

5-15-2017

Administrative Adjudication in the United States

James G. Gilbert

Robert S. Cohen

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

James G. Gilbert and Robert S. Cohen, *Administrative Adjudication in the United States*, 37 J. Nat'l Ass'n Admin. L. Judiciary 222 (2017)

Available at: <https://digitalcommons.pepperdine.edu/naalj/vol37/iss1/4>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Administrative Adjudication in the United States⁺

By Hon. James G. Gilbert and Hon. Robert S. Cohen*

⁺ ©2016. Published in *The Improvement of the Administration of Justice*, 8th Edition, by the American Bar Association. Reproduced with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

INTRODUCTION

It is always a challenge to summarize an area of law as broad and diverse as administrative adjudication into a concise and readable treatise, but against our better judgment, we agreed to give this a try. We have chosen to separate state and federal administrative adjudication for one obvious reason: the two systems are probably more diverse than they are similar. Notwithstanding that reality, there are certain aspects of administrative adjudication and administrative law that apply to both the state and federal systems.

State and Federal Adjudicatory Procedures Are Statutory, Not Constitutional

Unlike our Article III judicial colleagues on the state and federal level who derive their powers from their state constitutions, or on the federal level from the U.S. Constitution, administrative adjudication is a creature of the state legislature on the state side, and of Congress on the federal side. Because of this distinction we are often referred to as “Article I Judges.”¹

* Judge James G. Gilbert is the Chief Administrative Law Judge of the United States Postal Service and a member of the Executive Committee of the National Conference of the Administrative Law Judiciary of the ABA’s Judicial Division; he served as President of the Federal Administrative Law Judges Conference 2013–2014.

Judge Robert S. Cohen is the Chief Administrative Law Judge for the Office of Hearings for the State of Florida and a member of the Executive Committee of the National Conference of the Administrative Law Judiciary of the ABA’s Judicial Division; he served as President of the National Association of Administrative Law Judiciary 2009–2010.

Authors’ note: The opinions expressed herein are solely those of the authors and do not necessarily reflect the opinions or official positions of the United States Postal Service, the State of Florida, or any other governmental agency or organization. The authors wish to express their appreciation to Lilyanne Ohanesian for her assistance with the drafting and editing of this chapter, and to Judge Gary E. Shapiro, Vice-Chairman, Postal Service Board of Contract Appeals, for his assistance with the discussion on Boards of Contract Appeals. Any errors are those of the authors alone.

¹ Article I of the Constitution establishes the legislative branch of the federal government. Article III of the Constitution establishes the judicial branch. A reference to “Article III judges” is a reference to a judge appointed by the president under the authority of Article III of the Constitution and subject to the advice and consent of the U.S. Senate, or appointed or elected in a state under the

In general, a common thread among both state and federal administrative adjudication is a comprehensive statute that addresses the rights and responsibilities of state and federal agencies and those who are impacted by their decisions when it comes to adjudication of disputes. On the federal side, this is represented by the Administrative Procedure Act.² Each state has its own version of the federal statute, and it is often referred to as the particular state's Administrative Procedure Act. Under these enabling statutes, administrative law judges (ALJs) serve as independent adjudicators of disputes between state or federal agencies on the one side, and individuals or regulated businesses on the other. Also under these statutes, state and federal agencies derive their powers to regulate a particular community, and it is under these regulations that the disputes that form the basis of administrative adjudication often arise.

Administrative law is founded upon a very basic principle of due process: notice and an opportunity to be heard. This principle governs agency rulemaking, and it reflects the basis by which administrative adjudication serves its role in the process.³ The rise in the importance of administrative adjudication tracks the expansion of both state and federal regulatory powers over the past several decades.⁴ As both state and federal agencies conduct increased rulemaking, setting forth parameters of conduct as guided by statute through the issuance of regulations, it is inevitable that those parties subject to the regulation might seek redress of their grievance against the agency. Traditionally, this dispute might have been considered to be the exclusive province of the Article III judiciary. However, recognizing that our state and federal courts simply cannot be expected to resolve every dispute a party may have with a state or federal agency, the various administrative procedure acts seek to create a system of administrative adjudication in which the parties

various state constitutions. In addition to the administrative courts discussed herein, examples of other Article I federal courts include the Board of Veterans' Appeals, U.S. Bankruptcy Court, the U.S. Tax Court, U.S. Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces.

² 5 U.S.C. §§ 551 *et seq.*

³ See ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 295, 616–20, (2010).

⁴ See *id.* at 4–5.

may present their case before an independent adjudicator before reaching the more formal requirements of the state and federal judicial branches.⁵ By permitting the parties to seek to resolve a dispute at this level, administrative adjudication saves the parties, and the taxpayers, millions of dollars annually.⁶ A robust and independent system of administrative adjudication in which the judge enjoys the independence necessary to decide cases fairly and impartially is the foundation upon which administrative law rests.

The State Central Panel versus the Federal Agency-Based Adjudicatory Model

The federal Administrative Procedure Act (APA) was adopted in 1946, with the express purpose of ensuring that parties received fair hearings before impartial adjudicators.⁷ Under the federal APA, the individual federal agencies are, in themselves, adjudicatory bodies. Federal agencies appoint a chief administrative law judge and as many ALJs as are necessary to address the disputes that arise under the various statutes and regulations within the jurisdiction of that agency. These appointed federal ALJs are selected from a register that is established after a thorough examination and testing process that is unique to federal ALJs.⁸ The highly competitive process is conducted through the U.S. Office of Personnel Management (OPM), and all federal agencies are required to select ALJs from the register of qualified candidates (referred to as eligibles), who are ranked based upon their score in the examination and testing procedures. After their selection, federal ALJs serve in their capacity with a single federal agency, and may not be removed from their position absent good

⁵ See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 530–31 (4th ed. 2002).

⁶ See *id.*

⁷ “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review.” 5 U.S.C. § 702. See also George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996) (showing that the Administrative Procedure Act’s legislative history is rife with the intent to apply judicial review to agency action).

⁸ See 5 C.F.R. § 930.201.

cause established before the Merit Systems Protection Board.⁹ Federal ALJs are not subject to performance review or evaluation by the agencies in which they adjudicate, and an agency has no input into their salary, which is established by OPM and Congress.¹⁰ Each federal agency has its own rules of procedure, and the adjudication process generally takes place within the agency structure although hearings may be held anywhere.¹¹

In a growing number of states, there has been a significant shift away from the federal model, and toward a model referred to as a central panel.¹² Unlike their federal counterparts, many state ALJs serve in an independent agency whose responsibility is to hear administrative disputes that may arise from any number of separate state agencies.¹³ In the central panel model, administrative adjudicators are removed from state agencies, and serve in a model of adjudication more closely resembling that of an Article III court. The

⁹ See 5 U.S.C. § 7521. Once appointed, an ALJ may hear cases from any other federal agency. OPM administers the ALJ Loan Program under which federal agencies may seek the temporary assistance of ALJs from other federal agencies. See 5 U.S.C. § 3344; 5 C.F.R.

§ 930.208. This is frequently invoked by agencies that do not employ full-time ALJs, but nonetheless are required by Congress to provide an APA hearing under particular agency statutes. In addition, agencies with case backlogs may call upon the assistance of ALJs from other federal agencies to assist with decreasing the backlog of cases. Thus, an ALJ may hear cases involving not only his or her agency, but also a number of other federal agencies operating under various statutes. The necessity that ALJs be “specialists” in their own agency, but be “generalists” to hear the other cases is an important factor of the role of the federal ALJ.

¹⁰ See 5 U.S.C. § 5372, 5 C.F.R. § 930.205.

