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THE JUDICIALIZATION OF FEDERAL ADMINISTRATIVE LAW JUDGES: IMPLICATIONS FOR POLICYMAKING

GERALD M. POPS*

Students of the American federal administrative legal process have long debated the question of whether those persons charged with the responsibility for developing and conducting the formal hearing process and for making "initial decisions"\(^2\) should act more like judges or more like administrators. Advocates of the judicial model of behavior seek to inject into the administrative process certain values inherent and traditional in Anglo-American courts. These values particularly, although not exclusively, include the protection of the personal, property and procedural rights of private citizens which have been developed by judges acting in their traditional capacities as makers of common law and interpreters of the federal constitution and statutory law. They include a suspicion of activity of governmental officials acting within broad grants of discretionary authority and a belief that an adversarial dispute settlement process is more rational and more resistant to personal bias and self-interest. Conversely, the advocates of the administrative model of behavior are primarily concerned with the social rather than the individual perspective. According to their value system, effective implementation of the programs of government must come first and all administrative

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\(^2\) "Adjudication," as used hereinafter, refers to the processes and rules found in 5 U.S.C. §§ 554-58 (1976). It does not include cases that are not contested, such as when the Internal Revenue Service finds a deficiency in the return and the taxpayer concedes it. Neither does it include rule-making proceedings under 5 U.S.C. § 553 (1976).

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functions (including adjudication) must therefore conform to whatever organizational or managerial requirements are necessary for progress toward politically defined goals. To sum up the differences in a rather simplistic but nonetheless realistic way, the judicialists emphasize procedure and "fair process," while administrationists emphasize the policy itself and the institutional nature of decision making as a function of organization.

This essay asks three questions. First, has public policy, as expressed through statutes and administrative regulation, Civil Service Commission personnel administration policies, and articulated positions of professional interest groups, shaped the occupation of federal hearing examiner according to a specific model of behavior, to wit: the judicial model, the administrative model, or some combination of the two? Second, how important is the federal hearing examiner in the policymaking process? Third, assuming that we find a specific behavioral model to be dominant and also that we find hearing examiners to be important in policy formulation, what implications do these findings have for the nature, substance and process of administrative policy formulations?

I. Evolution of the Debate Over Role

The issue of the proper role of the hearing examiner first arose in 1906 when the position was established in the Interstate Commerce Commission.\(^3\) Congress saw a need for the subdelegation of fact-finding duties and greater functional specialization in the ICC.\(^4\) But it did not come to be of great concern until the 1930's when a flood of New Deal economic regulatory legislation greatly expanded the adjudicative and investigatory roles of administrative agencies. Expansion took place along diverse paths in the various agencies. A wide variety of methods were used for the formal adjudication of cases, all of them involving fact finding or investigation, hearings and hearing officers. Some of these methods were developed by the Congress in the acts establishing individual regulatory agencies,\(^5\) others were fashioned by the agencies

\(^3\) Hepburn Act, ch. 3591, § 20, 34 Stat. 584 (1906) (current version at 49 U.S.C. § 17 (1970)). The Hepburn Act expanded the jurisdiction of the ICC and brought an increase in the number of proceedings before the Commission.

\(^4\) L. Musolf, FEDERAL EXAMINERS AND THE CONFLICT OF LAW AND ADMINISTRATION 47-50 (1952) [hereinafter cited as Musolf].

themselves pursuant to general grants of adjudicative authority from Congress.\footnote{See generally Musolf, supra note 4, at 57-74. Factors causing variation among the methods developed included the sophistication of the clientele, the degree of specialized or technical knowledge involved in the dispute, convenience factors and administrative practice.} Not only was procedure varied, but agencies also differed in the weight they gave to the findings and recommendations of those persons conducting the hearings. The import of a given hearing ranged from a mere advisory function with little ability to discover evidence or to conduct more than a cursory airing, to a full-blown trial-like proceeding with a right in the losing party to appeal.\footnote{Report of the Attorney General's Committee on Administrative Procedure, S. Doc. 8, 77th Cong., 1st Sess. (1941).}

With the expansion in federal hearings came a contemporaneous alarum and counterattack from the organized bar. The bar saw in the expansion the possibility of the placement of administrative personnel into a dominant position in the settling of some of the most important civil concerns affecting American citizens, with consequent displacement of both lawyers' values and lawyers' fees. The 1930's witnessed a concerted effort by the American Bar Association through its Special Committee on Administrative Law to bring about the following changes: (1) make the procedures used in both adjudication and rulemaking in the agencies more like those used in the courts, (2) separate the adjudicative function from other administrative functions and move the exercise of adjudication to a common administrative court, (3) expand judicial review of agency activity, and (4) professionalize hearing officers and make them independent of agency influence.\footnote{McGuire, The Proposed United States Administrative Court, 22 A.B.A. J. 197, 199-202 (1937).} The culmination of this effort was Congress' enactment of the Walter-Logan bill in 1940;\footnote{S. 915, 76th Cong. 1st Sess. (1939); H.R. 6324, 76th Cong., 1st Sess. (1939).} the effort died, however, when Congress was unable to override President Roosevelt's acerbic veto. As the nation's chief

administrator in a period of great stress, President Roosevelt
shared the administrationist view which favored integrating adju-
dication with other agency functions in order to obtain concerted
action in policy formulation and for maximum effect in program
operations.  

The question of the role of the hearing examiner was itself a
major political issue which was located at the crossroads of the
great social and political issues of the day: positivist-social ori-
ented governmental action versus protection of private property
rights, social state efficiency versus primacy of individual rights,
personal liberalism versus economic conservatism and active reg-
ulation versus emasculation of social regulation by a conservative
judiciary. In 1941 the Attorney General’s Committee on Adminis-
trative Procedure, appointed by the President under continuing
pressure from the organized bar, transmitted its now famous study
to Congress, and at the war’s conclusion a monumental accom-
modation between the bar and the federal administration was at
hand. It was finally achieved in the form of the Administrative
Procedure Act of 1946, which today remains the primary statu-
tory source of law on federal administrative procedure.

