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Conflict or Constructive Tension: The Changing Relationship of Judges and Administrators

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Administrators these days often express frustration, resentment, and anxiety over judicial intervention into administrative operations. The indictment is familiar. Beginning in the late 1960s and early 1970s, the story goes, federal courts began a movement toward greater interference in administrative matters that has become progressively more intrusive. The trend, the argument runs, continues to this day.

It should not be at all surprising that administrators resent judicial rulings limiting their discretion and mandating procedural or substantive policy changes in agency operations. After all, one of the administrator's primary tasks is to anticipate and eliminate contingencies in the organizational environment.¹ Judicial rulings would seem to be just one more troublesome factor constraining administrative flexibility.

However, the courts perform a variety of essential functions required of them by the Constitution and statutes. They must ensure that administrators do not exceed their statutory authority, ignore basic procedural requisites, conduct themselves in a manner that is arbitrary and capricious or an abuse of discretion, make important policy determinations without some kind of reasoned decision based upon a record, or violate the provisions of the Constitution.² Neither these functions nor the courts designated to perform them are going to be eliminated.

The problem then is to develop an effective working relationship between judges and administrators. But before such an accommodation can be reached it will be necessary to assess the current relationship between these legal and administrative institutions. The starting point for such a reassessment must be a realization that the federal courts, led by the Supreme Court, have changed the law governing administrative agencies in ways more charitable to administrators. It is not true that there is a continuing trend toward greater interference in administration. Recent cases indicate an increasing judicial sensitivity to management problems and priorities.

This article examines the premises underlying current tensions between judges and administrators. It then turns to a consideration of the various counts in the indictment brought by administrators against the courts indicating the importance of recent federal court rulings. There is one new area of tension developing

■ *This article investigates the charge by administrators that federal courts are continuing a trend toward greater intervention in administrative matters, thereby undermining necessary administrative discretion. It argues, however, that federal courts, led by the Supreme Court, have over the past several years begun to recognize the need for greater administrative flexibility and to demonstrate a sensitivity to the problems brought by complex litigation that face administrators.*

between courts and agencies, cases in which administrators refuse to act at all or engage in administrative deregulation. Judicial reactions to this problem are also assessed. Finally, the article suggests that law is a discretion-reinforcing agent, a fact that argues for improved judicial-administrative relations and against continued hostility.

Law and Administration: Natural Animosity or Constructive Tension

Two premises are essential to any discussion about law and administration. First, discretion is an essential commodity in modern public administration. Problems are simply too diverse and specialized and the environment too dynamic for legislators to provide more than a moderate amount of guidance to those who must administer public programs. Beyond that, managers must have sufficient flexibility to adapt their organizations and practices to changing conditions in order to perform effectively and efficiently. A lack of discretion would stifle creativity and confine administrators to rigid behavior patterns producing a panoply of bureaucratic dysfunctions long feared by scholars of organizational theory.³

The second premise is that law is intended to, and does in fact, limit discretion. Internal checks acquired

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by careful recruitment and training of promising public servants and the external checks provided by executive supervision and legislative oversight have never been thought adequate substitutes for the opportunity to call an official into court to demonstrate the validity of his or her actions. "No man in this country," the Supreme Court has admonished us, "is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All of the officers of government, from the highest to the lowest, are creatures of the law, and are bound to obey it."⁴

It is not true that there is a continuing trend toward greater interference in administration. Recent cases indicate an increasing judicial sensitivity to management problems and priorities.

From these two premises it follows that there will inevitably be tension between judges and administrators. Adding to that conflict are the differing perspectives of legally trained professionals and management educated professional administrators.⁵ The former tend to treat as core values the utility of law as a defense against government intervention in personal and business affairs, the commitment to due process of law, an insistence upon equal protection of the law, and a concern for substantial justice. The latter, on the other hand, are by degrees more concerned with the latitude necessary to apply expertise to complex problems, the need for flexibility in meeting new challenges, and the goal of efficiency—what Gulick referred to as "the basic good."⁶

However, the fact that some tension exists between judges and administrators is not necessarily destructive nor should it transform natural tension into animosity. Such a polarized view of the judicial-administrative relationship would be understandable only if managers could successfully argue that absolute discretion is absolutely good and necessary or if legalists could contend that all discretion is bad. Neither argument has merit. Discretion does not necessarily have a straight-line correlation with efficiency.⁷ The relationship is more curvilinear. No discretion would paralyze management. On the other hand, complete discretion may undermine efficiency. Sofaer, for example, found in his study of an agency with extremely wide discretion that broad flexibility can lead to "inconsistency, arbitrariness, and inefficiency."⁸ He concluded that "the evidence seemed to refute the hypothesis that discretion results in less costly, speedier administration. . . . The presence of discretionary power seemed throughout the administrative process, disproportionately to attract political intervention."⁹ Legalists have the same problem. The relationship between just decisions and discretion is again nothing so simple as a straight-line negative correlation. Absolute discretion would mean a high probability of arbitrary and inconsistent administrative judgments. On the other hand, no discretion

would mean rule-bound administration without accommodation for equity or any other consideration of individualized justice.

