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# HOW NECESSARY IS THE ADMINISTRATIVE LAW JUDGE?

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Having administrative law judges preside in administrative cases affecting individual rights and liabilities is being criticized today as an outmoded procedure except in "accusatory" cases where a person is charged with wrongdoing. The purpose of this article is to examine the arguments behind this criticism and to demonstrate that the alternative procedures which are proposed, contrary to the claims made for them, are not likely to improve the quality of decision-making, and can, in fact, destroy the effectiveness of the procedure by undermining public confidence in it.

## I. THE ADMINISTRATIVE LAW JUDGE

The administrative law judge is an employee of the agency over whose hearings he presides.<sup>1</sup> He is, however, largely independent of the agency. His pay is fixed by the Office of Personnel Management;<sup>2</sup> he can be removed only for good cause established and determined by the Merit Systems Protection Board after a hearing;<sup>3</sup> and his performance cannot be rated by the agency.<sup>4</sup> In addition, his impartiality is assured by a rigorous "separation of functions" which insulates him from any supervision or direction by agency employees who have taken part in the investigation or prosecution of the case being heard, and which also prohibits him from consulting *ex parte* with any person on any fact in issue.<sup>5</sup> The administrative law judge, however, is not the final decisionmaker. He plays only an in-

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1. 5 U.S.C. § 3105 (1982). On occasion, when an agency finds itself understaffed with administrative law judges, it may temporarily borrow a judge selected by the Office of Personnel Management from another agency. 5 U.S.C. § 3344 (1982).

2. *Id.* § 5362.

3. *Id.* § 7521.

4. *Id.* §§ 4302, 4303.

5. *Id.* § 554(d).

intermediate role. It is the agency which is the final decisionmaker and it has broad discretion in overruling the administrative law judge.<sup>6</sup>

## II. ADMINISTRATIVE HEARINGS

The use of independent hearing officials stems from the due process requirement that an agency must afford a person a hearing before it takes action affecting that person's liberty or property.<sup>7</sup> It was a response to the concern that agency employees, advocating a particular agency action against a claimant who disputed the propriety of the action, should not also act as the judge of that dispute. The final solution was a compromise between those who thought that there should be a complete separation between agencies that prosecute and agencies that decide, and those who feared that separating those who make policy from those who determine disputes regarding its application would frustrate the agency's ability to put its policies into effect.<sup>8</sup> Under the compromise embodied in the Administrative Procedure Act, a distinction is made between rulemaking and adjudication with different minimum procedural requirements for each.

In rulemaking, an independent hearing officer and the concomitant separation of functions is not required unless a regulatory statute specifically provides otherwise. This is true because rulemaking is regarded essentially as setting policy to govern future conduct.<sup>9</sup>

Adjudication, on the other hand, consists of those cases which terminate in the issuance of an order against a specific party; "order" being defined to include the grant, modification, or denial of a li-

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6. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489-97 (1951); and *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364-65 (1955) (rejecting the "clearly erroneous" standard for agency review of administrative law judge's decisions). See 5 U.S.C. § 557(b) (1982), "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule," and ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 83 (1947) [hereinafter cited as MANUAL]. In some recent statutes, review more closely approximates the clearly erroneous standard. See, e.g., 30 U.S.C. § 820 (1982), providing that initial decisions reviewed by the Federal Mine Safety and Health Review Commission shall be affirmed if supported by substantial evidence. Assuming that this is the same standard that is followed by the appellate courts in reviewing administrative decisions, the MSHRC would have to give an initial decision the same weight that a district court would have to give a jury verdict. See *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

7. *Morgan v. United States*, 304 U.S. 1, 14-15 (1938).

8. See Davis, *Separation of Functions in Administrative Agencies*, 61 HARV. L. REV. 389 (1948); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37 (1950); *Butz v. Economu*, 438 U.S. 478, 513-14 (1978).

