

# ADDRESS

## ORGANIZING ADJUDICATION: REFLECTIONS ON THE PROSPECT FOR ARTISANS IN THE AGE OF ROBOTS

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### INTRODUCTION

Today's discussions regarding administrative adjudication are productive because they focus on the sorts of issues that often exercise lawyers when hearing rights are at issue. We are concerned with protecting adjudicatory impartiality by upgrading the status of administrative judges, by separating them as much as possible from their agencies, and by protecting them from those forms of importuning that lawyers devoted to the sanctity of adjudicatory records call *ex parte* contacts.

It is only natural for lawyers to be concerned with the maintenance of the neutrality of adjudicators and the exclusivity of the record. We want administrative deciders to focus in a particularized way on the facts and circumstances that relate to our clients. This sort of contextual, interpretive inquiry—hand-tailored to individual cases—epitomizes our craft. We view ourselves, and the adjudicators who hear administrative cases, as artisans as well as professionals.

We should, however, reflect for a few moments on the extent to which this lawyer's vision of adjudication threatens a competing managerial vision of effective administration. For adjudication, at least in the form of adversarial, trial-type proceedings, is profoundly

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anti-bureaucratic. Administrators would prefer to think of administrative adjudicators as a part of the administration team. They feel an institutional responsibility for agency decisions, a responsibility that is imperiled by adjudicatory impartiality. Too much of the latter and adjudicators can make policy to suit themselves, regulated parties, or the agency's clientele, rather than promoting the program of the agency in whose name they adjudicate.

The fear of runaway adjudicators reflects but one aspect of the tension between adjudication and administration. Administrators are concerned with general administrative programs, not with particularized inquiries. Rather than viewing each case as a unique opportunity to dispense individualized justice, as a job to be done well in and for itself, administrators are likely to see adjudication merely as the means for implementing rules. In their heart of hearts they would prefer rule-bound application of agency policy to innovative adjudicatory problem solving.

Nor are these formal adjudication's only defects when viewed from a managerial perspective. Adjudication not only breaks down hierarchy and decentralizes agency discretion, it is also notoriously slow and expensive. Indeed, *administrative* adjudication is often conceived of as an alternative to *civil* or *criminal* adjudication precisely because of a desire to avoid expense and delay. From the administrative perspective, therefore, adjudication is work better performed by robots than by artisans. Continuous tension between adjudication and administration is unavoidable.<sup>1</sup>

How that tension is resolved, or managed, depends on the organization of adjudication within particular agencies. And, because an agency's internal structures, processes, and decisional techniques are often very much within the control of administrators, it is highly likely that the more delay, expense, and separation from agency control we build into adjudicatory systems, the more administrators will seek to banish adjudication to the fringes of their agencies' activities. Or, I should say more properly, the more they will attempt to do so within the confines of administrative law. Moreover, although administrative law may be highly protective of adjudicatory rights where they exist, it is quite liberal in allowing administrators to organize implementation in ways that, to say the least, economize on adjudicatory resources. Let me give a few examples of agency innovation designed to deal with one or another

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1. For a more extended discussion of this point, see generally J. MASHAW, *BUREAUCRATIC JUSTICE* (1983).

administrative problems engendered by the requirement of a formal hearing process.

### I. AVOIDING ADJUDICATORY DELAY

In the 1962 New Drug Amendments,<sup>2</sup> Congress gave the Food and Drug Administration a truly daunting task. Not only was it assigned to determine whether all new drugs were effective as well as safe in its future licensing activities, the FDA was commanded to remove from the market existing drugs for which there was no "substantial evidence" of efficacy. This all sounds reasonable enough until one learns that at the time the legislation was passed there were thousands of drugs on the market whose efficacy was uncertain. Moreover, under the statute, no drug could be removed for lack of efficacy prior to a full trial-type hearing on the matter if the drug's manufacturer requested one. Demonstrating the generosity for which it is notorious among federal administrators, Congress gave the agency a whole two years to accomplish this feat using its massive corps of administrative law judges, which numbered exactly two.

