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PROTECTING THE INDEPENDENCE OF ADMINISTRATIVE LAW JUDGES: A MODEL ADMINISTRATIVE LAW JUDGE CORPS STATUTE

Administrative law judges (ALJs) preside in agency adjudicatory proceedings and their decisions constitute an integral part of state and federal policies. At the federal level, each ALJ serves one agency, hearing cases arising under that agency alone. This close association of ALJs with administrative agencies may lead to agency proceedings that are neither objective nor well-reasoned. Improper influence exerted by the agency, and an ALJ’s perception that the agency evaluates his performance, deprive parties to agency adjudication of a fair hearing. In addition, the administrative process as a whole suffers due to a public perception of bias.

Congress has taken several steps to protect the independence of federal ALJs. Section 11 of the Administrative Procedure Act (APA) to some degree separates ALJs from agencies by prohibiting any agency from disciplining, promoting, or demoting an ALJ. In 1972, a federal regulation retitled hearing officers “ad-

1. An administrative law judge presides in most agency adjudicatory proceedings, serving a function like that of a judge. He may conduct prehearing conferences, issue discovery rulings, and organize the hearing. In many ways, an ALJ participates more directly in the hearing than a judge does in a case. His responsibilities, for example, include developing a concise record, questioning witnesses when appropriate or efficient, and ensuring that the claimant is treated fairly. For a detailed description of the duties of an ALJ, see M. Ruhlen, Manual for Administrative Law Judges (1982). See also 5 U.S.C. § 556(c) (1982).

2. The sheer number of ALJs indicates the extent of their impact. In 1980, more than 4,000 ALJs operated at the federal and state levels. Of these, 1,119 were federal ALJs, processing 250,000 cases in that year. Rich, Central Panels of Administrative Law Judges: An Introduction, 65 Judicature 233 (1981). In comparison, there were 196 federal ALJs in 1947. Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 2 (1983) [hereinafter cited as S. 1275 Hearings].


4. Id.

5. The APA vested most control over the ALJs in the Civil Service Commission, now
ministrative law judges." Finally, the enforcement of procedural rules under the APA theoretically ensures independence for ALJs and a fair hearing for the parties to adjudication. These protective measures, however, are insufficient, because they have not achieved the goal of independence for the ALJs.

Eight states have enacted statutes that remove ALJs from their agencies and transfer them to an independent corps of ALJs. Cases assigned to the ALJs may or may not fall in their area of expertise and the ALJs operate through a centralized office distinct from the agencies. Enthusiasm and opposition have greeted similar legislation proposed at the federal level. The central corps concept in general encourages and protects the independence of ALJs, but the federal bill is inadequate in several ways. Rather than completely separating ALJs from subtle agency influence, the federal bill separates the corps into divisions by specialization. In addition, a federal bill such as S. 1275 that includes immediately all ALJs within the central corps may initially prove cumbersome and inoperative. In these respects and several others, the model statute proposed in this Note constitutes an improvement over the proposed federal legislation.

This Note concludes that the federal government should adopt some form of central panel system to protect both the in-

the Office of Personnel Management (OPM). The OPM fixes the compensation of an ALJ "independently of agency recommendations." 5 U.S.C. § 5372 (1982). An ALJ is removed or disciplined "only for good cause established and determined by the Merit Systems Protection Board, on the record after opportunity for hearing." 5 U.S.C. § 7521. In addition, the APA gives ALJs certain responsibilities and powers that they are to exercise independently. 5 U.S.C. § 556(c).


7. For example, an employee presiding at an adjudicatory proceeding may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency." 5 U.S.C. § 554(d)(2) (1982). Additionally, the APA lays out detailed procedural requirements for hearings. 5 U.S.C. § 556. See Butz v. Economou, 438 U.S. 478, 513 (1978) (stating that "[t]he process of agency adjudication is currently structured so as to assure that the hearing . . . is on the evidence before him, free from pressures by the parties or other officials within the agency"); see also Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (holding that the findings of the hearing examiner are to be given some weight on judicial review of an agency decision).


10. See supra note 9.
dependence of the ALJs and the public interest. Part I of this Note presents several alternatives to the central panel systems that have been proposed in past years and discusses their inadequacies. Part II summarizes the arguments concerning the central panel system of administrative adjudication. Part III discusses several of the integral elements of a central panel system and analyzes the state statutes and the proposed federal legislation in light of these elements. Finally, Part IV proposes a model statute for an independent corps of federal ALJs.

I. NEED FOR REFORM: ALTERNATIVES TO A CENTRAL PANEL SYSTEM

ALJs preside in those agency adjudicatory proceedings that agencies do not choose to conduct themselves. Their responsibilities include developing an accurate and complete record and rendering a fair and equitable decision.11 The APA created the position of ALJ to fill a gap resulting from the increasingly pervasive role of the administrative agency. Statutes authorizing agency action affecting property interests or individual rights require an adjudicatory proceeding. The governmental parties involved in the action are biased participants and courts lack the time to conduct detailed proceedings in administrative adjudication.12 The position of ALJ arose from this need for an independent adjudicator.13

The creation of the position of ALJ met the need for a third party to conduct hearings and provided for some independence. The degree of independence, however, is incomplete, and this incomplete independence has led to four basic problems: bias of ALJs, poor quality of decision making, inefficient administrative adjudication, and rulemaking through adjudication. Both critics and supporters of the present system have addressed these problems, and proposals for reform range from the adopted APA provisions to an independent administrative court. Although each of these proposals possesses some advantages, many of the suggested solutions fail to address completely the inherent weaknesses of the current system.

11. See M. RUHLEN, supra note 1, at 2.
12. Id. at 2-3.
13. In 1946, the APA established a corps of independent hearing officers within each agency. An agency can appoint as many ALJs as it needs. 5 U.S.C. § 3105 (1982).
A. Administrative Procedure Act Provisions

Congress intended the provisions of the APA that address ALJs to ensure the independence of ALJs by removing control over their status and pay from the agencies.\(^{14}\) In addition, the APA delegation of specific powers to the ALJs delineates their authority and separates them somewhat from the agencies that employ them.\(^{15}\) These APA provisions constitute the initial step towards independent ALJs. Although federal agencies do not control ALJs under law, the APA does not in any way protect the decisions of ALJs from more subtle agency influence. The APA does not, for example, address the tension between an ALJ’s role as adjudicator and his association with one particular agency. Nor does it preclude an agency’s discriminatory deprivation of vital secretarial services or comfortable surroundings.

B. Selection Process Reform

Currently, agencies choose ALJs by means of selective certification. The Office of Personnel Management (OPM) maintains a register consisting of the names of candidates chosen by the OPM after an extensive interview and testing process.\(^{16}\) An agency in need of an ALJ applies to the OPM, which certifies for the agency the three names on the top of its register from which to choose.\(^{17}\) Several years ago, certain agencies began to impose an additional experience requirement on candidates seeking positions with them because these agencies felt a need for ALJs with some experience.\(^{18}\) Often only former employees can meet


\(^{15}\) See 5 U.S.C. § 556(c) (1982).


\(^{17}\) Under the APA, “each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 577 of this title.” 5 U.S.C. § 3105 (1982). These appointments must be made from the three highest eligible candidates as certified by the OPM. See id. §§ 3317, 3318.

\(^{18}\) An agency may pass over a certified preference eligible by filing an objection to the candidate, accompanied by written reasons, and obtaining approval of the OPM. Id. § 3318. This provision provided the loophole that led to selective certification, because the OPM has accepted special experience requirements as legitimate reasons for passing over preference eligibles. For example, the OPM will specially certify for the Federal
the additional requirements.

Several commentators have suggested that Congress modify or abolish the selective certification process. Agencies frequently select ALJs not on the basis of their merits, but as a result of agency influence. Changing the selection process would seemingly correct the problem of agencies choosing former employees over more qualified candidates. This change would only reach the partiality of ALJs due to the initial hiring stage, though, because such reform does not address the permanent association of ALJs with agencies and the resulting partiality.

C. Administrative Law Judge Loan Program

Section 3344 of the APA provides that an agency that occasionally or temporarily needs additional ALJs "may use administrative law judges selected by the Office of Personnel Management from and with the consent of other agencies." One proposal for improvement of the current administrative system suggests increasing the use of this loan program to the extent of establishing a separate "loan corps." The primary objective of the program is the efficient disposition of cases. An agency that has a greater demand for ALJs during certain peak periods may utilize ALJs from other agencies. In addition, an agency that has only occasional need for an ALJ need not keep a full-time ALJ on its payroll. The arguments that the loan program would provide some variety to an ALJ in the cases he hears and a fresh viewpoint to the agency further support the loan program.