9. 5 U.S.C. § 553 (1982); MANUAL, *supra* note 6, at 14.

cense or permit.<sup>10</sup> In such cases, the separation of functions requirement does not apply if the agency or one of its members presides over the adjudication. This is in recognition of the fact that the agency is to be the final arbiter of both policy and its application to specific cases.<sup>11</sup> As a practical matter, however, the sheer volume of cases generally precludes the agency or one of its members presiding over these cases. If the agency or one of its members does not preside, the presiding officer must be an administrative law judge (who originally had the title of "hearing examiner") and, except in applications for "initial licensing," the separation of functions requirement also applies.<sup>12</sup> In initial licensing, the administrative law judge presides over the conduct of the hearing but there is no separation of functions and the intermediate decision (initial or recommended) can be rendered by any responsible agency employee.<sup>13</sup> The reason for treating initial licensing in this fashion appears to have been that while the rights of individuals are involved in initial licensing cases as well as in other adjudications, initial licensing is also considered to have some of the policymaking characteristics of rulemaking.<sup>14</sup>

As to the hearings, themselves, rulemaking requires only notice of the proposed agency action and the opportunity to comment upon it.<sup>15</sup> There is no right to an oral hearing.<sup>16</sup> Adjudicative hearings, on the other hand, are modeled after the traditional judicial procedures for deciding controversies.<sup>17</sup> The party against whom the agency proposes to take action must be given notice of the issues of law and fact asserted to support the proposed agency action.<sup>18</sup> The party has the right to present its case by oral or documentary evidence, and to conduct cross-examination.<sup>19</sup> The evidence is presented systematically in accordance with established rules allocating the burden of proof.<sup>20</sup> The decision rendered must not only be based upon the record, but the facts relied on must be supported by the evidence of

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10. See definition of "Adjudication" in 5 U.S.C. § 551 (1982).

11. 5 U.S.C. § 554(d) (1982); MANUAL, *supra* note 6, at 58.

12. 5 U.S.C. § 554(d) (1982).

13. 5 U.S.C. § 557(b) (1982).

14. *Id.*; MANUAL, *supra* note 6, at 50-51.

15. 5 U.S.C. § 553 (1982).

16. *See id.* Notice and comment can satisfy the statutory requirement for a hearing in an appropriate case even though the only participation allowed is the submission of written views. *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973).

17. *See id.* § 554.

18. *Id.* § 556(b)(3).

19. *Id.* § 556(d).

20. *Id.*

record,<sup>21</sup> a requirement not necessarily present in rulemaking.<sup>22</sup> Finally, of course, a hearing not presided over by the agency or one of its members, must be presided over by an administrative law judge.<sup>23</sup>

### III. THE FUNCTION OF THE ADMINISTRATIVE LAW JUDGE

In presiding over adjudicative hearings, the first duty of the administrative law judge, and one certainly important to the maintenance of public confidence in the process, is to assure that the parties are treated fairly and that rulings on requests and objections made by the parties are even-handed and impartial. Second, and of equal importance in those cases where the administrative law judge does render a decision, is the duty to state his findings on all issues of law, fact and discretion with supporting reasons.<sup>24</sup> There is value to both the public and the agency in having the administrative law judge preside over agency adjudications: The judge is free from any institutional pressures influencing a particular result. This is most important, of course, in the finding of facts. On questions of policy, the judge must follow agency policy as reflected in published agency rulings. Even with regard to questions of policy, however, there can be conflicting policies to apply to a given set of facts, or questions may be raised as to how a particular policy should be interpreted. The administrative law judge can perform a useful service in sharpening the policy issues for the agency's consideration in these cases.<sup>25</sup>

While the agency has broad discretion to overrule the administrative law judge, ignoring his decision entirely may result in reversal on judicial review.<sup>26</sup> The Supreme Court has stated that the administrative law judge's findings should be given such weight as "in reason and in light of judicial experience they deserve."<sup>27</sup> In practice, this has meant that special weight has been given the administrative law judge's credibility findings based upon his observation of the

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21. *See id.* §§ 556(d); 557(c); 706(2)(F). For the proposition that an agency is not tied to the record in informal rulemaking see *MANUAL*, *supra* note 6, at 31-32. The courts, however, have been reluctant to permit an agency to rely on factual material which was not made part of the rulemaking record before the agency and available for comment, although in a few instances they have allowed this. *See, e.g.*, *Nat'l Ass'n of Demolition Contractors v. Costle*, 565 F.2d 748, 752 (D.C. Cir. 1977).

