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A CENTRAL PANEL SYSTEM FOR MISSISSIPPI'S ADMINISTRATIVE LAW JUDGES: PROMOTING THE DUE PROCESS OF LAW IN ADMINISTRATIVE HEARINGS

Stephen R. Miller and Larry T. Richardson***

I. INTRODUCTION - SCOPE OF ARTICLE - APPLICATION TO MISSISSIPPI

"[I]mpartiality or objectivity is the polar star to guide tribunals on their courses of administering justice."[1] In administrative hearings, no less than in judicial proceedings, the tribunal's objectivity must be both real and perceived.[2] Neutrality of the hearing officer has been described as one of the two irreducible elements of due process of law.[3]

The institution of the administrative hearing has no proud heritage in Mississippi. Two major problems diminish the fairness of administrative justice. First, administrative agencies must exercise the combined functions of investigator, prosecutor and judge, creating an inherent conflict of interests. This practice compromises the objectivity of the administrative inquiry, favoring the interests of the agency. Although combination of functions is the most obvious source of bias in administrative hearings, the scheme has been blessed by both the Mississippi and U. S. Supreme Courts.[4] Probably no litigant ever approached an administrative hearing where the prosecutorial and judicial functions were combined without wondering how an agency could fairly decide a claim against itself.

Many agencies do try to separate the functions of prosecutor and judge by assigning separate staff to fulfill these roles.

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1. Ill. Cent. R.R. Co. v. Town of Goodman, 252 Miss. 297, 314, 173 So. 2d 116, 124 (1965) ("Absolute objectivity as yet is unobtainable by human beings, but the closer approximation thereof is the legal Holy Grail for which earnest tribunals must eternally seek."). *Id. Cf.* Eidt v. City of Natchez, 421 So. 2d 1225, 1232 (Miss. 1982) (finding that any decision of any administrative board or agency must be based upon substantial evidence appearing in the record).

2. Silas, *Eight States Set Pace in Setting Up Independent Administrative Law Panels*, A.B.A. J., July 1985, at 18.

3. Eidt v. City of Natchez, 421 So. 2d 1225, 1230 (Miss. 1982).

4. Withrow v. Larkin, 421 U.S. 35 (1975); McCaffery's Food Market v. Miss. Milk Comm'n, 227 So. 2d 459 (Miss. 1969); *Ex Parte* Fritz, 86 Miss. 210, 38 So. 722 (1905). Combination of functions is discussed in K. DAVIS, ADMINISTRATIVE LAW TEXT, §§ 13.01-.08 (1972).

However, in spite of separation of duties within an agency, the staff may have a tendency to pull together as a unit. Even if they have a clear concept that their mission is separate, they may subconsciously tend to work in concert. Regardless of how the agency staff thinks or acts, the public perception will always be that the hearing officer is biased. The perception that in-house hearing officers are biased toward their agency is a chilling factor which discourages potential claimants and casts doubt on even those decisions that are correctly decided in favor of the agency.[5] The appearance of favoritism must be avoided.

Second, the hearings are often inartfully conducted,[6] fostering decisions which may be unfair to either side. This is particularly a problem in Mississippi, where there is a proliferation of state agencies.[7] If the state had fewer and larger agencies, there would be economies of scale and increased opportunities for hearing officer specialization. Since there are presently many small agencies in Mississippi, few of these have a need for full-time hearing officers, and many agencies rely on non-specialists to conduct their hearings.[8] Mississippi case law generally promotes fair hearings. The factors which detract from the fairness of administrative hearings are the structure and procedure of the agencies hearing the cases. The Mississippi Supreme Court has recognized that even though administrative agencies are not restricted by the technical or formal rules governing trials before a court, they should observe the elementary and fundamental principles of a judicial inquiry in the exercise of judicial or quasi-judicial powers.[9] Although the court is not likely to let an unjust result stand, the problem remains that a very high percentage of administrative decisions are not appealed and therefore receive no sophisticated supervision.

Mississippi law establishes numerous rights and interests which the state (acting through its executive agencies) may not adverse-

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5. Levinson, *The Central Panel System: A Framework That Separates ALJ's From Administrative Agencies*, 65 JUDICATURE 236, 243 (1981-82).

6. *See, e.g.*, Britton v. Koontz First Nat'l Bank, 285 So. 2d 181 (Miss. 1973) (opponent to bank charter not permitted to cross-examine bank examiner); Real Estate Comm'n v. Ryan, 248 So. 2d 790 (Miss. 1971) (process not served on licensee; license revoked without substantial evidence).

7. For a list of Mississippi administration agencies, see MISSISSIPPI OFFICIAL AND STATISTICAL REGISTER 1984-1988 (Sec. of State 1985).

8. State Department of Rehabilitation Services, MISS. CODE ANN. § 37-33-153 (Supp. 1986); State Department of Public Welfare, MISS. CODE ANN. § 43-1-1 (Supp. 1986); Mississippi Employment Security Commission, MISS. CODE ANN. § 71-5-101 (1972). These agencies have statutory hearing officer positions with non-professional hearing officers. In addition, some agency governing boards conduct their own hearings (e.g., the Real Estate Commission, the Board of Medical Licensure, and, the Board of Nursing). For the most part, such boards are composed of members of the regulated profession who are not trained in fair hearing procedures.

