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## **SOME THOUGHTS ON BEGINNINGS AND ENDS: COURT OF APPEALS REVIEW OF ADMINISTRATIVE LAW JUDGES' FINDINGS AND OPINIONS\***

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It is a unique pleasure to address administrative law judges (ALJs). I think of ALJs as being "present at the creation" of most of the cases that eventually wind their way to the D.C. Circuit. In fact, in the most recent year for which statistics are available, well over half the cases in our circuit came directly from the agencies,<sup>1</sup> and in a large number of those an ALJ made the initial decision. And while you launch these cases, we represent the end of the road for most of those same litigants: even in our worst year, the Supreme Court took up fewer than one percent of our cases. So between us, we control a good bit of the administrative process.

In my heart of hearts, I think that you have the more important role. You, with the help of counsel, define the issues, lay down the law at least preliminarily, and, most important, make the findings of fact that drive the rest of the process. I may be prejudiced in this vein. I started my career as a law clerk to Judge Jerome Frank of the Second Circuit, a "legal realist" whose course at Yale Law School was titled "Fact Finding." Judge Frank stoutly maintained that whoever found the facts con-

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\* This article was originally given as a speech at the Federal Administrative Law Judges' Conference in Washington, D.C. on November 18, 1988.

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1. 1988 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS 2 (twelve-month period ended June 30, 1988).

trolled the outcome of the case. On reflection some thirty-five years later, I think he was probably right.

It is also interesting to me that what administrative law cognoscenti have recognized up to now as the de facto power of a factfinder increasingly is being translated into de jure power. More and more proposals for administrative change are coming down the pike, including, for example, the creation of new article I courts for veterans' claims<sup>2</sup> and proposals to do the same for social security claims.<sup>3</sup> Many of these proposals would make the ALJs' factual determinations conclusive or reviewable only for the most egregious errors.<sup>4</sup> So yours is a growth stock. This consensus in favor of more power in the factfinder comes, perhaps ironically for us court of appeals judges, at a time when there are loud, even strident, calls for judicial restraint on the part of article III judges—demands that we interfere less in the agencies' business and stop second guessing their judgment calls.

It is an interesting dichotomy, but I would guess that your ascendant power is an inevitable phenomenon. So long as agencies handle more and more disputes between citizens and their government in more and more specialized subject matter areas as I think that they will—notwithstanding the occasional campaign rhetoric to the contrary—and so long as there is a simultaneous reluctance to increase the numbers of article III judges indefinitely, more power is going to be lodged at your level. There is general agreement among article III judges that we do not want to grow in numbers. I have just come from a historic gathering (the first in 200 years) of all the federal courts of appeals judges in the nation, and that is the definite consensus: we don't want our group to get much bigger. That means, then, that proposals to limit our scope of review, particularly in the factfinding area, will be considered carefully. So your star is on the rise, and, if ours is not on the wane, it is at least fixed for a time.

I do not need to tell you that with any power surge comes increased

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2. Congress recently enacted the Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105 (1988) (to be codified at 38 U.S.C. §§ 4051-4092), which created a new United States Court of Veterans Appeals under article I of the Constitution.

3. See *Court Idea Revived*, NAT'L. L.J., March 24, 1986, at 2 (reporting a proposal for the creation of a new, specialized article I court to deal with disability and other social security claims).

4. These proposals would move the agency adjudication process in the direction of the model established under the federal child labor laws, see 29 U.S.C. §§ 212, 216(e) (1982), where the ALJ's decision is the final—i.e., unreviewable—action within the Department of Labor. See generally Cass, *Allocation of Authority within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U.L. REV. 1, 10-14 & n.48 (1986).

