Administrative Law Judges: The Past and the Future

By Michael Asimow

A striking feature of American administrative law is the administrative law judge (ALJ).[1] ALJs are fulltime trial judges, nearly always lawyers, who preside at administrative hearings. Every working day, ALJs conduct tens of thousands of state and federal hearings and render proposed decisions that become final in the vast majority of cases. ALJs are the face of justice for countless ordinary people who come into conflict with the government.

A glance at the institution of the administrative law judge reveals significant paradoxes. Most ALJs work for the agency for which they decide cases; thus they are specialist judges.[2] While they are captives of the agency, they have substantial de facto and de jure independence and a highly independent mind-set. ALJs hear testimony, find the facts, apply the law, and exercise discretion, but their opinions are proposed rather than final.[3] Agency heads are free to substitute their judgment for that of the ALJ on questions of fact, law and discretion, although they actually do so in relatively few cases. Courts review the decisions of agency heads, not those of the ALJ.

The paradoxes continue: ALJs generally act like true judges; their only job is to hear cases and they usually receive no ex parte staff assistance. Yet the agency heads who have the final call at the agency level typically receive large doses of ex parte staff assistance. Those agency heads often exercise the combined functions of rule making, investigation, prosecution, and adjudication.[4]

ALJs are so familiar in state and federal administrative law that we fail to appreciate their uniqueness. Other countries with advanced administrative law systems have no comparable institution. There was nothing inevitable about the way that the ALJ profession evolved in American administrative law. A look back at some often forgotten historical materials will illuminate the origins of ALJs and explain some of the paradoxes.[5]

It all started with the railroads. After the Civil War, as the nation industrialized, the political and economic power of the railroads posed immense problems. Powerful shippers were able to negotiate favorable deals with the railroads; small farmers and less favored business interests were drastically overcharged. Cutthroat competition between railroads with high fixed costs put many roads into bankruptcy. While there was, in theory, a judicial remedy for unfair rates, courts were unequal to the task. In other countries, railroads were nationalized, but that was never politically feasible in the U.S.

A number of states responded to political pressure from disgruntled shippers and the Grangers by creating state agencies empowered to regulate the railroads. However, these state agencies failed miserably. The railroads resisted them tenaciously; court decisions accorded no finality to administrative rate decisions and prevented state commissions from regulating even the intrastate portion of an interstate journey.

Clearly, a national solution was required, but the process of developing one consumed nearly 20 years of intense legislative struggle. Ultimately, Congress finally created the Interstate Commerce Commission (ICC) in 1887. The ICC was modeled on the combined-function regulatory agencies that had emerged in the states. Like the state agencies, the ICC combined functions of investigation, prosecution, and adjudication. Soon after its formation, it became independent of executive control. The ICC was the prototype of the American federal regulatory agency-possessing all the functions and powers necessary to compel private business to operate in the public interest.

The 1887 Commission was remarkably toothless. The statute that created it provided little more than a delegation of authority to the Commission to find answers to the difficult issues of railroad regulation. Indeed, in order for the legislation to pass, it had to offer something for everyone without resolving any issues in ways that the various interest groups could not support. What few teeth the Commission possessed were swiftly drawn by hostile court decisions. By 1920, however, with the aid of excellent commissioners and staff, statutory amendments, and more sympathetic judicial treatment, the Commission became a powerful, effective, and respected regulator of the railroads.

The ICC did its business through case-by-case adjudication of specific disputes between shippers and carriers. It seldom resorted to rule making. Supreme Court decisions required that due process be observed in this adjudication process, meaning that issues of railroad economics had to be resolved through trial-type hearings. Since there was a high volume of cases, many of them technical and most of them time-consuming, the ICC-commissioners were unable to hear the cases en banc or even by splitting up into panels. In 1906, legislation authorized the ICC to appoint trial examiners and it immediately began doing so. In 1907, the ICC appointed a chief examiner.

By 1917, the examiners began preparing proposed reports from which the parties might seek review. At first, those proposed decisions were accorded little deference and considered of little importance. The ICC staff worked institutionally with the commissioners to produce the final agency decision which took the form of a detailed written precedential opinion. In time, however, ICC hearing examiners became more professionalized and their decisions received greater deference. Indeed, the examiners often worked closely with the Commissioners in producing final decisions. Ultimately, ICC examiners gained considerable prestige for their skill in presiding over hearings, for their independence, and for their expertise in analyzing the complex cases presented for decision. These ICC hearing examiners were the progenitors of today's ALJs.

