Perceptions of Fairness in State Administrative Hearings

Chris McNeil
Procedural justice doctrine has long been a staple for social scientists when studying perceptions of fairness in judicial-branch trials.1 Funded by a grant from the National Science Foundation, researchers at the Grant Sawyer Center for Justice Studies at the University of Nevada—Reno, recently applied procedural justice doctrine to administrative proceedings at the state level.

Researchers presented surveys to individuals who sought an administrative hearing relating to alleged violations of state implied-consent laws. Eight hundred fifty surveys were either mailed or personally given to drivers in New York, Florida, and California (where the administrative law judge (ALJ) is an employee of the state motor vehicle agency) and Maryland, Oregon, and Texas (where implied-consent hearings are conducted by ALJs working in state central panels that are structurally separated from the motor vehicle agencies). These were mailed after the drivers learned the outcome of their hearing, and asked drivers to report whether the process, the ALJ, and the outcome were fair.

In addition, an online nationwide survey was made available to attorneys whose practice includes representing drivers in state administrative implied-consent hearings, and to ALJs whose dockets include this kind of hearing. In these cases, respondents were asked to rate the fairness of implied-consent hearings in their jurisdiction, including whether the process in their state generally is fair, and whether the outcome in these cases tends to be fair or unfair.2

The purpose of the research was to determine whether the structure of agency adjudication—i.e., whether the adjudicator is an employee of the agency or an employee of a central panel that is independent of the agency—makes a difference in the participants’ perception of the fairness of the adjudication. The goal was to empirically test participants’ subjective reaction to actual administrative adjudicative processes. The general research question was: what effect, if any, does the degree of structural independence of the administrative adjudicator have on the participants’ perception that the process was fair?

We know outcomes are a major determinant of satisfaction and the perception of fairness, based on “social exchange” theory described by Thibaut and Kelley.3 But we also know that winning or losing isn’t everything, and that the use of fair procedures can increase the satisfaction of all concerned without any increase in the real outcomes available for distribution.4

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2. All of the survey questions and answers, including answers to the open-ended question “what about the hearing was fair (or unfair)” are available at http://works.bepress.com/cbmcneil/12/.
Participants make distinctions between “decision control” and “process control.” Court procedures that vest process control in the hands of those affected by the outcome of a procedure are viewed as more fair than procedures that vest process control in the decisionmaker. It thus makes sense to examine participants’ perception of fairness, even though they may have lost during the hearing, in order to determine whether there are controls over the process or over the decision that correlate to the participants’ sense of the hearing was fair.

**Procedural justice doctrine**

In his work surveying defendants in traffic and misdemeanor cases, Tom Tyler asked a series of questions about the procedural and distributive fairness of the respondents’ courtroom experience. He found attitudes about the outcome, the judge, and the court all were strongly related to fairness judgments. So too here: we can anticipate the participants will be concerned about not only the outcome, but also the adjudicator’s control over the forum. We can anticipate that the more the process is controlled not by the agency but instead by the participants, the greater will be the participants’ sense of fairness.

Since the early 1980s, a majority of the states (now 26) have created centralized panels of executive-branch adjudicators. Central panel ALJs don’t work for any given agency—they are available when an agency needs an adjudicator, but the agency itself does not hire, discipline, or select central panel ALJs.

This stands in contrast to the more traditional agency ALJ, who is supervised by the same entity that investigated the events causing the prosecution of the action, and made the decision to initiate a given agency action. Given the demonstrated trend towards an administrative hearing that tends to be more judicial than institutional, lawmakers should know whether the trend away from agency ALJs in favor of central panel ALJs actually leads to greater trust and confidence in the central panel structure when compared with the non-central panel structure.

**Statistical analysis**

One of the main goals of the field study was to gather sufficient data to allow for a prediction having to do with the use of central panels. The null hypothesis is that it makes no difference whether the hearing is conducted by an ALJ who is either part of a central panel or is employed directly by the agency (here the agency would be the state department of transportation). Data gathered from drivers, defense counsel, and ALJs who have been involved in administrative license suspension cases may, or may not, disprove the null hypothesis.

