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## The social security decisions of Judge Frank Easterbrook, Seventh Circuit Court of Appeals

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COMMENT:

## The Social Security Decisions of Judge Frank Easterbrook, Seventh Circuit Court of Appeals

Martha F. Davis\*

“**W**hat process is due” is a hard question because so much of the doctrine of procedural due process is up for grabs. After *Mathews v. Eldridge*,<sup>1</sup> finding an answer requires agreeing that a certain benefit is an entitlement; agreeing on its worth and the cost of protecting it; and agreeing on who—the courts or the legislature or an agency—should decide on the appropriate process to protect the entitlement. What’s more, even the *Mathews* procedure for finding “what process is due” is unsettled.

In the past few years, Judge Frank Easterbrook of the Seventh Circuit Court of Appeals has advanced a theory which, in capsule form, argues that *Mathews* sets up a standardless lottery for determining due process rights.<sup>2</sup> Easterbrook argues that the *Mathews* test is a lottery because it gives no right to any procedures at all in instances where a due process right has been established.<sup>3</sup> Judge Easterbrook further questions the extent to which there can be any entitlements in the first place.<sup>4</sup>

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<sup>1</sup>424 U.S. 319 (1976).

<sup>2</sup>Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 120. In *Mathews*, the Court determined that, though Social Security disability benefits are a “property” interest, an evidentiary hearing is not required prior to their termination. To reach that conclusion, the *Mathews* Court advanced a three-part balancing test to assess the requirements of due process when an entitlement is at issue: (1) the private interests implicated; (2) the risk of the erroneous deprivation of such interest through the procedures used; and (3) the government’s interest, including the fiscal and administrative burdens that additional or substitute procedures would entail. 424 U.S. at 332–35.

<sup>3</sup>See Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 472 (1986).

<sup>4</sup>See Easterbrook, *supra* note 2, at 90–109 for constitutional and historical analyses of the due process clause.

In response to Easterbrook's model, Professor Martin Redish and his colleague Lawrence Marshall have advanced certain minimum, immutable principles which, they assert, due process must protect.<sup>5</sup> They call it the due process "floor."<sup>6</sup> The most immutable principle they identify is the necessity of an independent adjudicator.<sup>7</sup> Since *Mathews* adopts a limited view of immutable principles—i.e., only notice and opportunity for a hearing—Redish and Marshall share Easterbrook's cynicism about the *Mathews* balancing test.<sup>8</sup>

This article will first criticize Easterbrook's approach to procedural due process and, in particular, the application of his methods to appellate review. Since Judge Easterbrook's ascent to the bench, he seems to view social security cases as a place to assert new ideas. The discussion will therefore focus on due process and appellate review of social security cases.

Following that is a discussion of Redish and Marshall's views of due process. Even these authors' narrowest proposition—that the necessity of an independent adjudicator should be given great weight in determining what process is due—mandates independent judicial review of social security decisions.

Finally, this comment raises the possibility that Easterbrook is incorrect: that judicial review of social security cases cannot be ignored regardless of the meaning of *Mathews* balancing, because judicial review (as opposed to trial-type agency hearings) is not about individual due process rights, but about protecting the interpretation of the Constitution and the laws.

### EASTERBROOK'S APPROACH

In his 1982 article, *Substance and Due Process*,<sup>9</sup> Professor Easterbrook criticized the Supreme Court's willingness to encroach on legislative territory by determining "what process is due" in instances when the legislature has created an entitlement. Easterbrook is not only dissatisfied with the Court's activism, but he also believes that there simply are no principles to guide determination of "what process is due."

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<sup>5</sup>Redish & Marshall, *supra* note 3.

<sup>6</sup>*Id.* at 456.

<sup>7</sup>*Id.* at 457 ("[T]he participation of an independent adjudicator is at least a *necessary* condition, and may even constitute a *sufficient* condition, for satisfying the requirements of due process.").

<sup>8</sup>*Id.* at 474 ("[T]he indeterminacy of *Mathews*' balancing test threatens to undermine wholly the viability of the [due process] guarantee."). See also 424 U.S. at 334 (due process is flexible).

