

1-1974

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Recommended Citation

Edward B. Miller, *Administrative Decision Making--Mortal or Immortal*, 25 HASTINGS L.J. 1131 (1974).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol25/iss5/1

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Administrative Decision Making— Mortal or Immortal?

By EDWARD B. MILLER*

AS human beings most of us are so beset by our daily concerns that we have little time to reflect upon our mortality or upon religious tenets which suggest that we have a potential for immortality. Similarly, most administrative agencies are so preoccupied with immediate problems of coping with ever growing and ever more complex responsibilities that they, too, rarely take the time to reflect upon the question of whether their administrative decision-making function—sometimes referred to as their quasi-judicial role—ought to go on forever or ought, at some point, to be terminated.

As chairman of the National Labor Relations Board (NLRB) I believe I am correct in saying that I preside over an administrative agency which hands down more decisions in litigated cases than almost any other. Having so presided for some three and a half years now, I have concluded that this is a significant issue. I have further concluded that the experience of this agency strongly suggests that the issue *ought* to have been considered long ago, and that, if it had, mortality would have been the more reasonable option.

In attempting to explore this subject area, one ought to begin with an inquiry as to why a judicial—or quasi-judicial—function is ever bestowed upon nonjudges. In the case of the NLRB, it seems fair to say that the Congress, when it first enacted the National Labor Relations Act,¹ had no intention of creating a quasi-judiciary of the size and scope which we have attained today. Senator Wagner, when he first introduced Senate Bill 2926 in the 73rd Congress in 1934, said:

The National Labor Board, under the new legislation, is not designed to act chiefly as a policeman or a judge. Its chief function will be to mediate and conciliate industrial disputes, and to offer its services as an arbitrator whenever the parties so desire.

* Chairman, National Labor Relations Board.

1. National Labor Relations Act, 49 Stat. 449 (now 29 U.S.C. §§ 152-68 (1970)).

It will continue to promote peace rather than strife, and to appeal primarily to the better judgment and good intentions of industry and labor.²

And in the later stages of debate in the House, Representative Marcantonio said:

It should be repeated that the National Labor Relations Board is to be purely a quasi-judicial commission. Its prestige and efficacy must be grounded fundamentally in public approval and in equal confidence in its impartiality by labor and industry.³

These excerpts are typical of the general tenor of the legislative history of the act. The emphasis was strictly on the *quasi*, not on the *judicial*. It was recognized that some new concepts in industrial relations were being introduced into federal law and that the primary function of this board would be one of acquainting the public with these new concepts and of persuading industry, through informational and informed conciliatory effort, to accept these new concepts and to adhere to them. The idea that some four decades later this agency would have in its employ approximately one hundred "administrative law judges" spending their full time hearing and deciding litigated cases arising under the statute, and that the board would turn into primarily an appellate tribunal handing down written opinions in approximately 1500 cases a year would, I am sure, have astounded and dismayed both the proponents and the opponents of the original act.

By 1947, however, when what has now become known as the Taft-Hartley Act⁴ was under consideration by the Congress, the hard realities had become obvious. No longer did the legislative history of the act evidence the optimistic view that the board could accomplish its purposes largely through educational and conciliatory efforts. By that time the caseload of the board, in both election cases and unfair labor practice cases, had grown enormously. The case intake had exceeded the 10,000 mark, which may seem small in comparison with today's nearly 40,000 cases, but which was substantial enough to indicate that litigation was becoming a key function of the board.

The 1947 amendments made structural changes within the agency which emphasized the concern of the Congress that the decision-making functions of the board ought to approximate more closely the structure of a court. Thus the Senate Report commented, in criticism of the board: "In other words, the Board, instead of acting like an

2. 78 CONG. REC. 3443-44 (1935) (Remarks of Senator Wagner).

3. 79 CONG. REC. 9723 (1935) (Remarks of Representative Marcantonio).