The APA made the hearing examiner the principal focus of an
approach to adjudicative process which reflected a compromise
between judicialists and administrationists. The battle, however,
did not end there. It simply shifted to the courts where the inter-
pretation of much general and ambiguous language in the APA was
to be worked out, and to the agencies themselves, particularly the
Civil Service Commission. This era of uncertainty and strife ended
in 1953 with the decision of the United States Supreme Court in
Ramspeck v. Federal Trial Examiners Conference. The effect of
this decision was to clearly set out the central role and responsi-
bility of the Civil Service Commission in personnel administration
with respect to the office of hearing examiner. The decision clearly

10 Musolf, supra note 4, at 75-77.
11 Report of the Attorney General’s Committee on Administrative
Procedure, supra note 7.
(1946) (codified in scattered sections of 5 U.S.C.) [hereinafter cited as APA].
13 345 U.S. 128 (1952). The Supreme Court upheld the requirements of 5 U.S.C.
§§ 3105, 7521, 5382 (1976), relating to assignment of cases in rotation, removal and
prescription of compensation by the Civil Service Commission, by reversing the
court of appeals decision which had affirmed a federal district court injunction
against enforcement of such provisions by the Civil Service Commission upon hear-
ing examiners.
favored the agencies and was contrary to the interests of the organized bar. The ABA thereafter abandoned its tactics of direct confrontation in the courts and legislature and shifted to the less visible and more effective method of working with the Civil Service Commission and the internal legal-administrative structures of the agencies. Working through the Civil Service Commission’s Advisory Committee on Hearing Examiners (created in 1962 as the result of a recommendation of the temporary U.S. Administrative Conference), the U.S. Administrative Conference and the professional organization of federal hearing examiners (the Federal Trial Examiners Conference), the legal profession has maintained a continuing influence upon the process of formal adjudication as carried on in administrative agencies. The relative success or failure of this effort can be seen in the discussion which follows.

II. MODELS OF HEARING EXAMINER BEHAVIOR

The thesis that there are two models of behavior competing for a central place in the role of the hearing examiner is a thesis most peculiarly belonging to the American political system and its traditions. Crucial to the dichotomy is the tradition of the common law and the doctrines of separation of powers and checks and balances. The carriers of these beliefs are American lawyers and the advocates of limited government. They see two dangers in the assignment of adjudicative powers to administrative agencies: (1) a great expansion of the opportunity for government to deal with private persons in a way which is offensive to notions of fair procedure traditionally practiced or believed to be practiced in the courts, and (2) a merger of multiple functions (adjudication, rule-

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14 Two temporary Administrative Conferences preceded the creation of the permanent Conference in 1964. See 5 U.S.C. §§ 571-76 (1976). The first was called by President Eisenhower in 1953, the second was established by President Kennedy pursuant to Exec. Order No. 10,934, 26 Fed. Reg. 3,233 (1961).

The Conference adopted its recommendation as the result of a CSC recommendation. The advisory committee, which reported to the Commission, consisted of a member and a general counsel of agencies employing hearing examiners, the President of the Federal Trial Examiners Conference, a law professor, an ABA lawyer and a lawyer representing the Federal Bar Association. Macy, infra note 23, at 426.

15 The organization has since changed its name to the Federal Administrative Law Judge Conference.

16 The essence of the dichotomy which is developed in the following pages is drawn from Musolf, supra note 4, at 75-80. This perspective is adopted and reinforced by K.C. Davis, Administrative Law and Government 165 (2d ed. 1975). See also Feller, Administrative Law Investigation Comes of Age, 41 Colum. L. Rev. 585, 601 (1941).
making and enforcement) in the hands of the same political actors, causing an increase in power and the likelihood of its arbitrary and tyrannical use by those actors. To check these potential evils and to insure individual rights, lawyers and advocates for limited government, having lost the battle to prevent Congressional assignment of judicial powers to administrative agencies, now seek to isolate the judicial function from other functions within administration, and to make the exercise of that function more respectable. They seek, in short, to impose a judicial model of behavior upon administrators who adjudicate.

The administrative model is less traditionally rooted. Its origin, domestically, is in the creation of administrative regulatory bodies in the late nineteenth century which came into being in response to compelling political and social reasons. These resulted from the perceived need to involve government in dealing with complex and technical subject matter beyond the generalist capabilities of judges, to exercise continuing and active oversight and restraint of abusive economic practices and arrangements, and to circumvent a conservative judiciary if innovative social legislation were to survive death through interpretation and be given a chance to succeed. Granting adjudicative powers to agencies was viewed as a device to more fully arm them to effectively pursue legislative programs in concert with other agency powers, including the rulemaking and organizational powers also vested in them by Congress. The power to settle disputes between government and private concerns is viewed as one means of implementing a program by shaping and applying agency policy consistent with legislative intent in concrete circumstances, not as a judicial function unto itself. So the administrative purist would contend.

These models are well contrasted and summarized in a passage from Lloyd Musolf's treatise on the role and functions of hearing examiners.

Stated simply, the court tradition sees the examiner as an official to be strictly isolated because of his deciding functions, to be selected on the basis of his judge-like qualities, and to be given powers and prestige commensurate with his important station. Under the departmental, or agency tradition, the examiner is visualized as a part in a complex mechanism whose end product is a decision. According to this view, to remove the part

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17 P. WOLL, AMERICAN BUREAUCRACY 84-99 (1963).
from the mechanism, or to replace it with an entirely different kind of part, will make the mechanism break down, or at least check its smooth running.19

How might we operationalize an empirical study to determine which model more nearly describes the actual behavior of hearing examiners? Studies of examiners' attitudes, to the extent they are available and methodologically sound, tell us something of how examiners perceive their role. This kind of information, however, leads us to confuse performance with aspiration and function with design. I choose instead to focus upon some externally observable indicia of role. One of these is supplied by Musolf in the preceding quotation—the degree of separation of the examiner's function from other agency participants in the decision-making process. Additional indicators are supplied by Musolf and others: finality and formality of examiner decisions,20 degree of versatility in handling subject matter,21 control of the hearing,22 qualifications for and manner of selection and promotion,23 and personal status, independence and security.24

Table 1 lists specific indicators used for contrasting the role models and notes the value of each variable (indicator) for each model.