<sup>9</sup>Easterbrook, *supra* note 2.

As an example, Easterbrook cites the case of *Connecticut v. Dumschat*.<sup>10</sup> There, several applications by an inmate for commutation of his life sentence had been rejected by the Connecticut Board of Pardons without explanation. Dumschat sued the Board under 42 U.S.C. section 1983, alleging that the Board's failure to provide him with a written statement of reasons for denying commutation violated his rights under the Due Process Clause of the Fourteenth Amendment.

The Supreme Court rejected Dumschat's claim, concluding that the Board's power to commute sentences conferred no rights on Dumschat beyond the right to seek commutation. Wrote the Court, "[a] decision to commute a long-term sentence generally depends not simply on objective factfinding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision."<sup>11</sup> The Board had, in the Court's words, "unfettered discretion . . . [t]he statute imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Board."<sup>12</sup>

According to Easterbrook, the holding in *Connecticut v. Dumschat* means that there is no constitutional requirement that states have substantive rules to determine entitlement to benefits; instead, "[t]hey may use a subjective or even a random process for determining both entitlement to benefits and exposure to detriments."<sup>13</sup> Adds Easterbrook, "[a]lthough many people find subjective or random, and thus often arbitrary, decisionmaking objectionable, there is no way around arbitrariness: the use of rules may yield results equally arbitrary."<sup>14</sup>

In the same article, Easterbrook critiques *Logan v. Zimmerman Brush*,<sup>15</sup> in which the Supreme Court struck down a state statute which allowed an individual's claim to be extinguished by a state commission's inadvertent failure to hear the claim within 120 days of its filing.<sup>16</sup> The Court found that the applicant had a property right in the procedure

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<sup>10</sup>452 U.S. 458 (1981) (no "right" to commutation of prisoner's life sentence, though right to apply).

<sup>11</sup>*Id.* at 464.

<sup>12</sup>*Id.* at 466.

<sup>13</sup>Easterbrook, *supra* note 2, at 88 n.9.

<sup>14</sup>*Id.* By defining systems governed by rules as arbitrary, Easterbrook paves the way for the introduction of a cost-benefit analysis which, of course, purports to order that which is arbitrary. See generally Hanks, *On a Just Measure of the Efficiency of Law and Governmental Policies*, 8 CARDOZO L. REV. 1 (1986); Carlson, *Reforming the Efficiency Criterion*, 8 CARDOZO L. REV. 39 (1986); Markovits, *Cost-Benefit Analysis and the Determination of Legal Entitlements: A Reply to Professor Carlson*, 8 CARDOZO L. REV. 75 (1986); Hanks, *Comments on Carlson's Comments*, 8 CARDOZO L. REV. 85 (1986).

<sup>15</sup>455 U.S. 422 (1982) (Illinois Fair Employment Practices Act required Commission to hear claim within 120 days or lose jurisdiction).

<sup>16</sup>Easterbrook, *supra* note 2, at 86.

set out in the state statute, which could not be extinguished absent minimal procedural protections.<sup>17</sup>

In response to *Logan*, Easterbrook argues that the Supreme Court's implicit approval of statutes and rules which have no criteria for decisionmaking stands for the included proposition that decisionmakers may decide by lot,<sup>18</sup> even where a property interest is in the balance. This is, he suggests, a tacit acceptance by the Court of his view that arbitrariness is an unavoidable element of decisionmaking. "Indeed," he states, "any system constructed under the *Eldridge* criteria is a lottery because it permits incorrect decisions. The rules are crafted not to eliminate errors but to set tolerable rates of error, even though there is no reason at all to deny benefits to the unlucky victims of anticipated errors."<sup>19</sup>

Judge Easterbrook was appointed to the Seventh Circuit Court of Appeals in 1985.<sup>20</sup> Since then, his decisions in social security cases reflect the continued development of his idea that rules regarding entitlements can be arbitrary and may permissibly yield arbitrary results. The two most important cases are *Stephens v. Heckler*<sup>21</sup> and *Garrison v. Heckler*.<sup>22</sup>