22. *See id.* § 553.

23. 5 U.S.C. § 556(b) (1982).

24. *See* 5 U.S.C. § 557(c) (1982).

25. *See* *MANUAL*, *supra* note 6, at 84.

26. *ASG Indus., Inc. v. United States*, 548 F.2d 147 (6th Cir. 1977).

27. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496-97 (1951).

witnesses.<sup>28</sup> Findings that are based on the inherent probative value of testimony or documents and the inferences to be drawn from the primary facts are generally entitled to less weight than the credibility findings, but must still be considered and, where not followed, the agency should either expressly give its reasons for its disagreement with the administrative law judge, or the basis for the disagreement should be apparent from the agency's decision.<sup>29</sup> On questions of law or policy, the administrative law judge's conclusions probably have little if any weight. Nevertheless, ventilation of the objections and reasons for the policy or law being applied can expose flaws not previously recognized, and it would be sound practice for the agency to give careful thought to the administrative law judge's conclusions, since a reviewing court may find the judge's reasoning persuasive.<sup>30</sup>

In sum, the administrative law judge protects those who deal with the agency from arbitrary or unwise action by providing the agency and the reviewing court with an impartial assessment of the merits of the objections made to the agency's action.

#### IV. THE ARGUMENTS FOR DISPENSING WITH THE ADMINISTRATIVE LAW JUDGE IN "NON-ACCUSATORY" CASES

As part of a broader attack upon the adjudicative proceeding as a method for decisionmaking, Mr. William Pedersen and Professor Davis have advocated dispensing with the use of administrative law judges in certain proceedings on the grounds that many complex technical issues which are now being decided by adjudication are really policy or "legislative" issues.<sup>31</sup> To have such issues resolved by procedures which require separation of functions and proof through witnesses who are subject to cross-examination is thought to be unduly time consuming, a waste of resources and generally not helpful to the agency in reaching a final decision.<sup>32</sup>

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28. *Id.* at 496-97.

29. *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 585-89 (D.C. Cir. 1970); *NLRB v. Interboro Contractors Inc.*, 388 F.2d 495, 501 (2d Cir. 1967).

30. *See Russell Stover Candies, Inc. v. FTC*, Trade Reg. Rep. (CCH) [1983-2 Trade Cases] Par. 65,640 (8th Cir. 1983); *ASG Indus., Inc. v. United States*, 548 F.2d 147 (6th Cir. 1977).

31. 2 K.C. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 12.7, 12.8 (2d ed. 1979); 3 K.C. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 14.2 (2d ed. 1980); *see generally* Pedersen, *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991 (1978).

32. 2 K.C. DAVIS, *supra* note 31, at §§ 12.7, 12.8; 3 K.C. DAVIS, *supra* note 31, at § 14.2; *see* Pedersen, *supra* note 31, at 1008-10.

To evaluate the arguments, two concepts must be considered: First, the distinction between "legislative" and "adjudicative" facts; and second, the distinction between "accusatory" and "non-accusatory" hearings.

"Adjudicative" facts are those facts which are peculiar to a particular party while "legislative" facts are the background facts that the agency considers in formulating policy. Professor Kenneth Culp Davis, who originally framed the analysis, has cited *Londoner v. Denver*,<sup>33</sup> and *Bi-Metallic Investment Co. v. State Board of Equalization*,<sup>34</sup> as illustrative of the difference between the two kinds of facts.<sup>35</sup> The Supreme Court in *United States v. Florida East Coast Railway Co.*,<sup>36</sup> used these two cases to distinguish between rulemaking and adjudication, but the Court's language also sheds light upon what it would regard as adjudicative facts and what it would regard as legislative facts:

