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The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change

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THE MODEL ACT CREATING A STATE CENTRAL HEARING AGENCY: PROMISES, PRACTICAL PROBLEMS, AND A PROPOSAL FOR CHANGE

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* Administrative Hearing Examiner, State of Ohio. The author acknowledges the substantial assistance provided to him by his friend and colleague, Maryland Chief Administrative Law Judge John W. Hardwicke, in developing the thesis central to this article and for his contribution of the data presented as the Appendix to his Article, which is also in this Issue. The views expressed herein are, however, those of the author alone, and while others may share these views and have the author’s permission to take credit for those views, the reader is cautioned against concluding that these are the views of any governmental entity, in Ohio or elsewhere.

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INTRODUCTION AND PREMISES

When the American Bar Association (ABA) adopted the Model Act Creating a State Central Hearing Agency (Model Act),1 it advanced the proposition that to be effective, administrative adjudications must inspire in participants a sense of fairness, and specifically, that those who appear before agency fact-finders will be heard by an unbiased executive adjudicator. The Model Act is founded on the premise that participants will have greater confidence in the administrative process if the adjudicator is structurally removed from the agency, freed from the risk of ex parte influence and bias in favor of the agency and against the respondent. Through its skeletal structures, the Model Act provides the states with a blueprint for legislation that would create a free-standing entity. Specifically, it would operate independently of any particular agency, but would be nonetheless an organ of the executive branch, in recognition of the fact that although the administrative law judge (ALJ) employs the tools of the judiciary, his or her duties are not judicial but are executive in nature. The Model Act constructs a means by which tools traditionally used by the judicial branch may be adopted by those in the executive branch entrusted with the task of making factual determinations based upon an evidentiary record and applying those facts to established law. The public’s interest would thus be served by creating a safeguard against overreaching by the executive agency, a safeguard maintained by a well-trained cadre of adjudicators whose task it would be to execute governmental policy through the adversarial adjudicative process.

The promise of the Model Act is being realized in states and cities at a rate that should lend credence to the theories supporting the Model Act; more

than one-half of the states have adopted some form of the central panel. Most of these preceded the adoption of the Model Act, and the experiences of those states provided guidance to the lawyers, judges, academics, and others who helped fashion the outline of the Model Act. Other states are giving serious study to creating a central hearing agency, and most will likely consult the Model Act in the course of such study. Legislators and executive governmental officers nationwide have amassed a wealth of information about the strengths and weaknesses of the Model Act in its model form in the years since California first implemented a central panel in 1946 and since the ABA adopted the Model Act. Consequently, much can be drawn from the experiences of states that have implemented a central hearing agency in one of its many variations. As with most innovations, the Model Act has weaknesses, which only time, effort, and experience will lay bare. In addition, the experiences of states having experimented with central hearing agencies have exposed the need for the crafting of very significant enhancements of the skeletal structure. Specifically, there is a need for muscle and tendon to support the skeleton of the Model Act, if the Act’s central promise is to be realized.

The purpose of this Article is three-fold. First, it reports on what we have learned about the process of creating a state central hearing agency: about what structures have been tried and, in some cases, abandoned; about known shortcomings of the Model Act; and about the progress being made in addressing these shortcomings. Second, it explores the constitutional and statutory policies that should guide those who would create or improve existing central hearing agencies. In this exploration, it discusses the role of the executive adjudicator in implementing policy through the act of adjudication, the limits of what some have called the judicial independence of administrative adjudicators, and it considers how those who serve as ALJs and their superiors in a central panel view their respective roles. The Article then explores the need for statutory structures designed to ensure the separation of executive and judicial functions in the creation and maintenance of central hearing agencies. Third, drawing from the experiences of states now familiar with the process of creating central hearing agencies, it offers suggestions for providing by statute and rule the sinew needed to supplement the Model Act’s skeleton, so that the public trust and confidence in the central hearing structure is established and strengthened.

These suggestions form the basis of proposals now being considered by the National Association of Administrative Law Judges (NAALJ), the National Conference of Administrative Law Judges (NCALJ), and other national professional associations having a deep commitment to providing all who appear before executive adjudicators a fair hearing before a fair tribunal.
In publishing this Article, the author hopes to facilitate further national discussion about the role of the executive adjudicator, the effectiveness of the Model Act, and, ultimately, the adoption of standards by which states may create statutory supports for the central hearing agency expressly designed to ensure public trust and confidence in the administrative adjudication process.

I. THE EVOLUTION OF THE CENTRAL HEARING AGENCY

Among the tasks assigned to administrative agencies is the duty to resolve controversies attendant to the many roles delegated to the agency. In the execution of its duties, the administrative agency must have the means to resolve factual controversies involving constitutionally protected rights, privileges, or entitlements. Typically, the evidentiary hearing needed to resolve such controversies will be the penultimate step before the agency makes a final, appealable decision and the controversy leaves the executive branch of government. Once the hearing is concluded and the adjudicator issues her or his report, the controverted issues will be subject only to a limited opportunity for litigants to file objections as the step in between the rendering of the hearing officer’s report and the final agency order. In other cases, the decision of the executive adjudicator is the final step before the controversy leaves the executive branch. Given these premises, some discussion about the evolution of the executive adjudication process may be warranted, if for no reason other than to learn what we can about what works and what does not work in executive adjudications.

We know that legislatures grant certain lawmaking roles to the executive branch because doing so provides for an efficient means by which policy can be implemented. It also permits some measure of insulation behind which legislators may conceal their collective uncertainty about how any given law will be implemented. As McNeillagast noted:

Delegation of policy-making authority to administrative agencies is potentially attractive to elected officials. Doing so enables them to write simpler statutes, allows the details of policy to adjust to new knowledge and changed circumstances, and creates an expert body that can provide useful information about the needs for changes in either legislation or appropriations.

Central panels facilitate the policy-making functions of agencies, not by making policy for the agency, but by establishing standards for constituent agencies to use when providing a forum to those affected by the policies.

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2. "McNeillagast" is an acronym for Mathew McCubbins, Roger Noll, and Barry Weingast.

They establish formal requirements applicable to the agency and the respondent alike, not as a means of making substantive policy decisions for the agencies, but rather, as a means for establishing a level playing field between the agency and the respondent as policy-driven issues are litigated. The promise of a central panel is that the forum for litigating these policy-driven issues will be fair in both appearance and reality.

A. Defining the Central Panel

The central panel concept is relatively straightforward: agencies responsible for carrying out regulatory or licensing schemes must, from time to time, extend an opportunity to be heard to persons or entities affected by the schemes. Typically, the interests involve granting, modifying, or terminating governmental benefits, providing access to governmental services, publicly issued licenses, governmental contracts, assessment of taxes, and institutional decisions like those involved in parole or probation.\(^4\) Not all executive branch decisions warrant a hearing; to be entitled to an administrative hearing under the Due Process Clause, “a person must be deprived by government of ‘liberty’ or ‘property.’”\(^5\)

The diversity of matters to be resolved through the administrative process gives rise to the need to have a similarly diverse scheme for conducting hearings, but there are some constitutional minimums: the party affected by the governmental action must have “timely and adequate notice detailing the reasons” for the action and must have “an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.”\(^6\) Stated more broadly, “[t]he fundamental requisite of due process of law is the opportunity to be heard.”\(^7\) The hearing must be “at a meaningful time and in a meaningful manner.”\(^8\) There is no across the board formula for such a hearing; the Due Process Clause requires that the hearing be “appropriate to the nature of the case.”\(^9\) The hearing “need not be elaborate”\(^10\) nor be conducted by an independent decisionmaker,\(^11\) and the

\(^4\) See Michael Asimow et al., State and Federal Administrative Law § 2.0 (2d ed. 1998) (noting when governmental agencies must provide opportunity to be heard).
\(^5\) Id. § 2.2.
\(^7\) Id. at 267 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).
\(^8\) Id. (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
decisionmaker does not need to be an attorney. The "essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement."  

B. Impartiality vs. Independence of the Executive Adjudicator

Due process "demands impartiality on the part of those who function in judicial or quasi-judicial capacities," and in the central panel, the person serving in that function is the administrative law judge, hearing examiner, or hearing officer appointed, not by the agency-litigant, but instead by the chief officer (referred to here as the Chief ALJ) of the free-standing central panel. As described in 1981 by Malcolm Rich in one of a series of articles on the central panel movement as it then existed:

This office assigns ALJs to state agencies on their request to conduct administrative hearings. Among other goals, this process aims to promote more objective and efficient adjudication by separating ALJs from the agencies they serve. Thus, ALJs can serve more than one agency without being employed by any one of them.

The ALJ exercises such authority as has been delegated by the legislature to the agency involved in the litigation, as well as the authority delegated by the legislature to the central panel or office of administrative hearings.

