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WESTERN NEW ENGLAND LAW REVIEW

FOREWORD

"THIS YEAR'S REFORM IS NEXT YEAR'S NEED FOR REFORM"

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The hallmark of the administrative process must be its fairness whenever it resolves disputes over governmental rights and benefits or otherwise arbitrates or adjudicates the private rights of citizens. The ultimate question that must eventually be answered is whether such fairness requires a federal Article I judiciary. Present efforts by states to enhance the perception of fairness of the administrative process have focused upon the administrative law judge system. What is apparent, however, is that governments in general have not yet come to terms with the level of process in the system required to guarantee fairness or the appearance of fairness. The purpose of this symposium is to place the current problems in perspective and to identify the issues that must be addressed in the coming years.

After nearly ten years of debate, and under increased pressure from the courts to impose elements of simple fairness in cases where individuals could be deprived of rights by the government, the fed-

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eral Administrative Procedure Act of 1946[1] was enacted. That statute provides for a system whereby administrative hearings would be conducted by disinterested persons, generally administrative law judges where the agency heads were unable to try cases themselves,[2] and where there would be a strict separation of functions[3] — ensuring equal access at the same time in the same manner to all persons addressing the ultimate administrative decisionmaker.

In 1946, the world of administrative law primarily was peopled with independent regulatory agencies handling economic regulation, whether as licensing and rulemaking (including setting of rates) or enforcement to ensure that the public trust was not being abused, the Securities and Exchange Commission, for example. A far different world exists today where ninety percent of the cases handled by agencies are simple adjudications: Social Security claims, Black Lung claims, Longshore and Harbor Workers' Act proceedings, Whistleblowers, CETA's etc. Only fifteen percent of the judges currently employed are in economic regulation or in the general regulation of businesses and business practices. This has resulted in a growth of administrative adjudications which directly touch the public as against the economic regulation which, while real, was distant and remote.[4]

Significant stress has been placed upon a system originally designed in 1946 to permit large economic regulatory agencies with relatively small adjudicative staffs to determine major economic issues. Management has not come to grips with rationally supplying the large amount of resources necessary to meet their needs and almost all of the growth has been in new agencies. And the growth continues. Few statutes creating rights for individuals omit the requirement that a dispute be settled on the record by APA judges. The current immigration bill on the House side now being considered by the Congress provides for such determinations.[5] The dispute

1. Ch. 324, 60 Stat. 237 (current version at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1982)).

2. 5 U.S.C. § 556(b) (1982).

3. *Id.* § 554(d).

4. Over 300,000 claims are processed annually by the judges at the Office of Hearings and Appeals at the Social Security Administration, Department of Health and Human Services, and over 10,000 at the Department of Labor under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976 & Supp. V 1981) and Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1976 & Supp. V 1981). The chances of a citizen coming into direct contact with the Departments of Labor and Health and Human Services, or with a party involved in an adjudication, becomes very high.

5. H.R. 1510, 98th Cong., 1st Sess. (1983); *see also* S. 529, 98th Cong., 1st Sess. (1983)(Simpson & Mazolli Bill).

over the fair housing laws,[6] in fact, centers upon whether disinterested administrative law judges will hear those cases or whether they will continue to be heard in the over-burdened federal district courts.[7]

Congress has addressed the problems of the independence of administrative law judges in three separate statutes over the last ten years. It has created, in each instance, a use of judges as a true Article I judiciary by having the decisionmaking authority reside in different hands than those charged with policy.[8] All three instances involve programs within the Department of Labor. In each case, the Department of Labor has retained the policy, rulemaking, and administrative authorities, but adjudications have been moved to either independent agencies, such as the Federal Mine Safety Review Commission and the Occupational Safety and Health Review Commission, or to an agency housed within the Department, the Benefits Review Board, but maintaining a large degree of internal independence.[9] Appeals from decisions of these bodies are directly to appellate circuits.[10]

Congress's experimentation is by no means complete. We are witnessing today another of the grand movements in American politics where power and authority shift between the Executive Branch and the Congress. That shift has resulted in the last few years in a diminution of the power of the independent regulatory agencies and increase in the authority of the Executive Branch. Whereas twenty years ago the chairman of an independent regulatory agency was generally elected by his colleagues, today he is a Presidential appointee. It is not just a determination to reduce the level of regulation or to redirect the regulatory thrust, but a determination that those making decisions will be more responsive to the President than to the Congress. In almost every agency, the chairman now has a permanent appointment and has been vested with the entire power of the administration. The individual issues which are now being debated concerning administrative justice at both the state and fed-

6. *See* S. 1220, 98th Cong., 1st Sess. (1983)(proposed title: Fair Housing Amendment of 1983).

7. *See id.* § 6.

8. Federal Mine, Safety & Health Review Commission, 30 U.S.C. § 823 (Supp. V 1981); Benefits Review Board, 33 U.S.C. § 921(b) (1976); Occupational Safety & Health Review Commission, 29 U.S.C. § 661 (1976 & Supp. V 1981).

9. 30 U.S.C. § 823 (Supp. V 1981); 33 U.S.C. 921(b)(3) (1976); 29 U.S.C. § 661 (1976 & Supp. V 1981).