¹¹ It is not unusual for ALJs to travel throughout the United States to hear cases. While a majority of federal agencies are based in the Washington, D.C., metro area, many cases are heard outside of the area and throughout the United States. As a result, federal ALJs are based in nearly every major city in the United States, and may be called upon to travel frequently to hear matters that arise outside their agency’s headquarters location.

¹² See *infra* note 64 (jurisdictions with confirmed central panels); see also Alan C. Hoberg, *Ten Years Later: The Progress of State Central Panels*, 21 J. NAT’L ASS’N ADMIN. L. JUDGES 235, 244 (Fall 2001); Michael A. Nolan, *State Agency-Based v. Central Panel Jurisdictions: Is There a Deference?*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1, 23 n.69 (Spring 2009).

¹³ See MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 129 (3d ed. 2009).

popularity and success of these central panel adjudication models has not gone unnoticed on the federal level, and from time to time, Congress has considered adoption of a similar model for the federal government.¹⁴ None of those proposals has found much support in Congress.

Given the inherent differences between the state and federal models, it is helpful at this stage to separate our discussion in order to present a clearer picture of the current status of administrative adjudication on both the state and federal level.

FEDERAL ADMINISTRATIVE ADJUDICATION

In 2016, the Administrative Conference of the United States (ACUS) is expected to publish a comprehensive report on the depth and breadth of administrative adjudication in the federal government.¹⁵ This comprehensive report will explore the many-faceted levels of administrative adjudication that occur within the executive branch. Ranging from the statutory decisional independence of federal ALJs appointed under section 3205 of Title

¹⁴ *See id.* There have been numerous proposals for the consolidation of ALJs into a single central panel agency (“Corps Bill”) similar to the state models discussed herein. S. 1275, 98th Cong. (1983); H.R. 3539, 98th Cong. (1983); H.R. 5156, 98th Cong. (1984); H.R. 1213, 99th Cong. (1985); H.R. 451, 99th Cong. (1985); S. 673, 99th Cong. (1985); S. 950, 100th Cong. (1987); S. 594, 101st Cong. (1989); H.R. 1179, 101st Cong. (1989); S. 826, 102d Cong. (1991); H.R. 3910, 102d (1991); S. 486, 103d Cong. (1993); H.R. 1802, 104th Cong. (1995); S. 486, 104th Cong. (1995). More recently, the efforts have revolved around removing ALJ oversight and selection from OPM to a central agency (“Conference Bill”) without disturbing the current placement of ALJs within the federal agencies. *See, e.g.*, H.R. 3961, 105th Cong. (1998); H.R. 5177, 106th Cong. (2000); *see also* Daniel F. Solomon, *Fundamental Fairness, Judicial Efficiency and Uniformity: Revisiting the Administrative Procedure Act*, 33 J. NAT’L ASS’N ADMIN. L. JUDICIARY 51, 56–82 (2013). However, there has been no activity in this direction since 2000, although variations of both the Corps Bill and Conference Bill concepts remain in discussion among ALJ organizations and academics. Further, both concepts have been endorsed by the American Bar Association. *See* ABA Resolution 111, Aug. 1988 (endorsing central panel “Corps Bill”); ABA Recommendation 1 (2005) (endorsing oversight agency “Conference Bill”). Currently, there does not appear to be political support for either concept in Congress although this may change in the coming years.

¹⁵ The report will be published on ACUS’s website, found at <https://www.acus.gov/research-projects/federal-administrative-adjudication>.

5 to the nonjudicial agency employee who resolves disputes between his or her agency and a potential litigant, federal administrative adjudication occurs on multiple levels with varying degrees of decisional independence on the part of the hearing official, and with varying degrees of success as a vehicle for the delivery of due process. It is beyond the scope of this treatise to explore in depth the various forums in which administrative adjudication may occur on the federal level.¹⁶ Rather, we will explore the main avenues of federal administrative adjudication that offer a level of procedural due process for the litigant and confer independent decision-making authority to the hearing officials.

Adjudication Under the Administrative Procedure Act

As of December 2014, there were 1,698 ALJs serving in 26 different federal departments, agencies, boards, or commissions. Proceedings under the APA vary from agency to agency.¹⁷ Combined, these judges hear cases involving hundreds of federal statutes with adjudications that often exceed 900,000 cases on an annual basis. While rules of procedure vary, the format of the adjudication is often quite similar.

In general, an ALJ will conduct a trial-type hearing. The ALJ presides over the trial from assignment of the case until issuance of the judge's decision. The ALJ sets the time and date of the trial, the discovery schedule, resolves discovery disputes, rules on relevant motions and pretrial dispositive motions, and at trial conducts the proceeding including ruling on objections and evidentiary motions in accordance with the agency's rules of practice, or the Federal Rules of

¹⁶ Interested parties should seek the upcoming report from ACUS for a more detailed exploration of this topic. *See supra* note 15.

¹⁷ *See, e.g.*, 17 C.F.R. § 201 (Securities and Exchange Commission Rules of Practice); 20

C.F.R. § 405 (Social Security Administration Administrative Review Process for Adjudicating Initial Disability Claims); 29 C.F.R. § 18 (Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, Dep't of Labor); 16 C.F.R.; § 3 (Federal Trade Commission Rules of Practice for Adjudicative Proceedings); 29 C.F.R.; § 2200 (Occupational Safety and Health Review Commission Rules of Procedure); 29 C.F.R.; § 2700 (Procedural Rules for Federal Mine Safety Health and Review Commission and Office of Administrative Law Judges).

Evidence. Much of the trial procedures present in litigation before an ALJ are indistinguishable from that of litigation in the U.S. district court.¹⁸ The APA provides several powers that are delegated directly to the ALJ.¹⁹ These statutory powers include the power to

1. Administer oaths and affirmations;
2. Issue subpoenas authorized by law;
3. Rule on offers of proof and receive relevant evidence;
4. Take depositions or have depositions taken when the ends of justice would be served;
5. Regulate the course of the hearing;
6. Hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution.
7. Inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
8. Require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;
9. Dispose of procedural requests or similar matters;
10. Make or recommend decisions; and,
11. Take other action authorized by agency rule.

Review of an ALJ's decision may also vary by agency procedure, but the general rule is that the ALJ issues an initial decision, which may be appealed to an agency official (usually the secretary of the department, or to a board or commission). In general, the review by the agency official is *de novo*. The agency official may adopt the

¹⁸ See GLICKSMAN & LEVY, *supra* note 3, at 535; *see also* Butz v. Economou, 438 U.S. 478, 512–14 (1978).

¹⁹ Powers for ALJs are derived from the APA directly, and cannot be withheld by the agency. *See* Ronnie A. Yoder & Edward J. Schoenbaum, *Into the Twenty-First Century: Administrative Adjudication and the Administrative Law Judge*, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 289, 292 n.11 (7th ed. 2001) (quoting Attorney General's Manual on the Administrative Procedure Act 74 (1947), *reprinted in* ABA SECTION OF ADMIN. LAW & REGULATORY PRACTICE, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 106 (3d ed. 2000)). To the extent that a power has been delegated to the agency by Congress, the ALJ holds that power concurrently.

ALJ's decision as the final agency action, or may reverse the ALJ's decision and issue his or her own decision in its place, or may remand the decision to the ALJ for further proceedings. An ALJ decision that is not appealed to the agency official often becomes the final agency action under section 704 of the APA after exhaustion of the appeal period.²⁰ Once the agency issues the final agency action in whatever form, the decision is now ripe for appeal to an Article III federal court.

Adjudication Before Boards and Commissions

Under the federal administrative processes, adjudication before boards and commissions often takes place not as trial but as appellate proceedings. Initial fact-finding is generally delegated to an ALJ, who conducts a trial in which the judge takes testimony and documentary evidence before issuing an initial decision in accordance with the APA. (See previous section). As with most federal agencies, the initial decision of the ALJ is subject to some type of appellate review by the applicable board or commission before assuming the status as a final agency action. Among the boards and commissions with the most active dockets include the Federal Communications Commission, the Equal Employment Opportunity Commission, the National Labor Relations Board, the Commodity Futures Trading Commission, and the Securities and Exchange Commission.

