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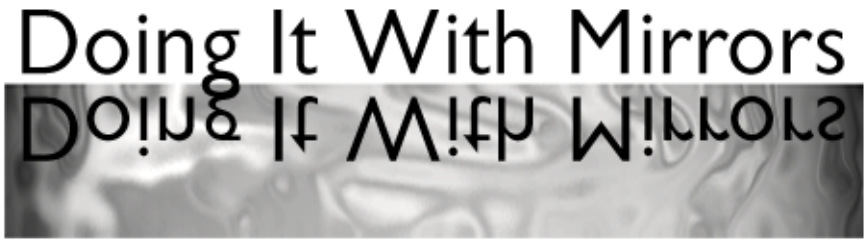

The Illusion of Independence of Federal Administrative Law Judges

By Nahum Litt

Like beauty, the independence of federal administrative law judges (ALJs) exists in the eye of the beholder. As a legal matter, the decisional independence of ALJs is ensured by the provisions of the Administrative Procedures Act. As a practical matter, this independence is open to far greater interpretation. As administrative institutions have grown and matured, the original pristine beauty is becoming harder and harder to find, and the independence of judges is increasingly under attack. This short overview addresses only the difficulties inherent in maintaining full independence for federal ALJs appointed pursuant to 5 USC 3501. The situation for the myriad of federal hearing officials who do not enjoy Title 5 status — such as immigration judges, board of contract appeals officials, Defense Department security clearance hearing officials, and Equal Employment Opportunity Commission hearing officers — is quite simply that they are appointed at will, can be removed at will, have virtually no protection, and consequently are not independent in any sense of the word.[1]

The earliest opportunity for asserting agency control over ALJs occurs during the process of appointing judges. This is then reinforced by the agency's ability to reward those ALJs who choose to "understand" agency "goals" or "missions" by slavishly taking them into account when ruling on issues of importance to the agency. Judicial independence is further eroded by rules and regulations that give the agency staff and its policymakers control on procedural issues that permit manipulation of the system on the agency's terms or allow ALJs

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The Impact of Michigan's Visiting Rules on Prisoners and Their Loved Ones

By Heba A. Nimr

In August 1995, amendments to the administrative rules regarding prisoner visiting were adopted by Governor Engler without approval by the Legislature's Joint Committee on Administrative Rules (JCAR).

In past issues of the Administrative Law Quarterly, the legality of the process by which these rules were implemented has been examined from various perspectives. In the Spring 1996 issue, defenders of the opposing executive and legislative branches wrote to justify their positions.[1] In the Winter, 1997 issue,[2] staff from Prison Legal Services of Michigan, Inc. explained the position of the prisoner class questioning the constitutionality of the process in *Blank v Michigan Department of Corrections*.[3]

The American Friends Service Committee (AFSC) is a Quaker-based nonprofit organization with social justice programs throughout the United States and the world. Since

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1970, AFSC has run a Criminal Justice Program in Michigan. The focus of the program, since the late eighties, has been working with prisoners and their loved ones to advocate for their rights. Issues we address include the parole process, health care, due process, conditions of confinement, and visiting restrictions. Each year, we log approximately 3000 phone and mail contacts with clients.

Based on our direct work with the population primarily affected by the administrative rules, this article will provide a brief sketch of the "on the ground" involvement of prisoners and their loved ones in the administrative rules process, and the impact of the eventual implementation of the visiting rules on them.

ALTERING THE WAY VISITING IS HANDLED IN MICHIGAN'S PRISONS

At the beginning of 1995, the Michigan Department of Corrections (MDOC) moved to significantly alter the way visiting was handled within the Department. A computerized visitor tracking system was developed and implemented, a memo was issued to apply uniform "visiting standards" in prisons throughout the state, and amendments to the MDOC's administrative rules were proposed.

Introducing the changes to come in visiting, MDOC developed a computerized visiting tracking system to replace a manual system that had included visiting cards and a monthly updated 50-page list of restricted visitors. At the same time the computerized system was being implemented, MDOC issued a memo announcing that they would soon require all prison visitors to present social security cards. Several individuals and organizations protested the new requirement. Upon learning that Federal law prohibited requiring the provision of one's social security number to receive benefits or privileges, the Department rescinded the memo.

In a March 13, 1995 memo, Deputy Director Dan Bolden outlined standard procedures which the MDOC would require all prisons to follow, effective April 10 of that year. Until then, individual prison administrations set their own visiting procedures according to the needs of their populations and available staffing, but within the limits of the applicable policy directives and administrative rules. When and how often people could visit prisoners, how they would be seated, and how restroom needs were met, varied according to the institution.

Most significantly, the standards issued by the MDOC provided that there would be a maximum number of visits a prisoner could receive each month, and very specifically detailed the hours to be allowed for visiting. Morning visiting was generally eliminated; most visiting hours were to be after 2:30 p.m. Visitors would be assigned seating, and only allowed to go to the restroom once during a visit; if a visitor needed to use the bathroom a second time, his/her return to the visiting room would be counted as an additional visit. Changes were also made in how children could visit. A child's birth certificate was required to be shown each time she/he visited and the child was only to be accompanied by a legal guardian, immediate family member, or other responsible adult who had received approval by the warden at least two weeks prior to the visit.

While these changes in visiting hours and general procedures

were being made within the Department, the MDOC was also proposing amendments to its administrative rules. Proposed changes included:

- Provide that the Department, not individual institutions, establish visiting standards;
- Require that people could only visit if they were on a prisoner's pre-approved visiting list;
- Allow prisoners to have immediate family members and only three others on their visiting lists;
- Allow a prisoner to modify his/her visiting list once a month;
- Define immediate family members very narrowly, excluding aunts, uncles, nieces, nephews, cousins, step-parents, step-siblings, mothers and fathers-in-law, and sisters and brothers-in-law;
- Only allow visitors to be on the list of one prisoner who is a nonimmediate family prisoner;
- Prohibit visits by any minors under 18, unless they are the proven child, step-child, or grandchild of the prisoner being visited;
- Prohibit visits from a child if the prisoner has been convicted of any assaultive behavior against the child or his/her sibling;
- Require that visiting children be accompanied by a legal guardian or immediate family member (no longer allowing any other adult to possibly receive approval to accompany the child);
- Give wardens complete discretion to deny anyone placement on a visiting list;
- Mandate that prisoners found guilty of a misconduct for substance abuse shall not be allowed visits for 90 days;
- Permit the Director to impose a permanent visiting restriction on a prisoner who is found guilty of any misconduct related to a visit, or two major substance abuse misconducts received at any time;
- Require the Department to monitor and record prisoner outgoing phone calls;
- Authorize an order of restitution as a sanction for any misconduct, not just violations including property damage.

