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# ADJUDICATION AND THE ADMINISTRATIVE PROCEDURE ACT

Bernard Schwartz†

As Scripture might have said, "Let us now praise famous laws." The Federal Administrative Procedure Act is *the* famous law that has made a seismic change in our administrative law. More specifically, the APA has transformed administrative adjudication in this country. Before the changes made by the APA in adjudicatory procedure are discussed, a word should be said about pre-APA adjudication in the federal administrative process.

## PRE-APA ADJUDICATION

Wordsworth begins a poem with the words, "Oh! what's the matter? What's the matter?"<sup>1</sup> A prosaic question like that is not always easy to answer.<sup>2</sup> Nor is it easy to state in a simple sentence the problems with agency adjudication before the APA. Well before that statute, the requirement of an evidentiary hearing had been imposed upon the adjudicatory process. It had, however, long been settled that the required hearing need not be held before the agency heads who had the power to make the decision.<sup>3</sup> Instead, there was a bifurcation in the processes of hearing and decision: the agency heads decided, but they did so upon the basis of a hearing record made before someone else.<sup>4</sup> The job of hearing the evidence was delegated to subordinates on the agency staff.<sup>5</sup>

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† Chapman Distinguished Professor of Law, The University of Tulsa College of Law.

1. William Wordsworth, *Goody Blake and Harry Gill, A True Story*, in 1 WILLIAM WORDSWORTH: THE POEMS 271 (John O. Hayden ed., Yale Univ. Press 1981).

2. With substantially these two sentences, Lord Hewart began his famous attack upon the lawlessness of English administrative agencies. LORD HEWART OF BURY, *THE NEW DESPOTISM* 3 (1929).

3. See *Guerrero v. New Jersey*, 643 F.2d 148, 149 (3d Cir. 1981).

4. See *id.*

5. See *id.*

### *Examiners Not Judges*

Before the APA, the presiding officer at agency hearings was a staff member to whom the job of hearing officer had been delegated. As summarized by the leading official study, "In general, it has been customary to designate hearing officers before whom evidence may be adduced — whether they be a board of three or more individuals, or, as is more common, a single hearing officer, variously known as a trial examiner, a referee, a presiding officer, a district engineer, a deputy commissioner, or a register."<sup>6</sup> In almost all agencies of consequence, there were enough hearings so that hearing officers could be assigned only to the job of hearing cases. Their pre-APA generic title was *trial examiner* — the title used in the major federal regulatory agencies. The title "examiners" was apparently first used in the Hepburn Act of 1906, which authorized the ICC to employ examiners to administer oaths, examine witnesses, and receive evidence.<sup>7</sup>

Before the APA, the courts compared the trial examiner to a Chancery master.<sup>8</sup>

[The master's] duty was not only to collect and collate but also to report and recommend. With the growth of the centralized and centrally placed quasi-judicial body, the time-space factor compelled an increased resort to both kinds of assistant. So nearly everyone of the Federal Boards employs some kind of field hearer. The Labor Board Examiner at first blush seems to fall into the more important and elevated category. He may be called on, as here, to file an intermediate report with recommendations. As he need not be required to do so and as even his unexcepted-to recommendations are not always treated with much respect by the parent board, his position is, as the writer has said, somewhat hybrid. But whether more strictly an examiner or, a fortiori, a master, he has not the automatic character of the slot machine or the stenographer.<sup>9</sup>

### *Institutional Decisions*

Despite the famous statement in the first *Morgan* case — "[t]he one who decides must hear"<sup>10</sup> — the agency head, who alone had the pre-APA power to decide, did not *hear*. The hearing was presided over by a staff member who had no power to decide. In many agencies, the examiner could file a recommended decision, but, as pointed out by the judge quoted, "his . . . recommendations are not always treated with much respect."<sup>11</sup> So far as the parties were concerned, the examiner was the administrative equivalent of the trial judge. Yet he was a "judge" controlled by the agency (usually, we shall see, the oppo-

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6. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 44 (1941).

7. See Hepburn Act of 1906, ch. 3591, § 7, 34 Stat. 584, 594 (1906).

8. See *Unity School v. Federal Radio Com'n*, 64 F.2d 550, 551 (D.C. Cir. 1933); *Raladam Co. v. FTC*, 42 F.2d 430, 432 (6th Cir. 1930).

9. *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 54-55 (3d Cir. 1942).

10. *Morgan v. United States*, 298 U.S. 468, 481 (1936) [hereinafter *Morgan I*].

11. *Baldwin Locomotive Works*, 128 F.2d at 55.

site party) and one who was more a monitor than a true judge, since he did not have power to decide the case.

Just as troubling was the fact that, the rule of *Morgan I* notwithstanding, the agency head did not personally decide the case. Though the relevant statutes provided that it was the agency head who was to decide, the decision was not that of the agency head in a literal sense. The case and the examiner's report would be referred to the different parts of the agency, which would deal with the issues in which they were competent. In that way, questions of law, engineering, accounting, and the like would be decided by specialists. The final decision would be the result of this cooperative process within the agency. The agency decision was an institutional decision, rather than a personal one by the agency head in whose name it was issued.

