ADMINISTRATIVE LAW

THE SUPREME COURT AND ADMINISTRATIVE IMPARTIALITY: A TESTING CASE FOR JUDICIAL REVIEW

Introduction by

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Judicial review of the procedure employed by federal administrative agencies has been productive of a vast array of authorities bearing on the fairness of that procedure. This has been especially true with respect to the procedure utilized in administrative adjudications. By and large, judicial review of administrative action has been of an excellent quality and has provided guidelines for examining the adequacy of judicial review procedures utilized by the courts. More generally, that performance has operated as a model for performance of judicial review in other fields of law as well because of the care with which federal courts have identified and justified relevant legal considerations bearing on judicial decision-making, the faithfulness with which these courts have adhered to these considerations, and the skill with which they have applied them to the varying circumstances of administrative action. Nevertheless, judicial review of administrative action by federal courts must be subjected to constant critical scrutiny to insure that performance of that function continues to produce results of high quality.[1]

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1. One needs only to recall such decisions as *In re* Yamashita, 327 U.S. 1 (1946), Korematsu v. United States, 323 U.S. 214 (1944), and United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950), to be reminded of the necessity of constant scrutiny of judicial review of administrative action.

A recent decision, not to be ranked with these cases, but which raises questions as to whether the Supreme Court is preparing for a revolutionary approach to basic issues concerning procedural fairness by administrative agencies covered by the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, is NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). The break with the traditional and highly salutary approach presented by this decision is subjected to a careful and penetrating criticism by Justice Black in an opinion in which Justices Brennan and Marshall joined. 394 U.S. at 769. The Supreme Court's abortion decisions in Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 197 (1973), although primarily focused on substantive due process questions, raise far more serious questions than *Wyman-Gordon* as to whether the Supreme Court has radically reoriented its whole concept of judicial review. These decisions, which already have joined that unenviable class of the most criti-

In attempting to examine how courts approach review of administrative action it might be useful to consider a hypothetical federal statute enacted in an effort to reduce the case load of federal district courts. Let us assume that Congress has provided that, with respect to judicial involvement in the settlement of cases,[2] federal district courts

> shall be empowered and directed to hear and determine each case informally, unless, within 10 days after notice that the case has been filed, the parties to the dispute involved submit to the court satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the court or upon such voluntary adjustment of the dispute, the case shall be dismissed.

Let us assume further that Congress enacted this statute to induce the contending parties to settle their differences without formal trial and rendition of final judgment and with the intent that an informal determination of the issues of law and fact might foreshadow an ultimate decision by the district court after formal proceedings, and thus impel the foreshadowed loser to settle the case rather than go forward with the formal trial.

Let us also assume the following facts. In complying with the hypothetical statute, district courts generally adopted a rule providing for appointment of a master to conduct a full hearing in each case, if necessary, and to transmit to the court for the purpose of its informal decision the record made by the master. This record includes evidence, a transcript of oral argument, briefs and other similar materials, but no recommendation by the master concerning the proper disposition of the case. The rule also requires the master to specify the issues of law and fact in the case and the evidence bearing on resolution of the fact issues. Upon receiving and considering the record and report, the district court renders its informal decision. If the parties comply with its decision, the court dismisses

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cized decisions of the Supreme Court in its history, have extraordinarily catastrophic implications for the exercise of judicial review in the field of administrative procedure. *See* Witherspoon, *Representative Government, The Federal Judicial and Administrative Bureaucracy, and the Right to Life*, 6 TEX. TECH L. REV. 363 (1975) and Witherspoon, *Impact of the Abortion Decisions Upon the Father's Role*, 35 THE JURIST 32 (1975).

2. For informed commentary on the role of the federal district court in settlement procedures, see Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129, 131-33, 148, 151-52, 154 (1972).

the action. Otherwise, the court sets a date for the usual formal trial. At that trial the master who served as hearing officer is also designated as an attorney for the party favored by the informal decision. His duty is to present to the court evidence, oral argument, and briefs.

