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**Parity, Politics and Procedures— A
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Parity for the Dairy Industry**

by

Marion Edwyn Harrison

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PARITY, POLITICS AND PROCEDURES—A PROPOSAL FOR REFORM IN DETERMINING PARITY FOR THE DAIRY INDUSTRY

By MARION EDWYN HARRISON*

This article describes and critiques the current system of establishing parity prices for dairy products. Upon determining that the current "institutional judgment" leaves parity determination open to political pressures, the author proposes that parity prices be established through the use of administrative law judges.

INTRODUCTION

Much has been published in law reviews and elsewhere concerning the proper utilization and function of the hearing examiner, now denominated administrative law judge,¹ in the federal system.² The popular press published a number of articles during the Watergate Era concerning the determination of the 1971-1972 dairy parity price.³ The institutional judgment by which the parity price is set is pregnant with suspicion and unpopular with all affected groups. It is the thesis of this article that the substitution of a rather commonplace Administrative Procedure Act (APA) hearing process⁴ would allay suspicion and reduce unpopularity.

OVERVIEW OF DAIRY PRICE REGULATION

Experience . . . has disclosed that the "milk problem" is exquisitely complicated. The city-dweller or poet who regards the cow as a symbol of bucolic serenity is indeed naive. From the udders of that placid animal flows a bland liquid indispensable to human health but often provoking as much human strife and nastiness as strong alcoholic beverages. . . . A milk flood washed away the foundations of what seemed the firmly entrenched constitutional doc-

* Partner, Harrison, Lucey & Sagle, Washington, D.C. B.A., University of Virginia; L.L.B. and LL.M., The George Washington University. Last Retiring Chairman, Section of Administrative Law, American Bar Association. Member of the Council, Administrative Conference of the United States. Among his clients the author represents and has represented dairy cooperatives as their Washington counsel.

1. 5 C.F.R. § 930.203a (Supp. 1975).

2. *E.g.*, 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 10.01-.06 (1958).

3. The full gambit of activities by one of the dairy cooperatives from 1969 through 1972 is summarized, probably more or less accurately, and somewhat tenuous conclusions are derived, in S. REP. NO. 981, 93d Cong., 2d Sess. ch. 5, pt. IV (1974), dealing with the 1971-1972 parity price determination.

4. Government Organization and Employees, 5 U.S.C. §§ 551-59, 701-06 (1970), formerly ch. 324, 60 Stat. 237 (1946).

trine that the legislature could regulate only business "affected with a public interest"; and the lactic tides have eroded in another constitutional doctrine which more recently appeared to have been strongly established (i.e., that only within very narrow limits can Congress delegate "legislative" powers), showing that what oil and chickens could not do milk could. The milk problem is so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry, and medicine to niceties of the legislative, judicial, and administrative processes of government.⁵

So much for the spirit of George Frederick Handel's "When Cows are Gently Grazing," and the contemporary urbanite-suburbanite equation of milk flow to tap water flow—a mere turn of the spigot. The Federal Government—more particularly the White House, the Office of Management and Budget (OMB), the Department of Agriculture (USDA), the Department of Commerce, the Department of State, the Department of the Treasury, the International Trade Commission (ITC),⁶ the Special Representative for Trade Negotiations (STR), and the Congress—regulate the flow of dairy products to the consumer essentially by three schemes: import controls, federal milk marketing orders, and parity prices.

Import Controls

Pursuant to section 22 of the Agricultural Adjustment Act of 1933,⁷ the President may direct the International Trade Commission (ITC) to investigate whether the import of a particular dairy product—for example, nonfat dry milk from whatever source or cheese from Switzerland—will affect or tend to affect the purchase of such products by the Commodity Credit Corporation (CCC);⁸ that is, whether imports will lower the market price of the products to or below the parity price so that the CCC would be obligated to buy quantities when it would not otherwise do so.

The President in his discretion may issue a proclamation imposing the quota recommended by the ITC or some lesser quota, or may take no action. Depending upon prevailing advisory channels, the President receives advice in varying degrees of suasion and informality from the USDA, the Commerce Department, the State and Treasury Departments, STR, OMB, the key members of Congress, and industry. Advice from the latter is usually bifurcated between importing, processing and "public inter-

5. *Queensboro Farms Prod. v. Wickard*, 137 F.2d 969, 974-75 (2d Cir. 1943).

