Due Process and the Ohio Administrative Procedure Act: The Central Panel Proposal

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I. INTRODUCTION: GOVERNMENT REGULATORY ADJUDICATIONS AND THE RIGHT TO A FAIR HEARING

Part of the compact that exists between the governed and government is that all who are subject to regulation may expect a fair hearing before being subjected to the loss of property at the hands of the regulator. This expectation comes from many sources, preeminent among which are the due process rights articulated in our state and federal constitutions. Constitutional jurisprudence teaches that the government's interest in preserving public health and safety is to be balanced against the individual's interest in autonomy and freedom to pursue all lawful endeavors. That balance is achieved, in large part, by the common sense we expect from our legislators as they craft laws intended to protect the public from threats to our collective health and welfare, by the integrity of our executive officers, with whom we entrust the task of enforcing those laws, and by the wisdom of those in the judiciary assigned the task of striking the balance between the interests of the individual and that of society at large.

In striking this balance we have as a society come to expect that all who are subject to governmental controls shall have access to a fair and impartial adjudicator whenever their substantial interests are threatened. That expectation creates a conflicting dynamic for those in government. As society expects more from its government in the form of protection against diverse threats to the public safety, it simultaneously expects only minimal intrusion into the affairs of the individual. When there is a call for regulation that might have an adverse impact on how we do business or live our lives, there is almost certainly going to be an equal call for fairness in the regulatory process.

Fairness, the impression and reality that a party has been heard and

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1. See, e.g., OHIO CONST. art. I, § 16.
understood in a forum free from bias, dishonesty or injustice,\footnote{RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 692 (2d ed. 1987).} has both an objective and subjective dimension: first, objective structures must exist to guard against overreaching by the government, trickery by adverse parties, or misuse of judicial proceedings. Second, and perhaps more elusive, the litigants and the public must draw from their experiences in these systems the sense that justice has been done, that they have been heard "at a meaningful time and in a meaningful manner."\footnote{Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).} We consider both the objective and the subjective elements when we speak of "fundamental fairness" as a component of "due process" under the law.\footnote{Lassiter v. Department of Soc. Servs., 542 U.S. 18, 24 (1981).} The question is thus drawn in two parts, the objective: whether our experience with a judicial forum leaves all parties with an opportunity to fairly be heard, and the subjective: whether these experiences create an impression that the process has been fair.

A. The Ohio Administrative Procedure Act and Regulatory Hearings

One of the less well-known judicial engines in Ohio is that of its state administrative agencies. Agencies like the civil rights commission, the bureau of motor vehicles, the environmental protection agency, and the bureau of employment services cast a wide net over all who live and work in Ohio. These bureaus, boards, commissions, departments, and agencies perform a vital and oftentimes difficult role in implementing governmental policies. Although technically part of the executive branch,\footnote{See OHIO CONST. art. III, § 7; see also ADMIN. LAW COMM., OHIO STATE BAR ASS’N, 1996-97 OHIO ADMINISTRATIVE LAW HANDBOOK AND AGENCY DIRECTORY § 1.1 (4th ed. 1996) [hereinafter 1996-97 OALH & AD].} administrative agencies share attributes and duties of the legislature and judiciary as well as that of the executive office. Many administrative agencies are authorized or required to conduct hearings in which findings of fact and conclusions of law are to be recorded in a forum that has many of the accoutrements of formal judicial proceedings.\footnote{1996-97 OALH & AD, supra note 7, at §§ 3.5, 3.26, 3.37.} To the layman, these look like trials. The number and diversity of agencies having adjudicative authority suggest that the Ohio General Assembly has deemed it a prudent use of limited governmental resources that resort first be made to the administrative entities knowledgeable in the regulated area before litigants press their claims to courts of broader jurisdiction. One recently published compilation of these...
agencies lists over 300 bureaus, boards, commissions, departments and agencies at the state level alone, many of which have been authorized to hold administrative hearings.\(^9\)

**B. The Scope of the OAPA**

Despite the diversity of these administrative entities, most agencies follow the adjudication structure found in Ohio's Administrative Procedure Act (OAPA).\(^10\) Found at Chapter 119 of the Ohio Revised Code,\(^11\) the OAPA is the foundation for administrative hearings (commonly referred to as "Chapter 119 hearings") at the state level. These procedures for the most part closely follow those first codified in the General Code in 1942.\(^12\)

Under the Revised Code and with some exceptions noted,\(^13\) the OAPA applies to:

- any official, board, or commission having authority to promulgate rules or make adjudications in the bureau of employment services, the civil service commission, the department or, on and after July 1, 1997, the division of liquor control, the department of taxation, the industrial commission, the bureau of workers' compensation, the functions of any administrative or executive officer, department, division, bureau, board, or commission of

\(^9\) *Id.* at 143-57.


\(^11\) *Id.*

\(^12\) 120 Ohio Laws Am. Sub. S.B. 36 at 358-405 (1942).

\(^13\) Sections 119.01 to 119.13 of the Ohio Revised Code do not apply to the public utilities commission or the utility radiological safety board, nor do they apply to actions of the superintendent of financial institutions and the superintendent of insurance in the taking possession of, and the rehabilitation or liquidation of, the business and property of banks, savings and loan associations, savings banks, credit unions, insurance companies, associations, reciprocal fraternal benefit societies, and bond investment companies, nor to any action that may be taken by the superintendent of financial institutions under section 1113.03, 1125.09, 1125.12, 1125.18, 1121.10, 1121.05, 1121.06, 1155.18, 1157.01, 1157.02, 1157.10, 1163.22, 1165.01, 1165.02, 1165.10, 1733.35, 1733.361, 1733.37, 1733.412, or 1761.03 of the Revised Code. Sections 119.01 to 119.13 of the Revised Code do not apply to actions of the industrial commission or the bureau of workers' compensation under sections 4123.01 to 4123.94 of the Revised Code with respect to all matters of adjudication, and to the actions of the industrial commission and bureau of workers' compensation under division (D) of section 4123.32, and sections 4123.29, 4123.34, 4123.341, 4123.342, 4123.40, 4123.411 [4123.411], 4123.33, 4123.441, 4123.442, and divisions (B), (C), and (E) of section 4131.14 of the Revised Code. Sections 119.01 to 119.13 of the Revised Code do not apply to actions of the bureau of employment services except those relating to all of the following: (1) The adoption, amendment, or rescission of rules; (2) The issuance, suspension, revocation, or cancellation of licenses; (3) Any hearing held pursuant to sections 4115.03 to 4115.16 of the Revised Code.
the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.\textsuperscript{14}

Thus, the jurisdiction of the OAPA is quite broad: it reaches across the state and across all endeavors, from environmental protection to the licensing of day-care centers, from civil service review to the Ohio Expositions Commission, and from crime victims reparation to liquor control.\textsuperscript{15} Notwithstanding the range of different issues and policies associated with the diverse interests of these agencies, the OAPA was crafted to offer the parties affected by these governmental entities a common procedure and forum that would allow those affected by the governmental action to be fairly heard.\textsuperscript{16}

\textbf{C. Fairness in Hearings: The Constitutional Mandate of “A Fair Hearing in a Fair Tribunal”}

The question arises, however, whether the OAPA now meets the needs of these diverse parties, and whether the public perceives the process offered by the OAPA to be fair. Our courts have attempted to characterize the objective elements of fairness, using the plain admonition that “[a] fair trial in a fair tribunal is a basic requirement of due process.”\textsuperscript{17} Do the processes prescribed under the OAPA still offer a fair trial in a fair tribunal? If they do, do they still produce a result that inspires public confidence and a subjective sense that all participants will have a fair hearing?

At the outset it should be noted that not all proceedings conducted by administrative agencies are adjudicative in nature, and not all adjudications affect constitutionally affected rights. Agency investigations and the issuance of uncontested licenses give rise to no right of hearing, and “ministerial” acts which are performed by the agency in a prescribed manner and without there being discretion on the part of the administrator are not adjudications.\textsuperscript{18} Also, where there is no impact on a recognized, constitutionally-protected interest, the Due Process Clause is not implicated and thus there is no need for “fundamental fairness” in the proceedings.\textsuperscript{19}

\textsuperscript{14} Id.
\textsuperscript{15} See 1996-97 OALH & AD, supra note 7, at 143-57.
\textsuperscript{16} See 2 OHIO JUR. 3D Administrative Law § 57 (1977).
\textsuperscript{17} In re Murchison, 349 U.S. 133, 136 (1955).
\textsuperscript{18} OHIO REV. CODE ANN. § 119.06 (Anderson 1994); see also 1996-97 OALH & AD, supra note 7, §§ 3.1-3.6.
\textsuperscript{19} See 2 OHIO JUR. 3D Administrative Law § 97 (1977).
For example, a three-day suspension from a position protected under the state civil service laws does not amount to such a deprivation of the employee's protected interest (that is, the employee's interest in continued employment) as to give rise to a due process right to a pre-disciplinary hearing. Property interests such as will be protected by the Due Process Clause are not, however, created by the Constitution, but instead they "stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Accordingly, there would be no property interest in avoiding a three-day suspension of employment under Ohio's civil service law, for example, where the applicable statute expressly limits the jurisdiction to review disciplinary suspensions to those of more than three working days.

Focusing, then, on the instance where a constitutionally protected interest is affected or threatened by agency action, the inquiry turns to whether the process afforded to the interest-holder comports with state and federal due process guarantees. Those eager to discover absolute answers to this inquiry will likely be frustrated by what they find. The notion of fairness in the context of due process proves to be difficult to reduce to concrete icons, although certain benchmarks are now well-known. "Due process," wrote Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, "is not a mechanical instrument. It is not a yardstick. It is a process." The process is one that should leave the parties and the public confident of the presence of "fairness between man and man, and more particularly between the individual and government . . . ."