Communications Commission eligibles who can show "two years of experience in the preparation, presentation, or hearing of formal cases . . . in the field of communications law." Lubbers, Federal Administrative Law Judges: A Focus on our Invisible Judiciary, 33 Ad. L. Rev. 109, 117 (1981) (quoting U.S. Office of Personnel Management, Announcement No. 318 (1979)).

19. See, e.g., Lubbers, supra note 18. Lubbers states that "the objective of selective certification could be achieved without closing the door to highly qualified generalists by changing the process of ALJ certification and selection." Id. at 119. Lubbers recommends allowing agencies to choose from the top 10 eligibles rather than from a group selectively certified by the OPM. In addition, he suggests giving special consideration to applicants who have specific experience in an area. Id. at 127; see also H.R. 6768, 96th Cong., 2d Sess. (1980); S. 262, 96th Cong., 1st Sess. (1979); Advisory Committee on Administrative Law Judges, Final Report (1978); Miller, The Tangled Path to an Administrative Judgeship, 25 Lab. L.J. 3, 10-11 (1974).


22. Id. at 49, quoted in Scalia, supra note 21, at 339.

23. Id. at 49, quoted in Scalia, supra note 21, at 340.
Although the loan program offers increased efficiency and variety in cases heard, agencies that employ their own ALJs have not utilized the loan program to reduce backlogs.\textsuperscript{24} Agencies would seemingly rather have their own specialized ALJs, regardless of the extent to which their caseloads pile up. In addition, an agency may feel that “borrowed” ALJs who normally preside over other agencies’ cases are not the most qualified or interested ALJs.\textsuperscript{25} Thus, the loan program provides an inadequate remedy to the problems of the administrative system primarily because agencies do not use it.

Even with increased use of the program, the loan program would not provide a complete remedy. An agency could continue to assign delicate policy cases to ALJs who represent the agency viewpoint and use “borrowed” ALJs for those cases that the agency views as insignificant. Additionally, the loan program does not provide agency ALJs protection from agency influence, and, consequently, the outcomes of adjudicatory proceedings would still reflect this lack of independence.

D. Administrative Courts—Article III Status

The most complete reform proposal, aside from the central panel system, suggests that Congress grant ALJs Article III, judicial status.\textsuperscript{26} This proposal derives from the arguments that the important matters that ALJs decide require consideration by an Article III judge. ALJs should constitute an independent group of decision makers, separate from the administrative system, governed by internal procedures.\textsuperscript{27} Granting ALJs Article III status would free them from most agency pressure because they would gain life tenure and guaranteed salaries.\textsuperscript{28} Although an administrative court system would provide advantages similar to a central panel system, an administrative court system would disrupt the balance of the current administrative system. Article III administrative courts would deny Congress flexibility in the funding and control of the administrative process and would shift the power to issue a final decision from the agency to

\textsuperscript{24} See Scalia, supra note 21, at 321-22 (indicating that those agencies frequently borrowing ALJs are not the large agencies that require full-time ALJs).
\textsuperscript{25} Id. at 344-45.
\textsuperscript{26} See Marquardt & Wheat, Hidden Allocators: Administrative Law Judges and Regulatory Reform, 2 Law & Pol’y Q. 472, 491-92 (1980).
\textsuperscript{27} See id.
\textsuperscript{28} See U.S. Const. art. III, § 1.
the administrative court. For purposes of protecting the independence of ALJs and improving the quality of decision making, such a reform of the basic structure of the administrative system is not appropriate or necessary. The central panel system addresses the inherent problems of the current administrative system without eliminating the administrative system or creating new problems.

II. ADVANTAGES OF AN INDEPENDENT CORPS

An independent corps system addresses the four principal problems raised by a lack of ALJ independence: bias of the ALJ, poor quality of decision making, inefficient administrative adjudication, and rulemaking through adjudication. The establishment of an independent corps of ALJs has alleviated these problems in states that have adopted a central panel system. The adoption of a federal corps of ALJs would similarly correct these problems at the federal level.29

A. Administrative Law Judge Bias

Due process limitations apply to administrative adjudicatory proceedings as well as judicial proceedings.30 In addition, the APA "requires . . . many of the same safeguards as . . . in the judicial process."31 Thus, the role of an ALJ is "functionally

29. Several organizations have announced their agreement with the proposition that a corps system would be effective at the federal level. See S. 1275 Hearings, supra note 2, at 4 (testimony of Edwin S. Bernstein, ALJ, U.S. Postal Service) (announcing the support of the Federal Administrative Law Judge Conference for the bill, and of the National Conference of ALJs for the corps concept).
30. See, e.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 250 (1980) (holding that due process requirements of neutrality "cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime"); Galvan v. Press, 347 U.S. 522, 531 (1954) (stating that in the enforcement of policies concerning the rights of aliens, "the Executive Branch of the government must respect the procedural safeguards of due process"); NLRB v. Phelps, 136 F.2d 562, 563 (5th Cir. 1943) (stating that "a fair trial by an unbiased and non-partisan trier of facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge"); see also Goldberg v. Kelly, 397 U.S. 254 (1970).
31. Butz v. Economou, 438 U.S. 478, 513 (1978); see also Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (stating that one of the purposes of the APA is "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge"), modified, 339 U.S. 908 (1950).
comparable' to that of a judge." In short, ALJs should remain disinterested and render nonpartisan and accurate decisions in administrative adjudications.

The relationship between an agency and an ALJ makes it very difficult for the ALJ to fulfill these objectives. The agency influences the ALJ, both directly and indirectly, and consequently the ALJ's decision making reflects his bias, conscious or unconscious, toward the agency. The simple association between the ALJ and an agency that participates in the proceeding as a party promotes bias on the part of the ALJ. ALJs associate with agency officials inside and outside of the office; their relationships resemble relationships among fellow employees. Discussion of cases can easily occur. More indirectly, ALJs will likely develop or adopt the agency viewpoint and approach to problems. Agencies' practice of hiring former employees as ALJs, despite the statutory requirement that they hire from the Civil Service Commission register, ensures that ALJs will understand and probably promote their agencies' viewpoints.

In addition to the more subtle forms of influence mentioned above, agencies may directly act with the intention of improp-

33. One survey demonstrates the feelings of state ALJs currently operating in central panel systems that a relationship between the ALJ and the agency promotes bias. In response to the statement that "[a] central panel ALJ whose office quarters are located within an agency will more likely be subject to inappropriate agency influence," 76.7% of the responding ALJs agreed or strongly agreed. M. Rich & W. Brucar, The Central Panel System for Administrative Law Judges: A Survey of Seven States 62 (1983); see also 2 R. Pound, Jurisprudence 442-43 (1959).
34. For example, in Brown v. United States, 377 F. Supp. 530 (N.D. Tex. 1974), an investigator for the Federal Bureau of Narcotics and Dangerous Drugs was discharged following a hearing. The court held that the investigator was denied due process because the hearing examiner and the prosecutor had discussed the case prior to the hearing.
35. See, e.g., Pfeiffer, Hearing Cases Before Several Agencies—Odyssey of an Administrative Law Judge, 27 A.D. L. Rev. 217, 221 (1975). Pfeiffer, an ALJ who has experience serving before eight different agencies, states that "exposure to the same field of regulation inevitably results in the development of a point of view which, unconsciously or otherwise, influences the initial decision and, in some cases, the conduct of the hearing." Id. at 221. See also S. 1275 Hearings, supra note 2, at 155-56 (testimony of John T. Miller, Attorney and Adjunct Professor, Georgetown University Law Center).
36. In 1975, of the 13 ALJs assigned to the FTC, 12 were former employees. Nothing indicates a change in the current situation. Segal, The Administrative Law Judge: Thirty Years of Progress and the Road Ahead, 62 A.B.A. J. 1424, 1426 (1976). Similarly, over 65 percent of NLRB ALJs are former employees, and over 50% of ICC ALJs were employees at the time of their appointment. Davis, Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer, 1977 Duke L.J. 389, 403. In 1978, 55% of ALJs responding to a questionnaire were members of an agency immediately before they became ALJs. U.S. Comptroller General, Administrative Law Process: Better Management is Needed 68 (1978).
37. See supra notes 16-17 and accompanying text.
erly influencing the outcome of adjudicatory proceedings. These actions range from denying secretarial assistance to "counseling" ALJs who grant more than the average number of appeals by claimants. One claimant even alleged that an "improper and illegal contractual arrangement [made by an agency] with a sitting ALJ" denied his employer a fair resolution of the corporation's case.