6. Formerly the Tariff Commission, see 19 U.S.C. § 2231 (1970).

7. 7 U.S.C. § 624 (1970).

8. CCC was organized pursuant to Exec. Order No. 6340 (October 16, 1933), under Delaware law, as an agency of the Government. President's Reorganization Plan 1 of 1939, 5 U.S.C. at 498, App. § 401 (1970), transferred it to USDA. Since June 29, 1948, CCC has operated pursuant to statutory charter. 15 U.S.C. § 714 (1970).

est"⁹ groups seeking greater imports, and dairy farmer ("producer") groups opposing them. The Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate may direct the ITC to conduct virtually any kind of import restriction investigation, the results to be reported to the requesting Committee to aid in consideration of legislation, pursuant to section 332 of the Tariff Act of 1930.¹⁰

A recent significant component of the import scheme is the threat of the Treasury Department's imposition of countervailing duties upon sundry dairy products imported from Western Europe. The thrust of the countervailing duty statute¹¹ is that the Secretary of the Treasury is required to impose special or countervailing duties upon a product, dairy or otherwise, which is imported with the payment of a bounty by the government of the country of origin. The Treasury Department, in part due to State Department and STR opposition,¹² traditionally has been hesitant to initiate this investigatory process which might adduce evidence that would activate the clearly mandatory imposition of countervailing duties. That the imposition of any such duty generates inevitable, if sometimes insignificant, waves across the seas of diplomatic and trade negotiations is no bar to imposition of duties once the existence of bounty payment is established.¹³ It would appear that this year, as in 1975, cheese imports from Western Europe would be fewer than in prior years due to agreements in avoidance of, or the actual imposition of, countervailing duties.

Analysis of the functioning of import controls and their relationship to all segments of the dairy industry is beyond the scope of this paper. Suffice it to say that, although the total quantity of dairy imports is not a large percentage of domestic milk production,¹⁴ the quantum and identity of imports disproportionately influences the domestic dairy market.

Federal Milk Marketing Orders

The federal milk marketing order scheme, now comprising 56 orders, is authorized by the Agricultural Marketing Agreement Act

9. Query: What is the "public interest"? For thoughtful enlightenment but no answer, see *Panel I: The Public Interest? Who Represents It?*, 26 AD. L. REV. 385 (1974), which is devoted to the subject.

10. 19 U.S.C. § 1332(g) (Supp. 1974).

11. 19 U.S.C. § 1303 (1970).

12. The Special Representative for Trade Negotiations, perhaps due in part to changes in top personnel, relaxed that traditional opposition in 1975.

13. See pleading of record in *National Milk Producers Fed'n v. Schultz*, Civil No. 1723-73 (D.D.C. 1973), for a reasonably current exposition of the interaction of the statute and Western European (especially Common Market country) bounty or subsidy practices.

14. E.g., imports averaged about 1.4 billion pounds annually in 1970-1973, inclusive; totalled about 2.5 billion pounds in 1974; and were 1.1 billion pounds for the first 10 months of 1975; compared with annual domestic production of roughly 115-120 billion pounds during those years. U.S. DEP'T OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, DAIRY SITUATION 5-6, 27, 30 (1975).

of 1937,¹⁵ and fully comports with the "exquisitely complicated" description appended by the late Judge Frank to milk regulation.¹⁶ Essentially a price classification predicated upon use, the scheme is statutorily required, *inter alia*, to prescribe minimum prices which milk dealers ("handlers") must pay to producers, to equalize those prices among all dairy farmers, and to bottom each provision of each order upon evidence adduced at a public hearing. The orders may not fix resale prices.

The gist of an order is the establishment of a price for Class I milk (Grade A milk used as fluid milk)¹⁷ and Class II milk (Grade A milk used for manufacturing of every kind plus all Grade B milk).¹⁸ A blend price is also established, based upon the overall usage allocation within the order. These orders provide a myriad of details to guide trade between producer and handler within the order geographic area.

In view of the functioning of the parity price scheme,¹⁹ the orders regulate the price of Class I milk more meaningfully than Class II milk. Even with respect to Class I, in a relatively strong market producers are able through their marketing cooperatives²⁰ to sell their Class I milk at "over order" or "premium" prices—that is, at prices higher than the order price.²¹ Approximately 75 per cent of the milk production of some 300,000 dairy farmers is covered by the 56 orders.²² About 95 per cent of all fluid milk is priced pursuant to federal or state regulation.²³

15. 7 U.S.C. §§ 601-02 (1970); 7 C.F.R. §§ 100-1139 (Supp. 1975).

