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The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices

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The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons and Selected Practices^Ψ

By Malcolm C. Rich, J.D. & Alison C. Goldstein, MPH, with Pro Bono Assistance from Goldberg Kohn *

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I. PREFACE

In the 1970s, states began to experiment with what was called the central panel system of administrative adjudication – an approach first utilized in California in 1945. In this new model, administrative law judges (ALJs) would not be employed by the agencies whose cases they hear, but by a distinct central panel agency created solely to manage them.

The central panel system is a framework to increase the judicialization of the state administrative process by seeking to keep ALJs separate from the agencies they serve, and to thereby ensure fair, high-caliber decision-making within an environment that promotes cost efficiencies.

Much of the discussion historically has been about the problems each central panel agency had faced in being created, and the even bigger challenges in getting the funding necessary for the present and for the expansion that each wanted. Every central panel is different, shaped either by the legislative battles that led to its creation, or the debates that led to the Executive Order creating the central panel. These differences involve how these central panels operated, including the kinds of cases they heard, how the agency was funded,

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how decision-making independence was insured, and whether there are cost efficiencies.

Legislative battles to create the central panel agencies often led to selected agencies being exempted in order to avoid a potentially deadly political battle. Sometimes agencies provided the opposition; sometimes unions provided the opposition; sometimes differing viewpoints between the executive and legislative branches led to a particular compromise. But a consistent tension was always whether an ALJ should be a specialist or a generalist. And always lurking in the background was the question of whether an ALJ should have final decision-making authority.

In 1981, there were seven central panel agencies. On May 8, 1981, a workshop was held in Chicago to provide a forum for exchange of information about state and federal ALJs and researchers doing work in the administrative law area. The event was co-sponsored by the American Judicature Society and the Administrative Conference of the U.S. - and became a forum for the candid discussion of similarities and differences between the state and federal adjudicative system and a consideration of the strengths and weaknesses of central panel systems.

The November 1981 issue of *Judicature* was devoted to the administrative law process. The articles, written by both researchers and practitioners, provided an overview of the central panel approach and how they operated. In 1983, a monograph was produced utilizing new research and the outcomes from the 1981 workshop (*The Central Panel System for Administrative Law Judges: A Survey of Seven States*, by Malcolm C. Rich and Wayne E. Brucar).

Over the next thirty years, there was substantial growth in the central panel approach with more than thirty state and municipalities adopting the central panel system. In September 2014, I was contacted by Judge Larry Craddock who asked me to assist in doing a new research study of the central panel system with an emphasis on what had changed to lead to the movement's growth, how central panels were currently operating, and what were the pros and cons of the approach thirty years after the initial study. Judge Craddock, who recently passed away, was a tireless advocate who promoted social justice generally, and the quality and independence of administrative adjudication, in particular. He had come to believe that the central panel approach was a key to reaching these goals and wanted to

promote research around the central panel efforts. I agreed to lead the research effort.

The purpose of this report is to provide a picture of the current state of the central panel system, now that the panels have had decades to operate. This picture includes the structure of the panels and the pros and cons of central panels. It includes insights into the central panel approach, including fairness and due process, efficiency, cost reduction, hiring, training, and supervision. We also focus on one of the most controversial of the issues surrounding central panels—the independence of ALJs, including final decision-making authority. We present our survey results which provide a description of the central panel phenomenon and conclude with suggested best practices.

The authors, in doing this study, have met many persons who have dedicated their professional lives to leading and studying government systems that promise fair, efficient, and high-quality adjudication. In addition to the Judge Craddock, we wish to thank Judge Julian Mann, Judge Robert Cohen, and Judge Lorraine Lee for their guidance. We thank Roger Lewis, Emily Gilman, and Kristen Jones for their research and guidance. We also thank Lakeisha Andress and Vinita Singh for their research assistance.

II. INTRODUCTION

The central panel movement has over the last 50 years changed the landscape of administrative adjudication—changing the way administrative law judges (ALJs) are utilized, including the finality of their decisions, the uniformity of hearing procedures, and the perceived fairness of the administrative process.

The central panel approach was created to bring a new level of due process to state-based administrative adjudication. Hearings within the central panel were designed to be cost efficient, uniform, high quality, and fair to all parties. Over time, the goals of central panels have expanded to include providing an effective, due process-oriented environment for the increasing number of persons seeking justice without the benefit of legal counsel.

The goal of this report is to document the growth of the central panel movement that has now emerged in a majority of states. This research is designed to provide data-informed recommendations to states and municipalities considering the adoption of a central panel

system or the enlargement of the jurisdiction encompassed by an existing central panel as well as to states considering the adoption of a more final decision-making authority for their central panel ALJs. The work is also intended to inform the debate over whether the central panel approach is something that the federal government should consider.

This research looks at such issues as the cost efficiency of central panels as well as the effect that central panels have on fairness. We also look at what characteristics are most likely to increase efficiency while maintaining the benefits of expertise and specialization, including finality of decision-making, whether jurisdiction is mandatory or optional, and how judges are assigned to cases.

III. A HISTORY OF THE CENTRAL PANEL APPROACH TO ADMINISTRATIVE ADJUDICATION

The debate about the function and independence of ALJs is as old as administrative law itself. Creating executive branch agencies with adjudicative powers became a major part of American jurisprudence in the New Deal era. But Roscoe Pound, the former dean of the Harvard Law School, was concerned about the built-in conflicts within administrative law as early as 1907, when he complained about state and federal courts upholding constitutional statutes in more than 50 cases that allowed executive agencies to have administrative hearing officers.¹

Pound quoted the French philosopher Montesquieu: “there is no liberty if the power of judging is not separate from the legislative power and from the executive power.”² But despite Dean Pound’s entreaties, the growth of administrative agencies with an adjudicative component was abundant. The central panel approach was designed to make the adjudication component independent from agency functions while focusing on the fairness, quality, and effectiveness of the adjudication.

In 1978, amendments to the federal Administrative Procedure Act changed the term “hearing officer” into “administrative law judge”—

¹ Roscoe Pound, *Executive Justice*, 55 U. PA. L. REV. 137 (1957).

² *Id.*

which demonstrated the growth in popularity, independence, and prestige afforded to administrative adjudication.

ALJs have become an important part of the American justice system. The life of nearly everyone is affected in some way by decisions rendered by these “quasi-judicial” judges, yet the administrative system of justice still does not receive the attention that it deserves. State court judges are evaluated for retention purposes by the voluntary bar associations, and court watching is a common approach toward accountability in the state courts. State ALJs, however, are in many ways the “hidden judiciary,” making decisions often as important or even more important than those rendered by our state judges.

The central panel is a framework that increases the judicialization of the state administrative law process by seeking to keep ALJs separate from the agencies they serve and to provide a hearing process that is uniform, efficient, and accountable. In so doing, the central panel approach seeks to ensure fair, high-caliber decision-making.

Starting more than fifty years ago, questions were raised about the decision-making independence of ALJs who were employees of the agencies comprising administrative justice. Were these ALJs to be fact-finders for their employer agencies or were they independent arbiters? Other questions were raised about the cost inefficiencies of having each administrative agency house its own group of ALJs.

The administrative process was originally designed to serve as an alternative to court action in complex economic and scientific matters. It has expanded to a panoply of matters, from the most complex – to social welfare, fact-driven matters where the litigants are often pro se. The executive branch agencies have been the subject of criticism over whether they adequately protect the rights of litigants and whether they are employing policy fairly. Administrative law judges, as employees of these administrative agencies, have been included as part of this criticism.

The federal approach to these criticisms is to allow the ALJ to remain an employee of a particular agency but to provide career appointment (tenure until retirement) and to give responsibility for the compensation and discipline of ALJs to bodies separate from the agencies. On the state level, the central panel phenomenon is a different reaction to these criticisms – removing ALJs from particular agencies and placing them within an independent central panel

agency. It is an experiment in administrative adjudication; indeed, it is a state-based laboratory experimenting with an approach to better ensure a high-quality, effective, efficient, and independent administrative judiciary.

IV. PURPOSE AND METHODOLOGY

Chicago Appleseed worked on its current central panel research with an advisory panel of administrative law judges led by Judge Larry Craddock as well as social scientists, pro bono lawyers, law students, and graduate students in the social sciences. We have collected data necessary to draw conclusions about how central panels have evolved over time and what benefits they might offer over a more traditional administrative law system. Our research has included:

- A survey designed for Central Panel Directors, Administrative Law Judges/Hearing Officers, Agency Directors, and practitioners.
- Interviews with Central Panel Directors, ALJs, Agency Directors, and practitioners. In these interviews, we learned about what prompted the state to create the central panel, stakeholders' satisfaction with the central panel, and challenges that arise both in the transition to a central panel as well as with maintaining a central panel over time.
- Interviews with experts and practitioners regarding the role of central panel agencies within administrative adjudication—the importance and impact of decision-making independence on lower-income persons and economic efficiencies and effectiveness that affect businesses and individuals. These interviewees included: professors specializing in research around administrative law; practitioners within legal aid and public interest organizations who represent persons before administrative tribunals; administrative agency personnel speaking to the impact that a central panel is having or could have on their operations; researchers who have been focusing on independence, efficiency, and effectiveness of

administrative adjudication; and persons who have appeared before administrative hearing officers within the administrative law system.

We consider the central panel approach a state-based laboratory for making administrative adjudication fairer and more effective. This report covers the following topics:

- History of the Central Panel Approach
- Implementing the Central Panel and the Reasons for the Growth of this Approach
- Structure of Central Panels
- Role of the ALJ within the Central Panel
- Pros and Cons of a Central Panel System
- Insights into the Central Panel Approach: Fairness, Efficiency, Cost Reduction, Hiring, Training, Supervision, and the Issue of Generalist v. Specialist ALJs
- Independence of Administrative Law Judges, including final decision-making authority
- Addressing Agency Concern with the Central Panel System
- Growth in the Central Panel Movement
- Survey Results: A Description of the Central Panels
- Suggested Practices of Central Panels and Central Panel ALJs

V. THE EVOLVING CONCEPT OF THE CENTRAL PANEL

In the 1970s, states began to experiment with what was called the central panel system of administrative adjudication—an approach first utilized in California in 1945. In this new system, rather than being employed by the agencies whose cases they hear, ALJs would be employed by a distinct central panel agency created solely to manage them.

The central panel system is a framework to increase the judicialization of the state administrative process by seeking to keep ALJs separate from the agencies they serve and to thereby ensure fair, high-caliber decision-making within an environment that promotes cost efficiencies.

Historically, much of the discussion has been about the problems each central panel agency faced in its creation and the even-bigger challenges in getting the funding necessary for the present as well as for the future expansion that each wanted. Every central panel is different, shaped by the legislative battles that led to its creation. These differences involve how these central panels operate, including the kinds of cases they hear, how the agency is funded, how decision-making independence is ensured, and whether there are cost efficiencies.

Legislative battles to create the central panel agencies often led to selected agencies being exempted in order to avoid a potentially deadly political battle. Sometimes agencies provided the opposition; sometimes unions provided the opposition; sometimes differing viewpoints between the executive and legislative branches led to a particular compromise. But a consistent tension was always whether an ALJ should be a specialist or a generalist. And always lurking in the background was whether an ALJ should have final decision-making authority.

We believe that administrative hearing officers are the hidden judiciary, and administrative adjudication deserves the attention of reform-minded practitioners who demand decision-making independence, efficiency, and effectiveness from our justice system. We say “hidden judiciary” because – while so much attention is paid to the selection or election and evaluation of state court judges – relatively little attention is paid to the administrative judiciary, who often are handling cases just as complex and as important to society.

The central panel approach – the independent central panel administrative agency that houses administrative hearing officers – represents an innovation its proponents say improve the administration of justice. Its opponents, however, say it is a step toward reducing the discretion of administrative agencies and, thus, toward reducing the effectiveness of the administrative process.

VI. RESEARCH ON THE EMERGING TREND: THE CENTRAL PANEL

California was the first state to create a central panel in 1945, but it was not until the 1970s that the concept began to expand. In 1980, the American Judicature Society (AJS) noted the central panel as an emerging trend in administrative adjudication and began to research the phenomenon.

In May 1981, the seven directors of the central panel agencies convened in Chicago for a first-ever meeting to discuss issues facing central panels at the time. The meeting was co-sponsored by AJS and the Administrative Conference of the U.S. The agenda was similar to the issues facing central panels today. The panels were just beginning to grow in jurisdiction, but agency pushback was a major subject of discussion. Other topics of concern were how the central panels were to be funded, technology, hiring and supervising procedures, quality control, and whether central panel ALJs were to be specialists (hearing one of a very few type of cases) or generalists (hearing a variety of cases). Final decision authority was also on the agenda, with an underlying theme of whether central panel ALJs were to be more akin to Article III judges or remain extensions of the executive agencies.

Based on the discussions over the two-day convening and a written survey of those directors, AJS published a monograph describing the operations of those seven central panels.³ In addition to demographic information, the monograph looked at the pros and cons of central panels as reported at the time.

Since 1981, there has been phenomenal growth in the number and size of central panels. While there were only seven states with central panels in 1981, by 2000 there were more than twenty central panels at the state and municipal levels. Today there are more than thirty states and municipalities that have moved to a central panel system of administrative law judges. The number of judges and the amount of funding for central panels has likewise increased substantially. In 1981, there were 160 central panel ALJs. In 2016, there were 787. The total budget for state central panel agencies in 1981 was \$10 million. In 2016, it was \$257 million.⁴

VII. IMPLEMENTING THE CENTRAL PANEL AND THE REASONS FOR ITS GROWTH

³ Rich & Brucar, *The Central Panel System of Administrative Law Judges: A Survey of Seven States* (1983).

⁴ *Id.* More recent descriptive data can be found in the survey of central panels conducted by the Louisiana Division of Administrative Law. This central panel agency issues on an annual basis demographic information on state-based central panels.

The central panel movement involves an interactive web of legislative negotiations, state-based politics, improving customer service, the policies and procedures of the hearing system, due process considerations, and perceived fairness. The central panel seeks to balance due process concerns with administrative effectiveness while retaining ALJ independence.

Central panels are formed in a number of ways and vary from state to state. Typically, the governor, with the consent of the state senate, appoints a chief ALJ or director to head the central panel.⁵ However, in other states, the chief ALJ or director may be appointed by a wide array of other means. For example, in North Carolina, the Chief Justice appoints the Chief ALJ, the Secretary of State appoints the position in Tennessee, and in Wisconsin the chief ALJ is hired through the civil service system.⁶

Most central panels are created through legislative action, although Michigan and now Illinois are two states where the central panels were created through executive order.

In 2016, Governor Bruce Rauner of Illinois established a pilot central panel in Illinois.⁷ With a second executive order issued in 2017, the Illinois pilot is now a permanent part of the administrative landscape in Illinois.⁸

In its first year, the Illinois central panel focused on things that many of the other central panels have been working on—building a high-quality infrastructure including elements such as uniformity of hearing procedures and technology for hearing-data management.

In 2018, legislation was introduced to expand the jurisdiction of the Illinois central panel with defined exceptions, including workers' compensation cases—a popular exception among central panels. The legislation failed to leave the legislative committee.

A. History of the Central Panel Movement

⁵ Allen C. Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, J. NAT'L ASS'N ADMIN. L. JUDICIARY 117 (1994).

⁶ Interviews with central panel directors.

⁷ Executive Order 2016-06. Executive Order to Eliminate Backlog and Delay in State Administrative Hearings.

⁸ Executive Order 2017-04. Executive Order to Continue and Expand Successes in Improving State Administrative Proceedings.

The central panel systems are invariably implemented within an existing structure of administrative adjudication. But the act of implementing the systems has often spurred conflicts that at times threatened the very existence of these panels. The changes that result from the creation of a central panel have an ongoing impact on the interests, values, and established practices of ALJs and agency personnel.

With the exceptions of Michigan and Illinois, panels are created through the actions of state legislatures, which establish the broad duties and limits of the central panel in each state. The oldest central panel in existence can be found in California. Begun in the mid-1940s, the debate surrounding it occurred at about the same time that arguments were being made in relation to the federal administrative procedure act. California's system ultimately became a model for central panels established much later.

In the 1930s, the State Bar of California established study committees to make recommendations to the legislature on approaches to administrative reform. In 1938 the bar issued a report seeking separation of the prosecuting and adjudication functions in state agencies and a procedure for judicial review of administrative decisions. The Judicial Council of California was directed by the legislature in 1941 to undertake studies of judicial review of administrative decisions and the need for changes in the procedures of regulatory agencies. The proposals were limited to the field of licensing, for the Judicial Council felt it was the area of administrative practice most in need of change.⁹

The studies produced three proposals that were ultimately embodied in the California Administrative Procedure Act (APA) of 1946. The studies proposed that a new department of administrative procedure be created to devote "continuous and expert" attention to the operation and procedure of the state's administrative agencies.¹⁰ The department was also to furnish a home for a central panel of ALJs.

⁹ Clarkson, *The History of the California Administrative Procedure Act*, 15 HASTINGS L.J. 137 (1964).

¹⁰ *Id.* For a further discussion of the California system, see Abrams, *Administrative Law Judge Systems: The California View*, 29 ADMIN. L. REV. 487 (1977).

Following the enactment of a central panel system in California, other states began to enact a state administrative procedure act. Tennessee and Massachusetts each established a centralized system in 1974. The Tennessee central panel agency—the administrative procedures division—was not established as a central panel. It was created to hold hearings for the small boards and commissions under public health and insurance.¹¹

Later, the Tennessee APA was amended to state that agencies that are not authorized to have their own hearing officers were required to use the central panel, and other agencies could elect to use central panel hearing officers. Opposition emerged from agencies that were resistant to change. Each agency had its own way of doing things and they were not happy being required to change.¹²

Central panels are often part of sweeping reforms in state administrative procedure. An example is the Florida division of administrative hearings, which began operations in November 1974. It came about as part of a broad administrative reform effort during which Florida substituted a new administrative procedure act. The thrust of the change involved rulemaking as opposed to hearings. At the heart of the creation of the Florida central panel was concern over agencies' use of rulemaking to accomplish what they could not do by statute. The appearance of justice was a critical factor in convincing the legislature to include a central panel system within the Florida APA.¹³

Fiscal matters were of prime importance to the Colorado central panel, created in the autumn of 1976. The catalyst for the creation of that panel reportedly was the Attorney General's Office, which wished to promote decision-making independence and cost cutting. Largely because proponents made arguments selling the panel on its fiscal impact, the legislation slipped through "without anybody noticing," said one respondent.¹⁴

Changing ALJ roles and the politics surrounding the implementation of central panels spawned a competition among special interests in the various states. Some agency officials saw in

¹¹ Interviews with central panel directors.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

the legislative debates an attempt to replace their administrative authority with the inflexible rule of law. Proponents of the legislation saw the central panel approach as a way to improve the administration of justice as well as to enhance the job status of ALJs. Agency personnel saw the same legislation as an attempt both to reduce the effectiveness of the process and to restrict the agency's ability to take action toward solving social problems. But those who worked to pass the legislation creating these early central panels often point to displeasure among some legislatures with agency rulemaking by fiat, which the central panel was designed to confront.¹⁵

While the legislatures often focused on fiscal matters and agencies focused on their perceived loss of power, the debate surrounding the creation of these early central panels often involved ALJs who were very pleased to become part of the central panel. The main attractions included an increased variety of cases, independence, and often somewhat-higher pay than they had been receiving as non-central panel ALJs. But even among the ALJs, the change to hearing a variety of cases created for some of them a substantial modification of work behavior that sometimes resulted in job dissatisfaction.¹⁶

A related problem in creating these early central panels involved the inherent structure of the central panel system. At the outset, ALJs who had been assigned to agencies were transferred into the central panels and then sometimes assigned to hear cases for their former agencies as independent ALJs. Disputes with former agencies at times spilled into the role of the central panel ALJ. Sometimes there would be animosity between ALJs and their former agencies, which appeared in what one observer described as cheap shots being taken by ALJs—pointed comments directed against agency officials within ALJ decisions.