The appearance of bias also damages the administrative system. The association of an ALJ with one particular agency for a period of years certainly gives the appearance of unity of purpose and thought. When the ALJ has come from within the ranks of the agency, the appearance of bias is especially strong. In addition to the general public's perception, the perception of the parties and attorneys involved in a proceeding is of great importance to the legitimacy of the administrative system. When parties to adjudication believe that the judge is impartial,
they will probably present their case more carefully and completely.43

The establishment of an independent corps of ALJs would virtually eliminate actual bias and the perception of bias by removing ALJs from the influence of the agency.44 Reforms that fail to separate ALJs from administrative agencies do not eliminate the threat of bias.45

B. Quality of Decision Making

The quality of adjudicatory decision making in the present administrative system suffers from the long association of each ALJ with one agency. Adjudicators hearing the same type of cases for any length of time may rely on their own preconceptions of a problem to decide a case.46 Although opponents of the central panel system argue that the administrative process depends on the expertise that an ALJ brings into the adjudicatory process,47 better reasoned decisions result when an ALJ hears a variety of cases. When confronted with varied types of cases, an ALJ must base his decisions on knowledge derived from the hearing and the expertise of others.48 The ALJ might also consider creative arguments more often under a central panel system. Although this may not always be beneficial, it may often be the creative arguments of parties to the adjudication that bring about important changes in the law.

Hearing a variety of cases will stimulate an ALJ intellectually as well as sustain well-reasoned decision making.49 An ALJ with

43. See Pfeiffer, supra note 35, at 230; see also Zwerdling, Reflections on the Role of an Administrative Law Judge, 25 Ad. L. Rev. 9 (1973) (elaborating on the impact of perceived bias on the parties).
45. See H.R. 6768 Hearings, supra note 40, at 32 (testimony of Christopher McNaughton, alleging that the threat to the independence of ALJs inheres in the structure of the present system).
47. See infra notes 99-103 and accompanying text.
48. See S. 1275 Hearings, supra note 2, at 23 (testimony of Judge Victor W. Palmer arguing that the knowledge of the ALJ is “supposed to consist of what happens in the hearing”).
49. See Pfeiffer, supra note 35, at 217; Miller, The Vice of Selective Certification in the Appointment of Hearing Examiners, 20 Ad. L. Rev. 477 (1968). In addition, Justice Rehnquist once commented that “a judiciary overburdened with work will respond more
experience hearing cases in eight different agencies once declared that, for these reasons, "no more than five years should be spent with any one agency." Nevertheless, diversity in cases heard probably would attract more qualified applicants to the position of ALJ. Qualified people otherwise might not consider a position that involves hearing routine cases on a daily basis.

In addition to the effect on an ALJ of hearing different types of cases, an ALJ's perception of his role will affect his performance. He may take more pride in his decisions and complete his job more thoroughly if he feels he has independence. Decisions made by ALJs in a central panel system, therefore, probably reflect more careful attention than those made by agency ALJs. Moreover, this feeling of independence provides another reason for more qualified applicants to consider the position of ALJ.

C. Efficiency in Administrative Adjudication

In theory, the central panel system of ALJs provides an important improvement over the present system of agency ALJs in terms of efficiency. In the present administrative system, each agency has a separate docketing system, separate staff and ALJs, and separate equipment necessary for administrative adjudication. A central panel system centralizes the supply of such equipment and resources and consequently may increase efficiency through economies of scale. A central panel system affirmatively to the need for putting in long hours if a large portion of the work is professionally challenging." What the Justices are Saying, 62 A.B.A. J. 1454, 1456 (1976) (presenting excerpts from a speech given by Supreme Court Justice Rehnquist at the A.B.A. Annual Meeting, Section of Labor Relations Law).

50. Pfeiffer, supra note 35, at 225.

51. See What the Justices are Saying, supra note 49, at 1456; see also S. 1275 Hearings, supra note 2, at 97 (testimony of Herbert E. Forrest, President, Federal Communications Bar Association).


54. The central panel system in Colorado was established with very little resistance for precisely this reason. Supporters sold the legislation on the basis of the system's fiscal impact; the legislature considered it a means of increasing efficiency in the administrative process. See M. Rich & W. Brucar, supra note 33, at 20.

55. One example of this centralization involves the fully computerized systems of docket management of the Department of Labor and the NLRB. These systems have capabilities sufficient to service an entire corps of ALJs. The docket schedules of all
would also allow for greater flexibility in the assignment of ALJs, in turn leading to greater efficiency. Certain agencies have a heavy workload and thus use full-time ALJs. Other agencies, however, have no need for full-time ALJs and, in fact, use ALJs only periodically. Under the central panel system, ALJs hear cases as they arise, and those agencies that do not require the services of ALJs continuously do not need to keep them on their payroll.

Evidence from two states using a central panel system supports the proposition that an independent corps of ALJs increases cost efficiency in state systems. In Minnesota, decreases have occurred in the cost of administrative hearings, the number of hearing examiners, the time required to issue a decision, and the backlog of cases. The evidence from New Jersey indicates a similar decrease in the costs of processing an administrative hearing and in the number of ALJs necessary, despite
government adjudicatory proceedings could be maintained on one computer system, reducing the costs that each agency now spends on its individual docket system. S. 1275 Hearings, supra note 2, at 6. In addition, under a corps system, it would be unnecessary for each agency to provide the secretarial and court reporter services or other equipment upon which an ALJ relies. Instead, one organization would provide such services for all ALJs.

56. See id.

57. For example, the Social Security Administration hires nearly 800 ALJs and uses most full-time. The Federal Deposit Insurance Corporation, on the other hand, does not have any full-time ALJs.

58. The amount budgeted to pay for hearings in the Minnesota Public Service Commission has decreased considerably over the past six years, despite continuous inflation. In 1976, the Commission had an annual budget of $400,000; the 1977 budget was $311,330; the 1978 budget was $234,000; and by 1982, the annual budget had decreased to $184,219. In the Minnesota Department of Commerce, the budget decreased from $120,000 to $60,000 over the same period. Duane Harves, the Chief Hearing Examiner in Minnesota, estimates that agencies have saved in excess of 50% in terms of hearing costs. S. 1275 Hearings, supra note 2, at 10, 13 (testimony of Duane R. Harves).

59. Despite the increased number of agency proceedings, the number of examiners necessary to carry the workload in Minnesota decreased by 27 percent between 1976 and 1982. This indicates greater productivity on the part of ALJs. Id. at 9-10.

60. In general, the average time required for issuing a decision has been reduced to 20 days. Id. at 10. Particularly in the case of worker compensation proceedings, which the legislature recently transferred to the central panel system, the decrease in the time required has been substantial. In December 1981, the average time for issuing a decision was 101 days. In May 1983, this time was 46 days; in 60% of the cases, the average time was 30 days. Id. at 11.

61. When the Minnesota state legislature created the Office of Administrative Hearings in 1975, Minnesota ALJs had a backlog of 15 cases per judge, including some cases that were two years old. By the end of May, 1983, the backlog was only four cases per judge, with a total of only 26 cases over 60 days old. Harves claims that by July 1, 1983, all judges in the system would be current and no cases would be older than 60 days. Id. at 11.

62. In 1980, the average cost of processing an administrative hearing in New Jersey was $540, compared to $508 in 1982. S. 1275 Hearings, supra note 2, at 76 (statement of Howard H. Kestin).
an increasing number of cases.\(^\text{63}\) The argument that the central panel system leads to delay and extra costs due to agencies’ desire to review more decisions lacks support.\(^\text{64}\) Like federal agencies, central panel state agencies accept the majority, sometimes up to ninety-five percent, of the decisions made by their ALJs.\(^\text{65}\)

Although use of the central panel system leads to increased efficiency in state systems, a central panel system may not necessarily result in increased efficiency in the federal system. The efficiencies may differ in a central panel system encompassing all federal ALJs because of the enormous size of the federal administrative system.\(^\text{66}\) Thus, the model statute proposed in this Note provides for a trial corps excluding selected ALJs.\(^\text{67}\)

D. Check on Agencies’ Rulemaking Through Adjudication

A leading complaint about the present administrative system is that agencies have adopted rules without following established procedures. Instead, agencies frequently set policy through administrative adjudication, using the adjudicatory process as a tool. The courts have criticized this practice,\(^\text{68}\) and others have called it “rule-making by fiat.”\(^\text{69}\) Florida, Massachusetts, and Minnesota have enacted statutes establishing central panel systems partly out of displeasure with this agency practice.\(^\text{70}\)

\(^{63}\) Overall, the productivity of the average ALJ in New Jersey has increased. In 1979, 130 ALJs heard 6,000 cases; in 1982, only 45 ALJs heard 12,000 cases. Each ALJ heard 145 cases in 1980, 203 cases in 1981, and 226 cases in 1982. Id. at 76.

\(^{64}\) See Lubbers, A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level, 65 JUDICATURE 266, 275 (1981).