responsibility. ALJs, not appellate court judges, are likely to become the court of last resort for many more litigants. In that context, maintaining your independence and integrity becomes ever more critical. And that is not always easy. You, in contrast to us, do not have life tenure and your duties and assignments may be changed at the behest of the agency. Thus, I believe that ongoing efforts by ALJs to distance yourselves from specific agency sponsors, and to build a reputation and a reality of professionalism and independence, are tremendously important to the future of administrative law as a whole. Only an impressive track record will convince a disgruntled citizen that an umpire hired by the agency is really going to give her a square deal.<sup>5</sup> And, of course, it is hard to work in and for an agency and not be subtly affected by its priorities and even prejudices. The ALJ has to enforce the law pretty much as laid down by the agency and the courts. But when the goals of the agency drive hard in one direction, it takes courage and intellectual discipline to find the facts impartially if they point to a result in the other direction. Yet that is precisely what ALJs must do now and with even more frequency in the future.

Moreover, the smaller the claim and the more insignificant the claimant, the greater the ALJ's responsibility is. I do not, for instance, envy the ALJs in the social security disability and labor law fields, or the immigration officers at the Department of Justice. Their caseloads are staggering; the policymakers cannot help but think in terms of missions, priorities, numbers, and even occasionally dollar signs. Yet, in such areas the ALJs must play God. Their conscience and professionalism are often their only guide. At every important juncture in our history and at every level of adjudication, truly independent judges have courted rejection, calumny, and misunderstanding by their bosses and even the public. We all feel occasionally like the spy who wants to come in from the cold and enjoy the approbation of going with the flow. But resisting such temptations is, in the final analysis, what judging is all about. Enough said—I know I preach to the converted. You ALJs are the real freedom fighters in my book, and I only wish the national budget reflected that truth.

I do wonder, however, for the future of your corps if we—the government as a whole—pay as much attention to many factors in ALJ selection as we should. We commonly seek to ensure that a candidate

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5. For a recent example of the skepticism that ALJs must confront regularly, see Tolchin, *Are Judge and Agency Too Close for Justice?*, N.Y. Times, Feb. 5, 1988, § 4 at 2, col. 3.

possesses such qualities as intellectual acumen and acquired expertise, but we might probe more deeply into a potential ALJ's judicial temperament, lack of bias, impartiality, signs of courage and integrity in his or her past history, and willingness to take principled stands against the mainstream when necessary. A good civil servant does not automatically make a good ALJ. ALJ positions should not be rewards for good soldiering on the agency's behalf. The Europeans may have a leg up on us in designing career ladders for their judges that include stints in the government bureaus as hearing officers, and that provide for upward mobility from there into the civil courts.

Our tradition of appointing article III judges is a much different one, relying more heavily on political factors and philosophical congruence with the administration in power. But the intransigence of that tradition should not prevent us from looking hard at our selection processes for ALJs, especially as they assume ever more critical functions in our decisional processes. For instance, I was shocked to learn of the low percentage of women who have been appointed ALJs: as of September 1988, only 4.1% of federal administrative law judges were women. I am equally disturbed by the low representation of minorities in the ALJ ranks: approximately 94% of ALJs are white.<sup>6</sup> Certainly the same needs for diversity and representativeness among judges applies at the ALJ level as at the appellate court judge level. Both of our benches dispense justice to all segments of the population, and our composite profiles ought to send the message that our ranks are open to everyone of ability. It is a goal for which all of us should be fighting together.

On another front, I am glad to see over the years the greater integration of ALJs into our judges' professional groups: the ABA, the National Association of Women Judges, and even our newly formed Washington-based Administrative Law Inn of Court. We have much to learn from each other.

But now for a minute to descend from the macro to the micro. Even without any increases in responsibility, the ALJs' findings and reasoning already dominate the administrative law process. They are the starting point for the rest of us. I recognize, of course, that the Supreme Court told article III courts a long time ago that they do not directly review an ALJ's findings, but rather must focus on the agency's decision.<sup>7</sup> In doing

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6. These figures were obtained from the Office of Administrative Law Judges in the Office of Personnel Management, Washington, D.C., and are current as of September 1988.