If these simple facts were not enough to convince the agency that its task was impossible, the FDA was also an organization that had significant experience with the delays attendant to formal trial process. One of its administrative law judges had just spent the past decade tied up in the infamous "peanut butter hearing" to determine the approved recipe for peanut butter. Although technically utilizing rulemaking proceedings, the FDA's implementation of its food constituency policy was also one that the Congress had burdened with formal hearing requirements.<sup>3</sup>

The story of how the FDA coped with the problem of retrospective drug efficacy review is a long one (it took the FDA twenty years, rather than two years, to accomplish its task) and involves many special features of drug regulation. Briefly put, the agency hit on a device for virtually eliminating all hearings from its regulatory process. In oversimplified terms, the device was summary judgment.

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2. For a general description of the drug approval process and the changes wrought by the 1962 amendments, see Note, *Drug Efficacy in the 1962 Drug Amendments*, 60 GEO. L.J. 185, 192-222 (1971). See generally R. HARRIS, *THE REAL VOICE* (1964); P. TEMIN, *TAKING YOUR MEDICINE: DRUG REGULATION IN THE UNITED STATES* (1980).

3. See Hamilton, *Rulemaking on a Record by the Federal Food and Drug Administration*, 50 TEX. L. REV. 1132 (1972).

First, the agency defined "substantial evidence" in a highly rigorous fashion. In essence, it demanded that drugs be shown to be effective as well as safe by a large-scale clinical study involving hundreds (sometimes thousands) of patients and employing exquisite scientific methods. Absent this type of study, the agency decided, a drug's efficacy would not be supported by the "adequate and well-controlled" evidence that Congress had required. The agency well understood that virtually none of the drugs then on the market had been subjected to this form of demanding study.

The agency then adopted a summary judgment rule.<sup>4</sup> In essence, it stated that if a manufacturer failed to submit an "adequate and well-controlled" study in support of the effectiveness of its drug, the drug was to be removed from the market.<sup>5</sup> Moreover, if the manufacturer demanded a hearing to determine the drug's efficacy, that hearing would be convened only if the manufacturer had made an offer of "substantial evidence" in support of continued marketing.<sup>6</sup> And, by "substantial evidence" the agency meant, of course, an "adequate and well-controlled clinical study."<sup>7</sup>

Although the circuit courts were initially skeptical of this strong summary judgment process,<sup>8</sup> the Supreme Court approved it.<sup>9</sup> In practical effect, summary judgment in this form eliminated hearings from the drug approval and removal processes. If a manufacturer submitted "substantial evidence," then it was entitled to approval of its drug preparation. If it failed to supply "substantial evidence," then it had offered no facts upon which a grant of approval could be based. In that circumstance, there would be nothing "material" to talk about at a hearing. Hence, the agency would issue a summary judgment order against it. Through this device (and others), the agency avoided all but a handful of hearings over the twenty-year life of the drug efficacy review process.<sup>10</sup>

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4. The agency's summary judgment regulations are presently codified at 21 C.F.R. § 314.200(a) (1991). They were not finally issued until nearly eight years after the statute was passed. 35 Fed. Reg. 7251 (1970) (regulations originally codified at 21 C.F.R. § 130.14).

5. 35 Fed. Reg. 7251 (1970).

6. *Id.*

7. *Id.*

8. *Cf. Hynson, Westcott & Dunning, Inc. v. Richardson*, 461 F.2d 215, 219-22 (4th Cir. 1972), *modified*, 412 U.S. 609 (1973); *USV Pharmaceutical Corp. v. Richardson*, 461 F.2d 223 (4th Cir. 1972), *aff'd*, 412 U.S. 609 (1973).

9. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 622 (1973).

10. For a more extended discussion, see P. HUTT & R. MERRILL, *FOOD AND DRUG LAW* 477-87 (1991); Ames & McCracken, *Framing Regulatory Standards to*

## II. REASSERTING HIERARCHY

Formal adjudication poses quite different problems for an agency like the Social Security Administration. Although delay is a concern, the core issue for the SSA is how to run a national program with consistent eligibility standards when the adjudication of several million claims per year is carried out by thousands of adjudicatory personnel. This is a particular problem in the disability program. The disability statute makes a large number of facts relevant to each case under a standard for judgment that is subject to enormous variance in its concrete application.