\(^{65}\) M. Rich & W. Brucar, supra note 33, at 69. This statistic also appears to rebut the suggestion that review is more cursory under the corps system. The acceptance of ALJ’s decisions indicates that the agencies feel satisfied with the decisions.

\(^{66}\) The federal system is obviously much larger and it may be more difficult to transfer all federal ALJs and federal adjudicatory proceedings to a central corps. See S. 1275 Hearings, supra note 2, at 183-84 (statement of Joseph B. Kennedy, ALJ, Federal Mine Safety and Health Review Commission, arguing that the experiences of the state systems are irrelevant in terms of the federal system).

\(^{67}\) See infra MODEL STATUTE §§ 2, 3.

\(^{68}\) See Morton v. Ruiz, 415 U.S. 199 (1974)(stating that the APA encourages rule-making through established procedures); SEC v. Chenery Corp, 332 U.S. 194, 202 (1947) (stating that “[t]he function of filling in the interstices . . . should be performed, as much as possible, through this quasi-legislative promulgation of rules . . . ”); Bell Aerospace Co. v. NLRB, 475 F.2d 485 (2d Cir. 1973) (holding that the NLRB could not reverse itself through adjudication, but must follow established procedures for rulemaking), aff’d in part, rev’d in part, 416 U.S. 287 (1974).


\(^{70}\) Id. at 249.
Centralized pools of ALJs provide a check on such agency behavior because an agency cannot rely on an independent ALJ to interpret and establish vague rules in favor of the agency.

III. ELEMENTS OF A CENTRAL PANEL SYSTEM: STATE STATUTES AND PROPOSED FEDERAL LEGISLATION

In order to develop a model central panel system that addresses the problems inherent in the current federal system, one must consider attempts to resolve some of the same problems in state systems. 71 Eight states have enacted legislation establishing central panels of ALJs, and each statute differs in approach. The provisions addressed with the most variation involve the jurisdiction of the corps and the relevance of expertise to the assignment of cases. These issues, along with the questions of the role of the director and the proper weight of ALJ decisions, constitute the principal issues in any discussion of an independent corps of ALJs. The provisions of the eight state statutes concerning those issues, considered together with the previously proposed federal bill, S. 1275, provide a necessary backdrop for the study and development of an independent corps of ALJs at the federal level.

A. Jurisdiction

An analysis of the jurisdiction of a central corps of ALJs must address two basic issues: which agencies the statute covers, and whether agencies' use of the corps is mandatory.

1. Covered agencies—State systems vary substantially regarding which agencies the statute covers. In California, the statute requires only those agencies specifically enumerated in the statute to use the central pool of ALJs. 72 In contrast to this

71 A comparison between the state and federal systems indicates that the states face some of the same problems facing the federal system. The eight states that have established central panel systems have addressed issues of independence and efficiency and have attempted to resolve the related problems. Victor Rosenblum, in his testimony before the Subcommittee on Administrative Practices and Procedure, suggested that the record of the California central panel system indicates the feasibility of the system. S. 1275 Hearings, supra note 2, at 196 (testimony of Victor Rosenblum, Professor of Law, Northwestern University). But cf. id. at 183 (statement of Joseph B. Kennedy, ALJ, Federal Mine Safety and Health Review Commission) (arguing that the experiences of the state systems are irrelevant in terms of the federal system).

72 CAL. GOV'T CODE §§ 11500(a), 11501 (Deering 1982). Originally, the California
method, several states provide for blanket coverage, specifying the exceptions to the coverage in the statute. In addition, two states have created systems in which only a few agencies must use the central panel, and any other agencies may elect to do so. Unlike any state statute, the recently proposed federal legislation would establish a corps consisting of “all current ALJs.”

Because state administrative systems are smaller in scale than the federal system, a central panel of ALJs that provides services to all state agencies operates more feasibly than the same type of system on the federal level. The problems of organizing and coordinating over 1,100 ALJs and proceedings from twenty-eight agencies could be overwhelming initially. Instead of attempting to transfer all current federal ALJs to a central corps,

statute required only licensing agencies to use the central panel ALJs. All other agencies had the choice of using their own ALJs or the panel. The number of agencies required to use the panel has increased continually, so that 70 agencies now use the central panel services.

73. In these jurisdictions, each state agency must typically use the panel ALJs unless the state APA excepts it from the statute’s coverage. COLO. REV. STAT. § 24-30-1003 (1982); FLA. STAT. § 120.57(1)(a) (1983); MINN. STAT. ANN. § 14.03 (West Supp. 1984); N.J. STAT. ANN. § 52:14F-8 (West Supp. 1984-1985); WASH. REV. CODE § 34.12.020(4) (1983). This type of provision gives the state legislature the option of excepting agencies that the legislature believes would not benefit from the panel system. For example, in New Jersey, the exceptions to panel coverage are: the State Board of Parole, the Public Employees’ Regulatory Commission, the Division of Workers’ Compensation, and the Division of Tax Appeals. The Senate reasoned that “[t]his exclusion is based on the grounds that these agencies are specialized entities devoted solely to hearings in highly specialized areas.” NEW JERSEY SENATE, STATE GOVERNMENT, FEDERAL AND INTERSTATE RELATIONS AND VETERANS AFFAIRS COMM., STATEMENT, reprinted at N.J. STAT. ANN. § 52:14F-1 (West Supp. 1984-1985).

On the other hand, the exclusion of certain agencies from coverage may simply result from political power struggles. The original legislation in Minnesota excluded jurisdiction over unemployment compensation and worker compensation claims, and the Bureau of Mediation Services. The chief hearing examiner in Minnesota states that these exceptions were appropriate because they were not really proceedings that presented contested cases. Harves, Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota, 65 JUDICATURE 257, 265 (1981). But cf. Rich, supra note 69, at 248. Rich argues that the Minnesota legislature passed the bill without including these claims and agencies in its coverage because organized labor prevented their inclusion.

74. In Tennessee, those agencies authorized to employ their own ALJs use the corps, and other agencies may elect to do so. TENN. CODE ANN. §§ 4-5-301(d), 4-5-301(e) (Supp. 1984). The Tennessee method provides for the basic needs of an administrative system that does not appoint separate ALJs to each agency.

The Massachusetts approach follows that of Tennessee. MASS. ANN. LAWS ch. 7, § 44 (Michie/Law. Co-op. Supp. 1984). Originally, only the Massachusetts Civil Service Commission and 12 other state agencies could use the services of the corps. This has since been changed, allowing other agencies to apply for service. Id. § 414.

75. S. 1275, 98th Cong., 1st Sess. § 562(a) (1983). The federal system would, therefore, encompass ALJs from 28 separate agencies and departments.
the model statute proposed in this Note provides for a trial corps. The model statute operates similarly to the state statutes that cover all agencies except those specifically exempted. This express exclusion method allows Congress to choose a combination of agencies that presents a manageable group and representative problems that the statute addresses. Under the model statute, the trial corps would operate for a period of several years to allow full evaluation of the independent corps system.

2. Mandatory or voluntary use—In the course of developing a central panel system, a legislature must determine whether use of the system will be mandatory or voluntary. The argument in favor of agencies' voluntary use of central panel ALJs asserts that a smoother transition to the central panel system will occur. If legislation does not require agencies to submit cases to the corps, agencies may offer less resistance to the change. Additionally, evidence exists that, under a voluntary use panel system, agencies will make increasing use of the corps, until eventually all agencies will use the corps.

The federal bill, along with several state statutes, allows the agencies to hear cases themselves if they so choose. A central panel system would also be effective, providing agencies with the flexibility to manage their own ALJs.
panel system in which agencies elect whether they will use the panel, however, may prove ineffective in terms of providing a check on the agencies. An agency may hear sensitive cases itself, and use panel ALJs for cases the agency finds unimportant. Moreover, "panel" ALJs may feel the need to compete with "agency" ALJs, once again threatening the independence of ALJs.

Mandatory use is necessary to prevent selective use by the agencies and to protect the independence of ALJs. It seems unlikely that agencies will choose to use the corps for every case that requires an ALJ. The model statute proposed in this Note, therefore, makes use of the ALJ corps mandatory, and requires covered agencies to use the corps for adjudicatory proceedings. Furthermore, to ensure a pure trial of the corps concept, the model statute limits use of corps ALJs to the covered agencies.

B. Role of the Director

A discussion of the role of the director or chief ALJ in a central panel system must address two separate issues: the method of selection of the Chief ALJ, and the duties of the Chief ALJ.

1. Method of selection— The various state central panel systems employ a fairly uniform method to select their Chief ALJs. A political body or an elected official outside the administrative agencies appoints the Chief ALJ. In most states, the governor makes the appointment and the state senate confirms the appointment. Similarly, the federal bill would provide for the appointment of the Chief ALJ by the President, with consent of the body that comprises the agency, may hear the case and render the decision thereon." S. 1275, 98th Cong., 1st Sess. § 568(c) (1983); see also WASH. REV. CODE § 34.12.040 (1983); CAL. GOV'T. CODE § 11512(a) (Deering 1982) (providing that the agency will determine if an ALJ will preside alone or with an agency member).