4. Labor-Management Relations Act, 1947 (Taft-Hartley Act) 29 U.S.C. §§ 141 *et. seq.* (1970).

appellate court where the divergent views of the different justices may be reflected in each decision, tends to dispose of cases in institutional fashion."⁵ Furthermore, the same report stated baldly: "[I]t is the belief of the Committee that Congress intended the Board to function like a court . . ."⁶

There was open disapproval of the conciliatory aspects of the board's functions, and the 1947 amendments added a specific provision, section 4(a) of the act, stating: "Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation . . ."⁷ What a change in emphasis!

Since those 1947 amendments there has been a still greater explosion in the judicial work of the agency. The unfair labor practice caseload of the board, wherein it acts as an appellate tribunal receiving the decisions of its administrative law judges, has increased nearly tenfold. Only a 1959 congressional enactment,⁸ authorizing the board to delegate a substantial part of its decisional workload in election cases to regional directors, has prevented a total inundation of the board's decisional processes to a degree which would have made it impossible for the board to continue to function.

In 1960 the so-called Cox Panel⁹ advocated a further delegation with respect to unfair labor practice cases which would have vested greater authority in the decisions of the board's administrative law judges (then trial examiners) and which would have permitted a certiorari review of those decisions by the board. Less than one year later, on December 21, 1960, the Landis Report¹⁰ contained a similar proposal. In 1966 Senator Javits introduced Senate Bill 3453 in the Congress which would have had much the same effect. None of these proposals became law. Other efforts and recommendations along these lines have been suggested and introduced, without success, on various occasions since those dates.

5. S. REP. NO. 105, 80th Cong., 1st Sess. 9 (1947).

6. *Id.*

7. National Labor Relations Act § 4(a), 29 U.S.C. § 154(a) (1970).

8. *Id.* § 3(b), 29 U.S.C. § 153(b) (1970).

9. Professor Archibald Cox was the chairman of the panel. Its members included David Cole, Guy Farmer, Arthur Goldberg, Charles Gregory, Dennison Kitchel, Plato E. Papps, Gerard D. Reilly, Louis Sherman, Russel A. Smith, George W. Taylor, and W. Willard Wirtz. The proper title of the panel was "The Advisory Panel on Labor Management Relations Law to the Senate Committee on Labor and Public Welfare."

10. J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 64-65 (1960).

It is not my purpose in this article to explore, in depth, the desirability or undesirability of either the delegation of decision-making functions in representation cases, which became a part of the law in 1959, nor the proposed delegation of all but certiorari review to administrative law judges, which has been repeatedly proposed but which has not become a part of the law. Rather, I wish to question what appears to be the underlying assumption in all of these sets of both accepted and rejected proposals—*i.e.*, that this administrative agency ought be endowed, *in perpetuity*, with its decision-making function. All of these proposals go merely to the question of whether there are ways and means by which this administrative agency can perform its decision-making role more efficiently and expeditiously, apparently on the assumption that it shall forever be cast in that role. As I have indicated by the brief review of the legislative history of the act, the changes in structure that have been made by the Congress are predicated on this assumption, and indeed are predicated on a radically and rather hastily revised view of the nature of this agency. Increasingly, the *administrative* role of the board has been de-emphasized. Every congressional reform of the agency's structure has chipped away at the *quasi*, while strengthening the *judicial*, in that well worn hyphenated adjective so regularly used to describe the administrative decision-making function.

Is this not a curious phenomenon? If the original concept, however naive it may now appear in retrospect, that an administrative agency could educate and conciliate the populace into accepting and complying with the new rules of the industrial relations game had proved unworkable in practice, then why was the traditional enforcement forum—the judiciary—not restored as the principal forum for handling litigation to achieve compliance with a federal statute?

Perhaps it would be appropriate at this point to remind the reader of the manner in which the statute reaches its accommodation between administrative decision-making and judicial decision-making. In essence, the statute takes the trial stage of the litigation out of the hands of the normal judiciary. At the same time, the trial court function is not fully conferred upon the administrative agency. The trial stage is at once shortened and elongated by: (1) making discovery procedures nonmandatory; and (2) building in an intermediate administrative appellate review of the decision made by the first-line decision maker.