The ICC served as the model for the Federal Trade Commission (FTC) which emerged in 1914 to deal with the problem of monopoly. All sides were dissatisfied with judicial enforcement of the Sherman Act. As in the case of the ICC, the legislation creating the FTC provided virtually no guidance to the new Commission (it banned "unfair methods of competition" without defining what those might be. Like the ICC, the FTC was an independent, combined-function regulatory agency with broad responsibilities that did its work through case-by-case adjudication rather than rule making. Its trial examiners (who often were also the investigators) conducted hearings and worked closely with the agency heads in producing final decisions. As in the case of the ICC, initial court decisions were extremely hostile to the FTC but subsequent court decisions were strongly supportive.

During the New Deal of the 1930s, numerous independent, combined-function agencies emerged to deal with the actual and perceived causes of the Great Depression. The idea was that agencies would specialize and develop expertise in managing their assigned sector of the economy. Agency heads and staff would utilize their expertise to solve the problems that the market had failed to solve. The ICC and FTC served as the model for these new agencies (as well as many regulatory agencies being formed at the state level).

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

Regulated parties bitterly resented this form of meddling in their private affairs. In addition, there was a great deal of quite justified skepticism about the fairness of agency decisionmaking. Even some New Deal

supporters shared in these convictions. Agencies had no internal separation of functions, so that prosecutors participated off the record in the decisionmaking process. Both the hearing examiners and agency heads seemed to the private sector to be biased against them.

For a time, the conservative justices of the Supreme Court stood as a bulwark against the New Deal. The Court invalidated a variety of state and federal regulatory schemes on the basis of federalism, separation of powers, or due process .[6] Beginning in 1937, however, the Court made an abrupt switch. It abandoned efforts to obstruct the administrative state by invalidating programs or upgrading agency procedures.[7] This judicial default caused New Deal opponents to seek relief from Congress. The struggle over administrative procedure led eventually to enactment of the federal APA in 1946.[8] The epic political battle can be understood as involving two separate struggles.

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

A judicialist has a wholly different orientation. The judicialist believes that the emphasis should be on fairness and due process for the private party. The model should be civil litigation in court.[9] Adjudication should apply existing policy, not make new policy with retroactive application. The official taking responsibility for the ultimate decision should be personally familiar with the issues and arguments. There should be a rigid separation between prosecution and judging, even if this means the process is less efficient and may not produce a decision that implements consistent agency policy. Judicial review is essential and courts should have broad powers. Needless to say, avid New Dealers tended to be institutionalists; opponents of the New Deal tended to be judicialists.

A second struggle was overtly political. Proponents of the New Deal believed that government regulation by expert agencies was the only salvation for the economy. Opponents believed that government interference with free markets was catastrophically wrong, would make the Depression worse, and would lead to socialism or fascism. These views translated directly into views on administrative procedure. Proponents of regulation favored streamlined agency procedures with little attention to due process, separation of functions, or judicial review. Opponents of regulation favored detailed administrative procedure codes, formalized hearings, and intensive judicial review in order to assure accurate decisions that took full account of their views. To opponents, the fact that judicialized process would slow down and encumber the regulatory process was a benefit, not a detriment.

The judicialist/New Deal opponent coalition, strongly supported by the American Bar Association's Section on Administrative Law, first attempted to induce Congress to adopt legislation for an administrative court, but this got nowhere. Ultimately, as Roosevelt weakened politically, this coalition succeeded in passing the Walter-Logan Bill of 1940 which would have drastically inhibited the regulatory process in New Deal agencies. Walter-Logan required more intrusive judicial review and would have rigidified the adjudication process (for example, it required three-person panels to conduct adjudication). Roosevelt vetoed the bill and his veto barely escaped being overridden.

Meanwhile, in 1939 Roosevelt appointed the Attorney General's Committee on Administrative Procedure, hoping that it would suggest moderate reforms. That Committee's 1941 report[10] provided extensive monographs on the administrative process, replacing superheated political rhetoric with solid empirical information on how agencies actually functioned. The majority report of the Attorney General's Committee stands as one of the great pieces of administrative law scholarship of all time. Its profound analysis of the administrative process remains excellent reading today.

The majority report emphasized the enormous diversity of administrative adjudication as it existed in 1940. This diversity prevented the majority from recommending one-size-fits-all reforms to the adjudication process. Thus the majority recommended quite modest reforms. It declined to recommend that combined-function agencies be divided into separate adjudicatory and non-adjudicatory agencies (although the two minority reports favored breaking up combined-function agencies). The majority focused instead on the role of hearing officers who had become fixtures in administrative adjudication by 1940. The majority believed that the objective of improving the fairness of adjudication could be achieved by dramatically upgrading the status of hearing officers.