USING THE ADMINISTRATIVE RULES PROCESS TO EXPRESS OPPOSITION

With the proposal of the amendments to the administrative rules, two public hearings were scheduled and announced. People concerned about the implications of the proposed rules used the public hearings as opportunity to speak out against the rules, as well as to call attention to their general frustration with the recent barriers being placed to prison visiting.

The two hearings were held in early June. More than two hundred people attended, with approximately half of them providing oral comment. Most of the attendees were the family and loved ones of prisoners; several organizations concerned with the rights of prisoners were also represented. Every person who testified spoke against the proposed rules. The testimony was often passionate and articulate. In addition to the opposition presented in the public hearings' testimony, more than 1,000 letters of protest to the rules were received by the MDOC.

Immediately after the hearings, the Department transmitted the proposed rule regarding telephone monitoring to JCAR. With very short notice, a hearing was held. Although not all of those who wanted to speak were given time, the rule was voted on and approved by the committee.

The next week, the remaining amendments were transmitted to JCAR, with few modifications:

- The list of nonimmediate family members who could be on a prisoner's visiting list was expanded to ten;
- Immediate family members was expanded to include step-parents, step-siblings, and mothers and fathers-in-law;
- Representatives of approved religious organizations would be provided an exception to only being allowed to visit one nonimmediate family member prisoner;
- Although a prisoner may add/delete a name of an immediate family member to his/her list at any time, modifications to the nonimmediate family member portion of the list could only be made every six months;
- Hospitalized prisoners could only receive visitors if the prisoner is critically ill, as certified by a doctor (previously, hospital visits could be approved by the warden, regardless of the condition of the prisoner).
- The mandatory sanction for a substance abuse ticket would be 30 days of noncontact visiting, rather than the 90 days of complete visiting restriction initially proposed.

JCAR soon held their own hearings, and, again, many hours of passionate testimony were offered against the rules. When a JCAR vote was finally taken on July 12, there were not enough necessary votes to approve the rules. Among the family and friends of prisoners in the committee room when the vote was announced, there was shock, followed by glee at their success. Here was an example where doing things "by the book" had worked. Together, concerned people had educated themselves and each other about how the administrative rules process worked, and identified the points of leverage where they could have influence. And, indeed, they exercised that influence. They showed up at the hearings, they spoke their truths, they wrote their letters, they mobilized others from complaining on the side-

lines to engaging in a process that few had been involved with before.

Still celebrating the success of victory, most understood that the battle was not yet over. Another JCAR meeting to address these rules was scheduled for early August. Recognizing that the legislators had the intent to pass some version of the proposed amendments, several who had protested their substance worked diligently with a JCAR member, throughout July, to negotiate alternative language which would address the security needs of the Department without severely restricting visiting between prisoners and their loved ones.

There was never an opportunity to present the suggested alternatives to the full body of JCAR, however. MDOC withdrew the rules from JCAR, issued their own certificate of adoption, and, without legislative approval, the rules were filed by the Governor's office with the Secretary of State on August 10. The rules became effective on August 25, 1995, and continue today.

THE DIRECT IMPACT OF THE RULES

Despite effectively using the system to provide public input and winning a legitimate victory, those who had struggled hard against these rules were demoralized by the actions of the MDOC and the Governor. The demoralization continued as the practical consequences of the rules began to take effect. In the testimony offered at the various public hearings about the rules, ominous predictions about the potential impact of the rules were offered repeatedly. Indeed, many of the predictions voiced by the loved ones of prisoners proved themselves true.

One of the most repeated concerns about the rules had been the bureaucratic chaos which would be generated by the need to make applications available to thousands of potential visitors, receive and process those applications, make sure correct information was entered into the computerized tracking system, and continue maintaining the statewide data base. Although the rules formally took effect on August 25, the requirement that visitors be on pre-approved lists did not officially begin until October 2. MDOC posted and distributed notices that in order for applications to be processed in time for names to be entered in the computer by that date, completed applications needed to be received by September 11. However, when October 2 arrived, many people who had met the MDOC deadline were still not entered into the computer, and therefore, through no fault of their own, were denied visits; for many, notification that they could not yet visit their loved one came after the visitor(s) had driven a considerable distance to the institution. MDOC officials acknowledged they were behind schedule in processing applications, but refused requests to extend the implementation date. It took weeks for some institutions to catch up with the backlog.

Our office received several complaints of bureaucratic complications caused by simple human error such as applications lost or misplaced by staff, however many complaints raised serious concerns about the way various institutions chose to interpret and implement the new rules. Some examples:

- To be complete, applications needed to include a potential visitor's full name, any other names they have used, information about past felony convictions, current criminal status, and past visiting restrictions. For many who were filling out applications, such questions were not applicable to them, so they left the response spaces blank. Several institutions immediately considered such applications incomplete because "not applicable" had not been written in every single blank. In fact, the directions on the application do instruct applicants to respond to all questions and to write "not applicable" when appropriate. However, among a population with oftentimes limited literacy, such directions would be expected to be frequently misunderstood or disregarded. Such simple misunderstanding resulted in long, frustrating delays of application-processing for many visitors; we were notified of a few cases where the applicant had even written "N/A" in the available spaces, but had their applications deemed incomplete because "not applicable" had not been written in full.
- Several applications were denied because of past temporary visiting restrictions which had been imposed on the applicant. Despite the fact that a person had already been "punished" for whatever infraction caused the initial restriction and had been continuing to visit (in some cases for more than ten years) without problems since the expired restriction, wardens were using the fact that a past restriction was imposed to permanently bar further visits. In a few cases, after much effort by the applicant and often after some kind of legislator intervention, the permanent restriction was removed. However, in many more cases, people chose to forego visiting, rather than to expend the energy to fight the restriction.
- At two institutions, adult visitors were informed that if claiming to be an immediate family member, they would be required to procure proof of their relationship to the prisoner they were visiting each time they visited, despite the fact that the relationship would already have had to be verified prior to placement as a family member on a prisoner's list. For in-laws and step-relationships, such "proof" would be a series of marriage and/or birth certificates that the institution was suggesting would need to be presented at each visit, or else the visit would not be permitted. Although this requirement was eventually rescinded, it had arisen out of a warden's misunderstanding of the rules and their mandate. Prisoners and visitors have had to deal with layers upon layers of such idiosyncratic misunderstandings of the visiting rules by prison staff throughout the state.