The challenge, then, is to find useful mixes of discretion and checks on abuses of discretion not only to achieve just decisions and bolster accountability but also to protect necessary administrative flexibility so that managers can administer their organizations efficiently. The most useful approach to thinking about law and administration is not a juxtaposition of law against administration, but development of an understanding of the interaction of courts and agencies as a necessarily ongoing relationship.

Before progress can be made in improving the judicial-administrative relationship, administrators must be made aware of some of the important changes in the law. There are indications in a variety of recent rulings of increased judicial sensitivity to administrative concerns.

Judges Neither Understand nor Care About Administrative Problems: Mythology and Reality in Recent Legal Developments

A common misconception is that a straight-line progression of judicial assumption of authority has occurred, substituting legal judgment for administrative discretion. Examination of administrative law cases over the past decade, however, indicates that part of this management perception is based upon a number of myths or misunderstandings, which are not generally supported by the case law. True, there are important controversies, but the relationship is not as adversarial as it may seem.

The last decade or so has witnessed significant changes in direction within the Supreme Court and some lower courts on issues of importance to administrators. In several areas, judges have openly recognized the importance of administrative discretion and have moved to protect it. One way to understand the importance of these rulings is to consider the charges issued by administrators against the judiciary and the manner in which a federal judge might respond to them.

1. *Courts do not care about costs.* There is substantial evidence to the contrary. Consider the development of standards for administrative due process, judicial acknowledgment of the need to avoid supplanting legislative budgeting, and the recognition of fiscal problems faced by administrators in institutional reform litigation.

Even before the important recent changes in the requirements of administrative due process, the Supreme Court acknowledged the need to permit a flexible approach to due process to accommodate administrative circumstances. In a 1976 ruling, *Mathews v. Eldridge*, the court went even further.¹⁰ In *Eldridge*, the court found that Social Security disability recipients were not entitled to a hearing before the termination of their benefits, though they would have an opportunity

to be heard at some point later in the process. The significance of this decision lies not in permitting administrators to deny claimants any due process, but in granting flexibility in assessing what process is due under varying administrative conditions. In *Eldridge*, the Supreme Court developed a balancing test for determining how much process is due someone before an administrative agency which specifically recognizes fiscal and administrative burden as a major element of the balance. In order to decide what process is due, the court said, one must consider:

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute safeguards; and finally, *the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.*¹¹ (Emphasis added.)

The *Eldridge* balancing test has been the controlling due process standard since 1976.¹² The court has consistently rejected calls for expanded administrative due process since that time and has, in fact, relaxed some of the requirements imposed in earlier cases.¹³

This approach to due process overtly considers the problems of financial and administrative burden so important to administrators. There are other indications that judges at both the Supreme Court and lower court levels are increasingly aware that their rulings have substantial fiscal implications for public administration.¹⁴

The Sixth Circuit Court of Appeals recently made the point rather forcefully that courts should not supplant the budgetary process. The case resulted from a challenge by parents to the closing of an innovative day treatment facility, known as Jewel Manor, by the Kentucky Department of Human Resources. The reason for the elimination of the facility was budgetary pressure. Disappointed parents argued that the closing of Jewel Manor meant a change of placement for their children within the meaning of the Education for All Handicapped Children Act (EHCA). As such, they insisted, the state was precluded from closing the facility unless it could justify the change of placement or establish some other equally acceptable program. The court of appeals admonished the district judge to grant wide deference to state and local governments in matters of program modification.

These [state] authorities do not, by electing to receive funds under the EHCA, abdicate their control of the fiscal decisions of their school systems. . . . Congress did not compel, as the price for federal participation in education for the handicapped, a wholesale transfer of authority over the allocation of educational resources [away] from the duly elected or appointed state and local boards. . . .¹⁵

The Supreme Court has extended that expression of concern about compulsion of state expenditures. The Third Circuit Court of Appeals affirmed a district court ruling ordering reform of Pennsylvania mental health programs in part on grounds that the Disabled Assistance and Bill of Rights Act of 1975 mandated minimum requirements for appropriate treatment in the

least restrictive setting. The state received funds under that act and was therefore obligated to comply with the statute's standards. The Supreme Court reversed finding that the legislation "intended to encourage, rather than mandate, the provision of services to the developmentally disabled."¹⁶ In reaching this conclusion, the court observed:

The fact that Congress granted to Pennsylvania only \$1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing "appropriate" treatment in the "least restrictive" setting, confirms that Congress must have had a limited purpose in enacting [this section of the law]. . . .

Our conclusion is also buttressed by the rule of statutory construction established above, that Congress must establish clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds.¹⁷

As the dissenters pointed out, the court's reading of the statute was extremely generous to the states involved.

Thus, evidence shows that judges are aware of some of the fiscal implications of their judgments and are concerned about the need to minimize these burdens. That does not mean they are willing to accept a budgetary justification for violating constitutional rights, but neither are they oblivious to administrative problems.