In *Stephens*, a social security disability benefits claimant appealed from a federal district court ruling that the administrative law judge's (ALJ's) decision below to deny benefits was supported by substantial evidence.<sup>23</sup> First, Judge Easterbrook noted the arbitrariness of decisionmaking: "An effort to sort a million people with a million personal histories and ten thousand ailments into just two bins—'disabled' and 'not disabled'—ensures 'arbitrary' action."<sup>24</sup> In light of this, he urged judicial restraint. Observed Easterbrook, "[w]hen Congress calls on the Executive Branch to perform a million discretionary unavoidably ar-

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<sup>17</sup>455 U.S. at 431–33 (Of course, the state was also free to eliminate the property interest altogether (and thus the procedural due process protections) by amending the statute.)

<sup>18</sup>Easterbrook, *supra* note 2, at 120. Easterbrook illustrates this assertion with the case *Meachum v. Fano*, 427 U.S. 215, 228 (1976) where the Court held that, because prisoners can be sent to one prison rather than another "for whatever reason or for no reason at all," a prisoner's expectation in remaining at a particular prison did not trigger the due process clause.

<sup>19</sup>Easterbrook, *supra* note 2, at 120. See 424 U.S. at 344 ("procedural due process rules are shaped by the risk of error"). In further support of his interpretation of *Mathews*, Professor Easterbrook cites *Bishop v. Wood*, 426 U.S. 341, 349–350 (1976) where the Court noted that "[w]e must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs."

<sup>20</sup>*WHO'S WHO IN AMERICA* 779 (44th ed. 1986–87).

<sup>21</sup>766 F.2d 284 (7th Cir. 1985).

<sup>22</sup>765 F.2d 710 (7th Cir. 1985).

<sup>23</sup>766 F.2d at 286, "Substantial evidence" is the appropriate standard of appellate review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(E).

<sup>24</sup>*Id.*

bitrary acts, it becomes very tempting for the Judicial Branch to point out the element of arbitrariness that affects a fair number of cases and to order the task done again.”<sup>25</sup>

After continuing with a more conventional review of the evidence in Mr. Stephens’ record, Easterbrook assessed the cost of additional processing of the case. The ALJ opinion was admittedly “sketchy.”<sup>26</sup> But insistence on long, complete ALJ opinions by remanding for additional hearings, Easterbrook asserted, clogs the queue of those who are still awaiting their initial hearings on the agency level.<sup>27</sup>

Easterbrook concluded that “[w]ithout question . . . the arbitrariness of the decision the ALJs are called on to make implies that they have very wide latitude. When there is not one ‘right’ answer to a legal dispute, it is difficult to say that selection of any one outcome is legal error.”<sup>28</sup> Easterbrook thus set up a system where any review would incur needless costs, since there is no right answer which further review could hope to ascertain.<sup>29</sup> On this basis, the ALJ’s “sketchy” opinion was upheld.<sup>30</sup>

One day after the *Stephens* opinion, Judge Easterbrook’s decision in *Garrison v. Heckler* was issued. There, Easterbrook wrote for the court upholding an Appeals Council decision that substantial evidence supported the conclusion that a claimant was not disabled. “There is no non-arbitrary way to make yes-or-no findings of disability, . . . and the Secretary has not embarked on a path that needlessly increases

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<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at 287.

<sup>27</sup>*Id.* (citing *Heckler v. Day*, 467 U.S. 104 (1984) to support relevance of delay in the administrative process). Contrary to Easterbrook’s implication in *Stephens*, the Supreme Court in *Heckler v. Day* rejected judicial injunctions requiring the Secretary to adjudicate disputed disability claims within mandatory deadlines. 467 U.S. at 111. Nevertheless, the cost aspect of *Stephens*, i.e., an estimate of the costs of additional procedure, has been cited favorably in *Lima v. National Labor Relations Board*, 819 F.2d 300, 306 (D.C. Cir. 1987) (Williams, J., dissenting), *Smith v. Bowen*, 663 F. Supp. 59 (S.D. Ind. 1987), and *Tom v. Heckler*, 779 F.2d 1250, 1258 (7th Cir. 1985) (Posner, J., dissenting). Though Judge Posner of the Seventh Circuit Court of Appeals stops short of Easterbrook’s assertions regarding arbitrariness, Posner often includes a cost-benefit analysis in his social security opinions, i.e., 779 F.2d at 1260. This usually amounts to an assertion that remands are costly and ALJs are overburdened. Posner offers no justification of why such costs should concern an appellate court in the first place, unless it is in the business of rebalancing procedures set by the legislature. The problems with weighing the costs of procedural safeguards against their benefits are discussed in Schwartz, *Cost-Benefit Analysis in Administrative Law*, 35 ADMIN. L. REV. 1 (1985).