There is, of course, a cost associated with delegation whether from the legislative branch to the agency or from the agency to the central panel. In the case of delegation from the legislative branch to the executive branch and then to the agency, the cost is rendered in the loss of legislative oversight in the interpretation and application of policy. With delegation from the agency to the central hearing office, the cost is the ability to retain control over the process by which adjudications are carried out. Whether such costs are reasonable depends, in part, on the state of administrative adjudications without a central panel. An honest evaluation of the status quo without a central panel may likely produce the recognition that procedures vary so dramatically from agency to agency as to leave the bar and the general public wholly without useful guidance as to the manner by which agency matters are litigated. Scattered and obscure rules and inconsistent procedures in

12. See id. at 199 (requiring only "thorough knowledge" (citations omitted)).
force within state agencies and among different state departments create a substantial drag on the process of resolving regulatory disputes.

II. CHALLENGING THE STATUS QUO: DEVELOPMENT OF THE CENTRAL HEARING AGENCY AND THE QUEST FOR UNIFORMITY

Prior to the effort by members of the ABA to address the problems associated with the multiplicity of administrative procedural formats, there were no clear protocols by which legislatures might craft a more efficient, predictable, and fair adjudicative process. In a 1972 study commissioned by the Administrative Conference of the United States (ACUS), the reporter surveyed regulatory statutes and concluded that the statutes were “almost unbelievably chaotic” and efforts to give effect to greater due process rights arose only on a “totally ad hoc fashion.”\textsuperscript{16} Although focused on the rulemaking functions of agencies, the 1972 ACUS study offered conclusions extending to administrative adjudication procedures as well. The reporter observed:

This trend, which shows no sign of abating, has contributed to what former Chairman of the Conference Antonin Scalia referred to as the “balkanization” of administrative procedure. One court, dismayed by the variety of statutory provisions, complained, that “[o]ne would almost think there has been a conscious effort never to use the same phraseology twice.”\textsuperscript{17}

From this the reporter concludes that there has been an unacceptably high cost associated with decentralization of the administrative process and offers a constructive challenge that is as relevant today as it was during the forty-year retrospective of the Administrative Procedure Act (APA) in 1986: “A focus on APA reform is not premised on blind preference for tradition, but on a belief in the value of uniformity in administrative law and procedure. Indeed, the principle that administrative procedures should be uniform was the bedrock of the APA.”\textsuperscript{18} Urging that legislators recognize the danger of disparate administrative procedures within the executive branch, the reporter offered Judge Scalia’s observation that:

“While absolute standardization, of course, is not desirable, the basic principle of a uniform administrative practice, with only such variations as operational differences justify, serves several important values. It is indispensable to the retention of an


\textsuperscript{17} \textit{Id.} at 344 (citing Admin. Conf. of the U.S., 1972–73 Report, 2 (1973); Assoc. Indus. of N.Y. State v. United States Dep't of Labor, 487 F.2d 342, 345 n.2 (2d Cir. 1973)).

\textsuperscript{18} \textit{Id.}
administrative system that can be fathomed by the general public and penetrated by lawyers who are not specialists in narrow fields of Federal practice. It is helpful to the courts in their review of agency action, facilitating the development of overall principles of judicial review and enabling the creation of a body of case law that can serve as precedent in more than one limited field. Finally, and perhaps most important, an allegiance to a standard body of procedural principles such as that contained within the APA has great advantages in the legislative process. The procedural provisions of major substantive legislation are understandably not the portions to which the Congress devotes its closest attention; and the comments it receives from both the agencies and the private sector are inclined to dwell upon the extent, rather than the manner, of the regulation that is to be imposed. It is generally desirable, then, for the Congress to adhere to the judgments it made when procedure itself was the center of its attention rather than merely the incidental accompaniment of a substantial program under examination. Those judgments are likely to be significantly more sound than the random procedural innovations which may slip by with each new piece of substantive legislation.”

A. Applying the Flexible Due Process Standard of Mathews v. Eldridge

The goals of maintaining public trust and confidence in the administrative adjudicative process; aiding courts in the review of agency adjudications; and compensating for the tendency towards legislative programs that fail to give due thought to the procedural niceties of agency adjudication resonate all the more so today. The goals draw shape and substance from decisions of the Court during the “due process revolution” marked by Goldberg v. Kelly, which set forth procedural requirements to be met in the context of revocation of government benefits. As Professor Verkuil notes in his 1992 reflection upon the state of the administrative judiciary, however, the process to which litigants are entitled in agency actions has by no means been elevated to that typically associated with the process afforded in civil or criminal trial proceedings. He describes the series of cases subsequent to Goldberg by which the Court held an executive adjudicator could simultaneously represent a benefits claimant, the government, and the impartial decider. The Court also approved what Professor Verkuil called the “low threshold for deciding independence outside the APA formal hearing

19. Id. at 344–45 (quoting Letter from Antonin Scalia, Chair, Admin. Conf. of the U.S., to Congressman John Dingell (May 23, 1974)).


22. See id. at 1349 n.32 (citing Richardson v. Perales, 402 U.S. 389, 410 (1971)) (“The three hat role was necessitated by the fact that in those days there were few attorneys for claimants and none representing the government. Obviously had the formal hearing requirements of the APA been mandatory, the separation of functions requirement would have forbidden the ALJ to assume total control of the process.”).
context.\textsuperscript{23} Further, the Court "encouraged experimentation with creative decision techniques that question the need for any type of government deciders, not only ALJs."\textsuperscript{24} Given the Court's acceptance of administrative adjudications by means of a lower level of protections, there is a need to examine the "flexible" interests to be balanced under \textit{Mathews v. Eldridge}.\textsuperscript{25} The forum must be created by taking into account three important factors: (1) the "private interest that will be affected by the official action;" (2) 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 (3) the "[g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."\textsuperscript{26}

\textbf{B. Testing the Premises of the Central Hearing Agency}

\textit{1. California's Central Panel and its Offspring}

An examination of the wide diversity of central panel schemes implemented by state and local governments between 1946 and 1997 suggests legislatures have indeed been engaging in the kind of balancing prescribed in \textit{Mathews}. The year 1997 is noteworthy because in that year the House of Delegates of the ABA unanimously adopted the Model Act.\textsuperscript{27} Long before the adoption of the Model Act, however, states had seized upon the notions supporting a central panel and many had fledgling programs, created without the benefit of a model of any kind. By the 1990s, central panels had sprouted throughout the country, each mindful of the need to measure costs and benefits associated with executive adjudications.

\textsuperscript{23} \textit{id. at 1349}. See \textit{Arnett v. Kennedy}, 416 U.S. 134, 163–64 (1974) (allowing government employee to be disciplined by his own superior for making statements against superior).

\textsuperscript{24} \textit{Verkuil, supra note 21, at 1350}. See also \textit{Schweiker v. McClure}, 456 U.S. 188, 197 n.11 (1982) (disputing claims of bias).

\textsuperscript{25} 424 U.S. 319, 334 (1976). See Christopher B. McNeil, \textit{Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative Central Panel}, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 32–33 (1998) ("It should come as no surprise that the agency adjudicative forum does not require a wholly independent adjudicator. Absent any state statutory or constitutional provision giving greater protection than the federal constitution, the independence required of agency adjudicators under the federal constitution flows first and foremost from the due process clause . . . [which] requires only that there be a balancing of the individual's interest in fair and accurate results against the governmental interest in efficient and expedient decision making[.]").

\textsuperscript{26} \textit{Mathews}, 424 U.S. at 335.

\textsuperscript{27} \textit{MODEL ACT, supra note 1}. 

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In his assessment of California’s Administrative Procedure Act in 1992, Professor Michael Asimow described the prescient approach California took when it created the nation’s first central panel. Enacted in the year preceding the enactment of the federal APA, California’s central panel was part of the state’s APA of 1945 and has matured to where it now provides a uniform procedural structure for adjudications in approximately sixty-five named agencies. It shares with most if not all other state APAs the characteristic that it does not provide the only means by which agencies conduct hearings; many state agencies in California are exempt from its operations, and as of 1992, central panel adjudicators heard only about five percent of all agency adjudications statewide. Professor Asimow expressed his reservations, however, about attributing too much to the central panel. He noted the main impetus for extending the reach of existing central panels is the improvement of the public’s trust in the process of administrative adjudication:

The main argument in favor of expanding the central panel is based on the criterion of acceptability. There is an appearance of bias when a judge works for the agency that makes the ultimate decision. That judge may well be imbued with the agency’s culture and his or her career path may theoretically be affected by a decision that the agency heads or senior staff dislike. Lay people understand the model of the criminal court judge who is totally independent of the district attorney. They would no doubt like to see this model applied in administrative law as well.

He questioned, however, whether gains in public acceptance have been as substantial as proponents of the central panel might urge.