D. The Eldridge Standard of Due Process in Agency Hearings

There is a balancing implied in this maxim, a balancing that begins "with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." The presence of this balancing test indicates that constraints will bind both the agency and the affected parties, and that the process due to the parties will turn on the interests being advanced on a case-by-case basis.

24. Id. at 163.
25. Id. at 162.
Another benchmark, one that articulates a very general criteria for reviewing the fairness of adjudications and gives some substance to the balancing required under constitutional law, is found in a three-part test that determines the constitutional sufficiency of administrative agency procedures. In Mathews v. Eldridge, the Supreme Court announced this test: when interests protected by the Constitution are implicated by action proposed by an administrative agency, the measure of due process is taken by examining

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

This three-part test has become the standard by which courts and litigants measure whether proceedings allow "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"

E. Measuring the OAPA Against Constitutional Requirements

When scrutinized under the Eldridge standard, the OAPA has repeatedly proved to meet constitutional standards for due process. For example, against a challenge that the administrative hearing provided for under the OAPA violates due process because it does not provide for the exchange of discovery in advance of the adjudicative hearing, the court in Korn v. Ohio State Medical Board applied Eldridge and held that, in the absence of any showing of prejudice, there was no due process infirmity in the process prescribed by the OAPA. According to the court, a licensee appearing before a professional occupational regulatory board has a due process right to "notice and hearing, that is, an opportunity to be heard." The hearing, however, "need not be elaborate. Something less than a full evidentiary hearing is generally sufficient in an administrative action."

28. Id. at 335.
29. Id. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
30. Id. at 333.
33. Id. at 1105-06.
34. Id. at 1105 (citing Luff v. State, 117 Ohio St. 102 (1927)).
35. Id. (citing Mathews v. Eldridge, 424 U.S. 319, 343 (1976)).
The Eldridge standard is applied in depth in the opinion by the Wood County Court of Appeals in Smith v. State Medical Board. The court noted that the first of the three-part Eldridge test, that the court consider the private interest that will be affected by the official action, is resolved with the finding that "a license to practice medicine is an important right, the revocation of which necessitates close adherence to procedural due process." Particularly in cases where the governing authority intends "to take action against [a] citizen," as opposed to those where the agency "is simply denying a citizen's request," courts will recognize the need to examine the nature of the protected interest, in this case the individual physician's interest in practicing his chosen profession, and determine whether the proceedings reflect the factors that go into acquiring and maintaining the license. In Smith, the court noted the standard was high, observing that "[t]he right of a physician to toil in his profession . . . is both a liberty and property, partaking in the nature of each, and is guaranteed by constitutional mandate from unwarrantable interference." Litigants appearing before Ohio administrative tribunals are entitled to and can expect the tribunal to engage in this kind of judicial scrutiny over the interests being threatened, and the OAPA fully accommodates this review process.

F. Balancing the Costs and Benefits of Improved Adjudications

More complex than the identification of the private interests involved, however, is the balance described in the second and third prongs of Eldridge's three-pronged inquiry: what are the risks of an erroneous deprivation of interests as a result of official action, and what is the value of additional or substitute procedural safeguards and the costs associated with those safeguards. Reduced to its core, this test "merely requires a comparison of the costs and benefits of giving the plaintiff a more elaborate

37. Id. at *2-*3.
38. Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1295 (1975). Friendly discusses the distinctions to be made based upon the nature of the governmental action. The revocation of a license to practice a profession, under this analysis, ranks "high on the procedural scale," whereas the "procedural rights accorded [a deportable] alien would not be many." Id. at 1296-97. The first part of the Eldridge test is likely to bring to the fore important citizen interests. The interests under consideration would include distinguishing between whether the proposed action is to revoke a presently valid license or permit, in contrast with a proposal to deny a pending application. In the former case, time, energy and money have likely been invested in the enterprise, whereas in the latter case there is but an expectation that the enterprise will proceed as planned. Id. at 1296.
40. Eldridge, 424 U.S. at 335.
procedure than he actually received.” The question is thus: What are the risks that our 
OAPA will lead to erroneous deprivation of protected interests, and what are the costs and benefits of creating additional or substitute procedural safeguards? These concerns are closely linked to the 
last prong of Eldridge: what are the government’s interests, “including the 
function involved and the fiscal and administrative burdens that the 
additional or substitute procedural requirement would entail.”

The second prong of the Eldridge test requires the court to consider the 
risk of error created by the state’s chosen procedure, along with the 
“probable value, if any, of additional or substitute procedural safeguards. ..” The Ohio Supreme Court recently considered the mandate from 
Eldridge that a court consider the risk of erroneous deprivation as a result of the administrative procedures required by statute. In State v. 
Hochhausler,” a driver with a blood alcohol level of .105 percent was 
arrested and charged under Ohio Revised Code section 4511.19(A) with a 
second offense within five years of driving while intoxicated (DUI). The arrest was followed by an immediate administrative license suspension 
(ALS) pursuant to Ohio Revised Code section 4511.191(F)(2) for such time 
as it would take to be brought before the court for an ALS hearing, along 
with the seizure and impoundment of the pick-up truck the driver was 
operating at the time of his arrest pursuant to Ohio Revised Code section 
4511.195. With varying degrees of success, the driver argued the second 
prong of the Eldridge test is not met where the state is permitted to take 
administrative action prior to a hearing.

In its response to these arguments, the Ohio Supreme Court reviewed 
the procedural requirements mandated by Eldridge. The supreme court 
noted first that Eldridge required the court to weigh the private interest of 
the driver in retaining the right to drive while awaiting his ALS hearing. 
The court did so, finding first that with respect to the ALS (that is, the 
suspension prior to a determination of guilt on the DWI charge), the driver’s 
interest is his “stake in the continued possession and use of his driver’s 
license pending the outcome of the ALS appeal.” The court found the

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41. Parrett v. City of Connersville, 737 F.2d 690, 696 (7th Cir. 1984) (citing Eldridge, 424 U.S. at 335).
42. Eldridge, 424 U.S. at 335.
43. Id.
44. 668 N.E.2d 457 (Ohio 1996).
45. Id.
46. Id. at 461.
47. Id. at 465.
48. Id. at 464.
49. Id.
driver’s protected “interest is substantial, in part because the [state] ‘would not be able to make a driver whole for any personal inconvenience or economic hardship suffered by reason of any delay in redressing an erroneous suspension through post-suspension review procedures.’” As a result, the “determinative factors” to be used when assessing the driver’s interests would include the “duration of the license suspension . . . the availability of prompt post-suspension review, and . . . the availability of hardship relief.” The court concluded that the burden borne by an individual by a summary administrative license suspension is not so imposing as to require notice and an opportunity to be heard before the roadside ALS. The burden on the driver, that he suffer an immediate pre-hearing deprivation of his driving privileges pending the initial appearance to be held within five days of arrest, was “minimal” and “not so burdensome that a presuspension hearing is required.”

Applying the second prong, the court noted that Eldridge cannot be read to require such procedures as would be needed to avoid all sources of error. There may be a risk of erroneous deprivation inherent in administrative proceedings, yet that risk will not necessarily rise to the level of constitutional significance. “While this prong also requires consideration of the reliability of the procedures, the Due Process Clause has never been construed to mandate that the procedures used be so comprehensive as to preclude any possibility of error.” Observing that the circumstances surrounding an arrest for DWI and the attendant alcohol-related suspension may be “accepted as objective facts” and that “the use of chemical testing procedures in drunk-driving cases is widely accepted by courts,” the court found the risk of an erroneous suspension of a driver’s license under the ALS law was “not so substantial as to require that the accused receive prior notice and an opportunity to be heard prior to the suspension.”

G. An Unacceptable Likelihood of Error

The court reached a contrary result, however, when it considered the
law that provided for prehearing seizure of the DWI-operator's vehicle. The seizure provisions, the arresting officer is directed to seize the vehicle operated by the driver. Thus, the owner of a vehicle being used by a second-time drunk driver may be adversely affected without prior notice. Noting that a motor vehicle "may be the subject of multiple private interests, i.e., a jointly owned family automobile or, as here, a company-owned vehicle . . . .," the court found the public interest in these proceedings is greater, and "the risk of erroneous deprivation is extremely high under the summary seizure provisions of R.C. 4511.195." This view was likewise taken by the federal court in Kutschbach v. Davies, where that court considered the administrative procedures attendant to immobilizing a vehicle operated by an individual driving without a valid driver's license under Ohio Revised Code section 4507.38. That court held that under the Eldridge test, "[n]o governmental interest justifies a delay of several days before the government is required to establish probable cause for the detention of a [person's] vehicle."

H. Contrasting the Hochhausler Process With Those in the OAPA

The procedures that were the subject of judicial scrutiny in Hochhausler were not, it should be noted, the procedures generally mandated under the OAPA. Unless there is an express provision otherwise, the OAPA requires that agency action wait until the affected party has had the opportunity to be heard: Ohio Revised Code section 119.06 provides that "[n]o adjudication order shall be valid unless an opportunity for hearing

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59. Id. at 469.
If a person is arrested for a violation of section 4511.19 of the Revised Code or of a municipal OMVI ordinance and, within five years of the alleged violation, he previously has been convicted of or pleaded guilty to one or more violations of section 4511.19 of the Revised Code or a municipal OMVI ordinance *,*, the arresting officer or another officer of the law enforcement agency that employs the arresting officer, in addition to any action that the arresting officer is required or authorized to take by section 4511.191 of the Revised Code or by any other provision of law, shall seize the vehicle that the person was operating at the time of the alleged offense and its identification license plates. Except as otherwise provided in this division, the officer shall seize the vehicle and license plates under this division regardless of whether the vehicle is registered in the name of the person who was operating it or in the name of another person.
61. Hochhausler, 668 N.E.2d at 467.
62. Id. at 468.
64. Id. at 1093.
is afforded in accordance with [the OAPA]."\(^{65}\) The OAPA as written is thus capable of meeting the due process requirements articulated in the first prong of the Eldridge test.