To those affected, the institutional decision of an agency was just as unsatisfactory as that type of decision would be if rendered by a court. The great objection was that nobody knew exactly how the institutional decision was arrived at. The procedure in the *Morgan* case<sup>12</sup> can be taken as an example. The private individuals there were granted a hearing before an examiner and oral argument before the Assistant Secretary of Agriculture.<sup>13</sup> But the decision took place in the recesses of the Department of Agriculture, and the private parties heard no more of the case until they were served with the agency order. The decision was signed by the Secretary of Agriculture,<sup>14</sup> but we know from the *Morgan* case that the decision was his only in a formal sense. It is impossible to say who made the actual decision — what official in the department really directed his mind to the evidence and arguments and drew therefrom the final conclusions adopted by the Secretary.<sup>15</sup> The examiner probably discussed the case with his superior, the latter discussed it with a bigger flea, and so ad infinitum. Ultimately the decision got the seal of the Secretary. "Such a procedure can obviously result in a decision which reflects the analysis of persons other than the administrator, and hence the designation as an 'anonymous decision' is apt."<sup>16</sup>

As the conduct of an agency hearing "becomes divorced from responsibility for decision two undesirable consequences ensue. The hearing itself degenerates, and the decision becomes anonymous."<sup>17</sup> Decision by a known tribunal is vital to the belief that justice is being done. In the agencies, Chief Justice Rehnquist tells us, "there is a feeling that . . . one doesn't exactly know who is making the decisions, and that the process is a little bit of a personnel shell game."<sup>18</sup>

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12. *Morgan I*, 298 U.S. at 472.

13. *See id.* at 478.

14. *See id.* at 477.

15. *See id.* at 479.

16. *Turner v. Apollonio*, 441 A.2d 679, 682 (Me. 1982).

17. REPORT, *supra* note 6, at 45.

18. Justice William H. Rehnquist, Luncheon Address (Mar. 18, 1976), in *Luncheon with Mr. Justice Rehnquist*, 28 ADMIN. L. REV. 614, 616 (1976).

Nowhere was this thought better expressed than in the comment of Dean Acheson, Chairman of the Attorney General's Committee on Administrative Procedure:

[T]he agency is one great obscure organization with which the citizen has to deal. It is absolutely amorphous. He pokes it in one place and it comes out another. No one seems to have specific authority. There is someone called the commission, the authority; a metaphysical omniscient brooding thing which sort of floats around the air and is not a human being. That is what is baffling . . . There is no [sic] idea that Mr. A heard the case and then it goes into this great building and mills around and comes out with a commissioner's name on it but what happens in between is a mystery. That is what bothers people.<sup>19</sup>

### *Combination of Functions*

The pre-APA problem of the institutional decision was compounded by that of the combination of functions. Most important federal agencies (particularly regulatory agencies) have been made the repositories of all three types of governmental power. In the administrative process, the different "stages of making and applying law have been telescoped into a single agency. In this concentration customary and separate procedures have disappeared."<sup>20</sup>

In particular, an agency such as the FTC combines the functions of investigator, prosecutor, and judge: "The Federal Trade Commission investigates charges of business immorality, files a charge in its own name as plaintiff, and then decides whether the proof sustains the charges it has preferred."<sup>21</sup> The same combination of functions exists in other agencies. These agencies are all parties, as well as judges, in cases that they have the power to decide.<sup>22</sup> "The agency which prescribes rules is also the investigator, the prosecutor, the judge, and to a large extent the appellate tribunal."<sup>23</sup> Unlike a court, which occupies an arbitral position between two contesting parties, the agency may be both an interested party and a trier of the contentions advanced by its counsel at the hearing.

The Supreme Court itself has characterized the combination-of-functions issue as substantial. Justice Brennan expressed his concern when he was a state judge. Uneasiness over combination, he said,

springs from the fear that the agency official adjudicating upon private rights cannot wholly free himself from the influences toward partiality inherent in his identification with the investigative and prosecuting aspects of the case; in other words, that the atmosphere in which he must make his judgments is not conducive to the critical detachment toward the case

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19. *Administrative Procedure, Hearings on S.674, S.675, and S.918, before a Subcommittee of the Senate Committee on the Judiciary, 77th Cong.* 816 (1941).

20. REPORT, *supra* note 6, at 204.

21. *Brinkley v. Hassig*, 83 F.2d 351, 357 (10th Cir. 1936).

22. *See id.*

23. REPORT, *supra* note 6, at 204.

expected of the judge. In a sense the combination of functions violates the ancient tenet of Anglo-American justice that "No man shall be a judge in his own cause."<sup>24</sup>

A state judge recently put the matter more strongly: "I still would not allow a hearing in which [the agency] acted as both prosecutor and judge. This for the same reason that we do not allow the prosecutor and judge in our court system to be the same person or even from the same branch of government."<sup>25</sup>

There is no doubt that, before the APA, administrative lawyers agreed with Dean Landis that "[n]o one can fail to recognize that there are dangers implicit in this combination of functions. . . ." <sup>26</sup> Combined with the institutional decision process, the danger was that combination made it impossible to preserve the appearance of justice. "The litigant often feels that, in this combination of functions within a single tribunal or agency, he has lost all opportunity to argue his case to an unbiased official and that he has been deprived of safeguards he has been taught to revere."<sup>27</sup>