If the case were heard by generalist judge, the staff would have to present the case in nontechnical terms and spell out difficult concepts. As a result, the process might be demystified to the benefit of interested members of the public and regulated parties. This argument illustrates nicely the conflict between acceptability and efficiency—while the public might find such hearings more accessible, the extra costs and delays inherent in educating the generalist judge could be quite substantial. On the whole, I find the argument based on acceptability quite weak in the unique context of California, where a central panel already exists. Very few of the agencies that employ in-house judges combine the functions of prosecution and adjudication; these agencies are already independent of the contending parties. Moving their judges to a corps would simply add a second layer of independence. In my interviewing, I found practitioners strongly in favor of independent judges only in the case of the State Personnel Board, and not in other agencies that employ in-house judges. This

30. See Asimow, supra note 28, at 1072 (citations omitted).
31. See id. at 1073.
32. Id. at 1183–84.
sentiment suggests that the pressure for an independent corps comes largely, although not entirely, from the judges themselves (both OAH and non-OAH judges) who perceive that they might benefit from such a change in terms of status, prestige, and perhaps compensation.\textsuperscript{33}

In a footnote on this point, Professor Asimow added a practical consideration not often raised, which might explain part of the appeal of moving to a central panel, at least among ALJs themselves; generally, incumbent administrative law judges fall into a number of different salary classifications. If they were merged into the central panel, it is likely that many would be upgraded in terms of compensation.\textsuperscript{34}

It bears noting that in 1995, California enacted a new APA, which included a "bill of rights" for participants in administrative hearings, including the right to notice and an opportunity to be heard, a prohibition against ex parte contacts with decisionmakers, a mandatory separation of functions between prosecutors and adjudicators, the requirement of a statement of findings and reasons, a limit on the ability of agency heads to overturn the credibility determinations of ALJs, and the development of penalty guidelines for use by professional licensing agencies.\textsuperscript{35} This was done without substantial change to the status quo of California's central panel system.

2. \textit{Florida's Experience: The Office of Administrative Hearings}

On the opposite coast, Florida has had a central panel since 1974, called the Division of Administrative Hearings (DOAH) and modeled after the California central panel.\textsuperscript{36} According to a recent survey, the Florida DOAH hears cases for all state agencies, school boards, some special districts, and some local agencies.\textsuperscript{37} Professor Levinson, in his reflections on the Florida experience in 1991, noted his concern that among the duties of the hearing officers of the DOAH is the role involving rule review.

The Florida system of rule review by DOAH is unique. I do not criticize the system on that account, because I have always admired the spirit of innovation in this state. I cannot help noticing, however, that other states have seen no need to adopt similar

\begin{footnotes}
\footnote{33}{\textit{Id.} at 1185.}
\footnote{34}{See \textit{id.} at 1185 n.401.}
\footnote{35}{See \textit{Cal. Gov't Code} § 11,425.10 (listing governing procedures for administrative adjudication).}
\footnote{36}{See L. Harold Levinson, \textit{The Florida Administrative Procedure Act After 15 Years}, 18 FLA. ST. U. L. REV. 749, 753 (1991) (discussing adaptation of a central panel in Florida) (footnotes omitted).}
\footnote{37}{See John W. Hardwicke, \textit{The Central Panel Movement: A Work in Progress}, 53 ADMIN. L. REV. 419 app. at 441 (2001) [hereinafter \textit{Central Panel Chart}] (Judge Hardwicke's article preceeds this one in this symposium).}
\end{footnotes}
systems. Apparently, legislators in other states are satisfied that their systems of legislative or executive oversight and judicial review provide adequate controls over agency rulemaking.  

Thus, the hearing officer in Florida may be in the somewhat unique (and probably uncomfortable) position of presiding over a hearing in which a respondent has been charged with violating a rule, the substance of which had been presented to the hearing officer in the rulemaking phase.

It is also worth noting, apart from the rulemaking role played by hearing officers in Florida, that reliance upon such hearing officers for all types of adjudications is substantially less now than it was in 1989. When Professor Levinson presented his assessment of the central panel in 1989, he reported that the hearing officers handled just over 7,000 cases.  

When surveyed in 1992, the thirty hearing officers in Florida handled 5,000 cases. That number dropped to 3,310 when a poll of the nation’s central panel administrative directors was taken in 2000.

C. Developing a Model for a State Central Hearing Agency

Florida and California are two of seven states whose central panels predated the substantial revision of the Model State Administrative Procedure Act (Model APA) concluded in 1981. Other states include Massachusetts (1974), Tennessee (1974), Colorado (1976), Minnesota (1976), and New Jersey (1979), each of which were studied in Malcolm Rich’s 1981 survey, upon which a substantial effort was made through the organized bar to recommend a template for creating central panels. This effort would continue, however, without success, for the next decade. By 1996, these seven states would be joined by Iowa, Louisiana, Maine, Maryland, Missouri, North Carolina, North Dakota, South Carolina, Texas, Washington, and Wyoming—states whose approaches to providing hearing examiner services were as diverse as the states themselves. As one well-informed observer wrote, the 1981 issue of Judicature, in which Malcolm Rich’s article had been published, was “the best collection of articles for state

38. Levinson, supra note 36, at 759 (citations omitted).
39. See id. (citations omitted).
41. See Central Panel Chart, supra note 37.
43. See Rich, supra note 15, at 249 (summarizing key features of each central panel).
44. See Central Panel Chart, supra note 37 (reporting that Missouri’s central planning began in 1965; it was not, however, included in the American Judicature Society study).
bar associations and legislative committees to use in developing new central hearing agencies in the 1980s."

The promise of such a collection went unfulfilled, however, as these later states cut diverse and inconsistent paths through this wilderness throughout the first half of the 1990s. As Judge Schoenbaum aptly put it, the result was "almost a complete lack of uniformity in the legislative enactments" that implemented central hearing agencies between 1981 and 1995.

The evolution of the central panel, described by Malcolm Rich in 1981 and later by Chief ALJ Gerald E. Ruth in his 1996 study urging a central panel for the Commonwealth of Pennsylvania, is one marked by decidedly different interpretations of the means and ends to be served by the administrative judiciary. Judge Ruth identified six ends to be served by moving to a central panel:

First, a centralized system will guarantee, and be perceived by the public as guaranteeing, the impartiality of ALJs as fact-finders. Second, this system will improve the quality of hearings and decisions. Third, such a scheme will place the management and training of all ALJs in the hands of experienced officials whose understanding and appreciation of the duties and responsibilities of the office come from their actual performance of such duties and responsibilities. Fourth, many in-house staff and part-time outside personnel will no longer be required. Fifth, a reduction of overall costs will be realized. Sixth, an experienced, government-wide, politically insulated, career service would attract quality individuals.

Similarly, in arguing for the creation of a corps of ALJs for the Social Security Administration, ALJ Joseph J. Simeone wrote:

[L]egislation's foremost value lies in the removal of the present system of such judges being associated with a particular agency and subject to its supervision, and the possibility of control. A unified corps by which judges are assigned to particular cases instead of being assigned by the particular department or agency would have the beneficent effect of removing the incongruous status and the public perception that such judges have an agency bias in favor of their controlling authority.

Second, a unified corps would be much more efficient than the present system. Under the present system, the management of administrative judges are assigned to and divided among numerous agencies so that some are overloaded and overworked while others are not so busy. The establishment of a unified corps would enable the administrative law judges to dispose of cases more uniformly.

46. Id.
47. See Ruth, supra note 40.
48. Id. at 321 (citations omitted).
As Judge Ruth discovered, however, the manner in which the several states pursued these goals was far from uniform. Each state had to consider how best to separate the adjudicative function of the executive branch from the prosecutory functions that originate in the executive branch, as well as from the delegated legislative functions performed by the executive branch through the administrative process. The manner in which cases would be assigned needed to be addressed, as well as the selection, duties and powers of the Chief ALJ. No doubt much of the diversity among the states results from the reaction of agencies when confronted with a proposal to implement a central panel. In the absence of a central panel, most agencies are at liberty to hire their own ALJs, many of whom then become employees of the agency, subject to supervision and tenure by the agencies they serve. This arguably enables the agency to groom its ALJs for the job. The ALJ has or gains the experience needed to resolve complex administrative issues and better appreciates the mandate of the agency and the need to interpret the rule of law in a manner that is consistent with agency policy. The promise of a central panel—that of an unbiased ALJ, insulated from agency control—has been viewed as a threat to the ability of the agency to accomplish its delegated executive authority. As Malcolm Rich observed when describing seven of the nations first central panels in 1981:

Proponents of the [central panel] legislation saw separating ALJs from agencies as a way to improve the administration of justice and to enhance the job status of ALJs. Agency personnel saw the same legislation as an attempt to reduce the effectiveness of the process and restrict the agencies' ability to take action toward solving social problems. . . .

[This] conflict between law and administrative authority had an impact on personal interests that resulted in fierce agency opposition during both the legislative debates and the changeover period.50

Where agency leaders were described as "very angry and upset" or charged with "a large amount of animosity,"51 the ALJs were generally receptive to the change. "The main attractions included an increased variety of cases, independence and somewhat higher pay than they would receive as non-central panel ALJs."52 One negative outcome, however, was the experience in Minnesota, where Rich reports that "for two years animosity between Minnesota hearing officers and their former agencies resulted in what was described as cheap shots being taken by the ALJs—pointed comments directed against agency officials within ALJ decisions."53

51. Id. at 249–50.
52. Id. at 250.
53. Id.
Over time, as more states moved towards using central panels, the variety of approaches widened. Appointment, pay, and tenure of individual ALJs varied from state to state, as did the role of any advisory or oversight body appointed by the legislature. In South Carolina, for example, ALJ candidates are not hired by a Chief ALJ; they are screened by the Joint Legislative Committee for Judicial Screening and must meet the same qualifications set for judges and justices under the state constitution. The candidate then runs for election by a joint session of the legislature, and the successful candidate will then serve a five-year term. ALJs in South Carolina are the finders of fact in contested cases brought under the state’s APA and also conduct the public hearings on proposed regulations when requested by a state agency headed by a single director who is a cabinet-level appointee. Consistent with screening by the panel that screens judges for the judicial branch of government, South Carolina ALJs are subject to the Code of Judicial Conduct, which Judge Kittrell notes “mandates complete impartiality in the decision making process and provides a further advantage over the former system in which hearing officers were employees of or were hired by the agency.”

