2008

Administrative Judges' Role in Developing Social Policy

Charles H. Koch Jr.
William & Mary Law School

Administrative Judges' Role in Developing Social Policy

Charles Koch, Jr.[*]

Administrative judges have a serious, in some sense dysfunctional, inferiority complex.[1] This leads them to be hyper-sensitive regarding their status vis-à-vis "real" judges. Yet their role in society may eclipse that of other judges. While their worth is often measured by cost effectiveness, their most significant contribution is in the evolution of social policy.[2] Indeed, given the growth of the administrative state, they have become crucial to policy development. As the great sage of the administrative process, James Landis, observed: "The ultimate test of the administrative [institution] is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making."[3]

---

* Dudley W. Woolbridge Professor of Law, William and Mary School of Law. B.A. University of Maryland, 1966; J.D. George Washington University, 1969; LL.M. University of Chicago, 1975. I would like to thank the LSU Law Review and particularly those who organized this symposium. Special recognition goes to Professor Edward Richards for conceiving a symposium that not only focuses on state administrative law but also on practical administrative law topics. I can only hope he has launched a trend in both regards.

1. Officials who preside over administrative hearings are given many names. Practice has settled on "administrative law judge," almost always "ALJ." An acronym, although perhaps instinctive for administrative systems, demeans them. Thus I use the general term "administrative judge." It emphasizes that they are, no matter the label, judges and no less so because they usually preside over specially tailored hearings. Certainly they are every bit as much judges as family or traffic court judges. Their constitutional status is equal to that of bankruptcy or immigration judges.

2. The term "policy" encompasses a wide variety of decisions that advance or protect some collective goal of the community as a whole (as opposed to those decisions that respect or secure some individual or group right). *See* 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 1.2[2](d) (2d ed. 1997); HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 141 (William Eskridge & Philip Frickey eds., 1994) ("A *policy* is simply a statement of objectives."); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058 (1975), *reprinted in* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY ch. 4 (1977).

3. JAMES LANDIS, THE ADMINISTRATIVE PROCESS 39 (1938).

It is well established that administrative agencies, like common law courts, may evolve policy through adjudication.[4] Despite this well-established and longstanding doctrine, little is understood about the mechanics of such adjudicative policy-making. Thus, the central role of the administrative judges to this crucial administrative function remains largely unexamined, even by the judges themselves. This Article isolates the role of administrative judges in the development of administrative policy. It concludes that they must have a substantial role if policy-making in administrative adjudication is to perform the key task of administrative policy-making in general.[5]

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. makes it clear that agencies as well as the courts must obey congressional intent to the extent they can find it in the statute.[6] Administrative judges are just as responsible as the agencies for compliance with this command. In doing so, they must follow the lead of the agencies for reasons beyond authority, including uniformity, accountability, and fairness. Like the agency, administrative judges may shift to policy-making only if application of the statute in the individual case is impossible without some policy-making.[7] Related to their role in policy-

4. While often affirmed, the leading cases are *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351 (2000). *See generally* KOCH, *supra* note 2, § 2.12. Similarly, the Supreme Court in *Chenery II* established administrative discretion to choose between rulemaking or adjudication. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 201 (1947) ("The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties in relation to the particular proposal before it.").

5. This article focuses on the administrative judge's role in the larger context discussed in Charles J. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693 (2005).

6. 467 U.S. 837 (1984).

7. It is necessary to distinguish administrative policy-making from statutory interpretation. This distinction is crucial to the authority of federal courts and hence it has been well expressed in that context. The Supreme Court recently observed: "[W]hile there are federal interests that occasionally justify this Court's development of federal common-law, our normal role is to *interpret law created by others* and 'not to prescribe what it shall be.'" Danforth v. Minnesota, 128 S. Ct. 1029, 1046 (2008) (quoting Am. Trucking Assns., Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring)) (emphasis added). Field, for example, observed that "'federal common law' . . . refer[s] to any rule

making, an administrative judge may find occasion to question the agency's interpretation and begin the process of reevaluation up the adjudicative hierarchy. Nonetheless, the administrative policy-making function is categorically different from statutory interpretation, and the role of the administrative judge is also different.[8]

Administrative policy is fluid, and adjudication has a well-accepted role to play in its development.[9] However, administrative judges, like that of their judicial counterparts, must stay within the limits of the adjudicative process. The notion of stability serves the individual values of predictability and reliance.[10] These

---

of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional." Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (emphasis omitted). Merrill expressed the necessary contrast between law making and interpretation. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) ("'Federal common law' . . . means *any* federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense.").