B. The Role of the Bar Associations in Creating the Early Central Panels

¹⁵ *Id.*

¹⁶ *Id.*

The State Bar associations were often important factors in many of the debates—not only in the creation of the early central panels. Their role in the creation of central panels has continued. The bar groups saw the central panel as a way of establishing enhanced prestige for lawyers, a goal which was seen as important to an association representing the interests of lawyers. But also at the heart of the support by state bars was the goal of creating an independent agency staffed by professionals with the sole function of conducting administrative hearings.

VIII. THE STRUCTURE OF CENTRAL PANELS

At the outset, the scope of central panel operations was dictated by the state legislatures through the state administrative procedure acts. In general, a jurisdiction can be considered as mandatory (agencies listed in the state APA must use central panel ALJs) or voluntary (agencies may use the central panel services).¹⁷ Central panels using a hybrid jurisdiction provide that the agencies can either use their own hearing officers or those in the centralized panel.

Today, it is common for state legislation to delineate which agencies do not have to utilize central panel ALJs. Proponents of the mandatory system claim that ALJs will be independent of agency influence only if agencies must utilize central panel ALJs for all of their adjudications. An agency that can use its own hearing officers will be free to consciously divide its hearing load between the two types of ALJs. This, say the proponents of mandatory jurisdiction, will destroy the appearance of justice that the central panel program seeks. But advocates of voluntary jurisdiction argue that because agency officials will feel less threatened by a voluntary use of central panel ALJs, there would be fewer problems in implementing the central panel.¹⁸

A. The Role of the Administrative Law Judge within the Central Panel

¹⁷ *Id.*

¹⁸ *Id.*

Related to the notion of ALJ independence is the amount of expertise that an ALJ should bring to the hearing process. This was the debate throughout the 1970s as the early central panels were being created. Those who see little need for expertise believe that ALJs have the ability to learn more than one area of the law and can serve as generalists—administrative judges who are capable of hearing a variety of types of cases. Critics subscribe to the view that administrative judges are present and useful only because of their specialized expertise in one area and, therefore, should only hear one type of case.

Yet if the system assigns ALJs exclusively to one agency because of the need for specialized expertise, will there be a risk of bias among its ALJs that the central panel was devised to eliminate? Others argue that the lack of specialized ALJ expertise leads to inefficiency. These opponents also argue that ALJs without specific knowledge will have to be educated by the parties and will consequently be subject to manipulation.¹⁹ But acquiring information from the parties has always been part of judging.

Today, the generalist-versus-specialist debate is resolved on a state-by-state, panel-by-panel basis. Judges sometimes hear only one type of case while others are assigned a variety of cases. In surveys conducted in the 1980s and interviews conducted since 2016, the results are similar. That is, central panels have developed hybrid systems through which some ALJs maintain specialized expertise in a very limited number of cases while other ALJs within the central panel are more generalist in nature. What seems to be consistent among ALJs we have surveyed and interviewed is that they tend to be satisfied with their jobs in no small part because of the opportunity to judge different areas of the law.

IX. PROS AND CONS OF A CENTRAL PANEL SYSTEM

Since 2016, we have surveyed and interviewed central panel directors and ALJs across the country. We have also interviewed practitioners and agency personnel nationwide. In reporting the results of these surveys and interviews, we seek to compare our current results with those data collected in 1981 and 1982. The

¹⁹ *Id.*

following are the comparative results. In a subsequent section, we report the results of an electronic survey completed by twenty-three central panel directors.

As we have discussed, debate over the pros and cons of a central panel system began in California in 1945 and intensified during the 1970s and 1980s when there was substantial growth in the number of central panels. The following pros and cons related to central panels were part of the research we conducted both in the 1980s and during the current effort.

- Proponents say that independent funding of central panels promotes ALJ independence.
- Proponents of central panels claim that the central panel's more-efficient allocation of ALJs reduces costs. Larger agencies will not have to keep all the ALJs they need to handle peak periods; smaller agencies will always have ALJs available to them.
- Implementing a central panel transfers some degree of financial control from the agency to the panel. No longer do the agencies have exclusive administrative and financial control of the hearing process and, as a result, the system is a potential source of conflict. These concerns become evident during the changeover as well as during the preceding legislative debates.
- Existing operations are funded in one of two ways. One approach is known as general funding. The state legislature appropriates a set amount of money which it transfers to the central panel agency to use as an operating budget. The other approach is the revolving fund, in which the central panel bills agencies for the use of its hearing services on an hourly basis. Under revolving funding, the agencies are appropriated funds by the state legislature. Central panels utilize both methods of funding, but their leaders are consistent in their conclusion that general funding is the best way to ensure the independence of central panel ALJ decision-making.
- Proponents say the central panel will allow cost cutting through administrative efficiencies and encourage administrative cost-cutting innovations. By using the

adjudication services of the central panel, administrative agencies with a small number of ALJs will be able to eliminate administrative overhead costs by transferring their hearing function to the central panel.

In cases where ALJs issue final rather than recommended decisions, cost savings will accrue from agency staff and litigants not having to conduct and participate in a second-stage adjudication proceeding.

- Proponents say central panel ALJs can hear a variety of cases so that they will always be approaching a problem from a fresh perspective.
- Proponents say the central panel will encourage uniform policies and procedures and will allow for more efficient collection and analysis of hearing data.
- Proponents see the judicialization of ALJs to be a good thing, but opponents of the central panel approach see it as a step toward reducing the power of agencies, making the system unnecessarily inefficient.
- Opponents say that placing all decisions relating to ALJ employment in the hands of agencies risks creating the appearance of bias. They point to the sometimes-political appointment of central panel directors as a source of political intervention into the administrative adjudication process.

The directors of central panels are often appointed through the state political structure. Once appointed, directors are given administrative control over the operations. To ensure independence, however, the term of office is often not in direct overlap with the term of the then-governor, and we heard no instance where governors have sought to influence the decision-making of the central panels.

ALJs are most often protected by the civil service system, while their director can be removed at will by the executive. This has raised the issue of whether central panel directors who are selected by elected officials may

appear susceptible to influence from the official who nominated them.

Directors always downplay this possibility and note that they consider their positions to be apolitical. Some note that their position has a benefit in terms of their ability to work with members of the legislature to bring about a more efficient and just policy for the central panel. A director familiar with and accepted by the political system, they say, can better resist attempts by a governor, for example, to interfere with the administrative process. These directors see their role as a buffer between state government and the decision-making independence of ALJs.²⁰

- Proponents of central panel systems note that central panels have low filing fees and, in many cases, no filing fees at all.
- Proponents of central panel systems note the new types of cases now being heard in some central panels that formerly were in the province of the state court judiciary, including corrections and child support. In general, these proponents note the accountability of central panel ALJs. State court judges are evaluated rarely—often just as part of a re-election bid, and then only for educating voters on a YES or NO basis. Central panel directors report that their ALJs are evaluated annually with a focus on how to improve judicial performance.
- Proponents also note that while the administrative process has important implications for the business community, it has an increasingly important role in matters involving the welfare safety net: cases involving food stamp eligibility determinations, Medicaid eligibility, eligibility for state-funded home health services, matters involving long-term care facilities certification, child support matters, hearings involving child and family state services, etc.

²⁰ *Id.*

Some legal aid lawyers have expressed the hope that independent, well-trained ALJs will provide more objective, higher-quality adjudication to their low-income clients. Equally as important, some lawyers have expressed their view that highly trained, independent ALJs will be of benefit to pro se litigants by providing a less adversarial, more efficient system of adjudication designed to make proceedings more fair, effective, and efficient for those without legal representation.

X. INSIGHTS INTO THE CENTRAL PANEL APPROACH

A. Fairness and Due Process

Proponents of central panel systems contend that separating the adjudication process from the agencies that have an interest in the outcome of a case enhances fairness and minimizes the appearance of impropriety and bias. Directors we interviewed often commented that the central panel system enhances public confidence in the system because ALJs are independent of the agencies.²¹

In interviews we conducted with legal aid lawyers whose clients appear before the “safety net” agencies, we have heard that they and their clients are often subject to a system that is “stacked against them.” Some see an independent ALJ as the safety valve for fairness.²²

Illinois Administrative Law Judge Edward Schoenbaum, a leader of the central panel movement, stated, “many people believe that [ALJs] who are not in a central hearing agency are biased in their adjudicative responsibilities ... [because the] ALJs are hired,

²¹ Based on interviews with Chris Seppanen (Michigan Administrative Hearing System, Executive Director), Georgia S. Brady (Maryland Office of Administrative Hearings, Administrative Law Judge, Deputy Director, Quality Assurance), Allen C. Hoberg (North Dakota Office of Administrative Hearings, Former Director), Robert Cohen (Florida Division of Administrative Hearings, Chief Administrative Law Judge), Cynthia Eyre (Louisiana Division of Administrative LALJ, former General Counsel). However, most conclusions about the fairness of central panel systems are derived from anecdotal, interview-based evidence, and the results of litigant surveys conducted by many central panels.

²² Interviews with individual legal aid lawyers.

promoted, supervised, and paid by the very agency for whom [they] are [reviewing]... [t]he public thinks this is unfair.”²³

Further, Ann Wise, former Director of the Louisiana Division of Administrative Law, holds fairness as one of the greatest justifications for implementing a central panel system, stating, “it is not fair to combine into one person or political entity all of these powers: to investigate (like police), to decide whether to bring charges (like grand juries), to prosecute (like district attorneys), and to decide guilt or innocence (like judges or juries).”²⁴

Central panels allow litigants challenging an agency decision to appear before a judge who is not also their adversary. Instead, such persons have the opportunity to appear before an ALJ that is independent from the agency at the heart of the dispute and receive an arguably unbiased review and decision.²⁵ Many central panel directors have remarked based on their anecdotal experience that central panels produce more fair outcomes.²⁶ But commentators report that some ALJs on central panels have expressed the view that they sometimes feel at least some continued pressure to rule in favor of agencies, particularly in systems where the panel is funded by the agencies.²⁷ But such blatant interference appears uncommon.²⁸

However, some central panel systems are funded by charging the agencies for their costs and services at a billable rate.²⁹ Some central panel systems, like Wisconsin and Michigan, seek to build safeguards into this process through a “Memorandum of Understanding” (MOU), which governs the relationship and funding

²³ Interview with Judge Edward Schoenbaum.

²⁴ Wise, *Louisiana's Division of Administrative LALJ: An Independent Administrative Hearings Tribunal*, 30 J. National Association of Administrative Law Judges 95, 96 (2010).

²⁵ Interviews with central panel directors.

²⁶ Based on interviews with Judge Larry Craddock (Texas State Office of Administrative Hearings), Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative Law Judge), Ed Felter (Colorado Administrative Hearings Office, Senior ALJ), Robert Cohen (Florida Division of Administrative Hearings, Chief Administrative Law Judge).

²⁷ Hon. W. Michael Gillette, *ALJ Central Panels: How is it Going Out There?*, The Judicial Edge (2015).

²⁸ *Id.*

²⁹ Interviews with central panel directors.

arrangement between the central panel and each agency.³⁰ Operating under such a MOU, however, requires significant administrative effort on an annual basis in order to negotiate the MOU with each agency and attempt to forecast the cost per case for that upcoming year.³¹ It is also reported to be difficult to resolve billing disputes that may arise with the agencies during the year.³²

Many central panel directors have remarked that funding plays an essential role in ensuring fairness. The vast majority believe that the best method of funding is an allocation from the state's general assembly.³³ This approach provides a source of funding independent of the agencies served by the central panel and allows for more independent operations by the central panel agency.

Creating an advisory council to give direction, policy counsel, and advice on the adoption of rules established by the central panel may be another way to increase fairness. For example, Maryland created the State Advisory Council on Administrative Hearings, which advises the chief administrative law judge.³⁴ The Council also identifies issues that the administrative law judges should address and reviews matters relating to administrative hearings, the administrative process, and policies and regulations proposed by the chief ALJ.³⁵

In addition, at the advice of its State Advisory Council for Administrative Hearings, the North Dakota Office of Administrative Hearings (OAH) decided early on not to aggressively seek to include

³⁰ Based on interviews with Brian Hayes (Wisconsin Division of Hearings and Appeals, Division Administrator) and Chris Seppanen (Michigan Administrative Hearing System, Executive Director).

³¹ *Id.*

³² *Id.*

³³ Based on interviews with Judge Larry Craddock (Texas State Office of Administrative Hearings), Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative Law Judge), Ed Felter (Colorado Administrative Hearings Office, Senior ALJ), Robert Cohen (Florida Division of Administrative Hearings, Chief Administrative Law Judge), Brian Hayes (Wisconsin Division of Hearings and Appeals, Division Administrator), Chris Seppanen (Michigan Administrative Hearing System, Executive Director), John Allen (Cook County Department of Administrative Hearings, Former Director).

³⁴ Maryland Office of Administrative Hearings Origins & Functions, Maryland.gov, <http://msa.maryland.gov/msa/mdmanual/25ind/html/01adminf.html>.

³⁵ *Id.*

agencies within its jurisdiction, but rather to encourage agencies to voluntarily use OAH.³⁶ It should be noted, however, that other central panel systems found it advantageous to work diligently to include as many case types and agencies as possible from the panel's inception.³⁷

An issue that straddles the notions of fairness, independence, and accountability is evaluation of ALJ performance. Opponents of any type of evaluation of ALJs look to general jurisdiction judges as examples. According to this view, other judges are not evaluated formally on a regular basis because they must enjoy absolute independence if the judicial system is to remain impartial. But general jurisdiction judges in many states are subject to retention election through which voters must vote affirmatively to allow these individuals to maintain their judicial seats. Proponents of evaluation claim that the public is owed a system that is transparent and accountable—one that includes a system that identifies areas of weakness for each administrative law judge and makes recommendations for improvements.

B. Efficiency

Central panels are credited with fostering better allocation of state agency resources and producing greater efficiency in administrative adjudication.³⁸ They are also credited with producing more

³⁶ Allen C. Hoberg, *Ten Years Later: The Progress of State Central Panels*, J. NAT'L ASS'N ADMIN. L. JUDICIARY 239 (2001).

³⁷ Based on interviews with Tammy L. Pust (Minnesota Office of Administrative Hearings, Chief Judge); Brian Hayes (Wisconsin Division of Hearings and Appeals, Division Administrator); Chris Seppanen (Michigan Administrative Hearing System, Executive Director).

³⁸ Thomas E. Ewing, *Oregon's Hearing Officer Panel*, 23 J. NAT'L ASS'N ADMIN. L. JUDICIARY 57 (2003) (detailing the increased efficiency effectuated by adopting a central panel in Oregon); James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN L. REV. 1355, 1383 (2002) (noting that central panels often render better decisions than those adjudicators employed by a single agency); Christopher B. McNeil, *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudication Under the Administrative Central Panel*, 18 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (1998) (advocating for the adoption of central panel systems for administrative adjudication); Karen Y. Kauper, Note,

systematic and uniform agency decision-making.³⁹ Central panel directors commented that increased efficiency is "one of the most underrated benefits of the system."⁴⁰

The Maryland Office of Administrative Hearings, for example, prides itself on issuing a decision on every hearing in ninety days or less.⁴¹ Michigan eliminated thousands of administrative rules to create a uniform set of rules governing all administrative cases.⁴² One goal of this effort was to make the process more clear and predictable to the parties.⁴³ New York City similarly recommended that its central panel create its own standard rules and procedures, rather than adopting the multiple sets of rules and procedures utilized by each of the different agencies.⁴⁴ Centralizing the process by placing ALJs and associated staff under one umbrella also reduces the overall costs associated with hearing cases and, generally, more cases can be heard by fewer ALJs.⁴⁵ Several directors also credit the central panel system with clearing case backlogs, since the central panel has more flexibility to add ALJs in certain subject areas when those areas experience a higher volume of cases.⁴⁶

There is some concern, however, that too much focus on efficiency may create problems—specifically in regard to the

Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judges Corps Statute, 18 U. MICH. J. L. REFORM 537, 543 (1985) (applauding the benefits of the central panel paradigm).

³⁹ Interviews with central panel directors.

⁴⁰ *Id.*

⁴¹ The Office of Administrative Hearings, Maryland.gov, <http://www.oah.state.md.us/>.

⁴² Based on interview with Chris Seppanen (Michigan Administrative Hearing System, Executive Director).

⁴³ *Id.*

⁴⁴ Based on interview with Fidel F. Del Valle (New York City Office of Administrative Trials and Hearings, Chief Administrative Law Judge).

⁴⁵ Based on interviews with Fidel F. Del Valle (New York City Office of Administrative Trials and Hearings, Chief Administrative Law Judge) and Chris Seppanen (Michigan Administrative Hearing System, Executive Director).

⁴⁶ Based on interviews with Fidel F. Del Valle (New York City Office of Administrative Trials and Hearings, Chief Administrative Law Judge), Samuel P. Langholz (former Chief Administrative Law Judge and Administrator, Iowa Administrative Hearings Division), Allen C. Hoberg (North Dakota Office of Administrative Hearings, Former Director).

imposition of quotas. A study of the Virginia Social Security ALJs found that:

[T]he requirement to schedule 40 cases per month, on average, is not reasonably attainable, nor is it reasonable to expect ALJs to achieve 500–700 case dispositions annually while also complying with SSA directives on legally sufficient decisions. Obviously, opinions could vary about how challenging “reasonably attainable” goals should be, and some might prefer more or less stringent challenges.⁴⁷

The Chief ALJ of the Florida Division of Administrative Hearings commented that while the Florida legislature has statutory mandates for certain cases to be resolved in a certain timeframe, he also has a collaborative relationship with the legislature allowing him to offer input on the feasibility of such standards.⁴⁸ In addition, these timeframes have been amended and revised over time to fit the current realities of the panel.⁴⁹

Such flexibility and open communication between the panel and the legislature has ensured that the panel hears cases efficiently and in a timely manner while also ensuring that ALJs allocate the appropriate time to each case—allowing extensions in the interest of due process where necessary.⁵⁰ Thus, consultation of ALJs before setting quotas and the willingness to be flexible in adjusting such standards appears to go a long way to prevent the aforementioned issues.⁵¹

⁴⁷ Administrative Law Judge Work Analysis Study, Human Resources Research Organization (2015), vi, <https://drive.google.com/a/jd16.lALJ.harvard.edu/file/d/0B2kAAfgH45ClZjRGejdWskwyNXc/vi?pli=1>.