Most lawyers and judges would probably regard this hypothetical statute and its operation as very unwise. Indeed, a considerable number of them would probably regard the statute and its implementation as unconstitutional because of its denial of procedural due process to the party who loses at the informal decision stage. The underlying reason for their positions would probably be that the statute requires a district court to involve itself in an informal pretrial proceeding in which it must pass tentative judgment on particular issues of law and fact to such a degree that the court would be unable at the subsequent formal trial to approach the same issues with the detachment and freedom from prejudgment necessary for fair and just adjudication. Undoubtedly, other serious reasons for asserting invalidity could be advanced against the statute and its implementation.

The effect of the hypothetical statute just presented is essentially the same as that of section 10(k) of the National Labor Relations Act (NLRA).[3] The operation of district courts under the hypothetical statute is comparable to that of the National Labor Relations Board (NLRB) in complying with section 10(k). Section 10(k) was adopted for the purpose of expediting the administration of substantive section 8(b)(4)(D),[4] which makes it an unfair labor practice for a labor organization to force an employer to assign particular work to employees in a particular labor organization. The Supreme Court has elaborated on that purpose by stating that section 10(k) was enacted to subject the employer and the union adversely affected by the informal decision of the Board to "intense pressure, practically, to conform to the Board's [tentative, informal] decision."[5] This approach, of course, amounts to a total inversion of the usual assumptions about the appropriate methods for effectuating settlement of justiciable controversies, *viz.*, mediation with the hope of voluntary, freely chosen settlement, and the utilization of adjudication for resolution of disputes that cannot be so settled.

3. 29 U.S.C. § 160(k) (1970).
4. 29 U.S.C. § 158(b)(4)(D) (1970).
5. NLRB v. Plasters' Local 79, 404 U.S. 116, 127 (1971).

If an evaluation of judicial review of administrative action is to be undertaken, the question next presented by the section 10(k) proceeding concerns how the federal courts have responded to administrative decisions rendered under that procedure. The Supreme Court case of *International Telephone & Telegraph Corp. v. Electrical Workers Local 134*[6] (*IT&T*) provides a basis for the study of that response. For purposes of comparison, reference may also be made to the Fifth Circuit's review of certain administrative actions.

In *IT&T* the employer filed a charge alleging that Local 134 had violated section 8(b)(4)(D) of the NLRA. A hearing officer, described in Board regulations as "the agent of the Board," was designated by the NLRB to conduct a hearing. This officer afforded all parties full opportunity to be heard, to examine and cross-examine witnesses, to adduce evidence bearing on the issues, and to present oral argument. At the close of the hearing, the officer transmitted the record of the whole proceeding to the Board but made no recommendation for resolution of the dispute by the Board. The officer, however, submitted a report containing an analysis of the issues of law and fact and of the evidence bearing on resolution of these issues for use by the Board.

After considering the record and report of the hearing officer, the Board ruled against Local 134 and sustained the employer's section 8(b)(4)(D) charge. Subsequently, Local 134 informed the Board's regional director that it would not comply with the Board's informal decision. The regional director immediately issued the formal complaint against Local 134.[7] A hearing on this complaint was held before a trial examiner under section 10(b)[8] of the NLRA. The official who had served as the hearing officer for the earlier section 10(k) proceeding also served as the prosecutor supporting the complaint at this second hearing. The record of the section 10(k) proceeding was, at his request, admitted into the section 10(b) proceeding and became its sole record. This prosecutor then proposed that the Board adopt as its findings of fact and conclusions of law those that it had made in the earlier section 10(k) proceeding, and the Board did so. It then ordered Local 134 to cease and desist from its unlawful conduct.