Adjudication Before Administrative Judges

In addition to ALJs, many federal agency adjudicators are bestowed the title of "administrative judge." The distinction between an administrative law judge and an administrative judge varies depending upon the statutory basis under which the administrative judge received his or her appointment. In general, administrative judges lack the statutory protections afforded ALJs. Administrative judges do not receive tenure, and their salaries are set by the agency in accordance with the General Salary Schedule for federal employees. Unlike ALJs, administrative judges are subject to agency performance review and may be removed from their positions in accordance with standard rules for agency employees. This lack of

²⁰ 5 U.S.C. § 704.

statutory job protection often places administrative judges in a difficult position. While the vast majority of administrative judges exercise their independent judgment in the cases before them, the structure of the selection and retention of administrative judges invites questions of their actual independence. The vast majority of administrative judges are not afforded the protections of decisional independence afforded the ALJ. Accordingly, the quality of due process and procedural fairness of proceedings before federal administrative judges may vary greatly by agency. While by practice some agencies have afforded administrative judges independence similar to ALJs, others view their administrative judges as agency employees whose loyalty and fealty to agency policy and direction is both expected and demanded. This dichotomy of independence is a cause of great concern in federal administrative adjudication, particularly as Congress frequently fails to require many agency adjudications to adhere to the strict compliance of fairness and impartiality demanded by the APA. Below we discuss the most common forums for administrative judges.

Boards of Contract Appeals

Prior to 1978, agencies maintained separate boards to hear contract disputes within the federal government.²¹ Between 1978 and 2007, 12 boards that were authorized by the Contract Disputes Act of 1978 (CDA) heard contract disputes.²² In 2007, the CDA was amended to consolidate the existing boards into three primary Boards of Contract Appeals (Boards).²³ The Boards decide disputes involving most types of federal government contracts, as alternative forums to the Court of Federal Claims.²⁴ Board cases generally are decided by three-judge panels. Appeals from Board decisions are decided by the Court of

²¹ See Jeri Keylene Somers, *The Boards of Contract Appeals: A Historical Perspective*, 60 AM. U. L. REV. 745 (2011).

²² *Id.* at 755.

²³ Section 847 of the National Defense Authorization Act of 2006 created the Civilian Board of Contract Appeals consolidating all existing federal agency BCAs except the Armed Services, Postal Service, and the Tennessee Valley Authority. National Defense Authorization Act of 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391–95 (2006) (codified as amended at 41 U.S.C. §§ 7101–7109).

²⁴ 41 U.S.C. § 7104(b).

Appeals for the Federal Circuit.²⁵ Each Board maintains its own jurisdiction.

The Armed Services Board of Contract Appeals (ASBCA) presently consists of 22 administrative judges (AJs) appointed by the secretary of defense, and decides contract disputes involving the Department of Defense and National Aeronautics and Space Administration. The Civilian Board of Contract Appeals, housed within the General Services Administration, presently consists of 16 AJs appointed by the administrator of General Services, and decides contract disputes involving federal agencies other than those served by the ASBCA and the Postal Service Board of Contract Appeals. The Postal Service Board of Contract Appeals, presently consists of 4 AJs appointed by the Postmaster General, and decides contract disputes involving the U.S. Postal Service.

The BCAs also decide other classes of cases, depending on the board and on various statutes and agreements. The BCAs consist of AJs appointed under the provisions of the CDA. BCA AJs enjoy similar protections as ALJs appointed under 5 U.S.C. § 3105, although the selection procedure for BCA AJs differs significantly in scope and purpose.²⁶ In place of the OPM selection model for ALJs, which emphasizes general litigation skills and seeks judges with broad litigation backgrounds in many different fields of law, BCA AJs are selected precisely because of their proven expertise in the specialized field of public contracts, and minimum qualifications include at least five years of demonstrated experience in this specialized arena.²⁷ In many respects, BCA AJs are the most closely related administrative adjudicators to ALJs in the federal administrative adjudication system.

Equal Employment Opportunity Board, Merit Systems Protection Board, and Appeals Boards

We also see the emergence of administrative judges in forums utilized for adjudication of employee-related matters and in matters involving the appeal of initial decisions of ALJs. The Equal

²⁵ 41 U.S.C. § 7107.

²⁶ 41 U.S.C. § 7105.

²⁷ *Id.* Like ALJs, BCA AJs are selected without regard to political affiliation.

Employment Opportunity Commission currently employs no ALJs, and seeks to have all agency adjudications handled by employees with the title of administrative judge. These employees, like their counterpart AJs at other agencies, are subject to agency review of their performance, and they are further subject to agency salary review. Most are offered no protection from interference from the agency in their adjudications. The same is true of their colleagues at the Merit Systems Protection Board (MSPB). Designed to give federal employees a fair and impartial hearing, the MSPB hearings are conducted by AJs who are federal employees subject to agency discipline. We see this pattern of use of General Salary Schedule agency employees as adjudicators throughout the federal government. While most agency AJs can and do exercise their good judgment and independence on the case before them, it is axiomatic that agency control over their employment, demotion, termination, salary, bonuses, and opportunities for advancement invites criticism and skepticism that the AJ hearing the case can do so without agency interference and with the degree of independence necessary to ensure due process.

Further, AJs also serve as appellate authority for ALJ initial decisions in some contexts. This situation underscores the AJ's role in many agencies as representative of the agency, in contrast with the ALJ's role as independent adjudicator not beholden to agency direction. The AJs who provide this appellate function often stand in place of the agency head, and are expected to review initial decisions of the ALJ with the understanding that their role is to enforce agency policy and issue the agency's final decision.²⁸

Immigration Judges

The other subset of important federal administrative adjudicators is the immigration judges (IJs). IJs are appointed by the Department of Justice and serve at the pleasure of the attorney general.²⁹ As with AJs, they are not afforded the protections enjoyed by ALJs, and they have limited authority over their cases. For example, an administration may decide that juvenile cases are to be given

²⁸ Examples of AJ staffed review authorities include the Department of Labor's Administrative Review Board and the Social Security Appeals Council.

²⁹ See 8 U.S.C. § 1101(b)(4).

priority and direct IJs to prioritize those cases over others. This removes from the IJ one important indicia of independence, which is control over the judge's docket. In recent years, the National Association of Immigration Judges (AFL-CIO), the bargaining unit representative for the 260 IJs³⁰ nationwide, has been advocating for the creation of a special Article I court, along the lines of the Bankruptcy Court or the Court of Veterans Appeals.³¹ These pleas have yet to be enacted while immigration caseloads expand under increased prosecution of undocumented aliens and other immigration violations. An alternative solution for IJs would be to bring them under the APA, and convert them to ALJs. To date the IJs have resisted inclusion in the ALJ corps in the hopes of scoring a political victory with the creation of an Article I court.³²

Adjudication in Other Federal Forums

It is beyond the scope of this discussion to investigate and discuss the many forums in which litigators may find themselves when faced with federal agency adjudication.³³ It is safe to say, however, that the further an administrative adjudication system strays from the formal review of agency action conducted by an independent and impartial ALJ under the APA, the greater the risk of diminished due process for litigants before federal agencies. This remains one of the largest challenges of federal administrative adjudication.

Current Challenges in Federal Administrative Law

In their excellent chapter in the 2001 (7th edition) of this treatise, Judges Yoder and Schoenbaum detail a number of challenges faced by

³⁰ See U.S. Dep't of Justice, Office of the Chief Immigration Judge, <http://www.justice.gov/eoir/office-of-the-chief-immigration-judge> (last visited July 9, 2015).