The physical accommodations of the central panel are important; ideally, the adjudication process should take place in a building completely separate from the agency, but within the executive branch of government. That is the case in Minnesota, North Carolina, North Dakota, Texas, Washington, and Maryland. In the case of Maryland, the central panel hearing agency is located in its own building and offers an example of the best way to promote the independence of the executive judiciary—independence from the agencies being served—while retaining the correct measure of interdependence with the executive and legislative branches of government. Judge Hoberg wrote in 1994 of the leadership role Maryland played in establishing a firm footing for the central panel in that state:

With expanded jurisdiction, a central location, a consolidated staff, a broad base of support, and effective management, the Maryland OAH is able to publish the Central Panel newsletter for the central panel states’ directors; act as a clearinghouse of information for other central panel states; and lobby for legislation to assess filing and processing fees for OAH administrative expenses. Additionally, the Maryland

54. See Marvin F. Kittrell, ALJs in South Carolina, S.C. LAW., May/June 1996, at 42, 42 (noting that these qualifications are established in Article V of South Carolina’s constitution).
55. See id. (discussing election of ALJs in South Carolina).
56. See id. at 42–43 (establishing duties and assignments given to ALJs in South Carolina).
57. Id. at 43.
OAH continues to obtain new types of hearing matters for assignment to its ALJs. Several new agencies have already been added to its jurisdiction since its establishment in 1990.\textsuperscript{59}

\textbf{D. Shared Hats and Overlapping Duties in the Executive Branch: Withrow and Due Process}

If the service being rendered is affording a full and fair forum to be heard prior to final agency action, then the means for affording that service can be characterized as spanning a wide spectrum indeed. In disputes involving public licenses or private rights affected by agency action, the decision-maker may be the agency head, the regulatory commission sitting as fact-finder, a subordinate to the agency head (typically an employee of the agency), an independent contractor appointed by the agency, or a member of a central panel of administrative adjudicators.

When the decision-maker is the agency head (or the members of the regulatory commission, or other appointed officials), the adjudicative goals can be met by the agency head hearing the case and deciding the questions of law and fact, even in those cases where the decision-maker was also involved in the investigation. In \textit{Withrow v. Larkin}, the Court held there was no due process violation where the decision-maker, an agency head, combined both the judicial function and the investigative function.\textsuperscript{60} When these functions are delegated, however, as is the case when an ALJ conducts an evidentiary hearing on behalf of an agency decision-maker, the same person cannot participate in both the investigative and decision-making functions.\textsuperscript{61} As such, the hearing examiner or ALJ must be cognizant of the need for a wall separating the investigative and the judicial function of the executive office.

\section*{III. CENTRAL PANELS AND THE MODEL STATE ADMINISTRATIVE PROCEDURE ACT}

Central panels, of course, offer real potential to erect and maintain such walls, and such a separation was incorporated into the 1981 amendments to

\textsuperscript{59} Id. at 84 (footnotes omitted).

\textsuperscript{60} 421 U.S. 35, 58 (1975) (distinguishing purposes and bases underlying the investigative function (the determination of probable cause) and the judicial function (the adjudication)).

\textsuperscript{61} See, \textit{e.g.}, \textit{Walker v. City of Berkeley}, 951 F.2d 182, 185 (9th Cir. 1991) (holding that where staff attorney functioned both as city’s attorney in a federal court case and as decision-maker in case involving plaintiff in the federal case—a former city employee suing the city in a claim of wrongful termination—employee’s due process rights were violated by staff attorney’s dual roles when deciding merits of agency litigation).
the Model APA. The Model APA divides agency employees into three groups: adversaries (including investigators and prosecutors), adjudicators (including both ALJs and the agency heads who make the final decisions based on the ALJs recommendations), and "everybody else."

Both the federal APA and the Model APA prohibit adversaries from serving as adjudicators or from advising adjudicators off the record. The federal APA prohibits the ALJ from "consult[ing] a person or party on a fact in issue, unless on notice and opportunity for all parties to participate." As Professor Asimow observes, however, this separation does not extend to prohibit the ALJ from receiving instruction from the agency (or from a chief administrative law judge) as to the proper interpretation of a point of law:

[Section] 554(d)(1) disables the ALJ (but not other agency decisionmakers, such as intermediate review boards or agency heads) from receiving ex parte advice on factual issues from any agency staff member (whether or not they have been adversaries in the case). But it does not appear to prohibit the ALJ from receiving advice on law or policy from the agency staff members.

The challenge is to ensure that the ALJ is protected from ex parte communication concerning factual issues, while still permitting and requiring an appropriate channel of communication between the agency and the parties to administrative hearings, so that the ALJ is properly informed of the controlling law, without suffering from pressure to find facts in a manner favorable to the agency. The promise of central panels is that such information and structure can be imparted through uniform training and can be monitored through appropriate evaluation and review tools. The training can be provided by the agency, while all forms of control (including performance evaluations and disciplinary action) are not tied to the agency, but still remain within the executive branch of government.

As is suggested by the range of approaches shown in the listing of central panels appended to Judge Hardwicke's Article, the manner in which executive branches approach the use of central panels varies widely among the cities and states using them. As will be discussed shortly, the national model for central panels was completed in 1995, so it may be instructive to see some approaches that existed at or immediately prior to that time. South Carolina may again be offered as an example. In 1993, the state legislature began a formal statutory restructuring, including the creation of the ALJ Division, which is regarded as a "quasi-judicial" body that "opened for

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62. MODEL STATE APA, supra note 42, § 4-301.
63. ASIMOW, supra note 4, § 3.3, at 109.
64. See id. at 121 (citing APA, 5 U.S.C. § 554(d)(2) and MODEL STATE APA, supra note 42, § 4-214(a)).
65. Id. (quoting APA 5 U.S.C. § 554(d)(1)).
66. Id.
business" in 1994. According to Professor Swent, the Division's quasi-judicial nature "relieves the Division of the full burdens of res judicata and stare decisis." Such a change improves the quality of the administrative process; the ALJs are able to maintain a fresh perspective, and given the diversity of cases over which they have jurisdiction, they write better decisions. In addition, the system benefits from increased economic efficiency, the public can expect the ALJ to be less burdened with pro-agency bias, and there is the potential for increased accountability when the ALJ is subjected to a centralized hearing structure.

Professor Swent also acknowledged the looming dissention on the part of constituent agencies, noting that "states having recently adopted a central panel approach to ALJ organization report significant hostility from the affected agencies. The complaints most often stem from a sense of lost authority." In a feature unique to South Carolina, decisions from occupational and licensing boards are final agency decisions before the ALJ receives the case; the ALJ receives the appeal as a matter of right, which is presented based on the record as developed at the agency level. It should thus be no surprise to find agency heads will be concerned if they believe a central panel threatens their executive authority, if the change is couched in terms that would lead the agency to believe the ALJ will no longer feel the need to follow agency statutory and regulatory interpretations.

By the time South Carolina was ready to enact legislation to create a central ALJ panel, twenty-one states had preceded it. Certainly, there were innovations being tested here, but the approach was measured by the same desires described by Malcolm Rich and Wayne Brucar in their study of central panels in 1983. "The appearance of bias has been eliminated, and public confidence in agency function has risen in response. Additionally, administrative process under the new adjudicative structure is arguably more efficient." The result in South Carolina should thus be viewed as a success, one of several diverse approaches from which we can learn. The approach

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68. Id. (footnotes omitted).
69. See id. at 6–9.
70. Id. at 9 (footnotes omitted).
71. See id. at 13 (footnotes omitted) (describing role of occupational licensing boards in the decision-making process).
72. See id. at 14.
74. Id. at 1 (footnotes omitted).
there, however, is unique in the nation, particularly in the manner in which ALJs secure their positions. More common is the process by which a chief ALJ is appointed, typically by the governor, and is invested with the authority to select, retain, and train ALJs. As the chart accompanying Judge Hardwicke’s Article suggests, however, even here there is a broad diversity of approaches; in some states, the ALJs are appointed by the Chief ALJ; in others the ALJs are appointed by the secretary of state, by an administrator, by the attorney general, or by the governor with the advice and consent of the senate.