16. *Queensboro Farm Prod. v. Wickard*, 137 F.2d 969, 975 (2d Cir. 1943).

17. About 80% of all milk now is Grade A—a record high. The essential difference between Grade A and Grade B is in production sanitary requirements.

18. There also, in three orders, is a Class III milk, relevant to this brief discussion only to the extent it is not Class I.

19. See text accompanying note 24 *infra*.

20. Organized pursuant to the Capper-Volstead Act, 7 U.S.C. §§ 291-92 (1970).

21. For the first 11 months of 1975, over one half of Class I milk sales by producers, individually and through cooperatives, were over order, ranging from \$.02 to \$2.17 per hundredweight and averaging \$.65 per hundredweight. Processors and handlers and their spokesmen—usually professional consumer groups and expansionist antitrust lawyers—contend these over order prices are unlawful either as violations of § 8c(18) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c(18) (1970), of the Capper-Volstead Act, 7 U.S.C. §§ 291-92 (1970), or both. Proponents of over order prices liken them to wages above the statutory minimum wage, made possible by market forces, the negotiating power of cooperatives, or both and essential to survival of the steadily dwindling dairy farmer population. Wampler, *Dairy Farmers Feeling Pressure of Rising Costs*, *Washington Post*, Aug. 17, 1975, at —, col. — [hereinafter cited as Wampler].

22. U.S. DEP'T OF AGRICULTURE, PRICE IMPACTS OF FEDERAL MARKET ORDER PROGRAMS—REPORT OF THE INTERAGENCY TASK FORCE 4 (1975). In addition to some 300,000 dairy farmers, down from about 4.5 million since 1940, there also are approximately 3,000 handlers, down from 30,000, and about 1,800 producers of fluid milk (dairies). At one time there were 81 orders. Remarks by Herbert L. Forest at Conference sponsored by Community Nutrition Institute, Washington, D.C. (December 4, 1975). The reduced number of orders results essentially from consolidation, not discontinuance.

23. U.S. DEP'T OF AGRICULTURE, GOVERNMENT'S ROLE IN PRICING FLUID MILK IN THE UNITED STATES vi (1972).

Parity Price

An economist who is not supportive of the parity price program for dairy products has suggested, probably accurately, that the parity price scheme "disguises and disposes of fluid milk surpluses in a way that is crucial to the stability and success of the system."²⁴

"Parity," at best a rather misunderstood concept, is best defined as the sum of money necessary to permit the farmer to buy in the present day what he could have bought in . . . 1910-1914. Stated another way, as the farmer might state it, "If a bushel of wheat would buy a pair of overalls in . . . 1910-1914, then to be at parity, the price of wheat should be enough now to buy a pair of overalls."²⁵

The Federal Government does not directly support the price of fluid milk or other dairy products. Rather, it indirectly buttresses the price of Class II, or manufacturing milk, by establishing a dollar-and-cents price at which CCC, an agency of and integral to USDA,²⁶ will purchase whole milk by the hundredweight. The Secretary of Agriculture announces sometime prior to April of each year the dollar-and-cents support level for the coming April 1-March 30 dairy year.²⁷ The sum is transmogrified, often to much industry complaint, into specific purchase prices for cheddar cheese, butter, and powder,²⁸ because the CCC buys those manufactured products (most of which it redistributes) rather than fluid manufacturing milk.

PARITY DETERMINATION—THE INSTITUTIONAL JUDGMENT

Doubtless there are reasons why the entire parity scheme should be scrapped, and another, or nothing, substituted; but these

24. Kwoka, *Federal Regulation of Milk Markets: A Multiple Pricing System*, December 3, 1975 (unpublished paper delivered at the conference sponsored by the Community Nutrition Institute, Washington, D.C.).

25. Wampler, *supra* note 21 at —.

26. See text accompanying note 7 *supra*.

27. The announcement is made by press release and by publication in the Federal Register of the precise purchase prices. Neither enumerates meaningful findings of fact or attempts seriously to equate the Secretary's institutional determination with the criteria of the statute. 7 U.S.C. §§ 1426, 1446(b) (1970).

