

A Credible Mechanism for Resolving Disputes

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Introduction

- The system of jurisprudence and the rule of law in the U.S. is premised on a system of checks and balances in a government with three separate but equal branches of government (the legislative, the executive and the judicial branches). The legislative branch makes the laws and the executive branch enforces the laws. The judicial branch interprets the laws by resolving disputes. The legislative branch holds the power of the “purse strings.” The executive branch possesses the enforcement mechanisms. The judicial branch cannot appropriate money and it doesn’t have a police force to enforce its judgments. It is the weakest branch of government, yet it is the last word because the people, so far, accept the legitimacy of the Supreme Court and the courts below it. It is the unseen glue which holds our system together.
- Agencies are created to implement specific legislative purposes.
- As such, agencies have a combination of functions:
 - EXECUTIVE – Enforcement
 - LEGISLATIVE –Rulemaking
 - JUDICIAL – Adjudications
- Where does the “Guidance Document” (Federal) fit? Under the Executive (function) or Legislative (function)?

**Prepared by the U.S. Attorney General to guide agencies in the performance of their functions.

Adjudications: Due process Analysis Factors

- ADJUDICATIONS: DUE PROCESS ANALYSIS FACTORS
- DEPRIVATION
 - Immediate
Threatened
 - Direct
Indirect
- PROPERTY
 - Entitlement
Expectation
Sources
- LIBERTY
 - Stigma
Good Name
Honor – Integrity
Opportunities Foreclosed
- PROCESS
 - Hearing
Timing – Scope
Lawsuit

Agency Program –Right to Adjudication

- Regulatory Agencies/*e.g.* the EPA (Environmental Protection Agency)
Enforcement initiated by agency
Enforcement initiated by private party
- Benefits Agencies, *e.g.* SSA, UI, Workers' Comp. (between two private parties)
Application for benefits
Termination of benefits
- Licensing Boards: Application, *e.g.*, denial, Suspension or revocation
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Powers of Adjudicator at Hearing

- Administer oaths and affirmations
- Sign and issue subpoenas
- Rule upon offers of proof and receive evidence
- Dispose of motions relating to discovery
- ****REGULATE THE COURSE OF THE HEARING**
- Fix the time for filing briefs and other documents
- Convene pre-hearing conferences to simplify issues
- Issue orders that control the course of proceedings
- Dispose of motions, including motions to dismiss, intervene or similar matters
- Reprimand or exclude from hearing any person for indecorous conduct
- Award attorney fees for discovery abuses when permitted by statutory law.

The Need for Decisional Independence

- The “Application” Section of the 2007 ABA Model Code of Judicial Conduct refers to the Administrative Law Judiciary.
- Canon 1 states: A judge shall uphold and promote the **independence**, integrity, and impartiality of the judiciary....
- The late Chief Justice William H. Rehnquist said that an independent judiciary is the “crown jewel of our democracy.”
- The administrative law judiciary, unlike constitutional judges, must deal with accommodating legitimate agency objectives without compromising judicial independence.
- **Structural Independence** [statutory frameworks that assure the ALJs judicial/decisional independence]
- **Functional Independence** [the ALJ’s insistence on being judicially/decisionally independent, sometimes despite a statutory framework to the contrary].
- **Job Security** is the bedrock of judicial independence
- **ALJs**, Quasi-Judicial Officers **or** Employees? Or, both?

Accountability of Adjudicators

- Ordinarily, the administrative law judiciary likes to fly under the radar.
- There are several appropriate forms of accountability. None include
 - political accountability.
- There is a constant interplay between judicial independence and accountability.
- APPROPRIATE FORMS OF JUDICIAL ACCOUNTABILITY
- Accountability to “reasoned elaboration” [having to give legal reasons for a decision].
- Accountability to precedent a/k/a *stare decisis* [the SSA has a policy of non-acquiescence (in opinions of other U.S. circuit courts of appeal if they conflict with SSA policy). Senior U.S. District Judge John L. Kane (Colorado) calls this a recipe for anarchy.
- Accountability to codes of judicial conduct, rules of professional conduct.
- For the administrative law judiciary, accountability to supervisory performance evaluations mandated by state personnel systems. There are two types:
 - Judgmental (affects pay, status, tenure)
 - Developmental (for self-improvement only)
- Right to Judicial Review.
- Public Performance Evaluations (developmental) [by commissions, public surveys].