³¹ Dana Leigh Marks, *Room for Debate: An Independent Immigration Court is Needed*, N.Y. TIMES (July 12, 2011), <http://www.nytimes.com/roomfordebate/2011/07/12/how-can-the-asylum-system-be-fixed/an-independent-immigration-court-is-needed>.

³² If Congress decides to enact comprehensive immigration reform, it remains to be seen whether IJs will succeed in their goal of the creation of an Article I immigration court.

³³ Interested parties should seek the upcoming report from ACUS for a more detailed exploration of this topic. See *supra* note 15.

the administrative judiciary throughout the 1980s and 1990s. Many of the same challenges they identified in the prior edition remain with us today well into the 21st century.

An Independent Administrative Judiciary

What does it mean for an administrative adjudicator to be independent?³⁴ It means that any person exercising judicial decision-making authority should be free from political interference, and should have the necessary protections to ensure that independence can be enforced. Under the APA, ALJs are given statutory protections to prevent retaliation by their agencies in the event of decisions they issue being viewed by the agencies as unfavorable.³⁵ However, as discussed above, the title “judge” is conferred upon many federal adjudicators, not just ALJs. Beyond the protections afforded AJs of the various BCAs, there is little to protect these administrative adjudicators from the influence of agency management.³⁶ Thus, the term “judge” within federal adjudication does not necessarily ensure that the presiding judge will have the authority to exercise the type of independent judicial decision-making authority traditionally conveyed with the title.³⁷

Nevertheless, even with the protections of the APA, ALJs are occasionally subject to attempts to interfere by the agencies, and efforts to enforce the decisional independence conferred upon ALJs by the APA have been unsuccessful to date in Article III federal courts that have entertained such challenges. Indeed, it appears that some Article III judges are just as confused in their understanding of the

³⁴ Judges Yoder and Schoenbaum review issues pertaining to the independence of federal administrative adjudicators in detail in their chapter in the 7th edition of this treatise, Yoder & Schoenbaum, *supra* note 19, at 296–300, and we refer the reader there for the additional background.

³⁵ See GLICKSMAN & LEVY, *supra* note 3, at 535–36.

³⁶ See ASIMOW & LEVIN, *supra* note 13, at 129.

³⁷ “Proliferation of the title ‘judge’ among federal hearing officers without merit selection and without assurance of decisional independence not only undermines the APA concept of formal administrative adjudication, it misleads the public into assuming that they are appearing before a hearing officer with decisional independence and cheapens the title to the point that in the administrative context ‘judge’ loses all meaning.” Yoder & Schoenbaum, *supra* note 19, at 297.

importance of decisional independence of federal ALJs as are some senior executives in federal agency management.³⁸

In *Mahoney v. Donovan*, Judge J. Jeremiah Mahoney filed suit against his agency for interference with his judicial independence under the APA.³⁹ While the district court ruled that Judge Mahoney's claims were not preempted by the Civil Service Reform Act of 1978 (CSRA),⁴⁰ the court found that Judge Mahoney lacked standing to enforce his own judicial independence under the APA.⁴¹ To avoid this standing barrier, the district court suggested that federal ALJs—rather than seek to enforce their own independence—might instead bring lawsuits against agencies for interference with their judicial independence “on behalf of the litigants” who appear before them.⁴² This curious solution to the standing issue would place an independent judge in the position of filing a lawsuit on behalf of litigants who appear in his or her court. The judge would then assert the litigant's rights as part of his or her lawsuit. One should pause to consider this notion. Not only would such a lawsuit raise serious questions under the ABA's Model Code of Judicial Conduct,⁴³ it would place the judge in the awkward position of being the advocate for a litigant from the judge's own courtroom. One shudders to think of the consequences to administrative adjudication if any ALJ would choose to advocate for one party over another in an Article III federal courtroom regardless of the virtue of the cause.

³⁸ In a recent decision, Judge Posner ostensibly compared the role of Social Security ALJs to that of assembly-line chicken processors. *See Ass'n of Admin. Law Judges v. Colvin*, 777 F.3d 402, 404–05 (2015). His observations do not comport with the rulings of the U.S. Supreme Court, which has found that administrative law judges are the functional equivalent of their federal district court counterparts. *See Butz v. Economou*, 438 U.S. 478, 512–14 (1978); *see also Fed. Mar. Comm'n v. S. Carolina State Ports Auth.*, 535 U.S. 743, 744, (2002) (“the role of the ALJ is similar to that of an Article III judge”).

³⁹ *Mahoney v. Donovan*, 824 F. Supp. 2d 49 (D.D.C. 2011), *aff'd in part*, No. 12-5016, 2012 WL 3243983 (D.C. Cir. Aug. 7, 2012), *aff'd in part on other grounds*, 721 F.3d 633 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 2724 (2014).

⁴⁰ Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

⁴¹ *See Mahoney*, 824 F. Supp. 2d at 49.

⁴² *See id.*

⁴³ *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 2.1, 2.2, 3.10 (2010).

On appeal, the District of Columbia Circuit Court of Appeals did not address the standing issue or the district court's proposed solution, but found that the complaints Judge Mahoney alleged were "working conditions" and thus were preempted by CSRA. Affirming the district court's decision but reversing its CSRA analysis, the appeals court briefly identified Judge Mahoney's concerns and made the following conclusory statement:

ALJ Mahoney challenges four sets of actions: (1) the selective assignment of cases on the basis of political considerations or the Secretary's perceived interests; (2) the failure to provide docket numbers necessary for the administrative law judges to manage their cases, as well as to provide access to legal-research resources; (3) unauthorized *ex parte* communications between his supervisor and a litigant appearing before him; and (4) the practice of providing the Justice Department with advance warning of notices of election in certain cases. We think these actions affect "working conditions" and thus fall within the scope of a "personnel action" under the Act.⁴⁴

The appeals court went on to make the astonishing statement that all claims of interference with judicial decision making by ALJs are "working conditions" under CSRA. "The degree of independence of an administrative law judge—the extent to which an administrative law judge may 'exercise[] his independent judgment on the evidence before him, free from pressures by . . . officials within the agency'—certainly sounds like a working condition."⁴⁵ One has to wonder if the appeals court would reach the same conclusion about its own decision-making process.

In 2015, the Court of Appeals for the Seventh Circuit rejected this overly broad application of CSRA as a bar to claims for ALJ independence. In a case brought by the union for Social Security Administration ALJs, plaintiffs argued that the imposition of case

⁴⁴ Mahoney v. Donovan, 721 F.3d 633, 636 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 2724 (2014).

⁴⁵ *Id.*

quotas resulted in an impact on the independent decision making of their judges. Although the Seventh Circuit also ruled that these claims of interference were preempted by CSRA, Judge Posner noted that the D.C. Circuit went too far in *Mahoney* when it found that all claims of interference with judicial independence by ALJs are barred by CSRA.

We are mindful that the District of Columbia Circuit, in *Mahoney v. Donovan*, went even further, ruling that *any* action alleged to interfere with an administrative law judge's decisional independence is a personnel action governed exclusively by the Civil Service Reform Act even though that Act provides no remedy for personnel actions that interfere—even that intentionally interfere—with decisional independence. That ruling, if sound, would nullify the express protection of such independence in the Administrative Procedure Act. *We doubt that it's sound[.]*⁴⁶

We agree with Judge Posner that the D.C. Circuit's broad application of CSRA is indeed unsound; however we also note that the ongoing inability of some members of the Article III judiciary to understand and to appreciate the unique role of the federal ALJ in the federal judicial system continues to inflict harm on the administrative judiciary.