81. See Levinson, supra note 53, at 244 (stating that "[t]he overall impact of the central panel system of course depends upon the extent to which use of central panel ALJs is mandatory"); see also S. 1275 Hearings, supra note 2, at 20 (testimony of Judge Victor W. Palmer).


83. See infra Model Statute § 3(b).

the Senate. 85

The appointment of the Chief ALJ by the President is an appropriate method for filling the position; the Chief ALJ fills a position analogous to an agency head. A strong argument exists, however, that because the Chief ALJ's decisions and actions will significantly impact the effectiveness of the central panel system, 86 a supposedly independent organization, the political appointment of the Chief ALJ is inappropriate.

The proposed model statute incorporates the procedure utilized by most states and provides for the President to appoint the Chief ALJ. 87 Nonetheless, the model statute addresses the above concern and ensures a degree of separation from the political process by fixing a six-year term for the Chief ALJ. Under the proposed statute, the term of the Chief ALJ does not correspond with that of the President. 88

To ensure that the selection process operates thoroughly, the federal bill would establish a "Judicial Nomination Commission," which would submit to the President the names of qualified nominees for Chief ALJ. 89 This process differs from that of the states. State central panel statutes do not provide for nomination committees, but generally leave the entire selection process to the designated elected official. The proposed model statute establishes a nominating committee because use of the committee should promote the selection of a qualified Chief ALJ

86. The insights of the director of a central panel system may lead to reform or adjustment of the system, because the director's position affords him a good overview of the system. One commentator praises the work of state central panel directors. "Directors in the central panel states appear to have made effective use of their overviews by adopting and modifying procedural rules for the ALJs and by submitting law reform proposals to appropriate public officials." Levinson, supra note 53, at 243.
87. See infra Model Statute § 4(a).
88. The term for the first director should be six years, the same number of years determined to be appropriate for the length of the trial corps system. See supra note 77.


The majority of states leave the duration of the term to the discretion of the appointer. For example, in California, Florida, Massachusetts, and Tennessee, no statutory provision establishes the term of the director. In Colorado, the director has Civil Service status and can be removed only "for cause."
89. S. 1275, 98th Cong., 1st Sess. § 566 (1983). Under this previously proposed bill, the Nomination Commission would also submit names for division chief ALJ, a position not established under the proposed model statute. The President may reject the list and request a second list. Id. § 566(e)(5).
respected by his peers. The composition of the committee, however, should be more diverse than that required in S. 1275. The proposed model statute provides that chief judges of federal courts of appeals, on a rotating basis, select part of the nominating committee to ensure a variety of views. Additionally, the proposed statute fills three of the positions on the committee with persons involved in the day-to-day problems of ALJs.

2. Duties—The duties of the Chief ALJ vary only slightly throughout the eight state systems. The Chief ALJ generally appoints the ALJs and the staff of the corps. Most importantly, the responsibility of assigning cases to ALJs lies with the Chief ALJ. The proposed federal legislation delegates only the duty of reporting to the President and Congress regarding the business and personnel needs of the corps. All other responsibilities lie with the Council of the corps, the main policy-making body of the corps.

The model statute proposed in this Note limits the extensive authority that the Council possesses under S. 1275. It provides that the Chief ALJ is responsible for the initial appointment of individuals to the position of ALJ and the assignment of cases to

90. See infra Model Statute § 9.
91. Under S. 1275, the Commission would consist of five members selected by specified parties. S. 1275, 98th Cong., 1st Sess. § 566(b) (1983).
92. This provision is consistent with S. 1275. Id. § 566(b). The proposed model statute provides that each of the following three persons will appoint a member to the Nomination Commission: the Chairman of the Administrative Conference of the United States, the Chairman of the Administrative Law Section of the American Bar Association, and the President of the Federal Administrative Law Judges Conference.
95. S. 1275, 98th Cong., 1st Sess. § 566(c) (1983).
96. Id. § 565(d)(9). S. 1275 would delegate the responsibility for "all . . . matters of general policy" to the Council of the corps. These matters include, but are not limited to, appointment of ALJs, approval of the establishment of regional offices, and promulgation of rules and regulations.

The Council would consist of the Chief ALJ and the division chief ALJs. Because the proposed model statute does not establish divisions, the position of division chief ALJ does not exist. The Council instead consists of the chief ALJ and several ALJs elected by the entire corps. See infra Model Statute § 8.
ALJs. Assuming a responsible Chief ALJ, an individual can perform these duties more efficiently than a group of ALJs. The model statute delegates general policy decisions to the Council, as does S. 1275.

C. Expertise

The method of assigning cases to ALJs represents a crucial issue in developing a central panel system. Additionally, a longstanding question in debates over the role of the ALJ centers on the degree of expertise in one substantive area that ALJs must possess. Thus, central panel systems vary a great deal with respect to whether the Chief ALJ takes expertise into consideration in the assignment of cases. Each state provision concerning the consideration of expertise in assignment of cases reflects a philosophy about the function of an ALJ.

Opponents of the corps concept contend that an ALJ must have expertise in a particular area in order to make a proper decision in an adjudicatory proceeding. They argue that administrative proceedings focus on complex issues that lie "outside the area of [general] judicial competence." Unless ALJs specialize in one administrative area, therefore, they cannot render intelligent decisions in agency proceedings. Moreover, they argue, a lack of knowledge will lead to inefficiency. An ALJ who has heard cases in a particular area for a single agency for several years will dispose of a case more efficiently than an ALJ who lacks knowledge in the subject.

97. See infra Model Statute § 4.
99. K. Davis, Administrative Law Text 16 (3d ed. 1972). Davis addresses the argument that agency adjudication is best done by the agency rather than by a court. The arguments for agency adjudication in this situation are analogous to the arguments of the proponents of specialization. Davis suggests that:

Courts are not qualified to fix rates or to determine what practices related to rates are to be preferred . . . . Judges rather obviously cannot furnish the skills in law, accounting, and engineering supplied by the staff of a relatively simple agency like the FCC, to say nothing of a more complex agency like the Department of Health, Education and Welfare.

Id. at 14; see also S. 1275 Hearings, supra note 2, at 295 (statement of C.M. Butler III, Chairman, Federal Energy Regulatory Commission). This statement contains a description of the Federal Energy Regulatory Commission's experiences in hiring ALJs. Butler argues that the time necessary for training an ALJ in the FERC area is substantial and that this is true even when the ALJs were hired from related agencies. Butler concludes that "the work of the major economic regulatory agencies is not so similar as to permit easy movement from one area to another." Id. at 295.

100. "[T]he specialized unit may dispose of hundreds of cases a week, whereas it
In addition to the argument that an ALJ must specialize in order to render a competent decision, opponents of the corps concept claim that Congress created the position of ALJ to enable agencies to generate policy through adjudication.\textsuperscript{101} An ALJ, therefore, must consider the effect of a particular outcome on the relevant substantive area of administrative law.\textsuperscript{102} Specialization leading to expertise is critical according to this argument, because only a knowledgeable ALJ can render a decision regarding a particular set of facts that furthers the goals and policies of the agency. These advocates of specialization believe that the need for expertise outweighs the need to protect the independence of the ALJs.\textsuperscript{103}

Notwithstanding these arguments expounded by opponents of the corps concept, specialization is unnecessary. An ALJ does not need to specialize in one area, but should instead be an expert "in the hearing of cases, in determining ultimate facts and interpreting and applying the law."\textsuperscript{104} A person qualified in these respects will properly conduct a proceeding and capably make an intelligent decision in a specialized area.\textsuperscript{105} Because the establishment of a central panel system will create interest in

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\textsuperscript{101} One commentator contends that

\textit{[g]ranting adjudicative powers to agencies was viewed as a device to more fully arm them to effectively pursue legislative programs in concert with other agency powers, including the rule-making and organizational powers also vested in them by Congress. The power to settle disputes between governmental and private concerns is viewed as one means of implementing a program by shaping and applying agency policy consistent with legislative intent in concrete circumstances.}

\textsuperscript{102} See \textit{id.} at 179 (stating that the "views of an ALJ must be broader than just one case").

\textsuperscript{103} \textit{But cf.} Davis, supra note 36, at 401 (arguing that the concern for objectivity and independence was the primary reason for the creation of the position of ALJ) (citing \textit{SENATE COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 45-50 (1941)}).

