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Adapting the Central Panel System: A Study of Seven States

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ADAPTING THE CENTRAL PANEL SYSTEM:

A STUDY OF SEVEN STATES*

By Malcolm Rich

(At the 1981 Annual Meeting, NAALJ passed a resolution endorsing the concept of corps statutes, and encouraging their enactment. The following article analyzes the experience of those states which have already adopted a central corps of administrative law judges.)

When administrative agencies were first established to regulate major industries and government benefit programs, they employed hearing officers to assist them in their decision-making. The agencies controlled the compensation and job tenure of their hearing officers and could ignore their decisions and enter de novo rulings instead.[1]

The Congress, in its 1946 Administrative Procedure Act (APA), sought to establish a corps of federal hearing officers that were more independent of the agencies. Hearing officers were to be given career appointments and compensation was to be managed by the Office of Personnel Management.[2] Yet the hearing officers were not granted complete independence from the agencies, for the APA allowed them to be assigned exclusively to particular agencies.

Since the enactment of the APA, the evolution toward judicialized adjudication has continued. Federal hearing officers were retitled Administrative Law Judges (ALJs) in 1972 and the Supreme Court recently referred to the role of the ALJ as being "functionally comparable to that of traditional judges."[3]

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* Reprinted, with permission, from 65 Judicature 246 (November, 1981).

1 Nathanson, Social Service, Administrative Law and the Information Act of 1966, 21 Soc. Prob. 21 (1966) or Pops, The Judicialization of Federal Administrative Law Judges: Implications for Policymaking, 81 W. Virginia L. Rev. 169 (1979).

2 U.S.C. Sections 551-59, 701-06, 1305, 3105, 3344, 6362, 7562.

3 Butz v. Economou 438 U.S. 478 (1978). For an indepth discussion of the role of the federal ALJ, see Rosenblum, The Administrative Law Judge in the Administrative Process: Interrelations of Case Law with Statutory and Pragmatic Factors in Determining ALJ Roles, printed in Subcomm. on Social Security of the House Comm. on Ways and Means, 94th Cong., 1st Sess., Recent Studies Relevant to the Disability Hearings and Appeals Crisis 171 (Comm. Print, December 20, 1975).

At the same time administrative adjudication in the states has also become increasingly judicialized as part of an effort to provide litigants due process of law. The hearing process in both systems now emphasizes legal representation and the use of evidentiary and procedural rules. ALJs now resemble judges in their duties as finders of fact or as decisionmakers or both. But a problem has emerged.

Judicialization, with its focus on providing justice in a new forum, has collided with an emerging emphasis on expedient resolution of conflicts. Thus, those within the administrative process concerned with providing due process protections for litigants and maintaining ALJ independence must balance these values against new demands for productivity in the administrative system.

Beyond the federal model, seven states have initiated a new approach to administrative adjudication by placing ALJs in an independent agency — a central panel or pool. This office assigns ALJs to state agencies on their request to conduct administrative hearings. Among other goals, this process aims to promote more objective and efficient adjudication by separating ALJs from the agencies they serve. Thus, ALJs can serve more than one agency without being employed by any one of them. Some see the central panel as a further usurping of the powers of agencies that used to directly employ ALJs — a sort of "creeping judicialization" that threatens the effectiveness of the administrative process.[4]

But though there are critics who question the desirability of the central panel approach, no one has explored this new system very extensively to see what its common features are and what participants think of it. That is the broad purpose of the study on which we report here.

The Central Panel: A Perspective

Discussions of the administrative system in recent years have been pervaded by such terms as "independence," "discretion," "evaluation" and "expertise." Legislation designed to affect the evaluation and tenure of federal ALJs has been introduced but not enacted. But in the process, the bills led some to examine state procedures for possible new models. As a result, the central panel approach has received new attention as a possible model for federal adjudication. In September 1980, Sen. Howell Heflin (D-Ala.), chaired hearings on the administrative law judge system, during which he explored the possibility of a central panel and the problems that would accompany it.[5]

[4] This term was part of a presentation by Professor Antonin Scalia of the University of Chicago Law School during the American Bar Association Conference on the Role of the Judge in the '80s, Washington, D.C., June 19-20, 1981.

[5] Hearings before the Senate Subcommittee for Consumers, Committee on Commerce, Science, and Transportation, September 4-5, 1980.

These hearings and other debates on the use of ALJs have pointed out how little we know about state administrative adjudication. The central panel has taken its place in the spectrum of administrative systems, but critical questions relating to its effectiveness and feasibility remain unanswered. Part of this problem reflects the newness of these operations, yet part reflects an emphasis on debating the policy questions surrounding the use of ALJs without exploring what ALJs do day-to-day. Before we can decide whether the central panel will advance the goals of the administrative process, we must first understand the duties and responsibilities of state ALJs and agency officials alike. Otherwise, the advantages and disadvantages of the central panel will be speculative.[6]

In this article we examine the central panels in seven states: California, Colorado, Florida, Massachusetts, Minnesota, New Jersey and Tennessee.[7] We interviewed each of the directors of those systems and conducted a mail questionnaire survey of their central panel ALJs.[8] Our purpose

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6 For a discussion of some of these advantages and disadvantages, see Lubbers, A unified corps of ALJs: a proposal to test the idea at the federal level, 65 Judicature 266 (November 1981).