We are, however, pleased to report that many of our Article III brethren are acutely aware of our important role in the federal judicial system. These thoughtful jurists understand that ALJs are an integral part of the federal judicial system, and are not outside observers, complaint processors, or mere agency functionaries. Judge Ripple of the Seventh Circuit Court of Appeals directly addressed this issue in the same decision in which Judge Posner likened ALJs to “chicken processors.”

The administrative adjudicative process is a vital part of our system of administering justice in today's

⁴⁶ Ass'n of Admin. Law Judges v. Colvin, 777 F.3d 402, 405 (7th Cir. 2015) (citations omitted) (emphasis added).

United States. Indeed, it is in the administrative process that most Americans have any contact with the American justice system. Here, their Government decides whether their elderly family members will receive a steady, albeit basic, income stream in their old age. Here, those in their family who have the misfortune of coping with a physical or psychiatric disability find whether they are eligible for sufficient support to live in some semblance of economic dignity. Administrative law judges affect directly the lives of millions; the quality of their work deeply affects, moreover, the respect that our people have for our system of justice. The rights of Americans are not *processed* by our judges; they are *adjudicated*. The task of adjudication at the administrative level involves an intimate knowledge of a complicated statutory scheme and the capacity to comprehend and analyze technical and, at times, conflicting statutory material. The judge must have the practical wisdom to evaluate the value of testimony, some of it true, some of it untrue, and some of it simply mistaken. Even though we review the decisions of these officers under a deferential standard, we know well that these analytical and evaluative tasks alone are time-consuming and demand great attention to detail.⁴⁷

Judge Ripple proceeded to warn his fellow Article III judges that impermissible interference with the independence of ALJs might not bode well for Article III judges in the future. Noting that the “working conditions” discussed have a most definite impact on the quality of adjudication and the administration of due process on any level, Judge Ripple reminded his colleagues that while today it may be a federal agency depriving ALJs of the “tools” necessary to conduct their courtrooms in a fair and impartial manner, another branch of government might likewise interfere with Article III judges’ “working conditions” in a more direct and perhaps constitutionally impermissible manner.

⁴⁷ *Id.* (Ripple, J., concurring).

Finally, I cannot accept even the slightest intimation that the exercise of legislative power, even with the most benign of motivations, could not constitute a significant constitutional impairment of our own work. That the courts of the Third Article cannot be burdened with non-adjudicatory responsibilities has long been established. I see no reason why we should take as a given that those same courts ever can be similarly impaired by being deprived of the tools necessary to achieve their assigned task with integrity.⁴⁸

It remains our fervent hope that other Article III judges heed the wisdom of Judge Ripple's words on this issue and recognize that the importance of protecting the independence of judges does not begin and end at the doorstep of our Article III courts. The independence of our administrative judiciary is a critical component of the constitutional framework that guarantees an independent judiciary, and any weakening of those protections invites further mischief with the role of the judge as fair and impartial adjudicator in our federal judicial system.

Are ALJs Constitutional?

One unique issue that arises in the context of ALJs has moved from academic theory to the Article III courts. Some scholars have raised previously the specter that the appointment of federal ALJs is unconstitutional.⁴⁹ The argument is that the Appointments Clause of Article II of the Constitution requires that "inferior officers" not be removed from presidential oversight by more than one layer of protection.⁵⁰ Simply put, the president appoints "principal officers,"

⁴⁸ *Id.* (Ripple, J., concurring).

⁴⁹ See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797 (2013); Naomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014); Harold J. Krent, *Presidential Control of Adjudication within the Executive Branch*, 65 CASE W. RES. L. REV. 1083 (2015).

⁵⁰

He shall have Power, by and with the Advice and Consent of the

namely agency heads, cabinet department heads, and members of boards and commissions, who, by virtue of the Appointments Clause, may appoint “inferior officers” of the United States. Thus the Appointments Clause of Article II of the Constitution requires that “inferior officers” not be removed from presidential oversight by more than one layer of protection.⁵¹

The potential constitutional issue for ALJs was first identified by Justice Breyer in his dissent in the case of *Free Enterprise Fund v. Public Company Accounting Oversight Board*.⁵² In that case, the Supreme Court ruled that a “second layer of tenure protection” prevents the Securities and Exchange Commission (SEC) from the ability to remove a Public Company Accounting Oversight Board member, thereby preventing the president from holding “the [Securities and Exchange] Commission fully accountable for the Board’s conduct, to the same extent that he may hold the Commission accountable for everything else that it does.”⁵³ This case emboldened litigants frustrated by the SEC’s increased use of enforcement proceedings through administrative adjudication to pursue their theories in the federal courts. The discussion centers on whether ALJs are “inferior officers” within the meaning of Article II of the Constitution. Recently, a federal district court determined that it had jurisdiction to entertain this question,⁵⁴ and issued a preliminary

Senate, to make Treaties, provided two thirds of the Senators present concur; and he 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.

U.S. CONST. art. II, § 2, cl. 2.

⁵¹ *See id.*

⁵² 561 U.S. 477, 543 (2010) (“Does every losing party before an ALJ now have grounds to appeal on the basis that the decision entered against him is unconstitutional?”) (Breyer, J., dissenting).

⁵³ *Id.* at 496.

⁵⁴ Most federal courts presented with this issue have declined jurisdiction given the failure of the party to exhaust administrative remedies before proceeding to an Article III court. *See, e.g., Jarkey v. U.S. Secs. & Exch. Comm’n*, 48 F.

injunction in favor of a litigant who sought to prevent the SEC from proceeding with an enforcement proceeding before an ALJ.

The litigant in *Hill v. Securities & Exchange Commission*⁵⁵ argues that the ALJs at the SEC are unconstitutional, in that as “inferior officers” their appointment had to be made by members of the SEC as principal officers appointed by the president. The ALJ’s two-layer tenure protection violates the Constitution’s separation of powers, specifically the president’s ability to exercise executive power over his inferior officers. Given that SEC ALJs were appointed through a human resources process involving their selection from the OPM register of eligibles (see discussion *supra*), and were not appointed directly by members of the commission, their appointment was unconstitutional.⁵⁶

If ultimately successful, the Appointments Clause conundrum has the potential to impact hundreds of ALJs appointed in various federal agencies outside the SEC. It raises the threat (identified by Justice Breyer) that millions of cases adjudicated by ALJs since 1947 could be invalidated. The upheaval and associated costs of such a scenario are immeasurable should this line of reasoning eventually find favor at the U.S. Supreme Court. Whether this argument becomes an ongoing flashpoint in federal administrative law that reaches the highest levels of our judicial system, or proves to be an anomaly unlikely to be upheld by the various courts of appeal is not clear at this early stage. Suffice it to say that students of administrative law will watch these developments closely as they unfold in the coming years.

Adjudication Under the Social Security Disability Act

Although any detailed analysis of this complicated and controversial issue is beyond the scope of this discussion, it is

Supp. 3d 32 (D.D.C. 2014); *Bebo v. Secs. & Exch. Comm’n*, No. 15-C-3, 2015 WL 905349 (E.D. Wis. Mar. 3, 2015); *Chau v. U.S. Secs. & Exch. Comm’n*, No. 14-CV-1903 (LAK), 2014 WL 6984236 (S.D.N.Y. Apr. 15, 2014).

⁵⁵ *Hill v. Secs. & Exch. Comm’n*, No. 1:15-CV-1801-LMM (N.D. Ga. June 8, 2015).

⁵⁶ “Because SEC ALJs are inferior officers, the Court finds Plaintiff has established a likelihood of success on the merits on his Appointments Clause claim. Inferior officers must be appointed by the President, department heads, or courts of law. U.S. Const. art. II § 2, cl. 2. Otherwise, their appointment violates the Appointments Clause.” *Id.* at 41.

important to note that Congress in recent years has focused considerable attention on adjudications that occur under the Social Security Disability Act, and their impact on the solvency of the trust fund moving forward. Long-existing criticisms of Social Security Administration (SSA) ALJs, SSA management, and the system itself are easily found in the Congressional Record.⁵⁷ What have not been found to date are any viable solutions. It seems likely that Congress will act in this arena in the near future, and any action that involves the role of SSA ALJs may impact the APA and administrative adjudication throughout the federal government.