## APA REFORMS

### *Internal Separation*

According to the Supreme Court, a "fundamental . . . purpose [of the APA was] to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge. . . . [T]he safeguards it did set up were intended to ameliorate the evils from the commingling of functions."<sup>28</sup> The APA provisions on the matter "did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions."<sup>29</sup> Instead, as Justice Brennan points out, "That statute embodies the theory of internal separation, leaving the functions with the agency but providing safeguards to assure their insulation from one another and to further the independence of personnel engaged in judging."<sup>30</sup>

The APA ensures internal separation by separating those in the agency who investigate and prosecute from those who hear and decide (at least at the initial level). As will be seen, APA hearings are conducted by independent administrative law judges, who are not subject to agency control. ALJs are not permitted to "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate."<sup>31</sup> The prohibition is against consultation of "a person or party." The Supreme Court has said that this bars consulta-

24. *In re Larsen*, 86 A.2d 430, 435 (N.J. Super. Ct. App. Div. 1952).

25. *State Transp. Comm'n v. Ford*, 844 P. 2d 496, 499 (Wyo. 1992) (Cardine, J., dissenting).

26. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 95 (1938).

27. REPORT, *supra* note 6, at 204.

28. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41, 46 (1950).

29. *Id.* at 46.

30. *In re Larsen*, 86 A.2d 430, 436 (N.J. Super. Ct. App. Div. 1952).

31. 5 U.S.C. § 554(d)(1) (1994).

tion with anyone, "including other agency officials, concerning a fact at issue."<sup>32</sup>

In addition, those engaged in investigating or prosecuting are cut off from the decision process: "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision . . . except as witness or counsel in public proceedings."<sup>33</sup> The APA separation requires the prosecutor and the adjudicator each to be responsible to the agency head by a separate chain of authority.<sup>34</sup>

How the APA operates to prevent internal combinations of investigating and judging, or prosecuting and judging, is shown by *Wong Yang Sung v. McGrath*<sup>35</sup> — still the leading case on the APA adjudicatory provisions. In that case, said the Court, "we find the administrative hearing a perfect exemplification of the practices so unanimously condemned."<sup>36</sup> The hearing in an alien deportation proceeding was "before an immigrant inspector, who, for purposes of the hearing, [was] called the 'presiding inspector.' Except with the consent of the alien, the presiding inspector may not be the one who investigated the case."<sup>37</sup> "But," as the Court pointed out, "the inspector's duties include investigation of like cases; and while he is today hearing cases investigated by a colleague, tomorrow his investigation of a case may be heard before the inspector whose case he passes on today."<sup>38</sup> The presiding inspector conducted the case on behalf of the government at the hearing. After its conclusion, he "prepare[d] a summary of the evidence, proposed findings of fact, conclusions of law, and a proposed order."<sup>39</sup>

The safeguards set up by the APA were intended to ameliorate the evils resulting from the combination of the functions of prosecutor and judge as exemplified by the *Wong Yang Sung* proceeding. This, *Wong Yang Sung* asserted, was beyond doubt.

According to the Davis-Pierce treatise,<sup>40</sup> the Supreme Court ignored the APA separation-of-functions provision when it upheld the three-hat ALJ system in Social Security cases.<sup>41</sup> In the Social Security hearing there is no agency counsel to present the case against the claimant. Whatever questioning of the claimant is necessary, apart from that by the claimant's own counsel, is done by the ALJ; if, as in many cases, the claimant has no attorney, all the questioning is by the judge.

32. *Butz v. Economou*, 438 U.S. 478, 514 (1978).

33. 5 U.S.C. § 554(d) (1994).

34. *See Columbia Research Corp. v. Schoffer*, 256 F.2d 677, 680 (2d Cir. 1958).

35. 339 U.S. 33 (1950).

36. *Id.* at 45.

37. *Id.*

38. *Id.*

39. *Id.* at 46.

40. 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §9.9, at 95 (3d ed. 1994).

41. *Richardson v. Perales*, 402 U.S. 389 (1971).

In one and the same case, the Social Security ALJ must represent the claimant, represent the SSA, and make an independent decision. To describe this situation, the SSA has used a “three hats” metaphor: “we use the terminology that we wear ‘three hats’. We put on the first hat, and we represent the claimant . . . . We then represent the government, the Social Security Administration . . . — that’s the second hat . . . . Then we turn around and put on the third hat, and we decide.”<sup>42</sup>

At first glance, this three-hat system may appear to contravene the APA separation-of-functions requirements because the Social Security ALJ is not limited to hearing and deciding. The ALJ also has the task of developing both the claimant’s and the government’s case. The Court rejected an attack on the multiple roles of the Social Security ALJ — what it called “the advocate-judge-multiple-hat suggestion”<sup>43</sup> — holding that the roles did not involve any prohibited combination of prosecuting and judging: “The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts.”<sup>44</sup> In social security cases, there is no “prosecution” as there was in the *Wong Yang Sung* deportation proceeding. The fact that ALJs reverse in favor of the claimant in almost half the Social Security disability cases “attests to the fairness of the system and refutes the implication of impropriety.”<sup>45</sup>