\textsuperscript{104} \textit{Coan, Operational Aspects of a Central Hearing Examiners Pool: California’s Experiences, 3 FLA. ST. U.L. Rev. 86, 88 (1975)} (supporting assignment on a rotating basis); see also \textit{Kestin, supra note 46}.

\textsuperscript{105} \textit{See S. 1275 Hearings, supra note 2, at 159} (testimony of John T. Miller). Miller argues that expertise is only a pretense, and that any qualified ALJ can quickly develop a working knowledge of an area. For example, one of the most eminent ALJs at the Federal Power Commission had only two years of telephone law experience that was of no use to him. He encountered, however, no difficulties developing an "expertise." In addition, the performance of federal district court judges supports the proposition that adjudicators can judge well without substantive expertise.
the ALJ position on the part of qualified people, a system in which ALJs receive assignments on a rotating basis should produce well-reasoned and unbiased outcomes. Moreover, Judge Victor Palmer suggests that any previous need for experienced ALJs may decline as the result of a significant change in the flavor of cases that ALJs hear; increasingly, ALJs hear more enforcement proceedings and benefits cases, and less regulatory proceedings. Evidence of this trend further supports the arguments for ALJs with general knowledge.

Not only is specialization of ALJs unnecessary, it is counterproductive as well. An ALJ who hears the same type of cases on a daily basis will frequently rely on his preconceptions of the issues in rendering his decision. An unconscious bias will affect his decisions and he will not thoroughly consider these decisions. Moreover, repetition of the same type of cases provides no intellectual challenge to specialized ALJs. Better quality decision making results from a system that enables ALJs to hear a variety of cases.

Specialization of ALJs proves counterproductive in several other ways. First, a panel consisting of ALJs experienced in many different areas is more efficient due to the flexibility in assignment. An ALJ will always remain available to preside in a hearing, regardless of which agency requires the ALJ. Also, rotation of assignments encourages agencies to promulgate more specific rules because they know that an independent ALJ is not well-versed in their policies.

106. See Pfeiffer, supra note 35, at 225.
107. See S. 1275 Hearings, supra note 2, at 152 (testimony of John T. Miller).
108. S. 1275 Hearings, supra note 2, at 7 (testimony of Judge Victor W. Palmer). Judge Palmer states that only seven percent of the ALJs currently serving are now hearing rulemaking cases, as opposed to 60% at the time of the enactment of the APA. The bulk of the cases over which ALJs now preside do not involve the type of complexities that some regulatory cases involve. See also Lubbers, supra note 64, at 269.
109. See supra text accompanying notes 46-53.
110. See id.
111. For evidence of cost savings due to state central panel systems, see supra notes 58-63 and accompanying text. A specific example of a state’s cost savings is realized when an ALJ traveling to out-of-town proceedings can handle several different kinds of cases because the central panel director need only arrange for one trip. See S. 1275 Hearings, supra note 2, at 87 (statement of Duane R. Harves). In addition, the common arguments address the possibility that the large agencies will use extra ALJs during peak periods.
112. If agencies’ policies are to be promoted, then they must be well-articulated. More potential exists for circumventing a vague rule rather than a well-written rule. In addition, clearly stated rules require an agency to accomplish its rulemaking through the established procedures. An independent ALJ will not provide a mechanism through which the agency can do its rulemaking. See supra text accompanying notes 68-70.
State statutes differ in their approach to the problem of specialization. In several states, the relevant legislation requires the chief ALJ or director to take expertise into account when assigning cases. This requirement may result in the assignment of an ALJ to an agency on a long-term basis,\(^\text{113}\) the establishment of general areas of specialization within the corps,\(^\text{114}\) or simply the exercise of discretion by the Chief ALJ.\(^\text{115}\) The pending federal legislation would similarly require the Council to assign cases by expertise by dividing the corps into several divisions of expertise.\(^\text{116}\)

The remaining states utilizing central panel systems make no provision for expertise and allow discretion in the assignment of cases.\(^\text{117}\) In general, a Chief ALJ may attempt to assign ALJs with some knowledge in an area when he feels that a particularly complex case requires expertise. But especially in these states that do not require assignment by expertise, the Chief ALJs attempt to train the ALJs in a variety of areas.\(^\text{118}\)

The model statute proposed in this Note does not establish

\(^{113}\) In the state of Washington, the director assigns each ALJ to an agency on a long-term basis. The responsibility of the ALJ is then primarily to that agency. WASH. REV. CODE § 34.12.040 (1983). This approach bears the most resemblance to the current federal approach.

\(^{114}\) In Minnesota, the legislative mandate has led to the establishment of three areas of specialization: utilities and transportation, environment, and licensing and enforcement. Supervisory examiners in each area assign cases to ALJs. MINN. STAT. ANN. § 14.50 (West Supp. 1984).

\(^{115}\) Florida and New Jersey each require that the director consider expertise when assigning cases. FLA. STAT. ANN. § 120.57(1)(b)(3) (West 1978); N.J. STAT. ANN. § 52:14F-6 (West Supp. 1984-1985). The director exercises discretion in choosing an ALJ to assign to a case. The practice in Florida is to assign each ALJ a wide variety of cases when possible. See M. Rich & W. Brucar, supra note 33, at 50 (interview with Florida Director).

\(^{116}\) S. 1275, 98th Cong., 1st Sess. §§ 564(a), 564(b) (1983). The initial divisions would be: Division of Communications, Public Utility, and Transportation Regulation; Division of Health, Safety, and Environmental Regulation; Division of Labor; Division of Labor Relations; Division of Benefits Programs; Division of Securities, Commodities, and Trade Regulation; Division of General Programs and Grants. The number of divisions could range from four to ten, and the Council would later establish this number and the jurisdiction of each division. The bill would then assign ALJs to divisions according to their current specialization.

\(^{117}\) These states are California, Colorado, Massachusetts, and Tennessee.

\(^{118}\) The director of the system in Colorado states:

If a hearing officer does one kind of case for a long period of time, he will have a tendency to stop listening. Moving the hearing officers around brings freshness to the system. Lawyers complain that they have to train the judges on the law, but this is what lawyers should do.

M. Rich & W. Brucar, supra note 33, at 50 (interview with Colorado Director). Similarly, the Massachusetts Director assigns ALJs considering experience only if a case is particularly complex. "[O]therwise, the hearing officers are broken into all types of hearings and are rotated regularly." Id. at 50 (interview with Massachusetts Director).
divisions within the corps as Minnesota has done,\textsuperscript{119} and as S. 1275 recommends.\textsuperscript{120} Assigning ALJs to divisions is inconsistent with one of the main goals of the corps system: to separate the ALJs from their agencies and promote the independence of ALJs. The regular association of ALJs with certain agencies would begin anew the process of indoctrinating agency viewpoints. Conceding that a special case might demand expertise due to its complexity, the proposed model statute allows the Chief ALJ to assign a knowledgeable ALJ when he deems it appropriate.\textsuperscript{121} In most cases, however, a qualified ALJ from the corps will assuredly render a competent decision.

\textbf{D. Weight of ALJ Decision}

Decisions by ALJs in state central panel systems constitute recommended or initial decisions reviewable by the agency.\textsuperscript{122} This practice is consistent with the standard of review established by the APA and the majority of state APAs. The federal bill would similarly provide final decision-making power to the agency.\textsuperscript{123} Contrary to these provisions, one commentator suggests that an ALJ's decision operate as a final order to ensure that the agency cannot circumvent the corps system.\textsuperscript{124} This step is unnecessary, however, for two reasons. First, the current standard of review does not threaten the independence of the ALJs, so no need exists to modify it. Second, the authority of an ALJ is substantial. Although ALJs simply recommend decisions, agencies generally accept these recommendations.\textsuperscript{125} Moreover, an ALJ has the opportunity to characterize witnesses and to draft findings of fact,\textsuperscript{126} and a reviewing court will attach some weight to the ALJ decision as a portion of the entire record on

\textsuperscript{119} See supra note 114.
\textsuperscript{120} See S. 1275, 98th Cong., 1st Sess. § 564 (1983).
\textsuperscript{121} The Chief ALJ must use this discretion subject to the disapproval of the Council should the Council find an abuse of discretion. See infra Model Statute § 6. This provision limits the discretion of the Chief ALJ without continually interfering with his duties.
\textsuperscript{123} S. 1275, 98th Cong., 1st Sess. § 568(c) (1983).
\textsuperscript{124} See Levinson, supra note 53, at 237.
\textsuperscript{125} In central panel states, agencies accept recommended decisions in the majority of cases and up to 95% of the time. See M. Rich & W. Brucar, supra note 33, at 69.
\textsuperscript{126} See Abrams, supra note 82, at 498-99.
judicial review. In several states, the decision of an ALJ is presumptively correct and an agency can set aside only those decisions not supported by substantial evidence. The model corps statute operates on the theory that, in reality, the ALJ's decision bears great weight. Accordingly, the model statute provides for agency review.