10. 30 U.S.C. § 816 (Supp. V 1981); 33 U.S.C. § 921(c) (1976); 29 U.S.C. § 660 (1976).

eral level must be viewed in the context of these shifting overall political balances and the effects that these shifts are having.

The accountability of judges is the second area of major activity. Concern for accountability has manifested in two areas. First in the implementation of peer review over the discipline of administrative law judges, and second, in a spate of cases seeking to discipline or remove judges for what one agency — the Social Security Administration — claims is a failure of judges to adequately perform their duties and functions. Several cases against judges are pending, and, as Professor Rosenblum notes in his analysis of the controversy over the APA standards of "good cause," implementation of any standard must be done in a manner consistent with the enhancement of the judge's independence and must not jeopardize his role.

None of the issues concerning a unified corps of administrative law judges at the state or federal levels is new.[11] The issues are fundamental, however, and are not a question of fine tuning of a system already working well. There have been numerous aberrations which, in the aggregate, may have caused the public to doubt whether those who try cases are in fact impartial and removed from the political exigencies that may skew their decisions away from solely those facts on the record and the applicable law. It is fundamental, for instance, whether or not judges are housed in the agencies that employ them. If the agency perceives that it has an ability to control its judges through its rules, and the public perceives that the agency insists on appointing only those that are "sensitive" or "responsive" to its needs, the public is not likely to perceive the system as fair.

Over the years the issues concerning a unified corps, how judges perform their function or how they are held accountable, which is the main thrust of the articles in this review, have operated on the assumption that an overriding necessity of the system is to maintain subject matter expertise. This enshrinement of one factor, albeit an important one, distorts the system's primary objective — the expeditious disposition of proceedings under a system that is fair and is believed by the public to be fair. The current system is not necessarily unfair in any given case, and the vast majority of cases that are disposed of are handled without great upset. But if one looks to the Congressional oversight hearings which periodically examine whether agencies are abiding by the requirements of non-interfer-

11. *See* S. Doc. No. 248, 79th Cong., 2d Sess. (1937), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT OF 1946, at 41-42 (1946).

ence with judges, there is a persistent trend in these reports showing an involvement which is not only unfair but frequently may border on the improper. The most recent report of the Senate Subcommittee on Social Security is only one of several reports about various agencies over many years, including the Federal Trade Commission and the Interstate Commerce Commission, which display "unusual" agency involvement.[12]

At the bottom, if subject matter expertise can be protected, no one could argue against reforms which will result in an enhancement of the public perception of fairness. This is where the debate principally lies, not in the obvious efficiencies of the use of personnel and physical resources, not in the petty concerns of some judges as to whether their current lifestyle is good or not good in their current agencies, not in the determination of chief judges as to what is comfortable for them personally, and not in an agency wanting its own procedural rules to enhance its own attorneys' chances of success or that it is good to bring one's own "sensitive" umpire to court.

Nor should we forget that this debate will not end merely because a "reform" is put in place today. There is no single answer that works well in every instance to balance how judges can be independent and accountable. There is no good answer to the question of how one evaluates a judge who is slow. Can anyone say that the judge who decides and issues forty cases a month but twenty come back on remand is better or worse than the judge who issues fifteen decisions a month and none are reversed? But, there can be no gainsaying that self-policing and peer review are better handled in the context of a unified corp or separate corp of judges than they are in situations where an agency having a stake in the outcome of a proceeding will be both the prosecutor, and possibly the judge, of the judge.

Several of the articles in this symposium are devoted in one form or another to the question of the *bona-fides* of a unified corps system — focused at this point on the federal government's possible experiment because of the introduction by Senator Howard Heflin of Senate bill 1275.[13] Several examine the state systems. This debate has been of great concern to the states, eight of which have passed varying degrees of a unified corps concept and two of which, New

12. *See* SUBCOMM. ON OVERSIGHT OF GOV'T MANAGEMENT OF THE SENATE COMM. ON GOV'TAL AFFAIRS, THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, S. REP. NO. 111, 98th Cong., 1st Sess. (1983).

13. 98th Cong., 1st Sess. (1983); 129 CONG. REC. S6610-13 (daily ed. May 12, 1983).

Jersey and Minnesota, have a corps which present models of how a unified system would work.[14] The most interesting aspect of this debate is that outside of the small "old boy" network of interested judges and agencies that hire administrative law judges, few members of the public — those who will be most affected by the outcome of the debate — are either interested or knowledgeable. What has been true so often in many of the areas that reflect a significant change in how the public will be treated, is that the debate is now being conducted necessarily with the view of those most affected in mind. There may be a groundswell of public opinion to stop the Social Security Administration from arbitrarily throwing off the disability roles disabled Americans, but, when the "hurt" stops, the cry for fixing the problem diminishes rapidly. Each of the reforms within the last decade has come because of strong interest groups having an issue and wanting their problem re-addressed. There are few public interest groups, however, which have reform of administrative procedures high on their list of priorities, and, more likely, most are not interested in pressing the point if it is to the detriment of their other principal issues. I would like to think that the large amount of writing on the subject is due to a general interest that has not been evidenced in the past rather than the fact that there are large numbers of law professors to write on the subject and a degree of visibility of administrative law judges which was not quite as evident in the past. I know better.

14. M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES 2 (1983).