9. Love v. State Bd. of Veterinary Examiners, 230 Miss. 222, 230, 92 So. 2d 463, 467 (1956).

ly affect prior to an administrative hearing.[10] The legislature's choice of the administrative hearing as the means to protect those rights demonstrates its importance. Although there is a wide variety in the kinds of rights involved, there can be no variation in the quality of due process of law. The hearing must be conducted in a manner that effectively provides due process.[11]

As contrasted with proceedings in courts of law, the actual hearing held before an administrative law judge is the critical phase. Neither the full panoply of discovery procedures nor the Mississippi Rules of Evidence are available for use before administrative boards.[12] The record made before an administrative tribunal is reviewable in a court of general jurisdiction,[13] ordinarily the circuit court. The purpose of such hearings is to prevent administrative error: the petitioner is given an opportunity to show the state that an otherwise legal exercise of power is improper because it is predicated upon an error of fact.[14] The question arises: In what kind of forum can these important rights best be protected?

Under our common law, administrative agencies can act upon information gained in their own investigations, but "where a hearing is required by law, . . . adjudication must be based upon evidence adduced at the hearing and not upon secret knowledge of the agency."[15] If a report of the agency is to be considered as evidence, it must be introduced as part of the record.[16]

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10. *See, e.g.*, MISS. CODE ANN. § 25-9-127 (Supp. 1986) (citing prerequisites to dismissal or action adversely affecting compensation or employment status of state personnel and exceptions thereto); MISS. CODE ANN. § 37-9-109 (Supp. 1986) (citing the rights of a school district employee who has received written notice of a determination not to offer a renewal contract for a successive year); MISS. CODE ANN. § 41-77-19 (Supp. 1986) (citing the procedures pertinent to the denial, suspension or revocation of licenses for birthing centers); MISS. CODE ANN. § 47-7-27 (1972 & Supp. 1986) (delineating the authority of the State Parole Board to effect the return of a paroled offender, the arrest of a parolee or the revocation of parole); MISS. CODE ANN. § 57-5-11 (1972 & Supp. 1986) (delineating the authority of the Mississippi Agricultural and Industrial Board in issuing certificates of public convenience and necessity and empowering the board to hold hearings and make such investigations as may be desired); MISS. CODE ANN. § 61-1-35 (1972) (delineating the authority of the Mississippi Aeronautics Commission to hold investigations, inquiries and hearings); MISS. CODE ANN. § 81-13-1(5)-(7) (Supp. 1986) (delineating the procedures to be followed when an applicant for a credit union charter is denied by the Credit Union Board).

11. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

12. *See, e.g.*, Merchant v. Board of Trustees, 492 So. 2d 959, 964 (1986) ("When hearing teacher dismissal matters, school boards proceed informally and are not bound by the Mississippi Rules of Evidence."). *Id.*; Hancock Bank v. Gaddy, 328 So. 2d 361, 364 (1976). ("The full panoply of pleadings and processes for discovery provided for full-fledged litigants in law and equity courts is not available for use before an administrative board."). *Id.*

13. State Board of Psychological Examiners v. Coxe, 355 So. 2d 669, 671 (Miss. 1978).

14. Goldberg v. Kelly, 397 U.S. 254, 267-69 (1970); Little v. City of Jackson, 375 So. 2d 1031, 1035 (Miss. 1979) (enumerating procedural safeguards designed to minimize the risk of error attending the removal of municipal civil service employees).

15. Britton and Koontz Nat'l Bank v. Biglane, 285 So. 2d 181, 185 (Miss. 1973), Banking Board granted a charter based in part upon report of the Comptroller of Banking. The report was given to the opponents of the charter at the outset of the hearing, but they were denied the right to cross-examine the field examiner who made the examination for the Comptroller. *Id.*

16. Id. at 185.

Mississippi, like a number of other states, has adopted legislation based on the Model State Administrative Procedures Act. Our present law is an abbreviated version of the 1961 Model Act.[17] Although this abbreviated version is silent on *ex parte* consultations, adjudicative hearings, records, rules of evidence in contested cases, and separation of functions, we are not advocating the adoption of more detailed procedural protections. The most detailed of procedural protections are rendered useless if a citizen stands before a biased tribunal. Unfortunately, this institutional bias is the most neglected problem in administrative reform efforts.

Nine states have taken the initiative and created a central panel system of administrative law judges.[18] This innovative concept was incorporated in the 1981 Model State Administrative Procedure Act.[19] This article will focus on the salient features of the central panel system and the 1981 Model Act.

II. THE CENTRAL PANEL ALTERNATIVE

A "central panel" of administrative law judges[20] is a free-standing agency whose mission is to hear and decide certain contested matters of administrative law. Its distinctive feature is that its hearing officers are not employed by the agencies whose actions they review.[21] The creation of a central panel would detach the adjudicatory function from agencies that have enforcement powers, removing the most obvious source of bias. Administrative law judges would clearly have no interest in the outcome of the cases they hear.

This solution must be a legislative one.[22] For decades, there has been a call upon the Congress to exercise its constitutional

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17. MISS. CODE ANN. §§ 25-43-1 to -19 (Supp. 1986).