Indeed, given the analytical tools provided to us by Thibaut and Walker, and Lind and Tyler, we predicted that central panel systems would foster an environment conducive to greater levels of perceptions of fairness, at least with respect to the litigants and observers (although not necessarily with respect to ALJs). The data seems to confirm that hypothesis: generally, defense attorneys and drivers reported greater levels of subjective fairness perceptions in central panel adjudications than in adjudications controlled by the departments of motor vehicles.

**Limitations**

A caveat is in order about the use of statistics to prove whether central panels provide a structure more likely to produce perceptions of fairness than do agency-operated hearings. Most scientists, Professor Faigman explains, “begin with the assumption that the phenomenon they are studying does not cause the effect that they expect.” We should, he notes, “presume innocence” and only with strong proof reject that presumption. That presumption applies here, so that without strong proof we should reject the research hypothesis that central panel structures are an appropriate predictor of increased levels of fairness perceptions by participants or observers.

“The convention applied by most scientists is that the null hypothesis should not be rejected unless the chances of making a mistake are less than five in one hundred.” This is how we come to look for “confidence” levels, expressed as a p-value of .05. The p-value is “the probability of getting data as extreme as, or more extreme than, the actual data, given that the null hypothesis is true.”

The null hypothesis here is that going to a central panel of ALJs won’t improve (or hurt) procedural justice values experienced by the participants or observers. Small p-values (notably those smaller than .05) are

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8. Id.

9. Id.

TABLE 1: QUESTION 29, FAIRNESS OF THE HANDLING OF YOUR CASE

<table>
<thead>
<tr>
<th></th>
<th>Very fair</th>
<th>Somewhat fair</th>
<th>Not very fair</th>
<th>Not fair at all</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central panel (n=16)</td>
<td>12.5</td>
<td>43.8</td>
<td>31.3</td>
<td>12.5</td>
</tr>
<tr>
<td>Non-central panel (n=35)</td>
<td>11.4</td>
<td>11.4</td>
<td>22.9</td>
<td>54.3</td>
</tr>
</tbody>
</table>

(p for effect of central panel v. non-central panel: p=.087)

TABLE 2: QUESTION 23, FAIRNESS OF THE ALJ’S HANDLING OF CLIENT’S CASE

<table>
<thead>
<tr>
<th></th>
<th>Very fair</th>
<th>Somewhat fair</th>
<th>Not very fair</th>
<th>Not fair at all</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central panel (n=40)</td>
<td>7.5</td>
<td>17.5</td>
<td>55.0</td>
<td>20.0</td>
</tr>
<tr>
<td>Non-central panel (n=110)</td>
<td>2.7</td>
<td>14.5</td>
<td>33.6</td>
<td>49.1</td>
</tr>
</tbody>
</table>

(p for effect of central panel v. non-central panel: p=.378)

evidence that centralization makes a difference, whereas large $p$-values argue against such an impact. The larger the $p$-value, the easier it is to conclude these differences between central panels and agency hearings can be attributed to chance.

Professor Faigman explains that requiring $p$-values of not more than .05 “is merely a convention, and most scientists take findings with rates between .01 and .10 very seriously,” adding that the standard a scientist adopts “is ultimately dictated by policy, not science.” That being said, there are some very good reasons for forbearing in reaching too firm a conclusion with respect to the research hypothesis. If we unhitch ourselves from the yoke of statistics we may make some general observations, but those observations should not be confused with claims of statistical significance.

Examination of data

Consider the data collected for Driver Question 29 (see Table 1).

Taken at face value, these percentages suggest that perceptions of unfairness were attenuated somewhat in central panels, with 43.8 percent thinking their hearings were “not very fair” or “not fair at all,” compared with 77.2 percent of drivers in agency hearings who felt the ALJ’s handling of their cases was either not very fair or not fair at all. This would seem to support the research hypothesis, that the central panel ALJs afforded fairer hearings. Using the Statistical Package for the Social Sciences (SPSS) General Linear Model to conduct an analysis of variance (ANOVA), with central panel versus non-central panel as the independent variable, and treating “don’t know” answers as having missing data, the $p$-value is <.067. Thus, while greater than .05, the $p$-value is within limits that many would regard as sufficiently significant to reject the null hypothesis and conclude that a central panel tends to reduce driver perception that the hearing was unfair.