7. See, e.g., *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *Universal Camera*

so, however, reviewing judges are allowed and indeed instructed to take into account the ALJ's findings as part of the overall mix of data from which the court must decide whether or not "substantial evidence" supports the agency's decision.<sup>8</sup> And on the court of appeals we do try conscientiously to adhere to that mandate.

As you know, many of our administrative law cases involve complex facts and highly technical subject matters. While we have the duty to familiarize ourselves with the subject matter of each case we consider—no matter how arcane—so that we can make responsible judgments as to whether an agency acted within reasonable bounds, the volume of our business necessitates taking short cuts. Up there in our ivory tower, we have limited expertise and resources to absorb, synthesize, and accommodate all of the facts and evidence presented by parties throughout the adversarial process. Even if we immerse ourselves ad infinitum and ad nauseam in the technical details of the record, a practice of which I have often been accused, still we are often left groping for the more elusive, intuitive grasp of the essence of a case. Over time we have developed a number of doctrinal devices to deal with our inherent limitations: we say we police the consistency and procedural regularity of agency decision-making, and that we require an explanation for any departure from past policies of the agency<sup>9</sup>; we insist on being able to discern the path of the decisionmaker, insuring, as Judge Harold Leventhal has said, that she does not cross the line from the "tolerably terse" to the "intolerably mute"<sup>10</sup>; and we take a "hard look" to assure that the agency has adequately considered all the relevant factors in a case.<sup>11</sup>

But most often the best initial hold a reviewing court can get on the case as a whole comes from the findings and opinion of the ALJ. The ALJ's decision cannot of course be determinative on review, but it often provides the most dispassionate voice in the record. When I first came

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Corp. v. NLRB, 340 U.S. 474, 492-97 (1951). See generally K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.16 (2d ed. 1980).

8. *Universal Camera*, 340 U.S. at 496-97.

9. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

10. *Id.* at 852.

11. See, e.g., *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520 & n.33 (D.C. Cir. 1983) (borrowing Judge Leventhal's phrase to suggest that we must "take a 'hard look' at both the facts and the agency's reasoning" (citation omitted)). See also Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974) ("The court does not make the ultimate decision, but it insists that the agency take a 'hard look' at all relevant factors.").

onto the court of appeals, Malcolm Wilkey, then my senior by ten years, told me that in an agency case I should go first to the ALJ opinion, then to the agency decision, then, in the remaining time, to the briefs. And that was in the main good advice.

A reviewing court will generally use the ALJ's recommended decision as the benchmark for its first impression on agency reasonableness. If an agency affirms the ALJ's findings, there arises an informal presumption of normalcy in the proceedings. But a reviewing court's antenna picks it up immediately when the agency has reversed or overridden in substantial part the ALJ's decision, particularly findings of fact. It is simply a fact of administrative life that when two primary decisionmakers disagree, a reviewing court will be especially careful to find out why, whereas when the agency head affirms the ALJ's decision, the challenger has a very heavy burden to bear. When there is disagreement, some of us, especially those who have worked elsewhere in government, may harbor a scintilla of suspicion that the politically appointed top level policymakers in an agency are more likely caught up in the pursuit of the agency's current mission or immediate goals than the ALJ at the bottom of the process who listens to the evidence. I think we give *you*, the ALJ, our closest attention in most such cases. Of course, the agency always has the last word on policy, and its interpretation of statutory law, if reasonable, will prevail when we do not think Congress has spoken to the precise issue. But when your board or commission finds the facts differently from you, we generally apply something of a strict scrutiny standard. Some courts of appeals have come right out and said it: when an agency departs from an ALJ's findings, "it must explain why."<sup>12</sup>