Bridging the Divide into Advanced Use of Technology in Administrative Adjudication

As we head toward the third decade of the new millennium, the use of technology in courtrooms continues to increase exponentially. We see this in the Article III courtrooms throughout the country and increasingly in many areas of federal administrative adjudication as well. However, given the decentralized nature of federal administrative adjudication, there has been no coordinated effort to adopt a single comprehensive administrative electronic filing and case management system for the federal government similar to that of PACER adopted by the Article III federal courts. No such centralized electronic filing and case management system is even in the discussion stages although the benefits and costs savings are self-evident.

As discussed, ALJs operate in 26 different federal agencies, each with its own budgets, priorities, and challenges in the information technology area. Within those 26 agencies may be multiple administrative jurisdictions handling various separate dockets. Thus, even within a single agency there may be multiple offices handling

⁵⁷ See, e.g., *Oversight of Rising Social Security Disability Claims and the Role of Administrative Law Judges: Hearing before the Subcomm. on Energy Policy, Health Care and Entitlements of the Committee Oversight and Government Reform*, 113th Cong. (2013), <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg82276/pdf/CHRG-113hhrg82276.pdf>; *Managing the Social Security Disability Insurance Program: Hearings before the Subcomm. on Social Security of the Committee on Ways and Means*, 104th Cong. (1995), <http://www.gpo.gov/fdsys/pkg/CHRG-104hhrg21578/html/CHRG-104hhrg21578.htm>.

separate adjudicatory dockets and none of them part of the same filing or case management system, and without any current plan to do so. Worse, many still operate with paper dockets and paper case files in this current electronic-management age. Although the calendar advances, many administrative courts remain comfortably ensconced in the prior century, with outdated technology, paper-intensive systems, and limited resources and experience in electronic case management. Often, given the specific missions of federal agencies, offices that handle administrative adjudications are among the last to see technological advances. Simply put, the agencies have other priorities, and in challenging budget times, modernization of agency adjudicatory practices finds itself exceedingly low on that list. This troubling trend must be addressed. In the meantime we see piecemeal approaches.

Recently, the U.S. Postal Service and the Federal Mine Safety Health and Review Commission conducted procurement on electronic case management and electronic filing systems. These contracts were awarded in 2014, and their implementation has begun, not surprisingly, with two different vendors and entirely different systems. While a centralized federal system that bridges the gaps between federal agencies is unlikely, individual agency approaches to these upgrades should be coordinated through a central executive branch information technology office. It is this lack of long-term planning that may lead to 26 separate systems for litigants to learn when practicing before federal administrative adjudicatory forums.

Professionalization of Administrative Courts: The Need for Professional Court Administrators in Administrative Adjudication

The lack of coordination for the institution of available technology in federal administrative adjudications reinforces the need for professional oversight and assistance for our federal administrative courts. Much of the oversight for these complex dockets falls into the hands of agency staff with no experience in legal matters, no experience with court adjudication, and often little understanding of the role of the federal administrative judiciary. As a model, we need to look no further than our counterparts in the Article III courts. There we see an Administrative Office of the United States Courts overseeing the Article III federal judiciary staffed with professional court administrators who can tackle the problems and

challenges presented with the storage of confidential information, personally protected information, trade secrets, confidential settlements, the necessity of sealed documents, and other common issues in both Article III and administrative proceedings. In the absence of professional court administrators, administrative agencies approach such challenges in the same piecemeal methods used to approach technology issues. However, the two go hand in hand. The creation of positions within the federal government for professional court administrators to bring their expertise to federal agencies is critical. OPM would be well served to begin discussions with the various federal agencies about this important topic.

Federal administrative courts annually adjudicate billions of dollars in federal benefits, fines, and penalties, and render decisions that have serious and long-standing impact upon thousands of regulated industries throughout the United States. Given the important and critical role played by federal adjudicatory bodies and the judges who serve in these courts as part of our federal judicial system and the economic engine of our country, investment in professional administrators and modern technology for our administrative courts is a small price to pay to ensure adequate and timely due process for all persons and regulated industries that seek resolution of disputed issues before an impartial administrative judge.

STATE ADMINISTRATIVE ADJUDICATION

While the majority of states, at least to some extent, continue to follow the federal adjudicatory model where the agency adjudicates the disputes related to its decisions, the focus of this section will be on states where a central panel of ALJs exists.⁵⁸ Put simply, a central panel is an agency of ALJs established to conduct

⁵⁸ “A central panel of administrative law judges (ALJs) is one in which a central office of administrative hearings employs a staff of ALJs and assigns them, on the request of administrative agencies, to preside over agency proceedings.” See, e.g., L. Harold Levinson, *The Central Panel System: A Framework That Separates ALJs from Administrative Agencies*, 65 JUDICATURE 236 (1981) (footnote omitted).

administrative adjudications for other agencies.⁵⁹ The central panel's principal role is to provide fair and unbiased adjudications and due process to both the agency involved in the litigation and the public.⁶⁰ The central panel is independent of, and not subject to the control or influence of, those agencies whose matters it adjudicates.⁶¹ Instead, the ALJs report to a central panel director or chief ALJ who is usually appointed by the governor with confirmation by the state senate.⁶² The main purpose of the central panel is to conduct fair and impartial hearings for other agencies.

The number of states (and the District of Columbia) using the central panel method for adjudicating disputes between the general public and state agencies is at least 24.⁶³ Anecdotally, other states may have more limited-jurisdiction central panels where a handful of agencies or licensure boards have their cases adjudicated by a centralized cadre of ALJs, but no publication exists that catalogues those states. Additionally, some counties and municipalities have central panels for adjudication of code enforcement, local licensure, traffic and parking offenses, and other types of local infractions.⁶⁴ Attempting to identify the number of central panels and the full extent of those cases each considers is part of the research being conducted by retired ALJ Larry J. Craddock as a source for part two of his study on final decision authority and the central panel ALJ.⁶⁵ At the time of the writing of this chapter, Judge Craddock is compiling data on the extent of final decision making by state ALJs versus

⁵⁹ Larry J. Craddock, *Final Decision Authority and the Central Panel ALJ*, 33 J. NAT'L ASS'N OF ADMIN. LAW JUDICIARY at 476.

⁶⁰ *Id.* (footnote omitted).

⁶¹ *Id.* at 477 (footnote omitted).

⁶² *Id.* (citing Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 81 (1994)).

⁶³ The 24 jurisdictions with confirmed central panels are Alaska, Arizona, California, Colorado, District of Columbia, Florida, Georgia, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, Texas, Washington, Wisconsin, and Wyoming.

⁶⁴ *Cf.* Cook County and Chicago, Illinois, and the City of New York.

⁶⁵ Craddock, *supra* note 59, at 558–59.

recommended decision making with the final decision issued by the agency head or governing body.⁶⁶

The number of cases filed and the number of hearings held annually by the various state central panels gives an indication of the breadth and depth of the panel's authority. Those states that adjudicate matters relating to "high volume" subject matter areas such as child support enforcement, state public assistance benefits, traffic violations and implied consent cases, unemployment compensation, and workers' compensation generally have higher case counts than those states that handle only lower-volume, more complex matters, such as professional licensure, teacher discipline, health care certificates of need, environmental permitting and enforcement, and state tax disputes, to name a few.⁶⁷ Due to the fact that many states handle a combination of high-volume and low-volume case types, a large variation exists in case numbers among states having central panels. For example, Professor Michael Asimow noted that only 5 percent of California's agency adjudications were handled by its central panel.⁶⁸ To prove the validity of Professor Asimow's work today, California's total number of cases filed in the past year was 13,192, far less than the 61,684 filed in Georgia, or the 125,408 cases filed in Michigan, the latter two being states with far lesser populations than California.⁶⁹

The landmark decision in *Goldberg v. Kelly*⁷⁰ held that certain procedures were constitutionally required in the revocation of government benefits.⁷¹ *Goldberg* neither reversed the string of prior decisions that had allowed administrative agencies to conduct their own hearings, nor required that complete judicial proceedings be

⁶⁶ *Id.* at 559.