Overall in 1995, the requests we received for advocacy assistance regarding visiting issues more than tripled, compared to the previous year. We attribute that increase largely to the immediate consequences of the changes in visiting rules.

Both the Department and those who protested the visiting rules predicted there would be a dramatic decrease in visits to Michigan prisons. MDOC reported that in May 1996, after the

whole package of visiting changes had been implemented, there was a 29% drop in visits as compared to the same month in 1995. Repeatedly, when justifying the need for changing visiting policy and when applauding the decrease in visits after implementing those changes, MDOC has argued that with the decrease in the volume of visits, the quality of visiting has increased. Our anecdotal evidence tells us otherwise; that, in fact, not only has visiting prisons become more qualitatively difficult, and sometimes impossible, the quality of prisoners' relationships to the outside world have often been severely strained by the new visiting rules.

Very practically, now that morning visiting hours were largely eliminated, many visitors' employment, medical, and location realities make it almost impossible to find appropriate times to visit. For someone who works second shift (2 p.m. to 10 p.m.) or predominantly in the afternoons or evenings, there are few times a week that it is possible to visit an incarcerated loved one, especially if that loved one is at one of the states' several multilevel facilities; prisoners of different security levels are not allowed to mix, therefore, at multilevel facilities already limited visiting times are divided among the existing security levels. For visitors who have difficulty or are prohibited from driving at night, visits may now only be possible during the summer, when daylight hours are longer.

For those driving long hours to visit loved ones in one of the many Upper Peninsula prisons, it used to be that visitors could drive up, have an evening visit, stay for the night, visit again in the morning, then drive home later in the day. Now, people who have to drive such long distances often have to choose between a much shorter visit, or staying an extra night in order to be able to visit for a reasonable amount of time. For many families and loved ones, such a choice does not exist, however, because the cost for staying the extra night is prohibitive. So, the choice is now more frequently between driving a long time to have a very short visit or not visiting at all.

When people protested the very narrow definition of immediate family proposed by the MDOC, representatives of the Department responded by emphasizing that nonfamily members would not be prohibited from visiting because they could simply be added to a prisoner's list of ten nonfamily members. However, the definition of immediate family member combined with the rule that a person can only visit one nonfamily member does indeed prohibit some people from visiting their incarcerated family. For example, if someone has two cousins in the system, or a sister-in-law and a nephew, or any combination of a variety of relationships, the person is forced to choose who s/he will visit. The only alternative to making such a choice would be to "juggle" lists by continuously removing oneself from one prisoner's list and reapplying to be on another prisoner's list every six months; even then, all that effort translates into perhaps one or two visits a year to each incarcerated family member. Our experience shows that such a scenario of being forced to make choices among visiting loved ones more severely impacts family networks of color since 1) people of color are disproportionately represented in the prison system, and 2) definitions of family in communities of color tend to place more emphasis on "extended" relations .

Almost any "nontraditional" families created by prisoners as their networks of support are threatened by the current administrative rules on visiting. There are, in fact, several such arrangements which have been severely altered or, in some cases, destroyed by the new visiting rules.

Paula (all names have been changed), a teacher, had been visiting an ex-student, serving as his counselor and mentor during his incarceration. She was also visiting her imprisoned fiancé. Not prepared to marry her fiancé, Paula had to make a choice between visiting her fiancé or her former student, since she could no longer visit them both.

Mario, a person who began visiting prisoners because of his religious beliefs and background, but who is not affiliated with any religious organization doing prisoner outreach, had been visiting several prisoners as an advisor. In most cases, he was the only person visiting each of these people. He, too, is no longer able to continue visiting all those to whom he provides spiritual support.

Perhaps the most devastating impact of the rules has been in the various situations which involve minors, who do not always understand why they are not allowed to see someone they love. The sudden cessation of physical contact between minors and their incarcerated loved ones has caused much reported confusion and in some cases trauma for the children. Minors can no longer visit their incarcerated siblings, aunts, uncles, and in some cases, their own parents. Again, "nontraditional" family arrangements have been most severely affected.

Sally had a young daughter when she came to prison several years ago to serve a life sentence. Having the best interests of her child in mind, Sally decided to voluntarily give up her parental rights. A couple Sally knew well adopted her daughter. Together, they agreed that Sally would be an integral part of her daughter's upbringing and in making important decisions about her life. For years, the legal parents of Sally's daughter would bring her to visit Sally on a regular basis. Because Sally is no longer the legal parent of her daughter, however, this family has been unable to continue this visiting arrangement. Sally's daughter was twelve when the new rules were implemented.

Several male prisoners who had not been listed as the father on their children's birth certificates, and whose children had not been listed in their Pre-Sentence Investigation Reports have also had to deal with the consequences of not being the "official" parent of their children. In order to continue seeing their children, many have had to scramble to establish their paternity. However, even when the parental relationship is official and undisputed, the more restrictive rule regarding WHO can accompany a child on a visit, has provided a serious barrier to many.

Tom wrote to our office about trying to re-establish visiting with his daughter. Previously, a family friend had been bringing Tom's teenage daughter to see him on a regular basis, without any objection by his daughter's mother. His daughter's mother, however, had remarried and was unwilling to accompany her daughter, herself, on visits with Tom; and, there is no other immediate family available to accompany her. So, despite the desire of the daughter to continue visiting her father, and the

willingness of an adult friend to accompany her, Tom will be unable to see his daughter until she turns eighteen.