19 Musolf, supra note 4, at 75.
20 Id. at 108-109.
21 Id. at 111, 127.
22 Id. at 124-27, 129-30.
<table>
<thead>
<tr>
<th>ROLE INDICATORS</th>
<th>JUDICIAL MODEL</th>
<th>ADMINISTRATIVE MODEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Degree of separation of examiner's function</td>
<td>Total separation — personal consideration by examiner.</td>
<td>Integrated — examiner's function a part of institutional decision by many under general agency supervision.</td>
</tr>
<tr>
<td>1. Relations with investigatory and prosecutory staff</td>
<td>Discouraged, formal.</td>
<td>Encouraged, informal.</td>
</tr>
<tr>
<td>2. Relations with agency supervisors</td>
<td>No direction or consultation.</td>
<td>Direction and consultation.</td>
</tr>
<tr>
<td>B. Importance of hearing: finality and formality</td>
<td>Finality like that of a trial court; formal procedure follows from belief that the formal record made at the hearing should be sole basis for decision.</td>
<td>Information gathering and recommendations to be fed to final agency decisionmakers.</td>
</tr>
<tr>
<td>1. Nature of action by agency head</td>
<td>Discretionary review only on points of law raised; facts deemed decided.</td>
<td>Agency head makes decision using the examiner's findings as informational input.</td>
</tr>
<tr>
<td>2. Judicial review</td>
<td>Hearing before examiner treated as analogous to a trial.</td>
<td>Agency decision is basis; examiner decision disappears.</td>
</tr>
<tr>
<td>3. Rules of evidence and procedure</td>
<td>Strict, court-like (e.g., hearsay excluded).</td>
<td>Liberal, include anything of probative value.</td>
</tr>
<tr>
<td>4. Consultation of examiner with others pending decision</td>
<td>Isolation of examiner.</td>
<td>Examiner freely consults with staff and superordinate officials.</td>
</tr>
<tr>
<td></td>
<td>5. Importance of the record</td>
<td>C. Versatility of Hearing Examiner</td>
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<tr>
<td></td>
<td>Written record compiled at hearing becomes sole basis for decision; free access for both parties.</td>
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<tr>
<td></td>
<td>Possessed of general knowledge; can handle any “case or controversy.”</td>
<td></td>
</tr>
<tr>
<td>1. Assignment of cases</td>
<td>By rotation, randomly.</td>
<td></td>
</tr>
<tr>
<td>2. Transferability</td>
<td>Unlimited; treated as member of corps which can handle any kind of dispute.</td>
<td></td>
</tr>
<tr>
<td>3. Training</td>
<td>General trial experience, law school.</td>
<td></td>
</tr>
<tr>
<td>D. Control of hearing</td>
<td>Extensive and exclusive powers of examiner.</td>
<td></td>
</tr>
<tr>
<td>E. Selection and promotion</td>
<td>Geared to standards of legal profession; no hierarchy.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Legal training; practice in trial work or administrative law.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Appointment by legally dominated extra-agency body, stress general law knowledge and “judicial character;” lateral entry allowed.</td>
<td></td>
</tr>
<tr>
<td>F. Personal status, independence, and security</td>
<td>High status, insulation from influence of others.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Top civil service grades.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Status of agency employee, interaction of influence encouraged.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Middle manager grades.</td>
<td></td>
</tr>
</tbody>
</table>
2. Removal

Automatic tenure, removal for cause only (misbehavior, gross incompetence).

3. Title

"Administrative law judge," or other connoting judicial status.

4. Professionalism

Identification with legal profession; code of judicial ethics.

Probationary period; removal for cause or at request of superiors (includes conflict over policy aims, inability to interact with agency staff, etc.).

"Hearing officer," "hearing examiner" or "employee."

Identification with co-workers in special skill or program area; loyalty to "public interest."
Tables 2, 3 and 4 present the data which tend to show whether the dominant role in practice gravitates toward one or the other model, at three different points in time. The data consists of declared policy (statutory language; administrative agency rule, regulation, or written directive; federal court opinions; attorney general opinions) and positions formally taken by critical interest groups (for example, statements by officers of the ABA or Federal Administrative Law Judge Conference, or recommendations of the U.S. Administrative Conference). They are presented for three distinct points in time: (a) just prior to enactment of the APA in 1946 (in Table 2); (b) in 1961 (Table 3); and (c) the present (Table 4). For each point in time and for each indicator I have made a qualitative judgment as to where on the scale of judicial to administrative behavior the datum should be placed. Using this method, a view of the totality of performance upon these variables may be had at a glance. Where official policy conflicts with an interest group position, only the policy is given. Positions are used where policy is not established.

A simple glance at Tables 2, 3 and 4\(^2\) clearly demonstrates two things about the hearing examiner/administrative law judge role as measured by the role indicia: (1) it has moved steadily, over the past twenty-five years, from the administrative model to the judicial model (from the right to the left side of the table); and (2) at present, the role is mixed, with judicial behavior dominant. Prior to the passage of the APA the only indicator of judicially dominant behavior was found in the policy the federal courts had of directly reviewing records made before hearing examiners, much as trial records are reviewed. Such a review was one of the few controls the judiciary had which could check the excesses of broad-gauged administrative programs and bring some procedural uniformity to bear upon the enormously diverse practices of agency adjudicators. In addition, the courts lacked confidence in the state of expertise thus far developed by the agencies in their new and rapidly expanding programs (this view finds support in the fact that decisions of the established ICC were rarely questioned).

In contrast, by 1978 administrative dominated behavior is recorded on the scales of only one indicator; the practice of agency heads to give extensive review to administrative law judge initial decisions having importance.\(^3\) Of special interest is the matter of

\(^2\) See pages 180-91.

\(^3\) **Comptroller General of the U.S., Report to the Congress of the U.S., Administrative Law Process: Better Management is Needed** 13-16 (1978) [hereinafter cited as **Comptroller General of the U.S.**]. The study examines only
<table>
<thead>
<tr>
<th>Role Indicators</th>
<th>Judicial Model</th>
<th>Mixed — Judicial Dominates</th>
<th>Mixed — Administrative Dominates</th>
<th>Administrative Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Separation of Functions</td>
<td></td>
<td></td>
<td>Great diversity among agencies; most treated as advisory.</td>
<td>Unrestricted</td>
</tr>
<tr>
<td>1. Staff relations</td>
<td></td>
<td></td>
<td></td>
<td>Unrestricted</td>
</tr>
<tr>
<td>2. Supervisor relations</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B. Hearing: Importance, Formality, Finality</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Action by agency head</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Judicial review</td>
<td></td>
<td>Examiner reports not required as part of record for review, but many in fact reviewed; scope of review broad.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Rules of evidence and procedure</td>
<td></td>
<td></td>
<td>Few decisions required to be written; procedure loose, flexible.</td>
<td></td>
</tr>
</tbody>
</table>
4. Consultation in reaching decision

5. Use of written record and findings

C. Versatility
1. Assignment to cases
2. Transferability
3. Training

D. Control of Hearing

E. Selection and Promotion
1. Qualifications

Unrestricted

No statutory requirement; some agencies used them.

Discretion of agency chief examiner.

Uncommon, although recommended by Atty. Gen.\(^a\)

Agency experience, some agencies required examiners be lawyers.

Agency controls.\(^b\)

Pass exam prepared by agency or 3 yrs. experience as public service commission employee: ICC required

\(^a\) Most of the data in this table obtained from Report of the Attorney General's Committee on Administrative Procedure, supra note 7.