<sup>28</sup>766 F.2d at 288.

<sup>29</sup>In addition, it is worth noting the similarity of Easterbrook’s analysis to that set out in *Mathews*. See generally Easterbrook, *supra* note 2.

<sup>30</sup>766 F.2d at 291 (Flaum, J., concurring) (“I believe that the tenor—if not the substance—of the majority’s remarks might convey an inappropriate message concerning this court’s view of the roles that Congress has assigned both to the ALJs and to the Courts in the adjudication of disability claims.”).

the arbitrariness of the system," Easterbrook opined. "The choice to have a little less individual treatment and a little more uniformity is within the agency's authority under the statute."<sup>31</sup>

With the decisions in *Stephens* and *Garrison*, Easterbrook expanded and applied the ideas developed while wearing his academic hat: (1) that determining procedure is the agency's prerogative, and (2) that the procedure can be arbitrary, in the sense that, Easterbrook believes, a claimant has no personal right not to be the victim of a mistake.<sup>32</sup>

### EXPLAINING EASTERBROOK'S APPROACH

At the outset, it should be acknowledged that these two decisions may have been mistakes, pure and simple. Certainly, Easterbrook has retreated from his extreme starting point to the more moderate position that "arbitrary" decisions are acceptable under the "arbitrary and capricious"<sup>33</sup> rulemaking standard of review, as opposed to the "substantial evidence" standard applicable to adjudications.<sup>34</sup> On the other hand, *Stephens* and *Garrison* seem to belong to a marked effort mounted by Easterbrook in his prior academic work to chip away at the substantial evidence test. Because of his prior work, Easterbrook's judicial application of these theories should not be dismissed as mere aberrations.

So, what was Easterbrook thinking at the time he wrote these opinions? He seems to believe that any decision (including both rulemaking and adjudications) is arbitrary; and that since arbitrary lines determine how a case comes out, there is no way to review the decision in a meaningful way except, Easterbrook concedes, to check that arbitrariness has not needlessly increased.<sup>35</sup>

<sup>31</sup>765 F.2d at 714.

<sup>32</sup>See Easterbrook, *supra* note 2, at 111 (errors in individual cases are a cost but not an independent violation of due process guarantee). As Professor Lawrence Tribe has pointed out, "putting such power in a court's hands is hard to square with any concept of institutional or substantive limits on the judicial branch." Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 HARV. L. REV. 592 (1985) (response to Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984)).

<sup>33</sup>5 U.S.C. § 706(2)(A).

<sup>34</sup>5 U.S.C. § 706(2)(E). See *Johnson v. Heckler*, 776 F.2d 166, 169 (7th Cir. 1985) (Easterbrook, J., dissenting) ("unless . . . rules create too many improper denials of benefits, they do more good than harm"), *vacated*, 107 S.Ct. 3202 (1987). Redish and Marshall, however, argue that core due process values apply equally in adjudicatory and rulemaking contexts. Redish & Marshall, *supra* note 3, at 471.

<sup>35</sup>See Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 21 (1984) ("Every line is arbitrary. Cases on either side will seem almost indistinguishable."). In the article, Easterbrook praises the Court's *ex ante* view of economic disputes and urges application of an *ex ante* approach to constitutional cases as well. See also Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 828 (1982) (applying Arrow's Theorem to Supreme Court decisionmaking while arguing that some choices are out of bounds).