28. *E.g.*, for application on and after October 2, 1975 (a midterm re-evaluation promised by the Secretary of Agriculture to Congressman William C. Wampler primarily as a USDA-Congress tradeoff and not required at the time by law) USDA announced conceptual figures of 80% and \$7.71 per hundredweight (an increase from \$7.24, which the preceding April 1 also equalled 80%), with purchase prices of \$.85 per pound for cheddar cheese, Grade A or high standard moisture bases, produced on or after October 2, 1975; \$.624 for powder extra grade no more than 3.5% moisture in 50 lb. bags; \$.8125 for Grade A or higher butter from certain points. Tilt toward or away from cheese can be significant within the dairy industry because some cooperatives and other producers have greater capacity to divert production to cheese manufacture than others. These and other substantive considerations are typical of the complications inherent in the simplest aspect of dairy regulation, and are beyond the purview of this article.

considerations are beyond the scope of this article.²⁹ Rather, this writer espouses procedural reform in order to fulfill the mandate of the existing statute, and to reduce the trouble and suspicion that have engulfed the prevailing institutional judgmental process for many years.

The statute is succinct in enumerating criteria:

The price of milk shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply of pure and wholesome milk to meet current needs, reflect changes in the cost of production, and assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs. . . .³⁰

The institutional method of judgment is fully consistent with the APA³¹ and commonly is used within USDA.³² Hence neither description of that method as applied to dairy parity price determinations nor the advocacy of its replacement suggests a contention that its use is unlawful.³³

The institutional process usually begins several months prior to April 1, sometimes as early as the preceding September.³⁴ The initial recommendation ordinarily originates in the Livestock and Dairy Division of the Agricultural Stabilization and Conservation Service (ASCS), a USDA component. Staff personnel serving on the Interagency³⁵ Dairy Estimates Committee and other intra-agency sources contribute economic estimates. ASCS ultimately drafts its recommended decision and justification, transmitting the same through channels (which include the Assistant Secretary of Agriculture for Marketing and Consumer Affairs) to the CCC Board, which consists of the Secretary of Agriculture and six other members appointed by the President with Senate advice and consent. The Director of Agricultural Economics inevitably exercises

29. The writer would contend that the present system or some equivalent is necessary. As noted above, the number of dairy farmers has declined since 1940 from 4.5 million to some 300,000. This country is on the verge of terminating self-sufficiency in dairy production, dairy products being the only commodity of which there has been neither rationing nor a shortage during or since World War II.

30. Agricultural Adjustment Act of 1937, as amended, Pub. L. No. 93-86, 87 Stat. 222, 7 U.S.C. § 1446(c) (Supp. 1974) (text of 1976 amendment omitted).

31. 5 U.S.C. § 557(b) (1970).

32. Russell, *Agricultural Law—Federal Administrative Procedures*, 19 S.D.L. Rev. 603 (1974).

33. The means by which USDA once employed the institutional method, however, were unlawful, though in a pre-APA context. Morgan v. United States, 298 U.S. 468 (1936).

34. S. REP. NO. 981, 93d Cong., 2d Sess. 625 (1974).

35. A misnomer in that personnel on the Committee are entirely USDA personnel. However, the misnomer may be more meaningful than the correct noun in view of the influential, and totally unauthorized, role of OMB and, to some extent, other agencies independent of USDA in coordinating what by statute is supposed to be the Secretary's decision.

considerable influence in evaluating the ASCS recommended decision. The final decision is that of the Secretary.

Notwithstanding the absence of statutory authority, it is recognized by more than those esoterically familiar with USDA operations that the Secretary makes no announcement until its numbers and verbiage are approved by the President or by some person or persons exercising the authority of the White House. The ultimate decision, therefore, is not necessarily that of the Secretary, but may be that of the President, with off-the-record input from, *inter alia*, the Treasury Department, persuasive members of Congress and the Office of Management and Budget (OMB). That OMB cannot possibly exercise any lawful persuasion with respect to the decision seems undeniable from the plain reading of the statute.

Interested parties are encouraged to submit "data, views and arguments," as the quaint phrase puts it, for consideration in the institutional judgmental process. Various industry associations and cooperatives customarily do so. These manifestations are written. Their economic data often derives from USDA, ITC or other governmental publications. It is doubtful that these comments weigh significantly in the judgmental process, although absent the requirement of an on-the-record proceeding one cannot know definitively.³⁶ It would be difficult to ascertain the relative impact of nongovernmental comment, congressional influence, OMB budgetary limitations, and other sources of economic, political or psychological input. The final press release, like most governmental press releases, tends to try to sooth the maximum audience,³⁷ while the formal decision essentially is a decree rather than a reasoned opinion or finding of fact.³⁸

36. For the determination of parity price effective April 1, 1976, comments were received during the 30 day comment period, Jan. 5, 1976 to Feb. 4, 1976, from nine associations, five cooperatives, no members of Congress, 25 members of the general public (all dairy farmers) and four other group sources. In view of the absence of an *ex parte* prohibition, one cannot ascertain how many oral comments also were received, or from whom.

