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## Similarities and Differences between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications under the Administrative Central Panel

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# **SIMILARITIES AND DIFFERENCES BETWEEN JUDGES IN THE JUDICIAL BRANCH AND THE EXECUTIVE BRANCH: THE FURTHER EVOLUTION OF EXECUTIVE ADJUDICATIONS UNDER THE ADMINISTRATIVE CENTRAL PANEL**

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**Overview**

For several years a debate has taken place in the pages of this Journal and elsewhere, concerning the independence of the administrative judiciary in the United States. It would be fair to characterize the debate as one that focuses on the role of the administrative law judge as a public servant — a public servant who must accomplish two oftentimes conflicting goals. The ALJ typically is possessed of an unusually thorough familiarity with government operations of one sort or another: she may know foster care rules for the State of Oklahoma better than virtually any judge or lawyer in her state; he may have been with the Social Security Administration through cyclical contractions and expansions, acquiring along the way a history of legislative expressions of intent that few can equal. This expertise is then linked (typically, although not always) with formal training in the law and the juris doctorate. Take this extraordinary command over governmental policies and systems, and add to it the lawyer’s knowledge of American judicial systems, and you have the typical ALJ.

At the same time, this public servant is also responsible for conducting hearings and rendering judgments, and the hearings and judgments possess many of the attributes of traditional adjudications: there are winners and losers, people lose government benefits or are barred from practicing their chosen professions or denied the opportunity to earn a livelihood in their field, agencies find they must abandon long-standing approaches to carrying out fledgling and sometimes poorly thought-out legislation, and the public is at times left to wonder how the ALJ ever came up with the decision that reaches the newspapers. Familiarity with the agency’s policies and its systems is useful in this regard, but the ALJ cannot simply defer to the agency; the task at hand is to impartially adjudicate the controversy, even though the outcome may be at odds with the result sought by the agency.

It is thus perhaps not surprising that articles here and in other

journals have considered the ramifications of independence and accountability in our chosen profession.<sup>1</sup> If she is to faithfully carry out her role as an adjudicator, the ALJ must strive to be free of overreaching by the agency she is serving. At the same time, in all likelihood the ALJ has attained her judicial position in large measure because she has a greater than average familiarity with the programs, policies, and regulations of the agency, and is probably closely tied to the government administrator charged with implementing those programs.

### **The National Administrative Law Judge Foundation 1997 Fellowship**

The 1997 Fellowship awarded by the National Administrative Law Judge Foundation was to focus on “the similarities and differences between judges in the judicial branch and the executive branch.”<sup>2</sup> This article will review these similarities and differences first by discussing the two adjudicative structures in terms of organic components (how each are created, organized, and abolished) and then in terms of operations (the functions, duties, and powers of the judges of both branches). To assist in this discussion, I will consult analyses of the judicial branch that have helped define how that branch differs from the executive and legislative branches of our tripartite system of government. On the other hand, the judges of the executive branch operate most often under one or more provisions of the state version of

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<sup>1</sup>See e.g., Lori Kyle Endris and Wayne E. Penrod, “Judicial Independence in Administrative Adjudication: Indiana’s Environmental Solution,” 12 *ST. JOHN’S J. LEGAL COMMENT.* 125 (1996); Edwin L. Felter, Jr. “Maintaining the Balance Between Judicial Independence and Judicial Accountability in Administrative Law,” 17 *J.N.A.A.L.J.* 89 (1997); Elaine Golin, “Solving the Problem of Gender and Racial Bias in Administrative Action,” 95 *COLUM. L. REV.* 1532 (1995); John Hardwicke and Ronnie A. Yoder, “Does Mandatory Quality Assurance Oversight of ALJ Decisions Violate ALJ Decisional Independence, Due Process or Ex Parte Prohibitions?” 17 *J.N.A.A.L.J.* 75 (1997); Richard B. Hoffman and Frank P. Cihlar, “Judicial Independence: Can It Be Without Article III?” 46 *MERCER L. REV.* 863 (1995); Jeffrey S. Lubbers, “The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluations for ALJs,” 7 *ADMIN. L.J. AM. U.* 589 (1994); Bernard Schwartz, “Adjudication and the Administrative Procedure Act,” 32 *TULSA L.J.* 203 (1996); Russell L. Weaver, “Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase ‘Judicialization’ in Pennsylvania,” 5 *WIDENER J. PUB. L.* 297 (1995).

<sup>2</sup>See 16 *J.N.A.A.L.J.* inside cover, Winter 1996.

the Model Administrative Procedure Act<sup>3</sup> or, at the federal level, the Federal Administrative Procedure Act.<sup>4</sup> Thus, the article considers how those acts offer provisions similar to or distinct from the judicial branch counterparts.

One result of making such an analysis is that the relative strengths and weaknesses of the administrative judiciary are raised to the surface, more visible when contrasted with the article III and constitutional judiciary. Preeminent in what makes the administrative judiciary vulnerable to charges that it does not deliver substantial justice is the charge, quite valid in some cases, that the administrative adjudicator is not insulated from the agency she serves. The charge is based on the existence of a relationship between the executive adjudicator and the agency served by the adjudicator, a relationship that is significantly different from that existing between judges of the judicial branch and the source of judicial authority (be it constitutional or statutory). This shortcoming, tolerated under the original and revised versions of the Model Administrative Procedure Act and the Federal Administrative Procedure Act, implicates the very basic requirement that all who come before executive adjudicators be given "a fair trial in a fair tribunal."<sup>5</sup>

In past presentations of Fellowship papers, and in other articles offered by those deeply committed to improving the practice of administrative law, our colleagues have begun to frame the debate by articulating the need for decisional independence on the one hand and, on the other hand, the need for management of ALJs to better utilize the finite amount of adjudicative resources available to the governmental administrator. Next year's Fellowship recipient will sharpen the debate by directly addressing the topic of maintaining an independent administrative judiciary.

Before we reach that point, before we draw some clear lines as

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<sup>3</sup>Uniform Law Commissioners' Model State Administrative Proc. Act (1981) (West 1997).

<sup>4</sup>5 USC §§ 551 et seq. (1994)

<sup>5</sup>In re Murchison, 349 U.S. 133, 136 (1955).

thresholds over which we shall not willingly cross, we may benefit from an analysis that focuses on the differences between the ALJ and other judges. Such an analysis would identify key components of the administrative adjudication process, explore how those components have evolved and why they exist in their present form; it would compare those components to similar structures in the other judiciary (be it the true article III court or courts of general jurisdiction at the state level). If properly crafted, the comparison should offer some insight into what distinguishes the different judicial engines; and that insight, in turn, should help focus our debate on components of the administrative judicial engine that must be protected at all cost, if we are to maintain decisional integrity while still providing effective and efficient service to the public and our employers.

### **Why Distinguish Between the Judicial and Executive Judge?**

It is one thing to articulate the differences between judges of the judicial branch and the those in the executive branch; yet it is quite another thing to use a discussion of those differences in a productive way. The instinctive defensive reaction to a claim that the administrative adjudicator is controlled by the agency she serves may be to raise the vigorous assertion that due process requires the ALJ be independent of the agency she serves.<sup>6</sup> The distinctions between judges of the judicial branch and those of the executive branch are such, however, as to call into question such a conclusion. At the outset, it is important to note the distinctions that courts have already made that set apart the executive judiciary from the judicial branch adjudicators: that “[a]dministrative decisionmakers do not bear all the badges of independence that characterize an Article III judge, but they are held to the same standard of impartial decisionmaking.”<sup>7</sup> Though it may be appealing for ALJs to believe they must operate independent of their agency, constitutional jurisprudence does not support a claim that due process mandates such independence. Rather, if we conclude that as

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<sup>6</sup>See, e.g., Ann Marshall Young, “Evaluation of Administrative Law Judges: Premises, Means, and Ends,” 17 J.N.A.A.L.J. 1, 21-31 (1997).

<sup>7</sup>Barry v. Bowen, 825 F.2d 1324, 1330, citing Schweiker v. McClure, 456 U.S. 188, 195 (1982); and Hummel v. Heckler, 736 F.2d 91, 95 (3d Cir.1984).

ALJs we must “avoid, and should be shielded as much as possible from, any influences that might in any way compromise such independence, neutrality, and impartiality” as Judge Young has recommended,<sup>8</sup> we must find bases for this mandate other than those found in the Due Process Clause of the Constitution.

Shortcomings inherent in the adjudicative process under the Model APA are well-known, and have been the subject of more than a decade of work by members of the National Conference of Administrative Law Judges, the Judicial Division of the American Bar Association, the National Association of Administrative Law Judges, and many other institutions and individuals.<sup>9</sup> This Fellowship paper is part of that effort. In fulfilling its mandate to “enhance the quality of administrative justice and . . . improve the process of dispute resolution,”<sup>10</sup> the National Association of Administrative Law Judges adopted a Model Act Creating a State Central Hearing Agency.<sup>11</sup> In the third part of this article, I discuss the provisions found in the Model Act as it was adopted by the House of Delegates of the American Bar Association.<sup>12</sup> This Model Act offers what I conclude to be a significant tool for addressing the two concerns described at the beginning of this Paper. The Model Act Creating a State Central Hearing Agency calls for creation of a cadre of administrative law judges who are simultaneously *independent* of the agencies they serve and yet *fully accountable* for their professional service in the executive branch. When viewed in the light created by a careful comparison between the role of judges in the judicial and executive judiciary, it

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<sup>8</sup>Young, *supra* note 7, at 24.

<sup>9</sup>See e.g., Karen Y. Kauper, “Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute,” 18 U. MICH. L. REV. 537 (1985); Karen S. Lewis, “Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics,” 94 DICK. L. REV. 929 (1990); Victor W. Palmer, “The Administrative Procedure Act: After 40 Years, Still Searching for Independence,” 26 JUDGES’ J. 34 (1986); Paul R. Verkuil, “Reflections Upon the Federal Administrative Judiciary,” 39 UCLA L. REV. 1341 (1992).