This view has several components. First, Easterbrook believes that statutes (and presumably rules and regulations) are the products of deals between the parties.<sup>36</sup> It follows, then, that statutes or rules are arbitrary in the sense that they do not reflect the parties' views of right or wrong, but reflect the compromises that the parties were able to bargain out of each other.<sup>37</sup>

Second, Easterbrook has identified and praised the tendency of courts to consider the effect of their rulings on future behavior of individuals not party to the suit before the court.<sup>38</sup> *Stephens* and *Garrison* are cases where an *ex ante* approach is decisive in determining not the result, but the level of Easterbrook's scrutiny on appeal. In particular, Easterbrook conducted a kid glove review in these cases both to save harried ALJs and to speed the process for those applicants still in line at the agency.

Finally, Easterbrook believes that the due process clause has a very narrow meaning which under no circumstances extends so far as to give social security claimants constitutional entitlements.<sup>39</sup> The rules regarding these entitlements are, then, arbitrary, since they govern the apportionment of entitlements which are notional at best. Easterbrook cites *Mathews* in support of this view that no claimant has a right to accuracy—it's simply a factor to be weighed in the aggregate.<sup>40</sup>

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<sup>36</sup>Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540–44 (1983); Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 87–89 (1984); Easterbrook, *supra* note 2, at 110. See Sunstein, *Factions, Self-Interest, and the APA*, 72 U. VA. L. REV. 271, 282 n.59 (1986).

<sup>37</sup>Easterbrook similarly analyzes Supreme Court decisions in *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

<sup>38</sup>See Easterbrook, *Foreword, supra* note 36, *passim*.

<sup>39</sup>See Easterbrook, *supra* note 2, at 90–109. This disavowal of the status of social security benefits allows Easterbrook to rely on *Meachum* and *Dumschat*, where arbitrary decisions were deemed permissible because no entitlements were at issue. However, in many other contexts where entitlements are not at issue, the Court has noted the impermissibility of arbitrary decisionmaking. See *Morrissey v. Brewer*, 408 U.S. 471, 481–82 (1972) (citing state's implicit promise that parolee's status would not be revoked arbitrarily); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("the touchstone of due process is protection of the individual against arbitrary action of government"); *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (state may not arbitrarily place prisoner in administrative segregation). On the Supreme Court, the strongest supporter of a narrow construction of the due process clause is Justice Rehnquist. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1502 (1985) (Rehnquist, J., dissenting); *Hewitt v. Helms*, 459 U.S. 460 (1983). See generally Note, *Justice Rehnquist's Theory of Property*, 93 YALE L.J. 541 (1984). Yet even Justice Rehnquist recognizes that "history reflects the traditional and common-sense notion that the Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" *Daniel v. Williams*, 106 S. Ct. 662, 665 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)).

<sup>40</sup>Easterbrook, *supra* note 2, at 111.

## CRITICIZING EASTERBROOK'S APPROACH

Easterbrook's approaches as applied in *Stephens* and *Garrison* are wide open to critique. For example, though Easterbrook generally adopts a narrow, text-bound view of the due process clause,<sup>41</sup> he proceeds in *Stephens* with a *Mathews*-type balancing test in order to decide that a remand is not worth its cost. Further, Easterbrook misreads *Mathews*' lottery-like qualities as being absolute, while at the very least, *Mathews* requires that a balancing process take place and a deliberate decision be made to have a lottery, if that is all a particular entitlement is worth. Judicial review may be an integral part of the legislature's view of how to regulate the acceptable rate of error, or the deal that was struck to get the legislation passed. Easterbrook's approach ignores the possibility that arbitrariness may have figured into the legislative equation.<sup>42</sup>

On a more pragmatic level, Easterbrook is guilty in *Stephens* and *Garrison* of ignoring the Administrative Procedure Act (APA), which sets out the "substantial evidence"<sup>43</sup> standard for appellate review of administrative adjudications. There are a plethora of cases which indicate that substantial evidence means evidence on the record in the particular case, rather than the appellate court's notions regarding administrative backlogs and costs.<sup>44</sup> The legislative history of the APA also indicates that substantial evidence review was enacted by the legislature for the very purpose of checking agency discretion.<sup>45</sup> Easterbrook's argument that review should be minimal in light of the inherent arbitrariness of agency rules and decisions simply has no statutory basis. In fact, the legislature has enacted a statute which

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<sup>41</sup>See, e.g., Easterbrook, *supra* note 2, at 90–109, where Easterbrook argues, based on historical evidence, that the due process clause has a narrow meaning.