IV. MODEL ADMINISTRATIVE LAW JUDGE CORPS STATUTE

The present administrative system in which agencies have the opportunity to influence ALJs leads to bias on the part of ALJs and to a lack of quality decision making. These inherent problems deprive parties to agency adjudication of a fair hearing, and the administrative process as a whole suffers. Eight states have taken steps to alleviate the problems resulting from this system and have enacted legislation that establishes an independent corps of ALJs. The corps system protects the independence of ALJs, improves the quality of their decision making, and increases efficiency of administrative adjudication. The adoption of the following proposed model corps statute would constitute a positive step towards reform of the federal administrative system.

A. Operation of the Model Statute—An Overview

The proposed model statute establishes a corps of ALJs that operates independently of the federal administrative agencies. The model statute transfers to the Corps all current ALJs except those expressly exempted. The statute transfers those ALJs that will present a representative and manageable trial corps.

127. See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (holding that some weight must be accorded the decision of the ALJ). Courts have not been certain how much weight should be attached to an ALJ's decision. As a result, courts have measured the undefined weight differently according to the facts of each individual case. For cases in which a reviewing court reversed an agency decision overturning an ALJ decision, see Cinderella Career & Finishing Schools v. FTC, 425 F.2d 583 (D.C. Cir. 1970); Retail Store Employees Union v. NLRB, 360 F.2d 494 (D.C. Cir. 1965). Cf. American Fed'n of Television & Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968), Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966).

128. In Colorado and Florida, the decision of an ALJ is presumptively correct. In Massachusetts, the practice indicates "a strong presumption in favor of the ALJ's findings on review." See Levinson, supra note 53, at 242.

129. See infra Model Statute § 7.
Federal administrative agencies will refer to the Corps all administrative proceedings conducted under sections 554 and 556 of the Administrative Procedure Act.

A nomination committee nominates and the President appoints the Chief ALJ of the Corps. The Chief ALJ appoints all ALJs and assigns cases to ALJs as he receives referrals from the administrative agencies. The Chief ALJ alone has the responsibility for assigning cases, although he must attempt to rotate assignments as much as possible. The Chief ALJ shall not take expertise into account in the assignment of cases, unless he believes that a fair resolution of a case so requires. He may use his discretion in those circumstances, subject to disapproval by the Council if it finds that the Chief ALJ has abused his discretion. The Council of the Corps constitutes the main policy-making body of the Corps.

**STATEMENT OF PURPOSE AND POLICY**

This legislation seeks to protect the independence of Administrative Law Judges by removing them from administrative agencies and transferring them to an independent corps; to improve the quality of administrative adjudicatory decision making; to increase efficiency in the administrative system; and to promote the fair and unbiased resolution of agency adjudicatory proceedings. This legislation establishes a Corps of Administrative Law Judges distinct and separate from the federal administrative agencies. The Corps of Administrative Law Judges will conduct certain federal proceedings and issue decisions concerning those proceedings according to the provisions of the Administrative Procedure Act.

**SECTION 1: DEFINITIONS**

For purposes of this Act, unless the context otherwise requires:

(a) "Administrative Law Judge" means a person appointed under Title 5 United States Code Section 3105 to preside in agency adjudicatory proceedings;

(b) "Agency" means an authority referred to in Title 5 United States Code Sec-
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(c) "Corps" means the Administrative Law Judge Corps of the United States established under section 2 of this Act;

(d) "Chief Judge" means the Chief Administrative Law Judge appointed and serving under section 4 of this Act;

(e) "Council" means the Council of the Administrative Law Judge Corps established under section 8 of this Act;

(f) "Nomination Commission" means the Judicial Nomination Commission for the Administrative Law Judge Corps established under section 9 of this Act; and

(g) "Board" means the Complaint Resolution Board established under section 10 of this Act.

SECTION 2: ESTABLISHMENT AND MEMBERSHIP

(a) This Act establishes an Administrative Law Judge Corps that consists of all Administrative Law Judges currently serving any federal agency not exempted in section 3(a) of this Act. The Corps will sit at the seat of Government and will remain in effect until six years from the effective date of this Act. After six years from the effective date of this Act, the exemptions granted in section 3(a) of this Act shall cease and the Corps shall consist of all Administrative Law Judges.

(b) This Act transfers Administrative Law Judges, serving as such on the date of the commencement of operation of the Corps, to the Corps as of that commencement date.

(c) An Administrative Law Judge ap-
pointed on or after the date of the commencement of the operation of the Corps to any agency not exempted in section 3 will be a member of the Corps as of the date of appointment.

Comment

This section provides that the Corps covers all current agencies except those enumerated in Section 3. Instead of attempting to transfer all current federal ALJs to a corps, this provision allows Congress to choose an appropriate combination of agencies for the trial of the corps system. Initially, the Chief Judge and Council can more efficiently and easily administer a trial corps than an all-encompassing corps.

Moreover, by requiring Congress to exclude expressly particular agencies from coverage, this statute ensures that Congress will consider the merits of each exclusion. Congress will not mistakenly exclude any agency from the Corps, and no questions can arise as to which agencies it meant to include.

SECTION 3: JURISDICTION

(a) The following agencies are exempt from the provisions of this Act:
Federal Labor Relations Authority;
Federal Mine Safety and Health Review Commission;
Merit Systems Protection Board;
Occupational Safety and Health Review Commission;
Social Security Administration;
United States Coast Guard; and
United States Postal Service.

(b) An Administrative Law Judge who is a member of the Corps will conduct all hearings of agencies required to be conducted in accordance with Title 5 United States Code Section 554 or 556.

(c) A federal court or an agency may refer to the Corps any case, other than
the cases that are referred to the Corps under subsection (b), if the court or agency determines that the fair resolution of the case requires a determination on the record after an opportunity for a hearing.

Comment

This section excludes seven federal agencies from the coverage of the Corps. The Social Security Administration utilizes too many ALJs to be included initially in the trial corps. After eliminating it from coverage, the size of the trial corps decreases by almost 700 ALJs, making the trial corps more manageable. The Corps does not include the Occupational Safety and Health Review Commission or the Federal Mine Safety and Health Review Commission because they operate essentially as independent review agencies. The Merit Systems Protection Board hears complaints against ALJs and thus cannot be included in the Corps. A conflict of interest would result if a corps ALJ presided in a MSPB proceeding regarding the conduct of another corps ALJ. Section 3 excludes the Federal Labor Relations Authority because several other labor-oriented agencies are included and provide sufficient representation of this area of administrative law for the trial corps. The statute excludes the United States Postal Service because it operates very independently of the federal government. Finally, the statute excludes the Coast Guard because the Coast Guard must remain in a state of military readiness and operates in essence as a branch of the Armed Services.

An ALJ from the Corps must conduct all adjudicatory hearings of all non-exempt agencies. Mandatory use of the system ensures that agencies will not elect to hear sensitive cases themselves.

SECTION 4: CHIEF ADMINISTRATIVE LAW JUDGE

(a) The Chief Administrative Law Judge is the principal administrative officer and the presiding judge of the Corps. The Chief Judge is nominated in accordance with section 9 of this Act and the President appoints the Chief
Judge with the advice and consent of the Senate.

(b) The Chief Judge must have served as an Administrative Law Judge for at least five years before the date of appointment as Chief Judge.

(c) The Chief Judge will serve the greater of a term of 6 years or until the President appoints a successor and the successor qualifies to serve. If nominated for reappointment in accordance with section 9 of this Act, the President may reappoint a Chief Judge with the advice and consent of the Senate.

(d) If the office of Chief Judge becomes vacant, the Council will elect one of its members with at least five years of experience as an Administrative Law Judge to serve as acting Chief Judge until the position is filled in accordance with section 9 of this Act. If no member of the Council has at least five years of experience as an Administrative Law Judge, the Council will elect one of its members regardless of prior experience. Any Administrative Law Judge appointed to serve as Chief Judge for an unexpired term shall serve only for such unexpired term but may be reappointed in accordance with section 9 of this Act.

(e) The duties of the Chief Judge consist of:

(i) appointing and maintaining a staff of Administrative Law Judges;

(ii) assigning Administrative Law Judges to administrative proceedings according to section 6 of this Act; and

(iii) reporting in writing to the President and the Judiciary Committees of the Congress concerning
the operations of the Corps, the future personnel requirements of the Corps, and the possibility of amending section 3 of this Act to include exempted agencies in the Corps.

Comment

The Chief Administrative Law Judge must have served as an ALJ for at least five years before the date of appointment. The importance of the position and the Chief Judge's control over the operation of the Corps mandate a significant experience requirement. For the same reasons, this provision separates the Chief Judge from the political process to some extent. A term of six years ensures that the Chief Judge serves without accounting directly to the President under whom he begins his term.