<sup>10</sup>17 J.N.A.A.L.J. at 1 (1997).

<sup>11</sup>16 J. N.A.A.L.J. at 121 (1996).

<sup>12</sup>Model Act Creating a State Central Hearing Agency, Adopted by the House of Delegates of the American Bar Association, February 3, 1997, 17 J.N.A.A.L.J. 309, 309-321 (1997).



becomes clear that the innovations found in the Model Act are a significant step towards ensuring the administrative tribunal is both fair and efficient.

### **Creation of the Executive and Judicial Branch Judiciaries What Makes a “Court” a Court?**

If we take for our definition of courts that a court “is an organ of the government, consisting of one or more persons authorized to administer justice,”<sup>13</sup> then we should at the outset distinguish courts from administrative adjudicative tribunals. While agency hearing examiners and administrative law judges may hear and determine facts, and from those determinations make conclusions with respect to law, the agency adjudicator is part of the executive branch of the government, and is not a “court.”<sup>14</sup> Agency tribunals do not have the power to punish contempts, which is one of the inherent powers of a court.<sup>15</sup> The administrative adjudication process also tends to be prospectively oriented, announcing rules to be followed based on laws passed by the legislature, whereas the function of courts is narrower, usually addressing themselves to problems only after the fact.<sup>16</sup>

Ultimately, the state constitution is the source of authority for all judicial power in a state.<sup>17</sup> The federal Constitution does restrict the power of a state to determine the limits of state court jurisdiction;<sup>18</sup> however, those provisions of the federal Constitution defining the extent of judicial power are inapplicable to the judicial power of state

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<sup>13</sup>20 Am. Jur.2d Courts § 1 (1995), citing *Wood v. Circuit Court of Warren County*, 331 F. Supp. 1245 (E.D Tenn. 1971).

<sup>14</sup>*Rommell v. Walsh*, 15 A.2d 6 (Conn. 1940); 20 Am. Jur. 2d Courts § 1 (1995).

<sup>15</sup>*Hernreich v. Quinn*, 168 S.W.2d 1054 (Mo. 1943).

<sup>16</sup>See *York v. Commonwealth* 815 S.W.2d 415 (Ky. App. 1991); 20 Am. Jur. 2d Courts § 1 (1995).

<sup>17</sup>21 C.J.S. Courts § 93 (1990); See, e.g., *City of Sapulpa v. Land*, 223 P. 640 (Okla. 1924).

<sup>18</sup>21 C.J.S. Courts § 93 (1990); See, e.g., *McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230 (1934) (privileges and immunities clause, article 4, § 2, cl. 1, requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens).

courts.<sup>19</sup> The jurisdiction of a given tribunal is regulated either by the state constitution or by statutes enacted pursuant to the state constitution.<sup>20</sup> This attribute of courts also controls legislative efforts to abolish, reorganize, divide, or consolidate constitutional courts, as well as attempts to alter, destroy, increase, or diminish the essentials of the jurisdiction, functions, or judicial powers of those courts (including inherent powers or functions).<sup>21</sup> Remaining with the legislature, however, is the power to establish the jurisdiction of constitutional courts, increase, diminish, or change their jurisdiction, confer on them additional jurisdiction, provided doing so is not prohibited by the state constitution and does not abridge the inherent powers of the court.<sup>22</sup>

### The Creation of Agency Adjudicative Bodies

One attribute of the power to confer judicial authority is the power to confer in an administrative body mixed administrative and quasi-judicial functions.<sup>23</sup> This mixture of executive and judicial authority is the *sine qua non* of the administrative tribunal. Characteristic of such tribunals is a focus on public rights, rather than private rights, although private rights may be directly affected by the decision of the tribunal.<sup>24</sup> The tribunal typically applies special knowledge acquired through continuous experience in difficult and complicated fields, and often the adjudicator is retained because of his or her greater than average ability to weigh intangibles associated with the subject matter, an ability that often results from specialization in the

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<sup>19</sup>21 C.J.S. Courts § 93 (1990); See, e.g., *Randolph v. Fricke*, 35 S.W.2d 912 (Mo. 1930), cert. denied, 283 U.S. 833 (1931).

<sup>20</sup>21 C.J.S. Courts § 94 (1990); See, e.g., *Seventh Urban, Inc. v. University Circle Property Development, Inc.*, 423 N.E.2d 1070 (Ohio 1981).

<sup>21</sup>21 C.J.S. Courts § 95 (1990).

<sup>22</sup>*Id.*

<sup>23</sup>21 C.J.S. Courts § 101 (1990); See, e.g., *Erie Ry. Co. v. Bd. of Pub. Util. Comm'r*, 98 A. 13 (N.J. 1916).

<sup>24</sup>L. Harold Levinson, "The Public Law/Private Law Distinction in the Courts," 57 *GEO. WASH. L. REV.* 1579 (1989) (noting the differences in the doctrine of immunity, in the procedures, and in the prosecutorial roles associated with the public law forum, observing the important attributes that are peculiarly public in nature — the power of taxation, eminent domain, law enforcement, etc. — are linked to peculiarly governmental liabilities and responsibilities — due process and the duty of rational decision making — and considering the role courts have in balancing between the public and private legal environments).

field of interest to the agency, applying insight gained through experience in the field.<sup>25</sup>

The agency adjudicative forum, like the agency itself, must be created by constitution, statute, agency action, or executive order.<sup>26</sup> Once established, the agency may control its judicial work through legislation patterned after the Model Administrative Procedure Act (APA)<sup>27</sup> or, at the federal level, may be subject to the provisions of the federal Administrative Procedure Act (FAPA).<sup>28</sup>

To understand how the role of the ALJ differs from that of an article III type of judge, it helps to narrow our focus a bit: the reference to an article III type of judge is one that arises because article III of the United States Constitution provides for the appointment of federal judges. The preeminent characteristic of this provision is that it attempts to assure the creation of an independent judiciary. How does it do so? It offers time, and money. This is the well-spring, from which the promise of eternal employment flows. Article III, section one of the Constitution provides that “the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The next sentence specifies that the judges of both “the supreme and inferior” courts shall enjoy life tenure and that their salaries may not be diminished during their continuance in office. This brings us to our first distinction: at the federal level, the article III judge enjoys the safeguards of life tenure and undiminished salary.<sup>29</sup>

In the context of the theme of this Fellowship topic, the two salient article III characteristics of lifetime tenure and undiminished salary are significant. The public perception of justice requires both accountability from our courts and judicial independence. Justice

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<sup>25</sup>73 C.J.S. Pub. Admin. Law and Proc. § 9 (1983); See *F.C.C. v. R.C.A. Communications Comm’n*, 346 U.S. 86 (1953).

<sup>26</sup>See generally, 2 Am. Jur. 2d Admin. Law § 24 (1994).

<sup>27</sup>Uniform Law Comm’n Model State Admin. Procedure Act (1981) (West 1997).

<sup>28</sup>55 U.S.C.S. § 551 et seq. (Law. Co-op. 1997).

<sup>29</sup>U.S. Const. art. III, § 1; See Stephen G. Breyer, “Judicial Independence in the United States,” 40 ST. LOUIS UNIV. L. J. 989, 989-90 (1996).

Blackmun, writing in *Freytag v. Comm. of Internal Revenue*,<sup>30</sup> makes the point that the concern over judicial independence was an integral part of our constitutional architecture. In a case that reviews the structure of the United States Tax Court and centers on whether the Chief Judge of that court may make appointments for special trial judges, Justice Blackmun recalls the notion of how the separation of governmental powers is expected to preserve judicial independence. The Appointments Clause of the Constitution, Art. II, § 2, cl. 2, provides:

He [the President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>31</sup>

Thus, the Constitution limits congressional discretion to vest power to appoint "inferior Officers" to three sources: "the President alone," "the Heads of Departments," and "the Courts of Law."

In *Freytag*, Petitioners argue that a special trial judge is an "inferior Officer," and also contend that the Chief Judge of the Tax Court does not fall within any of the Constitution's three repositories of the appointment power. The Court was not persuaded, and Justice Blackmun explained that "[t]he roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch. See *Mistretta v. United States*, 488 U.S. 361, 382, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989). The Appointments Clause not

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<sup>30</sup>501 U.S. 868 (1991).

<sup>31</sup>*Id.* at 877-78.

only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power."<sup>32</sup> The structural principles embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives simply because they are located in Article II. According to the Court, this dynamic protects our liberty interest by preventing the concentration of judicial appointment power.

The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch. . . . The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.<sup>33</sup>

There is thus a constitutional limitation imposed on the selection of article III judges: the limitation restricts Congress and the President from attempting to upset the balance of authority between the three branches of government. Were the political branches of our federal government to try to staff article III courts to further a political ideology, for example, they would be confronted by an existing cadre of more than 700 article-III judges who enjoy life tenure.<sup>34</sup> They would also have to mobilize a combination of political continuity, executive determination, the absence of strong resistance in the Senate, and a large number of vacancies.<sup>35</sup> In contrast, one commentator has written, "Stacking' [an administrative] commission with a small number of members who enjoy limited terms is considerably easier, especially at its creation, when all seats are vacant."<sup>36</sup> The political reality of our

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<sup>32</sup>Id.

<sup>33</sup>Id. at 878.

<sup>34</sup>David J. Meltzer, 65 *IND. L.J.* 291, 292 (1990).

<sup>35</sup>Id.

<sup>36</sup>Id.

position as members of the administrative bench is that we attain our positions not through the process of constitutional appointment suffered by our counterparts on the federal bench, but instead by virtue of a delegation of both legislative and executive authority. We do not generally enjoy the gift of unlimited time in office, but instead are in many cases wholly dependent upon the good will of the executive office we serve. We almost certainly do not enjoy constitutional protection against the diminishment of our salaries.