By its terms, the OAPA does not shortchange either the applicant or the licensee, although as a practical matter the first-time applicant is at a greater disadvantage than one renewing a license, given that a proposed enterprise may lose its investors if the regulatory process is perceived as a serious barrier to launching the enterprise, whereas the licensee operating under an agency license is permitted, under Ohio Revised Code section 119.06, to insist on preservation of the status quo while the administrative procedure runs its course. Beyond this consideration, however, the OAPA fully accommodates the need to consider the "private interests" that would be adversely affected by the proposed governmental action. For example, where the regulator, in this case the Ohio Attorney General, would purport to terminate the activity that had been allowed under gaming regulations affecting bingo operations, the court looked to the OAPA, applied Eldridge to find that due process required consideration of the private interests that would be affected by the official action, and held that the operators were entitled to a continuation of the lawful bingo operation until an appropriate hearing could be held.\(^{66}\)

II. THE OAPA AS A FLEXIBLE ADJUDICATION TOOL

Suggested by this review of the cases applying the OAPA is the conclusion that Ohio's administrative process has the flexibility required to afford litigants due process of law. There is a presumption that those affected by proposed agency adjudications will have the right to be heard

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\(^{65}\) OHIO REV. CODE ANN. § 119.06 provides:
The following adjudication orders shall be effective without a hearing:
(A) Orders revoking a license in cases where an agency is required by statute to revoke a license pursuant to the judgment of a court;
(B) Orders suspending a license where a statute specifically permits the suspension of a license without a hearing;
(C) Orders or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a higher authority within such agency, to another agency, or to the board of tax appeals, and also give the appellant a right to a hearing on such appeal.

When a statute permits the suspension of a license without a prior hearing, any agency issuing an order pursuant to such statute shall afford the person to whom the order is issued a hearing upon request.

OHIO REV. CODE ANN. § 119.06 (Anderson 1994).

before the action is taken and that such action will be taken only by the
agency that is specifically authorized to take such action.\textsuperscript{67} The OAPA

\begin{quote}
67. \textit{Ohio Rev. Code Ann.} § 119.06 provides:
\begin{quote}
No adjudication order of an agency shall be valid unless the agency is specifically authorized by law to make such order.

No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise.

The following adjudication orders shall be effective without a hearing:
\begin{enumerate}
\item Orders revoking a license in cases where an agency is required by statute to revoke a license pursuant to the judgment of a court;
\item Orders suspending a license where a statute specifically permits the suspension of a license without a hearing;
\item Orders or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a higher authority within such agency, to another agency, or to the board of tax appeals, and also give the appellant a right to a hearing on such appeal.
\end{enumerate}

When a statute permits the suspension of a license without a prior hearing, any agency issuing an order pursuant to such statute shall afford the person to whom the order is issued a hearing upon request.

Whenever an agency claims that a person is required by statute to obtain a license, it shall afford a hearing upon the request of a person who claims the law does not impose such a requirement.

Every agency shall afford a hearing upon the request of any person who has been refused admission to an examination where such examination is a prerequisite to the issuance of a license unless a hearing was held prior to such refusal.

Unless a hearing was held prior to the refusal to issue the license, every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license, except that the following are not required to afford a hearing to a person to whom a new license has been refused because the person failed a licensing examination: the state medical board, chiropractic examining board, board of examiners of architects, board of landscape architect examiners, and any section of the Ohio occupational therapy, physical therapy, and athletic trainers board.

When periodic registration of licenses is required by law, the agency shall afford a hearing upon the request of any licensee whose registration has been denied, unless a hearing was held prior to such denial.

When periodic registration of licenses or renewal of licenses is required by law, a licensee who has failed his application for registration or renewal within the time and in the manner provided by statute or rule of the agency, shall not be required to discontinue a licensed business or profession merely because of the failure of the agency to act on his application. Action of an agency rejecting any such application shall not be effective prior to fifteen days after notice of the rejection is mailed to the licensee.
\end{quote}
\end{quote}

\textit{Ohio Rev. Code Ann.} § 119.06 (Anderson 1994). However, there are exceptions for certain proceedings, including DWI-based administrative license suspensions. See, e.g., \textit{Ohio Rev. Code Ann.} § 119.062(A) (Anderson 1994):

Revocation or suspension of driver's license without hearing; notice of order.
\begin{enumerate}
\item Notwithstanding section 119.06 of the Revised Code, the registrar of motor vehicles is not required to hold any hearing in connection with an order revoking or suspending a motor vehicle driver's or commercial driver's license pursuant to section 4507.16, 4509.24, 4509.291 [4509.29.1], 4509.31, 4509.33, 4509.37, 4509.39, 4509.42, 4509.66,
further requires the agency to provide effective notice that the agency intends to act, and renders void any order entered by an agency that has failed to provide such notice. 68


Id.

68. Ohio Rev. Code Ann. § 119.07 provides:
Notice of hearing; contents; notice of order of suspension of license; publication of notice; effect of failure to give notice.

Except when a statute prescribes a notice and the persons to whom it shall be given, in all cases in which section 119.06 of the Revised Code requires an agency to afford an opportunity for a hearing prior to the issuance of an order, the agency shall give notice to the party informing him or his right to a hearing. Notice shall be given by registered mail, return receipt requested, and shall include the charges or other reasons for the proposed action, the law or rule directly involved, and a statement informing the party that he is entitled to a hearing if he requests it within thirty days of the time of mailing the notice. The notice shall also inform the party that at the hearing he may appear in person, by his attorney, or by such other representative as is permitted to practice before the agency, or may present his position, arguments, or contentions in writing and that at the hearing he may present evidence and examine witnesses appearing for and against him. A copy of the notice shall be mailed to attorneys or other representatives of record representing the party. This paragraph does not apply to situations in which such section provides for a hearing only when it is requested by the party.

When a statute specifically permits the suspension of a license without a prior hearing, notice of the agency's order shall be sent to the party by registered mail, return receipt requested, not later than the business day next succeeding such order. The notice shall state the reasons for the agency's action, cite the law or rule directly involved, and state that the party will be afforded a hearing if he request it within thirty days of the time of mailing the notice. A copy of the notice shall be mailed to attorneys or other representatives of record representing the party.

Whenever a party requests a hearing in accordance with this section and section 119.06 of the Revised Code, the agency shall immediately set the date, time, and place for the hearing and forthwith notify the party thereof. The date set for the hearing shall be within fifteen days, but not earlier than seven days, after the party has requested a hearing, unless otherwise agreed to by both the agency and the party.

When any notice sent by registered mail, as required by sections 119.01 to 119.13 of the Revised Code, is returned because of failure of delivery, the agency either shall make personal delivery of the notice by an employee of the agency or shall cause the notice to be published once a week for three consecutive weeks in a newspaper of general circulation in the county where the last known place of residence or business of the party is located. When notice is given by publication, a copy of the newspaper, with the first publication of the notice marked, shall be mailed to the party at the last known address and the notice shall be deemed received as of the date of the last publication.

The failure of an agency to give the notices for any hearing required by sections 119.01 to 119.13 of the Revised Code in the manner provided in this section shall invalidate any order entered pursuant to the hearing.

Ohio Rev. Code Ann. § 119.07 (Anderson 1994). However, some provisions of the OA PA alter the notice requirements of Ohio Revised Code section 119.07: section 119.062 provides for the revocation
The mandate for hearings in advance of agency action, and the requirement of notice prior to hearing, are two key ingredients to be considered when determining whether our administrative procedures comport with due process. The third is the hearing itself. Here one would expect to find a statutory framework that is designed to meet the second prong of the Eldridge test (a balance of the risk of erroneous deprivation against the probable value of any additional or substitute procedural safeguard) and the third prong (regard for the government's interest, particularly with respect to the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.)

69 And indeed, the OAPA again proves to be flexible and generally well-suited to this task.

The hearing itself may be held where the agency is located or, upon request, may be held either in the county seat of the residence of the affected party, or within fifty miles of the party's residence. The agency has express authority to compel the attendance of witnesses and the production of documents and other material, and can turn to the court for judicial enforcement of its subpoenas. Additionally, proceedings may be held in abeyance pending such enforcement (or for other reasons).

70 OHIO REV. CODE ANN. § 119.08 provides:
   Date, time, and place of adjudication hearing.
   The date, time, and place of each adjudication hearing required by sections 119.01 to
   119.13, inclusive, of the Revised Code, shall be determined by the agency. If requested
   by the party in writing, the agency may designate as the place of hearing the county seat
   of the county wherein such person resides or a place within fifty miles of such person's
   residence.

OHIO REV. CODE ANN. § 119.08 (Anderson 1994).

71 OHIO REV. CODE ANN. § 119.09 provides for adjudication hearings:
   As used in this section "stenographic record" means a record provided by stenographic
   means or by the use of audio electronic recording devices, as the agency determines.

   For the purpose of conducting any adjudication hearing required by sections 119.01 to
   119.13 of the Revised Code, the agency may require the attendance of such witnesses and the
   production of such books, records, and papers as it desires, and it may take the depositions
   of witnesses residing within or without the state in the same manner as is prescribed by law
   for the taking of depositions in civil actions in the court of common pleas, and for that
   purpose the agency may, and upon the request of any party receiving notice of the hearing
   as required by section 119.07 of the Revised Code shall, issue a subpoena for any witness or
   a subpoena duces tecum to compel the production of any books, records, or papers, directed
   to the sheriff of the county where such witness resides or is found, which shall be served and
   returned in the same manner as a subpoena in a criminal case is served and returned. The
   fees and mileage of the sheriff and witnesses shall be the same as that allowed in the court
   of common pleas in criminal cases. Fees and mileage shall be paid from the fund in the state
   treasury for the use of the agency in the same manner as other expenses of the agency are
litigants generally can expect the agency to prepare a verbatim record of the hearing, to permit judicial review based upon the record.\textsuperscript{72} This is not an absolute requirement, and an agency may by formal rule declare that a record will be made only upon request of a party; however, if a record is not made, any party may demand a hearing or rehearing for the purpose of making a record which may be the basis of appeal.\textsuperscript{73}

The hearings thus are clothed with many of the trappings traditionally associated with judicial decision-making. Witnesses may be called (and the agency may call the party as a witness)\textsuperscript{74} and the agency is expected to pass upon the admissibility of evidence and to preserve such evidence as is offered but deemed not admissible.\textsuperscript{75} Although the rules of evidence do not expressly control these hearings, and hearsay that might be excluded in a civil or criminal trial may be admitted in an administrative proceeding, the

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paid.