18. CAL. GOV'T CODE § 11370.2(a) (West Supp. 1986) (creates an Office of Administrative Hearings in the Department of General Services); COLO. REV. STAT. § 24-30-1001(1) (1982) (creates a Division of Hearing Officers in the Department of Administration); FLA. STAT. § 120.65 (West 1982) (creates a Division of Administrative Hearings within the Department of Administration); MASS. ANN. LAWS ch. 7 § 4H (Michie/Law. Co-op. Supp. 1986) (creates a Division of Administrative Law Appeals within the administration and finance executive office); MINN. STAT. ANN. § 14.48 (West Supp. 1986) (creates Office of Administrative Hearings); N.J. STAT. ANN. § 52-14F-1 (West 1986) (creates Office of Administrative Law within Department of State, which is independent of any supervision or control by the department); N.C. GEN. STAT. § 7A-750 (Supp. 1985) (creates the Office of Administrative Hearings, an independent, quasi-judicial agency); TENN. CODE ANN. § 4-5-321(a) (Supp. 1986) (creates Administrative Procedures Division in the Office of the Secretary of State); WASH. REV. CODE ANN. § 34.12.010 (Supp. 1986) (creates an independent Office of Administrative Hearings).

19. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-301 (1981) (creates an office of administrative hearings to employ a central panel of administrative law judges).

20. We use the terms administrative law judge and hearing officer to refer to the employee who presides at the hearing. The 1981 Model Act uses the term "administrative law judge," and the states use a variety of terms.

21. Rich, *Central Panels of Administrative Law Judges: An Introduction*, 65 JUDICATURE 233, 234 (1981).

22. Kelly v. Miss. Valley Gas Co., 397 So. 2d 874, 876-77 (Miss. 1981) (courts cannot make structural changes—proper function of legislature).

power under Article III to create a federal administrative court to decide administrative law issues.[23] Such a separation would allow agencies to do that which they do best—make policy and prosecute violators. The arguments on this topic relating to the federal government are applicable to state governments.

The Mississippi Legislature has constitutional authority to create and abolish inferior courts.[24] But rather than the creation of a new court, we propose the adoption of a central panel system of administrative law judges—a separate administrative agency—that would ensure that due process of law is afforded in contested administrative proceedings.[25] Of the two approaches, the central panel makes better sense for Mississippi. Creation of the central panel is an easy, preliminary step toward the consolidation of the excessive number of executive agencies in Mississippi.[26] An administrative court is a judicial, rather than executive entity, which could not have the flexibility and scope of authority needed to address the problems raised herein.

A central panel of hearing officers would promote economy and efficiency in the administrative process in many ways:

- The central panel would create career ladders for hearing officers, insuring an orderly supply of well-trained administrative law judges.
- The resources of the corps of hearing officers would not be wasted, increasing the caseload that each hearing officer could handle. Hearing officers would receive proper staff support.
- Those cases which are currently heard by a full commission or board could be heard more cheaply by a single hearing officer.
- A central panel could adopt uniform rules of evidence and procedure, helping to ensure that all hearings are conducted fairly. Uniform rules would also aid the bar and reviewing courts.
- Public confidence in the administrative process would be enhanced.
- The number and cost of appeals to circuit and chancery courts would be reduced.

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23. For a history of these efforts, see Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960) ("Administrative agencies are long on judicial form, short on judicial substance."). *Id.* at 931.

24. MISS. CONST. art. VI, § 172.

25. Rich, *Adapting the Central Panel System: A Study of Seven States*, 65 JUDICATURE 246 (1981).

26. *See supra* text accompanying note 8.

- The central panel would be an information source for the legislature on state of the art.[27]

III. QUALIFICATIONS OF DIRECTOR AND ADMINISTRATIVE LAW JUDGES

Although the qualifications of the central panel director[28] and administrative law judges vary among the central panel states, all of these states require legal or administrative procedure experience. Membership in the state bar is the most common qualification imposed upon administrative law judges. All but two of the central panel states require administrative law judges to be members of the state bars, and several impose additional qualifications.[29]

The 1981 Model State Administrative Procedure Act provides an option of requiring the administrative law judge to be admitted to practice law in the state or in a jurisdiction in the United States.[30] This option should be adopted as the minimum qualification for administrative law judges. One of the goals of establishing a central panel system is to have a cadre of professional administrative law judges able to conduct any type of hearing. Attorneys are specially qualified by training and experience in the application of law to facts, examination of witnesses, determination of evidentiary questions, and the essentials of a complete and fair hearing. The value of legal knowledge and training has been recognized by the Mississippi State Personnel Board. The personnel board's minimum qualification for employee appeals board hearing officers is a license to practice law in Mississippi.[31] The central panel office should be empowered to establish additional qualifications and standards for the evaluation, train-

27. The panel would gain a state-wide perspective of the hearings process without the bias of the agencies under its jurisdiction and would be in a position to inform the legislature if there are "problem" agencies. The panel would thereby serve as a check on other executive branch agencies. The panel would be an easily-managed cost center or program area for the state budget office.

28. The central panel director is the chief administrative law judge. He has additional duties which may include appointing administrative law judges, assigning cases for hearing, budgeting, staffing the office and developing personnel policies.

