hearings and render decisions through a process that retains in the executive branch ultimate control over the hearing officer, but which more fully insulates the hearing officer from agency pressure or influence.

There's no comparable vehicle in federal administrative law, although it has been the object of certain groups of administrative lawyers and judges since the early 1980s. Without it, the hearing officer is, by Congressional design, not independent of the agency he or she serves. There can be little question that under the present structure, the hearing officer is not free to interpret the law; the authority to do so rests squarely with the Secretary of the Department of Agriculture. This may be difficult to reconcile with our judicial instincts: there's probably not a person here today who hasn't bristled at the thought of someone else telling us how to interpret a law; and each of us has probably had some experience with a superior officer who we were convinced didn't understand the law well enough to apply it correctly. Just the same, the limitations that Congress set when it created the Division compel the conclusion that the hearing officer of the National Appeals Division is not authorized to exercise independent judicial authority. No one among us could rationally argue that we have the power to hold someone in contempt of court; yet there's not an article III court judge who lacks that power. And this is not a condition that applies just in the Department of Agriculture. Consider the experiences of ALJs serving the Social Security Administration. When Congress created the hearing examiner position (which is the precursor to the modern Administrative Law Judge), there were proposals which would have placed them outside of the Administration and into a separate entity. Instead, Congress created a special class of examiners whose salary, promotion, and tenure rights were protected not by the Social Security Administration but instead by the civil service commission. Here's how the General Counsel of the Health and Human Services Department described the level of independence attributed to Social Security ALJs: "Administrative law judges are not policy independent. There can be no serious dispute that the Commissioner, and not the 15,000 or so agency adjudicators, has the responsibility for interpreting the law in order to carry out the programs that Congress has assigned to the Social Security Administration. In matters of law and policy the

ALJs are subordinate to the Commissioner's responsibility to interpret and apply the statutes and set rules in case of adjudication. While ALJs are delegated the authority to make decisions in individual cases on behalf of the Commissioner, it is the Commissioner who has the responsibility to ensure that ALJ decisions comport with the law and the Agency's rules and policies. If this were not the case, agency rules could be subject to conflicting and varied interpretations and the coherence of the administrative program would be seriously impaired. Different individuals could have different rules applied to their cases without knowing it, based on which ALJ had adjudicated their case, or whether their case was decided at the [Department] or ALJ level. ALJs apply the adjudicatory rules as set by the Commissioner to the facts of the cases before them as the administrative law judges find those facts. Unlike Article III judges, ALJs do not have discretion to decide what the appropriate interpretation of the law is."¹⁴

Part of the purpose in making these observations is that we do well to distinguish between partiality and dependence as we describe our adjudicative roles. If one can, at least for the moment, accept the proposition that a hearing officer need not have judicial independence, then the next question might aptly be, okay, so what is required? And the proper answer to that is, it depends- it depends on the law creating the decision-making body, and it depends on baselines that are recognized as part of our federal constitutional guarantees of due process under the Fifth Amendment. We'll get to the due process requirements in a moment, but first let's consider the requirements imposed under the statutes that created the National Appeals Division.

¹⁵ What's the source of the authority for hearing officers at the NAD? Public Law 103-354, enacted October 13, 1994, and codified at 7 USCS 6992 delegated to the Secretary of the USDA the authority and the duty to create the National Appeals Division. By this Public Law the new NAD also picked up the functions of the prior NAD, the National Appeals Division established by section 426(c) of the Agricultural Act of 1949 (7 U.S.C. 1433e(c)). It also assumed the functions that had been performed by the National Appeals Division that had been

¹⁴Arthur Fried and Ronald G. Bernoski, *Panel Discussion on Independence and the Federal Judiciary*, 18 J.N.A.A.L.J. 47, 49 (Spring 1998).