7 In addition to the states under study, Washington has enacted enabling legislation for a central panel and New York City has utilized a central panel of hearing officers since 1979.

8 Our research method was twofold. We interviewed by telephone the directors of central panel agencies in seven states. We also conducted a mail questionnaire survey of all full-time ALJs in the same seven state central panel agencies.

A structured interview instrument was used throughout the telephone interviews although directors were provided ample opportunity to discuss matters at length — they often did so. Interviews, on average, were one hour in length. Our inquiries were designed to obtain an overview of organizational structure. In addition, we sought to identify factors important to the implementation of each pool as well as to the maintenance of the system. We also obtained directors' perceptions as to the relationships between the central panel and state agencies. A third area of focus involved directors' perceptions of the ALJ role.

Questionnaires were mailed to 125 ALJs. Questions were generally scaled and close-ended although the instrument requested additional comments. Eighty-seven ALJs (69.6 per cent) returned the completed questionnaires which focused on two aspects of ALJ role. First, we asked questions concerning the day-to-day duties of the ALJs including their activities during administrative proceedings. We then inquired into ALJ perceptions concerning their role, including views toward impact of the central panel on decisionmaking, independence, evaluation, and relationships between ALJs and the agencies. The questionnaire's last section was included to provide a demographic profile of central panel ALJs.

The questionnaire was a joint effort of the American Judicature Society and the Administrative Conference of the U.S.

is to focus on the variety of approaches encompassed by the central panel notion.

Central panels are an emerging trend among the states, and all existing and proposed panels share a common objective: to separate ALJs from agencies.[9] Yet our research shows that central panel systems are very different in terms of such dimensions as jurisdiction and the roles of both directors and administrative law judges. This suggests that the central panel notion is not a single approach, but rather a broad guideline that each state adapts to its unique political and economic situation.

We begin the article by examining some of the problems associated with implementing central panels. It is here that the state's political and economic environment shapes the central panel notion to produce a tailored system. We then consider the factors that embody the variety among central panel systems — jurisdiction, the position of director, and the role of the ALJ. Our conclusion is that the central panel idea serves as a guide that has been adapted by a number of states to their administrative judiciary.

Creating Central Panels

In each of the seven states studied, the central panel system was implemented with an existing structure of administrative adjudication. These were planned changes that affected and continue to affect the interests, values and established practices of ALJs and agency personnel. ALJs served different interests under the new structure, and agency officials lost some control over the hearing process. Thus, it is not surprising that efforts to implant central panels have met resistance.[10] Conflicts have appeared during legislative enactment, during the change-over period, and over budgetary considerations.

Each of the panels was created through actions of state legislatures which established the broad duties and limits of the central panel (see Table 1). The legislative battles associated with this process often helped shape the organizational structures. For example, the central panel in California, the nation's oldest ALJ pool, generally provides ALJs for only those hearings related to licensing. In 1941, the legislature directed the Judicial Council of California to study the need for change in the procedures of regulatory agencies.[11] The proposals were limited to the field of

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9 This separation is not only in terms of removing control of compensation and tenure from the agencies. The objective has been to also physically remove the ALJs' offices from those of the agencies.

10 This was the situation as described by many of the directors of central panel systems to which we spoke. For a further discussion of the impact of planned change, see Grau, The Limits of Planned Change in the Courts, 6 Just. Sys. J. 84 (Spring 1981).

11 Clarkson, the History of The California Administrative Procedure Act, 15 Hastings L. J. 237 (1964).

licensing, the area of administrative practice found most in need of change.[12] These proposals ultimately resulted in a central panel system for licensing agencies, but no others, when the California APA became law in 1945.

Legislative actions have also helped define central panel jurisdiction. The original enabling legislation in Minnesota provided that the Office of Administrative Hearings (the Minnesota central panel) would have jurisdiction over unemployment compensation, workers compensation and the Bureau of Mediation Services, among other areas. As a result, organized labor lobbied against the bill and reportedly prevented its passage.[13] The bill's authors then exempted these agencies, and the bill was quickly enacted. Yet in other states, these agencies were included within the panel's jurisdiction with little ensuing legislative conflict.