Although variance is something of a problem with respect to the state agency adjudicators—nearly ten thousand of them—who make the first-level decisions in disability cases, we will focus here on the seven-hundred-plus administrative law judges who hear *de novo* appeals from state agency denials; for, at the ALJ level, the variance in results has been clearly documented. While the average award rate of administrative law judges in disability cases has for the past decade ranged between roughly fifty and sixty percent, the distribution of award rates across the whole of the administrative law judge corps shows very substantial interpretive disagreement. At the extremes, some administrative law judges routinely award benefits in only eight to twelve percent of their cases, while others, at the other end of the distribution, make awards in eighty-four to eighty-eight percent of the claims that come before them. There is no reason to believe that “stingy” administrative law judges are seeing a subset of the population that is less impaired than, or is otherwise systematically different from, the subset seen by their “generous” colleagues.<sup>11</sup>

After a moment's reflection, it is not too surprising that there is a high level of inconsistency in award rates in this program. These are fact-based cases that are, in essence, being submitted to single-member juries. Anglo-American legal processes use multimember juries, in part, to cut down on interpretive variance. However, using multimember panels of administrative law judges to decide hundreds of thousands of disability cases would be extremely expensive.

An administration faced with this problem of variance could shrug its bureaucratic shoulders and chalk up whatever level of in-

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*Avoid Formal Adjudication: The FDA as a Case Study*, 64 CALIF. L. REV. 14, 17-49 (1976).

11. See J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS 21 (1978).

consistency was produced to the costs of adjudicatory independence. However, this would not necessarily be a responsible reaction. After all, what is to be said for a system in which the determination of who gets a disability award may be more a function of who decides the case than how that case stacks up against the situations of other claimants?

The Social Security Administration has actually tried several approaches to the problem of ALJ inconsistency. It has tried to make decisionmaking more "institutional" by providing administrative law judges with a staff of opinion writers. It has sought to give specific feedback on the quality of decisions through a national quality assurance system. Additionally, it has provided counseling and training to "poor performers." All of these efforts have met with stiff resistance from the administrative law judges in the form of political appeals to Congress and legal appeals to the judiciary in the name of preserving adjudicatory independence.<sup>12</sup> It is probably fair to say that the "managerial" strategy has failed. However, consistency can be pursued by other means. If interpreters cannot be taught to interpret alike, then perhaps most of the contextuality or interpretiveness that goes into making a disability decision can be eliminated. Decisions can, by rule, be made more formulaic and, to that degree, less particularized. If everyone uses the same formula, the results should be more consistent.

The SSA has formalized this approach in what are now called its "grid regulations."<sup>13</sup> Those regulations take the relevant characteristics of claimants—their residual functional capacity, age, education, and work experience—and array them on a chart. Having found that a claimant has a particular residual functional capacity (defined in accordance with the Bureau of Labor's Dictionary of Occupational Titles), and has a particular age, education level, and prior work experience, the administrative law judge can simply read out the result in the case. In the final column of the chart, or "grid," the Social Security Administration has specified for every combination of these factors a decision—"disabled" or "not disabled."

To be sure, this approach may squeeze a fair amount of testimony and evidence out of the ALJ proceeding that claimants be-

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12. For a description of the administrative law judges' complaints that these policies interfered with adjudicatory independence, see *Nash v. Califano*, 613 F.2d 10, 12-14 (2d Cir. 1980).

13. 43 Fed. Reg. 55349 (1978). These rules are codified in 20 C.F.R. Part 404 (1991).

lieve to be relevant. It denies them specific notice of the sorts of jobs in the national economy that they are thought capable of performing and an opportunity to rebut the testimony of the "vocational experts" who formerly provided that information to the administrative law judge. To that degree, claimants may feel that they are not being given the fully individualized hearing to which they are entitled under the Social Security Act. The Supreme Court, nevertheless, has approved the grid regulations as a standard exercise of administrative policy-making by rule.<sup>14</sup> Although the regulations clearly limit the discretion of administrative law judges, that limitation was thought to be appropriate. The interpretation of the statute, including the subsidiary policy judgments that necessarily go into that interpretation, is the responsibility of the Social Security Administration or, formally, the Secretary of Health and Human Services. Indeed, as the famous *Vermont Yankee*<sup>15</sup> case reveals, the Supreme Court has been very sympathetic to the introduction of hierarchical control of policy by rule when administrative adjudication threatens consistency through the decentralized exercise of discretion.