¹⁵7 U.S.C. §6992(a)(1998).

established by subsections (d) through (g) of section 333B of the Consolidated Farm and Rural Development Act (7 U.S.C. 1983B), and appeals of decisions made by the Federal Crop Insurance Corporation, and appeals of decisions made by the Soil Conservation Service.

What's the nature of the delegated authority? **The NAD provides a forum for hearing evidence**, offering this forum to those who have received an adverse decision from one of the designated agencies of the Department. The adjudicative function is circumscribed by a statute that represents the delegation of authority, from the Congress and the President (through the legislative process) to the Secretary, and from the Secretary to Director, who serves for a 6-year term of office, is eligible for reappointment, and who "shall not be subject to removal during the term of office, except for cause established in accordance with law."¹⁶ How does the delegation of this statutory authority have an impact on the day to day work of a hearing officer in the NAD? If the power to operate a forum for hearing evidence is circumscribed by delegated authority – unlike a constitutional grant of authority to “administer justice” – then we need to look at the statute (and the regulations promulgated under the statute) to set out the limits of what can take place in the forum. This is not a forum that operates independent of the agency; it's a true executive adjudication forum, and if it is to operate according to law it has to do so within the scope of the statutes that created the forum. The role of the hearing officer is to direct the activity of the forum, within the structure provided by the legislation that created the forum. 7 USCS § 6997 provides the statutory structure for all Division hearings. The statute sets out the general powers of Director and hearing officers. It does so first by making sure the NAD (both its Director and the assigned hearing officer) has access to the case record developed at the agency level.¹⁷ The statute also prescribes the administrative procedures the Director and the hearing officers are expected to abide by. Included in these statutorily articulated **powers** are the authority to require the attendance of witnesses, and the production of evidence, by subpoena and to administer oaths and affirmations.¹⁸ And included in

¹⁶Id. §6992(b)(1) - (b)(2).

¹⁷U.S.C. §6997(a)(1).

¹⁸Id. §6997(a)(2).

the statutorily articulated **duties** is the prohibition against *ex parte* communication.¹⁹

Also in the legislation were some statutory standards for getting the work done efficiently, including limits on the time for hearing, where the appellant generally is entitled to a hearing by NAD within 45 days after the date of the receipt of the request for the hearing; rules about where the hearing should be held (generally in the appellant's home state); and some statutory standards for the rules to be followed during the hearing, which the NAD hearing officer is expected to enforce: The evidentiary hearing before a hearing officer shall be in person, unless the appellant agrees to a hearing by telephone or by a review of the case record.²⁰ The hearing officer shall not be bound by previous findings of fact by the agency in making a determination.²¹ And some explicit statutory language directing what should be considered by the NAD hearing officer during the hearing, rules that appear to anticipate agency responses to the claims raised in these appeals: "Information at hearing. The hearing officer shall consider information presented at the hearing without regard to whether the evidence was known to the agency officer, employee, or committee making the adverse decision at the time the adverse decision was made."²² The hearing officer shall leave the record open after the hearing for a reasonable period of time to allow the submission of information by the appellant or the agency after the hearing to the extent necessary to respond to new facts, information, arguments, or evidence presented or raised by the agency or appellant."²³ And some specific guidance on the standards to be applied by the hearing officer with respect to the burdens borne by the litigants ("The appellant shall bear the burden of proving that the adverse decision of the agency was erroneous.")²⁴ And finally, an express deadline for issuing a decision, a provision for what happens if no appeal is taken from the hearing officer's decision, and instructions as to the effective date ("The hearing officer shall issue a notice of the determination on the appeal not later than 30 days after a

¹⁹Id.

²⁰Id. §6997(b)-(c)

²¹Id. §6997(c)(2).

²²Id. §6997(c)(3).

²³Id.