⁴⁸ Based on interview with Robert Cohen (Florida State Office of Administrative Hearings, Chief Administrative Law Judge).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Based on interviews with Fidel F. Del Valle (New York City Office of Administrative Trials and Hearings, Chief Administrative Law Judge), Samuel P. Langholz (former Chief Administrative Law Judge and Administrator, Iowa Administrative Hearings Division), Allen C. Hoberg (North Dakota Office of Administrative Hearings, Former Director).

C. Cost Reduction

Proponents of a centralized administrative system argue it results in reduced costs due to economies of scale and flexibility. The benefits of economies of scale are most apparent for agencies that have high-volume hearing needs, such as a thousand or more annual referrals.⁵²

A hearing officer issuing 1,000 orders a month can do so more efficiently than one issuing 100, for example, because of shared resources such as case management systems, operational staff, vehicles, office space, etc.⁵³ In addition, a larger hearing office has the capacity to absorb a greater amount of additional work than a smaller office.⁵⁴

The benefits of flexibility in case assignment are most visible for agencies with low-volume hearing needs (a few hundred referrals a year).⁵⁵ A centralized system allows a chief ALJ to assign ALJs a variety of cases with different subject matters depending on the ALJ's expertise.⁵⁶ "The resulting flexibility in case assignments bore fruit in reductions of redundant staff, monetary cost savings, or both in Colorado, New Jersey, Texas, and Minnesota."⁵⁷

An indication of the savings that may be anticipated by the institution of a central hearing panel is supplied by Oregon's experience, which first showed a fiscal impact in FY 2000–01. There were cost reductions in hours per case referral (down 17 percent), cost per referral (down 11 percent), cost of Department of Transportation referrals (down six percent, saving \$37 million) and cost of Department of Human Services referrals (down 23 percent).⁵⁸

⁵² John Hardwicke & Thomas E. Ewing, *The Central Panel: A Response to Critics*, 24 J. NAT'L ASS'N ADMIN. L. JUDICIARY 231, 233 (2004).

⁵³ *Id.* at 234.

⁵⁴ *Id.*

⁵⁵ *Id.* at 233.

⁵⁶ *Id.* at 233–34.

⁵⁷ *Id.* at 236–37.

⁵⁸ *Id.* at 234.

D. Hiring, Training, and Supervision

Central panel directors appear to place an emphasis on hiring and the need to select highly qualified applicants to fill ALJ positions. This includes applicants who have practiced law for a number of years and have prior experience handling cases before an administrative court or other trial experience.⁵⁹ The basic idea is that hiring highly qualified lawyers as ALJs will enhance fairness, efficiency, and the overall quality of administrative hearings for all parties involved.

Many proponents of central panels suggest that newly hired ALJs should receive further training by virtue of the work they perform under the central panel system. For example, the former Chief ALJ of the Pennsylvania Liquor Control Board argued that the central panel structure “will place the management and training of all ALJs in the hands of experienced officials whose understanding and appreciation of the duties and responsibilities of the office come from their actual performance of such duties and responsibilities.”⁶⁰ Many central panel directors reported sending new hires to the 4-hour National Judicial College training in Reno, complying with the required CLE training requirements for all lawyers, as well as conducting an annual training in addition to informal on- the-job training.⁶¹

In California, new ALJs complete a year-long probation and mentoring program, which includes conducting mock hearings and

⁵⁹ Based on interviews with Judge Larry Craddock (Texas State Office of Administrative Hearings), Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative Law Judge), Ed Felter (Colorado Administrative Hearings Office, Senior ALJ), Robert Cohen (Florida Division of Administrative Hearings, Chief Administrative Law Judge); Tammy L. Pust (Minnesota Office of Administrative Hearings, Chief Judge).

⁶⁰ Gerald E. Ruth, *Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase "Judicialization" in Pennsylvania*, J. NAT'L ASS'N ADMIN. L. JUDICIARY 245 (1996).

⁶¹ Based on interviews with Judge Larry Craddock (Texas State Office of Administrative Hearings), Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative Law Judge), Ed Felter (Colorado Administrative Hearings Office, Senior ALJ), Robert Cohen (Florida Division of Administrative Hearings, Chief Administrative Law Judge); Brian Hayes (Wisconsin Division of Hearings and Appeals, Division Administrator); Cynthia Eyre (Louisiana Division of Administrative LALJ, former General Counsel).

issuing practice decisions under the observation and review of an ALJ mentor. Before issuing their first decisions, new ALJs' opinions are reviewed by both their mentor and a more senior ALJ.⁶²

Many states provide only limited ALJ supervision after the initial training period, if any. For example, ALJs often issue their own decisions without any kind of evaluation prior to issuance.⁶³ In other states, the director observes hearings conducted by new ALJs and then provides feedback on the hearing and written decision.⁶⁴

E. Generalist v. Specialist ALJs

An important consideration for states implementing a central panel system is whether the panel will consist of specialist ALJs, who hear certain case topics exclusively or almost exclusively, or generalist ALJs, who hear a variety of cases.

The generalist system can combat ALJ insularity and complacency as well as the appearance of ALJ bias in favor of the agency, since ALJs work on a variety of cases originating from different agencies.⁶⁵ Further, a generalist system allows central panel directors more flexibility to assign ALJs to different depending on caseloads, thereby reducing costs and increasing the speed with which cases are heard.⁶⁶

Directors commented that ALJs prefer the generalist system with a more diversified caseload over hearing the same type of case over

⁶² Based on interview with Alicia Boomer (California Office of Administrative Hearings, Senior Counsel).

⁶³ Based on interviews with Georgia S. Brady (Maryland Office of Administrative Hearings, Administrative Law Judge, Deputy Director, Quality Assurance); Fidel F. Del Valle (New York City Office of Administrative Trials and Hearings, Chief Administrative Law Judge); Samuel P. Langholz (former Chief Administrative Law Judge and Administrator, Iowa Administrative Hearings Division).

⁶⁴ Based on interview with Allen C. Hoberg (North Dakota Office of Administrative Hearings, Former Director).

⁶⁵ Based on interviews with Georgia S. Brady (Maryland Office of Administrative Hearings, Administrative Law Judge, Deputy Director, Quality Assurance) and J. Richard Collier (Office of Tennessee Secretary of State, Chief Administrative Judge, Administrative Procedures Division).

⁶⁶ Based on interview with Brian Hayes (Wisconsin Division of Hearings and Appeals, Division Administrator).

and over;⁶⁷ however, some cases require highly technical expertise, which can be difficult for ALJs to acquire across several different areas of law.⁶⁸ One director described the question of whether to make ALJs generalist or specialists as a “constant tension.”⁶⁹ Interviews and surveys with ALJs indicate a strong relationship between hearing more than one type of case and job satisfaction.

In order to capture the benefits from both the specialist and generalist system, some states opt for a hybrid system where specialized ALJs hear more complicated or technical cases and other ALJs hear a variety of different cases.⁷⁰

States can consider placing ALJs in tiers based on their experience to most effectively capture the benefits of both the generalist and specialist systems. Based on our interviews, such a promotional system would likely incentivize ALJs to work hard and increase their knowledge base in order to earn the promotion to a higher tier.⁷¹ Additionally, this system would afford central panel directors the ability to maintain staffing flexibility by assigning higher- tiered ALJs to adjudicate cases along with lower-tiered ALJs during periods of increased caseloads.⁷² The hybrid system could also

⁶⁷ Based on interviews with Georgia S. Brady (Maryland Office of Administrative Hearings, Administrative Law Judge, Deputy Director, Quality Assurance) and J. Richard Collier (Office of Tennessee Secretary of State, Chief Administrative Judge, Administrative Procedures Division).

⁶⁸ Based on interviews with Georgia S. Brady (Maryland Office of Administrative Hearings, Administrative Law Judge, Deputy Director, Quality Assurance).

⁶⁹ Based on interview with Samuel P. Langholz (former Chief Administrative Law Judge and Administrator, Iowa Administrative Hearings Division).

⁷⁰ Based on interviews with Georgia S. Brady (Maryland Office of Administrative Hearings, Administrative Law Judge, Deputy Director, Quality Assurance), Judge Larry Craddock (Texas State Office of Administrative Hearings, Robert Cohen (Florida Division of Administrative Hearings, Chief Administrative Law Judge).

⁷¹ It is important for such a hybrid system to have the flexibility to absorb ALJs into higher tiers when they meet certain benchmarks for advancement, rather than when there is an opening at the higher tier. One central panel director commented that morale problems are created when ALJs work to gain the knowledge and experience to advance to a higher tier but have to wait for a vacancy.

⁷² Based on interviews with Georgia S. Brady (Maryland Office of Administrative Hearings, Administrative Law Judge, Deputy Director, Quality

combat ALJ complacency and the appearance of ALJ bias in favor of an agency, since higher-tiered ALJs can be assigned to lower-tiered cases in addition to adjudicating a variety of specialized cases.

XI. INDEPENDENCE OF ADMINISTRATIVE LAW JUDGES

Administrative law judge independence has always been at the heart of arguments by proponents of the central panel. Final decision-making authority, as opposed to recommendations subject to agency review, is one means through which ALJ independence can be effectuated. Many central panel directors have commented that while administrative law judges' opinions are often recommended decisions subject to agency review, the ALJs are empowered with the ability to create the record and make findings of fact, which is not subject to review or disturbed on review.⁷³ Others noted that most recommendations become final. States adopting a central panel system must make this choice, and there is much division on which alternative produces the fairest outcome.⁷⁴

Before central panels, administrative adjudication was clearly the province of the agency. The contested case took place at the agency, and fact-finding done by the ALJ was just a preliminary step to the agencies rendering the final decision. ALJs were considered to be employees of the agency, there only to provide aid via a fact-finding function to facilitate agency decision-making.

But the creation of the central panels transferred the focus of adjudication from the final agency decision to the decision-making by the ALJ. Legislatures that have provided for this change have

Assurance) and Chris Seppanen (Michigan Administrative Hearing System, Executive Director).

⁷³ Based on interviews with Judge Larry Craddock (Texas State Office of Administrative Hearings, Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative Law Judge), Ed Felter (Colorado Administrative Hearings Office, Senior ALJ), Robert Cohen (Florida Division of Administrative Hearings, Chief Administrative Law Judge); Brian Hayes (Wisconsin Division of Hearings and Appeals, Division Administrator), Tammy L. Pust (Minnesota Office of Administrative Hearings, Chief Judge).

⁷⁴ Flanagan, *supra* note 38; James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 IND. L. REV. 401 (2005); *Final, But Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53, 57 n.6 (2004).

been persuaded to do so in light of the hiring process, nonpartisan supervision, training, and overall independence of the central panel ALJ.

In addition, giving final decision authority to central panel ALJs has a financial edge. ALJ finality allows a step in the process—agency review—to be skipped, thereby providing for cost savings. Proponents of final decision authority view judicial review as a source of accountability within the system.

To proponents, giving ALJs final decision authority combines the recognition that central panel ALJs are highly trained, well-supervised administrative jurists with the benefits of cost savings provided by eliminating a major step in the process.

But opponents look to the role of the administrative agency as the reason to oppose central panel ALJ final decision authority. In their view, agencies need that final power in order to maintain policy consistency. In contrast, proponents state that agencies can set forth their policy positions through rulemaking and that lawyers for the agency during administrative hearings are free to argue their claims based on policy set forth by the administrative agency.

Proponents of central panel ALJ final decision authority also point to the potential abuse of power that could occur should agencies seek to overturn every central panel ALJ decision adverse to the agency. This would allow agencies to not only second-guess ALJ decisions applying policy to facts but to second-guess the fact-finding of the ALJ as well.

This protection from agency abuse is particularly pronounced in the increasing number of administrative law cases involving pro se litigants. These individuals, lacking legal representation, need the protection of an independent administrative process perhaps even more than cases in which parties are represented by legal counsel. This is one of the reasons why some legal aid lawyers to whom we spoke see the central panel as a protector of individual rights.

Central panels have proven themselves to be laboratories of new ideas to provide administrative adjudication that is fair, efficient, and independent. As final decision authority for ALJs is debated on an ongoing basis, we have seen a hybrid approach being employed among existing central panels.

There is a growing trend of legislatures providing for final decision authority to central panel ALJs in at least some matters. Georgia is the latest state legislature to do so. Agency personnel to

whom we spoke were much less opposed to final decision authority in cases where the adjudication has to do primarily with fact-finding and applying statutory law and conditions to the established set of facts. In more controversial, more complex cases involving legal representation for both parties, agencies are much less likely to want to give up control over review of the central panel ALJ decision-making.

What has occurred in a variety of states and municipalities is that as central panels become more accepted into the framework of administrative adjudication as independent, high-quality, well-trained adjudicators, opposition to final authority subsides. In fact, this process of acceptance has led to a phenomenal growth in the number of central panels as well as the jurisdictions covered by each.

In general, there appears to be a spectrum of ALJ decision-making authority and processes. For some central panel systems, decision-making authority is determined by the agency. In Wisconsin, the agency identifies whether they want a final or proposed decision at the time they provide the hearing order to the panel.⁷⁵ In other states, like Maryland and North Dakota, the state legislature plays a role in determining whether ALJ decisions are final or recommendations.⁷⁶ In New York City, ALJs only render recommendations; none of their decisions are final.⁷⁷ Colorado ALJs have no other final decision-making authority beyond Secretary of State election disputes.⁷⁸ In contrast, in North Carolina, South Carolina, and Louisiana, the vast majority of decisions rendered by the ALJs are final.⁷⁹ Florida ALJs have final decision-making

⁷⁵ *Id.*

⁷⁶ Based on interviews with Georgia S. Brady (Maryland Office of Administrative Hearings, Administrative Law Judge, Deputy Director, Quality Assurance); Allen C. Hoberg (North Dakota Office of Administrative Hearings, Former Director).

⁷⁷ Based on interview with Fidel F. Del Valle (New York City Office of Administrative Trials and Hearings, Chief Administrative Law Judge).

⁷⁸ Based on interviews with Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative Law Judge), Ed Felter (Colorado Administrative Hearings Office, Senior ALJ), Robert Cohen (Florida Division of Administrative Hearings, Chief Administrative Law Judge).

⁷⁹ Based on interviews with Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative Law Judge); Cynthia Eyre (Louisiana Division of Administrative LALJ, former General Counsel).

authority over most cases in their jurisdiction, excluding professional licensure cases and school board cases.⁸⁰

The ALJs for the Cook County Parking Ticket Hearing Officer System only issue final decisions.⁸¹ This specific central panel system was built on this concept from its inception, based on a perspective that permitting an agency director to overturn a judge's decision diminishes the value of the judge and the purpose of the process to create efficiency, fairness, and cost savings.⁸²

In Tennessee, most agencies request that the ALJs render "initial orders" subject to review by the agency director. If the initial order is not appealed within fifteen days, it becomes a final order.⁸³ Approximately 80–90% of the initial orders in Tennessee eventually become final orders.⁸⁴ In Iowa, ALJs generally issue recommendations, at which time the parties always have a right of appeal directly to the agency, thereby permitting the agency to modify or overturn the ALJ's decision.⁸⁵

Opponents of ALJ finality argue that agencies have greater knowledge and more expertise in the subject matters before the ALJs, and as such are the more-appropriate final decision makers.⁸⁶ The general concern is the inconsistencies that may arise from ALJ finality if the agencies and ALJs are using different policy approaches.⁸⁷

Former Illinois Supreme Court Justice and law professor Frank Sullivan Jr., remarked:

⁸⁰ Based on interview with Robert Cohen (Florida Division of Administrative Hearings, Chief Administrative Law Judge).

⁸¹ Based on interview with John Allen (Cook County Department of Administrative Hearings, Former Director).

⁸² *Id.*

⁸³ Based on interview with J. Richard Collier (Office of Tennessee Secretary of State, Chief Administrative Judge, Administrative Procedures Division).

⁸⁴ *Id.*

⁸⁵ Based on interview with Samuel P. Langholz (former Chief Administrative Law Judge and Administrator, Iowa Administrative Hearings Division).

⁸⁶ James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 IND. L. REV. 419 (2005).

⁸⁷ *Id.*

We have seen already that removing policy considerations from administrative adjudications strips those decisions of the separation of powers justification for deference: they are no longer the decisions of the entity under the Constitution with primacy for executing policy on that subject. Indeed, does the exhaustion doctrine—that a party must exhaust administrative remedies before seeking judicial review—have the same vitality under central panels if there is a non-deferential standard of review? Without a deferential standard of review, I think the very legitimacy conferred on administrative law judge decisions by virtue of those judges being accountable within the executive branch is arguably removed.⁸⁸

Further, there are some cases where even proponents of finality in ALJ decision-making agree that the agency should have final decision-making authority. For example, where the agency at issue is an elected board or commission, allowing the ALJ final decision-making authority would usurp the authority of officials chosen by the electorate specifically to make such decisions.⁸⁹

Central panel directors have differing opinions on this topic. Some agree that agencies have greater expertise and therefore should have final decision authority.⁹⁰ In response, proponents of finality in ALJ decisions argue that these decisions are still appealable and reviewable by a court. In addition, agencies or legislatures could consider reserving recommended decisions to only those specialized areas where level of ALJ expertise is a particular concern. Other proponents have argued that vesting final decision-making authority

⁸⁸ Frank Sullivan, Jr., *Some Questions to Consider Before Indiana Creates a Centralized Office of Administrative Hearings*, IND. L. REV. 397 (2005).

⁸⁹ Based on interviews with Allen C. Hoberg (North Dakota Office of Administrative Hearings, Former Director) and Robert Cohen (Florida Division of Administrative Hearings, Chief Administrative Law Judge).

⁹⁰ Based on interviews with Judge Larry Craddock (Texas State Office of Administrative Hearings), Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative law Judge), Ed Felter (Colorado Administrative Hearings Office, Senior ALJ), Robert Cohen (Florida Division of Administrative Hearings, Chief Administrative Law Judge).

in the ALJ results in cost savings and greater efficiency and fairness for litigants, as it eliminates a step in the process—allowing litigants to go from an administrative trial directly to the appeal, thereby streamlining and simplifying the process.⁹¹

Permitting ALJ finality and removing agency review also minimizes the perception of impropriety by not permitting an agency to appeal or overturn an unfavorable decision. Indeed, in North Dakota, from time to time where the ALJ's decision is not final, agencies ask the ALJ to make final decisions in difficult or controversial cases in order to avoid the appearance of impropriety. One chief ALJ commented that a drawback of giving ALJs such authority could be heightened scrutiny of the panel by the agency when the ALJ renders unfavorable decisions.⁹² While a consensus has not been issued on the question of ALJ finality, opponents and proponents seem to agree that agency policy should always be the cornerstone of decision-making.

Finally, there may be cost savings that accrue to final decision-making authority. In cases where ALJs have such authority, agencies and litigants do not have to expend time and money on a second-stage adjudication.

A. A Legislative Case Study in Imposing Final Decision-Making Authority: Georgia

On May 8, 2018, the governor of the state of Georgia signed House Bill 790 (H.B. 790) into law. The purpose of H.B. 790 was to implement various legal and systemic changes recommended by the state's Court Reform Council to streamline the state administrative hearing process and increase the public's perception of fairness in the judicial system. We detail the ways in which H.B. 790 has altered the landscape of administrative law within the state of Georgia, with a focus on the newly enhanced power of ALJs to issue final decisions in "contested cases." In an effort to facilitate a full understanding of the impact of the recently enacted legislation, the first section will

⁹¹ Based on interview with Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative Law Judge).