Some question exists, however, as to whether administrators have tried in complex litigation to assist judges to understand relevant fiscal dimensions and to work out accommodations where necessary to minimize judicial-administrative tension. For example, in one northern school desegregation case, the state, when called upon by the judge to produce a proposed remedy, sent six plans, recommended none of them, and provided only one witness for the remedy hearing whose only role was to explain what was in the plans.¹⁸ The state provided the judge no help whatsoever in understanding the administrative and fiscal problems involved in implementing any of the proposed remedies. In an Alabama case, state mental health officials were given six months to take action to remedy unconstitutional conditions at state mental health facilities, but they took no action at all. Moreover, the state refused offers of assistance from federal agencies. After indicating his understanding that state administrators may have lacked funds to implement reforms, the judge asked just how that prevented the administrators from producing a plan that could be implemented when funds did become available.¹⁹

Administrators can improve their relationship with judges in such cases by making careful decisions about when to fight and when to negotiate. They can present detailed and understandable explanations of their concerns about financial and administrative feasibility. They can resist the temptation simply to ignore likely judicial action until it is forced upon them.

2. *Courts are increasingly unwilling to defer to the expertise of administrators.* Again, there have been a number of opinions, particularly Supreme Court rulings, demanding deference to administrative expertise.

The court has issued these admonitions in two types of cases, rulemaking review and institutional reform litigation.

The court's leading ruling on judicial review of administrative rulemaking was the unanimous opinion issued in *Vermont Yankee Nuclear Power Corp. v. United States Nuclear Regulatory Commission*.²⁰ *Vermont Yankee* warned lower courts against fashioning procedural requirements beyond those contained in the statutes administered by the agency involved. Lower courts are to examine the record prepared by the agency during rulemaking, and, if it is adequately supported and within the statutory authority of the agency, the action is to be affirmed.²¹ While there has been disagreement among members of the court as to precisely how much deference is due,²² the prime forces expanding rulemaking procedural requirements in recent years have been legislation and executive orders, not judicial mandates.

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The court subsequently issued a number of rulings demanding lower court respect for and deference to administrative expertise at the state as well as the federal level. Two of the more forceful decisions concerned administration of programs for handicapped children and mental health treatment.

Amy Rowley's parents objected to the individual education plan (IEP) developed for their daughter by the Hendrick Hudson School District under the requirements of the Education for All Handicapped Children Act. While school officials had provided an FM microphone, training for teachers, tutorial assistance, and speech therapy for the hearing-impaired child, they refused the Rowley's request for a sign language interpreter in the classroom. Amy was acknowledged by all to be a bright child who read lips well enough to earn passing marks at least in her elementary grades in a regular classroom. But she did this in spite of the fact that she could only understand about half of the information conveyed. In sum, she was not able to perform up to anything like her potential without the additional assistance of a sign language interpreter. For that reason, they argued, Amy was denied the "free appropriate public education" required by the EHCA. The lower courts agreed, but the Supreme Court reversed.

The court concluded that the act did not require the state to do more than ensure that "personalized instruction is being provided with sufficient support services to permit the child to benefit from instruction" plus meet the procedural requirements for parental participation in development of plans. If that was done, the child was

by definition receiving a "free appropriate public education."²³ Perhaps of equal importance, however, was the court's discussion of how judges are to decide whether the child is in fact receiving benefit from the plan. The court insisted upon increased deference to administrative expertise.

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. . . .

We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy."²⁴

But the court's admonition to judges on the need for deference was not limited to this particular program. In the same term, the court issued a decision in *Youngberg v. Romeo* which, though it recognized a constitutional claim for protection against abuse and a requirement for some mental health care for institutionalized retarded persons, carried a strong warning against judicial second-guesses of expert administrative judgment.²⁵ Justice Powell insisted that "courts must show deference to the judgment exercised by a qualified professional." He concluded:

By so limiting judicial review of challenges to conditions in state institutions, interferences by the federal judiciary with the internal operations of these institutions should be minimized. Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions [about the kind of care and treatment needed by a patient]. . . . (Courts should not "second-guess the expert administrator on matters on which they are better informed.")²⁶

This was a suit which asked, among other things, for damages against hospital and state officials for the lack of treatment. Pressing the need to protect administrative discretion and recognize fiscal difficulties, the court wrote:

[L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. In an action for damages against a professional in his individual capacity, however, *the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints.* . . .²⁷ (Emphasis added.)

In other cases, the court has held that judges must "design procedures that protect the rights of the individual without unduly burdening the legitimate efforts of the states to deal with social problems"²⁸ and insisted that "courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system. . . ."²⁹

3. *The Supreme Court is continually expanding the authority of federal district courts to issue complex remedial orders obstructing administrative operations.* There are two important factors to be considered in assessing the remedial decree cases. First, administrators have often welcomed suits against prisons and mental hospitals as means to pressure legislators for increased appropriations.³⁰ Thus, it is not always clear that the relationship of court to agency in these cases is primarily adversarial.