### **New Deal Jurisprudence and the Administrative State**

It is not by happenstance that ALJs reach the bench by means other than constitutional appointment. In the evolution of the administrative adjudicative forum, we have gotten to where we are today because those who preceded us served a need that was different than the need met by article III judges. Consider the genesis of what is generally recognized as the first of our modern administrative agencies, the Interstate Commerce Commission.<sup>37</sup> The ICC was established by Congress under the powers of Article I, and has as its enabling authority the power to administer statutory schemes of federal regulation. Characteristic of the administrative state, its authority was over disputes involving public rights, and article III courts reviewed the ICC's decisions on a *de novo* basis.<sup>38</sup> In the formative years of the ICC, the notion was that the administrative bench need have no direct connection with article III courts, given that the scope of its authority was limited to resolving public rights disputes arising from the implementation of legislation. As one commentator noted, "the whole point of the [traditional] 'public rights' analysis" has often been that "no judicial involvement at all was required — executive determination alone would suffice."<sup>39</sup>

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<sup>37</sup>See, e.g., S. Breyer and R. Stewart, ADMINISTRATIVE LAW AND REGULATORY POLICY, 26 (2d ed. 1985); B. Schwartz, Administrative Law 21 (2d ed. 1984); cited in Richard H. Fallon, Jr., "Of Legislative Courts, Administrative Agencies, and Article III," 101 HARV. L. REV. 916, 924 (1988).

<sup>38</sup>Fallon, *supra* note 38, at 924.

<sup>39</sup>Peter L. Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch," 84 COLUM. L. REV. 573, 632 (1984), cited by Fallon, *supra* note 38, at 922.

In considering our heritage as administrative law judges, we should note that by the 1930s the administrative court was entrenched and expanding, sharing much of the same apparent authority as that possessed by article III courts, without the constitutional protection of life tenure and undiminished salary. In the 1932 case cited as the fountainhead of this trend, the Supreme Court upheld Congress' decision to vest in an *administrative* adjudicator the responsibility for deciding cases under the Longshoremen's and Harbor Workers' Compensation. The Court in *Crowell v. Benson*<sup>40</sup> assumed that public rights disputes may not require a *judicial* decision at either the original or appellate levels.<sup>41</sup> Even in private rights cases, *Crowell* held, an administrative tribunal may make findings of fact and render an initial decision of legal and constitutional questions, as long as there is an adequate review available in a constitutional court.<sup>42</sup> In order for these administrative adjudicators to be permitted to serve in a private rights case, the Court required that the "essential attributes" of the judicial decision must remain in an article III enforcement court, with the administrative agency or other non-article III adjudicator functioning less as an independent decision-maker than as an adjunct to the court. The Court analogized the role of the agency to the traditional roles of masters and commissioners.<sup>43</sup>

Thus, at the threshold of the New Deal, we see the Court's ratification of the administrative bench, even in the exercise of judicial authority over the private rights of citizens. This is true particularly with regulatory agencies that restrict private activity and typically possess the power to lay down rules, to determine whether private parties have violated the law, and to prescribe sanctions.<sup>44</sup> When we add to this the welfare or entitlement agencies created to dispense public funds through entitlement programs, we have what has become familiar to us as the modern administrative state.<sup>45</sup>

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<sup>40</sup>*Crowell v. Benson*, 285 U.S. 22 (1932).

<sup>41</sup>See *id.* at 50-51.

<sup>42</sup>*Id.* at 51-65; cited in Fallon, *supra* note 38, at 924.

<sup>43</sup>See 285 U.S. at 51; cited in Fallon, *supra* note 38, at 924.

<sup>44</sup>Fallon, *supra* note 38, at 924.

<sup>45</sup>*Id.*

## Benefits of Executive Adjudications

The benefits from this evolution of the Fourth Branch are tangible and significant. One commentator suggests four important values that support permitting the use of non-article III tribunals in place of constitutional courts:

The first value is an economic one: we have an interest in making the best use of expertise to implement a substantive regulatory agenda. Unlike article III judges, who can perform only adjudicative functions, agencies and legislative courts can apply their expertise not only to adjudication but also to rule-making, administration, and reporting to Congress and other decision makers. Mixing adjudicative tasks with administrative and rulemaking activities helps to adapt adjudication to the implementation of regulatory powers in a way that might not be possible within a scheme of strict separation of powers.<sup>46</sup>

The second value is a pragmatic one: we have an interest in attaining reasonable efficiency and order in the performance of basic governmental functions. Consider the range of governmental functions that one might argue should be brought to article III courts because they arise under the Constitution, laws or treaties of the United States: these include functions like those performed by the taxing, welfare, customs, and immigration authorities. And then consider the nightmare that bringing these cases would create if the administrative court were removed.<sup>47</sup>

The third interest is one that hits at the heart of many of us, and can be the source of serious concern. The establishment of non-article III tribunals leads, *by design*, to a greater flexibility by the tribunal to changing needs and political priorities. Congress and state legislatures can experiment with the creation of ALJ positions, providing

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<sup>46</sup>Fallon, *supra* note 38, at 936.

<sup>47</sup> *Id.*



adjudicative reviews by persons lacking life tenure, and then as the need arises can terminate the experiment — and fire the adjudicators— without ever having created unremovable and underutilized article III judge positions.<sup>48</sup>

And finally, there is convincing support for the proposition that nonjudicial proceedings can produce fairer and more consistent results than those realized through ad hoc judicial determinations. Commentators have noted, for example, that judicial determinations about whether a person should be considered disabled for Social Security purposes tend to be less consistent and equitable than judgments based on bureaucratic rules that reflect statistical regularities and likelihoods.<sup>49</sup>

### **Distinguishing the Executive Adjudicator from the Article III Judge: The Appointment of the Jurist**

These characteristics and benefits inure to both the state and the federal administrative bench. Over time, they have been the impetus for an entrenched and interwoven legal culture that looks to us and to article III courts for assurance that the benefits of adjudication by non-article III courts outweigh the costs associated with the loss of an independent adjudicator. And thus we come to an area where we should note the ALJ's role in society. The appointment of ALJs is accomplished by a wide variety of vehicles, where some are selected through organized applications like those used by the Office of Personnel Management in the selection of Social Security ALJs; at the other end of the spectrum, there are those holding the title of ALJ or hearing examiner who are screened by the agency they serve, hired by the agency, evaluated by the agency, subject to discipline by the agency, and rewarded by the agency. This latter approach carries with it the very real aura of dependence, not independence. As we have heard in the past, the public looks at this captive ALJ and asks "how can I expect to win this case when the [agency] is my accuser,

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<sup>48</sup>Id.

<sup>49</sup>Id.

prosecutor, and judge?"<sup>50</sup> One commentator wrote that this statement exemplifies the public perception of administrative law judges being biased and partial to their employing agencies.<sup>51</sup>

## **The Evolution of the Executive Adjudicator and the Central Panel ALJ**

The task before us, and the reason for considering the differences between the judicial court and the legislative or executive adjudicator, is that by considering the benefits and weighing the costs of turning to the administrative bench, we can craft the best possible vehicle for dispensing justice. My proposal for further discussion and consideration is that the creation of the central panel of hearing officers to serve the adjudicative needs of agencies at both the state and federal level is the single most effective device to attain the maximum degree of public benefit at the least level of public risk. By itself, this proposal breaks no new ground; indeed, the resolution of the ABA in 1997 recommending that state and territorial legislatures enact the Model Act Creating a State Central Hearing Agency brings the proposal to a concrete and forward position. What my proposal brings to the fore, rather, is the observation that there are significant differences between the administrative adjudicator and the article III adjudicator, particularly in terms of the accountability and the independence of the adjudicator, that should be considered in the further evolution of the administrative bench. The central panel proposal recognizes that the administrative adjudicator is not cloaked with the accouterments of independence attributed to article III judges, nor to judges of the judicial branch generally. When properly implemented, the central panel has the potential for accentuating the strengths of the administrative bench, compensating for the absence of this measure of independence, and in the process fostering credibility in the public mind.

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<sup>50</sup> Judge Earl Thomas, "Administrative Law Judges: The Corps Issue," at 5 (A.B.A. 1987).

<sup>51</sup> *Id.*, cited in Karen S. Lewis, "Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics," 94 DICK. L. REV. 929, fn. 2 and accompanying text (1990).

Chief Judge Felter<sup>52</sup> described the significant differences between traditional administrative law judicial systems and the central panel system, in his Fellowship article in 1995:

Unlike decentralized Administrative Law Judges, housed in the agencies they serve, independent central panels are geared to one mission only — adjudication. In a nutshell, the only business of a central panel of Administrative Law Judges is to hear and decide cases — not to occasionally serve as house counsel for an agency or in other legal capacities. Not only do central panels have a vested interest in being efficient and cost effective, they must because they are under a microscope focused on adjudications — to the exclusion of other tasks.<sup>53</sup>

Thus, we note what is left behind when a traditional executive judiciary turns to the central panel: members of the executive judiciary end their part-time roles as legal counselor to the agency, and stop serving as an employees of the agency. While the agency loses control over the employment status of the ALJ, control remains with the executive branch, only now channeled through the chief administrative law judge. The change is a fundamental one, and is a key to accomplishing the first goal stated in the Model Act: to “provide a source of independent administrative law judges to preside in contested cases” arising in the executive branch of government.<sup>54</sup>

## **Fundamentals of the Central Panel of Administrative Law Judges**

Under the Model Act, the duties of the executive judiciary

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<sup>52</sup>Edwin L. Felter, Jr., Chief Judge, State of Colorado Department of Administration, Division of Administrative Hearings.

<sup>53</sup>Edwin L. Felter, Jr., “1994 NAALJ Fellowship Paper: Administrative Adjudication Total Quality Management: The Only Way to Reduce Costs and Delays Without Sacrificing Due Process,” 15 J.N.A.A.L.J. 5, 9 (1995).