An agency may postpone or continue any adjudication hearing upon the application of any party or upon its own motion.

In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which he may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein.


\textsuperscript{72} See infra note 73.

\textsuperscript{73} \textbf{OHIO REV. CODE ANN. § 119.09} further provides instruction about conducting the record hearing:

At any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof presented at the hearing. This paragraph does not require a stenographic record at every adjudication hearing. In any situation where an adjudication hearing is required by sections 119.01 to 119.13 of the Revised Code, if an adjudication order is made without a stenographic record of the hearing, the agency shall, on request of the party, afford a hearing or rehearing for the purpose of making such a record which may be the basis of an appeal to court. The rules of an agency may specify the situations in which a stenographic record will be made only on request of the party; otherwise such a record shall be made at every adjudication hearing from which an appeal to court may be taken.


\textsuperscript{74} "In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may call any party to testify under oath as upon cross-examination." \textit{id.}

\textsuperscript{75} The agency shall pass upon the admissibility of evidence, but a party may at the time make objections to the rulings of the agency thereon, and if the agency refuses to admit evidence, the party offering the same shall make a proffer thereof, and such proffer shall be made a part of the record of such hearing.

\textit{id.}
exercise of discretion by the agency is restricted, and an agency may not exercise the discretion to allow or exclude evidence in an arbitrary manner.\(^7^6\)

\textit{A. Costs and Benefits of the OAPA in Its Present Form}

These accouterments reflect the balancing required by \textit{Eldridge}, where the OAPA offers a forum presided over not by a court but instead by the agency to which enforcement authority has been delegated through the legislative process. The OAPA thus meets both the objective requirement, that is, it provides a structure for both notice and opportunity to be heard, and the subjective requirement, in that it provides a forum that should leave the participants with a sense that their cause has been given due consideration by the agency. These provisions ensure that the adjudication will take place only after the affected parties have been fairly apprised of the basis for the government's intended action, and only after the passage of sufficient time as is needed to permit the party's measured response. At the same time, the agency is not unduly restricted in its enforcement ability: it can and should act promptly.\(^7^7\) The statutory time limits for commencing the administrative hearing are, however, not jurisdictional and an agency may unilaterally allow additional time to pass before actually conducting the hearing, provided the hearing is set, albeit in name only, within the required time.\(^7^8\) Administrative agencies also have the authority to protect the public and enforce the laws under a system in which litigants cannot thwart the process by forcing unreasonable or excessive delays, including those based on demands for unwarranted pre-hearing discovery.\(^7^9\)

\textit{B. The Need for an Unbiased Adjudicator}

There is one area in the procedures required by the OAPA that does, however, give rise to a concern that the luster of fairness may be absent, or


\(^7^7\) Whenever a party requests a hearing in accordance with this section and section 119.06 of the Revised Code, the agency shall immediately set the date, time, and place for the hearing and forthwith notify the party thereof. The date set for the hearing shall be within fifteen days, but not earlier than seven days, after the party has requested a hearing, unless otherwise agreed to by both the agency and the party.


\(^7^9\) This assumes the absence of specific authority allowing for discovery. \textit{See, e.g., Ohio Rev. Code Ann. § 4517.57 (B)} (Anderson 1993) (allowing discovery in proceedings before the motor vehicle dealers board).
at least clouded by, the appearance of conditions that make an unfair result possible or even probable. The OAPA in its present form allows the agencies to conduct the hearing or, as an alternative, to appoint a referee or examiner (commonly referred to as a hearing examiner or hearing officer) to conduct the hearing. The hearing examiner inherits all of the "same powers and authority in conducting the hearing as is granted to the agency."\textsuperscript{80} There are but two requirements for the appointment: the appointee must be an attorney, and must be "possessed of such additional qualifications as the agency requires."\textsuperscript{81} There arises in this provision an inherent infirmity, flowing from the fact that the hearing examiner has been hired by the agency and as a result may be possessed of personal bias in favor of the agency. This concern is perhaps intensified when the hearing examiner is not only appointed by the agency, but is employed exclusively by the agency and thus is dependant upon the agency for his or her livelihood.

One Ohio trial court recently made this observation in \textit{Kick v. Dailey}, where a state department employed a staff attorney whose duties included presiding over administrative hearings held under the OAPA.\textsuperscript{82} The Ohio Department of Agriculture charged the operator of an Ohio dairy with certain violations in the operation of his dairy, and upon the dairyman's request the Department set the matter for hearing prior to making a final determination with respect to the charges.\textsuperscript{83} Under the authority of Ohio Revised Code section 119.09, the Department appointed a staff attorney to preside over the hearing, and upon completion of the hearing the attorney issued his report and recommendation to the Director of the Department of Agriculture.\textsuperscript{84}

The court considered this set of circumstances in its determination that the dairyman had been denied due process.\textsuperscript{85} The court found that "[d]ue to the fact that [the hearing officer] is a staff counsel for the Ohio Department of Agriculture, he is not a neutral and impartial hearing officer and therefore the appointment of [the staff attorney] as the hearing officer denies the Petitioner his due process rights as required by the Fourteenth Amendment of the United States Constitution."\textsuperscript{86} The court's frustration with the structure of the administrative forum was made plain by this

\textsuperscript{80} \textit{Ohio Rev. Code Ann.} § 119.09 (Anderson 1994).
\textsuperscript{81} \textit{Id.}
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.} at *2.
observation:

Specifically, the Court finds that the Ohio Department of Agriculture violated the due process rights of Petitioner by not appointing an impartial hearing officer. The service of the Ohio Department of Agriculture's staff counsel as a hearing officer violates the common sense recommendations of Gingo v. State Medical Board (1989), 56 Ohio App.3d 111. The State of Ohio must certainly be able to appoint someone more neutral and impartial than Respondent/Appellant's staff counsel to serve as an administrative hearing officer. 87

The court's reference to Gingo v. State Medical Board 88 warrants some discussion. In that case, the court examined the history of the statutes controlling hearings before the state medical board. Prior to a 1985 change in the law, 89 there was a possibility that the hearing examiner in an adjudication hearing before the medical board could also have served as an investigator. Amendments to the law ended this possibility out of concerns that a litigant's due process rights would be threatened by the use of a hearing officer who might be biased in favor of the agency and against the subject of the investigation. 90

On appeal, the court of appeals found that Gingo would not support the trial court's rationale, and reversed the trial court, finding that the Department of Agriculture had not deprived the dairyman of due process. 91 The court of appeals first noted that there was no express statutory authority prohibiting the appointment of an agency's own staff attorney to serve as a hearing examiner in proceedings under Ohio Revised Code section 119.09. 92 It further noted that in the case before it, there was no suggestion that the staff attorney had served in an investigative capacity. 93 Even if the attorney had served in an investigative capacity, the court offered in dicta, "[c]ourts have been unwilling to find a violation of due process rights even when a hearing officer acts in both investigative and adjudicative roles." 94

The trial court's frustration in Kick is understandable. The court gives voice to a public perception that the administrative forum may be tainted by the bias of a hearing examiner who is closely tied to the agency that

89. OHIO REV. CODE ANN. § 4731.23 (Anderson 1985), as amended by House Bill No. 769.
90. Gingo, 564 N.E.2d at 1103.
92. Id. at *2.
93. Id.
94. Id. (citing Withrow v. Larkin, 421 U.S. 35, 58 (1975)).
prosecutes and adjudicates. Unlike the elected judiciary, the hearing examiner in proceedings held pursuant to the OAPA attains his or her office only upon the consent of the agency that makes the hiring decision, and retains that position only upon the continued approval of the agency. One need not search far in the law to find that bias is historically linked financial interest, and that the existence of a pecuniary interest in the outcome of a proceeding may threaten the presumption that parties are getting a fair trial as is required under the Due Process Clause:

Concededly, a ‘fair trial in a fair tribunal is a basic requirement of due process.’ In re Murchison, 349 U.S. 133 (1955). This applies to administrative agencies which adjudicate as well as to courts. Gibson v. Berryhill, 411 U.S. 564, 579 (1973). Not only is a biased decision maker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’ In re Murchison, supra, at 136; cf. Tumey v. Ohio, 273 U.S. 510, 532 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.95

One should hasten to note that the cases cited in Withrow suggest bases for disqualification that are altogether different than that found in Kick: in Gibson,96 the adjudicators were member of the state optometry board, each of whom were optometrists engaged in private practice. The district court “determined that the aim of the board was to revoke the licenses of all optometrists in the State who were employed by business corporations such as the [employer of the respondent licensee].”97 That such as result would “possibly redound to the personal benefit of members of the Board,” was a sufficient basis for the trial court to determine that the board was constitutionally disqualified from hearing the charges filed against the licensee.98 On the other hand, the bias that may be attributable to a hearing examiner under Ohio Revised Code Chapter 119 arises not because the results of the adjudication directly or indirectly benefit the examiner, but because the agency has retained and may in the future again retain the services of the examiner. In Tumey v. Ohio,99 another case cited in Withrow, the Court found that under the mayor’s court system in place at

97. Id. at 578.
98. Id.
the time in Ohio, "[t]he Mayor . . . had a direct, personal, pecuniary interest in convicting the defendant who came before him for trial, in the twelve dollars of costs imposed in his behalf, which he would not have received if the defendant had been acquitted." This same standard was again applied in *Ward v. Village of Monroeville*, with the same result, where the mayor served as judge and also held executive responsibilities for village finances. Neither *Tumey* nor *Ward* are founded on facts similar to the instance where a hearing examiner is hired by the agency that ultimately will adjudicate the matter. Instead, the adjudicator in *Tumey* reaped a financial benefit only if he or she found the defendant guilty of the misdemeanor charge pending before the judge; and in *Ward* the judge would succeed in his or her executive capacity only by gathering the proceeds that would be paid upon a conviction. The hearing examiner under the OAPA is paid not based upon the outcome, but instead based upon the continued confidence invested in the examiner by the agency client.