29. CAL. GOV'T CODE § 11502 (West Supp. 1986) (requiring that each administrative law judge shall have been admitted to practice law for at least five years immediately preceeding appointment); COLO. REV. STAT. § 24-30-1003(2) (1982); FLA. STAT. ANN. § 120.65(2) (West 1982); MASS. ANN. LAWS ch. 7 § 4H (Michie/Law. Co-op. Supp. 1986); MINN. STAT. ANN. § 14.48 (West Supp. 1986) (not expressly requiring membership in state bar association); N.C. GEN. STAT. § 7A-752 (Supp. 1985) (determining seniority according to date of admission to practice law in the General Court of Justice); N.J. STAT. ANN. § 52:14F-5(l) (West 1986) (requiring attorneys at law or those qualified in administrative law); TENN. CODE ANN. § 4-5-102(1) (1985 & Supp. 1986); WASH. REV. CODE ANN. § 34.12.030 (Supp. 1986) (requiring a demonstrated knowledge of administrative law and procedures).

30. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-301(b) (1981).

31. Classification and Compensation Division, Miss. State Personnel Board, Occupational Codes 7871 and 7873 (1986) (Employee Appeals Board Chief Hearings Officer and Employee Appeals Board Hearings Officer, respectively).

ing and promotion of administrative law judges as provided for in the Model Act.[32]

The central panel would be organized so that each hearing officer would hear cases from a few certain agencies. Hearing officers would be classified in grades, with less experienced hearing officers handling less complex cases. Hearing officers would receive training in evidence, fair hearing and related topics. More experienced hearing officers would hear several types of cases. This kind of organization is in contrast to the current system, in which employees presiding at hearings are often untrained in administrative or legal procedure.[33] Training, if done at all, is limited to learning the specialized substantive law affecting a particular agency.

IV. APPOINTMENT OF DIRECTOR AND ADMINISTRATIVE LAW JUDGES

In establishing a central panel, one of the more important considerations would be the method of appointment of the central panel's staff. The independence of the central panel, engendered by its organizational separation from the agencies, must be bolstered by excluding the agencies from the appointment process. Generally, in the central panel states, the governor appoints the director subject to senate confirmation.[34] The director appoints the administrative law judges in at least four of these states.[35] Under the 1981 Model State Administrative Procedure Act, the governor appoints the director who, in turn, is empowered to appoint the administrative law judges.[36] Senate confirmation of the director is optional.[37] Mississippi should adopt the method of appointment outlined in the Model Act and enacted by a majority of the central panel states. The governor should appoint the director sub-

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32. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-301(e) (1981).

33. *See supra* note 8.

34. CAL. GOV'T CODE § 11370.2(b) (West Supp. 1986); FLA. STAT. ANN. § 120.65(1) (West 1982) (director appointed by the Administrative Commission which is composed of the governor and his cabinet); MASS. ANN. LAWS ch. 7 § 4H (Michie/Law. Co-op. Supp. 1986) (appointed by the secretary of the executive office for administration and finance with the approval of the governor); MINN. STAT. ANN. § 14.48 (West Supp. 1986); N.C. GEN. STAT. § 7A-752 (Supp. 1985) (appointed by the attorney general); N.J. STAT. ANN. § 52:14F-3 (West Supp. 1986); WASH. REV. CODE ANN. § 34.12.010 (Supp. 1986).

35. CAL. GOV'T CODE § 11370.3 (West Supp. 1986); COLO. REV. STAT. § 24-30-1003(1) (1982); FLA. STAT. ANN. § 120.65(2) (West 1982) (stating that "[t]he division shall employ full-time hearing officers to conduct hearings."); MASS. ANN. LAWS ch. 7 § 4H (Michie/Law. Co-op. Supp. 1986) ("the chief administrative magistrate . . . may employ such persons . . . including administrative magistrates . . . ."); N.C. GEN. STAT. § 7A-752 (Supp. 1985) (suggesting appointment by director by expressly stating that "[t]he first chief hearing officer shall be appointed as soon as practicable."); N.J. STAT. ANN. § 52:14F-4 (West 1986) (appointed by the governor); TENN. CODE ANN. § 4-5-321(2) (Supp. 1986) (establishing "a pool of administrative judges and hearing officers."); WASH. REV. CODE ANN. § 34.12.030 (Supp. 1986).

36. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-301(a) & (b) (1981) (stating that the office shall employ administrative law judges).

37. *Id.* at § 4-301(a).

ject to senate confirmation.[38] Once confirmed by the state senate, the director should be removable only for good cause.

To further insulate the director from political pressure, his term should be noncoterminous with the term of the governor. Five states give the director a term longer than that of the appointing governor.[39] The statute establishing the central panel should provide that the governor shall appoint a director (chief administrative law judge) for a six-year term, and any successor should be provided a full six-year term in his own right. Administrative law judges and all other employees should be appointed by the director and be given full civil service protection.

At the outset at least, the central panel should be given authority and funds to contract for additional hearing officers as needed. Depending upon the scope of the central panel's jurisdiction as set by its enabling act, certain hearing officers from existing agencies should be transferred to the panel, making up its initial complement of hearing officers. A transfer of positions and funds would reduce start-up costs and ensure that the establishment of the central panel would be a cost-saving measure for the state.