<sup>54</sup>Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings), as unanimously adopted on February 3, 1997, by the House of Delegates of the American Bar Association, reprinted at 17 J.N.A.A.L.J. 313-22 (1997) (hereinafter Model Act).

remain with the executive branch, yet the executive judiciary is expressly separated from the investigatory, prosecutory, and policy-making functions of the executive branch agencies.<sup>55</sup> The independence of each ALJ is assured first by the selection of the individual ALJ. The Model Act offers three options for ALJ selection: by the Governor, using the screening and recommendation of a judicial nominating commission, by competitive examination in the classified service of state employment, or by the chief administrative law judge.<sup>56</sup> Once appointed, the ALJ becomes an employee of the central panel office (the Office of Administrative Hearings, in the Model Act).<sup>57</sup> One option also addresses exemptions for ALJs “grandfathered” by the conversion, exempting those already serving as ALJs from the requirement that they be licensed to practice law or that they have held such a license for five years.<sup>58</sup>

The role of the executive administrator (for example, the department head, or the members of a licensing board) who traditionally hears cases as an adjudicator may, or may not, change under the Model Act. One option of the Model Act is to provide that if the agency head or governing body “hears the case without delegation or assignment to a hearing officer or administrative law judge,” then the central panel office would not hear the case, preserving the status quo.<sup>59</sup> In all other cases, however, the Model Act provides for central panel officers to “administer the resolution of all contested cases.”<sup>60</sup> There may be times when such an appointment is not possible, for example, when there are not sufficient qualified ALJs to serve. In such a case, the chief administrative law judge shall designate “in writing an individual to serve as an administrative law judge in a particular proceeding before the agency” and may, under optional language, limit candidates to those possessing the qualifications of service as an ALJ, and may also subject the candidate to the Code of Judicial Conduct.<sup>61</sup>

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<sup>55</sup>Id., § 1-2(a).

<sup>56</sup>Id.

<sup>57</sup>Model Act, § 1-2(b).

<sup>58</sup>Id.

<sup>59</sup>Model Act, § 1-3(a).

<sup>60</sup>Id.

<sup>61</sup>Model Act, § 1-8.

Once a matter has been referred by an agency, one or more ALJs “shall administer the resolution of the matters referred.”<sup>62</sup> As such, the agency loses its role in administering resolutions once a referral is made. Optional language is offered, however, whereby the agency may engage in “appropriate interlocutory review” and may proceed to an “appropriate termination or modification of the proceeding[.]”<sup>63</sup> This permits the agency to settle cases docketed with the central panel adjudicator, apparently with or without the participation or approval of the ALJ.

### **Ensuring Systemic Independence and Uniformity Under the Central Panel**

In a substantial change from the status quo, under the Model Act the executive branch has a means by which executive adjudications throughout the state systems can be directed by a single person.<sup>64</sup> Selection of the chief administrative law judge is made either through the Governor, with the advice and consent of the Senate, for a definite term of years; or through competitive examination in the classified service of state employment.<sup>65</sup> This is in contrast with traditional approaches, where typically the Governor will appoint members of boards and commissions, and once appointed those members determine among themselves who shall direct the adjudicative efforts pursued by the agency. Without a central panel, the result can be and often is a patchwork of very different administrative approaches, amounting to a confusing legal system that the executive branch may have no reasonable means for organizing or monitoring. Worse, without a central panel there is no reliable way to control costs nor achieve the economies of scale that can be realized with a statewide, uniform adjudicative process.

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<sup>62</sup>Model Act, § 1-3(b).

<sup>63</sup>Model Act, § 1-10.

<sup>64</sup>Model Act, § 1-4.

<sup>65</sup>Id.

## **Cost-Benefits of Making the Administrative Process More Accessible**

Where the status quo is susceptible to charges that it is byzantine, inconsistent, and extremely inefficient, the alternative proposed by the Model Act offers the potential to create uniform, cost-effective procedures that laymen and lawyers alike can understand and utilize. Chief Judge Felter reported on the results achieved in Colorado, after that state implemented a central panel in 1976:

In 1980, in-house statistical research revealed that the central panel was able to handle workers' compensation cases at approximately \$1.50 per case less than the Division of Labor's referees had done prior to the 1976 consolidation. In fiscal year 1992/93, 17 ALJs (14.95 FTEs), statewide, through Denver and four regional offices, handled 12,811 cases for a cost of approximately \$2.1 million. This equals a total cost of \$163.92 per case ranging from a typical one hour workers' compensation hearing to a three week-long medical board hearing.<sup>66</sup>

Studies like those from Colorado, and others from California, Massachusetts, Minnesota, New Jersey, and Tennessee,<sup>67</sup> which preceded the development of the Model Act, have been supplemented with studies from the early 1990s, including reviews of central panels in Maryland, Texas, California, North Dakota, New Jersey, Tennessee, Wisconsin, Washington, Minnesota, Colorado, North Carolina, Florida, Iowa, Missouri, and Virginia.<sup>68</sup>

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<sup>66</sup>Felter, *supra* note 54, at 8.

<sup>67</sup>Malcolm Rich, "Adapting the Central Panel System: A Study of Seven States," 65 JUDICATURE 246 (1981) (evaluating central panel states using legislation that preceded the Model Act); see also Duane R. Harves, "Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota," 65 JUDICATURE 257 (1981).

<sup>68</sup>Allen Hoberg, "Administrative Hearings: State Central Panels in the 1990s," 14 J.N.A.A.L.J. 107 (1994).

## The Effect of a Central Panel on the Appearance of Impartiality and Independence

The Model Act creates the reality, not just the impression, of judicial independence in the executive judiciary. It does so first by protecting tenure of the chief administrative law judge by limiting the governor's power of removal to instances of "good cause following notice, and an opportunity for an adjudicative hearing. . . ." <sup>69</sup> This is true whether the chief administrative law judge is appointed by the Governor or through competitive examination. <sup>70</sup>

Under the Model Act, the rank and file ALJ is assured independence by the provision that subjects the ALJ to the "requirements and protections of" the applicable state classified service. <sup>71</sup> Removal, suspension, demotion "or adverse actions including, any action that might later influence a reduction in force" must be founded on circumstances constituting good cause, and can be imposed only after notice and an opportunity to be heard in an APA type of hearing before an impartial hearing officer. <sup>72</sup> In addition, the Model Act protects the ALJ from layoffs, linking any such layoffs to those permitted "in accordance with established, objective civil service or merit system procedures[.]" <sup>73</sup> Protection for the salaries of the ALJ is found in the requirement that the ALJ receive compensation "provided in the State budget." <sup>74</sup> In one alternative under the Model Act, the ALJ's compensation is to be "salary in the same amount as that provided for" a comparable court judge. <sup>75</sup> In reality, experience has shown that this parity has generally not been achieved, and the salaries of ALJs are more often than not substantially less than those secured by statutory and constitutionally created judgeships. <sup>76</sup> Recognizing that

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<sup>69</sup>Model Act, § 1-4(a).

<sup>70</sup>Id.

<sup>71</sup>Model Act, § 1-6(a)(3).

<sup>72</sup>Model Act, § 1-6(a)(3) and (a)(4).

<sup>73</sup>Model Act, § 1-6(a)(5).

<sup>74</sup>Model Act, § 1-6(a)(6).

<sup>75</sup>Id.

<sup>76</sup>See, Survey of Administrative Law Judge Salaries as of January 1, 1997, Nat'l Ass'n of Admin. Law Judges News, March 1998.

true parity in compensation among judges of the two branches of government is an appropriate aspiration but by no means a reality, the Model Act appears to get as close as possible to offering ALJs the two lynchpins of judicial independence: tenure in office, and an uninterrupted salary.

Beyond these two general protections, there is a third, explicit provision that guards against overreaching by the agency, where it states that an ALJ “shall not be responsible to or subject to the supervision, direction or direct or indirect influence of an officer, employee, or agent engaged in the performance of investigator, prosecutory, or advisory functions for an agency.”<sup>77</sup> The Model Act thus draws a very real line between the adjudicator and the executive agency, severing the chain of command between the adjudicator and the agency served by the adjudicative process. In creating this schism, the Model Act deliberately weakens the executive agency’s control over the agency adjudicator. The control is not eliminated, nor is there a net loss in control available to the executive branch; rather, control over the adjudicative process is taken from the agency, where it resides in a decentralized, possibly parochial form, and concentrates the control in a central adjudicative authority within the executive branch. This centralization reflects an evolution of the administrative adjudicative forum, providing a remedy to one of the more substantial shortcomings of the APA and FAPA.

### **The Further Evolution of the ALJ Under the Restrictions of the Central Panel**

There is a series of provisions mandating what amounts to a *quid pro quo* from those accepting work in a central panel office. In exchange for the protection of tenure through the civil service, the Model Act requires the central panel ALJ to commit all of his or her professional time to the task: full time service is required, and the private practice of law is prohibited, although there is optional language that would permit the ALJ to practice law if serving the central office

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<sup>77</sup>Model Act, § 1-6(b).



as a part-time ALJ.<sup>78</sup> Unlike the status quo, candidates for new positions as ALJs must be licensed to practice law, although there is optional language exempting from this requirement all non-lawyer hearing officers and administrative law judges who are already employed when the central panel is created.<sup>79</sup> There is optional language that adds to the juris doctorate requirement the further requirements that the license be issued by the state in which the office is located, and that the ALJ have a minimum of five years' admittance to the bar.<sup>80</sup> There also is broad language barring the ALJ from performing "duties inconsistent with the duties and responsibilities of an administrative law judge,"<sup>81</sup> and there are two important express provisions concerning control over the ALJ: First, the ALJ shall be "subject to administrative supervision by the chief administrative law judge;"<sup>82</sup> and second, the ALJ shall be "subject to the code of conduct for administrative law judges."<sup>83</sup>

### **Restrictions on the CEO: How the Chief ALJ Creates a Fair Tribunal**

Independence in the administration of the central office is further ensured by providing the chief administrative law judge with an explicit statutory mandate to "protect and ensure the decisional independence of each administrative law judge."<sup>84</sup> The chief ALJ (like all ALJs) must take an oath of office,<sup>85</sup> and the chief ALJ must be an attorney admitted to practice in the State for a minimum of five years.<sup>86</sup> The chief ALJ takes the appointment as a full-time position, and is barred from engaging in the private practice of law.<sup>87</sup> Also like all ALJs, the chief ALJ is subject to the code of conduct for administrative

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<sup>78</sup>Model Act, § 1-6(a)(8).