⁹² Based on interview with Ed Felter (Colorado Administrative Hearings Office, Senior ALJ).

describe the system of administrative hearings in place before H.B. 790 was enacted, while the second section will explore the changes to the system that the new law has imposed and their anticipated impact.

1. The Administrative Hearing System Before H.B. 790's Enactment

The Office of State Administrative Hearings (OSAH) was formed by the Georgia General Assembly in 1994 “as a new state agency.”⁹³ OSAH is situated within the state’s executive branch and is charged with “impartial administration of administrative hearings in accordance with the” Georgia Administrative Procedure Act.⁹⁴ By law, OSAH must remain independent of other state administrative agencies.⁹⁵ OSAH is headed by a chief ALJ, who is appointed by the governor for a renewable six-year term and is tasked with administering OSAH.⁹⁶ The chief ALJ’s duties include the promulgation of rules, regulations, and procedures necessary for OSAH to carry out its duties⁹⁷ and the appointment of all of OSAH ALJs.⁹⁸ As of 2017, OSAH employs thirteen full-time ALJs, not including the chief ALJ.⁹⁹

OSAH’s operations are predicated on the referral of contested cases from state administrative agencies. “Whenever a state agency authorized by law to determine contested cases¹⁰⁰ initiates or receives a request for a hearing in a contested case which is not presided over by the agency . . . ultimate decision maker, the hearing shall be

⁹³ Mark A. Dickerson, *The Georgia Office of State Administrative Hearings*, 19 J. NAT’L ASS’N ADMIN. L. JUDICIARY 121, 121 (1999).

⁹⁴ O.C.G.A. § 50-13-40(a) (2017).

⁹⁵ *Id.*

⁹⁶ *See id.* at (b)–(e).

⁹⁷ *Id.* at (c).

⁹⁸ *Id.* at (e).

⁹⁹ *Meet Us: Judges*, GEORGIA OFFICE OF STATE ADMINISTRATIVE HEARINGS, <https://osah.ga.gov/meetus-judges/>.

¹⁰⁰ The Georgia Administrative Procedure Act (Georgia APA) defines a contested case as “a proceeding, including, but not restricted to, rate making, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” O.G.C.A. § 50-13-2(2) (2017).

conducted by” OSAH.¹⁰¹ It is important to note that prior to the promulgation of H.B. 790, agencies could hold onto hearing requests indefinitely, without referral, because there was no mandated time by which agencies were required to refer a request to OSAH for hearing. Despite the lack of time constraints on agency referral prior to the enactment of H.B. 790, in 2016, upwards of 50,000 cases were referred to and resolved by OSAH,¹⁰² while in 2017, OSAH resolved more than 41,000 cases.¹⁰³

Prior to the enactment of H.B. 790, the general rule regarding ALJ resolution of contested cases indicated that any ALJ decision regarding such a case was to be treated merely as an “initial decision.”¹⁰⁴ Both before and after H.B. 790’s promulgation, any “initial decision” rendered by an ALJ is open to review within thirty days following its issuance, either upon the request of a party to the contested case or upon the relevant agency’s own initiative.¹⁰⁵ If agency review is pursued, any decision rendered by the reviewing agency becomes a final decision.¹⁰⁶

¹⁰¹ O.C.G.A. § 50-13-41(a)(1) (2017).

¹⁰² Survey of central panels conducted by the Louisiana Division of Administrative Law. This central panel agency issues on an annual basis demographic information on state-based central panels.

¹⁰³ STATE OF GEORGIA COURT REFORM COUNCIL, FINAL REPORT: COURT REFORM COUNCIL 8 (Nov. 20, 2017).

¹⁰⁴ O.C.G.A. § 50-13-41(d) (“Except as otherwise provided in this article, in all cases every decision of an administrative law judge shall be treated as an initial decision...”).

¹⁰⁵ See O.C.G.A. § 50-13-17(a) (2017) (“[I]n the absence of an application to the agency within 30 days from the date of notice of the initial decision for review, or an order by the agency within such time for review on its motion, the initial decision shall, without further proceedings become the decision of the agency.”). Note, when as agency reviews an ALJ initial decision, either upon the request of a party to the contested case or upon an agency’s own initiative, “the agency shall have all powers it would have in making the initial decision;” O.C.G.A. § 50-13-17(a) (2017); but must “give due regard to the [ALJ’s] opportunity to observe witnesses[such that, if] the reviewing agency rejects or modifies a proposed finding of fact or a proposed decision, it shall give reasons for doing so in writing in the form of findings of fact and conclusions of law.” O.C.G.A. § 50-13-41(d) (2017).

¹⁰⁶ See O.C.G.A. § 50-13-13(e)(1) (2017) (“A reviewing agency shall have a period of 30 days following the entry of the decision of the administrative law judge to reject or modify such decision.”); O.C.G.A. § 50-13-17(c) (2017) (“Each

Where a party to the contested case seeks to challenge this final decision, they are entitled to judicial review.¹⁰⁷ In contrast, if an ALJ's initial decision is not reviewed by an agency within thirty days of its rendition, it becomes a final decision.¹⁰⁸ Both the Georgia case law and Georgia APA indicate that a party may not bypass agency review of an "initial decision" by seeking judicial review within the thirty-day period following an ALJ's issuance of an "initial decision."¹⁰⁹ To do so would violate the principle of exhaustion, which is memorialized in the Georgia APA and asserts that, generally, a party may not seek judicial review of agency action unless they have exhausted all administrative remedies.¹¹⁰ Hence, in many respects, the statutory default rule in place prior to H.B. 790 left ALJs without meaningful decision-making power because a party was required to take advantage of the two-tier system of review before they could seek outside judicial review.

However, the Georgia statutes provided one important exception to this pre-H.B. 790 default rule: "[a]ny agency may provide by rule that proposed decisions in all or in specified classes of cases before

agency shall render a final decision in contested cases within 30 days after" an ALJ has rendered its initial decision).

¹⁰⁷ O.C.G.A. § 50-13-19(a) (2017). Note, if judicial review of the agency's final decision is sought, the reviewing court is precluded from substituting its own "judgment for that of the agency as to the weight of the evidence on questions of fact." O.C.G.A. § 50-13-19(h) (2017).

¹⁰⁸ See O.C.G.A. § 50-13-41(e)(1) (2017) ("If a reviewing agency fails to reject or modify the decision of the administrative law judge within such 30 day period, then the decision of the administrative law judge shall stand affirmed by the reviewing agency by operation of law.").

¹⁰⁹ See *Department of Pub. Safety v. MacLafferty*, 195 S.E.2d 748, 750 (Ga. 1973) ("The Department contends that agency review [of an ALJ's initial decision] provided in the Georgia Administrative Procedure Act is a necessary step in the exhaustion of administrative remedies required by the act as a prerequisite to judicial review...We agree.").

¹¹⁰ See O.C.G.A. § 50-13-19 (2017) ("Any person *who has exhausted all administrative remedies available within the agency* and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter.") (emphasis added); *Carnes v. Crawford*, 272 S.E.2d 690, 691 (Ga. 1980) ("[U]nder the APA exhaustion of administrative remedies available within the agency is necessary for judicial review of a final decision in a contested case, and an aggrieved person who fails to seek review by the agency of an initial decision of a hearing officer has failed to exhaust administrative remedies.").

the Office of State Administrative Hearings will become final without further agency action and without expiration of the 30-day review period otherwise provided for in this subsection.”¹¹¹ Hence, agencies could voluntarily opt to delegate final decision-making authority to ALJs reviewing contested cases, thereby allowing parties to the case to circumvent the generally required second tier of agency review by applying directly for judicial review of the ALJ’s decision. As of 2017, multiple agencies with significant caseloads had availed themselves of this exception, opting to grant ALJs final decision-making authority.¹¹²

Among these agencies are the Department of Driver Services and the Department of Public Safety, which referred almost 13,000 cases to OSAH in the 2017 fiscal year, and the Department of Human Services and Office of Child Support Services, which referred almost 9,000 cases to OSAH in the 2017 fiscal year.¹¹³ Hence, despite the default rule, ALJs exercised valid final decision-making authority in 65% of all cases referred to OSAH in the 2017 fiscal year—almost 27,000 contested cases.¹¹⁴

Another important hindrance to the power and efficacy of ALJs before the enactment of H.B. 790 was their reliance on courts to sanction parties to the contested case and enforce subpoenas they had issued. Though ALJs were statutorily empowered to “sign and issue subpoenas,”¹¹⁵ if the party subpoenaed failed to comply the issuing ALJ could not simply enforce the subpoena but was forced to rely on a superior court to do so on its behalf.¹¹⁶ A party to the contested case could seek to enforce the subpoena as well but was also obligated to seek enforcement through the superior court.¹¹⁷ Additionally, where a party, or their agent, otherwise failed to comply with the ALJ’s requests or the general hearing process, an ALJ did not have the

¹¹¹ O.C.G.A. § 50-13-41(e)(3) (2017).

¹¹² STATE OF GEORGIA COURT REFORM COUNCIL, *supra* note 103, at 7–9.

¹¹³ *Id.* at 7.

¹¹⁴ *Id.* at 8–9.

¹¹⁵ See O.C.G.A. § 50-13-41(a)(2) (2017) (“An administrative law judge shall have the power to do all things specified in paragraph (6) of subsection (a) of Code Section 50-13-13.”); O.C.G.A. § 50-13-13(a)(6) (2017) (“[T]he hearing officer . . . shall have authority to do the following: . . . sign and issue subpoenas”).

¹¹⁶ See O.C.G.A. § 50-13-13(b) (2017).

¹¹⁷ See O.C.G.A. § 50-13-13(a)(7) (2017).

authority to find the party in contempt and take appropriate action thereafter but, instead, was statutorily forced to rely upon the court to make such a finding.¹¹⁸

“In proceedings before . . . the hearing officer . . . if any party . . . disobeys or resists any lawful order of process; or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document; . . . or, upon appearing, refuses to take the oath or affirmation as a witness; or, taking the oath or affirmation, refuses to testify . . . [the] hearing officer . . . may certify the facts to the superior court of the county where the offense is committed for appropriate action, including a finding of contempt.”¹¹⁹

Thus, in many respects, ALJs were reliant on the courts to enforce order in OSAH hearings, a framework of authority that results in significant inefficiency, requiring reliance on a superior court and delaying the overall hearing process.¹²⁰

On March 30, 2017, the Governor of the state of Georgia established the Court Reform Council (Council) by executive order for the purpose of reviewing “current practices and procedures within the judicial court system and the administrative law hearing system and mak[ing] recommendations to improve efficiencies and achieve best practices for the administration of justice.”¹²¹ Key stakeholders were appointed to the Council, including the state’s attorney general as well as the chief ALJ, the latter of which had long advocated for ALJ final decision-making authority and other reforms to the APA and OSAH hearing process that would improve efficiency.¹²²

In November 2017, the Council issued its Final Report, which contained several recommendations for changes to the administrative

¹¹⁸ See O.C.G.A. § 50-13-13(b) (2017).

¹¹⁹ *Id.*

¹²⁰ STATE OF GEORGIA COURT REFORM COUNCIL, *supra* note 103, at 11.

¹²¹ Ga. Exec Order No. 03.30.17.01 (Mar. 30, 2017), https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/03.30.17.01.pdf.

¹²² See *id.*

hearing process.¹²³ H.B. 790 was greatly informed by this Final Report and enacts the recommendations made by the Council's Administrative Procedure Act Subcommittee.¹²⁴ Discussing H.B. 790 in a phone interview with Michael Malihi, the current chief ALJ, he disclosed that opposition to the Bill by government players and the public was virtually nonexistent.¹²⁵ In fact, the Bill enjoyed wide support across party lines—in the House, the Bill was unopposed, while in the Senate only one party voted against passage.¹²⁶ Mr. Malihi attributed this bipartisan support to the fact that the Bill's proposed changes were viewed as a matter of fairness and justice, and therefore appealed to persons from across the political spectrum.

2. The Administrative Hearing System After H.B. 790's Enactment

¹²³ STATE OF GEORGIA COURT REFORM COUNCIL, *supra* note 103.

¹²⁴ See Ga. H.B. 790, Synopsis (2018).

¹²⁵ In the conversation, Mr. Malihi emphasized the importance of the inclusion of key stakeholders in the reform effort. He indicated that he had long discussed administrative reform within Georgia with Governor Deal, one of the many factors that catalyzed the Governor's creation of the Council. Mr. Malihi stressed that a large portion of the reform's success and wide acceptance was due to the Governor's choice to appoint powerful state players, such as the attorney general, as well as key stakeholders, such as house and senate leaders, to membership in the Council. See *Court Reform Council – Members*, OFFICE OF ATTORNEY GENERAL CHRIS CARR, <https://law.georgia.gov/court-reform-council-members> (last visited June 20, 2018) (listing the final membership of the Court Reform Council); Ga. Exec Order No. 03.30.17.01 (Mar. 30, 2017), https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/03.30.17.01.pdf containing the original list of members appointed to the Court Reform Council). Ultimately, this strategy allowed crucial actors to deliberate about the system's faults and come to a learned remedy, influenced by the needs of Georgia and the reform experiences of other states. Moreover, the inclusion of powerful actors gave the reform effort credibility while simultaneously assuring that such actors were involved in the recommendation process, thereby cementing their incentive to implement and support implementation of their own recommendations.

¹²⁶ 2017-2018 Regular Session – HB 790, GEORGIA GENERAL ASSEMBLY LEGISLATION, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/790> (last visited June 18, 2018). In the same phone conversation with Mr. Malihi, he disclosed that, to his knowledge, the single senate vote against the bill was attributable to an error on the part of the voter, who was confused about the voting process.

The impact of H.B. 790 has been significant on the administrative hearing process and the power of ALJs. The changes engendered by the Bill can be grouped into three main categories: increased final decision-making authority of ALJs; introduction of a concrete time by which agencies must refer hearing requests to OSAH; and increased ALJ enforcement powers. Each of these changes is explored below.

i. The Introduction of ALJ Default Final Decision-Making Authority

Chief among the changes memorialized in H.B. 790 is its expansion of ALJ final decision-making authority. Though, before the bill's passage, a majority of cases referred to OSAH were in fact decided by ALJs with final decision-making authority, this authority did not exist by virtue of the ALJs' own power but by the power agencies vested in ALJs through voluntarily electing to authorize ALJs to make such binding decisions. H.B. 790, however, functions to vest ALJs with final decision-making authority by default such that only in exceptional circumstances will the decisions of ALJs be considered merely "initial decisions."¹²⁷ Hence, the new default rule would generally eliminate the two-tier system of review because an ALJ's decision would be final, automatically entitling the parties to seek judicial review upon the decision's rendition.¹²⁸

The exceptions to this new default rule are limited and fall directly in line with the recommendations of the Council's Administrative Procedure Act Subcommittee. These recommendations suggest that an exception should "be made for cases referred by agencies that are (i) responsible for licensing and supervising professionals, and which are comprised of members selected by the governor for their expertise in their respective fields; and (ii) [agencies that] were constitutionally created or are headed by constitutional officers."¹²⁹ Thus, in the case that a referring agency is

¹²⁷ Ga. H.B. 790, Sec. 3(c) (2018) ("Except as provided in subsection (d) of this Code section, every decision of an administrative law judge shall be a final decision as set forth in subsection (b) of Code Section 50-13-17.").

¹²⁸ *See id.*

¹²⁹ STATE OF GEORGIA COURT REFORM COUNCIL, *supra* note 103, at 6. In an interview with Mr. Malihi, he indicated that the exceptions were in part borne of constitutional concerns and in part borne of pragmatism. The constitutional

‘a constitutional board of commission; an elected constitutional officer in the executive branch of this state; or a board, bureau, commission, or other agency of the executive branch of . . . [the state of Georgia] created for the purpose of licensing or otherwise regulating or controlling any profession, business, or trade . . . [and the] members thereof are appointed by the Governor it is termed a “reviewing agency.”’¹³⁰

Any decision an ALJ renders regarding a contested case referred to OSAH by a reviewing agency is merely an initial decision.¹³¹ Hence, in such a situation, the two-tier decision-making process remains, such that the agency may review the ALJ’s initial decision and render a final decision thereon.¹³² Only after this final decision is rendered, or the ALJ’s initial decision has been unchallenged for thirty days following its rendition, will a party to the contested case be deemed to have exhausted all administrative remedies such that they become entitled to judicial review.¹³³ Note, however, that the voluntary exception for agency delegation of final decision-making authority still remains.¹³⁴ Hence, even though an agency may fall under the umbrella of “reviewing agency,” it can nonetheless

concerns arose regarding the grant of final decision-making authority to ALJs in cases referred by agencies that were constitutionally created or headed by constitutional officers.

The pragmatic concerns arose regarding those agencies charged with licensing and supervising professionals, of which there were too many within the state to simply accord ALJs final decision-making authority without significant complication and possible agency opposition.

¹³⁰ Ga. H.B. 790, Sec. 3(d)(1) (2018). At the time of the Council’s Final Report, it was estimated that this exception would encompass the “Professional Licensing Boards Division; [the] Professional Standards Commission; [the] Real Estate Appraisers and Real Estate Commission; [the] Department of Insurance; [the] State Personnel Board; [the] Secretary of State, Elections Division; [the] Secretary of State, Commissioner or Securities; [the] Peace Officer Standards and Training Council; [the] Composite Medical Board; [the] Board of Medical Examiners; [and the] Office of the Governor.” STATE OF GEORGIA COURT REFORM COUNCIL, *supra* note 103, at 6.

¹³¹ Ga. H.B. 790, Sec. 3(d)(2) (2018) (“[I]n all contested cases referred by a reviewing agency, every decision of an administrative law judge shall be treated as an initial decision”).

¹³² See Ga. H.B. 790, Sec. 3(d)(1),(2) (2018).

¹³³ See O.C.G.A. § 50-13-19 (2017).

¹³⁴ Ga. H.B. 790, Sec. 3(d)(5) (2018).

voluntarily choose to delegate final decision-making authority to ALJs with regards to some or all of the cases that it refers to OSAH.

This single reform alone, even allowing for the exceptions, will have a tremendous impact on the efficiency of the administrative system and the power of ALJs. In its final report, the Council estimated that this reform would increase the percentage of ALJ final decision-making in contested cases from 65% to 99.6% in a single fiscal year.¹³⁵ It is anticipated that H.B. 790's effective consolidation of the two-tier review system into a single tier will greatly increase the efficiency of the administrative hearing process in Georgia.¹³⁶ Not only does the new single-tier system have the potential to result in faster proceedings—the Council estimates that the total duration of the proceedings will be reduced by some thirty to sixty days—but this increase in judicial economy will ease the burden on taxpayers and “[r]educe the overall litigation costs for the parties.”¹³⁷ Moreover, the single-tier system will increase the public's perception of justice in the administrative hearing process as a single tier of review lends a stronger appearance of impartiality and finality to the process.¹³⁸

However, in its Final Report, the Council indicated that a possible disadvantage to the new system would be the reduction in “agencies' authority over decisions directly affecting them.”¹³⁹ This is of particular concern where a contested case requires that a decision maker have some level of expertise in the field at issue.¹⁴⁰ Whereas “[a]gencies are staffed with experts in their respective fields” this is not the case with OSAH and may give rise to problems when ALJ resolution of a complex issue requires heightened knowledge.¹⁴¹

ii. The Introduction of Time Constraints on Agency Referral of Hearing Requests

¹³⁵ STATE OF GEORGIA COURT REFORM COUNCIL, *supra* note 103, at 8.