There are, however, similarities to consider in the last case cited by the Court in *Withrow*. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, a prime contractor was sued by a subcontractor to recover money allegedly due for a painting job, and the matter was presented for arbitration pursuant to the United States Arbitration Act. Among the three arbitrators, one was an engineering consultant, and over the years the consultant had been hired from time to time by the prime contractor. The fact of this relationship was not disclosed to the subcontractor. The Court found within the Arbitration Act an intent on the part of Congress to provide "not merely for any arbitration but for an impartial one." Notwithstanding that there was no claim of actual fraud or bias in deciding the case, and despite the fact that the vote by the arbitrators was 3 to 0 (and thus the one vote was not necessary to support the outcome), the Court nonetheless held the arbitral process to standards much like that of trial judges:

This rule of arbitration [that the arbitrator disclose any circumstances likely

100. *Id.* at 523.
102. *Id.* at 60.
107. 393 U.S. at 146.
108. *Id.*
109. *Id.* at 147 (emphasis sic).
to create a presumption of bias or which might disqualify the arbitrator on
grounds of impartiality] and this canon of judicial ethics [that a judge
avoid action that might "reasonably tend to awaken the suspicion that his
social or business relations or friendships, constitute an element in
influencing his judicial conduct"] rest on the premise that any tribunal
permitted by law to try cases and controversies not only must be unbiased
but also must avoid even the appearance of bias.110

This "appearance of bias" may be at the heart of the court's decision in
Kick.111 In both the arbitral forum and that created by the OAPA, the
adjudicators preside over proceedings where the participants are part of
a much smaller universe, where it is not uncommon for many of the people
involved to know one another well. The familiarity that exists between the
parties and the adjudicators is one by-product realized when government (in
the case of reviews under the OAPA) or the private sector (in cases
controlled by arbitration standards) achieve the economies intended by these
alternate forms of dispute resolution. Without this familiarity, the agency
runs the risk that its adjudicators will have little or no doctrinal background
in the particular discipline. In arbitration, as the concurrence noted in
Commonwealth Coatings Corp., Justices White and Marshall took pains to
note that "arbitrators are not automatically disqualified by a business
relationship with the parties before them if both parties are informed of the
relationship in advance, or if they are unaware of the facts but the
relationship is trivial."112

Under the OAPA, there are, however, no standards similar to those
found in the United States Arbitration Act, and there is nothing in Ohio law
that provides, as does the Arbitration Act, for vacating the report of a
hearing officer where the decision is "procured by corruption, fraud or
undue means," or "[w]here there was evident partiality . . . in the
arbitrators."113 Instead, the OAPA provides for review by the common

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110. Id. at 149-50.
112. 393 U.S. at 150 (White, J., concurring).
113. Id. at 146 (citing 9 U.S.C. § 10). 9 U.S.C. section 10 provides:
(a) In any of the following cases the United States Court in and for the district wherein the award
was made may make an order vacating the award upon the application of any party to the
arbitration—
   (1) Where the award was procured by corruption, fraud or undue means.
   (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
   (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing,
upon sufficient evidence shown, or in refusing to hear evidence pertinent and material to the
controversy; or of any other misbehavior by which the rights of any party have been
prejudiced.
   (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a
mutual, final, and definite award upon the subject matter submitted was not made.
pleas court on issues of law and fact, and by the court of appeals on
questions of law.\textsuperscript{114} The review provisions are strewn together in a long
and cumbersome section of the OAPA, found at Ohio Revised Code section
119.12, which provides:

Any party adversely affected by any order of an agency issued
pursuant to an adjudication denying an applicant admission to an
examination, or denying the issuance or renewal of a license or registration
of a licensee, or revoking or suspending a license, or allowing the payment
of a forfeiture under section 4301.252 of the Revised Code, may appeal
from the order of the agency to the court of common pleas of the county
in which the licensee is a resident, provided that appeals from decisions of
the liquor control commission may be to the court of common pleas of
Franklin county and appeals from decisions of the state medical board,
chiropractic examining board, and board of nursing shall be to the court of
common pleas of Franklin county. If any such party is not a resident of
and has no place of business in this state, he may appeal to the court of
common pleas of Franklin county.

Any party adversely affected by any order of an agency issued
pursuant to any other adjudication may appeal to the court of common
pleas of Franklin county, except that appeals from orders of the fire
marshal issued under Chapter 3737. of the Revised Code may be to the
court of common pleas of the county in which the building of the
aggrieved person is located. This section does not apply to appeals from
the department of taxation. . . .

The court may affirm the order of the agency complained of in the
appeal if it finds, upon consideration of the entire record and such
additional evidence as the court has admitted, that the order is supported
by reliable, probative, and substantial evidence and is in accordance with
law. In the absence of such a finding, it may reverse, vacate, or modify
the order or make such other ruling as is supported by reliable, probative,
and substantial evidence and is in accordance with law. . . .

The judgment of the court shall be final and conclusive unless
reversed, vacated, or modified on appeal. Such appeals may be taken
either by the party or the agency, shall proceed as in the case of appeals
in civil actions, and shall be pursuant to the Rules of Appellate Procedure

\textsuperscript{(5)} Where an award is vacated and the time within which the agreement required the award
to be made has not expired the court may, in its discretion, direct a rehearing by the
arbitrators.

\textsuperscript{(b)} The United States district court for the district wherein an award was made that was issued
pursuant to section 580 of title 5 may make an order vacating the award upon the application of
a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award,
if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 372
of title 5.


and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code. Such appeal by the agency shall be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency, and in such appeal the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record.\textsuperscript{115}

Thus crafted, the OAPA provides the trappings of traditional adjudicative forums, including the right to notice, to be heard, and even the right of cross-examination and of independent judicial review, but does not provide for an independent adjudicator at the trial level (that is, where the facts are marshaled and a record is made based on those facts). This particular shortcoming has long been of some concern. One writer framed the issue in these terms:

As might be expected in light of the Court’s emphasis [in Mathews v. Eldridge] on instrumental concerns, most of the procedures that have fallen within the scope of the due process clause deal with the individual’s opportunity to argue his case effectively. The rights to notice, hearing, counsel, transcript, and to calling and cross-examining witnesses all relate directly to the accuracy of the adjudicative process. These procedural safeguards are of no real value, however, if the decision maker bases his findings on factors other than his assessment of the evidence before him. For example, if the individual seeking to enforce his rights is black, and the adjudicator is racially prejudiced and would therefore never find in favor of a black person regardless of the weight of the evidence, all of the procedural guarantees of hearing, notice, counsel, transcript and the examination of witnesses are rendered irrelevant. Similarly, if the adjudicator is himself an integral part of the governmental body on the other side of the case, then it is likely that his decision will be based on considerations other than the merits as developed by the evidence. The government would, in effect, be the judge of its own case. Once again, traditional procedural protections, however meticulously adhered to, become irrelevant.\textsuperscript{116}

Adjudication hearings under the OAPA, like those conducted under the Federal Administrative Procedure Act, are “quasi-judicial” in nature.\textsuperscript{117} The Code of Judicial Conduct (CJC) presumably applies to the attorney performing adjudicative functions under the OAPA. As is set forth in the

\textsuperscript{115} Id.
Compliance Section of the CJC, "[a]nyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purposes of this Code."

There is some support, however, for the proposition that the CJC does not apply to administrative law judges in the absence of express language adopting the CJC and applying to ALJs. According to a report of the ABA Standing Committee on Ethics and Professional Responsibility,

Applicability of this Code to administrative law judges should be determined by each adopting jurisdiction. Administrative law judges generally are affiliated with the executive branch of government rather than the judicial branch and each adopting jurisdiction should consider the unique characteristics of particular administrative law judge positions in adopting and adapting the Code for administrative law judges.

The proposition that a deprivation of due process follows from all arrangements wherein the administrative hearing examiner is hired by the regulatory body has not, however, found support in constitutional jurisprudence. For example, where a due process claim was raised challenging the use of hearing officers chosen by private insurance carriers to conduct review determinations on behalf of the Secretary of Health and Human Services, the Supreme Court rejected the claim.

In Schweiker v. McClure, the Court expressly held that where "hearing officers . . . serve in a quasi-judicial capacity . . . due process demands impartiality . . ." The Court began its analysis, however, with the presumption that the hearing officers were unbiased. The party attempting to claim a denial of due process based on the bias of the hearing examiner bears the burden of establishing a conflict of interest or some other specific reason for disqualification.