8. *See Chevron*, 467 U.S. at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'").

9. *See generally* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 91 (1991) ("These sources of indeterminacy in dealing with precedents have the effect of enabling the Justices to engage in conscientious disagreements over the scope of precedents, to consider new or renewed arguments, and to contribute to the evolution of constitutional doctrine.").

10. Predictability and stability are integral to assuring the rule of law. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 18–21 (1997). *See* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978) ("[A]djudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated. Even in the absence of any formalized doctrine of stare decisis or res judicata, an adjudicative determination will normally enter in some degree into the litigants' future relations and into the future relations of other parties who see themselves as possible litigants before the same tribunal.").

considerations are no doubt important to a fair administrative system. Citizens should be able to rely on a current understanding of agency law and take action under some reliable prediction of administrative reaction. Administration should seek consistency over time and within a program.[11] On the other hand, each new precedent potentially impacts policy options. Fortunately, *stare decisis* is not the rule in administrative adjudications, so an agency is permitted to change its policy.[12] Thus, adjudicative policy-making must balance stability and innovation.

The "agency," as an institution, is responsible for developing and adjusting its policy. Administrative adjudicative systems, even relatively informal ones, replicate the basic judicial hierarchy. The norm is a hearing reviewed through at least one level of administrative appeal, often to the agency itself. In the end, the agency must adopt a policy position in order for that policy to have weight, giving the administrative review authority, either the agency head or its representative, has the power to speak for the institution as a whole. Thus, the hierarchical system centralizes

---

11. The doctrine of precedent in general furthers both temporal stability and equality:

> This concern for equal treatment usually surfaces in discussions about the temporal stability of legal rules, because stare decisis promotes the equal treatment of individuals over time. But equal treatment in a spatial sense seems an equally compelling goal . . . . [G]eographical variation in otherwise uniform rules caused by divergent judicial interpretations seems irrational and unfair.

Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 852 (1994). Geographic or intra-program variation would seem particularly repugnant in most administrative schemes. *See generally* Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 677, 735–36 (1989).

12. *See* Entergy Serv., Inc. v. Fed. Energy Regulatory Comm'n, 319 F.3d 536, 541 (D.C. Cir. 2003) (citing Cassell v. FCC, 154 F.3d 478, 483 (D.C. Cir. 1998) ("An agency's interpretation of its own precedent is entitled to deference . . . . ")); State of Texas v. United States, 866 F.2d 1546, 1556–57 (5th Cir. 1989) ("An agency . . . is not bound by the shackles of stare decisis to follow blindly the interpretations that it, or the courts of appeals, have adopted in the past."). *But see* Borough of Columbia v. Surface Transp. Bd., 342 F.3d 222, 229 (3d Cir. 2003) ("If an agency departs from its own precedent without a reasoned explanation, the agency may be said to have acted arbitrarily and capriciously."); Ramaprakash v. Fed. Aviation Admin., 346 F.3d 1121, 1124 (D.C. Cir. 2003) ("[A]gency action is arbitrary and capricious if it departs from agency precedent without explanation."); Consol. Edison Co. of N.Y. v. Fed. Energy Regulatory Comm'n, 315 F.3d 316, 323 (D.C. Cir. 2002) ("Normally, an agency must adhere to its precedents in adjudicating cases before it.").

adjudicative policy-making authority in a superior review authority.[13] Yet, the interaction between the administrative judges and the review authority determines the success of adjudicative policy-making. The review stage serves the dual function of holding the administrative judges responsible outside their hearing room and allowing for open analysis of possible policy-making initiatives.[14] The administrative judges, for their part, serve the overall process by bringing policy alternatives to the agency's attention and forcing the agency to justify aggregate objectives as against practical reality and individual consequences.

In addition, administrative judges have the foundational role of developing the policy-making record. Policy confronted in adjudication requires that the facts compiled in the hearing level record be adequate to support policy determinations and the justification for those decisions. The record provides the policy analysis throughout the adjudicative machinery with the information it needs. In the end, the administrative judges must produce a record adequate for that purpose.

Fortunately, administrative law permits its adjudicators to be active in the development of the record.[15] It is one of the ways administrative adjudication is superior to other forms, especially in confronting policy issues. Administrative judges must ensure that the record contains the necessary technical and other policy oriented information, what administrative law defines as "legislative facts."[16] In addition, the administrative judge might

---

13. While administrative judges should share knowledge and experience in handling individual cases, they should not feel in any way bound by their colleagues' prior treatment of like cases.