<sup>42</sup>Easterbrook also confuses cases involving no entitlement or an entitlement only to procedure, e.g., *Meachum*, with those where the process due to protect an entitlement is at issue, e.g., *Mathews*.

<sup>43</sup>5 U.S.C. § 706(2)(E).

<sup>44</sup>See, e.g., *Richardson v. Perales*, 402 U.S. 389, 401 (1971). For a discussion of recent developments in the substantial evidence test, see Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1491–93 (1983).

<sup>45</sup>765 F.2d at 714. See, e.g., Legislative History, Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 48 (concern that agencies threaten "to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution"); *id.* at 305 ("I desire to emphasize the . . . provisions for judicial review, because it is something in which the American public has been and is much concerned, harkening back, if we may, to the Constitution of the United States, which sets up the judicial branch of the Government for the redress of human wrongs"); *id.* at 217 ("the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts . . . Judicial review is of utmost importance . . . It is indispensable since its mere existence generally precludes the arbitrary exercise of powers not granted.").

requires a review with teeth, and the review's very purpose is to minimize arbitrary results.<sup>46</sup>

More fundamentally, however, Easterbrook's textual argument that the due process clause must be narrowly construed leads to unconscionable results in the social security context, where failure to adequately review agency determinations may leave serious agency biases unchecked. Authors Redish and Marshall have responded to this problem with Easterbrook's wholly positivist view of due process in their article, "Adjudicatory Independence and the Values of Due Process."<sup>47</sup>

Briefly, offering a competing analysis of the historical evidence on which Easterbrook bases his narrow definition of due process, Redish and Marshall conclude that the positivist model fails on the facts.<sup>48</sup> Redish and Marshall then proceed to give content to the constitutional provision of due process, defining what they call the due process floor, i.e., the minimum standard. Balancing, they say, should determine whatever is wanted beyond the floor. Without such a floor, write Redish and Marshall, the due process clause is "a rubber stamp for all legislative enactments . . . [and] the flexibility of due process threatens to make the guarantee dependent on legislative choice."<sup>49</sup> They conclude that the participation of an independent adjudicator is the most essential safeguard beyond the due process floor. It has been accepted by courts, such as *Goldberg v. Kelly*,<sup>50</sup> and Redish and Marshall make a strong argument that other safeguards are worthless in its absence.<sup>51</sup>

The purpose of the due process clause is to assure the most accurate decision possible.<sup>52</sup> The rights to notice, hearing, counsel, transcript and so on relate directly to the accuracy of the proceeding.<sup>53</sup> These procedural safeguards are circumvented, however, if the decision-maker does not base his decision on the evidence before him.<sup>54</sup> Redish and Marshall suggest the examples of a racially biased judge, or a judge who is closely associated with the government prosecutors.<sup>55</sup> If

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<sup>46</sup>See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951) (substantial evidence test expresses a mood "that courts must now assume more responsibility for reasonableness and fairness").

<sup>47</sup>Redish & Marshall, *supra* note 3.

<sup>48</sup>*Id.* at 457-68.

<sup>49</sup>*Id.* at 456.

<sup>50</sup>*Goldberg v. Kelly*, 397 U.S. 254 (1970) (pre-termination hearings required for welfare recipients).

<sup>51</sup>Redish & Marshall, *supra* note 3, at 475-91. The other safeguards most frequently required are notice and opportunity for a hearing. *Id.* at 475. See, e.g., 105 S. Ct. 1487, 1493.

<sup>52</sup>Redish & Marshall, *supra* note 3 at 476.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

these judges make decisions on the basis of the plaintiff's color or their own friendship with the prosecutor, procedural safeguards will have little real effect on the outcome.