The trial court, which found a due process violation where the hearing


122. Id.


125. Id. (citing Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973)).
officers were employed by the private insurance carrier, found that the impartiality of the carrier’s hearing officers was compromised by their “prior involvement and pecuniary interest.”126 “Pecuniary interest” was shown, the District Court [held], by the fact that ‘their incomes as hearing officers are entirely dependent upon the carrier’s decisions regarding whether, and how often, to call upon their services.’”127

The trial court noted that:

hearing officers “are appointed by, and serve at the will of, the carrier [that] has not only participated in the prior stages of each case, but has twice denied the claims [that] are the subject of the hearing,” and that five out of seven of Blue Shield’s past and present hearing officers “[were] former or current Blue Shield employees.”128

“The District Court thought these links between the carriers and their hearing officers sufficient to create a constitutionally intolerable risk of hearing officer bias against the claimants.”129 “Additionally, the court thought it significant that ‘no meaningful, specific selection criteria govern[ed] the appointment of hearing officers. . . .”130

The Supreme Court disagreed, finding there was no evidence to support a claim of bias or failure of due process.131 It noted “appellees adduced no evidence to support their assertion that, for reasons of psychology, institutional loyalty, or carrier coercion, hearing officers would be reluctant to differ with carrier determinations. Such assertions require substantiation before they can provide a foundation for invalidating an Act of Congress.”132 It further found that “[t]he District Court’s analogy to judicial canons . . .” was inappropriate.133

The fact that a hearing officer is or was a carrier employee does not create a risk of partiality analogous to that possible arising from the professional relationship between a judge and a former partner or associate. We simply have no reason to doubt that hearing officers will do their best to obey the Secretary’s instruction manual. . . .”134

The same argument met the same fate in state courts. Although there are no reported cases on point in Ohio, case law generally suggests there

126. Id. at 192 (quoting McClure v. Harris, 502 F. Supp. 409, 414 (N.D. Cal. 1980)).
127. Id. (quoting McClure, 503 F. Supp. at 415).
128. Id. at 193 (quoting McClure, 503 F. Supp. at 414 (all but last alteration in original)).
129. Id.
130. Id. at 193 n.4 (quoting McClure, 503 F. Supp. at 415).
131. Id. at 196.
132. Id. at 196 n.10.
133. Id. at 197 n.11.
134. Id.
would be no disqualification of a hearing examiner where the sole basis given is that the hearing examiner is an employee of the regulatory body. For example, in Oregon the court of appeals in *Mathew v. Juras*\(^{135}\) considered a claim of denial of due process by an applicant for disability benefits where the claim was founded on the fact that the hearing officer was an employee of the Division.\(^{136}\) Here, the "petitioner attack[ed] the findings of the hearing officer on the ground that, as an employe [sic] of the Public Welfare Division, she was not an impartial official and thus he was denied due process and, accordingly, he contends the hearing 'was a sham.'"\(^{137}\)

The court of appeals considered this claim, which relied primarily on *Goldberg v. Kelley*.\(^{138}\) It wrote:

A similar problem concerning who might, within constitutional standards, be qualified in an administrative proceeding to serve as a hearing officer was considered in *Morrissey v. Brewer*, 408 U.S. 471, 486 (1972). In an unanimous decision the court said:

"This independent officer need not be a judicial officer. The granting and revocation of parole are matters traditionally handled by administrative officers. In *Goldberg*, the Court pointedly did not require that the hearing on termination of benefits be conducted by a judicial officer or even before the traditional 'neutral and detached' officer; it required only that the hearing be conducted by some person other than one initially dealing with the case . . . ."

Davis, Administrative Law Text 224-25, § 10.07 (3d ed. 1972), points out:

"The status of the examiner should and does depend upon his functions. His two main functions are to preside and to prepare initial or recommended decisions. Both functions are definitely subordinate . . . . The examiner's role as a deciding officer is overshadowed by the power of the agency. That the examiner's initial decision may become the final decision of the agency if no party appeals and if the agency does not of its own motion call up the case does not mean that the examiner has significant power, for the power is in substance only one of recommending. The only important power of decision relates to contested cases; the agency always decides such cases. The assignment of the examiner is not that of a judicial officer who makes a decision which is merely subject to review by an appellate tribunal. The key provision of the APA concerning the deciding function of the examiner is that 'the agency . . . shall have all the

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136. *Id.* at 406.
137. *Id.*
powers which it would have in making the initial decision.

"... To exalt the examiner to a position equal to or above that of the agency and to make him altogether independent of the agency would be clearly incompatible with the agency’s continued responsibility."

See, Davis, supra at 226-27, § 11.01 for rationale underlying institutional or agency decisions.

Under the Oregon Administrative Procedures Act (ORS 183.310 to 183.500) it is clear that, as stated by Davis, supra, decisions made thereunder are agency decisions, as distinguished from those made by a judge. Examination of the Narrative Statement of Additional Evidence filed herein satisfies us that the hearing officer was an impartial officer within the standards of Goldberg and Morrissey.139

Two Michigan cases reach the same result, where they both construe that state’s administrative procedure act to reject the claim that an employee of a state agency cannot, consistent with due process, serve as a hearing officer based solely on the fact that the hearing officer was an employee of the agency that made the initial determination [i.e., the Department of Social Services].140 It would thus appear, based on reported case law, that there is no infirmity of a constitutional dimension arising from the fact that agencies conduct fair hearings using employees of the agency.

III. PUBLIC PERCEPTION OF THE FAIRNESS OF AGENCY PROCESS AND THE CENTRAL PANEL HEARING EXAMINER

Left unanswered by the analysis thus far, however, is whether the flexible standard announced in Mathews v. Eldridge will continue to be satisfied by agency adjudications using hearing examiners who are closely tied to the agency. The concern is neither novel nor trivial, and as society expects more alternatives to traditional courtroom disposition of disputes with government regulators, it is reasonable to presume the concern will likewise increase over time.

Historically, the question of creating a more independent corps of administrative hearing officers has been raised at the state and federal levels on several occasions. In 1974, for example, the Ohio Attorney General proposed legislation that would have created a central “Office of Administrative Procedure,” and would have called for the use of administrative “hearing examiners who are in no way employees of the

139. Mathew, 519 P.2d at 407 (parallel citations omitted).
agencies whose hearings they conduct." The act had the potential to reduce the complexity of passage through administrative adjudications, curbing what the author referred to as the "degree of multifurcation in administrative procedure within Ohio." 

Although this proposal did not become law, it preceded by just a few years the first substantial overhaul of the Model Administrative Procedure Act since the act was created. In 1981 revisions to the Model State Administrative Procedure Act, two versions of a central office of hearing examiners were proposed. Under one version, agencies would be required to use administrative hearing examiners drawn from a central pool of examiners, which the Model Act referred to as Administrative Law Judges (ALJs). Under another version, use of the ALJs from the central panel would be permissive. The Model Act calls for the appointment by the governor of a director, and it would be the director's responsibility to appoint ALJs and assign them to cases. The Model Act would not permit an agency to either select or reject any individual ALJ for any proceeding except in accordance with other provisions of the Act, such as ALJ disqualification.

A. The National Experiences with Central Panel Adjudicators

In a study commissioned by the American Judicature Society and published in 1983, seven states that used a central panel of hearing officers were surveyed. The results of the survey were published in the book, The Central Panel System for Administrative Law Judges: A Survey of Seven States. In this review, co-authors Malcolm C. Rich and Wayne E. Brucar evaluate the strengths and weaknesses of the central panel systems then in place in California, Colorado, Florida, Massachusetts, Minnesota, New Jersey, and Tennessee. Also considered was the imminent implementation of a central panel in the state of Washington. With the Model Act before them, the authors reported on the experiences of states familiar with the costs and benefits of central panels as implemented and as

142. Id.
144. Id. at § 4-301 cmt., 15 U.L.A. at 99-100.
145. Id.
146. Id. at 4-301(a)-(b), 15 U.L.A. at 98-99.
148. Id. at 2.
149. Id.
prescribed by the Model Act. 150

The authors of this study were particularly cognizant of the costs associated with affording a fair hearing to those subject to administrative proceedings. 151

In these days of government budget cutting, administrative agencies are hard pressed to decide how much due process is enough—how much can they afford to give litigants. From a jurisprudential point of view, the central panel approach seeks to provide due process of law through a separation of legislative and judicial powers. 152

From the survey, the authors concluded the central panel offered four categorical advantages: (1) the maintenance of a central panel “more efficiently allocat[ed] hearing examiners” than could assigning ALJs permanently to one agency, and smaller agencies had qualified ALJs ready to serve without having to hire full-time or part-time personnel for this purpose; (2) ALJs who were not permanently tied to one agency would “feel compelled to write . . . [better-]reasoned justifications for their decisions;” (3) the ALJ whose duties included rotating through various disciplines would approach their subject matter with a fresh perspective; and (4) a central panel permitted “one administrative staff to handle the bookkeeping related to the employment of ALJs.” 153 This, plus other economies of scale, “allow[ed] . . . cost cutting innovations to be implemented.” 154

There were, however, also disadvantages noted. First and foremost was that the agencies being served experienced the effects of “judicialization” of the administration process.

Opponents of the central pool claim the idea is another step toward judicialization and is, therefore, another step towards reducing the power of agency officials. However, some proponents of the approach see this as a benefit. The conflict stems from the trade-off between due process and administrative effectiveness that administrators claim to need to make and implement policies. Judicialization is, in this view, an unnecessary shackling of that discretion. The further the ALJs are from the agencies, the greater the shackling of the administrators. Yet it is this administrative discretion that some proponents wish to confine by means of the central panel notion. 155

The other objection noted by the authors is that creating a central corps

150. Id. at 10-14.
151. Id. at 13.
152. Id. (emphasis sic).
153. Id.
154. Id.
155. Id.
under the direction of a central panel director would create "a different kind of bias." 156 Central panel directors—often political appointees—are responsible for decisions relating to the hiring, promoting, evaluation and setting salary of ALJs. Opponents view this arrangement as potentially creating a non-objective environment for hearings." 157 The authors of the study candidly reported that during the legislative debates that led to the creation of central panels, these objections were measured and intense: 158

These legislative debates spawned a competition among special interests that are critical to the conflict surrounding the central panel notion. That is to say, some agency officials saw in the legislative debates an attempt to replace their administrative authority with the inflexible rule of law, thereby reducing the effectiveness of the system. Proponents of the legislation saw separating ALJs from agencies as a way to improve the administration of justice and to enhance the job status of ALJs. The conflict between law and administrative authority had an impact on personal interests that resulted in fierce agency opposition in the majority of central panel states. 159

Thus, the central panel notion is one that addresses a critical nexus in the administration of justice: when the hearing examiner or ALJ is insulated from pressure from the agency, would the judicial product be of a higher quality than is the case where the examiner is an employee of the agency? Applying the cost-benefit analysis suggested by the Court in Mathews v. Eldridge, a review of the materials reporting on central panels suggests the answer to this question is a qualified "yes."