**“Accountability in the Administrative Law Judiciary: The Right and the Wrong Kind,” 86 *Denv.U.L. Rev.* 157 (2008) [reprinted in 30 *J. NAALJ* 19 (2010); Felter, Edwin L. Jr. [explores the reasons why political accountability is not appropriate]

CENTRAL HEARING AGENCIES (CENTRAL PANELS) vs. ADJUDICATORS IN THE AGENCIES

- Perceptions can be everything. A perceived lack of independence and impartiality can, in and of itself, amount to a lack of both.
- If the adjudicator is within the agency, and impenetrable wall between it and the adjudicator must be constructed to foster public perceptions of fairness, *e.g.*, the federal ALJs, who hear Social Security cases are in the Office of Hearings and Appeals of the Social Security Administration (SSA) and are physically separate from the administration.
- The best impenetrable wall is a central panel, an organization of adjudicators that is a separate agency from the agencies that are required to provide a fair hearing at the end of the administrative line.
- Now, there are 25 state central panels, 3 city central panels (NYC, Chicago, and D.C.), and one county central panel (Cook County, Illinois).
- CENTRAL PANELS – A GOOD GOVERNMENT IDEA
- Maryland was the first central panel established for a purely good government idea. It was established in 1989. The first two years were more expensive than all the confederated adjudicators existing before 1989. After the third year, costs were less.
- Alaska established a central panel in 2004 – for good government reasons.
A central panel offers an efficiency of scale.
- Its only function is to hear and decide contested cases.
- Thus, public perceptions of fairness are similar to perceptions of the judicial branch.
- The central panel still offers ALJs with specialized expertise, without compromising perceptions of fairness, *i.e.*, coziness with the agency is not a factor.
- The State of Illinois now has a central panel.

Forms of ADR (Alternative Dispute Resolution)

- Settlement Conference by a Judge --- judge discusses merits of positions to encourage settlement (can be heavy handed)
- Non-binding Arbitration (by a private arbitrator or arbitrators) ---a neutral selected by the parties hears the evidence and issues a court-like decision for the purpose of facilitating settlement.
- Binding Arbitration –same as nonbinding but the neutral’s decision resolves the matter and it is not subject to appeal.
- Early Neutral Evaluation – a neutral evaluates what will happen at trial and issues a report on strengths and weaknesses of each side’s position in order to facilitate settlement.
- Mini-Trial --- an abbreviated trial where the parties agree to be bound by the neutral’s decision.

Minimum Due Process Requirements for a Hearing

- Timely and adequate notice detailing reasons for proposed termination, revocation or denial.
- Effective opportunity to defend by confronting any adverse witnesses
- Opportunity to present arguments and evidence, orally
- Allowing the person to retain an attorney
- Basing a conclusion as to benefit eligibility or permit revocation or denial solely on legal rules and evidence presented at hearing
- A statement of the reasons for the determination, indicating the evidence relied on; and,
- An impartial decision maker.

REMEDIES

Adjudication by Tribunal (BEST CASE WINS)

Monetary Penalties

- Specific Performance of an Agreement
- Cease and Desist (injunctions)
- Revocation, Suspension or Probation (of License or Permit)

Mediation (PARTIES CAN SHAPE THE OUTCOME)

- Enforceable Settlement Agreement

Chevron and its Aftermath

- Judicial Branch Courts have historically granted deference to an agency's interpretation of its own rules and regulations

HOWEVER,

Under *Chevron*, the Supreme Court has been mandated to accord an agency's interpretation of its statutes (adopted by Congress) if there is genuine ambiguity in the statute. The rationale is that the agency should know best.

- *Chevron* has been increasingly disfavored under the rationale that it amounts to “the fox watching the chicken coop.”—without adequate oversight by the judicial branch.

Auer Opinion

- FACTS: Police sergeants sued for an alleged violation of the Fair Labor Standards Act (FLSA) by virtue of a departmental policy/regulation that provided they were management and not subject to being paid overtime. Ultimately, the Supreme Court determined that the regulation was reasonable, noting that to be non-exempt employees they must be subject salary reductions, a limit on hours worked beyond which the non-exempt employees are entitled to overtime pay—time and one-half pay, whereas exempt (management) employees are **not** entitled to overtime pay, salary reductions, or the mandates of the FLSA. The opinion illustrates the reluctance of the courts to interfere with an agency's reasonable regulations.

Kisor v. Wilkie Opinion

- Appeal from the Board of Veterans Appeals which upheld the denial of a greater status to veterans suffering from service connected post-traumatic stress disorder (PTSD) than other service connected medical conditions. The U.S. Supreme Court affirmed the Board by according **deference** to the agency's reasonable construction of the above provision—again illustrating the Court's reluctance to interfere with an agency's policies/rules.
- If the courts freely interfered with and second-guessed an agency's rules, the entire regulatory scheme would be undermined and the courts would become super-managers.