### *Administrative Judiciary*

Even more significant than the APA separation-of-functions requirements has been the setting up under the Act of an administrative trial judiciary. The securing of qualified hearing officer personnel, the Supreme Court says, is “the heart of formal administrative adjudication.”<sup>46</sup> Indeed, so far as the parties appearing before them are concerned, the officers presiding at hearings are the administrative equivalents of trial judges.<sup>47</sup>

Before the APA, as already seen, federal adjudicatory hearings were presided over by trial examiners and other hearing officers who were members of the agency staffs. Instead of “trials” before independent hearers, the private parties’ only “judges” were agency subordinates subject to the control of the opposing parties — at least in agencies in which the functions of prosecuting and judging were combined.<sup>48</sup> In addition, those “judges” normally played no significant part in the decision process. Though they were the ones who saw and heard the evidence, they could at most only file recommended decisions

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42. *Rausch v. Gardner*, 267 F. Supp. 4, 6 (E.D. Wis. 1967).

43. *Richardson*, 402 U.S. at 410.

44. *Id.* This was before the ALJ title was conferred upon APA hearing officers.

45. *Id.*

46. *Butz v. Economou*, 438 U.S. 478, 514 (1978).

47. *See id.* at 513.

48. *See NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 54-55 (3d Cir. 1992).



which might "not always [be] treated with much respect by the [agency heads]."<sup>49</sup>

The pre-APA situation was summarized in an Administrative Conference report:

Prior to the APA, there were no reliable safeguards to ensure the objectivity and judicial capability of presiding officers in formal administrative proceedings. Ordinarily these officers were subordinate employees chosen by the agencies, and the power of the agencies to control and influence such personnel made questionable any agency contention that its proceedings assured fundamental fairness. Furthermore, the role of the presiding officer in an agency's decisional process was often unclear; many agencies would ignore the officer's decisions without giving reasons, and enter their own *de novo* decisions.<sup>50</sup>

The result was that, as the Supreme Court states, "[m]any complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations."<sup>51</sup>

The report quoted above tells us that "[t]he APA was designed to correct these conditions."<sup>52</sup> It did so by setting up within each agency a corps of independent hearing officers who would not be subject to agency pressures.<sup>53</sup> The APA provided for appointment, by and for each agency, of as many hearing examiners as needed to conduct hearings.<sup>54</sup> The examiners were to be assigned to cases in rotation, so far as practicable, and to perform no duties inconsistent with their duties as examiners.<sup>55</sup> "They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record."<sup>56</sup> Under these provisions, federal agencies had to select their examiners from a list of personnel found qualified by the Civil Service Commission, and examiners were to receive compensation prescribed by the Commission "independently of agency recommendations or ratings."<sup>57</sup>

The Supreme Court has said that these APA provisions were "intended to make hearing examiners 'a special class of semi-independent subordinate hearing officers' by vesting control of their compensation, promotion and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees."<sup>58</sup> The APA intent was to enable qualified examiners to be chosen and to permit them to maintain the independence appropriate to a quasi-

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49. *Id.* at 55.

50. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS 10 (1980).

51. *Ramspeck v. Federal Trial Exam'rs Conference*, 345 U.S. 128, 131 (1953).

52. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *supra* note 50, at 10.

53. *See* 5 U.S.C. § 554 (1994).

54. *See* 5 U.S.C. § 3105 (1994).

55. *See id.*

56. *Butz v. Economou*, 438 U.S. 478, 514 (1978) (citing 5 U.S.C. § 7521). The Civil Service Commission is now the Office of Personnel Management.

57. 5 U.S.C. § 5372 (1994).

58. *Ramspeck v. Federal Trial Exam'rs Conference*, 345 U.S. 128, 132 (1953).

judge, by freeing them from direct agency control. "On paper at least," the sponsor of the APA in the Senate said, "they are to be very nearly the equivalent of judges, albeit operating within the federal system of administrative justice."<sup>59</sup> The APA is structured to assure hearing officer independence, free from pressures by the agency.<sup>60</sup> They were left within the agency for house-keeping purposes.<sup>61</sup> But their appointment, compensation, and tenure were largely removed from agency control and vested in the Civil Service Commission. The prohibition against removal except for good cause, after hearing, has been broadly construed. Thus, it applies to involuntary removal and retirement on a disability annuity; the APA is to be given a generous interpretation in light of the over-riding objective of hearing officer independence.<sup>62</sup> Under the cases, APA protection extends not only to removal, but also to demotions, suspensions, and other involuntary changes in status.<sup>63</sup>

### *Judicial Apotheosis*

The APA set up the independent corps of hearing examiners just discussed. Even more important has been the transformation of the examiner corps into an administrative judiciary. In 1972, the Civil Service Commission promulgated a regulation that changed the title of hearing officers appointed under the APA from "hearing examiners" to "administrative law judges."<sup>64</sup>

Whether such a change might be made by the Commission without statutory authorization became academic when a 1978 statute confirmed the Commission's action by providing that "hearing examiner" in the relevant APA sections should be changed to "administrative law judge."<sup>65</sup> This change in title elevated the status of hearing officers more than any other step could have done. And the judicial apotheosis has been achieved at no cost — simply by a change of name which was as painless as it was beneficial.