In fact, for a decade now the Supreme Court has been moving to make it harder for trial judges to justify issuance of a remedial order,³¹ narrowing the scope of such orders³² and limiting the duration for which district judges may retain supervisory jurisdiction over administrative institutions.³³ In cases involving school desegregation, mental health, and prison conditions, the court has admonished lower courts to avoid unnecessary orders, to carefully tailor those which are necessary to remedy constitutional violations without undue interference in agency operations, and to terminate control over those institutions as soon as possible.

4. *The Supreme Court keeps expanding legal protections available to employees at the expense of managers' discretion.* An expansion of employee rights did occur in the late 1960s and early 1970s. Once again, however, care must be exercised in judgments about judicial interference with administration. In the first place, many employee rights were created by statute or executive order and not judicial rulings.³⁴ It is, of course, true that federal courts added protections, particularly in the area of First Amendment free speech and association as well as due process requirements in adverse personnel actions. However, important changes have been made in recent Supreme Court decisions that define employee rights, particularly in the First Amendment and due process fields.

Using the *Eldridge* balancing formula, the court has drawn back from what were some years ago expanding administrative due process requirements in employee terminations concerning which employees are entitled to a hearing³⁵ and the type and timing of any hearing that is required.³⁶ These cases have indicated that the court will be reticent to require more elements of due process than are specified in statutes and regulations. Moreover, they have rejected claims by employees that civil servants are entitled to a hearing before they are removed from their jobs rather than some time later in the administrative process.

In the First Amendment field, the court has shifted the burden and increased the level of proof required for the employee to prevail on complaints of unlawful termination in violation of First Amendment free speech protections.³⁷ The most direct statement of the court's intention to leave managers free of unnecessary judicial involvement in personnel decisions came recently in *Connick v. Myers*.³⁸

The *Connick* case arose when Myers, a deputy district attorney in Orleans Parish, Louisiana, got into a dis-

agreement with her supervisor regarding a job transfer. She had been offered a transfer and promotion based upon her performance, but she resisted the step up because it would have required her to prosecute cases in the court of a judge with whom she had been working for some time on an offender diversion program. She saw the move as a conflict of interest. When her supervisor disagreed and insisted upon the move she charged that this was another example of his poor administration of the office. Her criticism alleged a range of administrative problems including attempts to coerce employees into participating in partisan political activities. The supervisor indicated her views were not widely shared within the office. At that, Myers went home and prepared a questionnaire which she circulated to other employees. Her supervisor summoned Myers who was summarily dismissed. The district court awarded damages on grounds that there was no question that she had been fired because of her First Amendment protected speech and there was no showing of significant impairment of organizational operations as defined by previous case law that justified the termination.³⁹

The Supreme Court reversed, finding that Myers had not adequately demonstrated the public significance of her speech. In so doing, the court added a new requirement to the existing burden an employee must carry in defending his or her speech against reprisal. It was not, however, merely the court's change of this test regarding when an employee can be disciplined that made the case so important, but it was also Justice White's insistence upon deference to management discretion in such matters.

When employee expression cannot fairly be considered as relating to any matter of political, social, or other concern of the community, government officials should enjoy wide latitude in managing their officers, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.⁴⁰

We hold that where a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. . . .

When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to employers' judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.⁴¹

The court's language in *Connick* coupled with its cautions against extensive judicially imposed due process requirements indicates a significant shift toward deference to administrative interests.

5. *The Supreme Court has consistently issued rulings that make it easier to bring suit in federal court.* It is

true that in the late 1960s and early 1970s the Warren court relaxed the rules governing who could bring a suit in federal court permitting a wider range of litigation. However, the Burger court has issued a string of decisions placing significant limits on standing to sue and other procedural standards governing access to federal courts.⁴² In fact, it is in the area of court access rules that the Burger court has made some of the most dramatic changes from the Warren court precedents.

The Burger court has sent other signals indicating that groups interested in changing policy should look to arenas other than the federal courts. For example, it rejected the claim that public interest groups acting as private attorneys general could collect attorneys' fees when they sued successfully.⁴³ (Congress later reversed that ruling by statute.) The court has also restricted the ability of private groups to claim a right to sue under statutes that do not specifically authorize private litigation, the so-called implied right of action.⁴⁴ Just because there may be a violation of law that government is unable or unwilling to prosecute, does not mean that a group of private individuals may step into the breach and demand court action. For several reasons, then, it simply is not true that the trend of the Warren court years to open the doors of the federal courthouse to more lawsuits has been continued by the current court.

6. *Federal courts are constantly expanding the threat to administrators from tort liability judgments.* The controversy surrounding the vulnerability of officials and units of government to damage claims is considered elsewhere in this symposium. But since administrators' frustration and anxiety about tort lawsuits is an important part of the conflict between judges and managers, some caveats are worthy of brief mention here.

First, while the Supreme Court has permitted more types of suits for damages over the past decade, it has brought about a kind of trade-off for administrators. At the same time that it has been allowing a wider range of damage suits, it has been limiting broad remedial orders that interfere with ongoing administration.⁴⁵ The message to lower courts is to limit interference with current administrative operations, but to let claimants come into court after the fact and collect damages if they can make their case.