The basic distinction between rulemaking and adjudication is illustrated by this Court's treatment of two related cases under the Due Process Clause of the Fourteenth Amendment. In *Londoner v. Denver*, . . . the Court held that due process had not been accorded a landowner who objected to the amount assessed against his land as its share of the benefit resulting from the paving of the street. Local procedure had accorded him the right to file a written complaint and objection, but not to be heard orally. This Court held that due process of law required that he "have the right to support his allegations by argument however brief, and, if need be, by proof however informal." . . . But in the later case of *Bi-Metallic Investment Co. v. State Board of Equalization*, . . . the Court held that no hearing at all was constitutionally required prior to a decision by state tax officers in Colorado to increase the valuation of all taxable property in Denver by a substantial percentage. The Court distinguished *Londoner* by stating that there a small number of persons "exceptionally affected, in each case upon individual grounds."<sup>37</sup>

Adjudicative facts were those relating to the specific assessment against the plaintiff in *Londoner* while legislative facts were those that the state officials took into account in increasing the assessments generally in *Bi-Metallic Investment*.

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33. 210 U.S. 373 (1908).

34. 239 U.S. 441 (1915).

35. 3 K.C. DAVIS, *supra* note 31, at §§ 14.5, 15.4.

36. 410 U.S. 224 (1973).

37. *Id.* at 244-45.

*Florida East Coast Railway*, itself, was an action by certain railway companies challenging a rule promulgated by the Interstate Commerce Commission (ICC) setting incentive per diem rates to speed the return of extra freight cars and to encourage the purchase of new ones.<sup>38</sup> The rule was prompted by a chronic freight car shortage. The existence of the shortage was a legislative fact. Indeed the shortage was so well known that Congress enacted legislation giving the ICC authority to set incentive rates.<sup>39</sup> The schedule of per diem rates was also found by the Supreme Court to be a legislative fact because it applied to all the railroads, and it denied the railroads an adjudicative hearing on those facts even though it was claimed that the burden imposed by ICC's rates would be a greater imposition to some of the railroads than to the others.<sup>40</sup>

The real focus of *Florida East Coast Railway* is on the general applicability of the rates to all railroads. What about an individual railroad which claims that the rates should not apply to it because of its peculiar facts? Under the Supreme Court's analysis, it would seem that the company would be entitled to an adjudicative hearing on this question. It is in such a case that the distinction between "accusatory" and "non-accusatory" cases would arise, for the issue would not be whether the party has engaged in misconduct but only whether it is entitled to be treated differently than the other companies. Similarly, a case in which the agency seeks to revoke or modify a permit for technical reasons and not for any wrongdoing by the party would also be non-accusatory. The argument is made that in such cases, notwithstanding the fact that the rights of individual parties are being decided, the decision is really based on the determination of legislative facts for which adjudicative proceedings are not appropriate.<sup>41</sup> Let us examine more closely the merits of this argument.

Initially it should be noted that an adjudicative hearing on a waiver from a rule is not concerned with the merits of the rule, but only with whether its application under a particular set of facts would be arbitrary. Whether such application would be arbitrary is determined by the policy served by the rule as set forth in the rule's statement of basis and purpose. There would be a right to an adjudicative hearing only if the facts urged to support the waiver were dis-

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38. *Id.*

39. *Id.* at 225-26.

40. *Id.* at 225 n.1.

41. Pedersen, *supra* note 31, at 994-96.



puted. If the facts urged in support of the waiver were not disputed, there would be no need for an adjudicative hearing to resolve questions of policy.<sup>42</sup> Similar considerations would also apply to persons who contested their coverage under a rule on the grounds that the facts with respect to them were completely different from the facts considered by the agency in promulgating the rule.

The right to an adjudicative hearing on the facts can also differ depending upon whether or not the agency is the moving party. No useful purpose would be served by giving a party who applies for a waiver or permit a hearing on the denial of the application when the action is based solely upon undisputed facts produced by the applicant. On the other hand, when the agency seeks to move against a party on the basis of facts that it believes justifies the action, the agency's refusal to accord a party an adjudicative hearing should be more carefully scrutinized. Without a hearing on the facts a party may have no real protection against arbitrary or misguided action by the agency.<sup>43</sup> In short, the party that has the burden of producing evidence to make a *prima facie* case (as distinguished from the burden of persuasion)<sup>44</sup> can be an important factor in determining the hearing rights of the parties.