In a typical proceeding under any other federal law, whether civil or criminal in nature, the initial proceeding is before a federal district

court judge. In civil litigation, at least, full discovery procedures are available. After the evidence has been received at the trial, the district court judge normally seeks proposed draft findings of fact and conclusions of law from the attorneys for the parties. With some frequency, he then adopts—or adapts—one or the other set of proposed findings as his decision. His decision is immediately enforceable, subject only to the possibility of a discretionary stay being granted pending review proceedings in the appropriate United States Court of Appeals.

In proceedings brought under the National Labor Relations Act,¹¹ the district court judge normally has no function (except in those special cases in which provision is made in the statute for temporary injunctive relief pending a full trial of the matter before the administrative agency). In the administrative trial, the hearing takes place before a hearing officer appointed by the agency—formerly called a trial examiner, more recently labeled as an administrative law judge. While administrative agencies may permit discovery procedures, the practice of this agency throughout its existence has been to limit severely any such procedures. This limitation grew out of a desire to protect charging parties from possible retaliation by their employers, and has proved feasible because most of the hearings are one or two day affairs. Thus, the simplification of issues, often advertised as one of the benefits of pretrial procedures, would not be likely to shorten substantially the already brief hearings.

After the administrative law judge has heard the case, he normally invites briefs by the parties and then issues a fully rationalized decision, it being generally understood that the Administrative Procedure Act¹² requires a rather full explanation by the hearing officer with respect to his resolution of credibility issues. Thus, the use of foreshortened findings of fact and conclusions of law has not been adopted in these trials at all. This tends to lengthen the procedure, because the administrative law judges, who wish to make their decisions as fully rationalized as the law requires, take a considerable amount of deliberative and drafting time to accomplish this end.

When an administrative law judge issues his decision, it does not have the same force or effect as a district court judge's decision. Indeed it has no legal effect at all. It is only a recommendation to the board as to what the decision in the case and the remedy, if any, ought to be. In a few cases neither the general counsel nor the respondent takes exception to the administrative law judge's decision, in which

11. 29 U.S.C. §§ 152-68 (1970).

12. 5 U.S.C. §§ 551 *et. seq.* (1970).

case it is automatically adopted by the board. But most cases are fully reviewed by the board through the means of taking exception to the administrative law judge's decision. Once again this lengthens the process, because it is the practice of the NLRB to allow time for the parties to file briefs in support of exceptions and the matter then must be fully considered at the appellate level. When a decision of the board issues it also is not a true substitute for a district court judge's decision, since it also has no legal or binding effect. Absent voluntary compliance with one of these decisions, the board must file a petition in the applicable United States Court of Appeals for enforcement of the board's order.¹³

Thus, while a two-step procedure is provided for arriving at something similar to a district court decision, the end product of the work of the board's hearing officers and the exercise of its appellate jurisdiction is still something less, legally, than a district court decision. And the process of getting to that tentative decision is, as I have described, a rather lengthy one. Administrative ingenuity and carefully time-targeted disciplines applied both by the public prosecutor (the general counsel) and the board itself have kept delays within some reasonable bounds. But there seems to be no way for a board decision to issue, on the average, in less than eleven or twelve months after the initial charge of a violation has been filed in one of the regional offices. This would seem to be a considerably longer time than it would take a district court judge to arrive at a decision in a case requiring not more than one or two days of hearing. Then, as I have indicated, the year has passed without a legally enforceable decision having been reached. The appellate dockets of the courts of appeal are such that it takes another year or more to get a legally enforceable decision through this rather cumbersome enforcement route. That means that in a fully litigated case, a full two years have elapsed before the cause has advanced to the point of authoritative decision.

Let us look at that now from the perspective of whether the administrative agency is an effective and desirable long-term substitute for the normal judiciary. Surely the time lapse figures I have set forth above give the lie to any notion that administrative decision-making is more expeditious than the utilization of the traditional judicial forum. The fact is that the trial stage is longer, not shorter, than the judiciary's trial stage, despite the nonutilization of discovery procedures.

13. National Labor Relations Act § 10(e), 29 U.S.C. § 160(e) (1970).

Another common cliché often invoked in support of administrative rather than judicial decision-making is that the administrative body has the benefit of expertise in the subject matter. There is, it seems to me, some truth in this assertion, but it should not be accepted blindly, and its precise advantages as well as its disadvantages should be subjected to scrutiny in any given subject area.