37. The press release issued by Secretary of Agriculture, Earl L. Butz, on January 3, 1975, pertaining to the parity price determination effective from that date through the marketing year ending March 31, 1976, declared an increase in the support price for manufacturing milk. This, it was stated, was

necessary because farm milk prices have declined while costs have remained at high levels. . . . Without this action, the Secretary said prices would have dropped even further in the next month or two, the very time when producers must feed greater quantities of grain and high priced commercially prepared concentrate feeds. Under these conditions, many producers would have left dairying and the future production of milk and dairy products would have declined.

The press release issued on October 3, 1975, pertaining to the parity price determination made by grace of the Secretary, rather than by statutory requirement, and effective October 2, 1975, stated that the Commodity Credit Corporation "increased the prices it will pay for butter, cheese and nonfat dry milk under the dairy price support program during the remainder of the marketing year."

38. The decision, 40 Fed. Reg. 3286 (1975), read in full as follows:

It is clear that the institutional method as employed in USDA for parity price determinations does not necessarily rise to the standard articulated by one authority:

The United States Department of Agriculture has announced an increase, effective October 2, 1975, in the price support level for manufacturing milk for the remainder of the marketing year which ends March 21, 1976, through purchases by Commodity Credit Corporation (CCC) of dairy products under the price support program as provided herein. Accordingly, § 1430.282 is revised to read as follows:

(a) (1) The general levels of prices to producers for milk will be supported from October 2, 1975 through March 31, 1976, at \$7.71 per hundredweight for manufacturing milk.

(2) Price support for milk will be through purchases by CCC for butter, nonfat dry milk, and Cheddar cheese offered subject to the terms and conditions of purchase announcements issued by the Agricultural Stabilization and Conservation Service, United States Department of Agriculture.

(3) Commodity Credit Corporation may, by special announcements, offer to purchase other dairy products to support the price of milk.

(4) Purchase announcements setting forth terms and conditions of purchase may be obtained upon request from: United States Department of Agriculture, Agricultural Stabilization and Conservation Service, Commodity Operations Division, Washington, D.C. 20250 or United States Department of Agriculture, Agricultural Stabilization and Conservation Service, Prairie Village ASCS Commodity Office, P.O. Box 8377, Shawnee Mission, Kansas 66208.

(b) (1) CCC will consider offers of butter, Cheddar cheese, and nonfat dry milk in bulk containers meeting specifications in the announcements at the following prices:

(2) Offers to sell butter at any location for which a price is not specifically provided for in this section will be considered at the price set forth in this section for New York City, less 80 percent of the lowest published domestic railroad carlot freight rate per pound gross weight for a 60,000 pound carlot, in effect at the beginning of the 1975-76 marketing year (April 1, 1975) from such other point to New York City. The minimum price at any location shall be the price at New York City minus three cents per pound. In the area consisting of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, CCC will purchase only bulk butter produced in that area; butter produced in other areas is ineligible for offering to CCC in these States. § 201, 401, 63 Stat. 1052, 1054 as amended; § 4(d), 62 Stat. 1070 as amended; 7 U.S.C. 1446, 1421, 15 U.S.C. 714b(d).

The decision, 40 Fed. Reg. 51,413 (1975), read in full as follows:

The United States Department of Agriculture has announced an increase in the price support program for milk, effective January 4, 1975, for the remainder of the 1974-75 marketing year and for the marketing year April 1, 1975 through March 31, 1976, through purchases by Commodity Credit Corporation (CCC) of dairy products as provided herein. Inasmuch as immediate action was required to increase the level of support in order to enable farmers to meet unusually high production costs and to assure adequate supplies of milk and dairy products next year, compliance with the notice of proposed rule making procedure would be impracticable and contrary to the public interest. Accordingly, § 1430.282 is revised to read as follows:

(a) (1) The general levels of prices to producers for milk will be supported from January 4, 1975 through March 31, 1976 at \$7.24 per hundredweight for manufacturing milk.