The Chief Judge appoints all ALJs and assigns all cases to the ALJs. One individual can fulfill these responsibilities better and more efficiently than a group of ALJs; the Council need not discuss and vote on these issues.

SECTION 5: APPOINTMENT OF ADMINISTRATIVE LAW JUDGES

The Chief Judge will appoint additional Administrative Law Judges to the Corps when the Council deems additional appointments necessary for the operation of the Corps. The Chief Judge will make appointments from the register maintained by the Office of Personnel Management under Title 5 United States Code Section 3313. In accordance with Title 5 United States Code Section 3317, the Office of Personnel Management will certify three names from the top of the register for each position to be filled.

Comment

The selection of ALJs will continue in accordance with Title 5 United States Code Chapter 33. Chapter 33 provides for the OPM register and for certification of eligible applicants from
this register. In contrast to the previously proposed federal bill, however, the Chief Judge rather than the Council appoints ALJs from the register.130

SECTION 6: ASSIGNMENT OF ADMINISTRATIVE LAW JUDGES

The Chief Judge will assign an Administrative Law Judge for any proceeding within the jurisdiction of the Corps. The Chief Judge will not consider whether an Administrative Law Judge previously served as an Administrative Law Judge before or as an employee of a particular agency in the assignment of proceedings. The Chief Judge will make assignments in a way that best contributes to the training of each Administrative Law Judge in a variety of administrative and regulatory matters. Notwithstanding the requirement that the Chief Judge not consider an Administrative Law Judge's experience in proceedings before or prior employment with a particular agency in the assignment of cases, the Chief Judge may assign an Administrative Law Judge to a particular case according to prior experience when the Chief Judge deems previous knowledge necessary to a fair resolution of the proceeding. The Chief Judge exercises this authority subject to disapproval by the Council should the Council find an abuse of discretion.

Comment

Under this provision, the Chief Judge will generally not take into account the expertise of a particular ALJ in the assignment of cases. Additionally, this section forbids the division of the Corps into areas of specialization. The Chief Judge must rotate assignments to the extent necessary to train ALJs in a variety of areas. This section seeks to establish a corps of ALJs with a broad range of experience.

The Chief Judge may assign proceedings to ALJs with special knowledge or experience when he feels that a particular case re-

130. Under the federal bill, the Council would appoint a person to the position of ALJ. S. 1275, 98th Cong., 1st Sess. § 567(a) (1983).
quires expertise. The Chief ALJ makes this decision subject to the Council's disapproval. If the Council finds an abuse of the Chief Judge's discretion, it may disapprove the assignment of an "experienced" ALJ.

SECTION 7: DECISIONS OF ADMINISTRATIVE LAW JUDGES

An Administrative Law Judge will render an initial decision in any proceeding in accordance with Title 5 United States Code Sections 554 and 556, which will become a final order unless reviewed by the agency in accordance with Title 5 United States Code Section 557(b). The initial decision will contain findings of fact and may contain conclusions of law.

Comment

The ALJ renders an initial decision, subject to agency review. This provision is consistent with the current federal system; Title 5 United States Code Section 557 accords the same weight to the decisions of ALJs as does this statute.

SECTION 8: COUNCIL OF THE CORPS

(a) The Council of the Corps constitutes the policy-making body of the Corps. The Council will consist of seven Administrative Law Judges elected by the members of the Corps to serve a term of three years. The Council will meet once a month or as necessary. This section requires a majority vote of the Council members present for Council approval.

(b) The duties of the Council consist of:

(i) prescribing the rules of practice and procedure for the conduct of proceedings before the Corps, except that these rules must be in accordance with the Adminis-
trative Procedure Act and any other agency procedures in effect before the effective date of this Act;

(ii) approving or disapproving the filing of charges seeking adverse action against an Administrative Law Judge under section 10 of this Act;

(iii) approving or disapproving the establishment or abolition of regional offices of the Corps and the assignment of personnel thereto;

(iv) disapproving the assignment of a proceeding to an Administrative Law Judge with previous experience in the area of the proceeding, if the Council finds an abuse of discretion by the Chief Judge;

(v) issuing rules and regulations as may be appropriate for the efficient conduct of the business of the Corps;

(vi) establishing and maintaining such other offices as are necessary to carry out the functions, powers and duties of the Corps;

(vii) fixing the compensation of Corps employees other than Administrative Law Judges, subject to Civil Service and classification laws and regulations;

(viii) delegating any of the Chief Judge’s powers to other employees during the continued absence from service of the Chief Judge; and

(ix) making arrangements for continuing judicial education and training of Administrative Law Judges.
This section establishes the Council of the Administrative Law Judge Corps as the main policy-making body of the Corps. While the Act delegates decisions regarding appointment and assignment of ALJs to the Chief Judge, the Council decides all other general policy matters. In addition, the Council may disapprove the assignment of a case to an ALJ if it finds the Chief Judge abused his discretion. This provision limits the Chief Judge's control over the assignment of cases. The Council consists of seven members, a number sufficient to facilitate discussion of policy issues.

SECTION 9: JUDICIAL NOMINATION COMMISSION

(a) This Act establishes a Judicial Nomination Commission for the Corps. The Nomination Commission will consist of seven members selected as provided in subsection (b) of this section and will submit the names of qualified nominees for appointment to the position of Chief Judge.

(b) Each of the following persons shall choose one person as member to the Nomination Commission:

(1) The Chief Judge of the United States Court of Appeals for the District of Columbia Circuit;

(2) The Chief Judge of the United States Court of Appeals for the 1st Circuit;

(3) The Chief Judge of the United States Court of Appeals for the 2nd Circuit;

(4) The Chief Judge of the United States Court of Appeals for the 3rd Circuit;

(5) The Chairman of the Administrative Conference of the United States;
(6) The Chairman of the Administrative Law Section of the American Bar Association; and
(7) The Chairman of the Federal Administrative Law Judges Conference.

The opportunity to appoint one member to the Nomination Commission will rotate in numerical order through the United States Courts of Appeals after the initial appointments.

(c) The persons first appointed pursuant to paragraphs 1 and 2 of subsection (b) will serve for a term of three years; the persons first appointed pursuant to paragraphs 3, 4, and 5 of subsection (b) will serve a term of two years; and the persons first appointed pursuant to paragraphs 6 and 7 of subsection (b) will serve a term of one year. Each person appointed after the initial appointments will serve a term of three years.

(d) The Nomination Commission will submit to the President the names of three persons qualified to fill the position of Chief Judge of the Corps. The President will appoint a Chief Judge from the list of three persons provided by the Nomination Commission. The President may, however, reject any list and request that the Commission submit another list, except that the President may not request more than two additional lists.

Comment

This provision establishes a Judicial Nomination Commission similar to that proposed in S. 1275. See S. 1275, 98th Cong., 1st Sess. § 566 (1983).
Nomination Commission ensures that the peers of the Chief Judge respect him and consider him qualified for the position.

Unlike the previously proposed federal legislation, the Nomination Commission consists of members chosen by four circuit court judges and three members involved in the day-to-day activities of administrative law judges. This combination of individuals should present a wide variety of views and ideas. The rotation of the opportunity to appoint a member among the circuit courts will also encourage a variety of views and opinions.

SECTION 10: DISCIPLINE OF ADMINISTRATIVE LAW JUDGES

(a) The Council will establish a Complaints Resolution Board to consider and recommend appropriate action upon complaints against the official conduct of Administrative Law Judges. The Complaints Resolution Board will consist of nine members, elected by the Corps for a term of two years. The Complaints Resolution Board will issue a report to the Council after a hearing concerning the misconduct of an Administrative Law Judge. The Complaints Resolution Board will recommend that the Council file a notice of adverse action with the Merit Systems Protection Board if the Complaints Resolution Board finds just cause for removing or disciplining an Administrative Law Judge.

(b) The Council may take action against an Administrative Law Judge only after the Council has filed a notice of adverse action against the Administrative Law Judge with the Merit Systems Protection Board. Action includes removal, suspension, reprimand and discipline.
This provision does not change the established approach to
discipline or removal of ALJs. The OPM may remove an ALJ
only for good cause, as determined by the Merit Systems Protec­
tion Board. This provision further establishes an internal proce­
dure within the Corps held prior to a Merit Systems Protection
Board hearing. The Council will refer complaints filed with it to
the Complaints Resolution Board, which will recommend appro­
priate action. Although this section does not prevent the MSPB
from proceeding with disciplinary actions, the procedure estab­
lished gives the Corps the opportunity to take care of problems
before the Council refers complaints to the Merit Systems Pro­
tection Board.

—Karen Y. Kauper