I recently conducted an informal survey of administrative law opinions handed down by the D.C. Circuit in the first several months of 1988 in cases that had originated before ALJs. Having involved only twenty-four cases, my analysis did not rise to the level of "statistical significance"; still, it confirmed my general impression of how important a role ALJs' work plays in the review process. First of all, as I went *looking* for how the court treats ALJs' findings, I was struck by the matter-of-factness with which courts and agencies alike rely on the ALJs' factfindings as determinative in the overwhelming majority of cases. But even beyond the factual determinations, the reviewing bodies most often fell in line with the ALJ's overall legal analysis: in two-thirds of the cases that

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12. *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 219 (2d Cir. 1976).

reached our court for review, both the agency and the court affirmed the ALJ's decision.<sup>13</sup> Perhaps most interesting, of the six cases where the agency disagreed with the ALJ's recommended decision,<sup>14</sup> the court set aside the agency action in all but two.<sup>15</sup> That says something!

A closer look at a few of the cases in the sample reveals some of the dynamics that go on between the appellate courts, the ALJs, and the agency middle man. When you base your findings clearly on the credibility or demeanor of witnesses, you are at your zenith of power, even when there are conflicting stories. In one recent case, we said: "We must accept the ALJ's credibility determinations, as adopted by the Board, unless they are patently insupportable."<sup>16</sup> And in only one case out of twenty-four did we find an ALJ's findings "inherently incredible."<sup>17</sup> But a word of advice: when you are basing your findings on the credibility of witnesses, it is wise to say so. If you do not clearly identify the source of your findings, there is much more room for interpretation by a reviewing agency or court as to whether your ultimate findings were indeed secondary or derivative or inferential, and not based on witness credibility. If they are perceived as secondary or inferential, and the agency subsequently overrules you, there is a greater chance we will go along with the agency, as indeed we did in one case in my sample.<sup>18</sup> However, even that case produced a spirited dissent on our court citing the "ill-conceived, ill-reasoned reversal of [the] Administrative Law Judge."<sup>19</sup>

With remedies as well, because they are seen as partaking more of policy judgments, we are likely to give the agency the benefit of the doubt if it adopts a remedy different from that selected by an ALJ. And, of course, if the ALJ or the agency uses the wrong legal standard in a deci-

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13. See, e.g., *Comuni-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 1539 (1989); *Simpson v. Young*, 854 F.2d 1429 (D.C. Cir. 1988); *United Food and Commercial Workers Int'l Union v. NLRB*, 852 F.2d 1344 (D.C. Cir. 1988); *Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353 (D.C. Cir. 1988).

14. See *G.W. Galloway Co. v. NLRB*, 856 F.2d 275 (D.C. Cir. 1988); *Drexel Burnham Lambert, Inc. v. Commodity Futures Trading Comm'n*, 850 F.2d 742 (D.C. Cir. 1988); *Chirino v. National Transp. Safety Bd.*, 849 F.2d 1525 (D.C. Cir. 1988); *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988); *Simpson v. Federal Mine Safety and Health Review Comm'n*, 842 F.2d 453 (D.C. Cir. 1988); *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143 (D.C. Cir. 1988).

15. See *Drexel*, 850 F.2d at 753; *Chirino*, 849 F.2d at 1530-31.

16. *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1297 (D.C. Cir. 1988).

17. *Chirino v. National Transp. Safety Bd.*, 849 F.2d 1525, 1530 n. 6 (D.C. Cir. 1988).

18. *Drexel Burnham Lambert Inc. v. Commodity Futures Trading Comm'n*, 850 F.2d 742 (D.C. Cir. 1988).

19. *Id.* at 756 (Starr, J., concurring in part and dissenting in part).

sion, we will reverse and remand. Customary deference notwithstanding, in several cases where the agency had overturned the ALJ, our court literally scoured the record, only to conclude ultimately that the board did not have substantial evidence for overturning the ALJ's findings. In one case, the court said that the basis of the board's mistake lay in some confusing "dictum" by the ALJ.<sup>20</sup> The message there, I suppose, is to keep your findings crisp and clean.