Contrast this with the result from the same question asked of defense counsel (Table 2). Here, 75 percent of counsel in central panel states found the fairness of the hearing either not very favorable or not favorable at all, contrasted with 82.7 percent of defense counsel in non-central panel states. This again suggests the use of a central panel mitigates the feeling of unfairness by defense counsel, but at $p=.378$, the $p$-value substantially exceeds .05 and .10, forcing the conclusion that this would not be a useful predictor, at least not with the data presently on hand.

Anecdotal evidence

The surveys used to gather data from ALJs, defense counsel, and drivers included one open-ended question: “What about the hearing was fair (or unfair)?” The overwhelming impression from the responses from drivers and defense counsel is that they perceive administrative license suspension hearings as being unfair. The responses offer something of a clue to what’s behind this perception.

Responses from drivers

“Personally I think it was unfair for the reason that the officer, Willie Jones, lied and the fact that he raised his right hand and swore that he will tell the truth and he did not. [The ALJ] heard what my attorney had to say in my behalf but he never heard what I had to say.”

“The woman hearing my case had clearly already made her decision before we sat down for the hearing. She looked at me with distaste and talked to me in a condescending manner as well as with attitude. She did not even consider my testimony.”

“The ‘judge’ is only an employee of the Dept. of Motor Vehicles and is very biased. Does not comply w/court recommendations and makes their own law. They are never unbiased in any case, despite superior court’s recommendations. They are a separate agency w/their own agenda, regardless of the court. I cannot emphasize this enough. The DMV overpowers the court and suspends licenses which put an extreme hardship on rural people w/no public transportation. Without a limited license, of course the person is unable to attend school, etc. & is subject to arrest. It is a never ending circle.”

12. Grateful acknowledgement is made here to Professor Michael J. Saks, Ph.D., Arizona State University, Sandra Day O’Connor College of Law, for his assistance in analyzing these data.
From drivers in central panel states:

"The case was postponed because officer was not present—that is unfair—also, judge present[ed] the MVA evidence. Point blank, it's your word versus the police officer's written testimony in which they view as 'facts,' making it a no-win situation."

"The officer provided false information. It had all the appearance of a kangaroo court."

**Responses from defense counsel**

Similarly, defense counsel responses were roundly negative and highly critical of the hearings, first from counsel to the contrary. They are basically 'rubber stamps.' After all, they are not real judges but executive branch employees who can be transferred around the state at will."

"No excuse for a refusal was going to be considered. The decision was based on a policy adopted by 'higher ups' and the ALJ stated he had no ability to rule anyway but with the pre-established policy."

"There is always a presumption that all evidence provided by law enforcement is truthful—even when much of it is demonstrably false. The judges believe that if they rule for the criminal case, more than for the purported issue."

"Petitioner was accorded all due process rights to contest the license suspension."

**Implications**

The gap between ALJs (who found the proceedings to provide fair outcomes and a fair process) and drivers and defense counsel (who found both the process and the outcome to be unfair) permeates the research results. While making no claim to statistical significance, the data suggest at the very least a profound level of distrust, hopelessness, and anger on the part of those whose licenses are at stake and those who serve in the defense of licensees.

At the same time, there appears to be at least some hint of confirmation that the research hypothesis is correct. There was, for example, no instance where agency-run hearings were deemed fairer, more just, or more impartial, than central panel hearings, and in each metric the central panels produced higher positive perceptions of procedural justice, both in objective and subjective measures. Similarly, group-value metrics (including ALJ courtesy, honesty, and bias) tended to show higher positive values for ALJs in central panels than in agency-run hearings.

The data thus support the general premise of the research hypothesis—that central panel adjudications can and may lead to higher positive levels of procedural justice by drivers and defense counsel. Keeping in mind the limitations applicable to the data due to insufficient response levels, there is at least some evidence that participants do see central panel hearings as being fairer. When drivers whose licenses were suspended were asked, "How fair was the outcome you received?" 50 percent of the drivers in central panel states found the outcome was either very fair or somewhat fair, contrasted with 25 percent of drivers in agency-operated states; while drivers in agency operated states described the outcome as either not very fair or not fair at all in 75 percent of the cases,

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**"The law is pretty clear about implied consent and failing a blood test."**

in agency-operated hearings:

"It was all unfair, in the sense that the hearing officer didn't even apply the law to the uncontradicted facts in the case."