¹³⁶ *See id.* at 7.

¹³⁷ *Id.*

¹³⁸ *Id.* (“Finality strengthens the appearance of impartiality, as an agency can no longer overturn decisions issued by an impartial body.”)

¹³⁹ *Id.* at 10.

¹⁴⁰ *See* STATE OF GEORGIA COURT REFORM COUNCIL, *supra* note 103, at 10.

¹⁴¹ *Id.*

Another means by which H.B. 790 has increased efficiency is its imposition of time constraints on agency referral of hearing requests to OSAH. As mentioned above, prior to H.B. 790 there was no time by which an agency was required to refer an administrative hearing request to OSAH.¹⁴² This had the potential to work great hardship on parties seeking a hearing because, absent agency referral to OSAH, a party could not directly petition OSAH for such a hearing. Indeed, this resulted in significant time delays in resolution of contested cases and even intentional agency failure to refer that resulted in hearing requests being held indefinitely without any resolution of the underlying contested case. As such, prior to H.B. 790's enactment, parties seeking an administrative hearing were at the whim of agencies with regards to when their cases would be heard and even *if* their cases would be heard at all.

The Council recognized this as a significant fault in the Georgia administrative hearing system and recommended that the agencies be bound to refer hearing requests to OSAH by a concrete time.¹⁴³ H.B. 790 implemented this recommendation such that agencies that have received “a request for a hearing in a contested case . . . [must] forward such a request for a hearing to the Office of State Administrative Hearings within a reasonable time not to exceed 30 days after receipt of such request.”¹⁴⁴ Perhaps even more impactful than this referral time limitation is the solution the legislation provides when an agency has not complied with the newly established referral period. “If an agency fails [to refer a hearing to OSAH in accordance with the 30-day limitation] . . . the party requesting the hearing may petition the Office of State Administrative Hearings for an order permitting such party to file a request for a hearing *directly with* the Office of State Administrative Hearings.”¹⁴⁵ Hence, this addition to the law is quite impactful, not only requiring agency action by a certain point but also providing persons with a simple solution that fulfills their needs if an agency fails to comply.

¹⁴² *Id.* at 13.

¹⁴³ *Id.*

¹⁴⁴ Ga. H.B. 790, Sec. 3(a)(1) (2018).

¹⁴⁵ *Id.* (emphasis added).

As with the case of the augmentation of ALJ final decision-making authority, the imposition of an OSAH referral deadline and an attendant right to petition OSAH directly is anticipated to have significant positive effects on the administrative hearing system. The change is likely to increase the efficiency of the system as it will “[reduce] any lag time between a party’s request for a hearing and OSAH’s docketing of the case.”¹⁴⁶ Moreover, the new time constraint leaves parties seeking to avail themselves of the administrative infrastructure with greater “certainty as to when their cases will be received and docketed by OSAH for hearing.”¹⁴⁷

In its Final Report, the Council indicated that one possible disadvantage of this new time constraint is that it may negatively impact an agency’s ability to resolve the request outside of the hearing process.¹⁴⁸ Before referring a hearing request to OSAH, agencies often attempt to settle a case with the parties involved.¹⁴⁹ Where an agency proceeds this way and has reached a potential settlement, it must wait for internal boards or commissions to approve the recommended settlement.¹⁵⁰ Often, the meetings of these internal bodies take place months apart, a cause for significant delay in the resolution process.¹⁵¹ Thus, a statutory mandate that agencies refer hearing requests to OSAH within thirty days of receipt clearly does not comport with the timeline for agency settlement outside of hearing.

However, H.B. 790’s enactment is not likely to significantly impact this alternative resolution method because, where a requesting party has gained the statutory right to petition OSAH directly, they need not exercise this right immediately.¹⁵² If the agency

¹⁴⁶ STATE OF GEORGIA COURT REFORM COUNCIL, *supra* note 103, at 13.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See O.C.G.A. § 50-13-41(b) (2017) (“Nothing in this article shall affect, alter, or change the ability of the parties to reach informal disposition of a contested case in accordance with paragraph (4) of subsection (a) of Code Section 50-13-13.”); O.C.G.A. § 50-13-13(a)(4) (“Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default”).

communicates with the party and is transparent about the timeline for settlement and settlement approval, there is a high likelihood that requesting parties will refrain from petitioning OSAH in favor of awaiting the resolution of a settlement. Where a party has so refrained but is ultimately unsatisfied with the settlement procedure or resolution, they are free to petition OSAH at any point during the process or thereafter if thirty days has lapsed since their initial hearing request.

iii. The Augmentation of ALJ Enforcement Authority

Another important impact of H.B. 790 is its augmentation of ALJ enforcement authority where participants in a hearing fail to cooperate. With the enactment of this legislation, ALJs are now able to enforce subpoenas they have personally issued, without the need to first seek the assistance of a superior court for enforcement.¹⁵³ Moreover, ALJs are now statutorily empowered to impose civil penalties . . . [for a person's failure] to obey any lawful process or order of the administrative law judge or any rule or regulation promulgated under [the Georgia APA] . . . for any indecorous or improper conduct committed in the presence of the administrative law judge, or for submitting pleadings or papers for an improper purpose or containing frivolous arguments that have no evidentiary support.¹⁵⁴

Where an ALJ has imposed such civil penalties, they may apply to “the superior court of the county in which the violation is committed . . . to enforce by proper proceedings any lawful process or order of civil penalties of the administrative law judge.”¹⁵⁵

As is the case with the other changes engendered by the passage of H.B. 790, ALJs' augmented enforcement authority is anticipated to improve the efficiency of the administrative hearings process. “Allowing for imposition of sanctions lessens the need for parties to

¹⁵³ See Ga. H.B. 790, Sec. 3(b) (2018) (“Subpoenas shall be enforced pursuant to subsection (a) of this code section); *id.* at Sec. 3(a) (“An administrative law judge shall have the power to impose civil penalties pursuant to paragraph (3) of this subsection for failing to obey any lawful process or order of the administrative law judge or any rule or regulation promulgated under this article”).

¹⁵⁴ See Ga. H.B. 790, Sec. 3(a)(2) (2018).

¹⁵⁵ *Id.*

seek action in superior courts [for enforcement] while their case is ongoing.”¹⁵⁶ Moreover, this increased power of ALJs is predicted to discourage parties from seeking subpoenas for persons they know will not appear or submitting improper pleadings, both of which are calculated to delay the process, effectively functioning as unauthorized continuances.¹⁵⁷ Furthermore, it is likely this augmented ALJ power will contribute to the perception that ALJs have the jurisdiction to rule on contested cases and maintain order in their hearings—further indication that ALJs are fair and impartial arbiters of the law rather than agency rubberstamps or mere hearing officers that hold no sway.

3. Conclusion

H.B. 790 has greatly impacted the landscape of the administrative hearing process in the state of Georgia. The bill was a response to the Court Reform Council’s Final Report—an effort to implement the recommendations therein, themselves a product of learned observation as well as collaboration and negotiation of key stakeholders within the state. The recently enacted legislation’s introduction of default ALJ final decision-making, time constraints on agency referral of hearing requests, and augmented ALJ enforcement authority is predicted by proponents to positively impact the state’s administrative hearing process in two main ways. First, the administrative hearing process is likely to become much more efficient as the former two-tier contested case review process has largely been disposed of, and ALJs no longer need to rely on superior courts to issue civil penalties for non-cooperation by persons in anticipation of and during hearings. Second, these changes are likely to contribute to the perception that ALJs and the larger OSAH hearing process are just and impartial, as the decisions of ALJs are, generally, no longer subject to agency review, and ALJs are now empowered to issue civil penalties—both an indication that ALJs are more than simply agency rubber stamps or mere hearing officers.

¹⁵⁶ STATE OF GEORGIA COURT REFORM COUNCIL, *supra* note 103, at 11.

¹⁵⁷ *See id.*

B. Addressing Agency Concerns with the Central Panel System

The vast majority of central panel systems have had to address agency concerns relating to the creation or expansion of a central panel system. The primary agency concerns were (a) loss of control of the process and (b) loss of subject matter expertise.¹⁵⁸ The Michigan Administrative Hearing System (MAHS) overcame the agency concern of loss of control through the creation of an MOU setting forth the responsibilities of the referring agency and the central panel, including how a hearing request would be processed, approximately how long the process would take, etc.¹⁵⁹ Other central panel systems highlighted for the agencies the benefits of:

- (a) case backlog removal;
- (b) increased efficiency in process and quicker adjudication of cases; and
- (c) cost savings due to no longer needing a hearing support staff, which was persuasive¹⁶⁰ Many central panel systems also agreed to hire agency ALJs.¹⁶¹

¹⁵⁸ Based on interviews with Chris Seppanen (Michigan Administrative Hearing System, Executive Director), John Allen (Cook County Department of Administrative Hearings, Former Director), Georgia S. Brady (Maryland Office of Administrative Hearings, Administrative law Judge, Deputy Director, Quality Assurance), Fidel F. Del Valle (New York City Office of Administrative Trials and Hearings, Chief Administrative law Judge), J. Richard Collier (Office of Tennessee Secretary of State, Chief Administrative Judge, Administrative Procedures Division), Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative law Judge), Ed Felter (Colorado Administrative Hearings Office, Senior ALJ), Allen C. Hoberg (North Dakota Office of Administrative Hearings, Former Director) and Cynthia Eyre (Louisiana Division of Administrative LALJ, former General Counsel).

¹⁵⁹ Based on interview with Chris Seppanen (Michigan Administrative Hearing System, Executive Director).

¹⁶⁰ Based on interviews with John Allen (Cook County Department of Administrative Hearings, Former Director), Cynthia Eyre (Louisiana Division of Administrative LALJ, former General Counsel).

¹⁶¹ Based on interviews with John Allen (Cook County Department of Administrative Hearings, Former Director), Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative Law Judge).

MAHS addressed the agencies and special interest groups' concerns of lack of expertise in technical, complex, or specialized subject matters through further utilizing the MOU approach. More specifically, pursuant to the MOU, MAHS and the agency agreed that they would jointly agree on the ALJs assigned to those specialized cases.¹⁶² Other central panel systems stressed to the agencies the caliber of highly qualified individuals hired for the ALJ position.¹⁶³ Some agencies ultimately opted to exempt from the central panel system a certain subset of their hearings on highly technical or specialized matters.¹⁶⁴ Other agencies requested only proposed decisions for those specialized cases, thereby retaining final decision-making authority.¹⁶⁵

However, with time, the agencies become comfortable with the compromises and utilization of the central panels.¹⁶⁶ No state that has adopted a central panel has returned to its previous practice. For a further discussion about addressing agency concerns with the central panel system, please see the results of the survey conducted with central panel directors beginning on page 67 of this report.

XII. GROWTH IN THE CENTRAL PANEL MOVEMENT

¹⁶² Based on interview with Chris Seppanen (Michigan Administrative Hearing System, Executive Director).

¹⁶³ Based on interview with John Allen (Cook County Department of Administrative Hearings, Former Director).

¹⁶⁴ Based on interview with Georgia S. Brady (Maryland Office of Administrative Hearings, Administrative law Judge, Deputy Director, Quality Assurance).

¹⁶⁵ *Id.*

¹⁶⁶ Based on interviews with Chris Seppanen (Michigan Administrative Hearing System, Executive Director), John Allen (Cook County Department of Administrative Hearings, Former Director), Georgia S. Brady (Maryland Office of Administrative Hearings, Administrative law Judge, Deputy Director, Quality Assurance), Fidel F. Del Valle (New York City Office of Administrative Trials and Hearings, Chief Administrative law Judge), J. Richard Collier (Office of Tennessee Secretary of State, Chief Administrative Judge, Administrative Procedures Division), Julian Mann (North Carolina Office of Administrative Hearings, Chief Administrative law Judge), Ed Felter (Colorado Administrative Hearings Office, Senior ALJ), Allen C. Hoberg (North Dakota Office of Administrative Hearings, Former Director) and Cynthia Eyre (Louisiana Division of Administrative LALJ, former General Counsel).

Since 1983, the central panel movement has grown from seven state central panels to more than 30 state and municipal panels. Some are exceptionally large, while some remain small. But the trend leans toward expansion in terms of the number of central panels, their jurisdiction, and final decision authority being granted to central panel ALJs. This growth can be attributed to a variety of reasons, but the most commonly cited include the recognition that central panels are free to hire experienced lawyers, provide them with substantial initial and ongoing training, and provide impartial and constructive evaluation of judicial performance as well as the perception that the central panel can provide independent decision-making at lower cost.

Our interviews with central panel directors, ALJs, and administrative agency representatives lead to the following conclusions.

Proponents of the central panel approach argue that the consumers of administrative adjudication appear to have accepted central panel ALJs as impartial arbiters. The independence of the central panels has led to improvements in the quality of hearings and decisions as well as the consistency and uniformity of the proceedings. The management and training of ALJs are perceived to be in the hands of experienced officials. While the increase in the number of new central panels has slowed since 2000, central panel directors noted in our interviews that the number of agencies using the services of the central panel has increased.

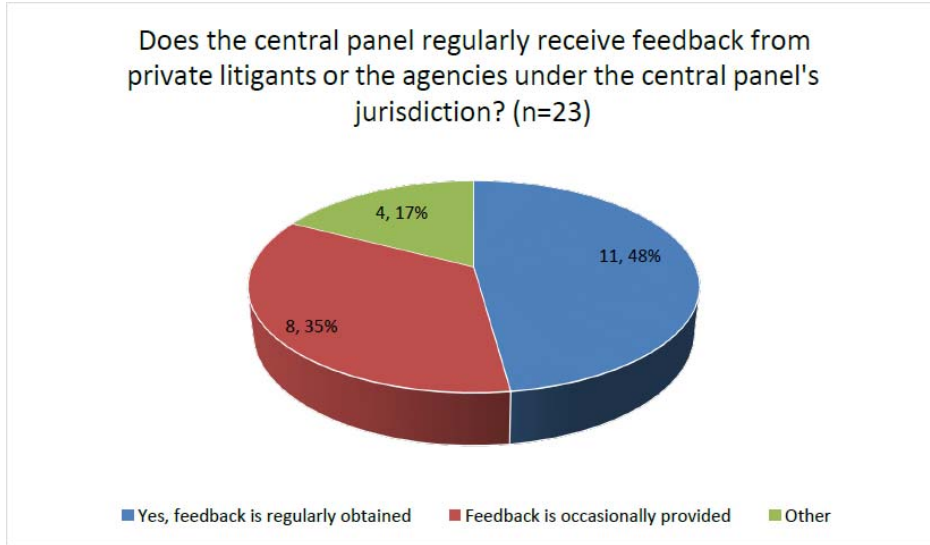
Central panel directors also note that since 2000, they have seen within their central panel agencies the streamlining and improved effectiveness of data management and technology. This includes electronic submission, case management, videoconferencing to conduct and record hearings, establishing and maintaining a database of hearing decisions, and maintaining transparency through up-to-date websites. Central panels have been responsible for producing codes of ethics for ALJs, uniform rules of procedure, and the enhanced use of alternative dispute resolution procedures.

XIII. SURVEY RESULTS: A DESCRIPTION OF THE CENTRAL PANEL PHENOMENON

We conducted a survey of central panel directors (CPDs) nationwide and received responses from twenty-five states. The

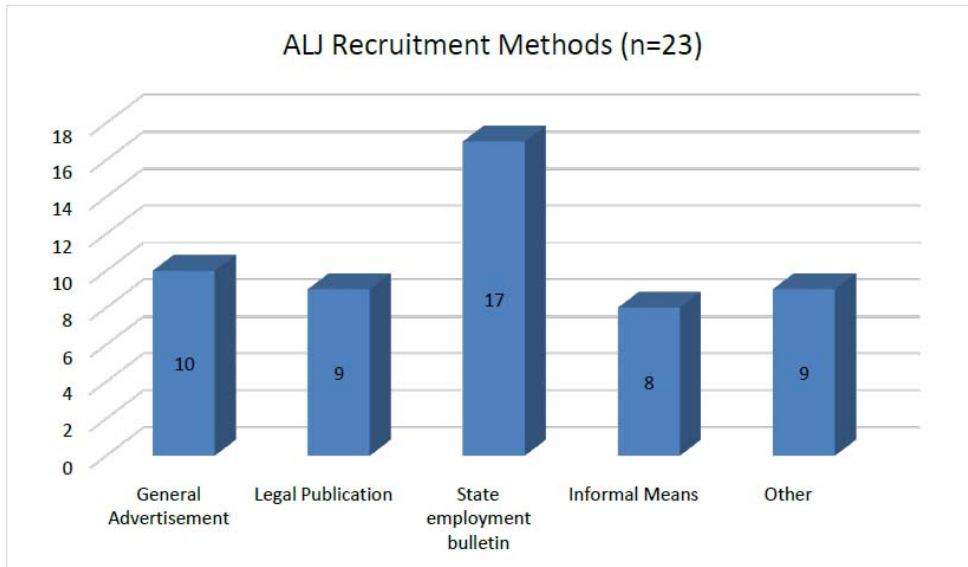
majority of the questions were answered by twenty-three central panel directors. The data below summarize the survey results.

Fairness and Due Process



Nearly half (11/23) of the central panel directors (CPDs) surveyed said they regularly obtain feedback, but 52% (12/23) said feedback is only provided occasionally or not at all. Directors in several states that do request feedback noted that response rates are low. In North Carolina the CPD has specifically charged the Deputy Director with improving the return rate.