The due process clause is also informed by non-instrumental (or institutional) values, and Redish and Marshall similarly argue that these values cannot be achieved absent an independent adjudicator. One such institutional value is the appearance of fairness: "Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decision-maker may have owed the other side special favors."<sup>56</sup> The goal of equality, which includes procedural equality, also requires an independent adjudicator. Write Redish and Marshall, "even if the parties are equally afforded every other procedural protection, the most rudimentary equality cannot be achieved if the adjudicator is subject to irrational factors that skew her decisionmaking towards one of the litigants."<sup>57</sup>

### THE IMPORTANCE OF JUDICIAL REVIEW

A recognition of the importance of independent adjudication is absent from Easterbrook's approach to appellate review in social security cases. The need for independent review of agency decisions was the impetus for the judicial review provisions in the APA.<sup>58</sup> But, even absent the APA provisions, so long as there is the recognition of some due process right in a particular benefit, some review is a necessary adjunct to any administrative determination.<sup>59</sup> There are two principal reasons: (1) to correct mistakes, and (2) to prevent bias.

It is not true, as Easterbrook seems to assert, that when the legislature draws a line, it is always content with mistakes.<sup>60</sup> The legislature knows about review, and knows that review may correct mistakes which occur in the initial application of rules to a particular set of facts. If it wants mistakes corrected, then the legislature can set up procedures for adjudication. If the legislature gives up on mistakes, it can set up a system of rulemaking to regulate the area. The fact that the review procedures for social security disability cases are comprehensive sug-

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<sup>56</sup>*Id.* at 483.

<sup>57</sup>*Id.* at 485. Redish and Marshall also discuss the non-instrumental values of predictability, transparency, rationality, participation, revelation and privacy. *Id.* at 485-91.

<sup>58</sup>See *supra* note 45 and accompanying text.

<sup>59</sup>Mashaw, *The Management Side of Due Process*, 59 CORNELL L. REV. 772 (1974). Professor Jerry Mashaw takes the position that the protections normally associated with due process in adjudicatory proceedings "are inadequate to produce fairness in social welfare claims adjudications." *Id.* at 775.

<sup>60</sup>Easterbrook, *supra* note 2, at 111. True, *Mathews* contemplates error, but *Mathews* is not a legislative test, it is one crafted by the Supreme Court.

gests that the legislature does want to spend the time and money necessary to correct mistakes.

Further, in the social security context, there is much evidence of bias which mandates appellate review.<sup>61</sup> For example, in *Chocallo v. Bureau of Hearings and Appeals*,<sup>62</sup> a former ALJ challenged the Social Security Administration's practice of collecting data regarding the decisions and productivity of ALJs, and considering that data for purposes of employment. In particular, the ALJ had been required on a weekly basis to report the disposition of cases and the number of hearings held.<sup>63</sup> Though the ALJ's claims were dismissed, the case did make public some of the agency pressures placed on ALJs.

Similarly, in *Association of Administrative Law Judges v. Heckler*,<sup>64</sup> the Association challenged the so-called "Bellmon Amendment," alleging that the procedures under the program compromised ALJs' decisional independence. The Bellmon Review Program consisted of a series of measures designed to improve decisional quality and accuracy. Foremost among those measures were provisions to target for review the decisions of ALJs who were found to have high "allowance rates" of granting social security benefits. ALJs whose allowance rates exceeded those desired by the SSA were eligible for counseling. For those whose performance did not thereafter improve, "other steps" would be considered. In the *Association* lawsuit, the ALJs charged that the targeting of individual ALJs for review based upon allowance rates was, in essence, an attempt to influence ALJs to reduce their allowance rates and thereby compromise their decisional independence. Concluded the court, "ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy. . . . [A]s a matter of common sense, that pressure may have intruded upon the factfinding process and may have influenced some outcomes."<sup>65</sup>

Finally, in January of 1987, the Bellmon Amendment was invalidated by the Ninth Circuit Court of Appeals.<sup>66</sup> Technically, the basis

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<sup>61</sup>See Redish & Marshall, *supra* note 3, at 499-500. Redish and Marshall assert that the potential bias of ALJs cannot be cured by the limited scope of federal judicial review. Instead, they suggest that ALJs should be provided with "the requisite protections of independence." *Id.*

<sup>62</sup>548 F. Supp. 1349 (E.D. Pa. 1982), *cert. denied*, 464 U.S. 983 (1983).