A. Precursor to the Model State Central Hearing Agency: Maryland’s Office of Administrative Hearings

When Allen Hoberg revisited the state of central panels in 1994 in his article, Administrative Hearings: State Central Panels in the 1990s, he offered a telling and useful status report on the evolution of the central panel. By this time, the Model APA expressly provided for the establishment of a central panel system, although there was still no widely accepted model by which states could fashion a central hearing agency. Hoberg’s article is helpful in part because it lays bare the disparities among central panels; some state panels have very limited authority, exercising fact-finding powers only in a small percentage of agency proceedings, while some, like Minnesota and Maryland, have very broad jurisdiction, hearing cases for all or nearly all state agencies. The central panel in Virginia is unique in that it appears to be completely decentralized. It consists entirely of a list of qualified hearing officers who are members of the State Bar, have practiced for at least five years, and have taken a training course required by the Supreme Court, which maintains the list. Thus, the Virginia approach offers a phantom central panel: one that exists on paper, with almost no administrative core. It is closely comparable to the approach taken by the Ohio Department of Education in meeting its need for impartial hearing officers to hear cases under the Individuals with Education Act (IDEA). In IDEA cases in Ohio, the State Department of Education directs individual school districts and other litigants to select a hearing officer from those whose names appear on a list of approximately ninety state-qualified impartial hearing officers (IHOs). The IHOs on this list secure their positions by written application to the State Department of Education, and

75. Hoberg, supra note 58.
76. See id. at 77–78 (citing MODEL STATE APA, supra note 42, §§ 4-301, 4-202(a)).
77. See id. at 79, 83.
78. See id. at 80 (citing VA. CODE ANN. § 9-6.14:14.1 (Michie 1991)).
thereafter, have no other direct contact with the Department, except for attendance at an annual one-day course on updates to the IDEA.79

In his article, Hoberg also reports in detail on the experience in Maryland, which he describes as "one of the 'Cadillacs' in the central panel system states," noting that the Maryland Office of Administrative Hearings may have the broadest jurisdiction and the largest caseload of administrative hearings of any central panel agency in any state.80 The advanced evolution of administrative procedures in the Maryland system has not been lost on those concerned with providing the best possible service in agency hearings. As Hoberg noted, "Maryland continues to be in the vanguard of central panel jurisdictions. It learned from some of the earlier central panel states and was able to capitalize on an opportune situation."81

Significantly, Maryland has offered the lessons it has learned and given us the template for what would become the Model Act in 1995. As Judge Schoenbaum wrote, the Model APA provided the "bare bones" by which a number of states had fashioned a central panel.82 It may turn out, however, that to be anatomically correct one would call the APA's contribution just the backbone, for it lacked any details of how a central hearing agency should operate and offered only its endorsement of the concept of separating the agencies from their ALJs. When the NCALJ convened a symposium on the lessons of state central panels in 1994, the lack of uniformity and other shortcomings of existing state central panels were brought forward, leading to studies and committee work that ultimately led to a draft Model Central Hearing Agency Act, based on the legislation adopted in Maryland in 1989.83 The Model Act was the result of this collective effort by members of the NCALJ, aided by reviews of the draft Model Act by members of both the Administrative Law and Regulatory Practice Section and the Judicial Division of the ABA, along with members of the NAALJ.84 Based on this collaboration, the final draft of the Model Act was approved by unanimous vote of the ABA's House of Delegates on February 3, 1997.85

B. The Model Act

The Model Act,86 as approved by the ABA in 1997, offers state and local governments a template by which the executive branch may fashion a means

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80. Hoberg, supra note 58, at 83.
81. Id. at 84.
82. See Schoenbaum, supra note 45, at 310.
83. See id.
84. See id.
85. See id. at 312.
86. MODEL ACT, supra note 1.
for adjudicating controversies arising under the various state administrative procedure acts. It is designed to compliment and supplement state APAs by isolating the adjudicative function and those who perform that function. It removes the adjudicator from the agency prosecuting the controversy, while retaining both the adjudicator and the adjudication within the exclusive control of the executive branch of government. The ALJs become structurally independent of the agencies they serve while still remaining in the executive branch of government. As one author described it:

Unlike de-centralized Administrative Law Judges, housed in the agencies they serve, independent central panels are geared to one mission only—adjudication. In a nutshell, the only business of a central panel of Administrative Law Judges is to hear and decide cases—not to occasionally serve as house counsel for an agency or in other legal capacities.\(^7\)

The adjudicator is thus able to conduct the fact-finding process independent of control by the agency while still possessing a limited mandate of adjudicative power, limited to that which has been statutorily delegated to the executive branch by the legislative branch of government without usurping the independent power of the judicial branch of government.

From the perspective of the ALJ, perhaps the most significant mandate under the Model Act is that the ALJs office is to be structurally separated from the investigatory and prosecutory functions of the executive branch agencies, as well as from any function by which draft policies are articulated, crafted, or promulgated; this allows the executive adjudicator to construe such policies when acting through adjudication.\(^8\) Interdependence of the ALJ is assured by the fact that the central panel remains in the executive branch, while independence from agency influence is assured first by the means of hiring ALJs, and second by the assignment of individual ALJs to any particularly adjudication.

Under the Model Act, an ALJ is hired by one of three alternative means: (1) by the Governor, using the screening and recommendation of a judicial nominating commission; (2) by competitive examination in the classified service of state employment; or (3) by the chief administrative law judge.\(^9\) Once appointed, the ALJ becomes an employee of the central panel office (the Office of Administrative Hearings, in the Model Act).\(^10\) In those instances where the executive adjudicator (the fact-finder) is the chief executive officer (such as a department director, board member, or

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\(^{8}\) *See Model Act*, supra note 1, § 1-2(a).

\(^{9}\) *See id.*

\(^{10}\) *See id.* § 1-2(b).
commissioner) who “hears the case without delegation or assignment to a hearing officer or administrative law judge,” then the central panel office would not hear the case, and the agency would retain all authority over the matter, thus preserving the status quo.\textsuperscript{91} In all other cases, however, the Model Act provides for central panel officers to “administer the resolution of all contested cases” arising within the authority of those agencies subjected to the state APA and not specifically exempted from the Model Act.\textsuperscript{92}

When a case is assigned to an ALJ of the central panel, the agency loses its role in matters of scheduling, selection of the person who will hear the case, and matters attendant to the presentation of evidence.\textsuperscript{93} As such, the agency loses its role in administering resolutions once a referral is made. Optional language is offered, however, whereby the agency may engage in “appropriate interlocutory review” and may proceed to an “appropriate termination or modification of the proceeding.”\textsuperscript{94} This permits the agency to settle cases docketed with the central panel adjudicator, apparently with or without the participation or approval of the ALJ.

The Model Act offers the chief executive officer (the governor, mayor, or the like) a significant advantage over non-central panel systems in that it invests in one person, the Chief ALJ, the authority to control the processing of executive adjudications for all agencies identified in the enabling legislation.\textsuperscript{95} The Model Act offers two options for selection of the Chief ALJ, either by gubernatorial appointment (with the advice and consent of the Senate, for a definite term of years) or through competitive examination in the classified service of state employment.\textsuperscript{96} Once appointed to the position, the Chief ALJ may be removed only by the governor, and only upon good cause, following an adjudicative hearing.\textsuperscript{97}

Adverse personnel action against individual ALJs must be founded on circumstances constituting good cause and can be imposed only after notice and an opportunity to be heard in an APA type of hearing before an impartial hearing officer.\textsuperscript{98} In addition, the Model Act protects the ALJ from layoffs, linking any such layoffs to those permitted “in accordance with established, objective civil service or merit system procedures.”\textsuperscript{99} Protection for the salaries of the ALJ is found in the requirement that the ALJ receive

\begin{itemize}
\item[91.] Id. § 1-3(a).
\item[92.] Id. § 1-3(a).
\item[93.] See id. § 1-3(b).
\item[94.] MODEL ACT, supra note 1, § 1-10.
\item[95.] See id. § 1-4.
\item[96.] See id.
\item[97.] See id. § 1-4(a).
\item[98.] See id. §§ 1-6(a)(3), (a)(4).
\item[99.] Id. § 1-6(a)(5).
\end{itemize}
compensation “provided in the State budget.” To drive home the tenet that the ALJ should be free of agency overreaching, the Model Act provides that an ALJ “shall not be responsible to or subject to the supervision, direction or direct or indirect influence of an officer, employee, or agent engaged in the performance of investigatory, prosecutory, or advisory functions for an agency.” In furtherance of the goal that the ALJ will focus wholly on the role of adjudicator, the Model Act requires the central panel ALJ to commit all of his or her professional time to full-time service, prohibiting the private practice of law. There is, however, optional language that would permit the ALJ to practice law if serving the central office as a part-time ALJ. There also is broad language barring the ALJ from performing “duties inconsistent with the duties and responsibilities of an administrative law judge.”

ALJs are made accountable for their actions first by being subject to supervision by the Chief ALJ, and second, by being subject to a code of conduct for ALJs (the terms of which are not set out in the Model Act but are left for development by the Chief ALJ). Once given charge over an evidentiary matter, the ALJ is given the power to issue subpoenas, administer oaths, control the course of the proceedings, engage in or encourage the use of alternative methods of resolving disputes, and the statutory authority to direct the payment of “reasonable expenses, including attorney’s fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.”