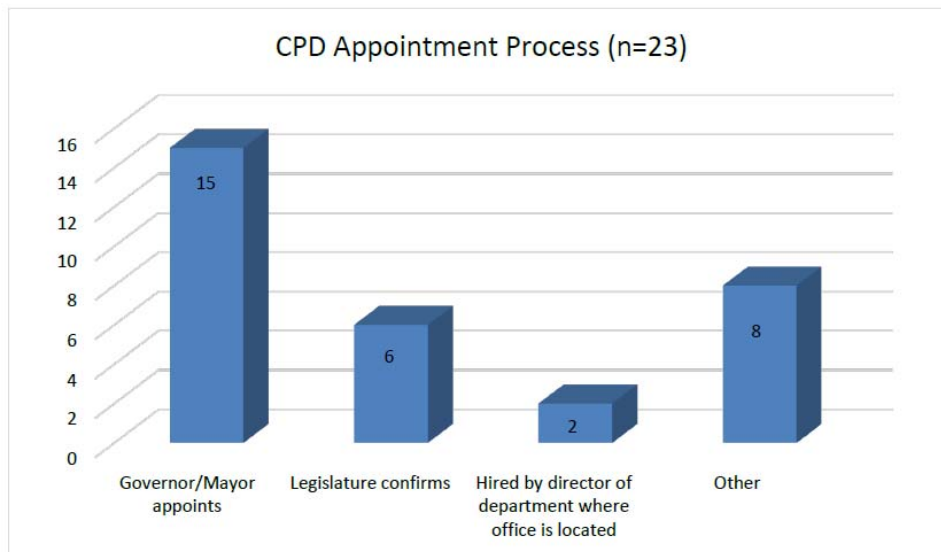
Hiring, Training, and Supervision



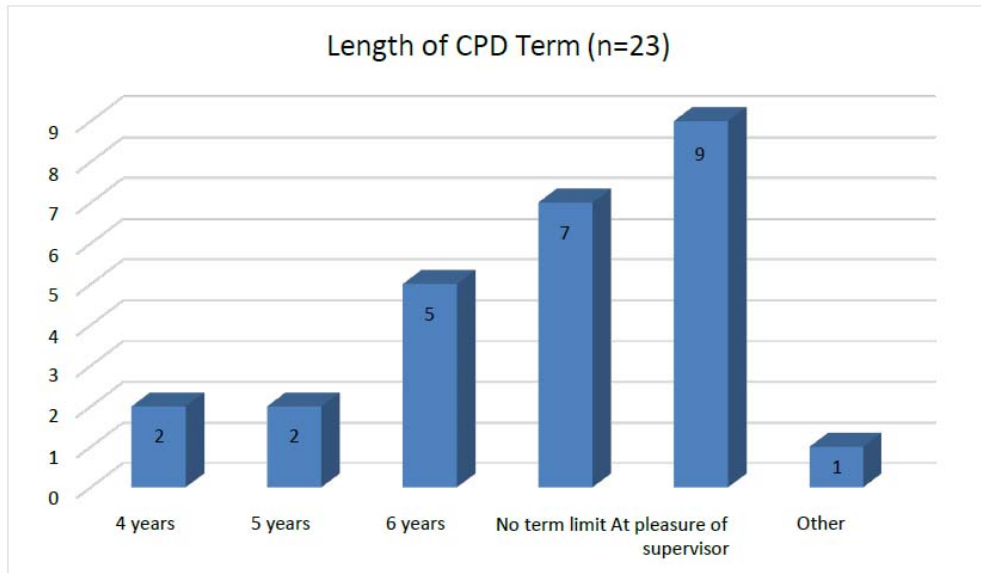
Other recruitment sources cited included the state bar association website and agency or state employment websites.



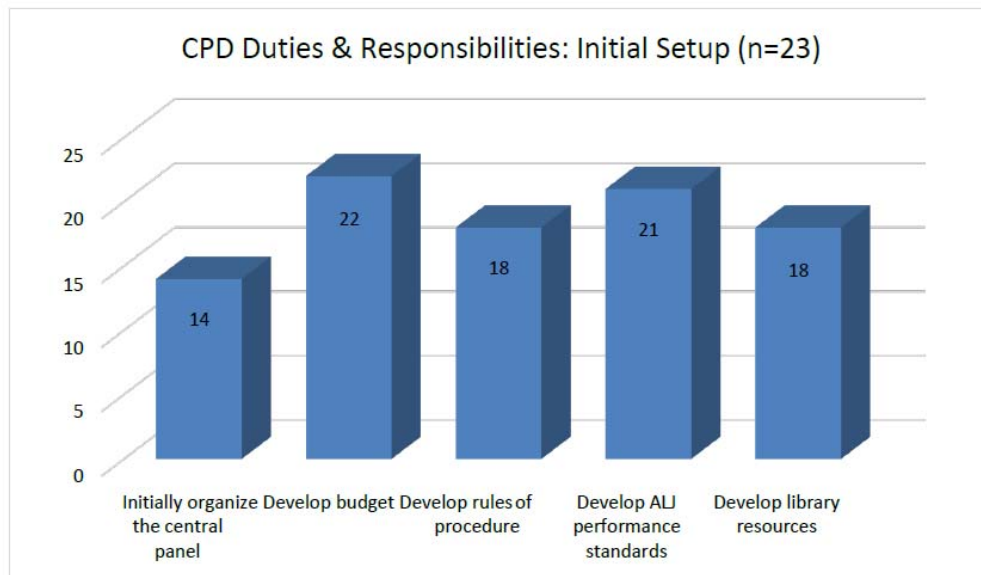
Many states have few specific requirements beyond a license to practice law, though nearly half (10/23) specified that CPDs are required to have substantial or extensive experience. Most (8/10) of the states with experience requirements demand five or more years of practice. A few states define specific areas of required experience including administrative law and representing clients in both administrative and judicial proceedings. Other requirements worth noting include vetting by the governor’s office and an absence of financial conflicts of interest.

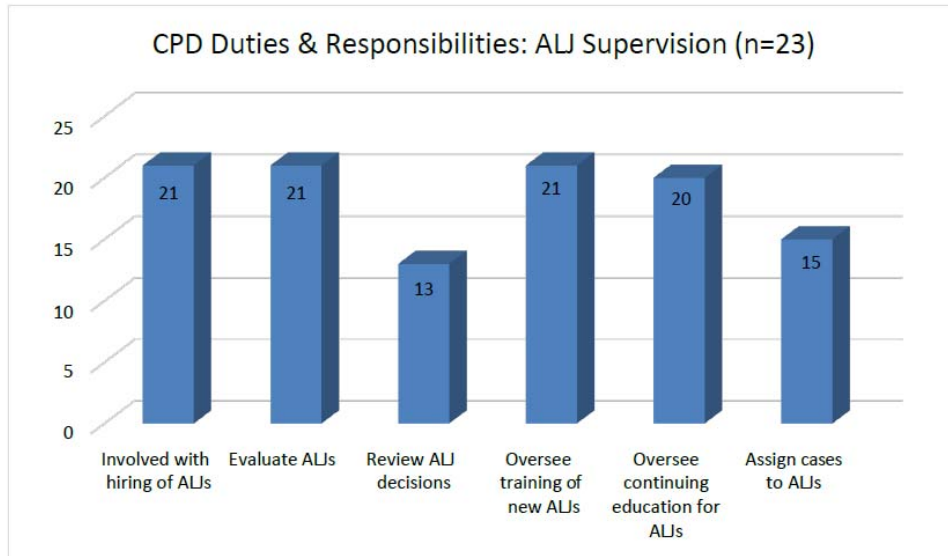


In nearly 2/3 (65%) of states, CPDs are appointed by the governor (or mayor, in municipalities). Several states (6/23) involve cabinet members in the selection and/or appointment process. In one state, a judicial selection panel makes a recommendation to the governor, while in another a vote is taken by the administrative law judges (ALJs).

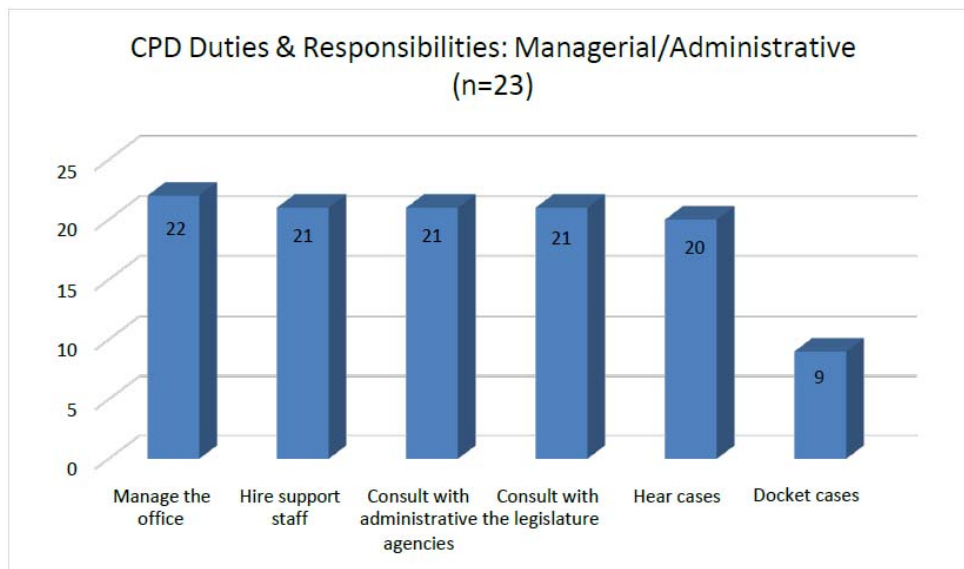


CPDs in 61% (14/23) of states have no term limits and/or serve at the pleasure of their superior, while 39% (9/23) of states specify term limits with lengths of four to six years.



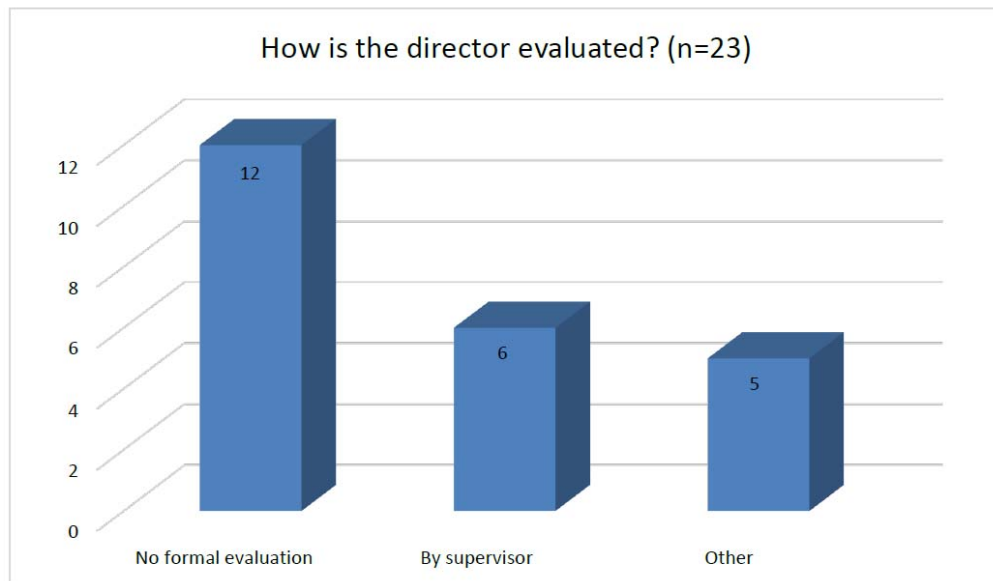


A unique approach to CPD review of ALJ decisions is conducted in Alaska, where the CPD (Chief ALJ) and all the more senior ALJs participate in a peer review process; however, there is no top-down control of decisions and no right of appeal to the Chief ALJ.



Other managerial/administrative duties include:

- hiring judges,
- general administration of the court operations,
- investigation allegations of misconduct and ethics of ALJs and hearing officers,
- overseeing management of the Rules Division or appointing the Codifier of Rules for the State,
- overseeing management of the Civil Rights Division, which is charged with investigation of claims of discrimination by state employees,
- serving as a member of the Governor's Cabinet, and
- presiding over a limited docket of cases.



No formal evaluation process for CPDs exists in more than half (12/23) of the states, but evaluation procedures that are in practice include:

- yearly performance plan;
- quarterly performance measures and annual details review by the governor's office

- number of cases heard, appeal rate of decisions, and customer satisfaction rating;
- constant evaluation by employees and agencies in their feedback to the governor and umbrella organization's director
- oversight committee with four members of the legislature, representative from governor's office, and three attorneys; and
- legislators review, question, and modify the central panel's budget and compel supporting data.



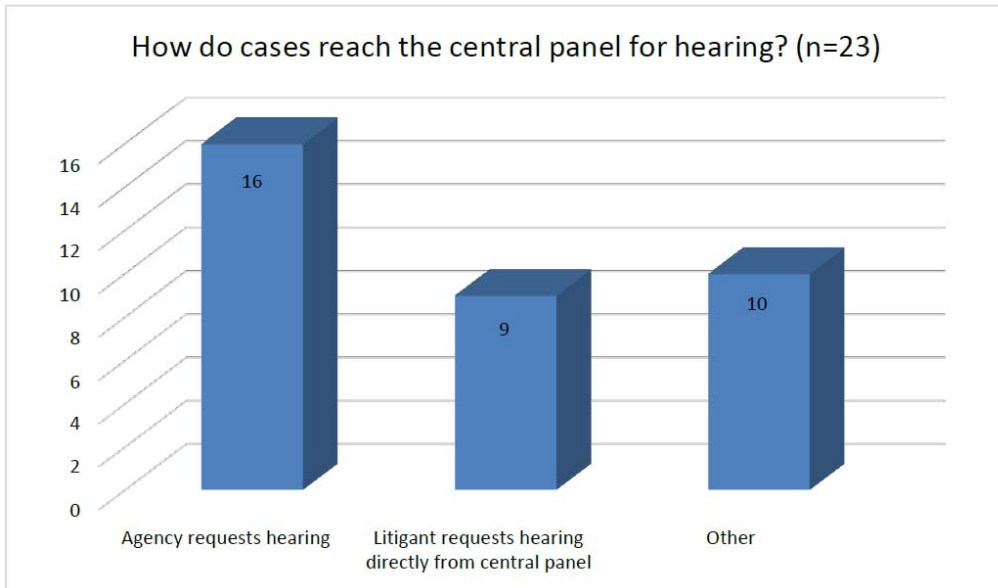
Procedures for removing directors vary, but 8/23 states remove directors for cause, 8/23 states remove directors at the pleasure of their superior, and in 5/23 states CPDs are employed at will. Other removal processes include:

- by at least a 3-1 vote of the cabinet; the governor must be on the side voting to remove;
- when term ends. Term is not concurrent with governor's term and not at will;
- upon appointment of a new director;

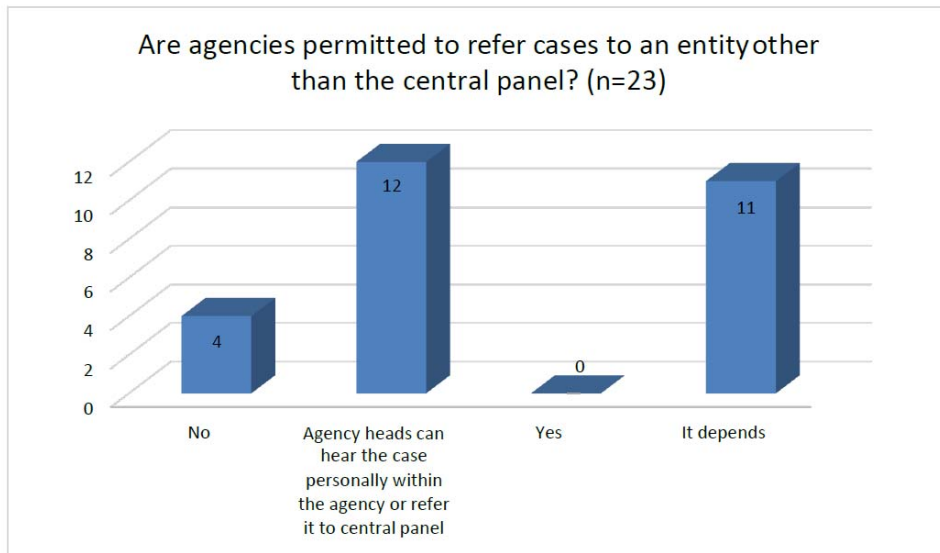
- with public employee protections, removal would be for cause (performance), promotion, or transfer with no loss of pay or classification; and
- there is no direct authority for the removal of the director.

Organizational Model

Mandatory v. voluntary use of ALJs



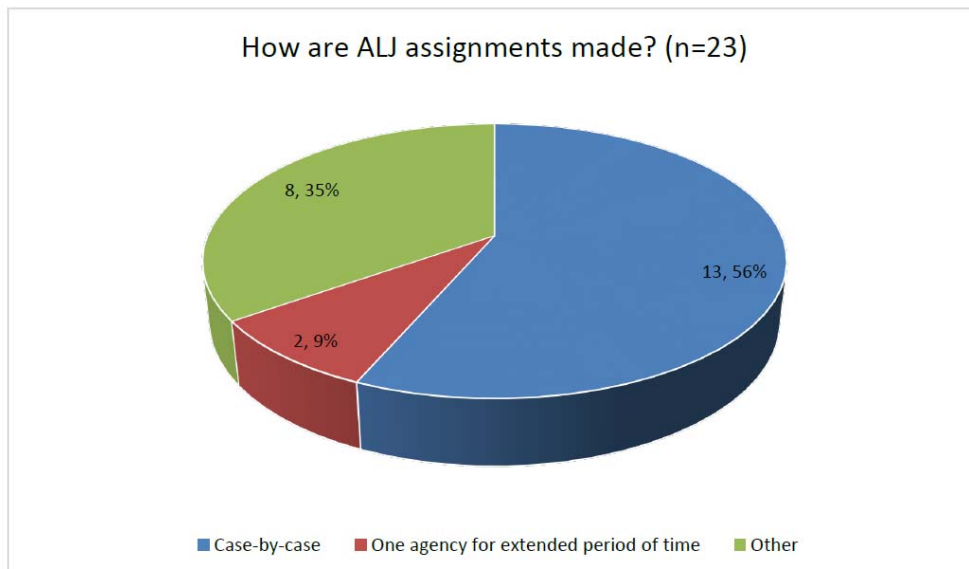
Cases reach the central panel for hearing through agency requests in nearly 70% (16/23) of states and through litigant requests in nearly 40% (9/23) of states. Close to one third (7/23) of states use both methods. In several states CPDs noted that the method depends upon the type of case and/or agency involved.



Central panel use is always mandatory in only four (17%) states. Agency heads have the choice to hear cases within the agency or refer it to the central panel in slightly more than half (12/23) of the states. There are no states in which agency heads are allowed to refer cases outside of the agency to entities outside of the central panel. CPDs in nearly half (11/23) of the states say it depends, but most of them (9/23) say that central panel use is mandatory in most cases with only specific exceptions or exemptions.

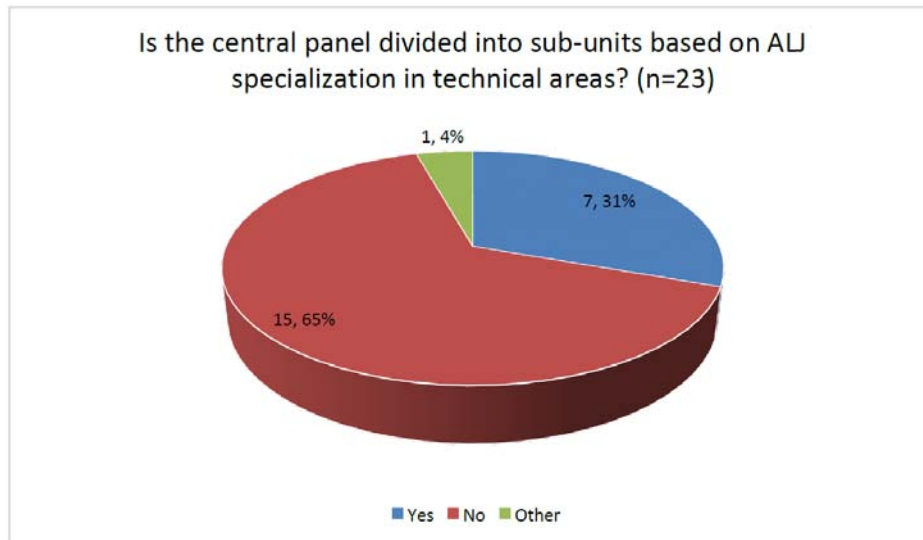
ALJs – Generalist v. Specialist?