When central panel legislation at the federal level was being debated in the early 1980s, the National Conference of Administrative Law Judges enlisted the aid of Senator Howell Heflin to introduce the first "ALJ Corps" bill. 160 The Conference also turned to E. Earl Thomas, Deputy Chief Judge of the United States Department of Labor, to synthesize several articles, studies and reports on the costs and benefits of creating a federal central panel of administrative law judges. The resulting monograph, published by the Judicial Administration Division of the American Bar Association in 1987, offers a useful perspective about the benefits and drawbacks of "judicializing" the administrative bench. 161

The impetus for change at the federal level was described in

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156. Id. at 13-14.
157. Id. at 14.
158. Id. at 83.
159. Id.
remarkably pedestrian terms. Businesses, review courts, and lawyers practicing before administrative tribunals at the federal level found them to be fundamentally unfair. One pro se litigant, frustrated in his attempt to defend himself against charges of Davis-Bacon Act violations made by the United States Department of Labor, put the question plainly: "How can I expect to win this case when the Department of Labor is my accuser, prosecutor and judge?" Judge Thomas reported on the public sentiment at the time:

In a recent editorial appearing in The Washington Post, one commentator wrote of how an agency "sets out rules for the . . . industry, enforces them, and then acts as judge in the enforcement actions to which it is a party." And, concluded this writer, "The most primitive concepts of fairness would be offended by such a stacking of the legal deck."

The federal central panel legislation continues to be studied, subjected to continued and fierce debate by its supporters and detractors. The debate, however, has not been quite so unproductive at the state level. By the time Judge Thomas completed his study in 1987, ten states had adopted the central panel system, with Missouri and North Carolina having joined those states already identified as relying on a central panel of ALJs. Sixteen more, including Ohio, were considering implementing central panel systems (Alabama, Arizona, Georgia, Illinois, Indiana, Maryland, Michigan, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Virginia, and Wyoming). By 1994 central panel systems were in place in 17 states, with Iowa, North Dakota, South Carolina, Texas, Virginia, Wisconsin and Wyoming joining the group. Georgia joined the movement later in 1994. In Judge Thomas's study, "[a]ll of the [ ] states report[ed] that their central panel systems save[d] both time and money." To date, not one of the states that moved to a central panel has repealed the implementing legislation. Furthermore, recent cost-benefit studies likewise point to the conclusion that the use of private

162. Id. at 5.
163. Id. at 8-9 (footnotes omitted).
165. THOMAS, supra note 161, at 10-11.
166. Id. at 11 n.38.
169. THOMAS, supra note 161, at 11.
170. Hoberg, supra note 167, at 78.
contract attorneys as hearing examiners, like the practice currently used on an ad hoc basis in Ohio, is much more expensive than offering the same or better administrative services through a central panel.\textsuperscript{171}

Although central panel structures vary from state to state, there are common elements. One recent survey described the central panel this way:

A central panel system is simply an independent administrative law judge (ALJ) corps in which a central office of administrative hearings employs a staff of ALJs and assigns them, upon the request of administrative agencies, to preside over agency proceedings that are within the jurisdiction of the central office. Agencies generally request the central panel ALJ services either because they are required to do so by law, or because the central panel has discretionary authority to preside over the proceedings of agencies not required to use its ALJs. In other words, an agency has discretion to use independent ALJs, but is not required to do so.\textsuperscript{172}

In the federal system, the Administrative Procedure Act established a corps of independent hearing officers, now referred to as ALJs, but placed these ALJs within each agency.\textsuperscript{173} The measure of independence attributed to these ALJs has been and continues to be a source of debate, with one writer observing that the lack of complete independence "has led to four basic problems: bias of ALJs, poor quality of decision making, inefficient administrative adjudication, and rulemaking through adjudication."\textsuperscript{174}

\textbf{B. Legislative Efforts in Ohio}

Legislation for a central panel system in Ohio was introduced by the Ohio General Assembly in 1994.\textsuperscript{175} The legislative proposal to create a central panel did not, however, proceed beyond committee review, in part

\textsuperscript{171} See Edwin L. Felter, Jr. 1994 National Association of Administrative Law Judges Fellowship Paper, \textit{Administrative Adjudication Total Quality Management: The Only Way to Reduce Costs and Delays Without Sacrificing Due Process}, 15 J. NAT'L ASS'N ADMIN. L. JUDGES 5, 58 (1995). It was an "extremely conservative" estimate that private attorneys serving the medical board as hearing examiners in Colorado would charge between $80 and $100 per hour, with the likelihood that the rate would be much higher. \textit{Id.} at 57. The analysis demonstrated that the state of Colorado would pay amounts exceeding $1 million to utilize private contracting attorneys, and in the process would "realize a loss of expertise, loss of interaction among judges and a loss of the efficiency of scale for delivering statewide adjudication services." \textit{Id.} at 58.

\textsuperscript{172} Hoberg, \textit{supra} note 167, at 76 (citing L. Harold Levinson, \textit{The Central Panel System: A Framework that Separates ALJs from Administrative Agencies}, 65 JUDICATURE 236 (1981)).


perhaps because of its inclusion in a wholesale initiative that would have drastically altered the OAPA with changes to rulemaking and judicial review in addition to changes in agency adjudication.\textsuperscript{176} The legislation, too, had adopted the less flexible (and perhaps less politically acceptable) approach that would have required agencies to use the central panel examiners, rather than making such an election discretionary with the agency.\textsuperscript{177} As frequently is the case with wholesale legislative initiatives, Ohio's efforts in this area in 1994 may have been too much, too soon.

Over time, however, empirical and anecdotal evidence suggests that the central panel approach, modified to permit agency choice in accepting or declining the services of an independent hearing examiner, offers a means for improving administrative adjudications in Ohio. Legislation that creates such a panel would have the potential of addressing and resolving concerns that the public mistrusts the purported independence of agency hearing examiners; it would also offer a cost-effective and more efficient means for delivering administrative adjudications in Ohio.

IV. COST-BENEFIT ANALYSIS IN THE 1990s

A comprehensive study of the central panel approach written by Allen Hoberg, Director of the North Dakota Office of Administrative Hearings, and published in 1994 by the American Bar Association and its Administrative Law Section, examined the costs and benefits associated with the use of central panels.\textsuperscript{178} Reasons given for moving to a central panel system included the general notion that the adjudicators in agency proceedings should have "a certain amount of independence from the agencies over whose proceedings they preside."\textsuperscript{179} Specifically mentioned within this notion were several categories of benefits:

Specific reasons for implementing a central panel system with independent ALJs, usually given by proponents, include the likelihood of fairness, in fact, the appearance of fairness, case management and workload efficiencies, cost efficiencies, decisional independence, protection of hearing officers, self-policing peer review, hearing officer professionalism and satisfaction, public confidence, different perspectives, and the elimination of ex parte contacts. Additionally, expectations for established central panel systems have included consolidation of a large number of disparate hearing units into a professional, well-managed agency; efficiency in implementing management systems for quality assurance (e.g., case

\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Hoberg, \textit{supra} note 167.
\textsuperscript{179} Id. at 76.
docketing, hearing scheduling, and cross-training); better ALJ performance evaluations; streamlined hearing process and uniform rules; reduction in the number of hearings; reduction of postponements; implementation of billing procedures to ensure that all agencies pay their fair share of hearing costs where budgets are based on reimbursement for user agencies; the ability to handle more cases with fewer judges; better performance than previous part-time hearing officers on complex cases; fostering timeliness in the decision making process, provision of a flexible resource base; maintenance of a fair process; use of only legally trained hearing officers who may be better able to deal with attorneys and complex hearings . . . ; location of ALJs under one roof; development of a code of professional ethics and performance standards for ALJs; upgrade of ALJ pay scales; and provision of some uniformity in decision formats.\textsuperscript{180}

In the review of existing central panel systems, Hoberg studied the structures of the various state systems, noting in particular the experiences in Maryland, North Dakota, and Texas.\textsuperscript{181} He also considered the structure suggested by the 1981 Model State Administrative Procedure Act, which “provides for establishing a central panel system.”\textsuperscript{182} In reviewing the experiences of California, Maryland, Massachusetts, New Jersey, Tennessee, Wisconsin, Washington, Minnesota, Colorado, North Carolina, North Dakota, Florida, Iowa, Missouri, Virginia, and Texas, Hoberg reported that the “general consensus” is that the “central panel systems have worked well in the[se] states.”\textsuperscript{183}

The success of such systems may turn in part upon the diversity of the structures: not all states require all agencies to participate, and some systems are quite limited in their jurisdiction. Of all the states, for example, “Maryland . . . may have the broadest jurisdiction . . . of any central panel . . . state.”\textsuperscript{184} Established in 1989, by 1991 the Office of Administrative Hearings employed seventy-two ALJs, scheduled over 76,000 hearings, and was a leader in developing internal organizational tools for its ALJs.\textsuperscript{185} The chief administrative law judge is empowered “to establish qualifications for ALJs; establish classifications for case assignment on the basis of subject matter, expertise, and case complexity; establish and implement standard and specialized training programs; provide materials for ALJs” and ensure the continuing education of ALJs; “develop model rules of procedure and other

\hspace{1cm} \textsuperscript{180} Id. at 76-77 (footnotes omitted).
\hspace{1cm} \textsuperscript{181} Id. at 76.
\hspace{1cm} \textsuperscript{182} Id. at 77-78 (footnote omitted); see MODEL STATE ADMIN. PROC. ACT §§ 4-202(a), 4-301, 15 U.L.A. 75-76, 98-99 (1990).
\hspace{1cm} \textsuperscript{183} Hoberg, supra note 167, at 78.
\hspace{1cm} \textsuperscript{184} Id. at 83.
\hspace{1cm} \textsuperscript{185} Id.
guidelines for administrative hearings; [and] develop a code of professional conduct for [the] ALJs. . . .”