\(^b\) President's Committee on Administrative Management, Report with Special Studies (1937).
2. Selection

3. Establishment and classification of positions

F. Personal Status, Independence, Security
1. Pay
2. Removal
3. Title

4. Professionalism

<table>
<thead>
<tr>
<th>ROLE INDICATORS</th>
<th>JUDICIAL MODEL</th>
<th>MIXED -- ADMINISTRATIVE DOMINATES</th>
<th>ADMINISTRATIVE MODEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Separation of Functions</td>
<td>Prohibited from consulting investigatory or prosecutorial staff working on case; other staff relations permitted.(^a)</td>
<td>Prohibit supervision by person performing investigation or prosecution.(^a)</td>
<td></td>
</tr>
<tr>
<td>1. Staff relations</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Supervisor relations</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B. Hearing: Importance, Formality, Finality</td>
<td></td>
<td>Agency rehearses “initial decision” at will and regards as advisory only.(^b)</td>
<td></td>
</tr>
<tr>
<td>1. Action by agency head</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^a\) 5 U.S.C. § 554(d) (1976).
\(^b\) Id. § 8a, 5 U.S.C. § 557(a) (1976).
2. Judicial review

Examiner report must be part of record;\textsuperscript{c}
substantial evidence rule applied.\textsuperscript{d}

3. Rules of evidence and procedure

Court-type procedures only where hearing required by statute;\textsuperscript{e}
requirement of impartiality.\textsuperscript{f}

4. Consultation in reaching decision

Examiner must "participate" in decision but may consult.

5. Use of written record and findings

Decision based on record;\textsuperscript{g} reasoning needs to be shown.\textsuperscript{h}

C. Versatility

1. Assignment to cases

By rotation, modified by grade, difficulty and importance of case.\textsuperscript{i}

\textsuperscript{c} Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
\textsuperscript{e} Id. § 556 (1976).
\textsuperscript{f} Id. § 556(a) (1976).
\textsuperscript{g} Id. § 556(d) (1976).
\textsuperscript{h} SEC v. Chenery Corp., 318 U.S. 80 (1943).
\textsuperscript{i} Ramspeck v. FTEC, supra note 5.
2. Transferability

3. Training

D. Control of Hearing
   Examiner presides if hearing required by statute, with powers as extensive as trial judge.\footnote{5 U.S.C. § 556(b) (1976).}

E. Selection and Promotion
   1. Qualifications
   2. Selection

   Exchange permitted but not practiced; high degree of specialization in some agencies.
   Agency experience and law background, generally.

   Civ. Serv. exam stresses agency expertise (selective certification); admission to bar.
   Agency decides how vacancy filled,\footnote{41 Op. Att'y Gen. 74 (1951).} but CSC responsible for selecting promotees\footnote{k} after consulting agency.
3. Establishment and classification of positions

Defined by CSC in manner reflecting high level duties; CSC authority upheld; several grades established.

F. Personal Status, Independence, Security

1. Pay, grade level

Near top of federal scale; CSC determines.

2. Removal

Subject to reduction in force as any fed. employee; provisional and temporary appointments used; otherwise for cause only.

"Hearing examiners," "semi-independent subordinate hearing officers."

3. Title

Federal Trial Examiners Conf. formed (no mandatory membership, no code of ethics); view of examiner as judge administrator; active lobbyist.

4. Professionalism

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¹Much of the balance of the above data was obtained from Macy, supra note 23.
Table 4
ROLE INDICIA FOR ADMINISTRATIVE LAW JUDGES (1978)

<table>
<thead>
<tr>
<th>ROLE INDICATORS</th>
<th>JUDICIAL MODEL</th>
<th>MIXED — ADMINISTRATIVE DOMINATES</th>
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<th>ADMINISTRATIVE MODEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Separation of Functions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Staff relations</td>
<td></td>
<td>Prohibited from consulting investigatory or prosecutory staff working on case; other staff relations permitted.</td>
<td>Prohibit supervision by person performing investigation or prosecution; general practice is for ALJs to have little contact with agency heads.</td>
<td></td>
</tr>
<tr>
<td>2. Supervisor relations</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
B. Hearing: Importance, Formality, Finality

1. Action by agency head

Thorough hierarchical review is common;\textsuperscript{a} but Admin. Conf. recommends finality for ALJ decision under specified conditions.\textsuperscript{b}

2. Judicial review

ALJ-made record must be part of review; court will not interfere on questions of fact, merits of case.

3. Rules of evidence and procedure

Court-type procedures used often, even where hearing not required by statute; requirement of impartiality.\textsuperscript{c}

4. Consultation in reaching decision

Practice is for ALJ to act alone, but still may consult with agency pers. not on case.

\textsuperscript{a} Comptroller General of the U.S., Report to the Congress (May 15, 1978).
\textsuperscript{c} 5 U.S.C. §§ 556, 556a (1976).
5. Use of written record and findings

Decision based on record; reasoning needn't be shown, but strong pressure to contra.

C. Versatility

1. Assignment to cases

By rotation, modified by grade, difficulty and importance of case.

2. Transferability

Temporary assignments by CSC now common; permanent inter-agency transfer difficult, but accomplished.

3. Training

CSC by regulation encourages agencies to promote attendance at Bar Assoc. and FALJC sessions; ABA and Admin. Conf. have recommended legal center for continuing education.

D. Control of Hearing

ALJ presides at all hearings; powers like trial judge; Admin. Conf. recommends that interlocutory appeals be strictly limited.

\textsuperscript{d} Id. § 556d.
E. Selection and Promotion

1. Qualifications

Bar membership, 7 years prof. legal experience, 2 years admin.
law or general trial experience; lawyers participate as oral interviewers; written
exams still stress special knowledge areas.

2. Selection

Lawyers participate in evaluation; increasing weight given to general
law knowledge, personal qualities.

3. Establishment and Classification of positions

CSC controls; only 2 grades per agency.

F. Personal Status, Independence, Security

1. Pay, grade level

Supergrades; commensurate salaries.

2. Removal

No probationary period; priority in placement if reduction in
force; removal for cause only.

*Administrative Conference of the U.S., supra note b (adopted by the CSC in 1970).*
3. Title

“Administrative law judge.”

4. Professionalism

FALJC develops judicial ethics; close working relations with ABA and Advis. Comm. on ALJs in CSC; agencies directed by CSC to encourage professionalism; CSC has Office of ALJs to plan, operate, and direct employee program.