The criticism is directed at the use of adjudicative proceedings to resolve disputes over difficult technical issues where the data

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42. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956); *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191 (D.C. Cir. 1983).

43. Compare *Cooper Laboratories v. Comm'r*, 501 F.2d 772 (D.C. Cir. 1974) with *Pactra Indus. v. Products Safety Comm'n.*, 555 F.2d 677 (9th Cir. 1977). In *Cooper Laboratories*, the a new drug application was summarily rejected without a hearing because of the applicant's failure to produce substantial evidence showing that the drug was safe and effective. Under the law the burden was on the new drug applicant to come forward with such evidence, and the Food & Drug Administration's authority to require an evidentiary showing meeting specific standards in order to be entitled to an evidentiary hearing on the rejection of an application had been upheld by the Supreme Court. See *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973) (dealing with the standards required to show the safety and efficiency of new drugs). In *Pactra Industries* it was held that the Consumer Products Safety Commission could not summarily reject objections to a ban it had issued against the use of vinyl chloride monomer. The ban had been based on scientific evidence indicating that the vinyl chloride was a carcinogen. In this instance the burden was on the CPSC to establish the validity of its ban and the court held that the agency could not summarily dispose of the case without a hearing when the scientific evidence was disputed. 555 F.2d at 684-85.

44. On the distinction between the burden of producing evidence and the burden of persuasion, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06 (1973); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 999, 1012-18 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 925 (1977).

available is likely to be incomplete.<sup>45</sup> Ideally, such an issue would be decided by gathering the best qualified experts within the agency and arriving at a consensus as to what action most closely would accord with the statutory objectives. The decision thus made would be an "institutional" one, and not simply the product of one person. Such a view, however, overlooks the practical way in which an agency usually works. Usually, the agency action is taken only after the matter has been investigated and the action recommended by agency employees. It would be unrealistic to ignore the danger that, in the process of making the investigation and securing agency approval, those employees to some extent will have become committed to a position. From the viewpoint of the party who opposes the agency action, the agency is likely to be regarded as much an adversary as if the proceeding were accusatory, especially if the agency action turns on sharply disputed factual matters. Such a party may be, for example, one who believes that such action does not adequately protect human health or the environment, or who believes that such action will unnecessarily restrict his freedom to market a product or to construct a plant. In each of these cases, that the party has not been charged with wrongdoing may seem minor when compared to the consequences of the agency's action to that person's health or livelihood.

It is, of course, true that the ultimate decision as to which side the agency takes in a scientific dispute is likely to be more a policy choice than a factual one, so that it should be judged solely by whether it is consistent with the statute and reasonable.<sup>46</sup> This, however, should not be a reason for reducing the hearing rights of the parties with respect to developing the facts and meeting the evidence opposed to their position. A good example is the case of *Seacoast Anti-Pollution League v. Costle*,<sup>47</sup> in which a nuclear-powered electrical utility plant applied for a permit to discharge heated water into the surrounding waters. The issue was not whether heated water is a pollutant but whether the discharge of heated water in *this instance* would injure the marine life and biota in the vicinity of the plant.<sup>48</sup> The parties opposing the building of the plant in that area were public interest groups. The Administrator, in deciding that the discharge

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45. Pedersen, *supra* note 31, at 995-96; 2 K.C. DAVIS, *supra*, note 31, at §§ 12.7, 12.8.

46. See *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 656 (1980); *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 476 (D.C. Cir. 1974).

47. 572 F.2d 872 (1978).