A key to enacting several of the panels has been the state bar association. The Minnesota bar was a primary force there, and its counterpart in New Jersey also spearheaded a movement toward the central panel approach. The Minnesota bar's articulated rationale for so vigorously pursuing the central panel was to reduce delay and to enhance the appearance of justice.[14] But its role was consistent with previous actions of bar associations in general as representatives of the legal community; they have been in the forefront of many reform efforts aimed at increased judicialization of federal administrative efforts. The bar vigorously supported federal legislation during the 1930s which, had it been enacted, would have established intra-agency, judicial-like review mechanisms. The bar also promoted the 1946 Administrative Procedure Act, which created a more independent corpos of federal ALJs, and in 1972 was a motivating force behind changing the title of hearing examiner to administrative law judge.[15]

Changeover Problems

The interplay of changing ALJ roles and politics spawned a competition among special interests in all seven systems. Some agency officials saw in the legislative debates an attempt to replace their administrative authority

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12 Id.

13 Interview with the chief hearing examiner of Minnesota central panel, September, 1980.

14 Id.

15 See "Logan-Walter Bill Fails," 52 A.B.A.J. (January 1941) and Davis, Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer, 1977 Duke L. J. 389 (1977).

TABLE 1 SUMMARY OF KEY FEATURES OF CENTRAL PANEL SYSTEMS

State	Panel began operations	Official title of central panel	Statutory mandate	Number of full-time ALJs*
California	1945	Office of Administrative Hearings	Cal. Gov't Code Secs. 11370.2, 11502	24 plus 1 deputy ALJ
Colorado	1976	Division of Hearing Officers	Colo. Rev. Stat. Sec. 24-30-1001	14
Florida	1974	Division of Administrative Hearings	Fla. Stat. Ann. Sec. 120.65	18 plus 1 assistant director
Massachusetts	Began: 1974 Expanded: 1975	Division of Hearing Officers	Mass. Ann. Laws Ch. 7, Sec. 4H	11
Minnesota	1976	Office of Administrative Hearings	Minn. Stat. Ann Sec. 15.052	13
New Jersey	1979	Office of Administrative Law	N.J. Stat. Ann Sec. 52:14F-1, Sec. 52:14B-1	45 plus 2 deputy directors
Tennessee	1974	Administrative Procedures Division	Tenn. Code Ann. Secs. 4-5-101 —4-5-121	5

*As reported by directors of central panels — September, 1980.

with the inflexible rule of law. One commentator has written

> To the administrator, as we have shown before, issues are defined as social problems that call for action with a view to the accomplishment of some determinate result. The emphasis on expertise and discretion in the implementation of policy is an outcome of this orientation toward concrete action. To the adjudicator, on the contrary, issues are structured as competing moral claims, involving an appeal to principle, and which call for a determination of authoritativeness.[16]

16 Nonet, Administrative Justice, Advocacy And Change In A Government Agency 247 (New York: Russell Sage Foundation, 1969).

Proponents of the legislation saw separating ALJs from agencies as a way to improve the administration of justice and to enhance the job status of ALJs. Agency personnel saw the same legislation as an attempt to reduce the effectiveness of the process and restrict the agencies' ability to take action toward solving social problems. Directors of central panels in Massachusetts, Minnesota and Florida report that one impetus for creating the pools was displeasure among some legislatures with agency "rule-making by fiat."[17] Agencies had adopted rules without public input, which prompted a perceived need to add a sort of 'check' on agency discretion. The pools were designed to provide that check.

The conflict between law and administrative authority had an impact on personal interests that resulted in fierce agency opposition during both the legislative debates and the changeover period. This reaction was characterized as "a large amount of animosity" in Florida and "initial agency resistance" in Tennessee.[18] In Massachusetts the reaction manifested itself in the ways agency personnel reacted to the ALJs:

> At first, the rate-setting commissioners still seemed to think that the hearing officers were still subordinate to their wishes.[19]

The director in Tennessee reports that agencies were "very angry and upset."

> They traditionally used their hearing officers for a number of functions besides hearing cases. They didn't want to lose the hearing officers from those functions.[20]

On the other hand, the ALJs were generally pleased to become part of a central pool, according to the directors. The main attractions included an increased variety of cases, independence and somewhat higher pay than they would receive as non-central panel ALJs. We questioned central panel ALJs on these matters through a mail questionnaire survey. Their answers concerning independence bore out the views of the directors. More than half of those questioned supported the value of being separated from the agency.[21]

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17 Interview with Chief Hearing Examiner in Minnesota, September, 1980.

18 Interview with directors, September, 1980.

19 Interview with the director of Massachusetts system. September, 1980.

20 Interview with the director of Tennessee system. September, 1980.

21 The questionnaire provided for open-ended responses.

However, there were several sources of problems among ALJs during the changeover. Some Colorado hearing officers were reportedly "very angry that anyone was going to ask them to do anything."[22] Some of the ALJs transferred into the central pools had been attached to other agencies, and thus had been hearing one type of case for long periods of time. Hearing a variety of cases meant a major change in work behavior that sometimes caused friction among the systems' principal actors.