Second, recent liability rulings are not unrestricted invitations to sue public officials. Even in the decisions expanding the range of possible damage claims, the Supreme Court has created a series of immunities making it relatively difficult for a plaintiff to win a case.⁴⁶ More recently, the court has recognized that its official liability decisions have placed added burdens upon public administrators discouraging initiative and producing time-consuming and costly litigation.⁴⁷ In *Harlow v. Fitzgerald*, the court expanded the standard immunity afforded public officials in federal tort suits and instructed judges to guard against unnecessary pre-trial discovery and other burdensome procedures.⁴⁸

In sum, the rules and judicial trends affecting the judicial-administrative relationship are not part of a continuing judicial assault on public administration. In

a variety of areas the federal courts have demonstrated a sensitivity to the problems administrators must face. That does not mean that they have been willing to serve as rubber stamps for administrative action, but it does give lie to some of the more extreme charges that the courts are about the business of undermining administrators.

Administrative Deregulation and Refusal to Act: A Developing Judicial-Administrative Tension

In one area an increase has recently occurred in judicial-administrative tension. Historically, legal challenges to administrators have primarily concerned efforts to limit overzealous use of administrative discretion. In the administrative environment of the late 1970s and the 1980s, however, attention has shifted to situations in which administrators either refuse to act at all or withdraw from previously developed policies. Although the need to compel administrative action as well as guard against excessive administrative zeal is rarely discussed these days, it is an important issue that was stated by Carl Friedrich more than 40 years ago.

Too often it is taken for granted that as long as we can keep government from doing wrong we have made it responsible. What is more important is to insure effective action of any sort. . . . An official should be as responsible for inaction as for wrong action; certainly the average voter will criticize the government as severely for one as for the other.⁴⁹

The efforts of the Carter and Reagan administrations to deregulate and generally move administrative agencies to less proactive approaches to their work have been the focal point of controversy. It is important in any discussion of administration and law to consider not only limits on the discretion to act but also the legal forces compelling the exercise of discretion. The cases calling for mandatory use of administrative authority have been basically of four types: (1) those objecting to an administrative refusal to launch a fact-finding or policy-making process; (2) agency refusal to issue rules; (3) intentional delay in agency action; and (4) rescission of existing or proposed policies.

Controlling the agency agenda is an important element of administrative discretion. Deciding what problems to address and assigning priorities is often more than a question of efficient management. It may involve a strategic decision. Administrators would frankly prefer to avoid some problems. Take the case in which the involvement of the Food and Drug Administration (FDA) was demanded in the capital punishment controversy. Death row inmates petitioned the FDA to launch an investigation to determine whether the pharmaceuticals used for execution by lethal injection were safe and effective for the specific application to which they were put. Drugs could only meet that criteria if they brought about quick and painless death, but the inmates alleged there was substantial evidence that in improper dosage and administration the drugs currently used could "leave a prisoner conscious but paralyzed

while dying, a sentient witness of his or her own slow lingering asphyxiation." FDA refused to investigate on grounds that it lacked jurisdiction to review state-sanctioned uses of drugs for these purposes. The agency did not argue that it lacked the capacity to inquire into the matter, but that it was without jurisdiction in the case. Moreover, the agency claimed that even if it had jurisdiction, it also had complete and unreviewable enforcement discretion concerning whether and when to take administrative action. The FDA refused to act on the basis of that discretion.

The D.C. Circuit Court of Appeals, however, found that the agency did have jurisdiction which it had previously asserted, for example, in drug experiments involving state prison inmates. The court rejected the claim to unreviewable enforcement discretion and found the FDA refusal to launch an investigation arbitrary and capricious. The court wrote:

In this case FDA is clearly refusing to exercise enforcement discretion because it does not wish to become embroiled in an issue so morally and emotionally troubling as the death penalty. Yet this action amounts to an abnegation of statutory responsibility by the very agency that Congress charged with the task of ensuring that our people do not suffer harm from misbranded drugs. . . . As a result of the FDA's inaction, appellants face the risk of cruel execution and are deprived of FDA's expert judgment as to the effectiveness of the drugs used for lethal injection. . . .³⁰

While the court will not dictate the outcome or the particular administrative process to be employed, the simple assertion of absolute discretion will be challenged.

Another problem area is the refusal to make rules. The Eighth Circuit Court of Appeals, recently found that the secretary of agriculture had abused his discretion by refusing to issue rules under a statute governing farm loan foreclosure. A family charged that the Department of Agriculture had an obligation under the statute to promulgate rules and provide adequate notice to those affected concerning possible deferments of foreclosures. The government argued that the statute "merely created an additional power to be wielded at the discretion of the agency, or placed in the Secretary's back pocket for safekeeping."³¹ The court found the refusal to make rules or institute any kind of process of reasoned decision making a "complete abdication" of responsibility.³²