The techniques of recapturing policy discretion from independent adjudicators are not exhausted by rulemaking. The National Labor Relations Board, which notoriously avoids rules, nevertheless manages to maintain a degree of policy control over its adjudicators by introducing evidentiary "skews" into labor law adjudication. Hence, for example, although it might be a "nice" question in every case whether an employer's unwillingness to supply a complete list of the names and addresses of employees to union organizers interferes with the union's right to organize, the Board has decided that this unwillingness always interferes and that such lists must be supplied. Although technically an adjudication, this bright-line precedent operates like a rule to unify the decisions of NLRB adjudicators.<sup>16</sup>

The Board may introduce more subtle skews as well. By consistently overturning administrative law judge findings, for example, that employer activity which *might* have interfered with union collective bargaining rights did not in fact do so, the Board introduces

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14. *Heckler v. Campbell*, 461 U.S. 458, 470 (1983).

15. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 539-49 (1978).

16. Indeed, this rule is so "rulish" that it was unsuccessfully challenged as a rule masquerading as an adjudication. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 762-66 (1969).

a presumption of irregularity based on certain salient facts. Moreover, even though the administrative law judge who "lived with the case" and judged it in terms of the overall context might disagree, the Board's determinations have been routinely upheld under the Federal Administrative Procedure Act.<sup>17</sup> Although that statute requires that the Board take account of the whole record, including the findings of the administrative law judge, it also provides that the agency shall—on review of a tentative or initial decision by the administrative law judge—retain all the powers that it would have had had it heard the case initially itself.<sup>18</sup> Through that provision, the Administrative Procedure Act pays homage to the administrative desire to maintain policy centralization in the face of decentralized adjudication.

### III. CUTTING COSTS AND OTHER THINGS BESIDES

Although the Food and Drug Administration, the Social Security Administration, and the National Labor Relations Board often chafe under the budgetary restrictions on administration imposed by Congress, they are rich beyond the dreams of avarice compared to state welfare administrators. Ironically it is there, in state welfare administration, that we find the most important, or most famous, case on administrative adjudication in American jurisprudence—*Goldberg v. Kelly*.<sup>19</sup> Although the formality imposed on welfare adjudication by *Goldberg* is considerably less than that conceived of in the formal hearing requirements of the Federal Administrative Procedure Act, the elements of a fair hearing prescribed by that case are impressive enough. Moreover, those requirements were to be implemented by welfare administrators who are routinely overburdened by claimant demands yet starved for fiscal protein.

Indeed, as welfare administrators saw their task at the time of *Goldberg*, it was virtually impossible. Most state welfare systems attempted to provide highly individualized income support and social services to their clients. Each client was provided not just with some easily determined amount of monthly income, but with a bevy of services and income supports for their "special needs." Decision-making about cases was continuous and complex, and disputes

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17. For a discussion of this issue in the context of an FCC proceeding, but diverting to labor board precedents, see *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955).

18. See 29 U.S.C.A. § 160(a)–(e) (West 1973 & Supp. 1991).

19. 397 U.S. 254 (1970).



hardly uncommon.<sup>20</sup> Into that mix the *Goldberg* opinion added the requirement that before any final withdrawal or termination of welfare grants—including, presumably, parts of grants—a disappointed recipient was entitled to an adjudicatory hearing.