Local 134 filed a petition to review and set aside the Board's order in the Seventh Circuit. The union contended, among other

6. 419 U.S. 428 (1975).
7. 29 U.S.C. § 160(b) (1970).
8. *Id.*

things, that the Board had violated section 5 of the Administrative Procedure Act (APA)[9] because the hearing officer in the section 10(k) proceeding had served as the prosecutor in the subsequent section 10(b) proceeding and that this combination of functions was prohibited by section 5.[10] The Seventh Circuit agreed and denied enforcement of the Board's order.[11]

On grant of certiorari on petition of the employer, the Supreme Court reversed the judgment of the Seventh Circuit.[12] In so doing it assumed that all of the procedures followed by the Board were authorized by section 10(k) of the NLRA. The Court held that those procedures, insofar as they involved participation by the hearing officer as prosecutor in the subsequent proceeding, were not prohibited by section 5 of the APA. More specifically, the Court held that the action of the Board in the earlier section 10(k) proceeding was not an "adjudication" within the meaning of the APA and, thus, that section 5 of that Act was not applicable to the Board's action. The Court also indicated that it disagreed with the Seventh Circuit insofar as its judgment had been based on the proposition that the commingling of functions in the case was "incompatible with the accepted norms for the proper administration of justice."[13]

In reviewing the NLRB's procedure in *IT&T*, both the Supreme Court and the Seventh Circuit focused on the validity of the procedures only insofar as they involved the combination in the same official of the functions of the section 10(k) hearing officer and the section 10(b) prosecutor. Moreover, the issue concerning the validity of this procedure was considered only with respect to the APA. Despite the failure of counsel for Local 134 to challenge the validity of the procedure from the broader standpoint of the Board's involvement in both proceedings as operating to prevent an unbiased final determination, there was ample precedent for the Court to consider this issue as a matter of interpretation of section 5 of the APA. Such an approach would have been possible because section 5, together

9. 5 U.S.C. § 554 (1970).

10. Section 5 is the basic provision setting forth the adjudicatory procedures to be followed by federal administrative agencies. It generally prohibits agency agents engaged in investigative or prosecuting functions in a case from participating or advising in agency review in the same or a factually related case.

11. Electrical Workers Local 134 v. International Tel. & Tel. Corp., 486 F.2d 863 (7th Cir. 1973), *rev'd*, 419 U.S. 428 (1975).

12. International Tel. & Tel. Corp. v. Electrical Workers Local 134, 419 U.S. 428 (1975).

13. *Id.* at 448 n.18, *quoting* Electrical Workers Local 134 v. International Tel. & Tel. Corp., 486 F.2d 863, 868 (7th Cir. 1973).

with its incorporation of sections 7 and 8 of the APA, clearly requires the Board to act impartially in rendering its decisions under section 10(b) of the NLRA, a function that clearly seems to be an "adjudication" under the APA.

One outstanding example of precedent for Supreme Court decisions based on theories other than those on which cases are litigated [is] *United States v. E.I. du Pont de Nemours* & Co.[14] The Government had challenged the validity of a stock acquisition under provisions of both the Sherman Antitrust Act and the Clayton Antitrust Act. The case had been litigated and decided under the Sherman Act by the federal district court and the Government's basic contention before the Supreme Court was also based on the Sherman Act. The Supreme Court, however, decided the case on the basis of a provision in the Clayton Act and ignored the Sherman Act issues which were the "focal point of eight years of litigation."[15] The Court stated that it was able to decide the case in this manner because the government had pleaded a cause of action under the Clayton Act and because the record permitted the Court to discern the facts essential to that cause of action.

If anything, *IT&T* presented a stronger case than *Du Pont* for the Court to take a similar approach because Local 134 had specifically relied on section 5 of the APA as the basis for challenging the validity of the NLRB decision, particularly insofar as that section spoke to the problem of impartiality in decisionmaking. Moreover, the facts in *IT&T* relating to the issue of prejudgment were laid bare not only in the record but also in the NLRB regulations and practice.

Another example of the Supreme Court's freedom of choice among decisional grounds may be found in *Wong Yang Sung v. McGrath.*[16] There the sole issue in a habeas corpus proceeding was whether the agency conducting a hearing on alien deportation had to conform to the requirements of sections 5 and 11 of the APA. The Supreme Court first resolved a statutory interpretation issue concerning section 5. Additionally, the Court assigned a meaning to the deportation statute that kept it from having an unconstitutional operation.[17]

14. 353 U.S. 586 (1957).

