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JUDICIAL INDEPENDENCE UNDER SIEGE

Wendell Fennell*

Fred Young**

Our Constitution and applicable statutes provide as a fundamental right of all citizens to have their meritorious case(s) heard and decided by an impartial adjudicator whether in an Article III or administrative tribunal. It is common knowledge that an absolute necessary element for the existence of an impartial adjudicator is **judicial independence**. However, it is of great concern to all of us who believe in the idea of impartiality and fairness that this necessary element of judicial independence is under such intense attack. The attacks emanating from those within the leadership roles of the administrative bureaucracies include the agencies' leaders and the government attorneys (Offices of General Counsel) in the U.S. Department of Agriculture (USDA) and Social Security Administration (SSA).¹

Perhaps the most widely publicized attack is within the SSA; however, attempts to destroy judicial independence is not at all limited to SSA. The USDA attack (primarily commencing in 1995) on the independence of the National Appeals Division (NAD) Hearing Officers is manifested in various and obvious ways. Congress mandated the establishment of the NAD when it enacted P.L. 103-354 on October 13, 1994. The NAD is an expansion of the National Appeals Staff (NAS). The Agricultural Credit Act of 1987 followed a Federal District Judge's decision, in *Coleman v. Block*, wherein the court ordered a permanent injunction against the USDA because the department was violating the rights of program participants. Congress

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¹The head of the SSA warned the department ALJs they would be subject to disciplinary action if they did not conform their opinions to internal policy. In response to this attack on judicial independence, Congressman George Gekas introduced H.R. 1544 which is known as the Federal Agency Compliance Act. H.R. 1544 was approved by the Subcommittee on Commercial and Administrative Law and was forwarded to the full Judiciary Committee by voice vote on July 24, 1997.

saw the need to correct this injustice by mandating the establishment of the NAS. The NAS reported to the Administrator of the Farmer Home Administration, an obvious opportunity for interference. As Congress viewed the operation of the NAS and appeals in other USDA agencies,² it became apparent that their intent of judicial independence was not being met; thus, Congress mandated the establishment of the NAD. Congress expressly mandated the independence of the NAD.³ Since the enacting of P.L. 103-354,⁴ the internal attacks and undermining of the NAD's independence has intensified, and unfortunately the attackers have had some success.

Today, the NAD Hearing Officers are under attack from within the NAD and from the agency heads and Office of General Counsel. The NAD Hearing Officers experience their decisions being reversed by the Director of the NAD without merit and in many cases in obvious conflict with law and fact. P.L. 103-354 provides for the review (appeals) of Hearing Officers' decisions by the NAD Director. This review is available to the appellants and the agencies under certain constraints.

It is clear from the following facts and analysis (the study period covers about one year) that the NAD Western Region⁵ (20-25 Hearing

² In *Doty v. USDA*, Nos. 94-5014, 94-5013 (Fed. Cir. Apr. 12, 1995), and 96-5131 (Fed. Cir. Mar. 21, 1997), the court found that the Agriculture Stabilization and Conservation Service's (ASCS) National Appeals Division was abusive and unfair. The *Doty* matter was subject to an appeal before the ASCS's National Appeals Division that was in place prior to enactment of P.L. 103-354. P.L. 103-354 established the USDA National Appeals Division.

³P.L. 103-354, §272(c) mandates that: "The Director shall be free from the direction and control of any person other than the Secretary. The Division shall not receive administrative support (except on a reimbursable basis) from any agency other than the Office of the Secretary. The Secretary may not delegate to any other officer or employee of the Department, other than the Director, the authority of the Secretary with respect to the Division."

⁴The part of P.L. 103-354 that established the USDA National Appeals Division is codified at 7 U.S.C. §699, et seq.

⁵Includes all states west of the Mississippi River except Minnesota, Iowa, Missouri, Arkansas, and Louisiana.

Officers) Hearing Officer's decisions are reversed when they reverse⁶ the agencies and are upheld (affirmed) when they uphold the agencies:

FACTS

1. Hearing Officers' decisions reviewed by the Director of NAD: 83
2. Reversed decisions: 73
3. Upheld (affirmed) decisions: 10
4. Reversed decisions (reversed by Hearing Officers) reversed by Director: 58
5. Upheld decisions reversed by Director: 2 (prior to September 1997 the number of upheld cases that were reversed by the Director was zero)

ANALYSIS⁷

In 79% of the cases where an agency was reversed by a Hearing Officer, the Director reversed the Hearing Officer. Whereas in only two of the ten cases (20%) where an agency was upheld by a Hearing Officer, the Director reversed the Hearing Officer.