See Zwerdling, supra note 24.
title since it appears to be a prime indicator of self-perception of role. Pursuant to a recommendation of the Executive Council of the U.S. Administrative Conference, which was supported by the Federal Trial Examiners Conference and the Administrative Law Section of the American Bar Association, the official designation of the position was changed to "administrative law judge" by the Civil Service Commission in 1972.26 Congress, in March of 1978, gave statutory dignity to the title change.27

Whereas the Civil Service Commission's Advisory Committee on Hearing Examiners recommended and lobbied for many of the changes in the early 1960's, today the Administrative Conference is playing a central role. This body, whose Executive Council is dominated by the legal profession28 and whose research is mostly performed by law faculty, is an official federal agency charged with the responsibility for determining how administrative procedure may be improved and with recommending changes in law or policy to federal agencies and to Congress.29 Its record of success to date is impressive. What is striking, from the viewpoint of this study, is the nature of recommendations it has made which have not yet been adopted. Several of these, including use of discovery procedures, finality accorded to hearing examiner decisions, continuing legal training, and requirement of less specialized agency-related knowledge for selection, would go far towards erasing whatever gap now remains between present practice and the judicial behavioral model described herein.30

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26 The change was administratively accomplished by the Civil Service Commission in August, 1972. 5 C.F.R. § 930.203a (1978).
28 As of December 31, 1977, of the eleven members of the Executive Council two were government lawyers, four were private lawyers, and one was a law college faculty member. Only three ranking government officials were included. Administrative Conference of the U.S., 1977 Report (June, 1978).
30 Administrative Conference of the U.S., 1969 Report (June, 1970);
The self-perception of administrative law judges that they are "judges," evidenced by the title they helped to adopt, is reinforced by statements of official spokespersons of the Federal Administrative Law Judge Conference. Joseph Zwerdling, a past president of the FTEC, emphasized what he saw as the personal and independent nature of the position.

The basic concept of the independent hearing examiner requires that he conduct the cases over which he presides with complete objectivity and independence. In so operating, however, he is governed, as in the case of any trial court, by the applicable and controlling precedents. These precedents include the applicable statutes and agency regulations, the agency's policies as laid down in its published opinion, and applicable court decisions. It is fair to say that the genuine independence and objectivity of the hearing examiner is one of the important keystones of the parties' confidence in the basic fairness of administrative proceedings.\footnote{Zwerdling, supra note 24, at 29.}

Agency staff, the statement continues, is viewed as a participant-advocate in the proceeding whose position must be presented and defended in open court. Its arguments should not carry special weight with the hearing examiner.

If there is still opposition to continued judicialization of the role of the hearing examiner in the Civil Service Commission, it has not recently surfaced. Placid and peaceful relations between the organized bar, the FTEC, the Commission and the Administrative Conference have been duly noted.\footnote{Macy, supra note 23, at 378.}

III. IMPACT OF ROLE CHANGE UPON THE POLICYMAKING PROCESS

What are the consequences, existing or potential, of what is clearly a rapid drift toward a judicial role model of administrative law judge behavior for the making of public policy? Presumably, as the administrative law judge's role in decision making moves from institutional-participatory to personal-professional, it be-

\begin{footnotesize}
\footnotetext{1}{Zwerdling, supra note 24, at 29.}
\footnotetext{2}{Macy, supra note 23, at 378.}
\end{footnotesize}
comes very relevant and important to inquire as to his or her character, values, professional standards, and politics. The usefulness of examining such things, however, is premised on the assumption that their share of influence in the policy-making process has not shrunk relative to the shares of other actors. Thus, before looking to the question of just what kind of person a judicially oriented hearing examiner is, it is worthwhile appraising whether the role is great or small and whether it is expanding or contracting.

What criteria may be used to evaluate the hearing examiner's share of influence in the formulation of public policy? I suggest three: (1) the kinds and importance of matters they are involved in; (2) the role of adjudicative policy making as related to the totality of policy formulated by administrative agencies (including rulemaking, enforcement and managerial decisions as well as adjudicative decisions); and (3) the degree to which hearing examiner decisions are allowed to stand by the agencies and by the courts. The complexity of making the first two of these evaluations is well beyond the design of this article. There are, however, such frequent assertions in the literature and such obvious examples as to conclusively persuade as to the wide scope and crucial importance of administrative adjudicative decisions. John Macy, former chairperson of the U.S. Civil Service Commission, states in his excellent study of the evolution of the personnel program for hearing examiners that "the substance of the proceedings over which Federal hearing examiners preside and with which their recommendations and decisions are concerned is broad in scope, infinitely varied, and tremendous in social, economic, and political import."31 A few examples round out his point: (1) Social Security Administration proceedings determining whether miners will be allowed compensation for black lung disease; (2) under Medicare, whether providers of service measure up to prescribed medical and hospital standards, thus entitling them to substantial markets and profits; (3) Federal Energy Regulatory Commission cases which fix the rates producers and pipeline transmission companies may charge

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31 The great majority of federal administrative law judges are caucasian males. The implications of this fact are not here in issue. It is tempting to incorporate what has been said elsewhere concerning the relationship of disproportionate staffing by race and sex on the one hand, and policy bias and the conduct of administrative hearings and the actors therein on the other. I have not done so here. However, the masculine referant will be used hereinafter to remind the reader of the fact and to capture whatever flavor it may lend.

32 Macy, supra note 23, at 382.
for gas transported or sold in interstate commerce and affect the price every retail user in the nation must pay; (4) NLRB proceedings determining whether private sector unions and management are bargaining in good faith; (5) FCC hearings leading to licensing for the construction or operation of broadcasting stations; (6) ICC hearings determining who may provide bus or train service within given areas or between specific points; (7) hearings before the Mine Safety and Health Administration determining whether a mine is to be closed due to dangerous or potentially hazardous conditions; (8) hearings on bank charter revocations and bank mergers; and (9) hearings on rates to be charged by interstate carriers which in turn affect the costs of all domestically transported goods, both commercial and private. There is a virtually endless list of issues to be acted upon—deportations, nuclear plant siting, deceptive advertising, air routes, cancer-causing agents, employee compensation claim awards and so forth.

The energies of many agencies, particularly those engaged in economic regulation, are absorbed and dominated by adjudication.35 The difficulty of formulating rules in advance to apply in many unforeseen circumstances, plus the sheer volume of disputes which press upon them for settlement, often cause agencies to settle for case-by-case adjudication as the major tool of policy formulation. This fact has been much criticized and has led often to reform proposals for institutional separation of judicial and legislative functions, with the former collected from all agencies and deposited in some form of general administrative court. Then, it is argued, the administrator would be freed from the procedural clutter and could concentrate his energies upon the making of general rules applicable to broad classes of subjects and circumstances.