15. *Id.* at 609 (dissenting opinion).

16. 339 U.S. 33 (1950).

17. The Supreme Court has also on occasion considered a constitutional objection to a statute that was not raised at the trial level, the court of appeals level, or in the application

The point is that the statutory issue raised under an appropriate part of the APA provided the Court with a justifiable opportunity for taking up a constitutional issue regarding the deportation statute, even though no constitutional challenge to the deportation statute had been pleaded. Even though Local 134 in *IT&T* raised no constitutional challenge to the section 10(k) proceeding, that case would also seem to have presented the Supreme Court with as strong an opportunity as did *Wong* for the Court to decide the constitutionality of that section 10(k) proceeding. This is true because in both cases the Court was faced with the validity of statutory hearings and the question of whether fundamental fairness existed in the decision-making procedures which implemented those hearings.

Even if Local 134 had urged a constitutional ground for invalidating the Board order,[18] still other Supreme Court precedent probably would have justified disposition of the case by interpreting the relevant statutory provisions, including section 10(k), so as to sustain the principle of impartiality of decision under section 10(b). The Supreme Court's decision in *Green v. McElroy*[19] is illustrative of such precedent. In that case the Navy Department had revoked the security clearance of an aeronautical engineer employed by a government contractor. As a result the engineer had been discharged by his employer. The revocation was based on confidential information not disclosed to the engineer and occurred without his having an opportunity to confront or cross-examine adverse witnesses. The engineer attacked the revocation order as invalid for both statutory and constitutional reasons. The Court held the order invalid under the governing statute, although the statute was probably broad enough in ordinary circumstances to have supported issuance of the revocation order. The circumstances, however, were

for certiorari or briefs at the Supreme Court level. *See, e.g.*, Screws v. United States, 325 U.S. 91, 118 (1945). The constitutional issues were first raised by the dissenting opinion in the court of appeals and then by inquiry at the oral argument before the Supreme Court. The majority of the Court treated the issue as going to a matter of fundamental error by the trial court in failing to give an instruction to the jury which was held to be required by the statute when given a construction to keep it free from constitutional objection. 325 U.S. at 107. In light of the conclusion well-supported below that the error of the NLRB in rendering decision in the section 10(b) proceeding against Local 134 after having rendered decision in the section 10(k) proceeding against that union was a fundamental error, *Screws* was also an instructive precedent on the point just discussed.

18. The failure of Local 134 to raise specific constitutional objections to the procedures challenged was noted by Justice Rehnquist. 419 U.S. at 448.

19. 360 U.S. 474 (1959).

not ordinary because, as the Court stated, the procedures adopted undercut the right of a person to follow his chosen profession without according him the benefit of certain principles that have remained relatively immutable in our jurisprudence: the rights of confrontation and cross-examination where governmental action will seriously injure an individual. The Court held that in order for an agency to suspend these rights "it must be made clear that the President or Congress within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use."[20] Because the case could be disposed of on statutory grounds, the Court did not reach the constitutional issue.

Both *Green* and *Wong* suggest that if the Supreme Court in *IT&T* had concluded that serious questions were presented concerning the constitutionality of the procedures whereby the NLRB made both the tentative decision under section 10(k) and the final decision under section 10(b), the Court could have assigned a meaning to section 10(k) that would have permitted some alternative to a determination by the Board under section 10(k). Those cases also indicate that the Court could have held that sections 5, 7, and 8 of the APA governed the matter of the required impartiality in decisionmaking by the Board under section 10(b).