Once the ALJ issues his or her adjudication report, there are four possible uses of the report. In one scenario, the assigned ALJ “shall render the final decision of the agency not subject to agency review,” unless expressly exempted in the statute. In other cases, and except as provided by law, the ALJ will issue a decision that could be a “proposed,” “initial,” or “recommended” decision depending on the adjective used in the legislation “unless the agency authorizes the issuance of a final decision, as provided in the Administrative Procedure Act.” Nonetheless, the agency is not free to manipulate the report to suit itself. When the proposed decision or order arrives at the agency, the agency “shall not modify, reverse or remand the proposed decision of the administrative law judge except for specified

100. MODEL ACT, supra note 1, § 1-6(a)(6).
101. Id. § 1-6(b).
102. See id. § 1-6(a)(8).
103. Id. § 1-6(a)(7).
104. See id. §§ 1-6(a)(10), 1-5(a)(8).
105. Id. §§ 1-9(1)–(3).
106. MODEL ACT, supra note 1, § 1-10(a).
107. Id. § 1-10(b).
reasons in accordance with law." 108 Judicial review of agency decisions procured under the Model Act occurs in the manner prescribed in the status quo, whether by the provisions of the APA or any other specific statutory provision. 109

C. The Chief Administrative Law Judge

The Chief ALJ is charged with the duty to "protect and ensure the decisional independence of each administrative law judge," 110 and (like all ALJs) must be an attorney and take an oath of office. 111 The Chief ALJ must have been licensed as an attorney for a minimum of five years 112 and is barred from engaging in the private practice of law. 113 Also, like all ALJs, the Chief ALJ is subject to the code of conduct for ALJs, 114 although at the outset, it may be that no such code exists, or if it does exist, the Chief ALJ will have promulgated it in the early years of the central panel's existence. Individual ALJs are appointed either by the Chief ALJ or through a nominating committee's recommendations to the governor. 115 The Model Act invests significantly in the Chief ALJ's exclusive authority for assigning individual ALJs to hear particular cases. 116 This power, coupled with the mandate to "protect and ensure the decisional independence of each administrative law judge," 117 is the centerpiece of the Model Act. By these two key provisions, the resulting central panel offers the promise that someone insulated from agency overreaching will hear the litigant.

While protection from agency overreaching is one intended result of the central panel, it is matched in importance by the twin goals of accountability and efficiency—the "good government" provisions. The Chief ALJ is expressly required to "establish and implement standards," as well as specialized training programs and materials for ALJs. 118 Optional language refines this by providing that the Chief ALJ "establish qualifications for the selection of administrative law judges." 119 The Chief ALJ is also authorized, in one option, to "create specialized subject matter divisions within the

108. Id. § 1-11.
109. See id.
110. Id. § 1-5(a)(4).
111. See id. §§ 1-4(b)(1), 1-6(a)(1).
112. See MODEL ACT, supra note 1, § 1-4(b)(5).
113. See id. § 1-4(b)(2).
114. See id. § 1-4(b)(7).
115. See id. § 1-5(a)(2).
116. See id. § 1-5(a)(3).
117. Id. § 1-5(a)(4).
118. MODEL ACT, supra note 1, § 1-5(a)(5).
119. Id. § 1-5(b)(2).
Office."\textsuperscript{120} The Chief ALJ is also directed to "adopt a code of conduct for administrative law judges."\textsuperscript{121} The Chief ALJ is also required to "monitor the quality of state administrative hearings through the provision of training, observation, feedback, and, when necessary, discipline of ALJs who do not meet appropriate standards of conduct and competence, subject to the provisions of Section 1-6(a)(4)."\textsuperscript{122} In addition, the Chief ALJ shall "provide and coordinate continuing education programs and services for administrative law judges, including research, technical assistance, technical and professional publications" and should "compile and disseminate information, and advise of changes in the law relative to their duties."\textsuperscript{123} These become significant when through centralization the ALJ migrates away from the busy hub of agency activity, where it is easy to absorb agency law and culture, in favor of an office culture driven primarily by a desire to ensure all litigants receive all process that is due.

Along with decisional accountability, the Chief ALJ is charged with assuring fiscal accountability for the operation of the hearing office. Governors and mayors who are in charge of large bureaucratic machines should note the potential for savings here with particular interest. Properly implemented, the central panel will consolidate and unify systems that quite naturally are as decentralized and disparate as the agencies themselves. The Model Act provides for this through mandatory disclosure to the Governor through an annual report by the Chief ALJ (and with optional language calling for a report to the Legislature as well).\textsuperscript{124} In addition, the Model Act mandates that the Central Office will be subject to audit by the same legislative audit office and under the same rules and rotation by which other state agencies are audited.\textsuperscript{125}

Recognizing the real need for interdependence among the executive and legislative branches of government and the central panel, and as a means by which the central panel may be monitored, the Model Act provides for the establishment of a panel to advise the Chief ALJ. The Model Act offers a framework for such an oversight commission, designated in the Model Act as the "advisory council on administrative hearings," drawn from the public and private sectors, with representatives from the senate, the house, the attorney general's office, agency designees, the general public, and the state bar association, with the governor choosing all but the legislative

\textsuperscript{120} Id. § 1-5(b)(6).
\textsuperscript{121} Id. § 1-5(a)(8).
\textsuperscript{122} Id. § 1-5(a)(9).
\textsuperscript{123} Id. § 1-5(a)(6).
\textsuperscript{124} Model Act, supra note 1, § 1-5(a)(10).
\textsuperscript{125} See id. § 1-7(b).
representatives and the representative from the attorney general’s office. 126 The essential powers and duties of the council would be to advise the Chief ALJ in carrying out the duties of the Office; identify issues of importance to ALJs that the Chief ALJ should address; review issues and procedures relating to administrative hearings and the administrative process; review and comment upon rules of procedure and other regulations and policies proposed by the Chief ALJ; review and comment on the Chief ALJ’s annual report; and study exempted agencies to recommend which exemptions should be continued. 127 The Chief ALJ can thus serve as a buffer (and frequently a lightning rod) between the agencies and the individual ALJs.

IV. THE CENTRAL PANEL AND THE SEPARATION OF POWERS DOCTRINE

Since its adoption by the ABA in 1997, the Model Act has been widely circulated and considered by states contemplating changes to their administrative procedure acts. 128 Between 1997 and 2001, Alabama, Michigan, and Oregon enacted some form of central panel, but none of those states adopted the provisions of the Model Act in full. The state whose central panel most closely resembles the Model Act is, quite naturally, Maryland, the state that offered the blueprint for the Model Act. Given that most of the existing central panels were established before 1997, it is not surprising that the Model Act has not been adopted in its model form by any state. It is, however, important to learn from the experiences of Maryland and its sister states, particularly with respect to the need to ensure that the central panel system does not transgress established constitutional limits respecting the separation of the three branches of government.

Students of administrative law are taught that the administrative adjudicative function can generally be said to follow or favor one of two models: the judicial model or the institutional model. 129

The judicial model suggests that an adjudicative decision by an agency is like a decision by a judge. Therefore, the administrative process should resemble judicial process as closely as possible. The administrative judge should personally listen to the evidence and argument, have no preconceptions about the case, receive no information about the case except through on-the-record submissions, and be completely independent of investigators and prosecutors. Adherents of the judicial

126. See id. § 1-12.
127. Id. § 1-14.
128. A remarkable and inexplicable exception to this appears to be New York, which made no mention of the Model Act, nor gave any indication the Act was considered, before lawmakers there rejected the central panel theory in 1999. See generally Hardwicke, supra note 37.
129. See ASIMOW, supra note 4, § 3.3, at 109 (explaining the judicial and institutional models).
model argue that *fairness* and *acceptability* to private litigants should be primary goals of the agency adjudication process.

The *institutional* model views an agency as if it were a single unit with the mission of implementing a specific regulatory scheme. The entire staff should be considered as members of a decisionmaking team and all should be available for off-the-record consultation. This theory holds that adjudication is a policymaking technique, along with rulemaking, advice-giving, and publicity. Each adjudicated case should promote the regulatory scheme and further agency policy. Adherents of the institutional model stress *accuracy* and *efficiency* as the dominant values to be pursued.\(^{130}\)

The central panel approach is designed to capture the positive attributes of both the judicial and institutional models; separating the adjudicator from the agency promotes fairness and acceptability, providing for effective control by a Chief ALJ over the adjudicators and centralizing the office functions promotes accuracy in reporting and efficiency in governance. It is in this endeavor, however, that the Model Act falls short. Drawing from the experience of states where a central panel exists, there emerges a picture in which constitutional expectations are not always being met. When a state central panel fails to conform to these expectations, the structural integrity of the system is threatened, and if the threat is substantial, the central panel as an adjudicative model will fail.