A related problem also involved the structure of the pool system. Since ALJs once attached to agencies were transferred into pool systems and assigned to hear cases for their former agencies as independent presiding officers, disputes with former agencies sometimes spilled into the role of the central pool ALJ. For example, for two years animosity between Minnesota hearing officers and their former agencies resulted in what was described as "cheap shots" being taken by ALJs — pointed comments directed against agency officials within ALJ decisions.[23]

Budgetary Considerations

Implementing a central panel transfers some financial control from the agency to the panel. No longer do the agencies have exclusive administrative and financial control of the hearing process, and, as a result, the system is a potential source of conflict. What is striking, then, is the lack of hard data on budgetary issues. State legislatures discuss the cost-effectiveness of these systems as much as any other issue, for the ways in which pools are funded can affect the degree to which agencies accept and use them. Yet most views on the budgetary issue are not based on financial studies; necessary data is often unavailable. Even though directors in Minnesota and New Jersey, for example, point to overall reduced costs for hearings, specific reasons for the changes have not been analyzed.[24]

Existing operations are funded in one of two ways:

*General funding, in which the state legislature appropriates a specific sum which the central panel agency may spend; and

*The revolving fund, in which the state legislatures give agencies funds to pay for hearings, and the central panel office bills the agencies for the use of its ALJs on an hourly basis.

Opinion was split among the directors we interviewed on which system is preferable, but in either case, the type of funding has become both a question of economic efficiency and a political issue. Opponents of the

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22 Interview with director, Colorado central panel system, September, 1980.

23 The Chief Hearing Examiner in Minnesota reports that this problem has now been resolved.

24 See, Harves, How the central panel system works in Minnesota, 65 Judicature 257 (November 1981) and Kestin, Reform of the Administrative Process, 92 New Jersey Lawyer 35 (1980).

revolving fund suggest it will result in fewer hearings and threaten the notion of due process that central panels are supposed to protect. By billing agencies, the state will encourage them to avoid hearings by settling more often or by requesting fewer hearings near the end of the fiscal year when their budgets for hearings grow thin.[25] It is also plausible that under either system of funding, an agency will send cases it considers frivolous or politically sensitive to the central panel for resolution.

No evidence conclusively validates either of these expectations. The newness of these systems and an inadequate system of data collection have proven to be obstacles in exploring the impact of funding methods. Under central panel systems, however, either the agencies or the central panel directors need to make accurate forecasts of requirements for hearings so that realistic budget appropriations can be made.

Differing Jurisdictions

The implementation process, including the sensitive political and economic situations related to it, has produced individualized central panel systems. The central panel approach in the seven states studied share the notion separating ALJs from agencies but vary in terms of daily operating procedures. The number of ALJs in each panel ranges from five to 45, and the panels also differ in their jurisdiction — that is, which agencies that must, by law, use only central panel ALJs.

The state legislatures through the state administrative procedure acts usually delineate the scope of central panel operations. Over a period of time, several means of using central panel ALJs have emerged. A 1961 amendment to the California APA cataloged all agencies required to use only central panel hearing officers. Today, more than 70 agencies must use these ALJs.[26] In Colorado, Florida, Minnesota and New Jersey, the state APA delineates exceptions — agencies that do not have to use central pool ALJs; all other agencies must use them. Under a third type of jurisdiction (voluntary use of central panel services) two states — Massachusetts and Tennessee — require a few agencies to use the pool, but the majority of agencies may choose whether to use the system.

The issue of mandatory versus voluntary jurisdiction relates to the objectives of a centralized situation. Proponents of a mandatory system claim that ALJs will be independent of agency influence only if agencies must use pool ALJs for all of their adjudications. An agency that can use its own hearing officers might assign more sensitive cases to them and thus destroy the appearance of justice that the central panel is designed to support.

Advocates of voluntary jurisdiction argue that because agency officials will feel less threatened by a voluntary use of pool ALJs, there will be fewer problems in implementing the central panel. And as agency officials

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25 For a further discussion of these theories, see Coan, Operational Aspects of a Central Hearing Examiners Pool: California's Experience, 3 Florida St. Univ. L. Rev. 86 (1975).

26 Cal. Govt. Code Sec. 11501. For a further discussion of the California system, see Abrams, Administrative Law Judge Systems: The California View, 29 Admin. L. Rev. 487 (1977).

see the benefits of the system, an increasing number of agencies will begin to use it. In the end, the same number of agencies that would have been covered by a mandatory system will use the panel — and with fewer changeover problems.[27] Yet it is also possible that agency officials, not wishing to relinquish any control over agency operations, will never voluntarily use the services of outside hearing officers.[28]

As in the budgetary area, the newness of these systems and a lack of data prohibit conclusions about the impact of jurisdiction on central panel operations. The topic, nevertheless, has produced enough controversy to warrant its consideration in the recently revised Model State Administrative Procedure Act, which expressly allows for both kinds of jurisdiction.[29]

The Panel Director's Impact

The position of director has also shaped the structure of the central panels. Directors develop budgets and serve as general office managers. They assign cases to the ALJs, and in many of the states their evaluation of ALJ performance determines salary increases. They are also integrally involved in the ALJ selection process in all seven states.