The administrative procedure battles were set aside during World War II, but revived afterwards. Roosevelt realized he had to agree to reform; conservatives realized that any solution had to be acceptable to Roosevelt. In a historic compromise, the APA emerged from Congress in 1946 and served as the model for state APAS in the years to come.[ll] Virtually every word in the Act represented a hard-fought compromise. Historians of the APA have observed that the unanimous votes that Produced the APA were highly misleading. Nobody was happy with the proposed legislation, but all sides felt they were better off with the it than with the status quo.

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

a. The New Deal combined-function independent agencies survived. The adjudicatory function was not separated from rule making, investigation, and prosecution.

b. Hearing examiners remained employees of the agency for which they decided cases; no central panel of hearing examiners was established. Agency heads retained power to make final agency decisions.

c. A great deal of federal administrative adjudication remained outside the ARA structure (socalled informal adjudication, including many benefactory programs).[12]

d. Judicial review remained subject to sharp limitations such-as the requirement of exhaustion of remedies and limited scope of review of factual and discretionary decisions.

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

a. The APA provides for an array of due-process like protections for formal adjudication.[13]

b. The APA imposed internal separation of functions, preventing adversaries from taking part in adjudication (albeit with considerable exceptions).[14]

c. Hearing examiners were granted an array of protections. Agencies lost control over the hiring, evaluation, compensation, and termination of their judges. The judges could not be supervised by prosecutors, were to be full-time judges, were protected from ex parte contact, and were assigned cases in rotation. They issued proposed decisions which became final unless the agency heads took over the case.[15]

d. Rule making was subject for the first time to mandatory notice and comment requirements (again with significant exceptions).[16]

e. Access to judicial review was assured in most cases.[17]

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

For purposes of this article, the big story of the APA is that it transformed the disrespected crew of agency hearing examiners into the highly respected and highly protected corps of ALJs we know today. This apparently occurred because the New Dealers insisted on preserving the combined-function agency. Agencies like the National Labor Relations Board (NLRB) and the Securities Exchange Commission (SEC) must, they thought, continue to make the rules, investigate, prosecute, and adjudicate. Unable to force an external separation, the opponents of the New Deal (supported by all members of the Attorney General's Committee) fell back on elevating the status of the front-line decisionmaker-the hearing examiner. They went as far as they could in the direction of making the person who hears the witnesses into a true judge. Thus the array of independence-protecting provisions in the APA.

Once the role of the hearing examiner was strengthened and the administrative process judicialized, the institutionalists/New Deal proponent coalition needed to assure themselves that the agency heads (not the hearing examiners) would have the final call on *all* issues of fact, law, and discretion. And thus the key provision in the ARA emerged: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision…"[18]

It would seem that none of this would have happened if Congress had followed the views of the minority members of the Attorney General's Committee. Under that approach, the adjudicating function would have been separated from the rule making and adversary functions. Alternatively, the hearing examiners might have been stripped from their employer agencies and placed into a central panel. If adjudication were conducted in a separate agency or in an administrative court of some kind (as it is in most other countries), or through a central panel, the various elaborate protections for hearing examiner independence in the APA would have been unnecessary and superfluous. The adjudicating agency or administrative court or central panel would have hired and evaluated its own ALJs and assigned them to cases as it saw fit; since that agency would not be engaged in law enforcement, there would be little need to construct elaborate protections of the judges' independence. Thus the ironic effect of the decision to preserve combined-function agencies was to spawn the aggressively independent administrative judiciary as we know it today.

In this highly abbreviated historic survey, only a few more events are worth mentioning. The status of hearing examiners was sharply elevated, and the status of agency heads sharply diminished, by the *Universal Camera*[19] decision in 1951. In *Universal Camera,* there was a credibility dispute between A and B concerning the reasons for discharging an employee. The hearing examiner believed A. The agency heads believed B. The Supreme Court held that the courts must review the agency head decision, not that of the ALJ.[20] Nevertheless, the fact that the ALJ believed a witness that the agency heads disbelieved is a minus factor in applying the substantial evidence test. As a result, agency heads became less likely to substitute their judgment on credibility questions for that of a hearing examiner. The hearing examiner's proposed decision became far more significant than it was before.

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

The final event that should be mentioned is the trend toward central panels in the states.[21] About half the states and several important cities have stripped at least some of their agencies of their captive judges, moving the judges into a separate agency. Central panels have some important advantages, particularly in giving private parties the sense their cases are being heard by a truly impartial judge. This trend is gathering momentum, something like freedom of information or sunshine laws did a generation ago. If the trend continues, the vast majority of the states will undoubtedly have central panels in the next 20 years.