In order to understand the significance of the impact on judicial independence of the above matter, the contexts of case-by-case merit, *ex parte* communications, and strategic planning should be considered. However, the context of case-by-case merit in terms of fact and law is beyond the scope of this paper.

The consideration contexts within the scope of this paper are (1) the context of *ex parte* communications that is occurring between the NAD Director and the USDA's Office of General Counsel, and (2) the

⁶When a Hearing Officer reverses the Agency's decision, this is a finding for the Appellant.

⁷Most of the NAD Hearing Officer determinations are not reviewed. It should be understood that the NAD Hearing Officers reverse the Agencies only about 35% of the time. The analysis provided only applies to this 35% (88% OF THE REVIEW CASES) PLUS THE FEW CASES WHERE APPELLANTS SEEK REVIEW (12%).

context of the 5-year Strategic Plan for the NAD.⁸

***EX PARTE* COMMUNICATIONS**

Some of the Hearing Officers' decisions that are before the Director on review are reviewed with the Office of General Counsel prior to the Director's review determinations. These *ex parte* matters are not revealed to the appellants (USDA program participants), thus, the appellants are not allowed to respond to the Office of General Counsel's position. When the Director reverses a Hearing Officer's decision based on an *ex parte* communication with the agencies' attorneys, the Director's decision is obviously unfair and flawed. Notwithstanding, these flawed decisions will be included in the Hearing Officer's total of reversed decisions.

STRATEGIC PLAN

In the Director's original 5-year Strategic Plan (published on the USDA home page), it is clear that Hearing Officers will be punished for reversing the agencies.⁹ The following is quoted:

Incorrect hearing officer determinations are overturned by the Director. Occasionally, a determination may be overturned on the basis of new information or other factors beyond the hearing officer's control, but in general, *reversals or remands of hearing officer determinations are indicators of hearing officer error.* Appropriate adjudication procedures and rational decision making will

⁸The NAD 5-year Strategic Plan was filed under "What's New" on USDA's internet home page on July 9, 1997. The point is being made that the Hearing Officers' decisions are reversed based on one-sided communications with the agencies' attorneys and these reversals will be used to pressure the Hearing Officers into rendering decisions that uphold the agencies. The planned intent is to force the Hearing Officers' decisions to some acceptable level of reversal rate.

⁹The Director's reversal of the Hearing Officers' determinations including those wrongfully reversed will be construed as error, thus, the Hearing Officers will be punished by a negative performance evaluation.

result in fewer reversals or remands. This objective, which seeks to reduce the incidence of reversals or remands of hearing officer determinations, will be reflected directly in performance measures in all Annual Performance Plans. *Performance against stated targets will be reflected in the performance plans of individual hearing officers.* (Emphasis added)

In addition to the attack on judicial independence as described in the above contexts, intent to weaken or destroy judicial independence is readily inferred from the language found in various documents authorized by the NAD Director. One such document is NAD Directive #1 wherein the USDA agencies are referred to *as NAD clients*. This same language is found in the five-year strategic plan. In another document the Director has instructed the Hearing Officers to conform their decisions to the opinions of the agencies' attorneys. The following is quoted from NAD Notes¹⁰ dated November 1996:

Legal opinions provide the "generally applicable interpretations" of the laws and regulations upon which a determination must be based. The Office of General Counsel (OGC), General Law Division, has advised that legal opinions issued by regional OGC offices may be relied upon as may opinions issued from OGC's Washington office. The only exception is that the Washington office opinion controls when there is a conflict between the opinions of the Washington and regional OGC offices.

In some cases the regional attorneys appear as counsel for the agencies in appeals before the Hearing Officers. The *ex parte* review with the agencies' attorneys is not only a violation of the *ex parte* rule, it also results in the violation of the 30-day limitation for the Director review determinations. This leads to the infamous case, *Passarell v.*

¹⁰The NAD Notes is a periodic internal documents containing announcements, guidance, and instructions as to the NAD hearing issues.

USDA, CA No. 95-2122, (D.D.C. Mar. 6, 1997), wherein the Agency's attorney(s) argued that "shall" in a statute directing the NAD Director to render his review determination within 30 days was merely "aspirational." The court found the agency's construction of "shall" was nonsensical and placed their argument within the context of George Orwell's celebrated work, NINETEEN EIGHTY-FOUR. Orwell's prophesy that the government would reverse the meaning of words in order to achieve its intent applies here. If the Hearing Officers are coerced into conforming their decision to satisfy agency intent, they would not only be deciding contrary to established law, they would subject themselves to considerable embarrassment. The first "shall" be avoided and the latter should be avoided.