<sup>79</sup>Model Act, § 1-2(b).

<sup>80</sup>Model Act, § 1-6(a)(2).

<sup>81</sup>Model Act, § 1-6(a)(7).

<sup>82</sup>Model Act, § 1-6(a)(9).

<sup>83</sup>Model Act, § 1-6(a)(10).

<sup>84</sup>Model Act, § 1-5(a)(4).

<sup>85</sup>Model Act, §§ 1-4(b)(1), 1-6(a)(1).

<sup>86</sup>Model Act, § 1-4(b)(5).

<sup>87</sup>Model Act, § 1-4(b)(2).

law judges,<sup>88</sup> although at the outset it may be that no such code exists, or if it does exist it will have been promulgated by the chief ALJ in the early years of the central panel's existence.

To accomplish the administrative task of running the central hearing office, the chief ALJ is given authority to supervise the office,<sup>89</sup> and employ staff "in accordance with the State budget."<sup>90</sup> The Model Act provides two alternatives for staffing the office: under one option, the chief ALJ shall "appoint and remove administrative law judges in accordance with" the Act; in another option the Governor appoints the ALJs "through a judicial nominating commission" provided for under one option of the Act.<sup>91</sup> In perhaps the most significant provision of the Chief's authority, the Chief ALJ is given the power to "assign administrative law judges in any case referred to the Office."<sup>92</sup> When paired with the mandate to "protect and ensure the decisional independence of each administrative law judge,"<sup>93</sup> the Model Act takes a quantum leap towards creating an executive judiciary that offers all participants a hearing that is both fair in appearance and fair in reality. The heretofore frustrated litigant who in the past would have to make his case to an in-house agency lawyer will now be able to appear before a lawyer trained in the business of agency adjudications, yet not financially beholden to the agency. The adjudicator will not have been chosen by the agency, but instead by a chief administrative law judge who answers only to the governor and who can be removed only for cause publicly shown.

### **Quality Control and Adjudicative Management Under the Central Panel**

Given the mandate that the executive judiciary be both fair and efficient, the Model Act offers at least a framework for creating an efficient administrative judiciary. The chief ALJ is expressly required

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<sup>88</sup>Model Act, § 1-4(b)(7).

<sup>89</sup>Model Act, § 1-5(a)(1).

<sup>90</sup>Model Act, § 1-4(c).

<sup>91</sup>Model Act, § 1-5(a)(2).

<sup>92</sup>Model Act, § 1-5(a)(3).

<sup>93</sup>Model Act, § 1-5(a)(4).

to “establish and implement standards” for ALJs, as well as specialized training programs and materials for ALJs.<sup>94</sup> Optional language refines this, by providing that the Chief ALJ “establish qualifications for the selection of administrative law judges.”<sup>95</sup> The chief ALJ is also authorized, in one option, to “create specialized subject matter divisions within the Office.”<sup>96</sup> The Chief ALJ is also directed to “adopt a code of conduct for administrative law judges.”<sup>97</sup> In a provision that some ALJs may find chilling (perhaps even threatening to their own version of decisional independence), the Model Act also requires that the chief ALJ “monitor the quality of state administrative hearings through the provision of training, observation, feedback, and, when necessary, discipline of A.L.J.s who do not meet appropriate standards of conduct and competence, subject to the provisions of Section 1-6(a)(4)[.]”<sup>98</sup> The rank and file should, however, take heart in the express mandate that the chief ALJ “provide and coordinate continuing education programs and services for administrative law judges, including research, technical assistance, technical and professional publications” and should “compile and disseminate information, and advise of changes in the law relative to their duties[.]”<sup>99</sup>

### Cost Effective Adjudications

As with any effort to attain economies of scale in the public sector, the operations of the central panel must be open to fiscal review, and the Model Act provides for this through mandatory disclosure to the Governor through an annual report by the chief ALJ (and with optional language calling for a report to the Legislature as well).<sup>100</sup> In addition, the Model Act mandates that the Central Office will be subject to audit by the same legislative audit office and under the same rules and rotation by which other State agencies are audited.<sup>101</sup> The Model

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<sup>94</sup>Model Act, § 1-5(a)(5).

<sup>95</sup>Model Act, § 1-5(b)(2).

<sup>96</sup>Model Act, § 1-5(b)(5).

<sup>97</sup>Model Act, § 1-5(a)(8).

<sup>98</sup>Model Act, § 1-5(a)(9).

<sup>99</sup>Model Act, § 1-5(a)(6).

<sup>100</sup>Model Act, § 1-5(a)(10).

<sup>101</sup>Model Act, § 1-7(b).

Act anticipates that agencies other than those required to use the central panel cadre will want to do so, and to this end expressly authorizes the practice.<sup>102</sup> Anticipating the opposite reaction may also arise, the Model Act mandates that all agencies of State government “shall cooperate with the chief administrative law judge in the discharge of the duties of the Office.”<sup>103</sup>

### **Limits on Agency Control Over the Adjudicative Process Under the Central Panel**

With one exception, the agency is not permitted to select a particular ALJ.<sup>104</sup> Agencies may have a role in selecting an ALJ “in arbitration or similar proceedings as provided by law or in this subtitle or in regulations adopted under this subtitle[.]”<sup>105</sup> Once the chief ALJ has assigned an ALJ to a hearing, the agency may not reject the chosen ALJ for a particular proceeding.<sup>106</sup> It should be noted, however, that the Model Act expressly exempts all agencies of the Legislative Branch of the State government, all agencies of the Judicial Branch of the State Government, and the Governor’s office itself, and provides language which may be used to exempt any number of other state agencies, as politics deems expedient.<sup>107</sup> Presumably one of the first acts of the chief ALJ would be to craft procedures that can be followed when a selected ALJ is challenged by the agency or a party as being unqualified due to conflict of interest or other substantive basis.

A uniform approach to administrative hearings increases efficiency and reduces the time it takes to understand the administrative process. The Model Act begins the process of creating a uniform approach by vesting in the ALJ certain powers. Included in a list of codified powers is the authority to issue subpoenas, administer oaths, control the course of the proceedings, engage in or encourage the use of alternative methods of resolving disputes, and the statutory authority

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<sup>102</sup>Model Act, § 1-5(b)(3) - (b)(5).

<sup>103</sup>Model Act, § 1-7(a).

<sup>104</sup>Model Act, § 1-7(c).

<sup>105</sup>Id.

<sup>106</sup>Id..

<sup>107</sup>Model Act, § 1-1(a).

to direct the payment of “reasonable expenses, including attorney’s fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.”<sup>108</sup> In a world where contempt sanctions are rare, a properly utilized attorneys-fees statute may do more to “judicialize” agency proceedings than any other single innovation.

### **Practical Realities: The Issue of Turf**

Agencies may be inclined to resist the Model Act, in large part because those in the agencies may fear the loss of control over the outcome of adjudicative hearings. The fear may be well-founded, for if the agency presently controls the outcome, it does indeed stand to lose that measure of control, and appropriately so. Nonetheless, under the Model Act the agency is not in all cases required to abide by the findings of fact, conclusions of law, or recommendation of the ALJ, unless such a provision exists elsewhere in the law. There are four possible uses of reports once rendered by the ALJ. Under one option, the assigned ALJ “shall render the final decision of the agency not subject to agency review,” unless expressly exempted in the statute.<sup>109</sup> In other cases, and except as provided by law, the ALJ will issue a decision that could be a “proposed,” “initial,” or “recommended” decision depending on the adjective used in the legislation “unless the agency authorizes the issuance of a final decision, as provided in the Administrative Procedure Act.”<sup>110</sup> Nonetheless, the agency is not free to manipulate the report to suit itself: When the proposed decision or order arrives at the agency, the agency “shall not modify, reverse or remand the proposed decision of the administrative law judge except for specified reasons in accordance with law.”<sup>111</sup> Judicial review of agency decisions procured under the Model Act occurs in the manner prescribed in the status quo, whether by the provisions of the APA or any other specific statutory provision.<sup>112</sup>

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<sup>108</sup>Model Act, §§ 1-9(1) through 1-9(6).

<sup>109</sup>Model Act, § 1-10(a).

<sup>110</sup>Model Act, § 1-10(b).

<sup>111</sup>Model Act, § 1-11.

<sup>112</sup>*Id.*

In some instances, there will be reason to consider establishing a panel to advise the chief ALJ. The reasons for creating such a panel may be political, they may be fiscal, or may come from other sources, but the Model Act anticipates that some formal oversight will take place as the central panel replaces the existing patchwork of the executive judiciary. In optional language, the Model Act offers a framework for such an oversight commission, designated in the Model Act as the “advisory council on administrative hearings,” drawn from the public and private sector, with representatives from the senate, the house, the attorney general’s office, agency designees, the general public, and the state bar association, with the governor choosing all but the legislative representatives and the representative from the attorney general’s office.<sup>113</sup> The essential powers and duties of the council would be to advise the chief ALJ in carrying out the duties of the Office; identify issues of importance to ALJs that the chief ALJ should address; review issues and procedures relating to administrative hearings and the administrative process; review and comment upon rules of procedure and other regulations and policies proposed by the chief ALJ; review and comment on the chief ALJ’s annual report; and study exempted agencies to recommend which exemptions should be continued.<sup>114</sup>

### **Why the Administrative Tribunal Will Prevail — Without an Independent Adjudicator**

The innovations built into the Model Act offer a tangible and workable bridge between the credibility gap separating the article III judge and the administrative law judge. It is true that the ALJ is not wholly independent of the executive branch; such independence is reserved for article III judges, and would not be consistent with the fundamental character of the administrative adjudicative forum. A greater degree of independence comes, however, from the barrier a central panel erects that insulates the ALJ from threats to pay and tenure by the agency. Instead of reporting to the agency, the ALJ will report to and be evaluated by the central panel chief administrative

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<sup>113</sup>Model Act, § 1-12.