Ironically, shortly after these administrative rules were adopted, Michigan adopted a juvenile justice legislative package which would, among other things, allow minors as young as fourteen to be sentenced as adults and incarcerated in adult prisons. Prisons are now deemed appropriate places for children, but the siblings and peers of these incarcerated youth will not be allowed in the visiting rooms.

After the implementation of the amended administrative rules, the very young sister of one prisoner was convinced that something had to be wrong with her brother if she could not see him. No amount of explanation by her parents or a therapist would assuage her fear that something was seriously wrong with him; even direct phone conversations with her brother were not convincing. When a formal written recommendation by the therapist was not enough to allow a visit between the young girl and her brother, the family had to get creative to assure her of her brother's well-being. The family took the girl to the prison where her brother was incarcerated. As one person went into the visiting room to see the girl's brother, she sat with other adults in the prison waiting room. When her brother came to receive his visit, the young sister was finally able to physically see him across two rooms and through several panes of glass.

QUESTIONING THE NEED FOR SUCH RESTRICTIONS

For all the negative consequences and heartache the combined changes in visiting procedure have caused, the Department has never demonstrated any true need for such rules. During the initial public hearings regarding the proposed administrative rules changes, Department representatives repeatedly cited overcrowded visiting rooms and the introduction of contraband as reasons calling for more restricted visiting. MDOC never identified which facilities were so excessively overcrowded, nor did they provide any statistics or proof that visitors were the primary introducers of contraband, or that there had even been any kind of increase of contraband introduction through the visiting rooms.

MDOC representatives at the public hearings denied that the changing approach to visiting was related to an incident the previous year in a Muskegon visiting room where a child was molested. However, the Governor's office press release announcing the adoption of the administrative rules changes cited the Muskegon incident and "the safety of defenseless children" as the reasons for immediately adopting the administrative rules without legislative approval. Not mentioned in the release or anytime later, when using the Muskegon incident to justify adoption of the rules to the media, was the fact that the Department's own official January, 1995 report on that incident concluded that, "The tools to manage this situation were available. They were just not utilized."

UNDERSTANDING THE CONTEXT OF THE RULE CHANGES—FURTHER ISOLATION

In the eyes of prisoners, their friends, and loved ones, the changes in visiting rules punished the entire population for the actions of a few. Adding salt to the wound was the fact that even those actions of the few could have been prevented if Department staff had followed their own policies which were already in place. Ostensibly in response to the 1994 escape of 12 men from the Ryan Correctional Facility, MDOC eliminated the concept of "regional" prisons which had been developed to keep prisoners closer to their communities and facilitate stronger family ties; in addition, they temporarily suspended outgoing local calls. Again, MDOC had the tools already in place to prevent the escape, yet has used the incident to try and implement policies which serve to further isolate prisoners.

Communication between prisoners and the outside world is getting harder and harder. Prisoner outgoing calls must be collect, which are already the most expensive calls to make. Added to the regular costs, however, is a surcharge applied to prisoner collect calls, only. With fewer staff available to supervise them, volunteers are having a harder time getting into prisons to do their tutoring, sponsoring of groups, and providing of spiritual support. Few prisoner publications can continue to exist with the support available from their dwindling prisoner benefit funds; and, a recent draft of a policy directive declared any opinion articles nonpublishable anyway.

An isolated prisoner population with little to lose is a more unstable and dangerous population. Strong family and community connections are one of the most important factors in reducing recidivism; prisoners' relationships with the outside world are extremely valuable. Anything a bureaucracy does to compromise those already tentative relationships is short-sighted public policy. Those family, friends, loved ones, and other concerned citizens who provide outside support to prisoners should not be hindered in providing that support. If anything, policies and the laws and rules which govern those policies should encourage and support those connections as much as possible.

Heba A. Nimr is on the staff of the Criminal Justice Program of the American Friends Service Committee, 1414 Hill St, Ann Arbor, MI 48104, (734) 761-8283.

ENDNOTES

[1] Gadola, The Legislative Veto Violates the Constitution, Administrative Law Quarterly, No. 15, p.1 (Spring 1996). Marvin and Ashton, JCAR is Constitutional, Administrative Law Quarterly, No. 15, p. 4 (Spring 1996).

[2] Girard and Walen, Michigan's Prison Visiting Rules are Unconstitutional, Administrative Law Quarterly, No. 17, p. 16 (Winter 1997).

[3] *Blank v Michigan Department of Corrections*, 222 Mich App 385, 564 NW2d 130 (Mich Ct App 1997).

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to reach only one conclusion, namely, the agency objective. Given the difference in roles among the various agencies, including enforcement, economic regulation, compensation, permits, benefits, *etc.*, the agency often will dictate the manner in which it seeks to manipulate the system.

In addition to this, an agency's mission can change substantially, depending upon the political party in control of the Office of Management and Budget, or even as a reaction to a certain public policy that failed and must be revised. A particularly interesting situation exists where an ALJ has been informed, either publicly or internally, what result is favored by an agency and whether he or she is to disregard on-point decisions by the federal circuit.[2] Agencies also have used a variety of means — including undertaking minutely detailed investigations of ALJs travel vouchers or telephone records, filing knowingly false charges against ALJs, withholding assignment of interesting cases, etc. — to intimidate and harass ALJs whose decisions are viewed as inconsistent with agency missions. This treatment can be further exacerbated if the agencies know that the ALJs have strong views about judicial independence and express them in independent forums that the agencies find objectionable (such as at American Bar Association meetings). This combination of factors tends to color any discussion of ALJ independence, as will be seen in the remainder of this article.