Because it is clear that the Supreme Court in *IT&T* could and should have taken up the question under section 5 of the APA as to whether the initial procedure the Board had followed under section 10(k) disqualified it from handling and deciding the subsequent section 10(b) proceeding against Local 134, the final questions remain as to how the Court should have resolved this disqualification question, and, if it resolved the issue adversely to the Board, how the decision should have been effectuated in light of the section 10(k) provision directing the Board "to hear and determine the dispute".[21]

Prior decisions indicate that the Court should have held that a situation causing or likely to cause an administrative agency engaged in adjudication of a case to prejudge the specific issues of law and fact in that case is a basis for holding that that agency is at least constructively biased and, therefore, disqualified from rendering the decision in that case. This rule was applied to a single member of

20. *Id.* at 507.
21. 29 U.S.C. § 160(k) (1970).

the NLRB in *Berkshire Employees Association v. NLRB.*[22] There an NLRB member undertook to induce a large retail customer of a manufacturer against whom a strike was pending to bring pressure on the manufacturer to accede to the union demands. This inducement took place prior to the filing of a charge of unfair labor practices against the manufacturer by the union. The Third Circuit held that the action of the Board member was a sufficient basis in law for urging disqualifying bias against that member and, if proved, for preventing his participation in the case filed against that particular manufacturer. Judge Goodrich, in an opinion for the Third Circuit that remanded the proceedings to the NLRB, stated:

> [This situation] goes far beyond a general predilection either for or against labor organizations in general or one organization in particular. It is comparable to the situation of a lawyer who has represented a client in an endeavor to get a settlement of a claim and, before the claim is settled, is appointed to the bench and sits in the very case as judge. . . . If the circumstances alleged are proved Berkshire did not have a hearing before an impartial tribunal, but one in which one member of the body which made exceedingly important findings of fact had already thrown his weight on the other side.[23]

The same principle was applied to the majority of a federal administrative panel by the Fifth Circuit in the leading case of *Pillsbury Co. v. FTC.*[24] There, then-Chief Judge Tuttle stated that the right of private litigants to a fair trial, including their right to the appearance of impartiality, is "the *sine qua non* of American judicial justice" and "of the judicial aspect of the administrative process."[25] In that case the issue of the Federal Trade Commission's impartiality in decisionmaking arose by virtue of congressional committees having intruded into the adjudicatory processes of the Commission in a manner that affected the panel members' disposition of a case. In response to questioning by Senators that was highly critical of the views tentatively expressed by the panel members while processing the case, these Commission members were moved to make a vigorous defense of their views. The vice of this external intrusion into the process of adjudication by the congressional com-

22. 121 F.2d 235 (3d Cir. 1941).
23. *Id.* at 239.
24. 354 F.2d 952 (5th Cir. 1966).
25. *Id.* at 965.

mittee was that it affected the capacity of the Commission members to remain amenable to a decision either in conformity or not in conformity with their previously expressed views and forced them to become advocates of a particular position expressed in a particular case which they still had under consideration. Moreover, if the members had adopted the position of the Senators criticizing the view they had taken earlier in processing the case, it might have appeared that the members had succumbed to congressional pressure and control of the agency purse strings. For these reasons the Fifth Circuit concluded that several members of the Commission panel had to disqualify themselves. Then-Chief Judge Tuttle stated:

> [C]ommon justice to a litigant requires that we invalidate the order entered by a quasi-judicial tribunal that was importuned by members of the United States Senate, however innocent they intended their conduct to be, to arrive at the ultimate conclusion which they did reach.[26]

Although recognizing the reluctance of the Supreme Court to disqualify the members of the Federal Trade Commission or other federal agency for bias or prejudice, the Fifth Circuit stated that it sought "to find a solution that guarantees a fair tribunal and that does not frustrate the purpose of the law."[27] The Fifth Circuit therefore set aside the order of the Commission and remanded the case for decision by a substantially changed panel of the Commission.

Thus, it is clear that where a single member or even a majority of the members of a federal administrative agency panel are proved to be biased, there are grounds for disqualification. In the situation where an entire panel or even an entire agency are found to have disqualifying bias, the Supreme Court has recognized the applicability of the doctrine of necessity to permit the all-biased panel or agency to render a viable decision.[28] The Supreme Court has also held, however, in *United States ex rel. Accardi v. Shaughnessy*,[29] that where an entire agency has prejudged the the issues of law and fact in a case being adjudicated by a lower echelon of that agency and has communicated that prejudgment to the lower echelon, the