<sup>114</sup>Model Act, § 1-14.

judge. Once a matter is brought under the authority of the central panel, the agency's role is solely that of a party litigant, until the issuance of the final report. The Model Act does not prohibit agency review of an ALJ's report and recommendation, and indeed continues the common procedure whereby the ALJ issues a proposed decision, which the agency head shall not modify, reverse or remand except for specified reasons in accordance with law. As such, the agency continues to have a role in implementing policy through adjudications: it can reach factual as well as legal conclusions that are contrary to those articulated by the ALJ, but it must do so using the report as a starting point, and when it does so its rationale must be in accordance with law.

### **Limitations of the Agency Adjudicator and the Central Panel: Why the Agency Adjudicator is Different**

The risks inherent in over reliance on the administrative bench should not be overlooked. There is a tangible distinction to be made between the role of judges of the administrative adjudicative forum and judges of the judicial branch. Noteworthy in this list is the absence in the agency adjudicative forum of a truly independent adjudicator. By constitutional and statutory design, the executive adjudicator is not truly independent; he or she answers to the chief executive of the governing body, be it the President, governor, or mayor.<sup>115</sup> The article III judge, and to a lesser extent the judicial branch judge whose position is a creature of statute, by definition does not answer to the chief executive officer. Replacing the article III judge with an agency adjudicator results in a tangible loss of independence, for the agency adjudicator, even under the central panel model, is not wholly insulated from pressure from the executive branch. While they doubtlessly face pressure from other sources, article III judges and judges whose positions are constitutionally created do not have to answer directly to the chief executive officer.

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<sup>115</sup>See Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law," 1989 DUKE L.J. 511 (1989) (probing the true limits of the separation of powers doctrine with respect to judicial review of agency action).

### Article III Courts and the Balance of Constitutional Power

One writer offers this description of the nature of the key checks and balances that are written into our Constitutional structure:

The framers of the Constitutional aimed to create a government capable of vigorous and effective action. Yet they also feared the arbitrariness and tyranny that could result from excessive concentration of power in a single branch. Believing that the best safeguard against administrative capriciousness and oppression lay in a structure in which the factional or self-aggrandizing impulses of one branch could be checked by another, the framers viewed article III's provision of a life-tenured federal judiciary as crucial to the separation of powers. To subject federal judges to political influence by Congress or the national executive would, in their view, have threatened the rule of law."<sup>116</sup>

This ideal, clearly limited to the article III court, may yet be threatened, if recent political trends continue. A case strongly in point arose during the last presidential campaign, with candidates from both the Democratic and Republican parties making campaign issues attacking the unpopular decisions of selected members of the federal judiciary.<sup>117</sup> Such attacks prompted the report of the American Bar Association's Commission on Separation of Powers and Judicial Independence, which was reported on during the ABA's annual meeting in 1997. In that report, the Commission made a series of very specific recommendations aimed at preserving the separation of powers between the judiciary, the Congress, and the President. One noteworthy recommendation was that legislation should be enacted to exclude budgetary items involving the federal judiciary's

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<sup>116</sup>Fallon, *supra* note 38, at 937.

<sup>117</sup>See Francis J. Larkin, "The Variousness, Virulence, and Variety of Threats to Judicial Independence," 36 *JUDGES' J.* 4 (1997).



appropriations from the presidential line-item veto.<sup>118</sup> My suggestion here is that the administrative branch can preempt similar attacks by aligning towards the central panel model.

### **Administrative Courts: An Inferior Mandate**

A second threat linked to the overuse of the administrative forum involves fairness to litigants. “Especially when a citizen advances a claim against the government or asserts an unpopular position, the life tenure and salary guarantees of article III provide a nontrivial safeguard of adjudicative fairness. An official who is dependent on Congress or the executive for continuation in office may be, or may appear to be, less impartial than a judge whose continued tenure is assured.”<sup>119</sup> Article III’s mandate does not, however, extend to state court judges, nor to the administrative adjudicator; as the Court held in *Palmore v. United States*,<sup>120</sup> the right to an adjudicator having the twin protections of tenure and salary guarantees is one that arises only if a case is litigated before an article III tribunal.<sup>121</sup> Under *Palmore* it is clear that the fairness norms of due process are not offended when the state court judge lacks life tenure. There is an inferior mandate under the due process clause attaching to the non-article III adjudicative forum, one that is met whenever the state court or administrative proceeding is unbiased and affords reasonable procedures.<sup>122</sup>

### **Is the Agency Adjudicator Independent or Impartial, and Does it Make a Difference Under the Due Process Clause**

It should come as no surprise that the agency adjudicative forum does not require a wholly independent adjudicator. Absent any state statutory or constitutional provision giving greater protection than the federal constitution, the independence required of agency adjudicators

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<sup>118</sup>See “Executive Summary: An Independent Judiciary,” Report of the ABA Commission on Separation of Powers and Judicial Independence, July 4, 1997, at 12.

<sup>119</sup>Fallon, *supra* note 38, at 940.

<sup>120</sup>*Palmore v. United States*, 411 U.S. 389 (1973).

<sup>121</sup> *Id.* at 410; See Fallon, *supra* note 38, at 940.

<sup>122</sup> Fallon, *supra* note 38, at 940.

under the federal constitution flows first and foremost from the due process clause. Instead of the protections flowing from lifetime tenure and guaranteed salary, due process requires only that there be a balancing of the individual's interest in fair and accurate results against the governmental interest in efficient and expedient decision making, as the Court explains in *Mathews v. Eldridge*.<sup>123</sup> This is an inferior mandate because it offers no assurance that those confronting the tribunal will receive the services of an *independent* adjudicator.<sup>124</sup> Indeed, agency adjudicators may be employees of the agency, supervised by the agency, and subject to discipline by the agency without necessarily tainting the process.

In *Schweiker v. McClure*<sup>125</sup> the Court held that persons acting as ALJs must be "impartial" in their adjudications, but it began its analysis by restating the doctrine that the officers are entitled to a presumption that they were unbiased.<sup>126</sup> The Supreme Court rejected the lower court's analysis that had found the links between adjudicator and the agency "were sufficient to create a constitutionally impermissible risk of hearing officer bias against the claimants."<sup>127</sup> The Court also rejected analogies drawn by the District Court between the standards applicable to agency adjudicators and standards applicable to those courts that are subject to the judicial canons.<sup>128</sup>

State courts, too, have been faced with constitutional challenges against agency adjudicators employed by the agencies being served. In Oregon, the court in *Matthew v. Juras*<sup>129</sup> considered the complaint that claims on behalf of people seeking disability benefits were being administratively adjudicated by employees of the agency responsible for administering the benefits program. Citing to both *Morrissey v.*

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<sup>123</sup>*Mathews v. Eldridge*, 424 U.S. 319, 334-34 (1976); see also, Fallon, *supra* note 38, at 942.

<sup>124</sup>See Christopher B. McNeil, "Due Process and the Ohio Administrative Procedure Act: The Central Panel Proposal," 23 OHIO NORTHERN UNIV. L. REV. 783, 798-803 (1997).

<sup>125</sup>*Schweiker v. McClure*, 456 U.S. 188 (1982).

<sup>126</sup>*Id.* at 195 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

<sup>127</sup>*Id.* at 193 (quoting from *McClure v. Harris*, 502 F. Supp. 409, 414 (N.D. Cal. 1980)).

<sup>128</sup>*Id.* at 197, n.11.

<sup>129</sup>*Matthew v. Juras*, 519 P.2d 402 (Or. Ct. App. 1974).

*Brewer*<sup>130</sup> and *Goldberg v. Kelley*,<sup>131</sup> the court rejected the challenge. Noting that under *Goldberg* the hearing officer need be neither neutral nor detached, the court found that all the due process clause required is that “the hearing be conducted by some person other than the one initially dealing with the case.”<sup>132</sup>

### The Role of the Impartial Agency Hearing Examiner

The court in *Matthew* also draws from Dean Davis, who wrote:

The status of the examiner should and does depend on his functions. His two main functions are to preside and to prepare initial or recommended decisions. Both functions are definitely subordinate. . . . The examiner’s role as a deciding officer is overshadowed by the power of the agency. That the examiner’s initial decision may become the final decision of the agency if no party appeals and if the agency does not of its own motion call up the case does not mean that the examiner has significant power, for the power is in substance only one of recommending. . . . The key provision of the APA concerning the deciding function of the examiner is that “the agency. . . shall have all the powers which it would have in making the initial decision.” . . . . To exalt the examiner to a position equal to or above that of the agency and to make him altogether independent of the agency would be clearly incompatible with the agency’s continued responsibility.<sup>133</sup>

The implications of this subordination are significant in this analysis of the distinctions between judicial courts and administrative adjudicative tribunals. It would be unfounded, for example, to suggest that the level of independence appropriate for article III judges is also

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<sup>130</sup>*Morrissey v. Brewer*, 408 U.S. 471 (1972).

<sup>131</sup>*Goldberg v. Kelley*, 397 U.S. 254 (1970).

<sup>132</sup>*Matthew*, 519 P.2d at 407.