RIGGING THE SYSTEM

Put aside the "detail" that federal agencies and departments appoint their own chief judges, frequently for reasons that directly contradict the ideal of judicial independence. Let us instead start with the fact that each agency appoints its own trial ALJs, albeit within a more or less constrained system which, for the most part, has traditionally limited the number of misfits who become judges. There have been no scandals based upon the criminal or unethical activity within this system such as we have, unfortunately, witnessed elsewhere. The examination, qualification, and selection process decidedly has not ensured *excellence*, but it has heretofore kept down the number of irresponsible applicants from being appointed. Appointing candidates whose qualifications are strictly political is rare. What this process has *not* done, however, is to maintain the high judicial standards that the public has a right to expect. Rather, the system allows the major regulatory agencies to select from the pool of qualified applicants ALJs who "understand" the system at an individual agency and that agency's objectives as viewed by the agency's political head and his or her staff at any given moment. It allows agencies to pick ALJs who will not "rock the boat."

To comprehend how this happens, we must make a distinction between the way the system operates for the Social Security Administration (SSA), with its need for 1,000 or more judges, and the rest of the agencies and executive departments, which total less than 250 judges. Today, almost all ALJs are first appointed to a position at SSA, which through official sanction, has been given *carte blanche* to avoid the limitations that exist for an agency that seeks only to appoint one or two judges.[3] But for the small agencies, there is a way out. For example, an attorney from the general counsel's office at the National Labor Relations Board (NLRB) can accept an appointment as an SSA ALJ, remain there for a year or so, and then be selected by the NLRB without any regard for that ALJ's ranking on the list of eligible ALJs or the requirements of the selection process. Thus, the NLRB can and does select its own former employees from the ranks of SSA ALJs. At the Federal Trade Commission in the 1960s, all but one of the 15 judges were former prosecutors with the agency. Also in that time frame, almost all NLRB judges had previously worked there. Indeed, one corporate executive has surmised that he was more likely to be struck by lightning than to draw an NLRB judge who was not pro-labor.

A further aberration in ensuring the selection of like to like takes place in agency interviews, typically by the general counsel's office, but sometimes by the head of the agency. In one instance, the chair at a particular agency asked a candidate whether he favored greater independence for judges, as expressed in the ALJ corps bill then before Congress. To me, that seems to be a loaded question designed to exclude freethinkers from the start.

For the most part, agencies that have the greatest effect upon the public through economic regulation have been able to select their own former employees and to keep the field narrow.

TOEING THE LINE

The ability to manipulate the selection process has given us a group of ALJs who oftentimes acquiesce to the agencies' perceptions of their roles. Since the assignment of cases need not be made solely on the basis of rotation, the agency or its chief judge can ensure that those ALJs with the "correct" attitude are appointed to the "right" cases. At the Interstate Commerce Commission, for example, when eliminating rail passenger service was deemed desirable in the 1970s, ALJs who failed to rule in favor of that termination were not reassigned to that type of case. To the contrary, such case assignments continued to be given to ALJs who had ruled for the railroads.

Another aspect of compliance to agencies involves following agency regulations that frequently favor agency staff and agenda. For example, Environmental Protection Agency (EPA) ALJs are not supposed to dismiss cases if the agency fails to appear at trial without their giving the agency advance notice of the intention to dismiss. Of course, no such constraint exists if the defendant-respondent fails to appear.

From time to time, the SSA issues regulations that deny ALJs the opportunity to develop cases or that deny state agency funds to provide further medical examinations. Under the notorious "Bellmon review" instituted by the SSA, ALJs who granted "too many" claims — defined as some arbitrary grant rate where an average of grants and denials was fixed — were targeted for special treatment and education.[4]

At certain agencies — for example, the Department of Transportation and, before it, the old Civil Aeronautics Board — agency staff participates at trial and refuses to take a position on the merits of, say, whether a certain individual or group should be allowed to start an airline. No party, of course, is advised of the agency's position *before* that party questions the agency witnesses, who do know what the agency's position is. Thus, the petitioning parties and the ALJ are at a distinct disadvantage in

gaining all relevant information or interpreting agency direction. After the hearing, the staff further tries to influence the outcome by advising the parties and the agency of the result it wants in the case. In fact, then, most agencies use idiosyncratic tactics that favor itself or its prosecutors and restrict the ALJs. One might even say that the agency staff tries to supplant the ALJ or sandbag him or her. And rest assured that most ALJs know this is occurring, yet they are also aware that they are paid by (and usually housed in) the agency that is a party before them.

Another interesting matter involves the question of agency "policy." Administrative law judges are charged with following agency policy, but doing so oftentimes can be a challenge. No one disputes that agency policy, when articulated and published as such, is binding upon the regulated public and that ALJs are required to follow it as well as statutes, regulations, and prior decisions of federal courts. However, agencies' views of what constitute policy can be rather broad. One judge was informed, off the record, by agency counsel during trial that the agency head had recently made a speech at a luncheon and that counsel would now assert this new (or newly articulated) "policy" in connection with the matters at trial. Of course, agency policy can veer dramatically because of political considerations or a change in administration.[5] Other policy changes can be caused by public perception of how the agency is handling its job.

Agency marginalization of ALJs also is a means of curtailing judicial independence. This can occur through the selection of the forum in which an agency chooses to bring a case. For example, the Departments of Transportation and Energy have set up internal boards to handle certain classes of cases primarily to avoid Administrative Procedure Act requirements, which include a trial before a federal ALJ if the charged party desires one. The EPA can enforce its hazardous waste authority under the Resource Conservation and Recovery Act (RCRA) in federal district court as well as before EPA ALJs. The long and short of it is that since the EPA is not required to use its ALJs in important RCRA cases, the ALJs understand that if they want groundbreaking RCRA cases, they must be generally solicitous of the agency's views and consider carefully the frequency of their rulings against the EPA's position. Perhaps more insulting is the possibility that the agency may choose to "settle" with a defendant — on highly favorable terms to that defendant — if the ALJ decides against the agency, thereby wiping the filed decision off the books.

Most cases where the agency has no special mission interest will get a fair shake from an ALJ who is not pressured to decide one way or another for statistical or political reasons. Social Security Administration disability cases based on traumatic accidents or Black Lung compensation cases in the US Department of Labor fall into this category. So would a dispute between two companies over whether one overcharged the other for use of industrial terminal facilities, which would be decided by a Federal Energy Regulatory Commission ALJ. In these and certain other types of cases, the agency is not an adversarial party in the strict sense of the word and does not care which party gets or keeps the dollars. The greater the agency interest, however, the less likely it is that an ALJ will feel totally at liberty to decide the case entirely on its merits.