Perhaps the greatest accomplishment of the APA has been this elevation of the federal hearing officer to the status of administrative judge, vested even with the dignity of the judicial title. The importance of the ALJ corps set up by the APA has been emphasized by the Supreme Court itself. In *Butz v. Economou*,<sup>66</sup> the Court went out of its way to discuss "the role of the modern . . . administrative law judge," which the Court said is "functionally comparable to that of a judge."<sup>67</sup> The Court described in detail the functions of ALJs

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59. Pat McCarran, *Three Years of the Federal Administrative Procedure Act — A Study in Legislation*, 38 GEO. L.J. 574, 582 (1950).

60. See *Butz v. Economou*, 438 U.S. 478, 513 (1978).

61. See *Karl Stecher*, 11 Admin. L.2d (P & F) 868 (Civ. Serv. Comm'n 1961).

62. *Benton v. United States*, 488 F.2d 1017, 1020 (Ct. Cl. 1973).

63. See *Karl Stecher*, 11 Admin. L.2d (P & F) at 868.

64. 37 Fed. Reg. 16,787 (1972).

65. 92 Stat. 183 (1978).

66. 438 U.S. 478 (1978).

67. *Id.* at 513.

and stressed "the importance of preserving the independent judgment of these men and women."<sup>68</sup>

In view of the APA purpose to create an independent administrative judiciary, "functionally comparable" to the traditional court judiciary, a recent federal opinion is unfortunate.<sup>69</sup> The opinion found that a Social Security ALJ was biased because at the hearing he had expressed resentment at a district court order remanding the case, made derogatory statements about one of the examining physicians, and statements indicating a bias against Puerto Rican applicants for disability benefits.<sup>70</sup> The district court did not, however, stop with a decision reversing and remanding. Instead, the court said, "In this instance. . . a simple remand seems insufficient. . . . [T]he ALJ should be held accountable for his conduct."<sup>71</sup> Indeed, the court went so far as to state, "it is . . . this Court's hope that appropriate disciplinary action will be taken against the ALJ in this case."<sup>72</sup>

The just-quoted statement is wholly contrary to the spirit of both the APA intent to create an independent administrative judiciary and the leading case<sup>73</sup> giving effect to that intent. To punish a judge for acts performed while he is judging a case is wholly inconsistent with the notion of judicial independence. It is ironic that the instant court urged the disciplining of the administrative judge for action taken in hearing and deciding at the same time that judges were loudly protesting statements urging the resignation or even the impeachment of a federal judge because of his ruling on admissibility of evidence in a criminal case.<sup>74</sup>

It must also be pointed out that, under the APA, ALJs have hearing and decision powers comparable to those of trial judges. They do not, it is true, have the security of Article III independence and tenure; but their position is far superior to what it was before the APA. ALJs may be appointed only from the Office of Personnel Management's register of eligibles.<sup>75</sup> They receive an absolute appointment the day they enter on duty; they do not serve a probationary period.<sup>76</sup> They cannot be assigned to duties inconsistent with their judicial duties.<sup>77</sup> They can be removed only for good cause determined by the Merit Systems Protection Board after hearing.<sup>78</sup>

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68. *Id.* at 514.

69. *See* Pastrana v. Chater, 917 F. Supp. 103 (D.P.R. 1996).

70. *See id.* at 110.

71. *Id.* at 111.

72. *Id.*

73. *See* Butz v. Economou, 438 U.S. 478 (1978).

74. *See* Linda Greenhouse, *Rehnquist Joins Fray on Rulings Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A1; Alison Mitchell, *Clinton Defends His Criticism of a New York Judge's Ruling*, N.Y. TIMES, Apr. 3, 1996, at A12.

75. *See* 5 U.S.C. § 5372(b)(2) (1994).

76. *See* 5 U.S.C. § 3105 (1994).

77. *See id.*

78. *See* 5 U.S.C. § 7521(a) (1994).

On March 1, 1996, there were 1,343 ALJs in thirty federal agencies, distributed as follows:<sup>79</sup>

TOTAL NUMBER OF ALJs BY AGENCY

DEPARTMENT	ALJs	Senior ALJs	Total
Department of Agriculture	4	0	4
Department of Commerce	1	0	1
Commodity Futures Trading Commission	2	0	2
Department of Education	1	0	1
Environmental Protection Agency	7	0	7
Federal Communications Commission	6	0	6
Federal Energy Regulatory Commission	19	0	19
Federal Labor Relations Authority	5	0	5
Federal Maritime Commission	3	0	3
Federal Mine Safety & Health Review Commission	11	1	12
Federal Trade Commission	2	0	2
DHHS/Department Appeals Board	4	0	4
DHHS/Food and Drug Administration	1	0	1
Dept. of Housing & Urban Development	5	0	5
Department of the Interior	12	0	12
International Trade Commission	2	0	2
DOJ/Drug Enforcement Administration	2	0	2
DOJ/Office of Immigration Review	4	0	4
Department of Labor	55	0	55
Merit Systems Protection Board	1	0	1
National Labor Relations Board	64	0	64
National Transportation Safety Board	4	0	4
Occupational Safety & Health Review Commission	15	0	15
Office of Financial Institution Adjudication	2	0	2
Securities and Exchange Commission	3	0	3
Small Business Administration	1	0	1
Social Security Administration	1,060	32	1,092
DOT/Coast Guard	9	0	9
DOT/Office of the Secretary	4	0	4
U.S. Postal Service	1	0	1
TOTAL	1,310	33	1,343

79. Memorandum from Bob Bell, Office of Personnel Management, to author (Mar. 1, 1996) (on file with author). Senior ALJs are retired ALJs who have come back as reemployed annuitants.