There may well be boards and commissions within the federal structure whose members and staffs become truly expert in highly technical areas, and as to which the average federal district judge would be ignorant. It is less than clear to me that this is the kind of expertise involved in matters falling within the jurisdiction of the National Labor Relations Board.

In saying that, I do not deny, nor even momentarily question, the fact that industrial relations is a sensitive field and one which has developed, as did Lombard Street a few centuries back, its own set of customs, practices, and jargon. It is also true that in the area of secondary boycotts, "hot cargo" contracts, and the like, the law itself has become intricate and complex. But about two-thirds of the caseload of this agency is comprised of charges that an employer has exerted undue influence on employees with respect to the exercise of their basic right to engage in or refrain from engaging in union activity. Those cases normally involve determinations of whether employees were laid off or discharged for reasons related to their activity for or against a union.

With that as a major source of litigation, it is doubtful that labor cases deal with matters so beyond the ken of the average judge that such cases could not effectively be tried except before administrative "experts." Doubtless, the insights into employee and employer behavior which are developed by the administrative law judges and by the board through a constant examination of such cases is helpful to sound decision-making, just as the steady parade of criminal cases before federal district judges may, in time, provide each such judge with some expertise in the administration of criminal justice. But this is something different from that kind of expertise which is commonly conceived as being the sole and exclusive possession of highly technically qualified administrators—or at least so it seems to me.

Furthermore, with most of the administrative law judges having been recruited from the agency itself and with most of the board members having acquired their "expertise" through service with the agency either as board members or in prior positions with the agency, there may also be room to question whether such expertise has not been

largely vicariously acquired. It is not as though the staffs—or even the board members—were recruited largely from among those who have for years practiced the arts involved in successful industrial relations. Familiarity gained through regular exposure to the types of problems which regularly arise in administering and enforcing a statute is a new kind of definition of expertise. That kind of expertise exists—but that is a skill resulting from specialization while acting as judge—not a pre-acquired expertise in a technical subject area.

I am also inclined to suggest that this kind of expertise is most useful in the initial stages of processing the complaints brought by the citizenry, rather than a *sine qua non* demanding administrative, rather than judicial, decision-making. In this connection I should call attention to the fact that the National Labor Relations Act gives the agency no independent investigatory authority, nor any power to initiate actions on its own.¹⁴ The only means by which any proceeding is initiated at this agency is through the complaint of an individual citizen. Those individual complaints—or more accurately charges—are filed in impressive numbers—some 26,000 last year. They are dealt with expertly, and, thanks to a history of good agency management, expeditiously. That is where an experienced staff has tremendous value. The staffs of the thirty-one regional offices are able to resolve approximately 94 percent of those citizen-filed charges through informal advice, settlement, and adjustment procedures without resort to any litigation whatever. That is an invaluable service to employees, to employers, and to unions. It is also a great public service, since it defuses many potential disputes and makes unnecessary, in most instances, both expensive litigation and hostile confrontations.

In that area, as well as in the significant area of conducting prompt and fairly run elections in which employees determine whether or not they wish to be represented by a labor organization, the specialized administrative agency finds its greatest justification. The performance of those functions seems to have been well within the contemplation of the framers of the initial legislation. And those areas are the ones in which the greatest number of this agency's employees perform their services—and perform them effectively. With the advent of new kinds of legislation in what may be loosely called the "labor" field, the public is gradually coming to appreciate that this corps of administrators has developed a professionalism and a body of experience which is of real value, and which can only be acquired over

14. *Id.* § 10(b), 29 U.S.C. § 160(b) (1970).

time. The newer agencies in this field suffer by comparison and doubtless will continue to, until they too have acquired their own body of practical experience which comes only from a long period of growing familiarity with the problems of administering a law in a specialized subject area.