Judge Henry J. Friendly defends retaining adjudicative autonomy in the agency.36 While acknowledging the necessity for procedural reform, he argues that the more important priority is the creation of bodies of substantive law in the agencies. This task requires the combined efforts of agency officials and dictates against insulating the administrative law judge from others in the agency who have special knowledge or policy-making responsibilities.37 Whatever the merits of separation may be, it is clear that

37 Id. at 174.
administrative process scholars agree that adjudication is by far the chief (although not the best) source of the policy formulated in these agencies.\textsuperscript{35}

Determining the weight given by agency leadership to administrative law judge initial decisions is a more difficult matter, although one at least superficially susceptible to empirical measurement. Statistics relating to the volume of initial decisions and the corresponding percentage of such decisions remaining intact after agency review have been routinely recorded.\textsuperscript{36} However, such statistics lose much of their significance in the face of the variability in the review procedures from agency to agency, the failure to distinguish routine and inconsequential cases from complex cases and those having policy implications and the precedential value of decisions. Whether the agency disturbs or does not disturb an initial decision is heavily influenced by such variables as the volume of cases initially decided, the level of staff support available to aid in the process of agency review, the amount of time available to those with official authority to review to actually review,\textsuperscript{40} and the predilection of the agency leadership for the balance between adjudication and rule making as modes of decision making. Indeed, the complexity of the matter would appear to make an effort at displaying a statistical array a disservice. One important piece of datum, however, is the fact that sixty-six percent of responding ALJs\textsuperscript{39} state that the nature of their agency's review is de novo and involves the entire case, rather than being limited to the matters that are appealed. In the face of rising case loads and demands upon agency time, this points to a lack of confidence in ALJs by agency leadership. This fact is reinforced by evidence of multi-layered reviews of initial decisions used in most agencies.


\textsuperscript{39} Macy, supra 23, at 389.

\textsuperscript{40} See Morgan v. United States, 298 U.S. 468 (1936); Morgan v. United States, 304 U.S. 1 (1938); United States v. Morgan, 313 U.S. 409 (1941). This line of decisions established the responsibility of the agency official or board charged with the review function to actually "hear" the case. Although this does not amount to a requirement of actually listening to all of the witnesses, it does necessitate consideration of the entire record of the hearing made before the administrative law judge.

\textsuperscript{41} Six hundred and ninety-two of the 1,025 ALJs working for federal agencies, or 67%, responded. See Comptroller General of the U.S., supra note 25, at 12.
Despite differing levels of confidence in ALJ initial decisions, they are often critical in the final decisions of agencies and likely to become more critical. Increasing numbers of ALJs and cases place increasingly greater burdens upon reviewers. Pressures are mounting to accord additional finality to ALJ decisions. The Comptroller General, sharply critical of delays caused by extensive agency review in a recent report to Congress, recommended that Congress enact legislation to accord greater finality to ALJ decisions.

In light of this evidence it seems fair to say that, at a minimum, hearing examiners are important participants in the making of public policy. If this is indeed the case, then it becomes imperative to inquire into the kind of people administrative law judges are—how they are trained, how they advance, the pressures and constituent influences to which they are exposed, and, to the extent they perceive themselves as members of a professional group, the standards and norms of that group.

IV. THE JUDICIAL STYLE

As noted above, hearing examiners think of themselves as judges (Administrative Law Judges, Federal Trial Examiners Conference). Furthermore, the evolution of their role, as dictated by law and policy, has moved that self-perception very much closer to reality. It is important to ask, therefore, whether there is such a thing as a "judicial style" which contains values or norms having important consequences for the quality and nature of administrative decisions.

It has been argued with much force that too much has been made over the differences between administrative and judicial

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42 The number of ALJs and the number of agencies employing them has increased from 186 and 15 agencies, respectively, in 1946 to 1025 and 28 agencies in 1978. Of the 1025, 826 are categorized as permanent, 199 as temporary. COMPTROLLER GENERAL OF THE U.S., supra note 25, at 4.

43 The President's Advisory Council on Executive Organization criticized "overjudicialization of the administrative adjudicatory process as evidenced by systematic full commission review of agency hearing examiner decisions" resulting in delay and ineffective use of agency resources. COMPTROLLER GENERAL OF THE U.S., supra note 25, at 12.

44 The Comptroller General recommended that the heads of agencies employing ALJs "[e]stablish procedures which would preclude extensive review of ALJ decisions in cases where the parties have not filed exceptions and where the case does not involve compelling public interest issues or new policy determinations." COMPTROLLER GENERAL OF U.S., supra note 25, at 47.
behavior, and that most of what appear to be differences are illusory. In the best court tradition the adversary system promotes fairness, saves time and energy by focusing upon the real issues dividing the parties, brings policy arguments into play, promotes compromise and cooperation and encourages innovation in resolving conflict. A good judge has a capacity for cool appraisal, matches various means to a given end, explores hidden fact through direct inquiry and confrontation, conceives strategy and has a true instinct for teamwork. Paul Freund attributes to the lawyer a concern for collaborative procedure and the reaching of shared goals. This team instinct serves diverse points of view both internal and external to the agency and allows the administrative law judge to comprehend the complex mission of the agency. All of these qualities are quite compatible with the qualities of a good administrator and may even be demanded of one.

To further confound the dichotomy, it has been argued that the presumably independent federal judge, sitting singly with guaranteed lifetime tenure, is in fact part of a system imposing hierarchical pressures upon him (he aspires to a seat on a higher court, he dislikes being reversed and he is part of a judicial administrative structure), and that his pattern of thought is like that of an administrator. Both judge and administrator, it is argued, are incrementalists and seek workable results with the least amount of disruption. The similarity vanishes, however, when one considers the unique duties imposed upon administrators by virtue of programmatic responsibility established by statute and the requirement for specialized knowledge in a field of public activity.

Special elements of administrative behavior arise not so much from the way administrators think, but from their organizational roles. For the judge's part, role and functions are rooted in a system which centers on a contest between two adversaries for some tangible advantage. In administrative adjudication, however, the role often calls for regularizing relations between the government and the regulated class so that the purpose of a government program is served. The decision should rest not on the basis of mutual adjustment of the interests of the two parties before the tribunal, but on the basis of serving the goals of the agency with respect to all parties, existing or potential, affected by the instant policy. If

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46 See M. Shapiro, The Supreme Court and Administrative Agencies (1968).
administrative law judges "go it on their own" and make the goal of their activity a decision on the merits of the dispute between litigants, they lose much of their usefulness to their employing agencies.\textsuperscript{48} And, of course, if the agency leadership is itself predominately engaged in adjudication as opposed to other modes of decision making leading to policy formulation, then narrowly focused adversarial decisions by administrative law judges become the basis for much agency policy.