I do not mean to suggest that there will not always be stalwarts who will fully carry out their constitutional responsibilities despite a full understanding of the situation. But these individuals recognize that, by doing so, they risk agency disapproval in some genuinely threatening forms and will never be appointed chief judge. Courageous judges are to be found in many places. For example, a group of SSA ALJs have had to use their own money to sue SSA to ensure judicial independence, both from harassment and to require SSA to abide by US Circuit Court decisions.

There is no beauty in this process, however, and considerably less independence than the public is entitled to believe should be attached to judges who decide matters of great economic and regulatory consequence involving both public and private interests.

Nahum Litt was chief judge of the Civil Aeronautics Board from 1972 to 1979 and chief judge of the US Department of Labor from 1979 to 1995, when he retired. He has also served as an administrative law judge at the Federal Energy Regulatory Commission and as an attorney at the Interstate Commerce Commission. This article originally appeared in 36 *Judges' Journal* 27 (1997). It is reprinted with the kind permission of Mr. Litt and the American Bar Association.

ENDNOTES

1 Some of these federal hearing officials may argue that they have not been removed at will. My point is that it *can* happen, as no statute or regulation forbids it. Moreover, in considering the matter, one must decide which came first: hearing official compliance with agency objectives in view of the absence of protections, or agency forbearance.

2 One example of ALJs being told to ignore federal circuit decisions has occurred in the Social Security Administration, where ALJs have been informed of the agency policy of "relitigation" or "nonacquiescence." See, *e.g.*, A. Murphy; When Government Ignores the Law: The Consequences of Relitigation, 29 *Judges' Journal* 2 (1990) and J. Riley; Limiting the Impact of Intercircuit Nonacquiescence, 29 *Judges' Journal* 6 (1990). The American Bar Association House of Delegates has taken a strong position against SSA's policy of nonacquiescence, at the urging of the Judicial Division and its National Conference of Administrative Law Judges.

Perhaps the most notorious case of predetermining an agency decision occurred in *PATCO v United States*, 685 F2d 547 (1982). At issue in the case was whether airline traffic controllers had been fired improperly by the Reagan administration following their strike. Apparently, various agency political appointees in the Federal Labor Relations Authority requested that the chief judge assign him-

self to the case, which he did, and the result was a foregone conclusion: the ruling completely backed the government's position.

[3] To further illustrate various inequities in the system, consider that certain agencies have also been able to maintain large numbers of judges even though their caseloads have declined drastically. The Federal Energy Regulatory Commission (FERC) and the National Labor Relations Board (NLRB) are cases in point, where despite significant decreases in workload, the number of judges has remained basically constant. At FERC, for example, five judges issued no decisions in two successive years, and the average number of dispositions of cases by NLRB judges over many years has been a mere six cases per judge, with an average hearing lasting no more than one or two days. M. Cleveland, testimony before the House Judiciary Committee, Subcommittee on Commercial and Administrative Law, March 28, 1996. [A copy of the testimony and attachments is on file at Administrative Law Quarterly].

[5] One "professor" hired by the SSA to review the judges' benefits grant rates suggested that it might be appropriate to institute *quotas* for grants. One can imagine judges dispensing negative judgements merely because they had already reached their monthly quota of positive dispensations.

[6] Interestingly enough, one cannot always predict how a change in administration will affect an agency. Not every change of administration results in a change of goals. For example, after 12 years of Republican Secretaries of Labor who de-emphasized regulatory enforcement, expectations were high that new Democratic Secretary Robert Reich would again represent certain pro-labor positions. Instead, he presided over what appears to be the largest decrease of enforcement effort in thirty years.

ADMINISTRATIVE PROCEDURES ACT REVISIONS MINORITY REPORT

By Robert Fitzke

The Michigan Law Revision Commission has been reviewing the Administrative Procedures Act (APA). The commission will recommend changes to the legislature. A committee of the administrative law section of the State Bar has reviewed the proposed changes. The committee has recommended changes to the commission. A minority of the committee has an alternate view of what the APA actually regulates and the principles that should govern its content — principles basic to the separation of powers. This paper, by one of the minority, outlines that view.

All state government power is encompassed in, and exercised by, one or another of the three branches — legislative, judicial, and executive. Because all government power is encompassed in these three branches, any power exercised by government must be located in one of the three. No branch may exercise the power of another unless expressly authorized by the constitution.[1]

The APA actually regulates the exercise, by executive branch agencies, of the power of the two other branches. Legislative power is delegated to the executive branch agencies to use in adopting rules with the force of law. Judicial power is put in the hands of executive branch agencies to use in resolving contested cases.

The procedures an agency must follow in wielding the legislative power are not subject to legislative choice. The exercise of legislative power by an agency must be subject to the same terms and conditions that are spelled out in Article 4 of the constitution, which governs the exercise of that power by the legislature itself. The legislature may not delegate that power free of the restrictions that apply when the legislature exercises that same power. Clearly, the exercise of legislative power by the executive branch is at the sufferance of the legislature and subject to continuing legislative control and oversight as well as constitutional limitations.

The legislature has only legislative power. It has no judicial power. The judicial power is exclusively in the judicial branch. Thus, the legislature has no judicial power to delegate. If it had judicial power the concept of separation of powers would be violated *ab initio*. There is no lawful way the legislature can transfer judicial power to anyone other than the judiciary. It simply has no lawful way to do so. The legislature can only assign appropriate jurisdiction over subject matter to the appropriate branch. The power of that branch to act has already been assigned by the constitution. The judicial function must be performed by the judicial branch.

1963 Const, Art. 3, § 2 states:

> *The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.*

1963 Const, Art 4, § 1 states:

> *The legislative power of the State of Michigan is vested in a senate and a house of representatives.*

1963 Const, Art. 6, § 1 states:

> *The judicial power of the state is vested exclusively in one court of justice…*

The word "exclusively" appears in the grant of judicial power but it does not appear in the grant of "legislative power."