<sup>133</sup>*Id.* at 407, quoting Davis, ADMINISTRATIVE LAW TEXT 224-27 (2nd ed. 1972).

appropriate for the ALJ. The ALJ serves an executive function not shared by the article III judge: her authority is no greater than that of the agency she serves, and as an adjudicator she is charged with an affirmative ethical obligation to perform judicial or quasi-judicial tasks in the context of the executive agency's mandate, not independent of that agency, for she has no authority independent of that agency. There is a symbiotic relationship between the ALJ and the agency not present in courts of general jurisdiction, a relationship that must be acknowledged in any discussion of the quest for ALJ decisional independence. Due process under the Constitution is not threatened by this relationship, and does not require independence of the ALJ from the agency being served. At best, due process requires a minimal degree of neutrality by the adjudicator.<sup>134</sup> The central panel meets that challenge, but goes beyond it, offering a tangible layer of protection against agency overreaching, and (it is hoped) offering evidence, if not proof, that the state is committed to providing participants with a fair hearing before a fair tribunal.

### **How the Central Panel Can Ensure the Public Perception of Fairness**

We can and should commit some of our energy to addressing the public concerns about fairness and the appearance of fairness in these administrative tribunals. I submit that the central panel format now adopted by the House of Delegates of the American Bar Association in the Model Act Creating a State Central Hearing Agency, offers the greatest potential for meeting the expectations of those served by the administrative branch.

With half a century of development to consult, states have available a record reflecting steady and successful evolution of the administrative judicial forum.<sup>135</sup> From California's generally positive

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<sup>134</sup>Kenneth Culp Davis, "ADMINISTRATIVE LAW TREATISE," 3rd Ed. (1978) (describing state and local administrative law, separation of powers, and reasons arguing for and against agency independence, sections 1:10, 2:8-9).

<sup>135</sup>See Malcolm C. Rich and Wayne E. Brucar, "The Central Panel System for Administrative Law Judges: A Survey of Seven States (1983)," Governor's Comm. on the Off. of Admin. L., State of N.J., 1984 Rep. (providing a survey, now a mid-point in the

initial foray into the administrative state,<sup>136</sup> to more recent developments in Delaware, Texas, Tennessee, and eighteen other states that have opted for central panel adjudicators, we now know much about how the public perceives administrative adjudications, and we have a substantial body of common law from which we may draw conclusions about what works and what does not work in administrative adjudicatory systems.<sup>137</sup> Agency adjudications are the result of a sharing of power between the executive branch and the legislative branch.<sup>138</sup> This sharing brings with it a tension that requires the participants to be mindful of policies and the public perception of fairness in the process.

Over time, changes have been made consistent with the public's interest in having a fair day in court. Under the direction of the Supreme Court, agency adjudications must afford rights closely linked to those arising when litigants are in Article III-type courts, like the right to cross examination, the right to notice of the charges upon which action is proposed, the right to compel the attendance of witnesses, and the right to be heard in a meaningful time and in a meaningful manner.<sup>139</sup> The process of selecting administrative law judges, too, has evolved, with in-house agency adjudicators now being replaced by independent hearing examiners from central panels in those states that have moved to the central panel model.<sup>140</sup> The quality of those

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development of central panel jurisprudence).

<sup>136</sup>Michael Asmiow, "New California Administrative Procedure Act: Adjudication Fundamentals," Eighth Annual Central Panel Directors' Conference, 1991 (surveying the migration of states to the central panel).

<sup>137</sup>See Thomas, *supra* note 51 (reviewing a proposal to centralize the federal government's employment of administrative law judges).

<sup>138</sup>See Merritt Ruhlen, "Manual for Administrative Law Judges," 1974 (Administrative Conference of the United States) (describing structure of administrative hearings at the federal level, noting the powers and limitations of ALJs in the federal scheme); George B. Shepherd, "Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics," 90 *Nw. U. L. Rev.* 1557 (1996) (describing the genesis of the separation of powers within the administrative forum, from an historical perspective).

<sup>139</sup>*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1984).

<sup>140</sup>See L. Harold Levinson, "The Central Panel System: A Framework That Separates ALJs from Administrative Agencies," 65 *JUDICATURE* 236 (1981) (describing the early stages of the central panel, and its precursors); Allen Hoberg, "Administrative Hearings: State Central Panels in the 1990s," 46 *ADMIN. L. REV.* 75 (1994).

responsible for adjudications has likewise evolved, with states adopting methods for appointing adjudicators that guard against cronyism, and further by creating codes of judicial conduct that are appropriate for the administrative forum.<sup>141</sup>

### **The Constitutional Judiciary and its Evolution and Devolution**

In contrast, the constitutionally-created judiciary has a legacy of at least two hundred years, and a lesser lineage for state constitutional courts. This legacy teaches much about what makes courts effective, but also warns of the dangers inherent in systems subjected to political gridlock and the immobility that comes with a constitutionally created adjudicative forum. Unlike the administrative court, Article III-type courts draw their power directly from sovereign constitutions. These courts are the preeminent source of adjudicative power, and with that plenary grant of authority comes a measure of diffidence that historically has, by design, not been subject to the democratic urges of the governed, and instead has reflected our nation's heritage that requires courts to honor the rule of law, rather than the popular vote.

Professionalism in the Article III-type judiciary, like that of the administrative law judiciary, is ensured by codes of judicial conduct, peer review, continuing education requirements and the like.<sup>142</sup> Increasingly, however, the public has begun to react, and usually negatively, by threatening these courts with sanctions should there be an outcome based on law but unpopular with the general public. The insulation protecting the independence of the judiciary is, in certain

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<sup>141</sup>See Peter L. Strauss, "An Introduction to Administrative Justice in the United States," 1989 (Carolina Academic Press) (discussing state administrative law under American federalism, and the history of the model state administrative procedure act promulgated by the National Conference of Commissioners on Uniform State Laws, p. 187-90, and non-judicial controls over government action, including "open government" regulations).

<sup>142</sup>See Karen S. Lewis, "Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics," 94 DICK. L. REV. 929 (1990) (describing limitations in the linkage between ethical standards of Article III-type judges and ALJs).

widely publicized cases, eroding or at least being threatened.

The selection of Article III-type judges, either through popular elections like those for courts of general jurisdiction in Ohio, or through a process akin to the modified Missouri plan, is one of the key measures for maintaining an independent judiciary, but the politicization of this process, and the high cost of running for judicial office, may be taking a toll on the perception that courts are run by those committed to a fair hearing before an unbiased tribunal.

The modern administrative state has learned much from Article III-type courts: both have created standards for professional conduct and professional development (in the form of codes of judicial responsibility and continuing education requirements), both benefit from (and sometimes suffer from) oversight by the legislative branch of government, and both are now the subject of direct public attention and probing into the cost-effectiveness of their services. As between the two types of courts, administrative adjudicative forums have a closer link to lawmakers and the executive branch. That nexus — and the political pressure that comes with such a link — has the beneficial effect of keeping the administrative adjudicator in touch with public policy. Article III-type courts acknowledge this, and in turn protect this relationship by giving due deference to the interpretations of law offered by the administrative adjudicator.

Freed from this direct legislative or executive oversight over its operations, the Article III-type court has had less incentive to concern itself with the “vox populi” with the result that the public at times reacts with disappointment and distrust when reviewing trials of great public interest. Pragmatically viewed, both types of courts have constituents and budgets, and both need the support of the former to ensure the sufficiency of the latter. To the extent each can adapt to changing technology and the changing demands for adjudicative services, each

will thrive and continue to be in a position to do justice.<sup>143</sup>

As between the two, administrative adjudicators are more likely to be able to make the changes needed to keep pace with the society's demands, and to make them in time so as to evoke in the public a sense of confidence.<sup>144</sup> The historical links between the executive and legislative branches, tying both to the administrative resolution of disputes, creates an empathy not always found in the relationships between constitutional courts and lawmakers.

Recent technological innovations and public expositions suggest the calcification of Article III-type courts and further suggest a growing mistrust for that forum (both at the state and federal levels), where "Court TV," gavel to gavel televised coverage of major trials, and spontaneous dissections of court events for mass media consumption threaten the public's perception that the judicial adjudicator can produce a fair trial. In the wake of *Daubert*,<sup>145</sup> further, it appears Article III-type courts are finding real difficulty in adjusting to the role of gatekeepers of the process of gathering and assimilating technological innovation in an increasingly complex technological world.<sup>146</sup>

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<sup>143</sup>See Charles Gardner Geyh, "Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress," 71 N.Y.U. L. REV. 1165 (1996) (describing how Congress and the judiciary are developing a new, interactive paradigm replacing traditional separation of powers, suggesting that this interaction is a natural and superior part of our administration of justice, and suggesting an interdisciplinary commission much like that suggested by the new Model Central Panel commission prototype); but see Jeffrey S. Lubbers, "APA Adjudication: Is the Quest for Uniformity Faltering?" 10 ADMIN. L.J. AM. U. 65 (1996) (describing the federal efforts to judicialize the administrative bench).

<sup>144</sup>See e.g., Senator Charles E. Grassley and Charles Pou, Jr., "Congress, the Executive Branch and the Dispute Resolution Process," 1992 J. DISP. RESOL. 1 (1992) (describing the Administrative Dispute Resolution Act and other agency dispute resolution innovations).

<sup>145</sup>*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

<sup>146</sup>Peter L. Strauss, "Changing Times: The APA at Fifty," 63 U. CHI. L. REV. 1389 (1996) (discussing the impact of advanced technology in the article III court and the administrative forum).



Article III-type courts are adjusting: they are armed with tools like Fed. Evid. Rule 706, which allows courts to retain the assistance of technical experts hired not by the parties, but by the courts, to assist the trier of fact in making the difficult determinations needed in technically complex cases. But Article III-type courts are also victims of their own success: implementing innovative programs like TQM and other quality control measures is unlikely, and there are but few tools available to urge courts to take costs into account when those courts try to keep up with modern demands on their limited resources.