V. JURISDICTION AND PROCEDURE

A major consideration would be the extent of the panel's subject matter jurisdiction, which would be established by statute. All cases should be heard de novo. The central panel should require proof by a preponderance of the evidence except in cases involving penalties.[40]

Hearing officers organized in a central panel would hear cases as assigned by the chief hearing officer. Upon creation of a central panel, a straightforward test for including cases in the panel's jurisdiction will be needed. The primary test for inclusion should be that where statutes provide that an agency has executive authority to administer, execute, implement, and enforce the law, and also has authority to provide a quasi-judicial review over the enforcement or implementation, review should be made by the central panel. There are scores of such reviews provided for in

38. MISS. CODE ANN. § 7-1-35 (1972 & Supp. 1986) (requires the advice and consent of the state senate for the appointment of officers). The governor's appointment power provides him with executive authority commensurate with his responsibility to see that laws are faithfully executed.

39. ME. REV. STAT. ANN. tit. 4 § 1151(3)(A) (1964 & Supp. 1986) (seven years); MINN. STAT. ANN. § 14.48 (Supp. 1986) (six years); MO. ANN. STAT. § 621.015 (Vernon Supp. 1986) (six years); N.J. STAT. ANN. § 52:14F-3 (1986) (six years); WASH. REV. CODE ANN. § 34.12.010 (Supp. 1986) (five years).

40. Woodby v. Immigration and Naturalization Serv., 385 U.S. 276, 285-86 (1966).

Mississippi statutes.[41] We recommend that the panel be given jurisdiction over all of these.

A second reason for establishing the panel would be to provide a forum for the efficient, fair, and speedy resolution of administrative law questions. For example, the central panel would be the logical body to hear tort claims against the state.[42] We do not envision that the central panel in Mississippi would be assigned any jurisdiction over ratemaking or rulemaking cases, but that it would be assigned to hear "contested cases" within that meaning of the term found in the Model State Administrative Procedure Act[43] and the Mississippi statutes.[44]

Once such a panel is established, jurisdiction could be assigned to it for other reasons. A category of such cases would be those cases in which state agencies are authorized by statute to invoke fines or penalties.[45] An efficient and expedient review of the fine could be had before the central panel. In such cases, the agency invoking the fine could concentrate its energies on prosecuting the penalty, without involving itself in the balancing act of providing a fair hearing while advocating the penalty.

The adoption of a central panel would not perfect the administrative process of adjudication. But a carefully structured central panel would have tremendous advantages over our current system, both in reduced cost of adjudication and in improved fairness of the decisions rendered.

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41. *See, e.g.*, MISS. CODE ANN. § 27-19-337 (Supp. 1986) (Board of Review of State Tax Commission's hearing on assessment for license taxes, permit fees, or license tags); MISS. CODE ANN. § 29-7-17 (Supp. 1986) (Department of Natural Resources' hearing on its assessment of penalties for unauthorized use of minerals on state-owned land); MISS. CODE ANN. § 41-7-197 (1972 & Supp. 1986) (Health Care Commission's hearing on its denial of certificate of need for health care facility); MISS. CODE ANN. § 41-75-11 (Supp. 1986) (Health Care Commission's hearing on denial of license for ambulatory surgical facilities); MISS. CODE ANN. § 53-1-47 (1972 & Supp. 1986) (Oil and Gas Board's hearing on assessment of penalties); MISS. CODE ANN. § 75-79-21 (Supp. 1986) (Commissioner of Agriculture's hearing on denial of license for pulpwood receiving facility); MISS. CODE ANN. § 81-7-1 (1972 & Supp. 1986) (State Board of Banking Review's hearing on Banking Commissioner's denial of application for branch bank); MISS. CODE ANN. § 83-49-11 (Supp. 1986) (Insurance Commissioner's hearing on revocation of license to sell legal expense insurance); MISS. CODE ANN. § 89-12-39 (Supp. 1986) (state treasurer's hearing on denial of claim upon abandoned property).

42. *See* MISS. CODE ANN. § 11-46-1 to -21 (Supp. 1986).

43. Model State Administrative Procedure Act § 1-102 Commentary at 80 (1981).

44. MISS. CODE ANN. § 25-43-3(b) (Supp. 1986).

45. *See, e.g.*, Insurance Comm'n v. Savery, 204 So. 2d 278 (Miss. 1967). For examples of such penalties, see MISS. CODE ANN. § 7-7-59 (Supp. 1986) (establishing a reasonable petty cash fund for each state agency and levying a civil penalty for violation of this section); MISS. CODE ANN. § 7-9-12 (Supp. 1986) (authorizing the state treasurer to establish clearing accounts and bank accounts necessary to facilitate the deposit, collection, investment and disbursement of state funds and also levying a civil penalty for violation of this section); MISS. CODE ANN. § 53-9-41 (Supp. 1986) (providing that coal exploration activities which disturb the natural land surface in violation of this section shall be subject to the penalties in §§ 53-9-55 to -59 and § 53-9-63); MISS. CODE ANN. § 69-9-7 (1972) (soybean purchasers who fail to file a report or to pay an assessment within the time required by the State Tax Commission shall forfeit a prescribed penalty); MISS. CODE ANN. § 73-21-103 (Supp. 1986) (delineating penalties for violation of provisions governing pharmacists); MISS. CODE ANN. § 73-39-19 (Supp. 1986) (delineating penalties for violations of provisions governing veterinarians or certified animal technicians); MISS. CODE ANN. § 75-31-335 (1972) (delineating procedure in event of milk product law violations; authorizing treble damages); MISS. CODE ANN. § 75-45-181 (1972 & Supp. 1986) (delineating penalties for violations of the Mississippi Commercial Feed Law of 1972).