And finally, I would note that your factfinding power is sometimes downright scary. In a recent disability case, an ALJ denied benefits to a claimant who alleged that stress originating in work conditions caused his heart attack.<sup>21</sup> Despite a long series of cases upholding benefits in work-stress related heart attack cases, the court stuck with the ALJ's finding, over conflicting testimony, that work related stress had not caused this particular attack.<sup>22</sup>

Because of the importance of your factfinding at all subsequent stages, I view with some interest recent debates about how detailed or sparse ALJ opinions should be.<sup>23</sup> From my viewpoint an opinion by an ALJ can and should do more than merely lay out the bare minimum of findings necessary to reach the legal conclusion in a given dispute. The ALJ's opinion is the reviewing court's first introduction to the case, and it should therefore spell out essentially everything the reviewing court needs to know. Thus, while like motherhood and apple pie, we all favor administrative as well as judicial succinctness, an overly terse ALJ opinion has lost sight of its audience.

You are writing for judicial readers down the road who may not and, in fact, probably will not, read for themselves all the testimony you have heard. ALJs thus need to lay out for us not only the critical findings, but the basis on which they have made them, even spoon feeding us the record cites for the most important findings. You need to distinguish between the primary findings based on witnesses or documents and the secondary inferences you draw from those sources. You need to draw us a map of how both your primary and secondary findings lead you to your

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20. *Simpson v. Federal Mine Safety and Health Review Comm'n*, 842 F.2d 453, 461 (D.C. Cir. 1988).

21. *Whitmore v. AFIA Worldwide Insurance*, 837 F.2d 513 (D.C. Cir. 1988).

22. *Id.* at 516.

23. For an articulate argument that ALJ opinions should become "very sparse," freeing ALJs to "leapfrog [from facts] to the conclusions of law," see the remarks of the Hon. Jean F. Green. Greene, Keppel & Gelpo, *Fact-Finding and Opinion Writing for Administrative Law Judges*, 4 *LAW AND INEQUALITY* 91, 94 (1986).



conclusions of law, and what legal standards you are applying to the facts. Very often we end up reviewing an ALJ's opinion directly when the agency adopts it as its own. Thus, the more explicit the connections you draw between facts and law, the easier you make our job. A rough count of our recent agency remands reveals that in approximately half the cases, the cause of the remand was the court's inability to understand or accept the decisionmaker's path of reasoning. We did not say that they were wrong, only that we could not figure out how they got from here to there. "Failure to adequately explicate" is the term of art used for our inability to figure out what an agency was doing or where it was going. Instead of spending so much time moot-courting the agency lawyers who come into court to argue for decisions already made, I think more agency resources ought to be spent in moot-courting the rationales and decisions themselves. I am not sure how this would work with ALJs, but I know that with article III judges, one's colleagues often succeed in picking up inconsistencies and gaps in one's reasoning or clarity that may produce confusion if left uncorrected. Many remands could be avoided by some comparable internal review process at all stages of agency decisionmaking. You may sometimes forget it, but we are generalists up here with limited capacities. As individual judges we sit on only a dozen or so cases from any given agency each year. In most instances, we need an extensive education as to what the case is all about. Conversely, we are also ornery critters who do not always react well if we think someone is trying to overwhelm us with jargon and complex concepts. Having a colleague read a proposed decision can often help this entire process along.

I hope that I have not bored you with the obvious. In a nutshell, and without idle flattery, you are probably the most critical part of the administrative process. If you get it right, the rest goes smoothly, almost automatically. If you do not, there are apt to be "searching reviews," remands, and inefficient repeats of the process. We on the court of appeals always look carefully—and usually first—at what you do; your work is never wasted or ignored, believe me. But in a more basic sense, we also look for you to do the right thing—to provide the non-mission oriented appraisal of the case for us to consider. In some agencies that takes great courage. But if you don't take that first principled step, you cut off our options up the line. Yours is a hard job, but an essential one if citizens are to retain their faith in a fair government and if our two

branches of government are to work together in harmony. I know you are up to the job, and I wish you well.