⁶⁷ *2015 Comparison of States with Centralized Administrative Hearings Tribunals*, informally published by Louisiana's Division of Administrative Law annually.

⁶⁸ Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1073 (1992).

⁶⁹ *2015 Comparison of States with Centralized Administrative Hearings Tribunals*, *supra* note 67.

⁷⁰ 397 U.S. 254 (1970).

⁷¹ The Supreme Court held that welfare was a legal entitlement, requiring pretermination hearings that afforded essentially all the requirement of a trial. *Id.* at 262.

inserted into the executive branch, but it did serve as the introduction to an ongoing series of cases that transformed the parameters governing agency conduct of administrative hearings. *Goldberg* was a significant step toward the “judicialization” of administrative procedures that forced many states to reevaluate their adjudicatory structures.⁷² Around the same time as the *Goldberg* decision, other federal cases began to focus on the critical role of the judiciary in the procedural model of administrative law. To increase oversight, the district courts interpreted the APA’s statement of basis and purpose in a broad fashion.⁷³ In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court had endorsed a “hard look” review that required the judiciary to make a more substantial inquiry into an agency’s processes and decisions.⁷⁴ At the same time, the Court reaffirmed that due process did not mandate any procedural checks on “legislative” decisions.⁷⁵ These rulings called attention to the need for stricter review of agency actions, while offering a solution that seemed to diminish legislative control and oversight.⁷⁶

While not exhaustive of the issue of why central panels began to develop beyond California in the 1970s and 1980s, Florida’s experience serves as an illustrative example. Pressures increased in the early 1970s in Florida, and its legislature received numerous complaints about agency actions from various citizens and interest groups.⁷⁷ In drafting their individual APAs, the states are free to follow

⁷² F. Scott Boyd, *Florida’s ALJs: Maintaining a Different Balance*, 24 J. NAT’L ASS’N ADMIN. L. JUDGES 175, 203 (2004) (citing Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975)).

⁷³ *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

⁷⁴ 401 U.S. 402, 415 (1971) (finding that section 706 of the APA requires a reviewing court to engage in a thorough, probing review); Boyd, *supra* note 72, at 203.

⁷⁵ *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 245–46 (1973) (finding that proceedings for the purpose of promulgating policy-type rules or standards are not impacted by due process clause) (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915)); Boyd, *supra* note 72.

⁷⁶ Boyd, *supra* note 72.

⁷⁷ Memorandum from Comm. on Rules and Calendar, Memorandum Outlining Problems with Administrative Governance 1 (on file at the Florida joint Administrative Procedures Comm.). Although undated, references to specific

the “laboratories of democracy” theory.⁷⁸ The states are not bound by the federal APA except to the extent they choose to pattern their APAs after the federal APA.⁷⁹ In fact, most states have patterned their APAs after one or more of the Model APAs that exist, rather than on the federal APA.⁸⁰ The black-letter law makes it clear that administrative agencies are creatures of statute (or of a constitutional provision).⁸¹ An administrative agency has no more inherent authority than what the drafters of the statute or the framers of the Constitution have given it.⁸² It may exercise only those powers expressly granted by statutory or constitutional provision along with those powers that may be implied by the powers expressly granted.⁸³ An agency may not improvise upon its express powers so as to confer power upon itself indirectly that it has not been granted either expressly or by necessary implication.⁸⁴

In those states that have adopted central panel ALJ final decision authority, the legislatures have made the decision to alter the regulatory scheme from the traditional one in which the agency makes the final decision following a recommendation from the ALJ.⁸⁵ This

incidents in the body of the report indicate it was prepared for consideration in conjunction with legislation during the 1974 session. Boyd, *supra* note 72.

⁷⁸ Craddock, *supra* note 59, at 502. The “laboratories of democracy” theory was popularized by Justice Louis Brandeis. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). The theory has been quoted with approval in many cases over the years since Justice Brandeis first introduced it. See, e.g., *Oregon v. Ice*, 555 U.S. 166, 171 (2009); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); Craddock, *supra* note 59.

⁷⁹ See Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 298 (1986) (cited in Craddock, *supra* note 59, at 485–86).

⁸⁰ *Id.* at 297.

⁸¹ Craddock, *supra* note 59, at 504 (citing 73 C.J.S. *Public Administrative Law and Procedure* § 12 (2004)).

⁸² 73 C.J.S. *Public Administrative Law and Procedure* § 107 (2004)).

⁸³ See *id.*

⁸⁴ See *id.* § 109.

⁸⁵ Three states, Louisiana, North Carolina, and South Carolina, give their ALJs final decision authority on both the law and the facts in almost every case. Other central panel states vary in that the ALJ in some has final decision-making authority over facts, but not the law; some give the ALJ final decision-making

creates an exception to the agency's traditional authority. Unless there is a provision in the state or federal constitution prohibiting the legislature from doing what it legislates to accomplish, the legislation will stand as state law. Unlike Congress, which has authority to exercise only those powers expressly granted by the U.S. Constitution or arising by necessary implication from the powers expressly granted, state legislatures have plenary legislative power to enact all legislation except as their plenary power has been limited by the state or federal constitution.⁸⁶ The *Wooley v. State Farm Casualty* case from Louisiana is the most widely cited case discussing the constitutionality of ALJ final decision authority.⁸⁷

As evidenced by the large number of states that have central panels of ALJs, state legislatures do not fear taking some power of decision making from agencies and placing it in the hands of independent ALJs. Several advantages of creating a central panel of ALJs exist, probably the most prominent of which is to foster the perception of fairness.⁸⁸ While due process and essential fairness can arguably be achieved without a central panel by paying careful attention to the separation of investigatory and prosecutorial functions within an agency, from adjudicatory functions by that agency, from the outside looking in, it is hard to convince the public that the appearance of

authority over facts and law in some cases, but not others; and some give the ALJ no final decision-making authority over either facts or law. See Craddock, *supra* note 59, at 559.

⁸⁶ Craddock, *supra* note 59, at 505 (citing G. Alan Tarr, *Understanding State Constitutions* 15–16 (1998); and Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the United States of the American Union* 174–74 (Lawbook Exch., Ltd. 1999) (1868)). *Wooley v. State Farm Fire & Cas. Ins. Co.*, 893 So. 2d 746 (La. 2005).

⁸⁷ Craddock, *supra* note 59, at 506. Florida is another state where an appellate court has determined that final decision authority by an ALJ does not violate the separation of powers doctrine. *Fla. Dep't of State v. Stevens*, 344 So. 2d 290 (Fla. Dist. Ct. App. 1977); *Emp't Sec. Comm'n of N. Car. v. Peace*, 493 S.E. 2d 466, 470–71 (N.C. Ct. App. 1997). While the supreme courts in these two states have not ruled upon the issue, the decisions of the intermediate state appellate courts stand as binding unless and until overturned.