²⁴Id. §6997(c)(4)

hearing or after receipt of the request of the appellant to waive a hearing, except that the Director may establish an earlier or later deadline.)²⁵ “If the determination is not appealed to the Director for review under section 278 [7 USCS § 6998], the notice provided by the hearing officer shall be considered to be a notice of an administratively final determination²⁶” “The final determination shall be effective as of the date of filing of an application, the date of the transaction or event in question, or the date of the original adverse decision, whichever is applicable.”²⁷

So the Act created a fairly comprehensive structure for providing an executive adjudicator for persons adversely affected by decisions made by several agricultural agencies of the federal government. But the hearing officer is by no means an outsider: he or she is part of the Department, bound to apply the law given interpretations handed down by the Department, even when to do so might seem to lead to unfair or inequitable results. Where’s the judicial equivalent of a safety net, the protection against overreaching by the executive or legislative branch? What’s to stop Congress from enacting laws that create only the facade of a fair hearing?

Although there is no requirement that the executive adjudicator be independent of the agency he or she serves, there certainly is a requirement that the adjudicator be impartial and unbiased. While article III judges draw their separate rank from the Constitution, the executive adjudicator and those who appear before the adjudicator can look to the due process clause for protection against overreaching by the government. This is by definition an inferior mandate to that of the article III judge. It is the product of a balancing of costs and benefits, and is measured by the realities present in the forum. The NAD adjudicator serves an executive function not shared by the article III judge: and certainly his or her authority is no greater than that of the Division itself. While the executive adjudicator cannot be called *independent* of the executive branch, the decisions of the adjudicator – like the decisions of an article III judge, must be *impartial*. As the Hearing Officer Manual points out, “Among the most critical aspects

²⁵Id. §6997(d).

²⁶Id.

²⁷Id. §6997(e).

of your job is to be fair and impartial. Fairness and impartiality mean, among other things, avoiding bias based on race, sex, ethnicity, religious beliefs, age, or socio-economic status. Similarly, you should avoid bias in favor of the agency or private parties. It also means preventing your personal or political beliefs from influencing the outcome of a case.²⁸

And ultimately, your ability to faithfully carry out your chosen profession here hangs on your ability to impartially consider the claims of all who appear before you. True, this means having to accept the interpretations of law handed down by the Office of General Counsel, because that office speaks for the Secretary on interpretations of law. To do otherwise would leave your appellants wholly unable to rely on a consistent body of law, and would deprive them of the a fair hearing before a fair tribunal.

I should add at this point that the notion calling into question the role of judicial independence for the administrative adjudicator is by no means a simple or one-dimensional issue. Social Security Administrative Law Judge Ronald G. Bernoski offers a thoughtful counterpoint to the comments of the General Counsel in the same issue of the Journal, where he reminds the reader of the rich history of the administrative law and the administrative law judge, and invokes the quote from the often-cited case of *Butz v. Economou*,²⁹ to the effect that an administrative law judge functions in a manner comparable to that of a trial court judge. Judge Bernoski invokes the role of the Due Process Clause, and expresses a frustration common among our colleagues when he says “we understand completely that within the framework of administrative law, it is both the duty and the responsibility of the agency to promulgate rules under the Administrative Procedure Act. We also understand that administrative law judges are bound to follow these rules. But we have difficulty with agency rules that are not consistent with the law.”³⁰

²⁸United States Department of Agriculture, Hearing Officer Manual of the National Appeals Division, 3.

²⁹438 U.S. 478 (1978)

³⁰Arthur Fried and Ronald G. Bernoski, *Panel Discussion on Independence and the Federal Judiciary* 18 J.NAALJ 47, 53 (Spring 1998).