26. *Id.* at 963.
27. *Id.* at 964.
28. Evans v. Gore, 253 U.S. 245, 247-48 (1920); Brinkley v. Hassig, 83 F.2d 351, 357 (10th Cir. 1936). *See also* United States v. Morgan, 313 U.S. 409, 421 (1941).
29. 347 U.S. 260 (1954).

decision by the lower echelon may be reversed and a new hearing may be conducted. Although the new hearing in *Shaughnessy* was dictated by an agency regulation and was perhaps more a matter of grace rather than of right, the Supreme Court stated:

> [A]s long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner. . . . [A]t least [the respondent] will have been afforded that due process required by the regulations in such proceedings.[30]

Implicit in the Court's holding is the proposition that even an entire agency cannot prejudge the issues of fact and law in a case before that agency in such a way as to make that prejudgment a principal factor in the decision of that case. Indeed, that the doctrine of necessity was not designed to embrace such a situation is recognized by the Fifth Circuit in *Pillsbury* and by even the Supreme Court itself in the more recent case of *Gibson v. Berryhill.*[31] In *Gibson* the Court sustained the holding of a federal district court that all members of a state administrative agency were disqualified on the dual grounds of pecuniary interest and prejudgment of the facts. The prejudgment holding derived from the fact that the state agency earlier had filed a complaint in state court alleging charges substantially similar to those pending against the litigants before the agency.

Having thus demonstrated that the Supreme Court could and should have disqualified all or part of the NLRB in *IT&T* for bias, the next question concerns precisely how the Court should have decided whether the Board was disqualified. Justice Rehnquist's apparent concern over this issue may be found in a footnote in which he observed that the function of the Board in a section 10(k) proceeding is to determine "whether there is reasonable cause to believe that § 8(b)(4)(d) has been violated."[32] This attempt to analogize the section 10(k) proceeding to a probable cause determination is clearly faulty, however, because that determination had already been made by the appropriate official of the Board before the section 10(k) proceeding was even held. As his opinion earlier correctly noted, Board action subsequent to this reasonable cause determina-

30. *Id.* at 268.
31. 411 U.S. 564 (1973).
32. International Tel. & Tel. Corp. v. Electrical Workers Local 134, 419 U.S. 428, 445 n.16 (1975).

tion in *IT&T* "had been held in abeyance pending the attempt to resolve the dispute pursuant to the § 10(k) proceeding."[33] The section 10(k) proceeding had a basic purpose quite different from that of determining whether there was reasonable cause for believing that there had been a violation of section 8(b)(4)(D). Its basic purpose is to serve as a tentative adjudication of an employer's charge that a union had violated that section. Even Justice Rehnquist conceded that the Board's action under section 10(k) was closer to adjudication than rulemaking.

At this point, however, we are not so much concerned with the definitions of adjudication contained in the APA as we are with the problem of fundamental procedural fairness and guidelines drawn from cases decided under the due process clauses of the fifth and fourteenth amendments for preserving and achieving such procedural fairness in administrative action.[34] The guidelines long since established by these cases tell us that when a proceeding operates like adjudication, has the effect of adjudication, is performed with the procedural trappings of adjudication, even when it is of a tentative nature, the circumstances are such that agency action must conform to the basic requirements of due process.

Consistent with these guidelines, the section 10(k) decision by the NLRB in the *IT&T* case was a tentative adjudication. Because the Board had already decided the case, even though only tentatively, it had therefore confronted and resolved the precise issues of law and fact it would later face in the final adjudication under section 10(b). There could be no instance of more certain prejudgment of specific issues in a case than that which occurred in *IT&T*.

A number of factors reinforce the intrinsic tendency of the Board's participation in initial section 10(k) proceedings to cause its prejudgment of specific issues to carry over as a sort of "mind-set" into its handling of the identical issues in subsequent section 10(b) proceedings. One of these is that the record of the section 10(k) proceeding is introduced into the section 10(b) proceeding and is usually the only record in the latter. Because the same basic issues are to be resolved in the second proceeding, the use of the same

33. *Id.* at 435.