In some ways related to the refusal to make rules is the tactic of delaying for as long as possible the issuance of rules required by statute. Here again, courts seem willing to draw a line. Efforts by the Environmental Protection Agency (EPA) to delay implementation of rules required by the Resource Conservation and Recovery Act covering toxic wastes were successfully challenged in a number of lawsuits. Among the remedies sought by the plaintiffs in one of the cases was an award of attorney's fees under the Equal Access to Justice Act. The court awarded the fee finding that the intentional delaying tactics employed by the agency were "exactly the type of arbitrary governmental behavior that the EAJA was designed to deter."³³

Finally, a number of challenges have been brought against efforts of administrators to deregulate by rescinding existing agency regulations or withdrawing pending rules. The Federal Communications Commission (FCC) efforts to reduce its regulatory control over broadcasting have prompted several such lawsuits. Another recent example is the withdrawal of mandatory automobile passive restraint rules by the Department of Transportation. In both cases, administrators claimed that the decision to reduce regulation administratively was not really policy making and was a purely discretionary matter not subject to judicial examination. The courts rejected that claim in both cases and insisted that a change in policy is a policy decision whether it results in promulgation of a new rule or abandonment of an old one. In fact, a panel of the D.C. Circuit Court of Appeals said, "such abrupt shifts in policy do constitute 'danger signals' that the Commission may be acting inconsistently with its statutory mandate. . . . We will require therefore that the Commission provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."³⁴ Having said that, however, the court upheld the FCC deregulation. It cautioned the commission that it was perilously close to violating its statutory responsibility but found enough evidence to say the FCC had met its requirements of reasoned analysis.

Indications are that judges at both the Supreme Court and lower court levels are increasingly aware that their rulings have substantial fiscal implications for public administration.

The Supreme Court did not find the necessary foundation for the rescission of the passive restraint rule and remanded the matter to the agency. It concluded that an "agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when the agency does not act in the first instance."³⁵ Since a rule was presumably adopted in the first instance on the basis of a careful reasoning process using the agency's expertise and available evidence, there is a presumption in favor of the rule. The court concluded:

In so holding, we fully recognize that "regulatory agencies do not establish rules of conduct to last forever," . . . and that an agency must be given latitude to adapt their rules and policies to the demands of changing circumstances. . . ." But the forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start, that presumption—contrary to petitioner's view—is not *against* safety regulation, but *against* changes in current policy that are not justified by the rule-making record.³⁶ (Emphasis in original.)

There is one final problem of what might be termed negative discretion. Administrators often argue that

judges should defer to their administrative expertise regardless of the type of policy under consideration. However, judges sometimes doubt that administrators are entitled to such deference when there does not appear to be a policy at all but rather a failure to make any policy or to enforce existing standards. Justice Brennan, for instance, observed that while judges ought to defer to the expertise of correctional administrators, the prison conditions frequently in dispute often arise not from a policy decision based upon administrative expertise but from sheer neglect. "There is no reason of comity, judicial restraint, or recognition of expertise for courts to defer to negligent omissions of officials who lack the resources or motivation to operate prisons within the limits of decency."⁵⁷

Administrators can improve their relationship with judges by making careful decisions about when to fight and when to negotiate.

Federal District Judge Bruce Jenkins of Utah came to a similar conclusion recently in a case involving claims made against the government by the families of alleged victims of nuclear testing. The court awarded damages to those who demonstrated that their illnesses stemmed from the testing. Jenkins rejected the notion that there should be a deference to administrative discretion in this sort of case. There was, he said, "no official policy of indifference to safety."⁵⁸ The "actions taken were negligently insufficient—not as a matter of discretion at all—as a matter of deliberate choice making—but as a matter of negligently failing to warn, to measure and to inform, at a level sufficient to meet the stated goals of the Congress, the executive branch and the Atomic Energy Commission."⁵⁹

In sum, administrators may not assume absolute administrative discretion when they refuse to act as compared to cases where they are alleged to have acted too vigorously. The problem of relating administrative discretion and judicial obligations to ensure accountability is all the more difficult when there is no policy for a given action but an actual departure from stated policy or simple neglect. This concept of negative discretion is an aspect of the judicial-administrative relationship that is very much a developing matter and worthy of attention.

Law as a Discretion-Reinforcing Agent

There are and always will be natural tensions between administrators and judges over the nature and boundaries of administrative authority. Yet there is a simultaneous positive aspect to this law-administration relationship. It is worthwhile to assess the reasons administrators ought to attempt to foster better working relations with judges, notwithstanding the difficulties such a prescription entails.

Knowledge of the legal elements of administration is an enabling force. Formal authority of administrators is derived from a statute or executive order. Care in using such authority supports effective administration. There is an admittedly rough but useful analogy to the budget process. An agency without adequate fiscal resources is in serious trouble. The amount of funds available is a significant factor in the agency's ability to perform. It is both an enabling force and, in a sense, a constraint. The fact that budgetary politics are complex and often disappointing does not indicate that a good manager ought to abandon concern for the subject or cease efforts to improve relationships with appropriations committees. The same is true of law and administration.