Erroneously assuming the worst about their clients, that is, that everyone targeted for termination or reduction would file an appeal just to keep the payments flowing until the hearing, welfare administrators struggled desperately to bring their systems back under control.<sup>21</sup> Their basic approach was to eliminate the possibilities for disputes to arise. If virtually all of the special circumstances concerning individual claimants were made irrelevant to the support system, then the occasions for disputes about the exercise of administrative discretion would be dramatically reduced. Thus, administrators moved fairly rapidly in the direction of rule-bound formulae for determining eligibility and the level of assistance. By “cashing out” the special needs budget and dividing it pro rata among welfare recipients, administrators may have deprived the neediest of important sources of support. However, they also believed that they were eliminating a large number of circumstances in which hearings would be required. By eliminating these potential hearings the administrators eliminated not only their direct administrative cost, but also the possible payment of aid to ineligible pending a hearing.

Having taken this step, administrators discovered another source of saving. If highly individualized determinations concerning the level of support based on special circumstances were no longer a part of the system, welfare offices could also dispense with the social work professionals who had previously made those judgments as a part of an overall social services plan. Over time, therefore, these relatively highly trained personnel were replaced by eligibility technicians who needed no special educational background and who could be paid at much lower rates.<sup>22</sup>

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20. See generally JOINT ECONOMIC COMM. OF THE CONGRESS, STUDIES IN PUBLIC WELFARE, PAPER NO. 5 (PART I), ISSUES IN WELFARE ADMINISTRATION: WELFARE—AN ADMINISTRATIVE NIGHTMARE, 92d Cong., 2d Sess. (1972).

21. Even if claimants were not abusing their right to appeal, the costs of paying aid pending a hearing were substantial. The state of Michigan, for example, estimated its *Goldberg* payments at nearly one-half million dollars in 1971. It also reported that in 92% of the Michigan appeals the hearing confirmed the initial termination decision. HEARINGS BEFORE THE SUBCOMMITTEE ON FISCAL POLICY OF THE JOINT ECONOMIC COMMITTEE, PROBLEMS IN ADMINISTRATION OF PUBLIC WELFARE PROGRAMS, 92d Cong., 2d Sess. 687 (1972).

22. Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 YALE L.J. 1198, 1214–16 (1983).

Notice, then, that this is a story in which the attempt to avoid the expense of formal hearing processes tended also to reshape informal adjudication. Welfare determinations that had been treated as the province of "expert" case-work personnel who attempted to take account of beneficiaries' special circumstances were reconceptualized as routine claims that could be decided by rule. Whereas the expense, formality, and delay of adversarial process often drive civil litigants to settlements that are more complex, textured, and innovative than might have been available through adjudicatory remedies, the opposite seems to have been the case in welfare administration. Avoiding formality there drove out much informal, discretionary adjudication as well.

### CONCLUSION

One may argue of course about whether the net effects of a shift in welfare administration from discretionary judgment to rule-bound adjudication is a good or a bad thing. While there is a loss of pre-existing opportunities for individualization, there comes with that loss the avoidance of risks of oppression, inconsistency, and unfairness. Lawyers, in particular, have often held a dim view of social workers,<sup>23</sup> and the influence of local politics on welfare adjudication is hardly unknown.<sup>24</sup>

The tradeoffs represented by my other stories are equally problematic. In each case, one sort of value—an adjudicatory value, like particularized inquiry, contextual interpretation, or decider independence—was traded off against a different sort of value—an administrative value, like institutional responsibility, the accomplishment of general legislative goals, or the consistency that comes with rule-bound application. My point here is not to try to argue for some particular balance between legal and managerial visions of adjudication. I can provide no tidy solution to what is surely an almost intractable problem. As I suggested earlier, the tension between adjudication and administration is a problem that can only be managed, not solved.

My point in telling these tales at a conference like this one is only cautionary—we must proceed to "improve" adjudication with a certain degree of humility. To the extent that "hearings" are designed as exquisite exercises in lawyers' technique, they will pro-

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23. See generally D. BAUM, *THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE* (1974); J. HANDLER, *PROTECTING THE SOCIAL SERVICE CLIENT* (1979).

24. See, e.g., Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818, 825-26 (1971).

vide more and more incentives for administrators to avoid their use. We must remember that as administrators organize adjudication within the overall context of their programmatic responsibilities, they are likely not only to prefer robots to artisans, but also to have a range of legal techniques for making that preference effective.