Because of their wide-ranging responsibilities, directors have had substantial impact on the quality of ALJs, the extent to which pool ALJs will hear a variety of cases, and the degree to which these ALJs are separated from the agencies. Because of their visibility, directors also can affect the potentially stormy relationship between state agencies and the central panel. The importance of the position, though, raises a potentially troubling issue. Although the central panel is supposed to eliminate bias, directors are selected by state government officials and may appear to be susceptible to their influence (see Table 2).

Current directors downplay this possibility. The California director, for example, said his appointment was "apolitical," that he and the governor who appointed him were members of different parties and that other directors have served under several governors.[30] Tennessee gives the secretary of state, whose office is constitutionally separate from the state's executive

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27 For example, the central panel notion will prompt a less hostile reaction from agency officials as discussed earlier.

28 Under a "quasi-voluntary" system in Massachusetts, this has not been the case. The director there reports that approximately one new agency every six months requests central panel hearing services.

29 National Conference of Commissioners on Uniform State Laws, Model State Administrative Procedure Act (1981 Revision). The 1981 Model Act provides two alternative versions of the central panel approach — mandatory (agencies must use central panel ALJs) or permissive (agencies may use central panel ALJs). For a discussion of the Model Act, see Levinson, The central panel system: a framework that separates ALJs from administrative agencies, 65 Judicature 236 (November 1981).

30 Interview with director, September, 1980.

TABLE 2	HOW DIRECTORS OF CENTRAL PANEL SYSTEMS ARE APPOINTED
California	By the governor with confirmation of senate. Cal. Gov't Code, Sec. 11370.2(6).
Colorado	By civil service system. The director of the Department of Administration chooses one of the top three candidates resulting from written test and oral board.
Florida	By majority vote of the governor and his cabinet of six sitting as the Administrative Commission with confirmation of the senate. Fla. Stat. Ann., Sec. 120.65(1).
Massachusetts	By Secretary of Administration and Finance with approval of the Governor. Mass. Ann. Laws Ch. 7, Sec. 4H.
Minnesota	By the governor with the advice and consent of the senate. Minn. Stat. Ann., Sec. 15.052(1).
New Jersey	By the governor with the advice and consent of the senate. N.J. Stat. Ann., Sec. 52:14F-3.
Tennessee	By the Secretary of State.

branch, the power of appointment.[31] And two states — Minnesota and New Jersey — give the directors a six year term — longer than the governor who appoints them.

Whether the process used to select directors will adversely affect the appearance of justice depends on the role they play. Several directors during a recent workshop on central panels (sponsored by the American Judicature Society and the Administrative Conference of the United States)[32] pointed to their contact with the political system as an advantage. In effect, they saw their role as a buffer between state government and the decisionmaking independence of ALJs. A director familiar with and accepted by the political system can better resist attempts by a governor, for example, to interfere with the administrative process.[33]

Role Of The ALJ

The role of the central panel ALJ is still another factor that distinguishes central panels not only from other systems but from each other.

[31] Interview with the director of Tennessee system, September, 1980.

[32] May 8, 1981, Chicago, Illinois.

[33] Comments made at the ALJ/ACUS Workshop, May 8, 1981.

The ALJ role has often been generally defined in terms of the required amounts of expertise and requisite amounts of independence. Should administrative judges be "generalists," capable of hearing a variety of case types, or "specialists," possessing narrow expertise and only hearing cases in that area? And to what extent should ALJs be free of agency influence?

Expertise and independence are related. According to some proponents of central pools, ALJ independence depends upon ensuring that ALJs are capable of hearing all kinds of cases. If the system assigns ALJs exclusively to one agency, it risks a bias among its ALJs that the central panel was devised to eliminate. Said one observer:

> When a judge possesses true expertise in a subject matter, a significant danger exists that conclusions may be reached on perceptions or information outside the record. This would be a manifestation of bias, and special efforts to avoid any resulting unfairness would be indicated.[34]

Others argue that the lack of specialized ALJ expertise leads to increased inefficiency. Rotating ALJs from agency to agency, they say, will not allow these administrative judges to acquire the expertise necessary to deal with highly complex cases in an effective and efficient manner.[35] These opponents also argue that ALJs without specific knowledge will have to be educated by the parties and will consequently be subject to manipulation. Yet acquiring information from the parties has always been part of judging.

> Most of the time, the best judge is the individual who possesses the capacity by way of insight, temperament and knowledge to make fair and constructive use of the expertise of others. A judge should not usually be the source of the information, technical or otherwise, upon which a result is based.[36]

The Need For Expertise

Is specialized expertise necessary? It probably depends on the type of case — a rate-making proceeding may require more technical expertise than a case involving eligibility for benefits. Central panel ALJs preside over a variety of cases, which confuses the issue even more.

In our mail survey, we asked central panel ALJs whether an ALJ should have specific expertise in the area over which he or she presides. Table 3

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34 Kestin, Reform of the Administrative Process, 92 New Jersey Lawyer 35 (1980).