An understanding of legal developments is also important as a defensive matter. It can help to avoid liability judgments, prevent the loss of invested time and effort when agency decisions are reversed, avoid loss of control over one's agency to a complex remedial court order, and lead to savings of money as well as time from having to replicate and improve work rejected in judicial review.

Two other key functions are served by enhancing the relationship between administrators and judges. Understanding the relationship provides increased predictability which is critical to any manager. The first task is to understand judicial trends sufficiently to anticipate likely judicial responses to agency actions. An awareness of legal limits on administration provides an ability to predict not only what courts will do with respect to one's own but also to other agencies. Administrators thus informed can manage their operations with some expectation of how other agencies will be able to respond. Administration without attention to law would not mean more efficiency, it would mean chaos.

Finally, administrators need legal support for their claim to legitimacy within government and, perhaps more importantly, within the larger society. There is a certain irony in the fact that administrators busy challenging the legitimacy of judicial involvement in policy making are in danger of being convicted by their own arguments. Many of the charges made against judges can be made in only slightly modified form against administrators. They are not elected. Many cannot be removed from office except for cause. It is extremely difficult to keep them responsive and responsible. They frequently do precisely what the majority of the people do not wish them to do. The list goes on. Beyond that particular threat to legitimacy, however, is the need for assistance in establishing a legitimate place for administrators in the constitutional framework. Our constitutional authority is derivative. We obtain our authority by inference and indirectly.⁶⁰ We must always be able to trace our authority back through the chain of statutes and judicial rulings that support us.

Conclusion

This article has assessed common assumptions about the evolving relationship between federal courts and

administrators. It has provided evidence that despite the natural tensions between administrators and judges, it is an overstatement to charge that federal judges neither understand nor care about the harm their rulings may cause to management. In fact, legal authorities and opinions, if properly understood, are enabling and protecting forces providing sources of administrative discretion and protecting its use.

Moreover, the federal judiciary, led by the Supreme Court, has in several respects drawn back from intervention in administration in open recognition of the need for managerial flexibility. That good reasons exist for not applauding some of those deferential rulings does not change the fact that they do support more dis-

cretion. One rapidly developing area of judicial-administrative challenge is likely to remain of importance in the near term at least: the refusal of administrators to use the discretion that they possess.

Good reasons exist for administrators to develop their relationship with courts, reasons of an extremely practical nature and others of wider import, including the need to have law as a support for the legitimacy of public administration. In the final analysis, administrative discretion does not exist for its own sake. Administrators are vested with particular authority to serve public purposes in a society predicated on a rule of law. Natural tension, yes, but necessary as well.

Notes

1. Victor Thompson, *Bureaucracy and the Modern World* (Morristown, N.J.: General Learning Press, 1976), p. 10.
2. 5 U.S.C. §706.
3. See Robert K. Merton, "Bureaucratic Structure and Personality," in Merton et al. (eds.), *Reader in Bureaucracy* (New York: Free Press, 1952).
4. *United States v. Lee*, 106 U.S. 196, 220 (1882).
5. It is, of course, understood that many are administrators and that a substantial proportion of those managers have not received advanced training in public administration. See Frederick Mosher, *Democracy and the Public Service* (New York: Oxford University Press, 1984).
6. Luther Gulick and L. Urwick (eds.), *Papers on the Science of Administration* (Fairfield, N.J.: A.M. Kelley, 1977), p. 192.
7. Phillip J. Cooper, *Public Law and Public Administration* (Palo Alto, Calif.: Mayfield, 1983), pp. 217-219.
8. Abraham Sofaer, "Judicial Control of Informal Discretionary Adjudication and Enforcement," *Columbia Law Review*, vol. 72 (December 1972), p. 1374.
9. *Ibid.*, pp. 1301-1302.
10. *Mathews v. Eldridge*, 424 U.S. 319 (1976).
11. *Ibid.*, p. 335.
12. Evidence for this is provided in my study on administrative due process since *Goldberg v. Kelly* which was reported in "Due Process, the Burger Court, and Public Administration," *Southern Review of Public Administration*, vol. 6 (Spring 1982), pp. 65-98.
13. See, e.g., *Parham v. J.R.*, 422 U.S. 584 (1979); *Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978); and *Ingraham v. Wright*, 430 U.S. 651 (1977). The court has spoken of the *Eldridge* balancing formula as "the familiar test prescribed in *Mathews v. Eldridge*." *Schweiker v. McClure*, 72 L. Ed 2d 1, 9-10 (1982).
14. One federal district judge put it this way: "Subject to constitutional limitations, Arkansas is a sovereign State. It has a right to make and enforce criminal laws, to imprison persons convicted of serious crimes, and to maintain order and discipline in its prisons. This Court has no intention of entering a decree herein that will disrupt the Penitentiary or leave Respondent and his subordinates helpless to deal with dangerous and unruly convicts.
15. "The Court has recognized heretofore the financial handicaps under which the Penitentiary system is laboring, and the Court knows that Respondent cannot make bricks without straw." *Holt v. Sarver*, 300 F. Supp. 825, 833 (E.D. Ark. 1969). See also Ralph Cavanagh and Austin Sarat, "Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence," *Law & Society Review*, vol. 14 (Winter 1980), p. 408.
16. *Tilton v. Jefferson County Bd. of Ed.*, 705 F.2d 800, 804-805 (6th Cir. 1983).
17. *Pennhurst State School v. Halderman*, 451 U.S. 1, 20 (1981).
18. *Ibid.*, p. 24.
19. See, generally, *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972).
20. *Wyatt v. Stickney*, 334 F. Supp. 1341, 1344 (M.D. Ala. 1971).
21. *Vermont Yankee Nuclear Power Corp. v. U.S. Nuclear Regulatory Commission*, 435 U.S. 519 (1978).
22. See, e.g., *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582 (1981) and *Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).
23. See, e.g., *Industrial Union Dept. AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) and *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1981).
24. *Hendrick Hudson Bd. of Ed. v. Rowley*, 458 U.S. 176, 189 (1982).
25. *Ibid.*, p. 208.
26. *Youngberg v. Romeo*, 457 U.S. 307 (1982).
27. *Ibid.*, pp. 322-323.
28. *Ibid.*
29. *Parham*, 422 U.S. at 608, n. 16. This case involved commitment of juveniles to state mental hospitals.
30. *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981), a case challenging conditions at Ohio's principal maximum security prison. See also, *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).
31. Stephen L. Wasby, "Arrogation of Power or Accountability: 'Judicial Imperialism Revisited,'" *Judicature*, vol. 65 (October 1981), p. 213. See also, Stonewall B. Stickney, "Problems in Implementing the Right to Treatment in Alabama: The Wyatt v. Stickney Case," *Hospital & Community Psychiatry*, vol. 25 (July 1974), pp. 454-455.
32. See, e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Washington v. Davis*, 426 U.S.