CPD Perspective

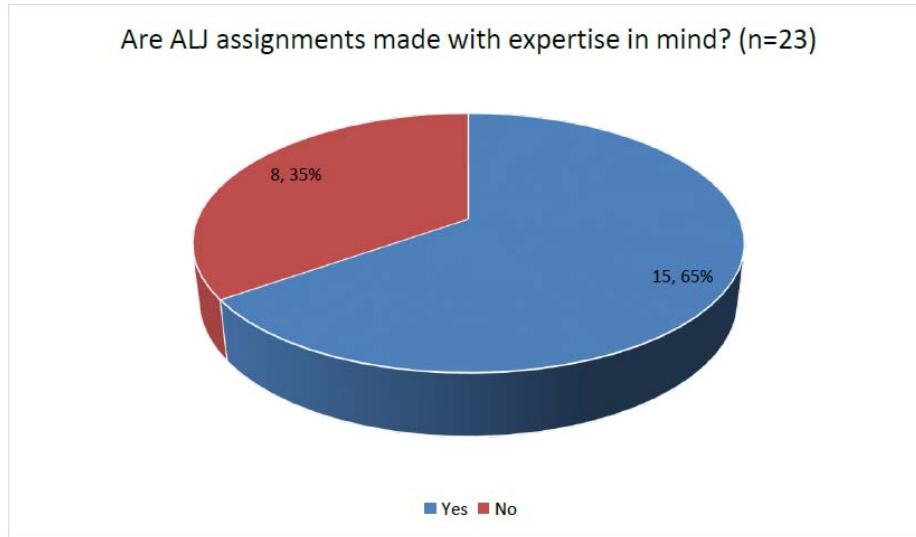


More than half (13/23) of states assign ALJs on a case-by-case basis. Only two states (9%) assign ALJs to one agency for an extended period of time. One third of states use different methods to assign ALJs, including:

- geographically for general jurisdiction ALJs and case-by-case for specialized matters;
- based on a circuit system;
- assignments made monthly for case dockets;
- ALJs are moved between eight main areas when caseloads fluctuate;
- some are by batch, others case by case;
- most cases are set on pre-calendared dates to which an ALJ is already assigned;
- some are case-by-case; most develop an expertise (e.g., Medicaid cases and workers compensation cases) that keep them in a unit; and
- case-by-case on dockets.



Nearly 2/3 (65%) of states do not divide central panels into sub-units based on ALJ specialization in technical areas, while 30% (7/23) of states do. One state divides some of the central panel ALJs into sub-units while others are general jurisdiction.



ALJ assignments are made with expertise in mind in nearly 2/3 (65%) of states while the other third of states do not assign ALJs according to their expertise.

Perspectives from Administrative Law Judges About the Role and Independence of ALJs

We conducted a limited survey of administrative law judges (ALJs) that included five judges from four states. While these data certainly are not conclusive due to the very small sample size—we believe they suggest potential trends and areas for further research to determine best practices and lessons learned from central panels nationwide. Summaries of the key findings are below.

Specialization of ALJs

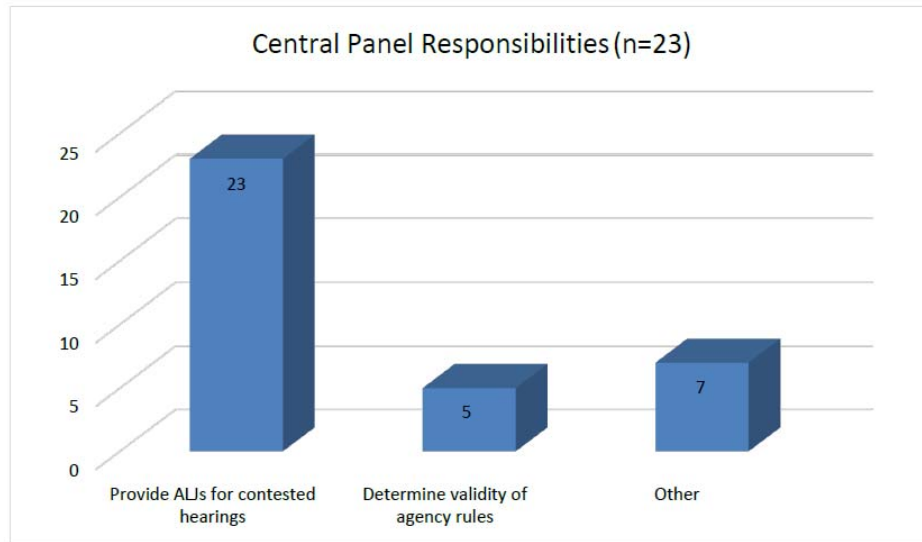
- Most (4/5) ALJs do not believe that an ALJ should have specific expertise in every area of which he/she presides.

- All ALJs disagreed or strongly disagreed that ALJs in a central panel system experience too much variety in the cases coming before them.

Independence of ALJs

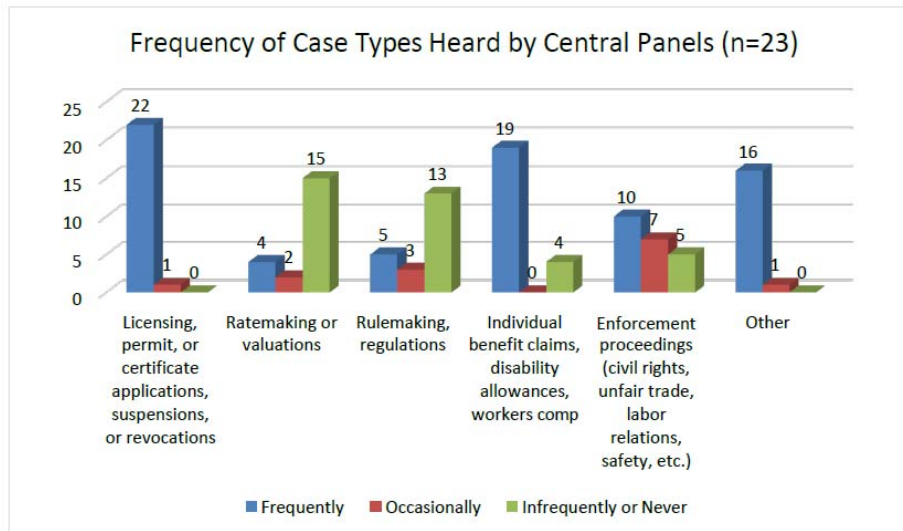
- All reporting ALJs disagree or strongly disagree that agencies still view ALJs as agency employees.
- All reporting ALJs believe that employment by the central panel better insulates ALJ decisions from inappropriate agency influence.
- Most (3/5) reporting ALJs agree or strongly agree that if central panel ALJs' office quarters are located within an agency the ALJs will more likely be subject to inappropriate agency influence. The other two ALJs were undecided
- Most (3/5) reporting ALJs believe that a mechanism for evaluating the job performance of ALJs will not jeopardize their independence. Two ALJs said that it depends.

Jurisdiction of ALJs/central panels

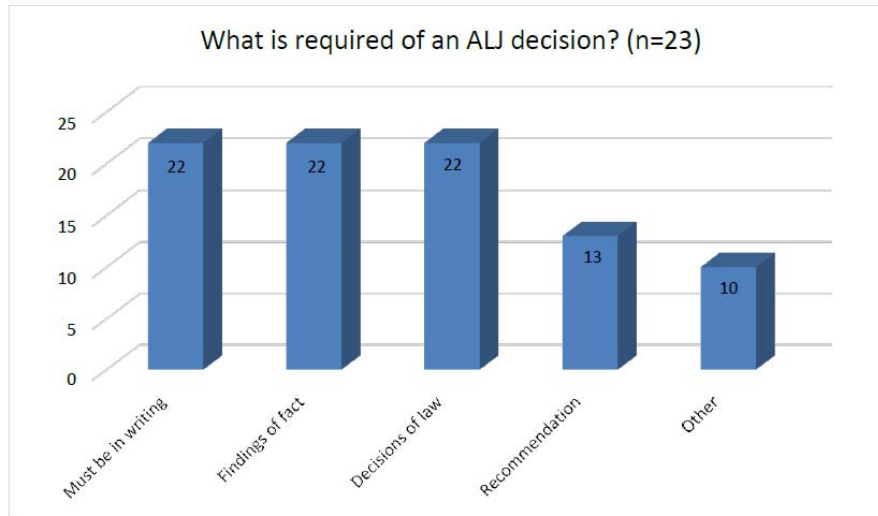


All the central panels we surveyed provide ALJs for contested hearings. A little more than 20% (5/23) determine the validity of agency rules. Descriptions of other responsibilities include:

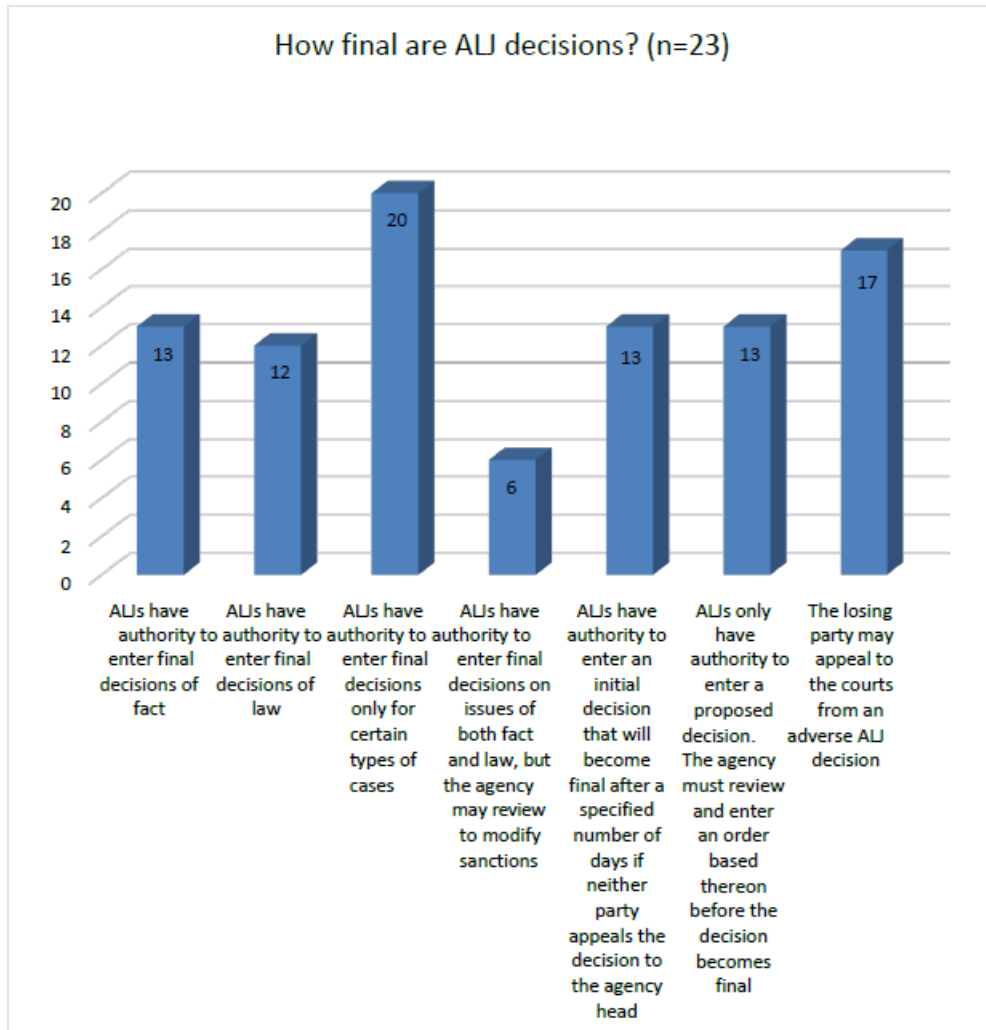
- conduct mediations for state and municipal entities;
- adjudicate all violations of the Code of ordinances for 12 citation issuing departments and agencies;
- adjudicate workers compensation cases; and
- provide ALJs for contested hearings in matters where they have specific statutory authority. In some instances, they provide “contract” ALJs for certain other entities where contested hearings are required.



The types of cases most frequently heard by central panels include licensing, permit, or certificate applications, suspension or revocations (22/23) and individual benefit claims, disability allowances, and workers comp (19/23). Ratemaking or valuations cases (15/23) and rulemaking and regulations cases (13/23) are infrequently or never heard by central panels.

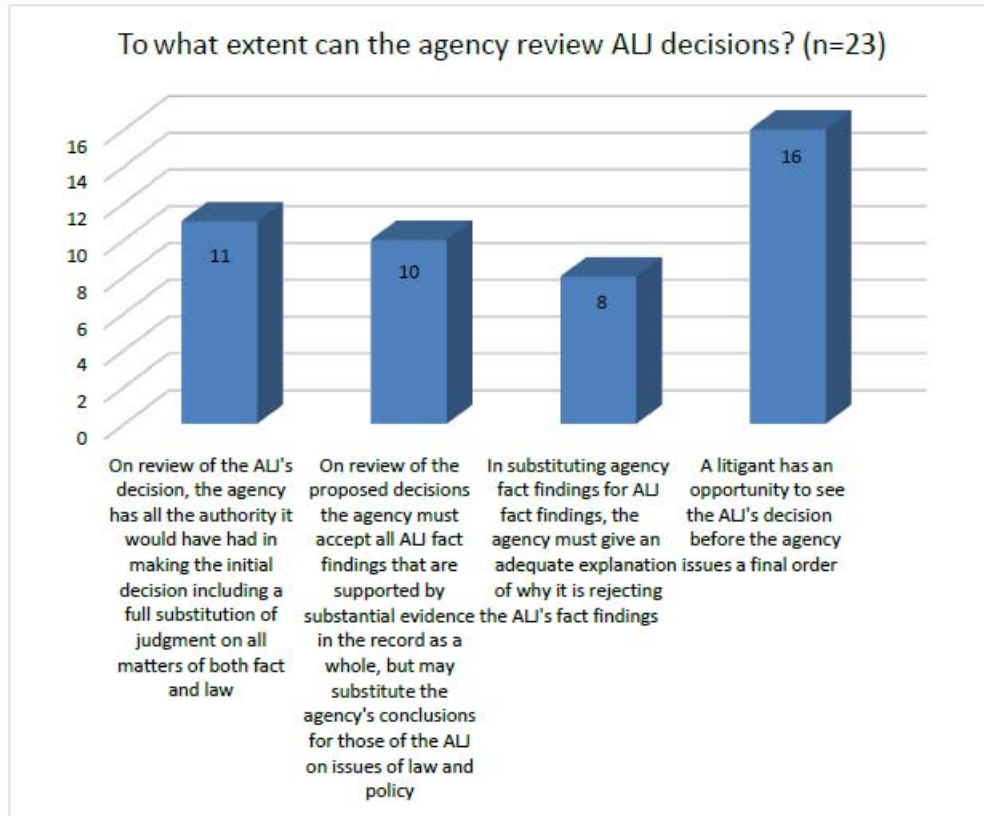
Final Decision-making Authority

Central panels in nearly all (22/23) the states we surveyed require ALJ decisions to be in writing, and include findings of fact, and decisions of law. More than half (13/23) say that ALJ decisions are considered recommendations. Other types of requirements noted for ALJ decisions include a decision and order, recommendations in some cases but not all, citations to the record, and policy statements.

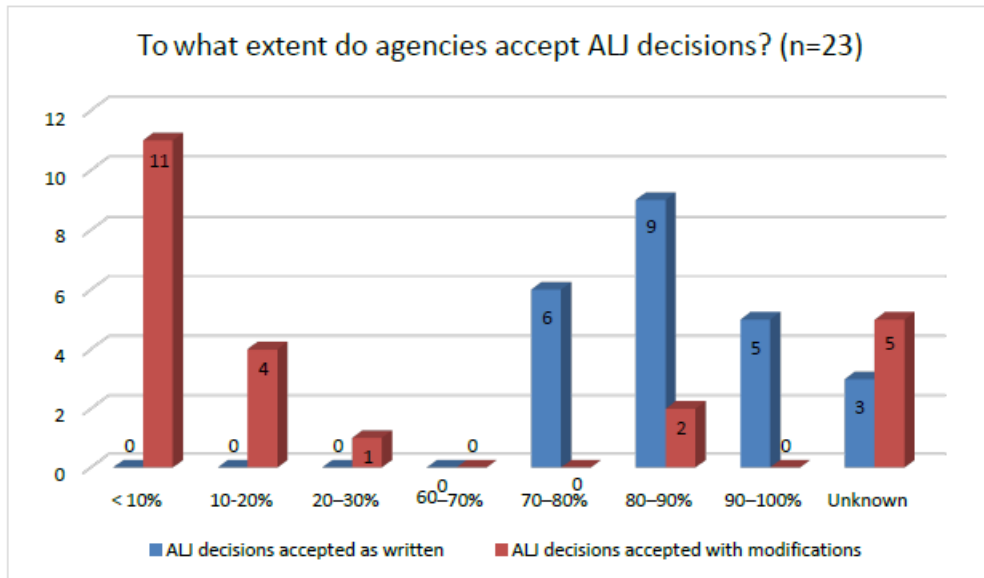


The decision-making authority of central panel ALJs varies greatly, but the widest agreement (20/23) is on the authority to enter final decisions only for certain types of cases. The least common decision-making authority is to enter final decisions on issues of both fact and law, with agency ability to review and modify sanctions.

Additional comments demonstrate the wide variety of decision-making authority held by central panel ALJs. The most frequent comments clarified that initial or recommended decisions can become law after a given number of days (from 30 to 90) and that some or most decisions are final for particular types of cases, while other types of cases are exempted.



Agency authority to review ALJ decisions differs widely. The most common authority belongs to the litigant, who in 70% (16/23) of states has the opportunity to see the ALJ's decision before the agency issues a final order. Comments demonstrate that agency authority also varies by case type.



ALJ decisions are accepted as written 70–100% of the time in 20/23 states. ALJ decisions are accepted with modifications less than 10% of the time in nearly half (11/23) of states.

Addressing Agency Concerns with the Creation or Expansion of a Central Panel System

We also conducted a limited survey of central panel directors (nine CPDs from nine different states/municipalities). Again, while these data certainly are not conclusive—due to the very small sample size—we believe they suggest potential trends and areas for further research to determine best practices and lessons learned from central panels nationwide. Summaries of the key findings are below. For additional discussion from the results of interviews about agency concerns, please see section on Addressing Agency Concerns with the Central Panel System on page 46 of this report.

Initial concerns regarding the adoption of a central panel

By far, the most significant concerns regarding the adoption of a central panel revolved around the agencies' perceived loss of control. Additionally, CPDs expressed concerns about agencies' willingness to accept recommended decisions that challenged the agencies' initial

determinations. Another CPD mentioned concerns regarding sustainability.