48. *Id.* at 874-75.

would not injure the environment, relied upon the report of a panel of agency experts which had not been made available to the parties and contained references to material not in the record. On review, the court noted that the issues in the case turned upon the credibility of the experts, who should be subject to cross-examination for a complete disclosure of the factual grounds for their conclusions.<sup>49</sup> The court also found that the facts upon which the opinions were based must be facts in the record and not extra-record information of which the experts had knowledge but which had not been disclosed to the other parties.<sup>50</sup>

The court obviously believed that developing the facts through adjudicative procedures was important to ensure not only that the agency had all relevant facts before it, but also that the reviewing court had a complete record.<sup>51</sup> Cross-examination of scientists cannot be dismissed as a worthless exercise, for it is a most effective way of disclosing the factual underpinning of a scientific opinion and the assumptions that were made in arriving at it.

Professor Davis faults the court for requiring trial-type procedures to resolve what he regards as a legislative fact.<sup>52</sup> But the issue was not the general proposition as to whether heated water was a pollutant, but the much narrower question of whether the discharges from that plant would be a pollutant in that particular environmental setting. The public utility was seeking to show why they would not. Thus, the court's characterization of the factual issues as sharply

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49. *Id.* at 875, 881-82.

50. *Id.* at 880, 881-82.

51. The court stated "[i]f determinations such as the one at issue here are not made on the record, then the fate of the Hampton-Seabrook Estuary could be decided on the basis of evidence that a court would never see or, what is worse, that a court could not be sure existed." *Id.* at 877.

52. 2 K.C. DAVIS, *supra* note 31, at § 12.7. Professor Davis cites the case of *Taylor v. District Engineers*, 567 F.2d 1332 (5th Cir. 1978), as an example of how *Seacoast* should have been decided. It is questionable whether the comparison is an apt one. *Taylor* involved the denial by the Corps of Engineers of a permit to build an access highway over navigable waters. The statute, 33 U.S.C. §§ 403, 406 (1976 & Supp. V 1981), made no provision for a hearing before the Corps on the permit, and could be construed as vesting complete discretion in the Corps subject only to some limited court review to determine whether the denial of a permit was arbitrary. *See Di Vosta Rentals, Inc. v. Lee*, 488 F.2d 674 (5th Cir. 1973), cited by the court in *Taylor*, 567 F.2d at 1336. In *Seabrook*, the statute expressly required a hearing. (The court did not decide whether the case was brought under 33 U.S.C. § 1326 or § 1342, but both required a public hearing. *See* 572 F.2d at 875 n.3.) Review of the administrator's decision was in the court of appeals on the evidentiary record made before the agency. *See* 33 U.S.C. § 1369(b) (1976). Thus, the court had ample grounds for ruling that the hearing required was an adjudicative hearing.

contested and specific to the parties involved—in short, the typical kind of adjudicative facts—seems accurate.<sup>53</sup>

Davis and Pederson also argue that, even when the issues are adjudicative, the separation of functions should be dispensed with because it precludes the agency from taking advantage of its institutional expertise.<sup>54</sup> Since that expertise most likely had input into the agency's position previously, it means either that those who were responsible for formulating the agency's position initially will be judges on the merits of the dispute or the matter will be reviewed by some other agency employee. How neutral a reviewing employee may be depends upon the internal organization of the agency and the relationship between the employees within the agency. For example, if the reviewing employee served under the same supervisor who took part in deciding the agency's initial position, the reviewing employee might be reluctant to take a position which would conflict with that supervisor. Further, the reviewing employee might be reluctant to overrule the original employees who participated in the initial policy decision, if by doing so the reviewing employee may meet with hostility. This will be true particularly if they meet on a daily basis or if they are working together on other matters. It goes without saying, of course, that the administrative law judge is not subject to any such pressures.

Another objection to adjudicative hearings is that they are expensive and time-consuming.<sup>55</sup> It is questionable, however, whether informal proceedings would be any less expensive. Such proceedings

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53. See 572 F.2d at 876.