35 See, e.g., Riccio, Due Process in Quasi-Judicial Administrative Hearings: Confining the Examiner to One Hat, 2 Seaton Hall L. J. 398 (1971).

36 Kestin, supra n. 34.

TABLE 3 VIEWPOINTS OF CENTRAL PANEL ALJ RESPONDENTS ON EVALUATION AND EXPERTISE

Statements:	Agree*	Undecided	Disagree**
The presence of a mechanism evaluation the overall performance of ALJs will jeopardize the independence of ALJs. (N=84)	28.9%	22.9%	48.2%
An ALJ should have specific expertise in the areas over which he/she presides. (N=87)	43.6	13.8	42.5

* Respondents answered "agree" or "strongly agree."

** Respondents answered "disagree" or "strongly disagree."

shows a nearly even split between those who agree and those who disagree that ALJs should have specific expertise. Table 4 shows that the outcomes vary substantially by state. This suggests that state central panel ALJ viewpoints are fashioned on their individual experiences, including the way in which the panel is operated. We therefore asked each of the directors whether ALJs are assigned to cases on the basis of specialized expertise.

First, it must be noted that directors do not have full discretion in this regard. The states of New Jersey, Minnesota and Florida provide that the director must assign ALJs on the basis of specialized expertise. From our interviews, we found that directors generally seek to assign ALJs with specialized expertise to cases where that expertise can be used and to develop a corps of centralized ALJs expert in a variety of areas. For example, the

TABLE 4 VIEWPOINTS OF CENTRAL PANEL ALJs (BY STATE) ON THE IMPORTANCE OF EXPERTISE
Should an ALJ have specific expertise in the areas over which he/she presides?

	Agree*	Undecided	Disagree**
California (N=21)	4.8%	14.3%	80.9%
Colorado (N=10)	70.0	20.0	10.0
Florida (N=10)	30.0	0.0	70.0
Massachusetts (N=9)	88.9	0.0	11.1
Minnesota (N=11)	63.7	27.3	9.1
New Jersey (N=24)	50.0	16.7	33.3
Tennessee (N=2)	0.0	0.0	100.0

* Respondent answered "Agree" or "Strongly Agree."

** Respondent answered "Disagree" or "Strongly Disagree."

director in Colorado answered affirmatively the question, "is the ALJ assigned with his or her expertise in mind?," but she added that she wants to "eventually train all hearing officers to hear all types of cases."[37]

The issue of expertise also relates to the complexity of cases. The director in Massachusetts assigns ALJs with expertise in mind "when there are particularly complex cases....Otherwise, the hearing officers are broken into all types of hearings and are rotated regularly." Taking this approach one step further, the system in Minnesota is formally organized into three areas for case assignment and supervision: 1) utilities and transportation law, 2) environmental law and 3) the licensing division.[38] The director in Minnesota follows a legislative mandate requiring him to assign on the basis of expertise, and he sees it "as the only sensible way to operate."[39]

Performance Evaluation

In both state and federal systems, ALJ evaluation is now a critical issue. Opponents of any type of evaluation of administrative law judges emphasize that, historically, general jurisdiction judges have not been evaluated formally because evaluation might undermine the independence they need to decide cases objectively. For the same reason, ALJs should not be evaluated, they argue. Proponents of the evaluation of ALJs claim that administrative judges should be accountable for their actions, and accountability, in their view, can come through evaluation.

Evaluation of ALJs is part of the duties of directors in all the states. For the most part, these evaluations take the form of annual reviews, which typically bear upon ALJ salary increases. One evaluation system merits special note. The evaluation program in New Jersey (which emanated from a report issued by a committee of the New Jersey Supreme Court regarding evaluation of state judges) includes measures of productivity, conduct and quality. And since there is no automatic pay increase in New Jersey (with the exception of cost-of-living benefits granted by the legislature), the director has the discretion of increasing ALJs' salary as much as 10 per cent or decreasing it as much as five per cent based upon the evaluation.[40]

Among other work-related viewpoints, we asked central panel ALJs whether the presence of a performance evaluation system would jeopardize their independence. Table 3 shows there are fewer of those who agreed that performance evaluation would jeopardize their independence than those who disagreed. This is somewhat surprising in light of a fairly uniform opposition to

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37 Interview with director of Colorado central panel, September, 1980.

38 Interview with director, September, 1980.

39 Id.

40 Interview with director of New Jersey central panel, September, 1980.

TABLE 5 VIEWPOINTS OF CENTRAL PANEL ALJs (BY STATE) ON THE IMPACT OF EVALUATION
Will the presence of a mechanism evaluating the overall performance of ALJs jeopardize the independence of ALJs?