But I return to the question of whether the *judicial* function is best performed by administrators rather than judges, and if so why. And I find myself still searching for affirmative answers which can withstand careful scrutiny. The NLRB, at least, is not equipped, because of the structure of its decision-making functions, to reach judicial determinations in as expeditious a manner as the traditional judicial forum. Further, there is real doubt in my mind as to whether it possesses an indispensable "expertise" in dealing with the issues which come before it for decision, except to the extent that it hears and determines a substantial number of cases of a similar nature on a regular basis. That kind of "expertise" could readily be achieved by any judiciary which was permitted some degree of specialization. So why an *administrative* judiciary?

There may be a better answer to the question, and one more consonant with the realities. When new social legislation is enacted, there is justification for a kind of tentative, administrative decision-making process during the formative years. It is hard now to remember how novel and experimental the basic tenets of the National Labor Relations Act were just three decades ago. But they were, and no one knew whether the law would be successful or whether the concepts which it embodied would be viable. There was, then, good reason to institute a rather slow, tentative, flexible, decision-making process during the days when the workability of the law itself was still in serious question. There was good reason why a hearing officer, at that stage, should not have had the authority to enter a final decision and why his recommended findings and conclusions, all fully rationalized, ought to have been reexamined by three presidential appointees before becoming an agency decision. There was reason, too, why even the agency decision should have been subjected to the scrutiny of a court before being enforced. For in those days there was truly a need for administrative development, experimentation, and gradualism, and for administrative determinations to be subjected to judicial scrutiny before becoming final. Decision-making at that point is of a different quality than the traditional judicial function of applying, with a considerable degree of finality and authority, well settled law to an evidentially determined set of facts.

But once a law has attained respectability, acceptability, and reasonable predictability, and once fundamental interpretative questions have been resolved by administrators who live daily with the law and the problems arising thereunder, and once administrative interpretations have been subjected to a reasonable period of judicial scrutiny, I would suggest that administrative tentative decision-making eventually becomes a poor substitute for traditional decision-making by the judiciary.

First, it becomes too slow. Once a law has become generally accepted and understood, persons seeking relief under it should not have to go through two years of litigation in order to have their rights effectively vindicated.

Second, no matter how many internal reforms are made, the public does not readily accept the idea that an agency charged with the responsibility of administering and enforcing a law can itself also put on a judge's hat and be regarded as a totally impartial judiciary. The public is even less likely to accept the impartiality of such decision makers when they are, as is the case in almost all administrative agencies, appointed for brief terms of office. Appointees to such boards or commissions become identified in the public eye with the administration which appoints them, and they are regarded as political, rather than judicial, figures.

If the kind of "expertise" is needed which grows out of hearing a specialized set of cases, then perhaps the day has come when we must have specialized courts. Indeed there are many who argue today that employer-employee controversies of all types—whether arising under the National Labor Relations Act, as a result of suits on individual contracts or on collectively-bargained contracts, controversies under the wage hour laws, controversies under the equal opportunity laws—have attained such a total volume and such a complexity that a specialized labor tribunal within the federal judiciary would be desirable. That may be, and we may come to similarly specialized judiciaries in other fields, such as criminal law, commercial law, tax law, patent law, and perhaps still others. But that is not an argument for decision-making by administrators rather than judges in any of those areas.

The rationale instead suggests that when Congress finds it necessary to establish an administrative agency to deal with new legislation of national scope and significance, that agency should be vested with decision-making powers only during perhaps the first ten years of its existence. Such a law ought, from its inception, to provide for the

termination of administrative case litigation at the end of that ten-year period. If by then the law has proved sufficiently unworkable or unacceptable that questions under it cannot be resolved through the normal judiciary then probably the law as well as the agency ought to be drastically revised or scrapped. But if it has proved acceptable, workable, and its major applications have been substantially established, then why should it not thenceforth be enforced by judges, rather than administrators? That is not to say that the agency ought to be abolished—it may, as in the case of the NLRB, still have many useful administrative and prosecutory functions, which require the full-time services of a substantial group of experienced personnel, who can make a real contribution in whatever the specialized field of its operations may be. But once the principles are set and the law is established, the wisdom of the traditional separation of powers dictates that judicial functions ought to be performed by the judicial branch of the government.

But administrative decision-making in cases requiring litigation ought, I suggest, have a clearly defined and limited life expectancy. In short, it should be mortal—not immortal.