Concerns remaining after initial adoption of central panel

The CPDs who were surveyed on this issue agreed that in the long run, the initial concerns regarding the adoption of a central panel were abated. One CPD commented that “the rate of acceptance of recommended decisions by agency directors, even those that have gone counter to the initial agency determination, is substantial. In those cases where the recommended decision goes contrary to the initial agency, the rate of acceptance of the recommended decision is about 90%.”

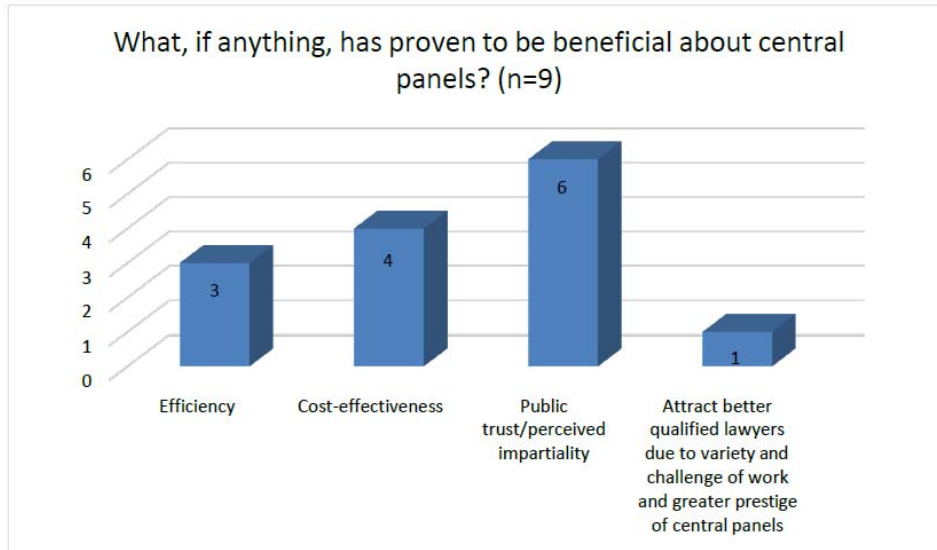
Another CPD commented that “the challenge was political, not logistical or managerial. Once the political question of prior agency autonomy was resolved by legislative mandate, there was little challenge in the execution of that mandate.”

A CPD also noted that “some agencies may not have the win percentage the agency would like, but the process is well respected.” While “the agencies did lose some control, the benefits of having an independent judge far outweigh any issues with control.” Another CPD noted that while one agency briefly switched back to having its own hearing officers after an attempt at independent ALJs it did return back to the independent ALJ system.

Challenges with expansion of central panels

The main challenges noted by CPDs with the expansion of central panels have revolved around resources and unpredictable swings in workload. One CPD explained that, “since its creation, numerous new jurisdictions have been added without new resources.” Other CPDs expressed concern about “the agency's growth over time, taking in new subject areas and handling areas that are constantly evolving and fluctuating” or highly technical matters occasionally being difficult when the judge assigned had a limited background in that area. Another CPD noted that “the only current problem comes during sunset periods when we have to remind legislators of the reasoning behind the implementation of a central panel.”

Benefits of central panels



The central panel directors we surveyed on this question cited multiple benefits of central panels, but the most common (6/9) was improvements in public trust or perceived impartiality of the administrative courts. This improvement was illustrated in a comment from one CPD:

“Of paramount importance is the trust that has built up with the public that citizens will receive a fair and impartial hearing forum. There is no doubt that those persons who participate in administrative litigation through our central panel feel that regardless of the outcome, they have been given a fair hearing by an agency that is independent. This is reflected in our annually accumulated post hearing surveys. Without exception, over the last 20 years the number of participants rating the process as good to excellent have exceeded 90%.”

CPDs’ desired modifications of the central model in their state

Multiple CPDs commented that they would incorporate more state agencies into the central panel model if they could. One CPD

noted expanding the number of local jurisdictions for which they handle administrative hearings would be desirable. Another CPD commented that perceived fairness could be improved if they had enough judges so a party could exclude a judge by right. This respondent also explained that having more full time ALJs would help with managing workload, building camaraderie, and providing for backup.

Would CPDs revert to the administrative law model that existed prior to the central panel model if they could?

100% of reporting CPDs answered No, they would not (9/9).

Growth

New types of cases that have come under the jurisdiction of the central panel since its inception

Many CPDs we surveyed noted that the central panels have been expanding consistently. One explained, “the history in our state is one of aggregation. The Central Panel started out as a natural resource hearing panel in 1985 and has never lost a jurisdiction. Today, it hears all manner of cases.”

The most common new types of cases absorbed by central panels include workers compensation, tax issues, special education, teacher dismissal and other employee disciplinary and appeals processes, public benefits (including SNAP eligibility, Medicaid eligibility, TANF), medical malpractice, child/adult abuse or neglect, Title IX, environmental cases, and child support. Following trends in legislation nationwide, a frequently noted new area of jurisdiction was marijuana regulation, licensing, and enforcement.

XIV. SUGGESTED PRACTICES OF CENTRAL PANELS AND CENTRAL PANEL ALJS

Based on our current research, the following are some practices to be considered:

- Create an advisory council to give direction, policy counsel, and advice on the adoption of rules established by the central panel. Such a reform council could include a review of current practices and procedures within both the judicial court system and the administrative hearing system, with a constructive exchange of ideas and proposals;
- Create reasonable completion deadlines for ALJ decisions that are both timely and fair, and seek input from ALJs;
- Implement high application and selection standards for ALJs;
- Standardize all rules and procedures utilized by the central panel system from the beginning, rather than adopting existing fractured rules and procedures from the agencies;
- Assign ALJs hired from agencies to caseloads outside their former agency in order to minimize any appearance of bias or impropriety;
- Implement a hybrid system of generalist and specialist ALJs;
- Direct funding allocation from the legislature;
- Utilize technology, including implementing electronic data collection systems to track cases and electronic filing systems as well as permitting parties to access forms online;
- Implement a complaint process for lawyers and pro se litigants to voice concerns. Implement consumer satisfaction surveys for lawyers and litigants. Survey agency officials for their satisfaction with the central panel and for their recommendations;
- Require implicit bias training for central panel ALJs;
- Provide training for central panel ALJs that focuses on approaches to handling the hearing room when one or more of the parties is unrepresented by legal counsel;
- Focus on increasing diversity among central panel ALJs;
- Continue research on pros and cons of ALJ decision finality;
- Maintain flexibility in the management of central panels to handle fluctuating caseloads; and

- Further investigate the benefits of state-specific practices including:
 - To promote safety and visibility, the North Carolina central panel conducts a majority of its hearings in courthouses located throughout the state.
 - In Georgia, state legislation has given its central panel ALJs the ability to issue fines to litigants and lawyers for disobeying subpoenas, not following court orders, and other misconduct.
 - Newly hired central panel ALJs in North Carolina are assigned a mentor by the central panel, and those ALJs receive intensive training at the National Judicial College in Reno, Nevada.
- Issue an annual report analyzing factors including:
 1. Changes in jurisdiction and documentation of the cost impact of these changes,
 2. Expertise in jurisdiction and documentation of the cost impact of these changes,
 3. Case processing time,
 4. Case-flow management data, and
 5. Cost efficiency data.

XV. CONCLUSION

The central panel concept represents a major change in the way administrative adjudication is done. Administrative hearing officers are hearing cases that are equally important to those being heard in most courtrooms in the state courts. But we have not paid enough attention to administrative justice, including the decision-making independence of these administrative hearing officers—the hidden judiciary.

The benefits of the central panel approach include:

- Increased efficiency,
- Cost effectiveness,
- Enhanced public trust and perceived impartiality among lawyers and the broader community,

- An opportunity to bring more transparency to our justice system as well as to attract higher-quality lawyers who want to become ALJs.

These benefits are weighed against the commonly expressed administrative agency concern that the central panel approach leads to a loss of agency control and a loss of policy expertise at the adjudicative level.

Despite these concerns, while the pace of creation of new central panels has slowed in recent years, the jurisdictions of the existing central panels have increased. The typical growth pattern of central panels is to see an increasing number of agencies having their cases heard by central panel ALJs.

The focus on the central panel system has historically been on whether the central panel brings cost efficiency and whether it brings an enhanced perception of impartiality. But it also has provided a laboratory to test new approaches to adjudication. Central panel directors report an increasing number of new types of cases being brought into their operation, including issues that have historically been handled in other types of tribunals such as the state courts of general jurisdiction. These issues include child support, corrections, medical leave disputes, and conflicts related to Article IX policies.

Moreover, as central panels become more trusted by the executive and legislative branches of state government for their ability to provide high-quality and independent adjudication, they become the “go to” tribunal for administrative adjudication, mediation, and rulemaking expertise.

The central panel has also brought new approaches to adjudication involving large percentages of unrepresented persons—an issue that our state court systems struggle with on an ongoing basis.

The central panel movement represents state- and municipality-based laboratories developing new approaches to resolving disputes. As a research and advocacy organization focused on identifying and stopping injustice in the court system, Chicago Appleseed believes that the central panel movement has become such an important part of our justice system that it deserves the ongoing attention of social justice advocates.

We must ensure that the administrative adjudication portion of our justice system is accountable and transparent—and the central panel movement is an important part of this goal. We must make a review of this system a part of our watchdog/reform efforts—the lives of hundreds of thousands of persons and businesses are at stake.

XVI. APPENDIX: CENTRAL PANEL SURVEY QUESTIONS

Central Panel Survey Questions – For Central Panel Directors

1. Which state do you work in?
2. Is the information on your website up to date?
3. What is the central panel in your state responsible for? (Bold all that apply.)
 - a. Provide ALJs for contested hearings
 - b. Determine validity of agency rules
 - c. Other – Please explain.
4. How do cases reach the central panel for hearing? (Bold all that apply.)
 - a. Agency requests hearing
 - b. Litigant requests hearing directly from central panel
 - c. Other – Please explain.
5. How frequently are the following types of cases heard? Please answer Frequently, Occasionally, or Never for each type of case.
 - a. Licensing, permit, or certificate applications, suspensions, or revocations
 - b. Ratemaking or valuations
 - c. Rulemaking, regulations
 - d. Individual benefit claims, disability allowances, worker's compensation
 - e. Enforcement proceedings (civil rights, unfair trade, labor relations, safety, etc.)
 - f. Other – Please explain.
6. Are the hearing public or private?
7. Are the hearings recorded?
8. How are ALJs recruited? (Bold all that apply.)
 - a. General advertisement
 - b. Legal publication
 - c. State employment bulletin

- d. Informal means
 - e. Other – Please explain.
9. How are ALJ assignments made?
- a. Case-by-case
 - b. One agency for extended period of time
10. Is the central panel divided into sub-units based on ALJ specialization in technical areas?
11. Are ALJ assignments made with expertise in mind?
12. Are agencies permitted to refer cases to an entity other than the central panel?
- a. No, central panel use is mandatory.
 - b. Agency heads have two options: to hear the case personally and within the agency, or to refer it to the central panel.
 - c. Agency heads are allowed to refer cases outside of the agency to entities other than the central panel.
 - d. Other – Please explain.
13. Is there a right to counsel?
14. What is required of an ALJ decision? (Bold all that apply.)
- a. Must be in writing
 - b. Findings of fact
 - c. Decisions of law
 - d. Recommendation
 - e. Other – Please Explain.
15. Please select all of the following statements that accurately describe the finality of ALJ decisions. Please explain your answers if necessary.
- a. ALJs have authority to enter final decisions of fact.
 - b. ALJs have authority to enter final decisions of law.
 - c. ALJs have authority to enter final decisions only for certain types of cases.
 - d. ALJs have authority to enter final decisions on issues of both fact and law, but the agency may review to modify sanctions.
 - e. ALJs have authority to enter an initial decision that will become final after a specified number of days if neither party appeals the decision to the agency head. (If selecting this option, please indicate the number of days.)

- f. ALJs only have authority to enter a proposed decision. The agency must review and enter an order based thereon before the decision becomes final.
 - g. The losing party may appeal to the courts from an adverse ALJ decision.
16. Please select all of the statements below that accurately describe agency review of ALJ decisions. Please explain your answers if necessary.
- a. On review of the ALJ's decision, the agency has all the authority it would have had in making the initial decision including a full substitution of judgment on all matters of both fact and law.
 - b. On review of the proposed decisions the agency must accept all ALJ fact findings that are supported by substantial evidence in the record as a whole but may substitute the agency's conclusions for those of the ALJ on issues of law and policy.
 - c. In substituting agency fact findings for ALJ fact findings, the agency must give an adequate explanation of why it is rejecting the ALJ's fact findings.
 - d. A litigant has an opportunity to see the ALJ's decisions before the agency issues a formal order.
17. To what extent do agencies accept ALJ decisions?
- a. Percent accepted as written:
 - b. Percent accepted with modifications:
18. What new types of cases have come under the jurisdiction of the central panel since its inception? (Ex. traffic court, child support, eviction, divorce, probate, etc.)
19. What qualifications are required of a director?
20. How are directors appointed/chosen?
21. What are the duties and responsibilities of the director? (Bold all that apply.)
- a. Initially organize the central panel
 - b. Develop budget
 - c. Develop rules of procedure
 - d. Develop performance standards for ALJs
 - e. Develop library resources
 - f. Involved with hiring of ALJs
 - g. Evaluate ALJs

- h. Review ALJ decisions
 - i. Oversee training of new ALJs
 - j. Oversee continuing education of ALJs
 - k. Assign cases to ALJs
 - l. Docket cases
 - m. Manage the office
 - n. Hire support staff
 - o. Consult with administrative agencies
 - p. Consult with the legislature
 - q. Hear cases
 - r. Other – Please explain.
22. How long is the director's term?
23. How is the director evaluated?
24. How is the director removed?
25. Does the central panel regularly receive feedback from private litigants or the agencies under the central panel's jurisdiction? (an example of this would be satisfaction surveys administered after the completion of a case.)
26. Thank you for completing our survey. As we mentioned in the accompanying letter, we would also like to contact practitioners and agency personnel to learn about the impact of the central panel on their work. If you have suggestions for people we should contact, or existing research (such as survey data or other feedback) we should consider, please indicate this below. If you have already provided this information to us by email, please feel free to disregard this.

Central Panel Survey Questions – For Administrative Law Judges (ALJs)

1. How many years have you been an ALJ with your central panel office?
2. What was your occupation prior to serving as an ALJ in the central panel?
3. How did you learn of your current position?
4. What is the selection process for ALJs?
5. Does your position as ALJ represent a financial improvement or a financial sacrifice when compared to your previous position? (Bold applicable response.)
 - a. Improvement

- b. Sacrifice
6. Did you receive your highest academic degree in the state you are currently employed in? (Bold applicable response.)
 - a. Yes
 - b. No
 7. What is the term of office for ALJs?
 8. What is the removal process for ALJs? (Bold all that apply.)
 - a. For cause
 - b. Probationary period
 - c. Discretionary
 - d. Other:
 9. How are ALJs evaluated? (Bold all that apply.)
 - a. Annual Review
 - b. Informal
 - c. Other:
 10. How are salary and promotions determined?
 11. In your opinion, will an ALJ evaluation mechanism jeopardize the independence of ALJs? (Bold applicable response.)
 - a. Yes
 - b. No
 - c. Other
 12. In your opinion, should an ALJ have specific expertise in the areas over which he/she presides? (Bold applicable response.)
 - a. Yes
 - b. No
 13. Rate the following resources as: **Adequate, Inadequate, Do not have but desirable, or Do not have and unnecessary**
 - a. Law library
 - b. Personal law clerk
 - c. Shared law clerk
 - d. Personal secretarial assistance
 - e. Subscriptions to legal periodicals or commercial services
 - f. Regular policy briefings by agency officials
 - g. Hearing manual for ALJs
 - h. Technical assistance by designated staff member
 - i. Index of prior ALJ decisions
 - j. Uniform rules of practice for all hearings
 - k. State of the art office equipment

- l. Financial support for attending continuing education seminars, meetings
14. Indicate the extent to which you agree with the following statements: **Strongly Agree, Agree, Undecided, Disagree, or Strongly Disagree**
 - a. An ALJ should be free to deviate from the central panel rules of hearing procedure if the situation necessitates.
 - b. ALJs are adequately compensated for their work.
 - c. An ALJ's skills are utilized more effectively in a central panel system.
 - d. ALJs in a central panel system experience too much variety in the cases coming before them.
 - e. ALJs are under undue pressure to decide cases quickly.
 - f. Agency officials still view ALJs as agency employees.
 - g. If an ALJ is employed by a central panel his/her decisions will be better insulated from inappropriate agency influence.
 - h. A central panel ALJ whose office quarters are located within an agency will more likely be subject to inappropriate agency influence.
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 - m. ALJs are under undue pressure to decide cases quickly.
 - n. Agency officials still view ALJs as agency employees.
 - o. If an ALJ is employed by a central panel his/her decisions will be better insulated from inappropriate agency influence.
 - p. A central panel ALJ whose office quarters are located within an agency will more likely be subject to inappropriate agency influence.
15. How much of the total time spent doing your job is devoted to the following activities? **0-10%, 10-20%, 20-30%, 30-40%, 40-50%, 50-60%, 60-70%, 70- 80%, 80-90%, or 90-100%**
 - a. Pretrial preparation (readings researching, etc.)
 - b. Conducting pre-hearing conferences and negotiations

- c. Presiding at formal hearings
 - d. Written decisions
 - e. Travel
 - f. Administrative duties
 - g. Other hearing-related activities
 - h. Pretrial preparation (reading, researching, etc.)
 - i. Conducting pre-hearing conferences and negotiations
 - j. Presiding at formal hearings
 - k. Written decisions
 - l. Travel
 - m. Administrative duties
 - n. Other hearing-related activities
16. How frequently do you engage in the following work-related activities? **Frequently**, **Occasionally**, or **Infrequently/Never**
- a. Read decisions of other ALJs
 - b. Read final agency decisions or opinions
 - c. Read industry publications or commercial services
 - d. Consult other ALJs for advice or information prior to hearing
 - e. Consult other ALJs while case is pending
 - f. Request drafts of decisions from your law clerk
 - g. Talk with individual members of the private bar about agency procedures
 - h. Make suggestions to agency officials about policy changes
 - i. Disqualify yourself from hearing a case
 - j. Attend professional meetings or seminars
 - k. Wear a robe during a hearing
17. Which of the following general categories of proceedings do you frequently preside over? (Bold all that apply.)
- a. Licensing
 - b. Ratemaking
 - c. Rulemaking
 - d. Enforcement
 - e. Benefits
18. Rate the frequency with which you do the following activities: **Frequently**, **In some cases**, or **Never**
- a. Conduct pre-hearing conferences
 - b. Direct counsel to brief certain legal issues
 - c. Go off the record to deal with procedural problems

- d. Question witnesses directly
- e. Call in witnesses on your own initiative
- f. Admit evidence for whatever it may be worth
- g. Deliver decisions orally
- h. Rule on requests for discovery
- i. Employ sanctions for improper conduct in hearing room