*Decision Process*

The most famous sentence in the first *Morgan* opinion is: "The one who decides must hear."<sup>80</sup> It is, of course, impossible to give literal effect to this desideratum in any agency of consequence. At the same time, *Morgan I* did show graphically the unsatisfactory situation that prevailed in the administrative process of decision, where neither the one who heard nor the agency head in whose name the decision was formally issued made the actual decision. By his striking statement of the ideal — "The one who decides must hear" — Chief Justice Hughes dramatized the institutional-decision problem and, as it turned out, pointed the way to the remedy adopted by the APA: vest the one who actually hears with the power to decide the case, at least initially.<sup>81</sup>

The APA turns around "the one who decides must hear" principle by vesting the one who hears with the power to decide. The ALJs — the administrative judiciary set up under the APA — have not only been given the judicial title; they have also been vested with most of the decision-making power of trial judges.<sup>82</sup> The APA empowers the ALJ to issue an initial decision that becomes *the* decision of the agency unless appealed.<sup>83</sup> It is true that the APA gives the agency authority to require (in specific cases or by general rule) that the record be certified directly to it for decision.<sup>84</sup> In such a case, the agency retains all decisionmaking power, with the ALJ relegated to authority only to recommend a decision. In virtually all federal agencies, however, the power to make an initial decision has been delegated to the ALJ. The result, in the vast majority of federal agency cases, is to have an initial decision by the judge who presided at the hearing.

*Trial and Appellate Levels*

What the APA did was to set up a virtual trial-appellate structure within federal agencies. As far as it goes, the APA does much to resolve the institutional decision problem. At least at the trial level in the federal agencies, the one who decides does hear and the one who hears does decide. At the ALJ level, there is now a personal process of hearing and decision similar to that existing in a trial court. In this respect, the APA has made a fundamental change in the agency decision process. The change, the D.C. circuit tells us, is "far more than a quibble about semantics . . . . It means the difference between a decision by an adjudicatory official with independent status, who saw the witnesses' demeanor and gauged their truthfulness, and a decision by someone who is an official of the prosecuting agency and who saw only a paper record."<sup>85</sup>

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80. *Morgan v. United States*, 298 U.S. 468, 481 (1936).

81. *See* 5 U.S.C. § 557(b) (1994).

82. *See id.*

83. *See id.*

84. *See Communications Satellite Corp. v. FCC*, 611 F.2d 883, 887-88 (D.C. Cir. 1977).

85. *Dart v. United States*, 848 F.2d 217, 229-30 (D.C. Cir. 1988).

The APA is, however, not entirely consistent in carrying out the goal of setting up trial and appellate tribunals within the agencies. The ALJ is, to be sure, given authority to make an initial decision that becomes the final agency decision if there is no appeal to the agency. However, if there is an appeal from an initial decision, the agency is not limited to appellate power in deciding the appeal. This was the rule of the *Allentown* case.<sup>86</sup> The FCC there had reversed an initial decision even though the examiner's findings had been based upon demeanor.<sup>87</sup> The court of appeals reversed, holding that findings based on demeanor were not to be overruled by an agency without a "very substantial preponderance in the testimony as recorded."<sup>88</sup> In effect, the agency was limited to appellate power, with power to reverse only if the findings were "clearly erroneous."<sup>89</sup>

The Supreme Court in *Allentown* held that the limitation of the agency to appellate power was not warranted.<sup>90</sup> The APA provides expressly, "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision."<sup>91</sup> The agency on appeal from an initial decision has all the decisionmaking powers of a tribunal of first instance.<sup>92</sup> While the agency may defer to ALJ findings, that is not compelled.<sup>93</sup> The court's deference is to the agency and not the ALJ.

Under *Allentown*, the losing party in the initial decision stage has everything to gain by an appeal to the agency. Since the agency is not restricted to appellate power, there is the same chance for a favorable decision on appeal that there was at the trial level; the agency may decide for appellant even though the findings below were not "clearly erroneous."<sup>94</sup> Acting under their *Allentown* power, agencies felt completely free to reverse examiners' initial decisions. In the FCC at the time of *Allentown*, the Commission actually reversed initial decisions in a majority of cases.<sup>95</sup> The result was that losing parties tended to appeal initial decisions and the agencies had to decide as many cases as they did before the APA.

However, in the more recent cases, there has, despite *Allentown*, been an emerging doctrine of agency deference to ALJ decisions, particularly where credibility is concerned. Thus, the courts are starting to treat the ALJ as the primary judge of the evidence presented at the hearing.<sup>96</sup> At the least, the recent federal cases hold that the agency is required to explain why it has rejected

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86. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955).

87. *See id.* at 359.

88. *See id.* at 364 (citing *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 430 (2d Cir. 1951)).

89. *See id.*

90. *See id.* at 364-65.

91. 5 U.S.C. § 557(b) (1994).