- 229 (1976); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *Rizzo v. Goode*, 423 U.S. 362 (1976); and *Rhodes v. Chapman*, *op. cit.*
32. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406 (1977); *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979); and *Firefighters Local Union No. 1784 v. Stotts*, 81 L. Ed 2d 483 (1984).
 33. *Pasadena Bd. of Education v. Spangler*, 427 U.S. 424 (1976).
 34. Indeed one purpose of the Civil Service Reform Act of 1978 was to assemble and clarify the various statutory protections for civil servants provided by, among others, the Civil Rights Act of 1964 as amended, the Age Discrimination in Employment Act of 1967, the Fair Labor Standards Act, and the Rehabilitation Act of 1973. 5 U.S.C. §2302(b) (1978).
 35. *Bishop*, 426 U.S. 341, and *Paul*, 424 U.S. 693.
 36. *Arnett v. Kennedy*, 416 U.S. 134 (1974).
 37. Consider the shift from *Pickering v. Bd. of Education*, 391 U.S. 563 (1968), to *Mt. Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), to *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979).
 38. *Connick v. Myers*, 75 L. Ed 2d 708 (1983).
 39. *Myers v. Connick*, 507 F. Supp. 752 (ED La. 1981), *aff'd* 654 F.2d 719 (5th Cir. 1981).
 40. *Connick*, 75 L. Ed 2d at 719-720.
 41. *Ibid.*
 42. See *Allen v. Wright*, 82 L. Ed 2d 556 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); and *Warth v. Seldin*, 422 U.S. 490 (1975).
 43. *Alyeska Pipeline v. Wilderness Society*, 421 U.S. 240 (1975).
 44. *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); and *Cannon v. University of Chicago*, 441 U.S. 677 (1979).
 45. See, *Rizzo*, 423 U.S. 362. See also, David Rosenbloom, "Public Administrators' Official Immunity: Developments During the Seventies," *Public Administration Review*, vol. 40 (March-April 1980), pp. 166-173.
 46. See, e.g., *Butz v. Economou*, 438 U.S. 478 (1978).
 47. 457 U.S. 800 (1982).
 48. *Ibid.*, pp. 817-818.
 49. Carl Friedrich, "Public Policy and the Nature of Administrative Responsibility," in Friedrich and E. S. Mason (eds.), *Public Policy* (Cambridge, Mass.: Harvard University Press, 1940), p. 4.
 50. *Chaney v. Heckler*, 718 F.2d 1174 (D.C. Cir. 1983).
 51. *Allison v. Block*, 723 F.2d 631, 633 (8th Cir. 1983).
 52. *Ibid.*, p. 638.
 53. *Environmental Defense Fund v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983). The other key case compelling production of rules was *Illinois v. Gorsuch*, 530 F. Supp. 340 (D.D.C. 1981).
 54. *Office of Communications of the United Church of Christ*, 707 F.2d at 1425.
 55. *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual*, 77 L. Ed 2d 443, 457 (1983).
 56. *Ibid.*
 57. *Rhodes*, 452 U.S. at 362 (Brennan, J., concurring in part, dissenting in part).
 58. *Irene Allen v. United States*, 588 F. Supp. 247, 337 (D. Utah 1984).
 59. *Ibid.*, p. 338.
 60. I am indebted for this idea, if not these precise words, to John Rohr.