<sup>63</sup>*Id.* at 1369.

<sup>64</sup>594 F. Supp. 1132 (D.D.C. 1984).

<sup>65</sup>*Id.* at 1142. See also *Barry v. Bowen*, 825 F.2d 1324, 1330-31 (9th Cir. 1987) (attorney's fees awarded under EAJA where Bellmon review unjustifiably increased likelihood that plaintiff's benefits would be denied); *Hummel v. Heckler*, 736 F.2d 91, 95 (3d Cir. 1984) (even if substantial evidence supports decision, applicant is entitled to unbiased adjudication); *Salling v. Bowen*, 641 F. Supp. 1046, 1056 (W.D. Va. 1986) ("If there ever was a chilling of judicial independence, this is it."); *Barry v. Heckler*, 620 F. Supp. 779, 782-83 (N.D. Cal. 1985) (Bellmon Amendment denies applicant's due process right to unbiased judge).

<sup>66</sup>*W.C. v. Bowen*, 807 F.2d 1502 (9th Cir.), *modified*, 819 F.2d 237 (9th Cir. 1987).

for the decision was the agency's failure to comply with notice and comment rulemaking. But in finding that the amendment was a substantive rule, the court observed that it was "designed to alter ALJ decisions."<sup>67</sup>

In the aftermath of the Bellmon Amendment, many ALJs favored enactment of legislation designed to weaken the agency's influence on their decision-making. In particular, debate focused on S. 1275, with congressional hearings conducted in 1983, and S. 673, introduced in 1985. Both bills were designed to create an independent corps of ALJs divorced from any single agency. Both proposals were criticized by the Department of Justice, which charged that ALJ independence would result in inefficiency and loss of expertise.<sup>68</sup> In contrast, Nahum Litt, past chairman of the ABA's National Conference of Administrative Law Judges, supported the change, in part because "abuses were blatant" in the Social Security Agency.<sup>69</sup> Thus far, however, such legislative efforts at reform have failed.

### CONCLUSION

In short, in the social security context, with its clear evidence of potential bias, review by an independent decision-maker is part and parcel of the core due process requirement enunciated by Redish and Marshall. Independent decision-making cannot be assured absent an appellate review with teeth. All of these factors point toward heightened review, not the retreat which Easterbrook hopes to lead.

As Easterbrook himself points out in "Substance and Due Process," judicial review is a very basic principle.<sup>70</sup> A final thought, then, is that this may be much ado about nothing; one need not defend the content of *Mathews* in order to defend judicial review of agency decisions. In fact, the purpose of judicial review may be to protect constitutional interpretations of law rather than to give individuals personal rights not to be victims of agency mistake.<sup>71</sup> And if that is so, it is all the more clear that Easterbrook is over-anxious to entrust these important decisions to decision-makers whose independence is questionable at best.

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<sup>67</sup>*Id.* at 1505. Additional evidence of the potential bias of ALJs is the absence of systematic publication of ALJ decisions. Lubbers, *Federal Administrative Law Judges: A System on our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 110 (1981).

<sup>68</sup>*Administrative Law Judge Corps Act S. 673: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 43-50 (1986) (testimony and statement of Robert J. Cynkar, Deputy Asst. Atty. Gen., Civil Division).

<sup>69</sup>Silas, *Breaking Away*, 71 A.B.A. J. 18, 19 (July 1985).

<sup>70</sup>Easterbrook, *supra* note 2, at 92-93.

<sup>71</sup>See generally Jaffe, *The Right to Judicial Review*, (pts. 1 & 2), 71 HARV. L. REV. 401 (1958), 71 HARV. L. REV. 769 (1958).