Agency policy generated through adjudication need not be of an ad hoc, case-by-case nature. Administrative law judges can be socialized and trained to understand the political dimensions of the agency's mission and to work toward developing a cohesive body of case law which both aids the pursuit of programmatic goals and establishes the kind of consistency in the application and formulation of policy that permits the regulated to rely with some confidence upon a predictable state of affairs. But such unfortunately is not the case. Administrative law judges think about and are trained in procedure rather than in substance. This can easily be seen in the continuing drive of the Administrative Conference to modify civil service testing to exclude knowledge of a specialized nature suited to particular agency programs.\textsuperscript{49} Much of the fault, according to Judge Friendly, must be laid at the doorstep of the legal profession:

If our machine age has invented any counters for detecting the fallacious and the equivocal as sensitive as the professors and students of the great law schools, I have not seen them. Yet, with a few distinguished exceptions, the law teachers and the law reviews have not yet begun to do for the administrative agencies what, for many years, they have been doing for the courts. Perhaps I am quite wrong about this, but I have the impression that the study of administrative law in most law schools, at least until very recently, has been concentrating unduly on procedure at the expense of substance, as the criticism of the agencies in the profession surely has. Another way of stating this would be that instruction has been too much concerned with what the courts do with the agencies rather than with what the agencies do with themselves. Yet the procedural battle has been largely won in the type of agency with which we have been here concerned—indeed, attempts to wage it further

\textsuperscript{48} Musolf, supra note 4, at 179.

in some respects may do more harm than good; it is in the substance of administrative adjudication that improvement is sorely needed.\textsuperscript{50}

Adjudication is a decision mode which relies upon adversaries to develop the information base which informs a neutral third party's judgment. Such a process for fact-finding is ideal when parties disagree over a contested truth and struggle to persuade a neutral decision maker that evidence supports their construction of the facts. But in many administrative hearings what is at issue are not objective facts but what may be termed "social facts."\textsuperscript{51} When dealing with a question of fact, the typical legally trained mind will concentrate upon the event or what happened \textit{in the case}. Under the same circumstances, an administrator, charged with programmatic responsibility, is legitimately concerned not so much with the case, but rather with the aggregate effect of any rule or guideline upon all the subjects of the program. Thus, an administrator's view is, or ought to be, broader. It must take into account other circumstances and other parties not within the specific circumstances, but within the context logically suggested by the specific. An attempt should be made to deal with the general problem uncovered, not simply with the case at hand.

A further failing of the judicial style is its neglect of the concepts and methods of social science. More can be done in redirecting administrative adjudicative energies toward policy substance if other disciplines besides law, particularly political science and economics, are drawn upon.\textsuperscript{52} Freund is critical of law schools for their failure "not to train students in the social sciences, but to prepare them for collaborative enterprise by seeing that they acquire some insight into the methods and concepts of those disciplines."\textsuperscript{53}

To summarize, although many qualities of judicial thought and behavior comport nicely with ideals of administrative decision making, there are other qualities which, when carried into public administration, are ill-suited to public policy formulation. These include a narrowing of vision from the broad class of clients

\textsuperscript{50} H. Friendly, \textit{supra} note 36, at 173-74.
\textsuperscript{51} D. Horowitz, \textit{The Courts and Social Policy} 45-51 (1977). "Social facts are the recurrent patterns of behavior on which policy must be based." \textit{Id.} at 45. They are thus to be distinguished from "historical facts" which "are the events that have transpired between the parties to a lawsuit." \textit{Id.}
\textsuperscript{52} H. Friendly, \textit{supra} note 36, at 175.
\textsuperscript{53} Freund, \textit{supra} note 46, at 45.
to the case client, an excessive concern with procedure at the cost of developing a cohesive, specialized and substantive law, and the neglect of social science concepts and methods.

V. INEFFICIENCY IN THE USE OF RESOURCES

These preoccupations and preferences of judicial thought and style have an important impact upon agency resources. They incline agencies toward favoring adjudication to rulemaking as the primary decision mode. Rulemaking, however, is a more efficient mode of decision. The announcement of a rule, given the protections and processes set out in the Administrative Procedure Act, directly addresses issues relating the agency to its clients or subjects. If the rule is well thought out and participation of the affected parties is broad, the rule stands a good chance of settling many potential disputes in a single proceeding. If the agency fails to act in advance by rule, relying instead upon a case by case adjudicative approach, the result is obvious. Adjudication, by the very nature of the elaborate procedural protections employed, is a time consuming process which focuses upon the facts of a case involving a single individual. When that process is multiplied by the number of contending clients or subjects that share somewhat imperfectly the issue of dispute, the agency spends a great deal of time working toward a policy in an uncoordinated, time exhaustive manner. Many agencies thus acquire massive backlogs of cases which absorb much of their energy.

To be sure, there are many instances where agencies lack the experience or knowledge to formulate a rational rule in advance which would satisfy the majority of the parties. The use of adjudication in such situations to gain experience is sensible. But when reliance upon the adjudicative process becomes habitual and continues long after the necessary experience needed to make the rule is gained, the result is an obvious waste of agency resources.

VI. NARROWING OF POLITICAL DEBATE AND INFORMATION BASE

The role of rules of law in government, whether procedural or substantive, varies according to political ideology. In a society which distrusts government and wishes to preserve a large share of autonomous private action the rules are used to restrict government action, to make it predictable, to keep it within ascertainable

\[m^4\text{ APA, § 4, 5 U.S.C. § 553 (1976).}\]
boundaries and to protect individual rights. Courts function to keep administrative action within these guidelines. In a society which views government action as a positive force in guiding and shaping social life, administration is less restricted by rules and courts. The first, or restrictive approach is said to predominate in American constitutional law and has had an important influence on our administrative law. The current movement toward deregulation is a reaffirmation of these traditional views. So also are the strengthening of the Freedom of Information Act55 and the passage of privacy legislation in 1974.56

Nonetheless, it is a fact that a great many, perhaps most, administrative actions are performed pursuant to very broad grants of delegated authority, thus restricting the ability of courts to effectively limit discretion.57 Whether owing to statutory intent or to recognition of the futility of attempting to effectively administer review of a mammoth bureaucracy, the courts have generally affirmed administrators in their exercise of discretion.58 Reviewing courts are left with the functions of validating agency jurisdiction, insuring fair process and applying the substantial evidence rule59 to insure that findings of fact and of mixed fact-law are not clearly unwarranted based on the hearing record. The net effect is that administrators, including adjudicatory tribunals, are relatively free to interpret and apply policy as they desire. Nonet observes that

while focusing on whether government acted within the scope (of authority), legal criticism is diverted away from the substance and import of official determinations. The system allows administrators to develop protected areas where they can exercise discretion without legal scrutiny; once their authority in such areas is legally confirmed, its use is free from further control. This is reflected in the often stated principle that judicial review of administrative determinations should be restricted to questions of jurisdiction, and should not extend to the merits of agency decisions. In either case, whether discretion is reduced or indirectly protected, there is no place in legal argument to

challenge official policy. The legal process renounces any role in fashioning the substance or direction of public policy.\textsuperscript{60}

Not only is the scope of debate upon policy questions narrowed, but the nature and use of the data itself is constrained and distorted by rules of procedure and the tactics of adversarial combat. Judge Jerome Frank observed, in a famous essay,\textsuperscript{61} that lawyers are trained to discredit expert testimony against their clients despite the knowledge that such testimony is accurate and relevant.