This tension between the quest for judicial independence for the executive adjudicator and the need for consistent executive adjudications will likely continue to manifest itself: consider the instance where a court of appeals in one jurisdiction interprets a provision of law one way, yet the Department reaches a different conclusion. While the decision is binding in the appellate jurisdiction where the issue has been decided, it may be challenged by the Department in other jurisdictions, under the doctrine of nonacquiescence. The Supreme Court recognizes the value of this doctrine, as it explained in the case of *U.S. v. Mendoza*.³¹ Justice Rehnquist observed in that case that allowing the federal agency the option to continue to test the merits of its interpretation of the law against that of the jurisdiction that ruled contrary to the agency makes sense, because to do otherwise would “deprive this Court [i.e., the Supreme Court] of the benefit receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.”³² But the outside observer might reasonably conclude that the agency has no business disregarding the decision of the first court of appeals, and indeed should acquiesce in that first judgment. This conclusion can be the source of tension between the administrative adjudicator and the agency, particularly if the doctrine of non-acquiescence is not explained to the adjudicators.

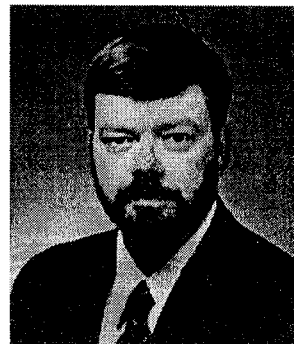
Before concluding my remarks, I would like to make a brief effort at predicting the future for the National Appeals Division. Speaking as an advocate for administrative adjudications, one who believes traditional courts need the alternatives that arise in the agency hearing, I see the Division as being partly but not fully evolved. Gone are the days when the only fact-finder a claimant could turn to is someone hired by and controlled by the agency. With the 1994 legislation that expanded the role of the Division, Congress has moved the agricultural community a step farther along to road towards creating a system that not only is fair to the appellants but in all ways appears fair. No doubt more than a few appellants have left a proceeding

³¹464 U.S. 154 (1984)

³²Samuel Estreicher and Richard L. Revesz *Nonacquiescence by Federal Administrative Agencies*, 98 *Vale L.J.* 679 (1989) (quoting *U.S. v. Mendoza*, 464 U.S. at 160 (1984).

feeling the disappointment that comes from not prevailing against a governmental agency, and with that disappointment there was probably the sense that the government's adjudicator was an employee of the Department being charged with errors in judgment. Ideally, as each new state moves towards the creation of a stand-alone central panel of hearing examiners, members of Congress will likely take notice of these trends, and see how the streamlining of executive adjudications that have saved money for the states might likewise be a good move for the federal administrative judiciary. So you might well watch for the further evolution of the federal executive judiciary.

But for now, the 1994 legislation recreating the NAD suggests that our lawmakers found it useful to provide a forum somewhat removed from the adversarial worlds that spring up between the executive branch and the people we all serve. The Director ultimately shoulders the burden of being the focal point between these two sides, but once the hearing officer completes the task of gathering evidence, and applying the law to the facts presented, much of the tedious work that would otherwise have been borne by our district courts is accomplished, with greater efficiency and with an informed hearing officer. To the extent this continues to offer an efficient way to fairly hear facts and make preliminary decisions based on recorded facts, our legislators will likely expand the administrative judiciary, using hearing officers instead of administrative law judges and district judges, retaining in the Director a vital role in melding both the adjudicative and executive functions like those present in the NAD. Due process will continue to be an elastic concept, one driven by practical realities as well as a keen eye towards that which not only is fair, but appears to all participating to be fair. The NAD hearing officer will succeed when those who appear in the NAD forum leave convinced they have been heard by an informed and impartial hearing officer who was knowledgeable in the controlling law and capable of applying facts presented to that law.