(2) Price support for milk will be through purchases by CCC of butter, nonfat dry milk, and Cheddar cheese, offered subject to the

The "institutional method," it has been said, involves "the cooperative effort of a number of officers with the agency head," bringing to bear the "cumulative efforts of specialized officers" and producing "a series of automatic internal checks" by each officer upon the data and ideas the others contribute.³⁹

AN APA PROCEDURE FOR PARITY PRICE DETERMINATION

A society yearning for responsive and efficient administration but fearful that whimsy or politics might dominate agency action found in [the APA hearing examiner-administrative law judge] program, if not a panacea against all prejudice and undue influence, at least a repository for public confidence in a crucial phase of the administrative process.⁴⁰

terms and conditions of the Agricultural Stabilization and Conservation Service, United States Department of Agriculture.

(3) Commodity Credit Corporation may, by special announcements, offer to purchase other dairy products to support the price of milk.

(4) Purchase announcements setting forth terms and conditions of purchase may be obtained upon request from: United States Department of Agriculture, Agricultural Stabilization and Conservation Service, Commodity Operations Division, Washington, D.C. 20250 or United States Department of Agriculture, Agricultural Stabilization and Conservation Service ASCS Commodity Office, 6400 France Avenue South, Minneapolis, Minnesota 55435.

(b) (1) CCC will consider offers of butter, Cheddar cheese, and nonfat drymilk in bulk containers meeting specifications in the announcements at the following prices:

(2) Offers to sell butter at any location not specifically provided for in this section will be considered at the price set forth in this section for the designated market (New York, San Francisco, or Seattle) named by the seller, less 80 percent of the lowest published domestic railroad carlot freight rate per pound gross weight for a 60,000 pound carlot, in effect at the beginning of each marketing year (April 1), from such other point to the designated market named by the seller. In the area consisting of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, CCC will purchase only bulk butter produced in that area; butter produced in other areas is ineligible for offering to CCC in these States. Butter produced in the area of California, Idaho, Oregon and Washington is ineligible for offering to CCC outside that four-state area.

(c) the butter shall be U.S. Grade A or higher. The nonfat dry milk shall be U.S. Extra Grade, except moisture content shall not exceed 3.5 percent. The Cheddar cheese shall be U.S. Grade A or higher.

(d) The products shall be manufactured in the United States from milk produced in the United States and shall not have been previously owned by CCC.

(e) Purchases will be made in carlot weights specified in the announcements. Grades and weights shall be evidenced by inspection certificates issued by the U.S. Department of Agriculture. § 201, 401, 63 Stat. 1052, 1054, as amended; § 4(d), 62 Stat. 1070 as amended; 7 U.S.C. 1446, 1421, 15 U.S.C. § 714b(d).

39. Fuchs, *The Hearing Officer Problem—Symptom and Symbol*, 40 CORNELL L.Q. 281, 289 (1955).

40. Rosenblum, *The Administrative Law Judge in the Administrative Process: Interrelations of Case Law with Statutory and Pragmatic Factors in Determining ALJ Roles*, Report to the Administrative Conference of the United States, 1975 (unpublished).

With a simple amendment to the language of the parity statute,⁴¹ the full requirement and protection of an APA individual judgment could supplant the present institutional judgmental process.

The USDA already has formal adjudicatory proceedings of the individual judgment type with respect to nine statutes involving nine different regulatory patterns.⁴² An administrative law judge corps, presently comprising five administrative law judges⁴³ and the Judicial Officer as the agency for APA finality purposes,⁴⁴ function in implementation of these nine statutes so that USDA would not need to establish a new mechanism were the parity statute to be amended. At most, limited additional staffing would be required. As noted above, however, the basic parity determination is made once annually. After the determination is made, the Secretary may raise, but not lower, the parity price during the marketing year (commencing April 1) to which it applies.⁴⁵

By an unusual route, the 94th Congress and the Ford Administration have provided, at least during the tenure of Secretary of Agriculture Butz, that the Secretary will examine the parity price quarterly and adjust it if the statutory criteria so require.⁴⁶ These

41. 7 U.S.C. § 1446(c) (1970). "The price of milk shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary *after a hearing on the record pursuant to the Administrative Procedure Act*, determines necessary . . ." (italics indicate suggested language). The author proposes inclusion of the phrase "on the record" to assure that even absent a compelling legislative history the test of *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973), would be met. A full evidentiary hearing, including the right of cross examination, is proposed, inasmuch as factual data, ever subject to challenge as to reliability or interpretation, must be the basis for the determination.