The purpose of these tactics—often effective—is to prevent the trial judge or jury from correctly evaluating the trustworthiness of witnesses and to shut out evidence the trial court ought to receive in order to approximate the truth.

In short, the lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts.\textsuperscript{62}

The nub of the evidentiary problem raised by the adjudicatory system is the trade off between fairness to the parties and the application of scientific or technical expertise. Few would argue that the adjudicative model is improper where the issue is the truth or falsity of facts in issue, or where a possible consequence of the agency's action is substantial hardship for the individual party being proceeded against. But where formal adversarial adjudication, complete with many elements of full due process, is used to make decisions involving complex issues of economics, human motivation, biomedics, or politics, decision making becomes less rational than it might be. These narrowing factors, taken together, point to both a less rational and less democratic policy process as flowing from a misapplication of the judicial model to administrative decision making.

VII. THE AGENCY AND ITS POLITICAL ENVIRONMENT

The judicial model changes the nature of agency-interest group relations, because it insulates the administrative law judge from the rest of the agency and compels the client to deal with the administrative law judge alone in an attempt to formulate policy (in an atmosphere ill-suited to concentrate upon policy). Several effects of this change may be suggested. Whether such effects are


\textsuperscript{61} J. Frank, Courts on Trial (1973).

\textsuperscript{62} Id. at 85.
"good" or "bad" depends upon individual views as to the proper relationship between the legislature and the executive, the scope of administrative discretion, and the rights, access and influence of individuals and groups. Changes which are likely to occur include the following:

1) The agency becomes less responsive to the political demands of interest groups. Access to agency leaders is reduced by increased delegation of decision-making authority to administrative law judges. At the same time, administrative law judges are becoming less sensitive to their political environment by being further isolated from agency staff personnel.

2) Policy is more disjointed because of the case approach and lack of attention given to the building of a cohesive body of substantive law.

3) Because of reduced access to agency leaders, political pressures are exerted more often in an indirect manner through congressional committees and individual congressmen, administrators in other agencies, the media, or the executive chain of command. Although this may provide more breathing room for agency leaders (by shifting the pressures of direct contact to administrative law judges and others), it will likely make the agency's task of building and sustaining an administrative constituency (including key interest group support) more difficult.

4) The decline of administrative constituencies would heighten the need for political responsiveness. Structural changes may be attempted. One such possible alteration is the transfer of regulatory functions from independent regulatory commissions\(^3\) to executive line agencies\(^4\) so as to afford a more predictable environment for interest group claims and greater access to administrator-politicians. Another is the acceleration of demands for deregulation and debureaucratization.

5) A decline in the health, size and effectiveness of agencies may also be in store. In short, the administrative law judge is an important buffer between the agency leadership and its clientele. This puts a burden upon him to be sensitive to political realities and political change. If he is out of touch with the politics and the

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\(^3\) Independent regulatory commissions are characterized by multi-member heads having staggered terms and a good measure of protection from removal by the executive.

\(^4\) Executive line agencies are agencies headed by single administrators appointed by the President who serve at his will and pleasure.
environment of agency policy making, his decisions must constantly be monitored or else the agency's ability to build the constituency it needs to survive and prosper will be impaired.  

VIII. Conclusions

To study the functions and role of administrative law judges is to gain insight into the decision-making process in administrative agencies having substantial enforcement and regulatory powers. This is especially true where adjudication forms a major part of the agency's total output. The Administrative Procedure Act has placed the administrative law judge at the very center of the policy process in such agencies. His operations are at the heart of the controversy between the legal profession and the political leadership of the government, or, putting the matter more broadly, between the forces of limited government and the forces of governmental positivism.

Examination of declared public policy and articulated professional interest group positions regarding the role and functions of administrative law judges leads inescapably to the conclusion that their behavioral pattern has been moving steadily from an administrative to a judicial model in the last quarter of a century. The shift appears most traceable to accommodation between the legal profession and the Civil Service Commission in the early 1960's which allowed the former a large measure of influence in personnel administration respecting hearing examiners. The trend has been further strengthened by creation of the Administrative Conference of the U.S. and the influence of that lawyer-dominated organization in initiating legislative and Civil Service Commission rule changes relating both to the position of hearing examiner and the formal adjudicative process.

When we turn our attention to the consequences of these inroads of legal and court professionalism for public policy making, we find elements which both enhance and detract from policymaking principles generally embraced by public administration practice in the United States. Elements or qualities of the judicial model ill-suited to effective administration and policy making are: (1) a focus on an adjustment of the issues between the parties which reduces the amount of participation of potentially interested groups and individuals (especially where the agency neglects general rule-making activity), (2) adversary psychology emphasizing

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65 Musolf, supra note 4, at 179.
victory for one of the parties, thereby narrowing the kinds, amount
and accuracy of information needed for expanding policy alterna-
tives and justifying policy decisions, and (3) an exaggerated con-
cern for procedure rather than for the production of substantive
policy in line with agency goals. To the extent that the judicial
model has been carried into complex decision areas of scientific,
economic, behavioral, or political variables, it has resulted in a less
rational, less democratic decision process. It is also forcing a
change in agency-client intergroup relations with shifts in access
and pressure patterns, with consequences which may be profound
for the political system, but the nature of which are uncertain.

If reform is to occur it seems necessary to change the legal
profession from within to accommodate the needs of rational and
democratic administrative policy formation. This view assumes
the legal profession's co-optation of the Civil Service Commission
apparatus relative to administrative law judges and the dominance
of the organized bar in the shaping and altering of administrative
formal adjudicative procedure. Judge Friendly's exhortation to
legal educators and scholars to turn their attention away from
procedure and toward the study of substantive policy correspond-
ing to separate areas of administrative activity is well taken and
will hopefully gain advocates.

Beyond this central and fundamental reform, however, adjust-
ments can be made to structure agency adjudication so as to per-
mit broader representation of interests, a broader and more reli-
able input of information and a broader consideration of policy
issues. This would suggest a backing away from the current em-
phasis on adversarial procedure, away from the growing tendency
to treat administrative law judge decisions with trial court finality,
and away from further erosion of the specialized substantive
knowledge base required for the selection of administrative law
judges. It means moving toward expanding the role of other kinds
of knowledge and methods of knowledge accumulation, particu-
larly those of the social sciences, increasing the representation of
all interested parties in policy making and enlarging the role of
politically sensitive and responsible administrators in the policy
process.