34. *See for example* Goldberg v. Kelly, 397 U.S. 254 (1970) (agency that cuts off welfare assistance by a tentative adjudication must comply with basic due process requirements even though the recipient is entitled to a subsequent final adjudication where notice and hearing are afforded); Bell v. Burson, 402 U.S. 535 (1971) (law authorizing agency to suspend driver's license must establish by confirmance with basic due process requirements that it is probable driver will be liable to injured party under state law).

record by the same tribunal means that the prejudgment of these issues is highly likely to govern their second resolution. The Supreme Court in *IT&T* conceded that this is true.[35] Second, the record of the first proceeding will be as exhaustive as the parties can possibly make it because the decision in that proceeding is usually the only one the union and the employer can afford to face. This is true because of the intense practical pressure to conform to that decision which the NLRA and the context of the situation place on the parties. Thus, there are usually no new issues of fact left for later decision. Third, the very fact that the Board's section 10(k) decision was supposed to operate under the NLRA to put pressure on the losing union or employer to conform to it and the union or employer nevertheless elects not to conform necessarily introduces a psychological factor into the Board's handling of the second proceeding. Because the Board is thus challenged as to its proper handling of the first proceeding, it is in reality placed on the defensive. The defensive posture is highlighted by the fact that the Board has designated the person who served as hearing officer in the first proceeding to act as prosecutor in the second proceeding. From the standpoint of the Board, no one is better qualified to assist it in the defense of its earlier decision than the hearing officer who heard the evidence and argument, compiled the record, formulated the issues for that decision, and specified the evidence bearing on their resolution. Because the official is an "agent of the Board" and the Board is not precluded from consulting with him under section 5 of the APA in making its prior decision under section 10(k) of the NLRA, that official can be more effective than any other Board attorney in presenting the case in defense of the earlier decision. He can articulate positions that other members of the Board may have articulated in the ex parte sessions when he was serving as the hearing officer in that first proceeding.

In light of the foregoing, it is clear that the issue with respect to the impartiality of decision by the NLRB under section 10(b) in the *IT&T* case should have been resolved by the Supreme Court against the Board. Guided by the precedents of *Wong Yang Sung* and *Green*, the Supreme Court should have held that section 10(k), properly construed, does not authorize this decision-making procedure by the NLRB. The Court could have assigned a meaning to section 10(k) that would have provided an acceptable alternative to

35. 419 U.S. at 447.

former Board procedures. It should have held that section 10(k) simply authorizes the Board to assign one of its members to conduct the tentative adjudication. If a second proceeding under section 10(b) becomes necessary because a losing party believes that the tentative decision rendered in the section 10(k) hearing is wrong, the Board would be in a position to conduct the section 10(b) proceeding without the participation of the member who conducted the original proceeding. A similar solution is frequently utilized by human relations commissions when they assign a commission member to conduct proceedings seeking through the member's mediation to settle a dispute over alleged discrimination.[36] Under this interpretation no essential aspect of the original purpose of section 10(k) would be undercut and that immutable principle of American judicial justice that requires an impartial tribunal which has not prejudged the specific issues of law and fact presented for its resolution would have been honored. By this interpretation the Supreme Court would have avoided the establishment of a double standard, one for the federal courts and another for the administrative agencies, with respect to the requirement of impartiality in adjudicative decisionmaking.

Survey

The cases discussed in this article concern actions by administrative agencies. These administrative decisions are based on a wide variety of federal statutes and rules and regulations promulgated by governmental agencies. In the following cases the Fifth Circuit considered the interpretation and application of these statutes and regulations in a number of areas, ranging from the granting of Social Security benefits to procurement procedures with respect to defense contracts. In addition to the interpretation of these statutes and regulations, an equally important issue in the field of administrative law is whether the administrative decision should be reviewed by the courts or should be left to the discretion of the agency. Thus, several cases in this survey explore the extent of judicial authority to review agency decisions as it has been treated under the authorizing statutes themselves and under the Administrative Procedure Act.

36. J. WITHERSPOON, ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS 330, 369 (1968), *discussing* Section 712(a) of the Alpha Model State Civil-Rights Act.