42. Packers and Stockyards Act, as amended, 7 U.S.C. §§ 181-231 (1970); Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a-499s (1970); Horse Protection Act of 1970, 15 U.S.C. §§ 1821-31 (1970); Animal Welfare Act, 7 U.S.C. §§ 2131-55 (1970); Federal Meat Inspection Act, 21 U.S.C. §§ 601-95 (1970); Poultry Products Inspection Act, 21 U.S.C. §§ 451-70 (1970); United States Grain Standards Act, 7 U.S.C. §§ 71-87h (1970); Federal Seed Act, 7 U.S.C. §§ 1551-1611 (1970); and Virus-Serum-Toxin Act, 21 U.S.C. §§ 151-58 (1970).

43. 37 Fed. Reg. 28,475 (1972); 38 Fed. Reg. 10,795 (1973).

44. 7 U.S.C. §§ 450c-450g (1970).

45. This restriction, in the nature of an annual floor, is derived from legislative history, unvarying USDA practice, USDA regulations (7 C.F.R. §§ 5.1-5.6 (Supp. 1976)) and the comprehensive quality of the statutory criteria. The statute *per se* contains no such description.

46. The Senate passed *viva voce* Senate Joint Resolution 121, to raise the parity price effective April 1, 1976 to a dollar figure equating to 85% and to require quarterly determinations as to the parity price. The House passed the measure with a record vote, 307-111. 122 CONG. REC. 12,851 (daily ed. Dec. 17, 1975). The President on January 20, 1976 vetoed the measure. 122 CONG. REC. 1221 (daily ed. Feb. 4, 1976). To forestall the overriding of the veto by the originating body, the Senate, the Secretary dictated a memorandum to Senator Robert Dole of Kansas, reading in full as follows:

This confirms our telephone conversation that [it] is my firm intention to adjust the level of dairy price supports to 80% of parity on April 1, 1976. The exact level of adjustment will depend upon

adjustments presumably might be no more than mathematical computations to maintain the dollar price per hundredweight at the percentage level at which it was set at the commencement of the marketing year—the prior April 1; or they might be an evaluation of that percentile determination according to the statutory criteria. The former would suggest no more than mathematical computations; in that event, nothing would be gained if a revised statute were to require an APA hearing each quarter.

CONCLUSION

Even though the CCC has purchased under the parity scheme since 1951, only about 4 per cent of total dairy production has gone to CCC.⁴⁷ Notwithstanding the lack of inevitable correlation between prices paid to farmers and those paid by consumers,⁴⁸ the CCC removes from the market an average of 5.6 billion pounds of milk equivalent annually,⁴⁹ pays out some \$314 million,⁵⁰ and arguably costs the taxpayer over \$153 million in the process.⁵¹ For that measure of dollar activity, combined with the necessity of a ready supply of milk and other dairy products, a system of parity price determination fundamentally beyond reproach or cavil is a basic need. "The history of liberty has largely been the history of observance of procedural safeguards."⁵²

the parity figure on April 1. It is my intention thereafter to examine the level of price support quarterly, and to make such adjustment quarterly as may be needed to assure an adequate supply of dairy products as defined in the law.

Id. at 1224. The Senate failed to override, 37-51, doubtless in part because for at least one year the Secretary agreed to do administratively a portion (80% and quarterly adjustments) of that which the Resolution would have mandated (85% and quarterly adjustments). *Id.* at 1220-33.

47. U.S. DEP'T OF AGRICULTURE, ASCA COMMODITY FACT SHEET 3 (June, 1975).

48. *Why Farm-Price Dips Don't Help You Much At the Grocery Store*, Wall Street Journal, May 8, 1975, at 1, col. —.

49. U.S. DEP'T OF AGRICULTURE, ASCA COMMODITY FACT SHEET 3 (June, 1975).

50. *Id.*

51. Figures at 80% parity. Thomas Lenard, Government Regulation of Milk Markets Discussion Paper, December 3, 1975 (unpublished paper on file with Council of Wage and Price Stability). Buxton & Hammond, *Social Cost of Alternative Dairy Price Support Levels*, AM. J. AGRICULTURAL ECON. 286-91 (1974).

52. *McNabb v. United States*, 318 U.S. 332, 347 (1943).