### **The Advantages of the Executive Adjudicative Forum**

In contrast, the executive adjudicator, benefitting from expertise in the technical areas of limited jurisdictions and able to operate in an environment freed from expensive and time-consuming pre-trial discovery burdens, has proved to both be effective and be publicly perceived as being fair and efficient.<sup>147</sup> This result is not one arising from serendipity, but is one natural result from operating in a forum that was deliberately created to meet the needs of citizens whose interests were to be balanced against the operations of government at the state and local levels.<sup>148</sup>

In contrast to the experience of Article-III type courts, administrative forums have had a measure of success in applying proven management tools to enhance the quality of adjudicative output. Total Quality Management (TQM), performance evaluations, and other well-established management tools are available and have been put into

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<sup>147</sup>See Karen Y. Kauper, "Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute," 18 U. MICH. J.L. REV. 537 (1985) (detailing problems that led to the early evolution of the central panel).

<sup>148</sup>See William B. Swent, "South Carolina's ALJ: Central Panel, Administrative Court, or a Little of Both?" 48 S.C. L. REV. 1 (1996) (making the distinction between the role of an administrative court and an ALJ hearing, surveying the evolution of administrative law with respect to central panel development).

place in administrative bodies.<sup>149</sup> Here again the contrast between the executive adjudicator and the article III adjudicator is readily apparent, particularly with respect to the use of increased oversight and evaluations in an effort to improve ALJ productivity and efficiency.<sup>150</sup> In her recent article on the subject, Judge Young describes the paradox:

Most significantly, whereas in the judicial branch evaluations of judges are commonly done through bar surveys and/or by specially appointed commissions, in the administrative law arena, although some jurisdictions use survey instruments to obtain feedback from the bar and other interested parties, when performance evaluation of administrative law judges is considered or undertaken, the model is often that of a supervisor evaluating a subordinate employee in a traditional management-by-objectives context, or at least contains aspects of such a process. Such a model would no doubt be considered anathema in the judicial branch, comparable to the impropriety of a superior judge attempting on an ex parte basis to influence another judge with regard to issues in pending or impending cases.<sup>151</sup>

### **The Continuing Debate on the Management of AJLs**

Judge Young thus sets out some terms of the debate: ALJs are evaluated using management tools which would be rejected by members of the third branch judiciary. To call into question the wisdom

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<sup>149</sup>See Edwin L. Felter, Jr., 1994 National Association of Administrative Law Judges Fellowship Paper, "Administrative Adjudication Total Quality Management: The Only Way to Reduce Costs and Delays Without Sacrificing Due Process," XV J. NAALJ 1 (1995) (examining

cost/benefit-based innovations to which the APA-type adjudicatory schemes are amenable).

<sup>150</sup>See Young, *supra* note 7, at 5.

<sup>151</sup>*Id.*, at 17 (footnotes omitted).

wisdom of using such management tools, Judge Young identifies as “[o]ne of the central tenets of our legal system . . . the due process concept that decision-makers must be independent, in order that they can be neutral and impartial in their decisions.”<sup>152</sup> This premise, however, appears to draw from sources other than our administrative law jurisprudence. Our cases tell us that as ALJs we must be impartial, but there is no due process requirement that we be independent of the agencies we serve. To the contrary, the Supreme Court has rejected the conclusion that a pecuniary dependence between ALJ and agency carries with it any aura of a deprivation of constitutional rights. In *Schweiker v. McClure*<sup>153</sup> the hearing officers were former or current employees of the agent acting in behalf of the agency, and their charge was to conduct review determinations on behalf of the Secretary of Health and Human Services. The Court found no evidence to support the complainant’s “assertion that, for reasons of psychology, institutional loyalty, or carrier coercion, hearing officers would be reluctant to differ with carrier determinations. Such assertions require substantiation before they can provide a foundation for invalidating an Act of Congress.”<sup>154</sup> Judge Young draws from the words of Justice Breyer, when he discusses “[t]he question of judicial independence [as] revolv[ing] around the theme of how to assure judges decide according to the law, rather than to their whims or to the will of the political branches of government.”<sup>155</sup> This may tend to blur the lines of this discussion, for Justice Breyer was addressing the role of article III judges in his comments, and was not describing the role of the executive adjudicator.<sup>156</sup>

Rather than suggest the existence of a due process right to an independent adjudicator in agency hearing, our case law appears to be

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<sup>152</sup>See Young, *supra* note 7, at 24

<sup>153</sup>*Schweiker v. McClure*, 456 U.S. 188 (1982).

<sup>154</sup>*Id.*, at 196, n. 10.

<sup>155</sup>Young, *supra* note 7.

<sup>156</sup>Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L. J. 989, text accompanying footnote 1 (1996).

aligning with a cost-benefit analysis. Judge Posner recently described the state of the law in an opinion resolving a challenge to the use of hearing officers in the City of Chicago's traffic court. In *Van Harken v. City of Chicago*,<sup>157</sup> plaintiffs complained about the use of in-house hearing examiners to hear challenges to citations for parking violations. The hearing officers "are hired by, and can be fired at will by, the City's Director of Revenue" and as such, plaintiffs contend, they may fear losing their positions if they rule in favor of respondents too often.<sup>158</sup> Judge Posner was unmoved by this claim, observing that "[i]f their very tenuous stake (a fear that if a hearing officer lets off too many alleged parking violators, the Director of Revenue may get angry and fire him) were enough to disqualify them on constitutional grounds, elected judges, who face significant pressure from the electorate to be "tough" on crime, would be disqualified from presiding at criminal trials, especially in capital cases. They are not."<sup>159</sup>

According to Judge Posner, the due process clause "is not a straightjacket, preventing state governments from experimenting with more efficient methods of delivering governmental services, in this case the provision of a municipal road system."<sup>160</sup> Due process does not require an independent adjudicator:

The test for due process in the sense of procedural minima, as set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L. Ed.2d 18 (1976), requires a comparison of the costs and benefits of whatever procedure the plaintiff contends is required. The use of cost-benefit analysis to determine due process is not to every constitutional scholar's or

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<sup>157</sup>*Van Harken v. City of Chicago*, 103 F.3d 1346, cert denied 117 S. Ct. 1846 (1997).

<sup>158</sup>*Id.*, at 1353.

<sup>159</sup>*Id.*, citing *Bracy v. Gramley*, 81 F.3d 684, 689 (7th Cir. 1996), rev'd on other grounds, 117 S.Ct. 1793, 1799-1800 (1997).

<sup>160</sup>*Id.*, at 1351.

judge's taste, but it is the analysis prescribed by the Supreme Court and followed by the lower courts including our own.<sup>161</sup>

The cost-benefit analysis, applied in the context of the Chicago traffic court, yields a finding that there is no constitutional violation, and is very much tied to fiscal realities. "The hearing officers are not, it is true, as well insulated from the pressures of their political superiors as administrative law judges. But they are almost certainly cheaper (they receive \$35 an hour, with no benefits, and are paid only when they are working), a relevant consideration under the cost-benefit formula of the *Mathews* case. . . ."<sup>162</sup> Given this analytical framework, it would be a mistake to conclude there is a constitutional mandate under the Due Process Clause that requires an independent adjudicator in administrative proceedings.

Thus it seems our task as ALJs is not to erect a wall between the adjudicator and the agency, but rather create tools that will assure that each litigant appearing in the administrative adjudicative forum will receive the services of an unbiased ALJ. Management tools, even the humble personnel evaluation process used to develop the professional skills of civil servants, can be an integral part of the process of ensuring the adjudicator understands his obligation to make decisions based on the facts and the law. Equally significant (and probably equally problematic) is the promise of cooperation that would follow from the use of a committee put in place to work with central panels, like that offered as an option under the Model State Act Creating a State Central Hearing Agency. This coexistence is consistent with the heritage of

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<sup>161</sup>*Id.*, citing *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993); *Zinermon v. Burch*, 494 U.S. 113, 127 (1990); *McCullum v. Miller*, 695 F.2d 1044, 1048 (7<sup>th</sup> Cir. 1982); *Sutton v. City of Milwaukee*, 672 F.2d 644 (7<sup>th</sup> Cir. 1982); *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1483 (D.C. Cir. 1989); *Artway v. Attorney General*, 81 F.3d 1235, 1251 (3d Cir. 1996).

<sup>162</sup>*Id.*, at 1353.

administrative agencies,<sup>163</sup> and is likely to enhance the adjudicative product and the public's perception of that product.

**Convergence: "Judicialization" of the Administrative Forum and the Development of Pragmatic Alternatives for the Article III-type Court.**

The distinctions to be made between Article III-type courts and executive adjudicators both begin and end with the public's perception of both. From its inception, the administrative adjudicative forum is one that survives only by remaining sensitive to immediate public perception that the results rendered in the forum is fair.<sup>164</sup> The trend towards use of a central panel system is a prime example of how the executive forum can simultaneously bow to pressure for cost-effective delivery of judicial services while at the same time enhance the public perception that one can receive a fair hearing before a well-informed adjudicator. It may be many years before Article III-type courts learn the lessons from the executive adjudicator, and begin to appreciate the role public perception plays in the maintenance of the modern adjudicative engine.

The effects of this evolution are already becoming apparent, however, as Article III-type courts seek alternative ways for resolving disputes, and in the process take on some of the important characteristics of the administrative court, including streamlined discovery, specialized courts, trained and qualified adjudicators, relaxed evidentiary standards, and summary adjudications. In the final analysis,

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<sup>163</sup>See Walter Gellhorn, *FEDERAL ADMINISTRATIVE PROCEEDINGS*, (1941) (describing the history of the role of the regulated and lay community in the adjudication process).

<sup>164</sup>See, e.g., Stephen F. Williams, "The Era of 'Risk-Risk' and the Problem of Keeping the APA Up to Date," 63 U. CHI. L. REV. 1375 (1996) (noting the shift from adjudication to rulemaking that had been detected by, among others, Justice Scalia, and suggesting a redirection towards interagency cooperation and cooperation between the executive, legislative and judicial branches).

this convergence is a natural result of demands by the public for adjudications that are fair, both in appearance and reality. As lawyers and judges we aid the cause when we take steps that will lead to the further evolution of both the administrative forum, as it becomes more like the judicial model, and Article III-type courts, as they struggle with meeting the increased need for timely and efficient adjudications.