On a much smaller scale, Massachusetts created an Administrative Law Appeals Division, with jurisdiction only over the actions of “the Contributory Retirement Appeal Board, the Board of Registration in Medicine, the Division of Capital Planning and Operations, the Office of Veteran’s Services, and to other state agencies that request the [Division] to conduct adjudicatory hearings.” New Jersey’s panel “extends to nineteen principal departments,” whereas in Minnesota, its central panel extends to “nearly all state agencies, except for unemployment compensation and welfare eligibility matters.”

From his review of the existing panel options, Hoberg noted four by-products of the evolution towards a central panel structure. First, he found that “the establishment of central panel systems” [were] just . . . part of recent developments in administrative law. Growth of central panels will be tempered by opposition from attorneys, agency heads, and incumbent ALJs, and “[e]ven in states in which a central panel system has already been established, turf battles continue, usually [during] each legislative session, over expansion of the central panel’s jurisdiction.” Hoberg noted that closely associated with these developments, at least in some jurisdictions (notably California, Maryland and North Dakota), was the creation of an administrative law revision commission that would consider the need for further change to regulatory adjudications.

Second, and along these lines, some central panel jurisdictions have established advisory councils whose duties include examining or drafting uniform administrative rules, creating ethical standards for hearing officers, and proposing minimum standards and qualifications for hearing officers. Without a central panel structure, each agency tends to have its own set of adjudication rules, or no rules at all, and the adoption of a central panel tends to lead to state-wide uniformity in how administrative adjudications are handled.

Third, Hoberg suggests that one by-product of a move towards central

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186. Id.
187. Id. at 78.
188. Id.
189. Id. at 79.
190. Id. at 89-92.
191. Id. at 89.
192. Id. at 93.
193. Id. at 90.
194. Id. at 90-91.
195. Id. at 91.
panels is the establishment of a uniform code of judicial conduct for central panel ALJs.\(^\text{196}\) The enabling legislation in both Maryland and New Jersey, for example, directed the chief administrative judges to establish uniform standards for the conduct of ALJs, something that is notably absent in Ohio.\(^\text{197}\)

The final by-product of the movement towards central panels is the continued refinement and acceptance of such panels in other jurisdictions.\(^\text{198}\) There is now a much broader base of experience in the use of adjudicators whose mission is the same as that of traditional agency hearing examiners but who lack the economic and political ties to the agency they serve.\(^\text{199}\) The independence afforded to a hearing examiner through a central panel appears to have led to improvements beyond just the appearance of fairness: there is a trend towards uniformity of process and cost-effectiveness that is achieved only through separating the hearing examiner from the agency.\(^\text{200}\)

The by-products described by Hoberg could inure to the benefit of Ohio if central panel legislation were to be enacted. Under the present form of OAPA, agencies whose board members prefer not to hear cases themselves have no choice but to self-select their hearing examiners. By electing to use in-house staff or contract hearing examiner-attorneys, the regulator cannot escape the appearance that it is relying on the analysis of a biased judge. This appearance may not be well-founded, and in fact it may be only the very rare exception that a hearing examiner bears any bias in favor of the agency that employs him or her. Just the same, Americans familiar with even the base rudiments of due process are sophisticated enough to demand a greater measure of independence from agency adjudicators.

V. A PROPOSAL TO CREATE A CENTRAL PANEL FOR OHIO’S ADMINISTRATIVE AGENCIES

As noted above, legislation proposing a mandatory central panel system was proposed in the 1994 Ohio legislative session. As introduced, H.B. 673 would have enacted the version of the Model State Administrative Procedure Act of 1981 in which a central panel of hearing officers would be created and agencies would be required to use these officers unless expressly exempted. The agency would still be able to preside over hearings by

\(^{196}\) Id.
\(^{197}\) Id. at 91-92.
\(^{198}\) Id. at 92.
\(^{199}\) Id.
\(^{200}\) Id. at 76-77.
having the state agency head or one or more members of the state agency hear the matter, but if a hearing officer was used, the officer would need to be one appointed by the Office of Administrative Hearings. 201 Unfortunately, the legislation also sought to implement changes in the rulemaking process, altering the manner in which the General Assembly conducts its formal oversight of the legislative functions of agencies. 202 These changes, and others affecting fundamental role of government agencies (like the availability of declaratory relief at the agency level) brought the legislative measure to a standstill after it was introduced, and it is unrealistic to suggest the entire Model Act would find favor in Ohio, now or in the foreseeable future.

Instead of pursuing the entire agenda of the Model Act, it would appear prudent to address the one core change that might reasonably and over time lead gradually to more constructive change in the administrative system. That change would be the creation of an office of administrative hearings that is possessed only of limited jurisdiction, but is available to other agencies on an as-needed and as-wanted basis. Performance data is now available from several jurisdictions that have implemented central panel systems, and much of that data can be used to predict the effect of creating a central panel alternative in Ohio. For example, many agencies currently hire contract attorneys to serve as hearing examiners. Other than self-imposed limits incumbent with the prudent administration of their respective offices, state agencies are not limited in how they compensate their hearing examiners, so it is hazardous to attempt to define any absolute cost savings that could flow from moving from the use of contract hearing examiners. Economics in Ohio are such that it would not be unusual to find contracted attorney hearing examiners who are paid ninety-five dollars per hour or more, as market conditions permit. Even with the cost of associated fringe benefits considered, the rate paid to private attorneys is likely to exceed substantially that which would be paid to full-time civil servants at approximately the Attorney V level in civil service steps under the current state civil service pay scheme.

A current survey of agencies identifies over three hundred independent boards, commissions and agencies are operating in Ohio, most of which have adjudicative authority under the OAPA. 203 It stands to reason that the executive branch could more effectively control the costs associated with agency hearings if there was some measure of uniformity in the selection and training of attorneys who serve as administrative hearing officers under

202. See id. (Proposed New Section 183.41-183-69).
203. See 1996-97 OALH & AD, supra note 7, at 143-57.
the OAPA. The central panel structure would allow the executive branch
to capture the economies of scale and regulate the compensation of hearing
examiners, while improving the appearance of fairness. The trade-off, of
course, is that the adjudicative process becomes more judge-like, and agency
control over the adjudicative process diminishes.

It may be that one of the better models available for consideration by
lawmakers in Ohio is one established by Texas in 1991.204 Texas started
small, requiring the use of central panel hearing examiners only when the
agency "does not employ a person whose only duty is to preside as a
hearing officer over matters related to contested cases before the
agency."205 Smaller agencies in Texas, like those in Ohio, typically
relied on contracted attorneys from outside of government for hearing
examiner service.206 The private interests of these parties brought pressure
to resist the central panel approach, so that one year after the panel was to
begin there were still only six ALJs.207 Over time, however, the central
panel has won the support of larger state agencies, such as the Texas
Secretary of State and the Texas Department of Transportation.208

According to recent reports issued by the Texas Office of
Administrative Hearings (OAH), agencies that were not required to use the
independent hearing examiners sought out the examiners.209 In 1992, the
OAH commenced hearing cases for the Alcoholic Beverage Commission,
and in the next two years added the Department of Insurance, drivers'
license hearings for the administrative license revocation program, and the
Texas Lottery Commission.210 More recently, the office has assumed
responsibility for hearing contested cases for the Public Utility Commission
of Texas, the Texas Natural Resources Conservation Commission, the Texas
Department of Agriculture, and contested cases before the Texas Workers
Compensation Commission.211 Although centralized in administration, the
hearing examiners themselves are intentionally decentrally located, with

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are now located at TEX. GOV'T CODE ANN. §§ 2003.021-.046 (West 1997).
205. Hoberg, supra note 167, at 87-88 & n.96 (quoting TEX. REV. CIV. STAT. ANN. art. 6252-13f
§ 2(b) (West Supp. 1993)).
206. Id. at 88.
207. Id. at 87-88.
208. Id.
<http://www.soah.state.tx.us/Backgrnd/bkgndidx.html>.
210. Id.
211. Id.
offices in 12 Texas cities. This approach has the benefit of allowing the system to develop over time and only upon proof that it is a cost-effective means for serving the administrative entity.

According to Hoberg, even agencies that had been opposed to the central panel system find that they need independent hearing officers, if only occasionally. Turf battles aside, the central panel option on an agency-by-agency basis allows individual agencies the chance to explore alternatives to hiring full-time employees or contract attorneys to perform agency adjudications.

VI. CONCLUSION

Ohio taxpayers and Ohio’s administrative agencies share a common interest in ensuring that all who come before regulatory bodies will have a fair hearing before a fair forum. The Ohio Administrative Procedure Act has proved to be a flexible and useful tool for balancing the interests of efficient and effective government regulation with the interest of individual autonomy and liberty. In one respect, however, an improvement may be warranted. Due process notions of fairness include the concept that a judicial forum such as that called for under the OAPA be free from bias, and even the appearance of bias.

The presence of a wall insulating the hearing examiner from the agency is not a constitutional mandate, but it offers a substantial benefit in assuring the public that indeed each litigant appearing before an agency tribunal will be fairly heard. In addition, cost-benefit analyses, including studies conducted in other state administrative jurisdictions, suggest that a material savings in limited state administrative resources is possible with a properly structured central panel of hearing examiners. Legislation to be introduced in Ohio, amending earlier legislative proposals and limited to creating a central panel of hearing examiners, makes sense and should be given careful consideration by the General Assembly in the coming legislative session.

212. Id.
213. Id.
214. Hoberg, supra note 167, at 89.
215. Id.