92. *See id.*

93. *See United States v. Raddatz*, 447 U.S. 667, 680 (1980).

94. This is in contrast to *FED. R. CIV. P. 52(a)* which provides that a federal district court's "findings of fact . . . shall not be set aside unless clearly erroneous."

95. *See BERNARD SCHWARTZ, ADMINISTRATIVE LAW* § 7.26 (3rd ed. 1991).

96. *See, e.g., Diaz v. Chater*, 55 F.3d 300 (7th Cir. 1995).

ALJ findings.<sup>97</sup> In addition, the recent cases increasingly hold that, where there are disagreements between the agency head and the ALJ on questions of fact and credibility, the reviewing court may examine the evidence more critically in deciding whether the agency decision is supported by substantial evidence.<sup>98</sup>

The federal courts can do even more toward assimilating the ALJ role to that of a trial judge by following state cases that reverse where the agency substituted its judgment for that of the hearing officer on factual findings or reversed such findings that were supported by substantial evidence.<sup>99</sup> Perhaps it is too much to expect them to follow the example of a Florida court that holds that an agency may not reject a hearing officer's finding unless there is no competent substantial evidence from which the finding could reasonably be inferred.<sup>100</sup>

### SUGGESTIONS

Without a doubt, the APA has effected a quantum improvement in the administrative adjudicatory process. One has only to compare adjudication under the APA with the pre-APA situation, when *Morgan I*<sup>101</sup> was descriptive of the institutional decision process and "examiners . . . were mere tools of the agency concerned and subservient to the agency heads,"<sup>102</sup> to realize the APA's beneficial impact. As a general proposition, the adjudicatory process set up by the APA should be maintained. Certain suggestions for improvement can, nevertheless, be made.

#### *Central ALJ Corps*

Under the APA, ALJs are appointed by and work within the different agencies that are subject to APA formal hearing requirements. An increasing number of states, on the other hand, have followed the example first set by California in 1945<sup>103</sup> and set up a central pool of independent ALJs who are assigned to different agencies as they are needed. In their systems, the ALJs are an independent cadre of judges, who are part of an autonomous agency, not subject to or part of the agencies for which they render adjudicatory decisions.

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97. See, e.g., *Reyes v. Bowen*, 845 F.2d 242, 245 (10th Cir. 1988).

98. See, e.g., *Aylent v. Secretary of HUD*, 54 F.3d 1560, 1561 (10th Cir. 1995); *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 933 (11th Cir. 1995).

99. See, e.g., *Goin v. Commission on Ethics*, 658 So. 2d 1131, 1138-39 (Fla. Dist. Ct. App. 1995); *Berger v. Department of Prof'l Regulation*, 653 So. 2d 479, 480 (Fla. Dist. Ct. App. 1995); *Moran v. Shotgun Willies, Inc.*, 889 P.2d 1185, 1188 (Mont. 1995).

100. See *Crawley v. Department of Motor Vehicles*, 616 So. 2d 1061, 1063 (Fla. App. 1993). See also CAL. GOV'T CODE § 11.425.50(b) (West Supp. 1996) (mandating that an ALJ decision based upon credibility must be given "great weight" on judicial review).

101. See *Morgan v. United States*, 298 U.S. 468, 474 (1936).

102. *Ramspeck v. Federal Trial Exam'rs Conference*, 345 U.S. 128, 131 (1953).

103. Julian Mann, III, *Striving for Efficiency in Administrative Litigation: North Carolina's Office of Administrative Hearings*, 15 J. NAT'L ASS'N ADMIN. L. JUDGES 151, 157 (1995).

By the end of 1995, twenty states had adopted central panel ALJ systems.<sup>104</sup> Bills have been introduced to establish an independent federal ALJ corps,<sup>105</sup> but they have thus far only crossed Woodrow Wilson's Congressional "bridge of sighs to dim dungeons"<sup>106</sup> of committee inaction.<sup>107</sup>

APA adjudication would be improved by passage of a bill to establish a central federal ALJ corps. This is the logical last step in the half-century movement to assimilate administrative hearing officers to a veritable trial judiciary. It must, however, be recognized that, as indicated, there is little likelihood of any central ALJ corps bill being enacted by Congress in the foreseeable future.

### *Non-APA "Administrative Judges"*

There are many more federal ALJs than there are Article III judges.<sup>108</sup> But there are also many more non-APA hearing officers in federal agencies than there are APA ALJs. Indeed, according to a recent estimate, there are over twice as many non-APA "administrative judges" than APA ALJs.<sup>109</sup> According to a survey, there are 83 types of cases, totaling almost 350,000 a year, that non-ALJs are conducting in federal agencies outside the APA adjudication requirements.<sup>110</sup> These cases are heard by over 2,600 presiding officers;<sup>111</sup> this non-ALJ corps is, as stated, more than twice as large as the ALJ corps.<sup>112</sup> The largest group of non-ALJ "administrative judges" are the near 200 "immigration judges" who hear and decide immigration cases in the Department of Justice.<sup>113</sup> They account for almost half the cases dealt with by non-ALJ personnel.<sup>114</sup> Adjudicatory decisions are also made, in large numbers, by non-ALJs in the Departments of Health and Human Services and Veterans Affairs.<sup>115</sup> Compared to APA ALJs, these non-ALJ hearer-deciders have "less decisional independence, lower pay and benefits, and less job security. The selection and appointment procedures for [them] are controlled by the agencies themselves."<sup>116</sup>

104. *See id.*

105. *See, e.g.*, H.R. 1802, 104th Cong. (1995); S. 486, 104th Cong. (1995).

106. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 66 (10th prtg. 1893).

107. However, there was a Senate hearing on such a bill. *Administrative Law Judge Corps Act: Hearing on S. 594 before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 101st Cong. (1989).

108. *See* A. Leo Levin & Michael E. Kunz, *Thinking About Judgeships*, 44 AM. U. L. REV. 1627, 1649 (1995).

109. *See id.* at 1649 n.84.

110. *See* Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1345 (1992).

111. *See* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Falttering?*, 10 ADMIN. L.J. AM. U. 65, 71 (1996).

112. *See supra* text accompanying note 109.

113. *See* Lubbers, *supra* note 111, at 71.

114. *See id.* During the 1995 fiscal year, immigration judges decided 138,023 deportation cases and 66,064 asylum cases. Charles Finnie, *Playing Public Officer and Judge; Can INS Handle New Deportation Power?*, LEGAL TIMES, May 6, 1996, at 2.

115. *See* Verkuil, *supra* note 110, at 1345-46.

116. *Id.* at 1347.



There is little justification for second-class administrative justice presided over by non-ALJs, particularly in cases, such as those under the Immigration Act, that affect personal rather than property rights. Despite protests to the contrary, the title "immigration judge" is a euphemism, if not an oxymoron.<sup>117</sup> At the least, deportation proceedings, which "may result . . . in loss of both property and life, or of all that makes life worth living,"<sup>118</sup> should be subject to the APA, especially the ALJ requirement. Here, too, however, it must be recognized that it is most unlikely that Congress will replace the non-ALJ hearers-deciders with APA ALJs. Budgetary constraints, if nothing else, will prevent the provision of the fairer (and more expensive) adjudicatory system.

### *Allentown Repeal*

Despite the recent case law favoring greater agency deference toward ALJ decisions, *Allentown*<sup>119</sup> remains the governing rule. Ultimately, then, ALJ decisions are still subject to complete agency review power. The *Allentown* rule should be eliminated by a statute limiting the agency on appeals from ALJ decisions to appellate power. Congress could accomplish this by removing from section 557(b) of the APA the provision: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision."<sup>120</sup> In its place, there should be a provision that, on review of an ALJ initial decision, the agency shall have only the powers of review that a court has upon judicial review of the agency's decisions.<sup>121</sup>

### CONCLUSION

During the half-century it has been in operation, the APA is *the* law "that has made all the difference" in administrative adjudicatory procedure. When we compare the pre-APA hearing and decision process with that under the APA, we seem now to be in another, and altogether different, administrative law world. Above all, there is the quantum change from the *Morgan I*<sup>122</sup> decision process to an administrative counterpart of the decision process in the courts. Instead of hearings before "mere tools of the agency concerned,"<sup>123</sup> there are veritable trials, comparable to those in courts, before a federal administrative judiciary — "a corps of deciders who today rival federal and state judges in terms of their qualifications and benefits."<sup>124</sup> The present ALJ corps is the APA's greatest adjudicatory accomplishment.

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117. *But see* William Robie, *A Response to Professor Verkuil*, 39 UCLA L. REV. 1365, 1366-67 (1992).

118. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

119. *See* *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955).

120. 5 U.S.C. § 557(b) (1995).

121. *See* COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 203 (1955).

122. *Morgan v. United States*, 298 U.S. 468 (1936).

123. *Ramspeck v. Federal Trial Exam'rs Conference*, 345 U.S. 128 (1953).

124. *See* Verkuil, *supra* note 110, at 1352.

The evolving system of administrative justice under the APA brings to mind an opinion of Justice Jackson years ago, which referred to the distinction between American law, in which one system of law courts applies both public and private law, and the practice in a Continental country such as France, which administers public law through a system of administrative courts separate from those dealing with private law questions.<sup>125</sup> The French administrative courts are specialized tribunals that review the legality of administrative acts.<sup>126</sup> Although proposals have been made for establishment of comparable American administrative courts, the French concept of administrative reviewing courts has largely remained foreign to American administrative lawyers.

Under the APA, however, our system has taken its own path toward establishment of an administrative judiciary — but, in the American version, an administrative trial judiciary. The history of hearing officers under the APA, culminating in their present judicial status, has set the pattern for the developing American administrative justice. In particular, we can project a continuing increase in the size of the administrative judicial corps. When the APA provisions went into effect, the federal agencies employed 197 examiners. There are now more than six times as many ALJs in the federal agencies.<sup>127</sup> Only the fiscal squeeze of recent years has prevented the number from rising substantially higher. In the next century, we can predict that there may well be a federal administrative judiciary that completely dwarfs the traditional judiciary — with ALJs in ever-increasing numbers dispensing both regulatory justice and the mass justice of the Welfare State.

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125. See *Garner v. Teamsters Local*, 346 U.S. 485, 495 (1953).

126. See generally BERNARD SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 19-50 (1954).

127. See text accompanying *supra* note 79.