The title "Administrative Procedures Act" is probably an unfortunate misnomer. Unfortunate because it tends to misdirect our thinking. Misnomer because the APA, at its core, is not about regulating the "administrative procedures" of the executive branch of government. By its terms, the APA sets forth how the executive branch is supposed to exercise the constitutional powers of the two other branches of government. Legislative power is delegated to an executive branch agency to use in adopting legislative rules. The Supreme Court has consistently held that agencies adopt legislative rules by exercising delegated legislative authority. In *Clonlara v St Bd of Education*, the Supreme Court said;

> *A legislative rule is the product of an exercise of delegated legislative power to make law through rules.*[2]

Judicial power is "delegated" to an executive branch agency to use in addressing contested cases. There is little basis to argue the power delegated is not "judicial."[3]

The powers to promulgate and apply rules that have the force of law and to interpret and enforce these rules, are delegated to the executive branch in statutes other than the APA. There is no express provision in the constitution that allows the executive branch to exercise legislative power to make rules or judicial power to resolve disputes. A more accurate title for the APA, therefore, might be, "Act to Regulate Agency Exercise of Delegated Constitutional Authority."

LEGISLATIVE POWER

Legislative power is the power to make laws. The substance of legislative power is seldom discussed. By analysis it consists of the authority to fund the government and to create and assign jurisdiction over specified functions — in the broad sense — to the executive and judicial branches. The function, itself, determines the power to be exercised and, therefore, the branch to which it is assigned. Many statutes contain delegations of legislative power to be exercised by an agency to use in adopting

rules. Rules adopted under APA procedures pursuant to such delegations of legislative power are generally referred to as "legislative rules." This designation indicates that rules adopted using delegated legislative authority have the force of law.

But the legislative power on which the validity of agency rules depend does not become transformed because it is delegated. It is the same legislative power, whether it is exercised by an agency or is exercised by the legislature. (The omission of the word "exclusively" in the grant of legislative power gives validity to the delegation of that power to the executive, but is not authorization to change that power in the delegation process nor authority to the legislature to delegate its power without continuing oversight of its exercise.) The delegation of legislative power to an agency is neither an outright gift nor a creation of administrative authority. It is direct delegation of legislative power.

Case law is consistent on this. As delegator, the legislature has the right, and obligation, to limit and restrict the ways in which its delegated power is exercised. The agency may only exercise it under the terms and conditions set by the legislature for the exercise of that power. The legislature, in turn, may not delegate legislative power free of the various requirements and restrictions on that power set forth in Article 4.

This analysis might resolve the issue of legislative oversight by the Joint Committee on Administrative Rules. The rule-adopting process, which is an exercise of legislative authority is, logically and legally, not complete until the legislature makes certain its delegation of legislative authority has been properly carried out. This is not oversight of the executive branch by the legislative branch; it is oversight by the legislature of the exercise of delegated legislative power. Such oversight simply assures the legislature that its delegated power is not being abused, misused, or misdirected. In effect, legislative oversight is a ratification of the exercise of delegated legislative powers.

Because an agency's legislative rule-making power is an exercise of delegated legislative power, it follows that the provisions of the APA for legislative rulemaking should be drafted so as to parallel the provisions of Art. 4 that set forth what steps the legislature, itself, must follow in exercising its legislative power. Approaching the APA from this perspective helps resolve the issue of what process an agency should follow in promulgating legislative rules. This perspective suggests that an agency should follow substantially the same procedures the constitution requires of the legislature.

Approaching the APA, or a rewrite of the APA, from the perspective of what the APA is actually doing sheds a different light on some of the APA's other rule-related provisions. For example, the APA wrestles with categories of rules other than legislative rules with their force-of-law. These others have been variously identified, as "housekeeping", *etc*., rules. By viewing the APA from the perspective of it being a statement of the parameters within which legislative power that is delegated to agencies in other statutes, may be exercised, it becomes clear that unless an agency rule needs the force of law, it doesn't have to be adopted under delegated legislative power. These non-force-of-law rules can be collectively termed "administrative rules". They are only binding on agency people, not on "outsiders".

The validity of such "administrative rules" is not based on the exercise of delegated legislative power. Administrative rules are the exercise of authority that is inherent in the master-servant, or employer-employee relationship. Agent-principle relationships are, in fact, the internal glue that holds together the administrative structure of all kinds of organizations. Administrative rules are adopted simply under powers directly necessary to, and implied by, "administration " The power to adopt administrative rules, thus, is inherent in the executive branch.

This leaves only two categories of rules: (A) legislative rules adopted and applied under the exercise of delegated legislative power that have the force of law on persons outside the administering agency; and (B) administrative rules adopted as a part of the agent-principle relationship applied only within the administering agency. Procedures for adopting these latter rules do not really belong in the APA because they are truly an exercise of inherent executive power.

JUDICIAL POWER

Authority that is given, under many statutes, to state agencies to hear and resolve "contested cases" is clearly judicial power. One need only reflect a moment on the nature of the separation of powers to arrive at this conclusion. Authority to a state agency to hear contested cases must be found in one of the three branches of government. Such authority is clearly not legislative. Legislative power is used to make rules. It is also, clearly, not an inherent part of the executive power. If it were, it would not be necessary for the legislature to authorize the executive to use it. Such power would already be at the executive's disposal. By elimination, the only power left is the judicial power. It makes little difference what

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the hearing-power is called. It is both self-evident and consistent in the case law. When an agency hears contested cases, it exercises the dispute resolution power of the judicial branch.

Once it is clear that the APA is really a blueprint for the exercise of delegated powers and not the regulation of agency administrative authority, it also becomes immediately clear that the so-called judicial or "quasi-judicial" power that is delegated to agencies to exercise is improperly delegated under any circumstances. The word "quasi-judicial" is, itself, misleading. There are only three branches of government: Legislative, executive, and judicial. "Quasi-judicial" is not on the list. Clearly, any power of a "quasi-judicial" nature, *i.e.*, power to resolve disputes, must fall in the judicial branch because, just as clearly, "quasi-judicial" is neither executive nor legislative power. Unless there is an express constitutional exception, such "quasi-judicial" power must be exercised "exclusively" by the judicial branch of government. This follows because: The judicial power is "exclusively" in the court pursuant to specific constitutional language; because by constitutional design the executive power does not include judicial power; and because by constitutional design, the legislative power does not include the judicial power. If the power of one branch included inherent power over another (and the language of the constitution permits that only by express provision) there would be no separation of powers. If the legislature has no judicial power, it has none to delegate. "Quasi-judicial" has no meaningful definition. It is a somewhat clumsy way of avoiding the separation-of-powers bar.