The mission of the NAD was originally established by the Agricultural Credit Act of 1987, and that mission remains the same although enlarged jurisdictionally. The mission is to provide USDA program participants that have experienced adverse determinations a *fair hearing before a fair Hearing Officer*. However, according to a letter from the Office of General Counsel to Senator Phil Gramm of Texas dated September 2, 1997, this mission has been reversed from providing a fair hearing before a fair Hearing Officer to that of (quoted):

We point out that Congress established NAD in order to ensure closer adherence to statutory and regulatory guidelines in distributing program benefits. That such closer adherence to statute and regulation would result in an increase in participant dissatisfaction that is manifest in an increased number of lawsuits should not be particularly remarkable.

While it is true that closer adherence to statutory and regulatory guidelines is one desirable result of any adjudication, this desirable result applies equally to the program participants and the agencies. Apparently the agencies and their attorneys would have us believe "closer adherence to statutory and regulatory guidelines" only applies to the program participants. Congress did not mandate the

establishment of the NAD so that agencies could appeal the actions of participants; it is the reverse.

The agency's interpretation of Congressional purpose or mission of the NAD is that of assisting the agencies in ensuring that only the participants (appellants) more closely follow statutory and regulatory guidelines is error. The agency's interpretation of Congressional intent as to the NAD mission has gone through an *Owellian* metamorphism such that *fair hearings and fair decisions* is now *providing assistance to the agencies in ensuring the participants more closely follow statutory and regulatory guidelines*. The Senate's¹¹ (the NAD bill originated in the Senate) construction of the NAD Bill included the hopeful result that the Bill would reduce participant lawsuits because the NAD would provide a fair hearing and decision.

Congress¹² intended for the Administrative Procedure Act (APA) and the Equal Access to Justice Act (EAJA) to apply to the NAD Hearings; however, the agencies' attorneys¹³ erroneously promulgated rules that were in conflict with Congressional intent. These rules were allowed to stand (internally) as controlling law until recently overturned by the Courts in *Lane v. USDA, Norman G. Cooper, et al.*, 120 F. 3d 106 (8th Cir., 1997). The District Court first ruled¹⁴ that the APA and EAJA applied to the NAD hearings and that the applicable regulation promulgated by the USDA was in error. This ruling was upheld by the Eighth Circuit. The APA assists in fostering the independence of the NAD and in leveling the playing field for the

¹¹The Senate Bills were 3119 and 1425. The report language of the Department of Agriculture Reorganization Act of 1994, Section 202, contains the following: "Subsection (a) establishes the National Appeals Division (NAD), and requires that the provisions of the Administrative Procedures Act (APA) shall apply to all appeals heard by NAD."

¹²The NAD bill that originated in the Senate (S. 1425) expressly mandated that the APA apply; however, in conference with the House, much of the Senate's specific language was dropped. However, the enacted bill never contained language that prohibited APA application. The *Lane* court correctly construed the non-specific language of P.L. 103-354 to imply application of the APA.

¹³Agencies (USDA) attorneys' promulgation of the NAD rules was independent of the NAD's input.

¹⁴*Lane v. United States Department of Agriculture*, 929 F. Supp. 1290 (D.N.D. 1996).

program participants in their appeals before the NAD. The matter of APA applicability has been a controversy since the Agriculture Credit Act of 1987. In the early stages of the NAS, the Hearing Officers were told not to use the words *due process* or *fairness*. Yet it seems obvious to the reasonable mind that the independence and very existence of the NAD (and the NAS) is directly tied to fairness (due process). The OGC's disconnect of the NAD and the APA is just another way of separating the NAD from judicial independence.

A great concern currently pervasive within the federal government is non-acquiescence by the agencies as to Federal District and Appellate Court rulings. The agencies have stubbornly taken the position that they need not comply with rulings unless the U.S. Supreme Court has spoken. Apparently, the agencies prefer to litigate the matter in the District and Appellate Courts for as long as possible or to defy the rulings until the matter is settled, if ever, in the Supreme Court. In the case of *Lane*, it appears that this non-acquiescence policy will be the strategy of the NAD leadership and the Office of General Counsel.

If the agency leadership and its alter egos are allowed to reverse the meaning of the language of controlling law and coerce the Hearing Officers into rendering decisions that favor the agency's position, judicial independence and fairness within the NAD will be nonexistent.