VI. BUDGETING

In this decade, state agencies have been operating within severe budgeting restraints. Revenue shortfalls in four of the last five years have resulted in reductions of agency budgets and recommendations of eliminating some agency programs.[46] These budgetary constraints have affected agency capacity to conduct hearings.[47] One of the features of a central panel system would be the reduction of the overall cost of administrative hearings. There is a paucity of research on the budgetary impact of a central panel, but the experiences of two central panel states indicate a substantial savings.[48]

Two approaches are used to fund the operation of a central panel system: a general fund appropriation and a revolving fund assessment.[49] Under the general fund approach, the central panel receives an appropriation from the general fund, and agencies use the central panel services as needed at no cost to the agencies. Under the revolving fund approach, the central panel assesses or bills each agency for the services actually used by that agency. Each agency includes a separate line item expense for central panel services in its budget.

At least three states use a revolving fund assessment to fund the central panel system.[50] The major weakness of the revolving fund approach is that the central panel budget is dependent upon the extent of use by the agencies. The administrative law judges of the central panel may perceive that unfavorable rulings will result in less usage by agencies. Agencies may avoid use of the central panel judges through use of informal proceedings and settlement of cases. Thus the independence of the central panel and the due process protection it is designed to provide would be compromised. Also, as a separate line item of expense in an agency budget, the allocation for central panel services may be more susceptible to legislative cuts. An agency may place a low priority on this allocation and reduce it, or more willingly accept a reduc-

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46. JOINT LEGISLATIVE BUDGET COMMITTEE OF THE 1986 MISS. LEGISLATURE, BUDGET REPORT FOR FISCAL YEAR 1987 at 17 (1986).

47. 1984 MISS. BD. OF NURSING ANN. REP. 8 (reported that the agency had held 92 hearings, had a backlog of cases and requested the hiring of an additional investigator and a paralegal clerk to assist with subpoenas, confessions, records and board actions).

48. Harves, *Independent Hearing Examiners – the Minnesota Experience*, THE HENNEPIN LAWYER, May-June 1980, at 26-27 (Minnesota); Silas, *Eight States Set Pace in Setting Up Independent Administrative Law Panels*, A.B.A. J., July 1985, at 18 (New Jersey).

49. For a discussion of the California system and the general background on these two approaches, see generally Abrams, *Administrative Law Judge Systems: The California View*, 29 Ad. L. Rev. 487 (1977).

50. CAL. GOV'T CODE § 11370.4 (1980 & Supp. 1986) (specifying that the total cost shall be collected from state agencies); MINN. STAT. ANN. § 14.53 (West Supp. 1986) ("Chief administrative law judge shall assess agencies the cost of services rendered . . . ."); WASH. REV. CODE ANN. § 34.12.130 (Supp. 1986) (creating administrative hearings revolving fund).

tion in this item in order to protect other program allocations.

We propose the use of a hybrid model, combining the general fund and revolving fund approaches. This hybrid model alleviates the weakness of the revolving fund approach and utilizes the resources of general and special funds. The central panel would receive funds from the general fund to conduct hearings for those general fund agencies within its jurisdiction. This general fund appropriation assures that the basic, or core, needs of the central panel would be provided for and that the central panel would not be solely dependent on the extent to which agencies use its services.

In addition, the central panel should be authorized to assess special fund agencies for the use of its services. Many of the special fund agencies are small, specialized licensing and regulatory agencies governed by part-time boards with annual budgets of less than $500,000.[51] These special funds are largely derived from fees and assessments and are protected from across-the-board budget cuts.[52] These agencies probably have the greatest need for experienced and impartial hearing officers. The central panel system would provide these officers, and the pay-as-you-use approach of the assessment fund would make it affordable and cost effective for these agencies.

VII. AGENCY REVIEW OF DECISION

In addition to organizational separation and independence, other means of negating institutional bias are essential. Impartiality diminishes if the agency head is free to review, modify, or reject the order of the administrative law judge. Yet, a feature common to the Model Act and the central panel states is agency review of the proposed order of the administrative law judge.[53] Under the Model Act, the agency, which is often a party, may review the administrative law judge's initial order.[54] The act also requires that the initial order be a part of the record, with the differences between the initial order and the agency's final order to be identi-

51. JOINT LEGISLATIVE BUDGET COMMITTEE OF THE 1986 MISS. LEGISLATURE, BUDGET REPORT FOR FISCAL YEAR 1987, at 289-364 (Part 2, Special Fund Agencies).

52. MISS. CODE ANN. § 27-104-13 (Supp. 1986) (protecting special funds from across-the-board cuts); JOINT LEGISLATIVE BUDGET COMMITTEE OF THE 1986 MISS. LEGISLATURE, BUDGET REPORT FOR FISCAL YEAR 1987 at 17 (1986); *Panel Slashes 25.5 Million*, The Clarion Ledger, Jan. 10, 1986, at A1, col. 4.

53. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-216(a) (1981); *see, e.g.*, COLO. REV. STAT. § 24-4-105 (1973 & Supp. 1985) (specifying procedures for review of an agency decision or initial determination of a hearing officer); N.J. STAT. ANN. § 52:14B-10 (West 1986); TENN. CODE §§ 4-5-314, 4-5-315 (1985 & Supp. 1986) (specifying procedure for review of initial order, but not expressly delineating review of order of administrative law judge). The policy for agency review is to prevent the agency from losing its traditional adjudicative function and to prevent a transfer of power to the administrative law judge. *See generally*, K. DAVIS, ADMINISTRATIVE LAW TEXT, § 10.07 (1972).

54. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-216(a) (1981).

fied.[55] Agency review may be eliminated by law.[56]

California and Florida are indicative of the authority for agency review found in the central panel states. In Florida, an agency may modify or reject conclusions of law or interpretation of administrative rules, but it may not reject or modify the findings of fact, unless the agency determines that those findings were not based on competent substantial evidence, or the proceedings did not meet the essential requirements of law.[57] In California, an agency may adopt the proposed decision in its entirety or reduce the penalty and adopt the balance of the decision. If the proposed decision is rejected, then the agency may decide the case on the record.[58]

Although agency review is standard in central panel states, it is an undesirable factor that should be eliminated. Agency review reintroduces the institutional bias that the central panel was designed to remove. The agency which is a party to the controversy may be permitted to interfere in the adjudicative process. This again provides an unhealthy union between the adjudicatory and prosecutorial functions. The agency is allowed to switch roles from that of zealous prosecutor to that of appellate judge of its own cause. This veto power over the administrative law judge's decision creates a real bias against a contestant.

Relieving agency heads or boards of the burden of adjudication would permit them to devote their time and energy to their fundamental task of defining and improving administrative policy. They could focus on problem areas within their jurisdiction and zealously defend their policies without the burden of also trying to be fair judges in cases where their established policy is challenged.

Allowing agencies to review the central panel's decisions would, in effect, be assigning them a purely judicial function, which would violate the separation of powers clause of our constitution. We propose that agencies be given no power of review over central panel decisions.[59] The final order of the central panel hearing officer should be made reviewable by a court of law, on the record made at the central panel.

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55. *Id.* at § 4-216(i).

56. *Id.* at § 4-216(a)(1).

57. FLA. STAT. ANN. § 120.57(1)(i)(9) (Supp. 1986).

58. CAL. GOV'T CODE § 11517(b)-(c) (Supp. 1986).

59. *See* Grossman and Mullen, *Administrative Law Reform in New Jersey: The First Five Years of the OAL*, 7 SETON HALL LEGIS. J. 153, 164-66 (1984). If the jurisdiction of the central panel includes ratemaking or rulemaking, review by the agency may be appropriate.

VIII. STATUTORY STANDARDS AND JUDICIAL REVIEW

The concept of the central panel may be seen more clearly in the context of the tripartite structure of our government. Although administrative agencies have been described as the "fourth branch of government," Mississippi government has but three branches.[60] The work of the central panel would be quasi-judicial in nature, but it would be an executive branch entity exercising executive powers.

The role of the legislature, beyond the establishment of the central panel, would be to determine the standards to be applied by the executive agencies.[61] The key concept is that there should be clearly defined standards, which are usually prescribed by legislation.[62] The authority to define standards could be delegated to an agency,[63] but whether enunciated by statute or regulation, standards would have to be clearly stated.[64] The legislature would establish the structure of the central panel, assign it jurisdiction, and provide it with legal standards to apply in hearing cases. Within the four corners of that statutory charter, the panel would perform fact-finding and apply standards (statutory and regulatory) to the facts before it.[65]

In courts, the record is built step by step before the hearing ever takes place. This orderly procedure is usually not followed in administrative proceedings. The entire record for appellate review is usually made during the course of an evidentiary hearing, but the record must be made in a manner that is comprehensible for appellate review.[66] A secondary yet major benefit of having a central panel would be that well trained hearing officers

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60. MISS. CONST. art. I, §§ 1, 2; Alexander v. Allain, 441 So. 2d 1329, 1335 (Miss. 1983).

61. Clark v. State *ex rel.* Miss. State Medical Ass'n, 381 So. 2d 1046, 1050 (Miss. 1980); State v. Allstate Ins. Co., 231 Miss. 869, 882, 97 So. 2d 372, 375 (1957).

62. Smith v. Ladner, 288 F. Supp. 66, 69 (S.D. Miss. 1968); State v. Allstate Ins. Co., 231 Miss. 869, 882, 97 So. 2d 372, 375 (1957).

63. Howell v. State, 300 So. 2d 774, 779 (Miss. 1974) (suggesting that the authority to define standards must be limited so as not to encroach upon the legislative prerogative).

64. Cohen v. M.S.U., 256 F. Supp. 954, 961 (N.D. Miss. 1966); Miss. Air & Water Pollution Control Permit Bd. v. Pets & Such Foods, Inc., 394 So. 2d 1353, 1355 (Miss. 1981).

65. Farrish Gravel v. Miss. State Highway Comm'n, 458 So. 2d 1066, 1068 (Miss. 1984); Strong v. Bostick, 420 So. 2d 1356, 1361 (Miss. 1982); Miss. Milk Comm'n v. Winn-Dixie, 235 So. 2d 684, 688 (Miss. 1970); Broadhead v. Monaghan, 238 Miss. 239, 259, 117 So. 2d 881, 890 (1960). The court in *Broadhead* stated that

> the Legislature may delegate to an administrative officer or agency power to enforce penalties prescribed by the Legislature . . . without resort to the courts. Due process does not require that the courts, rather than administrative officers, be charged . . . with determining the facts upon which the imposition of such a penalty depends.