A. *Separation of Judicial and Executive Powers under Drennen and Holmberg*

At the outset, it should be noted that the federal APA and the Model APA both provide for the structural separation of the investigative, prosecutorial, and adjudicative functions.\(^{131}\) The Model Act, likewise, provides that central panel adjudicators will be structurally separated from those engaged in investigations and prosecutions.\(^{132}\) Beyond the question of shared roles, however, is the question of shared and exclusive powers. Ours is a system of “separateness but interdependence, autonomy but reciprocity” among the three branches of government.\(^{133}\) A danger arises when the legislature empowers a central panel (or any executive branch adjudicator) with such authority as to usurp that which falls within the exclusive domain of the judicial branch of government. In the collective effort to advance the

\(^{130}\) *Id.*

\(^{131}\) *See* APA 5 U.S.C. § 554(d); *see also* MODEL STATE APA § 4-214.

\(^{132}\) *See* MODEL ACT, *supra* note 1, § 1-6(b) (stating judge remains separate from investigatory and prosecutory agents).

\(^{133}\) *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952).
government's institutional interests (efficiency and accuracy), it is quite possible to invade the exclusive domain of the judicial branch.

Consider the question of separation of powers as it arose in a series of cases involving the enforcement of child support orders. In 1987, pursuant to federal regulations, states were called upon to improve efforts to ensure that delinquent and absent parents complied with support obligations. The Child Support Enforcement Amendments of 1984\textsuperscript{134} gave rise to an obligation imposed upon the states to "have in effect and use . . . expedited processes as specified under this section to establish . . . and enforce support orders" in intrastate and interstate cases.\textsuperscript{135} "Expedited processes" were further defined as "administrative or expedited judicial processes or both which increases [sic] effectiveness and meet processing times . . . and under which the presiding officer is not a judge of the court."\textsuperscript{136} The regulation also required that once such orders were established they "must have the same force and effect under State law as orders established by full judicial process within the State,"\textsuperscript{137} the "due process rights of the parties involved must be protected,"\textsuperscript{138} there must be "written procedures for ensuring the qualifications of presiding officers,"\textsuperscript{139} the recommendations of the presiding officers "may be ratified by a judge,"\textsuperscript{140} and appeals from the orders may be taken "under the State's generally applicable judicial procedures."\textsuperscript{141}

The cumulative effect of these regulations is a federal mandate urging an administrative remedy at the state level, in which the judicial functions of establishing paternity and issuing and enforcing support orders are to be delegated to the executive branch. The scheme is wholly consistent with the institutional model of administrative systems because it recognizes the need to offer prompt and accurate orders in support of children. Twice, however, the scheme has been attacked: first, in 1988, when Nebraska implemented the scheme without a central panel, and again in 1999 in Minnesota, following a decade in which the central panel for that state presided over these support hearings. In both cases, the respective state supreme courts found the schemes violated the separation of powers doctrine of the state constitutions.

\begin{footnotesize}
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\item\textsuperscript{135} 45 C.F.R. § 303.101(b) (1999) (describing basic requirement for an expedited process).
\item\textsuperscript{136} 45 C.F.R. § 303.101(a) (1999).
\item\textsuperscript{137} Id. § 303.101(c)(1).
\item\textsuperscript{138} Id. § 303.101(c)(2).
\item\textsuperscript{139} Id. § 303.101(c)(4).
\item\textsuperscript{140} Id. § 303.101(c)(5).
\item\textsuperscript{141} Id. § 303.101(c)(6).
\end{enumerate}
\end{footnotesize}
In *Drennen v. Drennen*, support obligors challenged proceedings held before referees appointed under the Child Support Referee Act ("Child Support Act"), alleging that the Child Support Act violated the separation of powers clause found in article II, section I of the Nebraska Constitution. The Nebraska Supreme Court agreed, finding that the system by which these orders were entered was judicial in nature. The trial was to be conducted in the same manner as one before a district trial judge; the referee was given "all legal and equitable powers available to a district court judge except that a child support referee shall not have authority to set bail and order detention in lieu of bail." Thus, the agency adjudicator was bestowed with the accouterments of judicial authority and was at the same time expected to garner the efficiencies of administrative disposition of child support issues. The court focused on this exercise of judicial power in striking down the Child Support Act; it found that under the state constitution, district courts have constitutional equity jurisdiction that "is beyond the power of the Legislature to control," and that such power includes the court's jurisdiction over divorces and child support orders. It observed that "[c]onstitutional requirements for the exercise of judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level." In striking the Child Support Act, the court noted that the Act gave to the referee the power to determine orders establishing, modifying and enforcing child support obligations and spousal support obligations, and then held that "[t]he plain meaning of that language is that the district court is deprived of original jurisdiction in each of the designated areas. The Legislature may not limit the constitutionally granted original jurisdiction of the district court. This portion of the act is clearly unconstitutional. . . ."

It took ten years to reach the court, but when the Minnesota Supreme Court was presented with a question similar to that raised in *Drennen*, it reached the same conclusion. In *Holmberg v. Holmberg*, the court considered delegation of judicial power to the state's central panel (the Office of Administrative Hearings) under the same federal program by which

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142. 426 N.W.2d 252 (Neb. 1988).
144. See *Drennen*, 426 N.W.2d at 254.
145. Id. at 256 (citing Neb. Rev. Stat. § 43-1603).
146. Id. at 259.
147. Id. (citing *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.39 (1982)).
148. Id.
149. 588 N.W.2d 720 (Minn. 1999) (holding administrative process in violation of separation of powers).
expedited procedures were to be put into place for the enforcement of child support orders. Through a decade-long and gradual implementation process, the use of central panel ALJs to hear these expedited cases spread until 1995 when the state legislature required its application in all counties for all child support proceedings. In these proceedings, the ALJ has “all powers, duties, and responsibilities conferred on judges of district court to obtain and enforce child and medical support and parentage and maintenance obligations’ including the power to issue subpoenas, conduct proceedings according to administrative rules in district court courtrooms, and issue warrants for failure to appear.” The ALJ in Minnesota could not preside over contested parentage cases, or contested contempt proceedings but could enter orders in agreed-upon parentage and contempt actions.

In finding the delegation of this authority to the ALJ to be unconstitutional, the court first explained the rationale behind the separation of powers doctrine in this context:

The separation of powers doctrine is based on the principle that when the government's power is concentrated in one of its branches, tyranny and corruption will result. Still, even during the time of the framers, separation of powers did not mean absolute division of our government’s functions.

As government has grown larger and more complicated, the separation of powers doctrine has become harder to define. Increased use of administrative agencies has further blurred boundaries between government branches. In validating administrative agencies located in the executive branch, courts have characterized agency actions as “quasi-judicial” or “quasi-legislative” and mandated stringent standards to check agency activities.

Recognizing this interdependence among the branches of government, the court in *Holmberg* noted the benchmarks by which it would measure the constitutionality of the delegation of judicial authority to the central panel ALJ: “In determining if the original jurisdiction of the courts is being usurped, we look at the origins of the rights and relief, equitable or statutory, an agency oversees.” It distinguished between proceedings in a tax court, whose function is primarily legislative, and those of family courts, whose

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150. See id. at 722.
151. Id. at 723 (citations omitted).
152. See id. (citations omitted).
153. Id. at 723–24 (citations omitted).
154. *Holmberg*, 588 N.W.2d at 723 n.20. “Indeed, Professor Laurence Tribe suggests characterizing our government structure as one of institutional interdependence rather than functional independence.” Id. (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-2 (2d ed. 1988)).
155. *Holmberg*, 588 N.W.2d at 724 (citations omitted).
functions are largely equitable in origin. It cited with approval the premise that a determination of whether a given administrative adjudication scheme violates the separation of powers doctrine can be made by considering "the existence of adequate judicial checks on administrative actors, the function delegated, ALJ decision appealability, voluntariness of entry into the administrative system, and whether the legislative delegation is comprehensive or piecemeal." It then rendered its verdict that:

With its creation of the administrative process, the legislature has delegated to an executive agency the district court's inherent equitable power. This delegation infringes on the district court's original jurisdiction. Not only are ALJs given responsibilities and powers comparable to a district court, but ALJs also have the power to modify district court decisions.

In its survey of the procedures followed by the central panel, the court also raised a collateral point, one not related to separation of powers but relevant in this discussion nonetheless. The administrative scheme called for child support officers (CSOs) to appear and participate in proceedings before the ALJ. The CSOs typically would not be lawyers but would nonetheless draft pleadings and appear at the hearings to represent the authority without attorney supervision. This, the court stated, amounted to the unauthorized practice of law. "By granting the power to practice law to CSOs, over whom the court does not have disciplinary authority, the legislature has further removed the administrative process from the judiciary's supervision."

In the context of this article, Drennen and Holmberg are useful for two reasons. First, they offer commonplace examples of how our legislative and executive branches are truly interdependent and endeavor, with utmost good faith, to provide efficient and fair means for resolving governmental legal issues. Second, both cases should alert us to the grave risks to our administrative systems if care is not taken to properly survey the legal landscape when creating a central panel of administrative adjudicators. This is not, by any means, an indictment of the Model Act; for one thing, the Model Act was adopted long after Minnesota established its central panel, and Nebraska's experience took place without the benefit of a central panel of any kind. Rather, the cases help draw attention to the potential for mischief when a bare-bones structure like that afforded by the Model Act is implemented in the real world, without careful thought to the supporting statutes and regulations by which administrative adjudications are made.