	Agree*	Undecided	Disagree**
California (N=21)	19.0%	23.8%	57.1%
Colorado (N=10)	30.0	20.8	50.0
Florida (N=9)	44.4	44.4	11.8
Massachusetts (N=7)	28.6	14.3	57.1
Minnesota (N=11)	45.5	18.2	36.4
New Jersey (N=23)	26.1	17.4	56.5
Tennessee (N=2)	0.0	50.0	50.0

* Respondent answered "Agree" or "Strongly Agree."
** Respondent answered "Disagree" or "Strongly Disagree."

performance evaluation on the part of federal ALJs.[41]

We broke down the responses to our question involving performance evaluation by state and report the results in Table 5. As with the outcome to the question concerning expertise, the results varied substantially by state. But note that despite the rigorous performance evaluation in New Jersey, nearly three-fifths of New Jersey's responding ALJs stated that the presence of a mechanism evaluating their performance would not jeopardize their independence.

The ALJ In The Hearing Process

Central panel systems also differ in the way ALJs are used within the hearing process. Specifically, we looked at the types of cases heard by central panel ALJs and the relationships among the agencies, the central panel office and the ALJs themselves. These issues relate to the day-to-day functioning of central panel ALJs and, therefore, define the ALJ role in a very pragmatic way.

Table 6 lists the frequency with which types of cases are heard by central panel ALJ respondents, but it tells only part of the story. Table 7 shows the combination of cases that ALJs reported they heard frequently. It

41 The federal APA precludes performance evaluation of federal ALJs. Recently proposed legislation at the federal level included provisions for performance evaluation of ALJs. All organized groups of federal ALJs opposed the legislation. It was not enacted. For an overview of the evaluation issue, see Rosenblum, "Evaluation of Administrative Law Judges: Aspects of Purpose, Policy and Feasibility," a paper submitted to the Administrative Conference of the United States, February, 1981 (cited with permission of author).

TABLE 6 TYPES OF CASES HEARD BY CENTRAL PANEL ALJ RESPONDENTS

	Frequently	Occasionally	Infrequently or never
Licensing, permit, or certificate applications, suspensions, or revocations (N=86)	74.4%	22.1%	3.5%
Ratemaking or valuations (N=81)	17.3	19.8	63.0
Rulemaking, regulations (N=80)	12.5	21.2	66.2
Individual benefit claims, disability allowances, workman's compensation (N=81)	28.4	37.0	34.6
Enforcement proceedings (civil rights, unfair trade, labor relations, safety, etc.) (N=81)	27.2	54.3	18.5
Other (N=40)	55.0	35.0	10.0

TABLE 7 PATTERNS IN TYPES OF CASES HEARD FREQUENTLY BY CENTRAL PANEL ALJ RESPONDENTS*

Licensing only (N=26)	35.6%
Ratemaking only (N=1)	1.4
Rulemaking only (N=0)	0.0
Enforcement only (N=1)	1.4
Benefits only (N=8)	11.0
TOTAL	49.4%
Licensing & ratemaking (N=5)	6.8%
Licensing & rulemaking (N=3)	4.1
Licensing & enforcement (N=7)	9.6
Licensing & benefits** (N=5)	6.8
Ratemaking & benefits** (N=1)	1.4
Enforcement & benefits** (N=2)	2.7
Licensing & ratemaking & enforcement (N=1)	1.4
Licensing & rulemaking & enforcement (N=4)	5.5
Licensing & enforcement & benefits** (N=5)	6.8
Licensing & ratemaking & rulemaking & enforcement (N=2)	2.7
Licensing & ratemaking & enforcement & benefits** (N=1)	1.4
Licensing & ratemaking & rulemaking & enforcement & benefits** (N=1)	1.4
TOTAL	50.6%

* ALJs reported that they heard these cases frequently in response to the mail questionnaire survey question, "How often do you preside over each of the following general categories of proceedings."

**Denotes combination of cases heard which include regulatory and benefit adjudication. See text under "The ALJ in the Hearing Process" for discussion.

is only a rough view since we present only those cases that our respondents said they heard frequently — as opposed to occasionally or infrequently. Half of our respondents, then, report that they hear one type of case only, while half hear at least two types of cases frequently.

One other notable aspect in looking at combinations of cases heard frequently by pool ALJs is the way in which regulatory type proceedings are combined with benefits adjudication. At the federal level, these two types of cases represent different models of judicialization. In the regulatory model, ALJs preside over adversarial proceedings in which attorneys often argue their cases using formal rules of evidence and procedure. In contrast, benefits adjudication (in the Social Security program, for example) is non-adversarial. Litigants often argue their own cases before the ALJs, who must balance the interests of the litigant, the government and the public. Within the state central panels, approximately a fifth of reporting ALJs say the combination of cases they hear includes both regulatory and benefits adjudication.

This variety of cases coupled with the physical separation of central panel ALJs from the agencies has led some commentators to question whether ALJs can acquire the agency guidance they need as to the meaning of agency policies. And they ask to what extent agency policies are binding on ALJs who are no longer directly employed by the agencies.