54. Pedersen, *supra* note 31, at 996-97, 1008-09, 3 K.C. DAVIS, *supra* note 31, at § 17.15.

55. Pedersen directs his objection to the expense incurred by having specialized hearing officers, and concedes that the delay caused by having adjudicative hearings is relatively minor. Pederson, *supra* note 31, at 1008-10. One solution to the expense of each agency having its own administrative law judges is to establish a separate corps of administrative law judges such as is proposed by S. 1275, 98th Cong. 1st Sess. (1983). Professor Davis also objects to the separation of functions as an inefficient use of agency employees but also considers hearings permitting the use of cross-examination to be an unnecessarily expensive way to try legislative facts. 2 K.C. DAVIS, *supra* note 31, at § 12.8 at 441. As to factual questions such as the existence of a freight car shortage, this may be true. The difficulty with the analysis, which the author hopes is made clear by this article, is that the line between what facts are "adjudicative" and what are "legislative" is not always clear-cut. Insofar as the relative expense of adjudicative versus less formal procedures is a factor in determining the hearing rights of the parties, it is to be noted that the Supreme Court has approached the question of a party's hearing rights in Social Security disability payment cases by balancing the cost to the Government against the benefits to the other side. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). See also, Friendly, *Some Kind of a Hearing*, 123 U. PA. L. REV. 1267 (1975).

involve not only presenting written submissions but also the opportunity to orally comment on the agency action which is often permitted if the agency believes the case is important or of special interest to the public. In fact, the only substantial additional expense created by an adjudicatory hearing before an administrative law judge is the expense of bringing witnesses to the place of hearing and making them available for cross-examination. To say that cross-examination is likely to be unproductive really reflects an unnecessarily skeptical attitude toward finding the truth in scientific controversies.<sup>56</sup> The validity of scientific opinions rests upon the soundness of deductions drawn from empirical data, a full disclosure of the facts relied upon and the reasoning behind the expert conclusions. Such inquiry can only aid the agency in reaching an informed opinion about the relative merits of each side. In short, while an agency should be given a good deal of latitude in deciding policy, this should not be a grounds for weakening the fact-finding process by reducing the availability of cross-examination.

Finally, the argument is made that, if cross-examination is necessary to develop the record, this can be done more efficiently by a panel of experts presiding as an inquisitorial board than can be accomplished by lawyers conducting cross-examination before another lawyer who is presiding as an administrative law judge.<sup>57</sup> If expertise is required on the part of the presiding officer, an answer would be to have administrative law judges, who are either expert in the regulatory fields in which the agencies are involved or who could call upon expert advice for assistance. Certainly, no one can quarrel with permitting administrative law judges to use expert advice, provided it does not compromise their independence. Whether the administrative law judge should be an expert in the regulatory field is a different question; all that need be said is that the importance of expertise on the part of the presiding officer may be overemphasized. It is rare that the resolution of a scientific dispute involves matters so arcane that they cannot be explained in terms comprehensible to a layman of ordinary intelligence. Indeed, it is a useful exercise to require that they be explained for it will not only aid the reviewing court whose members may not have expert knowledge in the field, but it may also eliminate reliance on technical jargon and help them reach a clearer understanding of the issues.

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56. This seems to be the real import of Pedersen's comment that when the facts are difficult to ascertain, decisions are dictated by policy rather than by the facts. See Pedersen *supra* note 31, at 1012.

57. Pedersen, *supra* note 31, at 1019, 1032-33.

## V. CONCLUSION

The administrative agency with its combination of prosecutorial, legislative and adjudicative functions presently has a good deal of flexibility in the way it carries out its mission. But the agency can only be effective if the public has confidence in the process, a confidence created by the conviction that they have been treated fairly and that the outcome is reasonable, even though they may be unhappy about the ultimate judgment. The administrative law judge helps to preserve the proper balance between the prosecutorial, adjudicative and legislative functions of the agency. If the agency, in its zeal to be more efficient, overrides adjudicative safeguards in favor of strengthening its prosecutorial or legislative functions, the courts may well feel the need to restore the balance by exercising greater judicial oversight, with the net result being to simply transfer the cost of litigation from the agencies to the courts. It is also possible that Congress may be persuaded by public opinion to restrain the agency's powers.