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recipient of the 1997 Fellowship awarded by the National Association of Administrative Law Judges, and is the current co-chair of the Courts & Communities Committee of the National Conference of Administrative Law Judges, a conference of the American Bar Association's Judicial Division. He is the immediate past chair of the Administrative Law Committee of the Ohio State Bar Association. Before becoming an administrative hearing examiner he served as an Assistant Ohio Attorney General from 1988 to 1994, where he provided litigation services, statutory drafting and interpretation services, and open meetings/public records advice to the Ohio Certificate of Need Review Board, the Public Employees Retirement System, the Ohio Department of Rehabilitation and Corrections, the Ohio Department of Public Safety, The Ohio State University, the Ohio Board of Embalmers and Funeral Directors, and other state agencies. He is the author of several articles on the practice of administrative law, including *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative Central Panel*, 1998 Fellowship Article, 18 J.N.A.A.L.J. 1 (Spring 1998), and *Due Process and the Ohio Administrative Procedure Act: The Central Panel Proposal*, 23 Ohio N.U. L. Rev. 783 (1997). He has lectured on administrative law extensively, including recent presentations as the CLE producer and presenter for: *Research, Technology, and the Administrative Law Judge*, (October, 1998) Portland, Oregon, National Association of Administrative Law Judges Annual Meeting; *Using the Internet for Legal Research*, (September, October, and December 1998) Columbus Bar Association; *On-Line Legal Research and the Judiciary*, (August, 1998), Toronto, Ontario, Annual Meeting, American Bar Association, Judicial Division; *Executive and Judicial Branch Judges*, (May 1998) National Association of Administrative Law Judges, Kentucky Affiliate, Frankfort, Kentucky Fellowship Lecturer: *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative Central Panel*, (September 1997) National Association of Administrative Law Judges, Denver, Colorado; *The Future of Administrative Law*, (September, 1997) National Association of Administrative Law Judges, Denver, Colorado (Panelist); *Practicing Before State Agencies: The Ohio Bureau of*

Motor Vehicles, (June, 1997) Ohio State Bar Association ,Annual Meeting, Columbus, Ohio; Moderator: The Nuts and Bolts of Administrative Hearings, (May 1996) Ohio State Bar Association, Annual Meeting, Cincinnati, Ohio. He currently serves as a hearing examiner for the Ohio Department of Education, Ohio Department of Human Services, the Ohio Bureau of Motor Vehicles, the Ohio Board of Nursing, the Ohio Dental Board, the Ohio Board of Architect Examiners, the Ohio Board of Chiropractic Examiners, and the Ohio Board of Engineers and Surveyors. Mr. McNeil also teaches legal writing and advanced legal research at Capital University Law School, in Columbus Ohio. He is admitted to the bar of the United States Supreme Court as well as the state and federal bars of Ohio and Kansas. He has served as a deputy public defender in Junction City, Kansas, and as lead attorney for the Child Support Enforcement Agency in Kansas City, Kansas. He is the author of two chapters in the Ohio Administrative Law Guide and Directory (West 1998) and is the author of two books for practicing lawyers and human resource managers: Preventing and Responding to Workplace Sexual Harassment (LRP 1996), and Kansas Statutes of Limitation and Time Standards (KBA Press, Topeka, Kansas 1988). He maintains his office in Worthington, Ohio, and can be reached at PO Box 595, Worthington, Ohio 43085-0595; or by phone at 740.549.5400, by fax at 614.888.2687, by email at cmcneil@iwaynet.net, or at his website at www.cbmcneil.com.

Resources Consulted:

Because the research that contributed to this paper is the product of over four years of work, the risk exists that I have relied upon resources and yet not fully nor appropriately given credit for the contribution of those sources. Much of the analysis that appears above was first presented in an article I wrote for the National Administrative Law Foundation, *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative Central Panel*, 1997 Fellowship Article, 18 J.N.A.A.L.J. 1 (Spring 1998). Some of the material also came from my article, *Due Process and the Ohio Administrative Procedure Act: The Central Panel Proposal*, 23 O.N.U. L. Rev. 783 (1997). My discussion of the case involving three

partnerships and the Farm Service Agency was taken from the Director Review Determination in the case of Sawyer Farms, et al. and the Farm Service Agency, Consolidated Case Nos. 98000196W and 98000370W, and the Hearing Officer Manual of the National Appeals Division of the U.S. Department of Agriculture. Other sources of background and analysis used in this paper include but are not limited to the following:

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