Ultimately, the federal government will have to fall into line. One viable scheme, in my opinion, is to merge the judges in benefactory agencies (such as Social Security, black lung, the Board of Veterans' Appeals, and Workers' Compensation for Maritime Employees) into a single independent agency exclusively devoted to adjudicating claims disputes. Perhaps when the federal central panel finally emerges, the APA provisions relating to the ALJs (particularly those relating to hiring, specialization, and evaluation) can also be reconsidered.[22]

The ALJ emerges out of this long history as the result of a series of compromises unique to the United States. First came the combined-function regulatory agencies which became necessary because essential industries remained in private rather than governmental hands. In part because of due process constraints imposed by the Supreme Court, those agencies mostly made policy through case-by-case adjudication and pursued judicialized methods. As a result, they ultimately found it necessary to delegate the function of conducting hearings to hearing examiners. Next came the titanic struggles between judicialists and institutionalists and between proponents and opponents of the New Deal. The historic compromise that emerged in the form of the federal APA retained combined-function agencies but it also produced the relatively extreme provisions relating to the hiring, management, compensation, evaluation, and independence of the person conducting the hearings. Today, those highly professionalized and independent-minded men and women, whom we call ALJs, have become the vast state and federal administrative judiciary.

Endnotes

1. Unless otherwise stated, the term "ALJ" as, used herein covers all administrative trial judges, whether called ALJs, administrative judges, hearing officers, referees, or outer titles. *But see* note 22 which distinguishes federal ALJs from other federal administrative judges.

2. An increasing number of state and local ALJs work for central panels, meaning they are not captives of any particular agency and are generalized rather than specialized judges. *See* text at note 21.

3. In an increasing number of cases, especially in the states, ALJs now make the final decision at the agency level. Agency heads are out of the loop. *See* Jim Rossi, *ALJ Final Orders on Appeal: Balancing Independence with Accountability,* 19 J. of Nat. Ass'n of Administrative Law Judges 1 (1999).

4. Many agencies, especially at the state level, engage only in adjudication; rule making, investigation and prosecution have been split off into different agencies.

5. The following sources are useful in understanding the historic trends sketched here. Louis L. Jaffe, Judicial Control of Administrative Action (1965); Attorney General's Committee on Administrative Procedure, Final Report: Administrative Procedure in Government Agencies (1940) (and accompanying monographs); Robert E. Cushman, The Independent Regulatory Commissions (1941); Paul Verkuil et al., *The Federal Administrative Judiciary* 1992-2 ACUS Rec. & Rep: 777; James Landis, The Administrative Process (1938); Ralph F Fuchs, *The Hearing Officer Problem Symptom and Symbol,* 40 Cornell L.Q. 281 (1955); Robert L. Rabin, *Federal Regulation in Historical Perspective,* 38 Stan. L. Rev. 1189 (1986); Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions,* 49 Admin. L. Rev. 1 (1997).

6. Particularly noteworthy were the *Morgan* cases which struck powerful blows for the judicial process in economic decision-making. *Morgan 1* required the agency head to be personally familiar with the issues, *Morgan v. United States,* 198 U.S. 468 (1936); and *Morgan 11* inhibited ex pane contacts between prose-cutors and decisionmakers. *Morgan v. United States,* 304 U.S. 1 (1938). *See* Daniel J. Gifford, *The* Morgan *Cases: A Retrospective View, 30* Admin. L. Rev. 237 (1978).

7. In *Morgan IV,* the Court made it nearly impossible to prove violation of the rules in the first two *Morgan* cases. *Morgan v. United States,* 313 U.S. 409 (1941).

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

9. The *Morgan* cases, discussed in note 6, *supra,* are powerful statements of the judicial view.

10. Attorney General's Committee on Administrative Procedure, *supra* note 5.

11. The 1961 Model State APA was heavily influenced by the federal act.

12. Under the APA, the adjudication provisions apply only if "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (the APA. will be cited without the prefatory 5 U.S.C.). There is no statutory requirement of a hearing on the record in the case of a vast number of adjudicatory situations. The APA does not apply in such situations.

13. *See* APA §§ 554, 556, 557. .

14. *See* APA § 554(d). *See* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies,* 81 Columbia L. Rev. 759 (1981).

15. *See APA §§* 554(d), 556, 557; 5 U.S.C. §§ 1305, 3105, 5372, 7521.

16. *See* APA § 553.

17. *See* APA § 701.

18. *See* APA § 557(b).

19. *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951).

20. Id.

21. *See, e.g.,* Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals,* 39 UCLA L. Rev. 1067, 1181-91 (1992).

22. In the view of an influential study for the now defunct Administrative Conference of the United States, these controls on hiring and management of ALJs are the reason why most new administrative schemes are outside the *APA. See* Verkuil, supra note 5, This trend has caused the adjudication provisions of the federal APA to be less and less significant. The APA applies primarily to Social Security cases and a relatively small number of cases from traditional economic regulatory agencies. Judges not covered by the APA (so-called administrative judges) outnumber judges covered by the APA (ALJs) by more than two to one.

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