14. "In very broad terms, if the head of the agency remains relatively free to reverse the ALJ, the values of expertise and political accountability predominate. If the head of the agency is bound to defer substantially to the ALJ, the value of objectivity and its appearance are dominant." William R. Anderson, *Judicial Review of State Administrative Action: Designing the Statutory Framework*, 44 ADMIN. L. REV. 523, 556 (1992).

15. *See, e.g.*, Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995) ("ALJs have a duty to develop a full and fair record in social security cases."); Yanopoulos v. Dept. of Navy, 796 F.2d 468, 471 (Fed. Cir. 1986).

16. "Legislative facts" are contrasted with "adjudicative facts," or the facts necessary to resolve the relevant individual dispute. Kenneth Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) ("When an agency wrestles with a question of law or policy, it is acting legislatively. . . . [T]he facts which inform [the tribunal's] legislative judgment may conveniently be denominated legislative facts,"

consider whether broader opinions beyond those provided by the litigants are necessary for a full airing of the policy issue. Administrative judges have considerable discretion to *admit* such a range of evidence, but they also need independent authority to *seek* additional information, particularly legislative facts or policy-oriented comments from non-litigants.[17] While party control of the record is sufficient for individual dispute resolution, the policy-making function of adjudication is greatly enhanced when an administrative judge ensures an adequate policy-making record in those limited cases where the judge determines that the agency may need to develop its policy in deciding an individual dispute.

The agency is also the locus of the general policy-making process: "rulemaking." Ostensibly, administrative judges are not included in that process; yet, they have a role. It is well-established that agencies have broad authority to interpret their own rules and policy pronouncements and even to engage in justified deviation.[18] Since the agency has the authority to

---

whereas adjudicative facts are "facts concerning [the] immediate parties."). The distinction is also important to the rules regarding judicial notice. FED. R. EVID. 201, Pub. L. No. 93-595, § 1, 88 Stat. 1930 (1975).

17. Under the Model Code of Judicial Conduct, judges may seek legal advice only. MODEL CODE OF JUD. CONDUCT Canon 3(b) (2008). *See also* JEFFREY SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS 173 (2000) ("While judges may, under certain circumstances, obtain expert advice concerning the law from disinterested legal experts, the exception does not extend to experts in other areas."). The Model Code of Judicial Conduct intentionally narrows access to "legal" experts, which, as discussed below, might be valuable in making policy judgments if read generously. Consultation with other types of experts is prohibited for members of the judiciary, but administrative law might take a different view. *Id.* § 5.07.

18. The classic authority for this proposition is *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945) ("Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt."), but the most cited case is *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (dealing with agency interpretations in general). The Supreme Court continually reaffirms this longstanding approach. *See, e.g.*, Christensen v. Harris County, 529 U.S. 576, 588 (2000) ("[A]n agency's interpretation of its own regulation is entitled to deference."); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.").

interpret its general policy pronouncements, its administrative judges in the course of applying the policy statements will identify instances in which interpretation is necessary.[19] Thus, as with superior precedent, administrative judges might interpret rules so as to move the agency's policy along.[20] Moreover, their applications of general policy to individual disputes provide perspective on the policy as applied so that the agency has "samples" for evolving future policy.

Change should percolate up through the process, and judges' interpretations provide experience upon which the rule and its policy are to develop. Adjustments within the terms of the rule neither challenge the agency's authority nor unduly upset stability and equality. While judges must pay close attention to the language and clear meaning, a potential policy-making contribution, as with precedent, requires them to look behind the rule to conclude that strict application of the terms of the rule would not further its purpose in the case at hand. That is, rather than literal strategies of interpretation, the judge may attempt to apply the rule as the agency should interpret it in that context and hence launch a policy inquiry throughout the administrative hierarchy.

The melding of rules and other policy pronouncements into individual adjudicative decisions raises complex questions about the allocation of authority within the administrative structure. That administrative rules have different force and may bind administrative adjudicators in various ways might be seen as complicating the division of authority. Rules made pursuant to delegated authority to make policy—"legislative rules"—have the force of law binding both the agency, including of course the

19. Interpretation may not constitute amendment or repeal. So even the agency head may not amend or repeal in an adjudication, because a rule must be amended or repealed by the same procedure with which it was promulgated. KOCH, *supra* note 2, § 4.60[2]. If the need for amendment is identified in adjudication or if the interpretation cannot make the necessary adjustment without constituting an amendment, then the adjudicators must commend the issue to the policy-making processes of the agency.

20. Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 96 (1995) ("The APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication . . . .").

administrative judges, and courts.[21] However, the vast majority of an agency's general policy is announced in other forms and under various labels: generally "guidance documents." The practical value of these guidance documents is to allow the agency to efficiently and expeditiously disclose its policy thinking.[22] While guidance documents are said to have only "persuasive" effect, they nonetheless generally bind the agency and hence all agency adjudicators.

From a system perspective, comprehensive adherence assures equal treatment. In terms of fairness, individuals should be able to rely on these guidance documents.[23] In short, administrative judges have the dual role of applying general agency policy and assuring individual fairness in its application.[24] Nonetheless, in certain circumstances, this role may demand that the administrative judges raise policy questions that the agency should confront.

In sum, administrative judges are no less than the cornerstone of the administrative adjudicative aspect of policy-making. Administrative judges serve the policy-making function as both record builders and initial decision-makers. All other participants in the adjudicative process, including the courts, work from this initial policy analysis. The agency must develop policy that carries forward the intent of the statute, and administrative judges should

---

21. *E.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."); Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979); O'Sullivan v. Countrywide Home Loan, Inc., 319 F.3d 732, 741 (5th Cir. 2003) (citing *Chevron*, 467 U.S. at 844 ("Where . . . agency regulations are promulgated under express congressional authority, they are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.")).

22. *E.g.*, Robert Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use them to Bind the Public?*, 41 DUKE L. J. 1311, 1317 (1992) ("The use of nonlegislative policy documents generally serves the important function of informing staff and the public about agency positions, and in the great majority of instances is proper and indeed very valuable."). Nonetheless, the Office of Management and Budget recently published guidelines to encourage agencies to provide some participation for guidance documents. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432-01 (Jan. 25, 2007).

23. Anthony, *supra* note 22, at 1323.

24. The Supreme Court has ruled that the agency should not apply such policy where the result would be unfair. Morton v. Ruiz, 415 U.S. 199, 233–35 (1974).

contribute to that policy development. This paper urges that they embrace this role and think carefully about how they should perform it.

The very theory of our government, however, counsels caution and restraint. Administrative judges are one level further removed from the democratic institutions than are the agencies they serve. The regulatory and beneficial programs for which the administrative state was created require delegations, and practicality has supported very broad delegations. For example, Justice Blackmun found in *Mistretta v. United States*: "Applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[25] Democratic accountability is permissibly removed one level through monitoring the implementing authority. Posner and Vermeule observed:

> Accountability is not lost through delegation, then; it is transformed. Congress is accountable for the performance of agencies generally, and people properly evaluate the agencies' accomplishments as well as failures when deciding whether to hold members responsible for authorizing the agency, or for failing to curtail its power, fix its mistakes, or eliminate it altogether.[26]

Administrative judges, however, are another level removed and suffer from many of the same process impediments present in all judicial policy-making. In the end, democracy demands that the final policy judgments be made by the agency as intended by the legislature and monitored by the courts. Argued here is that administrative judges, nonetheless, should be important participants in that process, but they must be no more than that.

The specter of personal prejudices also counsels hesitation. Recognizing a policy-making role does not give administrative judges license. As they leave the realm of individual dispute

25. 488 U.S. 361, 372 (1989).

26. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1749 (2002).

resolution and join the policy-making process, they must carefully consider the sources of their personal policy preferences. A good deal of theoretical and behavioral work has been done on judicial decision-making, and administrative judges should examine that.[27] Administrative judges must be conscious of their motivations and assure that they are appropriate.[28] Lynn Stout, however, offers reason for optimism that should guide both the administrative judges and the agencies who employ them: "Judges understand, at an intuitive level, that the judicial role is premised on society's expectation that judges, when they are judging, will adopt an other-regarding preference function rather than a self-interest preference function; that they will seek not to improve their own welfare but to 'do the right thing.'"[29]

27. Of the numerous theoretical and empirical efforts to explain how judges make policy choices, I find most useful Dworkin, *supra* note 2.

28. See Koch, *supra* note 5, at 720–26, for further explanation.

29. Lynn Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1625 (2002). For those of us who think about managing administrative judges, she observes: "If the judiciary is indeed an institution built on the expectation and experience of judicial altruism, even in its diluted form of commitment to public service, understanding the determinants of altruistic behavior may well be the key to encouraging good judging." *Id.* at 1619.