These questions relate to how interaction of agencies with ALJs affect ALJ independence and cannot be answered unequivocally "yes" or "no," in part because of the very nature of the hearing process. More specifically, when conflicts are clearly addressed by agency rulings and regulations, they do not come to hearing. The cases that are heard by ALJs are in a "gray" area where agency policy demands interpretation. The ALJs then are faced with whether the conflicts they are to resolve fall somewhere within the spectrum of interpretations associated with each agency policy.

There are some clear and differing standards among the states concerning just how binding agency policies are on administrative law judges. In Minnesota, for example, an agency must establish a policy by rule. According to the director,

> Once established, and the rule is in effect, the office of administrative hearings is bound to follow that rule. Only the courts may find a rule illegal; a rule may not be challenged in a hearing.[42]

The relationship between the agencies and the ALJs becomes murkier when agencies do not have well-defined policies or when they have issued only their own interpretations of policies. Directors report that their ALJs will be bound by public agency regulations but not by interpretations of regulations issued by the agencies. For example, the Administrative Procedures Division

[42] Interview with director, September, 1980.

in Tennessee will "follow the statutes or rules promulgated by the agency but will not be bound by agency argument."[43] Similarly, in Massachusetts, the Division of Hearing Officers will "construe regulations very strictly without regard to agency policy." And Florida's Division of Administrative Hearings considers agency interpretations as persuasive but not binding.

> As a practical matter, hearing officers are probably not greatly influenced by agency interpretations simply because it's the agency interpretation.[44]

The central panels we have studied have gone to great lengths to ensure a separation between the panel and the agencies. This is clear, but an equally critical issue is the extent to which ALJs are bound by the information they do receive from the agencies. From the discussions we have had with directors, the answer seems to depend on the formality with which agencies promulgate their policies. For the most part, rules and regulations are considered as binding by ALJs. Yet agency policies, even when promulgated through the rulemaking function, leave a large amount of room for interpretation. It is this agency interpretation that is never considered binding by pool ALJs. To the extent that the clarity of agency policies varies from type of case to type of case, the ALJ role will differ as well.

Conclusion

This article has examined areas that distinguish central panels systems — jurisdiction, the power of directors and the role of the ALJ. The panels share the objective of separating ALJs from the agencies they serve, but each is unique in the way it functions. As a result, the role of an ALJ varies from system to system since the discretion and the independence of ALJs are defined in part by what ALJs do on a day-to-day basis.

The central panel approach is an increasingly used umbrella concept for balancing due process protections, administrative effectiveness and ALJ independence. The way in which this approach is used varies from state to state. These systems differ in factors ranging from means of funding to the number of ALJs to the types of agencies they serve. As a result, the role of the ALJ differs as well. Directors have differing powers and, in addition, profess various operating philosophies about such factors as the importance of specialized expertise when ALJs are assigned to cases.

Finally, the procedures agencies follow in the administrative process also affect central panel operations. One example is the clarity with which agencies make known their policies, including the amount of leeway left by the agencies for interpretation. The duties of the ALJ are affected by these types of agency choices, particularly for central panel ALJs who must deal with numerous agencies.

The central panel approach, in sum, has provided only the framework for separating ALJs from the agencies. The states have individually adapted

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43 Interview with director, September, 1980.

44 Interview with director, September, 1980.

the panels' operating procedures to the larger political and economic environments. The result has been seven central panel systems that differ along important dimensions. This flexibility is an important characteristic that the federal government and any state interested in implementing the central panel approach should recognize.

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COMMENT: Colorado member Thomas R. Moeller, who referred the Editor to the foregoing article, observes:

At the time of the Annual meeting in Reno, I did not know fellow conferee, Harvey Cochran, would be attending. He and I have discussed your letter and I certainly agree with Harvey's assessment that the Central Panel System in Colorado is not working as expected. The main problem is that our central office bills each agency for the use of the ALJ on an hourly basis, commonly known as "revolving funds."

/ The preceding article / states, factually I think, that there was resistance both from management and labor to the changeover of the central pool of hearing officers in Colorado. Indeed, one agency, the Public Utilities Commission, effectively lobbied to have its hearing officers excluded from the pool. Since then they have had appreciable increases in pay as well as back pay returned to them as a result of a 1978 salary survey pay increase without a correlative result for the other centralized hearing officers.

For the first six years of my tenure, I was attached to the Department of Labor and Employment, hearing exclusively Workmen's Compensation cases. Although I did not participate, I did sympathize with the other Workmen's Compensation hearing officers who resisted the changeover because: (1) The reverse effect centralization has had on their salary, (2) increased workload because of the diversified cases, and (3) loss of stature, in that only Workmen's Compensation hearing officers were assigned agency supplied certified court reporters whereas all other agency hearings are electronically recorded.

Furthermore, allowing the agency to control the assignment of cases, and the amount for hourly billing arbitrarily set by the legislature at the behest of the agencies (which is far below customary legal billings) and controlling the number, type assigned and settlement negotiations, as well as, final agency review, has left an appearance of a central panel system in Colorado. In effect, I would call it a quasi-central panel system....