⁸⁸ Boyd, *supra* note 72, at 213 (citing Gerald Ruth, *Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase "Judicialization" in Pennsylvania*, 5 WEIDNER J. PUB. L. 297 (1996); William Sherill, *The Florida Division of Administrative Hearings*, 75 FLA. B. J. 22 (2001)).

impartiality can be achieved.⁸⁹ Procedural fairness was clearly one of Florida's objectives in creating its central panel. "It is ludicrous to think that an agency that sits as prosecutor, judge, and jury is not tainted with some prejudice that has to spill over into its decision-making at the various stages."⁹⁰

Using Florida as an example, its amendment of the state APA and creation of its central panel of ALJs, in 1974, demonstrated its commitment to the classic model of administrative law. From the time of the creation of its central panel, Florida ALJs were granted authority not only to conduct hearings on administrative rules, but to issue final orders in those cases.⁹¹ Over time, Florida and most other states with central panels of ALJs have expanded their decision-making authority to include final decisions in numerous other agency matters.

A detailed discussion of each of the various states having central panels and listing those areas where they have recommended decision authority versus final decision authority will have to wait for the completion of part two of Judge Larry Craddock's analysis of the central panel model and final decision-making authority, expected to be released in 2016.⁹² To complete the analysis, a survey of states having central panels of ALJs is being conducted. That survey is expected to provide detailed data of the full extent of each central panel's jurisdiction, the number and types of cases in which the ALJs have recommended versus final decision authority, and the economics of the central panel model as opposed to the agency adjudicatory model.

The directors and chief ALJs of those states that have central panels of ALJs meet annually in what has become known as the

⁸⁹ See, e.g., Boyd, *supra* note 72, at 214.

⁹⁰ *Id.* at 215 (citing Memorandum from Representative S. Curtis Kiser, Memorandum on Trip to Sacramento, California to Review California Administrative Procedure Act 1 (Dec. 1973) (on file at the Florida Joint Administrative Procedures Committee, Tallahassee)).

⁹¹ FLA. STAT. § 120.56(2) (2014) (regarding proposed rules); FLA. STAT. § 120.56(3) (2014) (regarding existing rules). In 1991, Florida's APA was further amended to grant final order authority to ALJs in challenges to policy not adopted as rules, now codified at FLA. STAT. § 120.56(4). Under current Florida law, Florida ALJs now issue final decisions in a wide variety of other cases. Boyd, *supra* note 72, at 214.

⁹² Craddock, *supra* note 59, at 559.

Central Panel Directors Conference. At the 2015 meeting, information concerning the topics that will be surveyed as part of Judge Craddock's research as well as developments concerning the jurisdiction and acceptance of the central panel in each of the participating states was examined. Each state gave a report, and statistical data concerning each central panel state was compiled by the Louisiana Department of Administrative Law.⁹³ One of the hallmarks of the central panel states is that their administrative adjudicatory bodies exist with a low staff-to-judge ratio. Many of the states that operate out of one centralized office employ a larger number of judges than administrative and support staff. Central panel states having multiple offices generally have a higher staff-to-judge ratio than those with one centralized office.⁹⁴

Some central panel states perform tasks other than just the adjudication of administrative disputes. North Carolina, for example, handles the rulemaking function of the state in a division of its Office of Administrative Hearings.⁹⁵ The Florida Division of Administrative Hearings provides no cost indexing of all final orders issued by that state's agencies, making these orders available on its website to the public for research and informational purposes.⁹⁶ Other states provide similar services in addition to performing their adjudicatory functions.

Most states with central panels of ALJs employ few, if any, law clerks, staff attorneys, paralegals, and other staff to assist the ALJ in research, drafting, and writing of decisions.⁹⁷ The ALJs are expected to conduct their hearings and prepare written decisions and perform their own research when necessary. Many utilize unpaid interns and

⁹³ 2015 *Comparison of States with Centralized Administrative Hearings Tribunals*, *supra* note 67.

⁹⁴ *Id.*

⁹⁵ See 26 N.C. ADMIN. CODE ch. 2 (describing the process for submitting and processing of rules by the Office of Administrative Hearings).

⁹⁶ FLA. STAT. § 120.53 (2014).

⁹⁷ See 2015 *Comparison of States with Centralized Administrative Hearings Tribunals*, *supra* note 67. The information concerning these staff ratios and types of professional and paraprofessional judicial staff is derived from oral reports given by the directors or chief ALJs participating in the 2015 Central Panel Directors Conference in Atlanta, Georgia. This information has not been reduced to writing in any formal compilation.

externs from local law schools to assist for short periods of time. The central panel model is designed to maximize efficiency by lessening the financial burden on agencies that are either billed for ALJ services by the central panel or upon the taxpayers of those states in which a direct allocation from the legislature supports the central panel. Arguably, the leanness of central panels of ALJs make this model a cost-effective method for adjudicating disputes in those states having central panels.

Even those states that have not adopted a central panel of ALJs for handling administrative disputes have, over time, departed more and more from the federal model of “procedural safeguards,” since they have found federal solutions inadequate to their needs.⁹⁸ The history of the central panel has been well documented.⁹⁹ Though it is noted that the jurisdiction, structure, process, and authority of these panels varies greatly,¹⁰⁰ still the number of states creating central panels increased at a slow, but steady rate from 1974 into the first decade of the 21st century.

The debate over whether the federal or agency model is better for states than the central panel model is by no means completed. With about half the states having some form of central panel, regardless of the limits or extent of their jurisdiction, and about half having agencies perform investigative, prosecutorial, and adjudicatory functions, there is no clear majority of opinion on the issue. Anecdotally, legislators and members of the public in states having central panels of ALJs favor the separation of the adjudicatory function of an agency from its investigative and prosecutorial functions. The perception of bias when the same agency that denied a license, permit, or benefit to sit in judgment of the propriety of that

⁹⁸ See Arthur Bonfield, *The Federal APA and State Administrative Law*, *supra* note 79, at 334; Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551 (2001).

⁹⁹ Boyd, *supra* note 72, at 227 (citing Allen Hoberg (former chief administrative law judge of North Dakota), *Ten Years Later: The Progress of State Central Panels*, 21 J. NAT’L ASS’N ADMIN. L. JUDICIARY 235 (2001); James Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1357 (2002); John Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419, 441 (2001)).

¹⁰⁰ Boyd, *id.* (citing Hoberg, *supra*; Hardwicke, *supra*, at 420).

decision does not sit well with the typical citizen.¹⁰¹ A state's willingness to separate the adjudication of disputes from its investigative and prosecutorial functions demonstrates a reluctance of the legislatures in those states to continue to place all agency functions in the hands of the agency head or collegial board without some independent administrative review. While the results of Judge Craddock's research and part two of his article on final decision authority will remain uncertain until the surveying and compilation of the data has been completed, it is likely the results will support the need for an independent, impartial administrative judiciary. What further remains uncertain is whether more states will continue to join the ranks of the central panel states and create separate, independent panels of ALJs to adjudicate their administrative disputes.

CONCLUSION

Ultimately, administrative adjudication, whether on the state or federal level, is about the delivery of due process to the individuals and businesses that are subject to government regulation. As several commentators and courts have noted, many Americans only contact with the American justice system may occur before an administrative judge.¹⁰² Therefore, it is critical that we remember that the independence of administrative adjudicators, state and federal, must be foremost on the minds of our state legislatures and Congress. A strong commitment to ensuring the independence of the administrative adjudicator, regardless of the form that adjudication process may take, is the greatest protection for our citizens, and the most important assurance of due process for taxpayers and businesses that rely upon independent administrative judges to resolve fairly and impartially their disputes with the government.

¹⁰¹ 2015 Central Panel Directors Conference, Atlanta, Georgia, from oral presentations by directors and chief judges of central panel states.

¹⁰² *Ass'n of Admin. Law Judges v. Colvin*, 777 F.3d 402, 405 (7th Cir. 2015) ("Indeed, it is in the administrative process that most Americans have any contact with the American justice system.").