The legislature may not delegate judicial authority to the executive branch because the constitution puts all judicial power "exclusively" in the judicial branch. The legislature has no judicial authority to delegate or power to create the judicial authority it does not have. The legislature has authority to confer jurisdiction on a court, but no power to confer formal dispute resolution proceedings on an executive agency, under any name. The executive branch has no inherent judicial power. If it did, delegation from the legislature would be necessary.

The so-called delegations of judicial or quasi-judicial authority or any form of dispute resolution authority involving 'outsiders", therefore, are simply not constitutionally permissible. Informal "hearings" without binding effect are, of course, not affected by the constitutional bar.

The fairly straightforward alternative to the clearly improper delegation by the legislature of judicial power to the executive branch is to assign the same jurisdiction where it belongs; to the judiciary. This only requires shifting the employment of administrative law judges from the executive branch to the judicial branch. None of the expertise of these people, unique to the agency for which they have been working, would be lost. A separate division of the court, analogous to probate, might be used. Or hearings officers/administrative law judges could be magistrates. This latter would make selection of the administrative law judges a court function. Those decisions are legislative policy matters.

Bills periodically have surfaced in the legislature to carve the administrative law judges/hearing officers out of the agencies. Sometimes moving them to the governor's office. But the motivation does not seem to have been constitutional. More likely it has been simply to give these hearings more credibility and to respond to ongoing criticism that a hearing conducted by someone employed by the same agency whose decision is being challenged does not comport with "neutral magistrate". However, if we focus on what the APA is actually doing, it seems reasonably clear that, constitutionally, any formal dispute resolution activities involving "outsiders" must be conducted by the judicial branch. It is the only one of the three branches that has the judicial power. Its power is a pure, undelegable, monopoly that the legislature has no lawful way to put into the hands of the executive branch to exercise. Any questions raised by the "exclusive" language of Art 4, § 1 and the language of Art. 6, § 28 are resolvable by the phrase "as provided by law". But, in any event, the legislature has no "judicial" authority to delegate.

Finally, it is a curious twist that the separation of powers into three branches, a form of government designed to prevent the "executive" from having all the government power, has been repeatedly breached, despite the clear constitutional bars, by legislative action that has put all three branches of power back into the executive branch!

RECOMMENDATIONS

Members of our committee expressed concerns with what they perceived to be a proposed "streamlining" of the various APA procedures to the point of elimination. The minority agrees. The minority suggests that viewing the APA as a recipe for the exercise of delegated power, rather than a regulation of "administrative procedures", furnishes a ready-made, constitutional model of what needs to be in the APA. APA provisions for making rules with the force of law should include substantially the same constitutional guidelines for the exercise of the same legislative power when exercised by the legislature. The minority also suggests that the exercise of judicial authority must stay "exclusively" within the judicial branch and be exercised pursuant to the constitutional requirements of Art. 6. This latter would eliminate the APA procedures for contested cases because the provisions in Art. 6 would, and should, cover that process. Finally, it is the minority's contention that recognizing the APA as a road map for exercising delegated powers will ensure a cleaner, nonfictional application of the constitutional doctrine of separation of powers set forth in Art. 3, § 2. The Law Revision Commission seems a logical forum to discuss these issues.

Robert Fitzke has served as chief executive of Delta Dental (1962-69), general counsel of the Michigan Senate (1976-80), and hearing officer for the Department of Public Health. He is a member of the Administrative Law Section's committee on the Administrative Procedures Act.

ENDNOTES

1 1963 Const, Art 3, § 2

2 *Clonlara v St Bd of Education*, 442 Mich 230, 245; 501 NW2d 88 (1993).

3 See, *e.g.*, *Couch v Schultz*, 193 Mich App 292, 296; 483 NW2d 684 (1992), app den 441 Mich 855, 489 NW2d 764 (1992).

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Administrative Law Section Council

At its October 1997 meeting, the Administrative Law Section Council discussed our web page. Courtesy of the State Bar, we have a web page, but we are not using it. Karl Benghauser and Erick Williams agreed to develop uses for the web page.

We also discussed the need for articles to appear in the Quarterly. Council and section members are urged to write or recruit others to write articles for the Quarterly. We also discussed organizing a writing competition for law students, designed to generate articles for publication. Diane Royal agreed to work on that.

We continue to monitor the proceedings of the Michigan Law Revision Commission, which is drafting a new administrative procedures act. The commission plans to introduce legislation in 1998.

At its December 1997 meeting, the council voted to file an amicus brief in the case of *Perry v Civil Service Commission*. The case involves a hearing officer in the Corrections Department who was fired, possibly because he sided with prisoners more than the agency thought he should have. Our brief will be on the issue of decisional independence. Fred Baker has agreed to file it.

The State Bar plans a series of legislative update sessions on legislative topics that may be of interest to the various sections. Sessions are scheduled for 21 April, and 10 September. Terry Davis, Bob McFarland, and Diane Royal will be attending.

The next council meeting is 22 February 1998.

SPRING SEMINAR

The long-awaited 1998 Spring program will be held May 14 and 15 at Weber's Inn in Ann Arbor. The program committee, consisting of Terry Davis, Bob Nelson, Bill Perone, and Sharon Feldman, have put together a program worthy of the wait. It begins at 1:30 on the 14th with an address by renowned political pundit Bill Ballenger. Following Mr. Ballenger, participants can choose between sessions on hearing room security, or court reform. The afternoon program concludes with state board of education member Gary Wolfram, discussing deregulation in Michigan. The evening part of the program starts with a reception, followed by dinner and entertainment by Habeas Chorus. On Friday, there will be sessions on appellate court issues, the privatization and centralization of administrative law judges, and an update on the proposed revisions to the administrative procedures act, featuring the chair of the law revision commission, Richard McLellan.

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