"We are scheduled to conduct two hearings every 15 minutes. The amount of time allotted is inadequate to present any kind of a case. Further, Kansas allows no pre-hearing discovery at DL hearings, so you are walking into these hearings with no idea what the testimony will be except for what your client remembers about the stop and testing process."

"ALJs in WA go out of their way to find for the Dept. and suspend licenses. It is in no way fair, and is a mockery of justice. They actually have a goal of reducing the number of dismissals, and view their job as part of the system designed to remove drunk drivers from the road, not to provide people accused of drunk driving a fair hearing."

From defense counsel in central panel states:

"The officer was allowed to testify about hearsay, his conclusions (i.e., opinions) were taken at face value, and the ALJ ignored strong evidence the driver too much, the system will be scuttled and they will be out of a job – that philosophy comes directly from more than one of them."

**Responses from ALJs**

In stark contrast, the ALJs found the process and the outcome to be fair, and offered some insight about possible contrary views in a few of their responses, all but the last of which came from central panel states:

"The ALJ did not work for the agency. The ALJ had final order authority. The law however is structured in a way that would likely feel unfair to a driver who may expect the ALJ to have some discretion with respect to the length of the suspension and or the availability of a hardship permit. In addition, the fact that the driver is punished for a decision that he or she made 'to refuse the test' while he or she is presumably in an impaired condition (this is presumably would be a defense to a contract dispute) may not seem fair to some."
compared with 50 percent of the drivers responding this way in central panel states ($p=.056$). When asked “did the ALJ listen to your side of the story?” 59 percent of central panel drivers said “yes,” in contrast to 55 percent of drivers in hearings conducted by the agency ($p=.028$).

Only 17 percent of the drivers in agency-run hearings described their ALJs as being unbiased, compared with 24 percent of drivers in central panel states ($p=.099$). When asked about ALJ courtesy (i.e., treatment with respect and dignity), 82 percent of drivers in central panel cases rated their ALJs either very or somewhat favorably, compared with only 36 percent of drivers appearing in agency-operated hearings ($p=.031$). Only 23 percent of the drivers in agency-operated hearings regarded the ALJ’s handling of the case as either very fair or somewhat fair, compared with 56 percent of drivers in central panel states ($p=.067$).

Asked whether the ALJ “listened to your side of the story,” 24 percent of the drivers in central panel states said “no,” compared with 47 percent of the drivers in agency-operated hearings ($p=.028$).

When asked simply to rate the fairness of the ALJ, 80 percent of the drivers in agency-operated hearings responded either not very favorable or not favorable at all, contrasted with 50 percent of drivers in central panel states ($p=.066$). Not surprisingly, drivers in central panel states were more satisfied with the outcome of their cases, with 47 percent either being somewhat or very satisfied, compared with only 14 percent of the drivers in agency-operated hearings ($p=.007$).

To much the same effect, defense counsel familiar with these hearings tended to find central panel hearings to be fairer. Only 5 percent of defense counsel in agency-operated hearings considered the ALJ to be unbiased, compared with 15 percent of counsel in central panel hearings ($p=.086$). Eighty-three percent of defense counsel in central panel hearings reported very favorable or somewhat favorable experiences of ALJ courtesy, compared with only 59 percent of counsel in agency-operated hearings ($p=.46$). And a rather appalling 90 percent of defense counsel in agency-operated hearings found the job the agency was doing was either not so good or not good at all, compared with an almost as dismal 63 percent of defense counsel in cases run by central panels ($p<.001$).

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The data suggest a tendency, at least, that the efficiency obtained by agency adjudications comes at a price. Thibaut and Walker saw that an inquisitorial model threatens the perception of procedural justice, and these data seem to confirm the threat exists today in agency hearings. It is no doubt efficient to provide “some kind of hearing” to drivers accused of violating state implied consent laws. The data suggest that participants tend to view with suspicion both the process and the outcome when the investigative agency conducts the administrative hearing, and find it to be fairer if the adjudicator in OMVI administrative license suspension hearings is not controlled by the agency.

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