Id.

66. State Bd. of Psychological Examiners v. Coxe, 355 So. 2d 669, 671 (Miss. 1978).

would build a complete record for judicial review.[67] Where there is no adequate administrative remedy, courts must hold a full evidentiary hearing rather than a simple review of the administrative record.[68]

The central panel would sit on that important frontier where the executive and judicial branches touch upon each others' realms of responsibility. The adoption of a central panel would better define the relationship between the courts and the agencies within the panel's jurisdiction. The Mississippi Supreme Court has repeatedly announced that reviewing courts should not second-guess fact-finding by administrative bodies.[69] By this rule, reviewing courts are bound to apply the law in light of facts found at the hearing, with their review limited to a search for errors of law. "Our Constitution does not permit the judiciary of this state to retry de novo matters on appeal from administrative agencies. Our courts are not permitted to make administrative decisions and perform the functions of an administrative agency."[70]

In Mississippi, the settled rule for appellate review of administrative decisions is for the court to determine whether the agency's decision

(1) was not supported by substantial evidence;
(2) was arbitrary or capricious;
(3) was beyond the power of the administratrive agency to make; or
(4) violated some statutory or constitutional right of the complaining party.[71]

Although the legislature could codify or modify these grounds,[72] we propose no change in these standards of review. However,

67. Cases within the jurisdiction of the central panel could not be litigated prior to the hearing at the central panel, but would enter the courts as an appeal on the record. Davis v. Barr, 250 Miss. 54, 63, 157 So. 2d 505, 508 (1963) (noting that "where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act"), *clarified*, 250 Miss. 73, 73-74, 163 So. 2d 745, 745-46 (1964), *cert. denied*, 377 U. S. 965 (1964). *Id.* at 63, 157 So. 2d at 508. The central panel would, in proper cases, entertain motions for rehearing or reconsideration. Geiger v. Miss. State Board of Cosmetology, 246 Miss. 542, 547, 151 So. 2d 189, 191 (1963).

68. Campbell Sixty-Six Express, Inc. v. J. & G. Express, Inc., 244 Miss. 427, 440, 141 So. 2d 720, 726 (1962).

69. Miss. State Tax Comm'n v. Miss.-Ala. State Fair, 222 So. 2d 664, 665 (1969).

70. Bd. of Trustees of Pass Christian v. Acker, 326 So. 2d 799, 801 (Miss. 1976); Miss. State Tax Comm'n v. Miss.-Ala. State Fair, 222 So. 2d 664, 665 (Miss. 1969); *accord* Lofton v. George County, 183 So. 2d 621, 622-23 (Miss. 1966); Cal. Co. v. State Oil and Gas Bd. 200 Miss. 824, 841-45, 27 So. 2d 542, 546-47 (1946), *aff'd on rehearing*, 200 Miss. 847, 849, 28 So. 2d 120, 121 (1946). *But see* Knox v. L.N. Dantzler Lumber Co., 148 Miss. 834, 854, 114 So. 873, 877 (1927) ("[V]aluation of property for assessment is a judicial act . . . ."). *Id.* at 854, 114 So. at 877.

71. Mainstream Savings and Loan Ass'n v. Washington Federal Savings and Loan Ass'n, 325 So. 2d 902, 903 (Miss. 1976); Miss. State Tax Comm'n v. Miss.-Ala. State Fair, 222 So. 2d 664, 665 (Miss. 1969).

72. *See, e.g.*, MISS. CODE ANN. §§ 25-9-132 and 37-9-113 (1972 & Supp. 1986) (specifying the standard of review for public employee appeals and review of teacher dismissals). Mississippi common law on judicial review of administrative decisions is consistent with the standards outlined in the Model State Administrative Procedure Act.

this standard of judicial review is a deferential one. Thus it is incumbent upon the legislative and executive branches to ensure that the process to which the courts are deferring is worthy of the standard.

We recommend the circuit, rather than the chancery court as the forum for judicial review of the central panel's final order. This is the appropriate court in our constitutional scheme.[73]

IX. CONCLUSION

In summary, the adoption of a central panel system for Mississippi's administrative law judges would substantially increase the fairness of the quasi-judicial aspects of our administrative process. This approach has been tried in other states, and it works well. Agencies that have prosecutorial functions would be unshackled from the burden of trying to provide a fair hearing while at the same time trying to enforce the law. The central panel, once established, would be a flexible basis for future legislation to build upon. The central panel would cost less to operate than the scores of tribunals that must be periodically convened under our current law. Most importantly, its adoption would preserve the appearance and the reality of fairness, enhance the credibility of the administrative process, and generate "the feeling, so important to a popular government, that justice has been done."[74]

73. MISS. CONST. art. 6, § 156. *But see* Western Line Consol. School Dist. v. City of Greenville, 465 So. 2d 1057, 1060 (Miss. 1985) (appeal of reasonableness of annexation is a question for equity jurisdiction which is properly assigned to chancery court); Charter Medical Corp. v. Miss. Health Planning and Dev. Agency, 362 So. 2d 180, 182 (Miss. 1978) (chancery court has jurisdiction for review of decision of state board where there is no adequate remedy at law).

74. Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 172 (1951).