156. See id.
157. Id. at 725 (citations omitted).
158. Id. at 725-26.
159. Id. at 726.
A state’s APA typically is the source of the bulwark of that structure; it sets forth norms for jurisdiction, for the scope of agency authority and exceptions to general rules of authority, for the time, place, and manner for invoking administrative review and subsequent appeal, and generally articulates the evidentiary burdens and burdens on appeal. In addition to the state’s APA, the central panel once created must immediately begin the process of articulating its own procedural and structural rules through a public and interactive rulemaking process. One should not look to the Model Act for these details; it was intended for another use altogether. The Model Act was created to reflect what has been learned through the hard knocks and success stories of those states that had already moved to a central panel system, so as to be of benefit to states not yet convinced of the wisdom of moving to a central panel; the Model Act also serves as a guide to states with a central panel to which improvements might be made.

**B. Anticipating Agency Arguments Against Transition to the Central Panel**

Closely related to the constitutional concerns raised in *Drennen* and *Holmberg* are concerns shared by many agencies when the central panel concept is presented for the first time. In Malcolm Rich’s survey of the difficulties arising when a state converts from a decentralized administrative process to a central panel, he noted the agency’s often-stated reluctance to move to a central panel system in part because the agency would stand to lose an important element of control over the outcome of its adversarial hearings. Chief ALJ John W. Hardwicke reported on these concerns in his 1994 article *The Central Hearing Agency: Theory and Implementation in Maryland.*[^160] The article preceded by one year (and laid the foundation for) the work of the NAALJ and the ABA’s NCALJ, in creating the Model Act; in many ways, the article offers a comprehensive review of what legislators and executive administrators need to consider when contemplating the creation of a central panel. In the article, Chief Judge Hardwicke gives voice to the concerns raised by agencies when Maryland’s lawmakers were considering the implementation of a central panel. He described agency concerns as typically falling into one or more of three categories:

1. The CHA [central hearing agency] will be a new, independent judiciary not responsible to anyone; independent of the executive and not part of the judiciary. Legislators and Executives already suspect and resent judges—why increase their number?
2. Government always gets bigger. A new agency will have a new cost center, its

own executive and administrative staff, its own ambitions for growth and empire. The nature of a new agency implies expansion—expense, red tape, bureaucracy. 3. Existing agencies may lose control of their expertise and their policies; agencies will be subverted, intimidated or ignored by independent law judges.\footnote{161}

In a footnote supporting this observation, Chief Judge Hardwicke recalled the experience of the presiding officer in the California Office of Administrative Procedure, who wrote, "[a]n independent Office of Administrative Hearings necessarily creates another difficulty. By its very nature, it takes away power from the administrative agency and thereby causes an atmosphere of antagonism. No administrator likes to have his power curtailed—especially not by lawyers."\footnote{162}

Judge Coan and Judge Hardwicke's observations are well-founded in the experience of the various states and in the federal sector where there has been a long-standing effort on the part of individual ALJs and their membership organizations to secure the very independence feared by the agencies. If the lessons offered by Drennen and Holmberg are not to be wasted on us, however, the quest for independence and its use of the central panel model deserve some careful analysis.

1. Separating the Myth from the Reality: Due Process Requirements and an ALJ's Stake in Judicial Independence

The grant of authority possessed by a governmental agency is by definition limited to its statutory enabling language. Were the executive branch to usurp judicial power, as the courts found was the case in Minnesota and Nebraska, the constitution then would void the resulting adjudication as violative of the separation of powers doctrine. Yet there has been a constant and determined effort by ALJs to secure for themselves the power to exempt themselves from restraints on their ability to decide matters set before them. Voiced under the general description of the need for judicial independence, the proposition is advanced as though it is axiomatic that all ALJs must be judicially independent in order to provide litigants with the process due under the state and federal constitutions. One ALJ presented the case in this fashion, as a predicate to arguing against oversight and evaluation of ALJs by superiors in the workplace:

One of the central tenets of our legal system is the due process concept that decision-makers must be independent, in order that they can be neutral and impartial in their decisions. They must avoid, and should be shielded as much as possible from, any influences that might in any way compromise such independence,

\footnote{161. \textit{Id.} at 49 (citation omitted).} \footnote{162. \textit{Id.} at 49 n.77 (quoting George R. Coan, \textit{Operational Aspects of a Central Hearing Examiners Pool: California's Experience}, 3 U. FLA. L. REV. 86, 89 (1975)).}
neutrality, and impartiality—in order that every person, rich or poor, of whatever standing in the community, can receive equal justice based on the law and not on preconceived notions or improper influences.  

The author provides no citation in support of the conclusion that independence of all decision-makers, including ALJs, is truly a central tenet of due process, and indeed case law seems to belie that conclusion, and in its place suggests that impartiality, not independence, is the foundational requirement of due process. Judge Posner's observations in Van Harken v. City of Chicago were more informative. Under an innovative system for resolving traffic and parking citations, the parking ticket the police officer writes in the city of Chicago is prima facie evidence of a violation. The owner of the car can either pay the fine written on the ticket (which cannot exceed $100) or challenge the ticket either in writing or in person. These challenges are adjudicated not by regular judges or other employees of the City or State but by private lawyers whom the City hires as part-time hearing officers. In an inimitable and unmistakable style that defies effective paraphrasing, Judge Posner makes the point that there is no due process violation based on the dependent relationship between the hearing officers and the City:

The plaintiffs also object to the fact that the hearing officers are hired by, and can be fired at will by, the City's Director of Revenue, who may want to maximize the City's "take" from parking tickets. Actually, this cannot be assumed. The Director of Revenue is appointed by and serves at the pleasure of the Mayor, whose concerns transcend the collection of parking fines. The enforcement of the parking laws is not merely a program for raising revenues; it is also designed to facilitate traffic flow. Compliance, which produces no revenue, may be as important to the City as noncompliance, which produces revenue but also clogs the streets. Compliance is not reliably promoted by absence of fair adjudication of contested parking violations; indeed, if parking fines are assessed randomly, you might as well park illegally, as you are as likely to be fined if you park legally. And drivers are voters, and so cannot be treated with an utter disregard for their predictable indignation at being fined for parking violations that they did not commit.

So it is possible that the plaintiffs are being too cynical about the Director of Revenue. But even if they are not, we do not think that the adjudicative reliability of the hearing officers is fatally compromised by the manner of their appointment and by their lack of secure tenure. The officers are not paid by the number of hearings that they resolve against the respondent; they are not paid any portion of the fines they impose, as in Tumey v. Ohio...; they have no quota of fines that they must impose on pain of losing their jobs or having their pay reduced; and they have no

164. See id.
165. 103 F.3d 1346 (7th Cir.), cert. denied, 520 U.S. 1241 (1997).
other financial stake in the outcome of the cases that they adjudicate, as in *Aetna Life Ins. Co. v. Lavoie*. . . . If their very indirect, very tenuous stake (a fear that if a hearing officer lets off too many alleged parking violators, the Director of Revenue may get angry and fire him) were enough to disqualify them on constitutional grounds, elected judges, who face significant pressure from the electorate to be “tough” on crime, would be disqualified from presiding at criminal trials, especially in capital cases. They are not.\textsuperscript{166}


   It is perhaps emblematic of the administrative adjudicative process that ALJs are closely tied to the agencies. Many served in non-hearing officer positions prior to service as an ALJ; many are not lawyers, but are trained in the subject matter of the agency’s jurisdiction. Nor are they by nature timid creatures. To slightly misquote the quote, Justice Scalia has quite properly observed that “administrative law is not for sissies.”\textsuperscript{167} ALJs tend to be better informed about their respective subject matter than most judges of general jurisdiction and are valuable for that very talent. When trained in trial and advocacy skills, such as those involving due process, evidence, and effective legal writing, the ALJ brings to the table a highly prized assortment of skills that can take years to acquire. When a central agency plan is touted as a means for ensuring the independence of the ALJ, the agency is well within its rights to question such a plan. Equally important, if carried to its logical conclusion, the quest for ALJ independence from the executive branch of government would result in exactly the kind of usurpation of the judicial function of government prohibited by the separation of powers clause. As the court noted in *Holmberg*, an administrative adjudicative scheme that invests in its ALJs the powers, duties and responsibilities constitutionally located in the judicial branch of government will be subject

\textsuperscript{166} *Van Harken*, 103 F.3d at 1352–53 (citations omitted).

\textsuperscript{167} Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 Duke L.J. 511, 511. The quote in full is taken from Justice Scalia’s opening comments during a lecture he gave at Duke Law School:

> When I was invited to speak here at Duke Law School, I had originally intended to give a talk that reflected upon the relationship among the Bork confirmation hearings, the proposed federal salary increase, capital punishment, *Roe v. Wade*, and Law and Astrology. I was advised, however, that the subject of this lecture series is administrative law, and so have had to limit myself accordingly. Administrative law is not for sissies—so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture. There will be a quiz afterwards.

*Id.*
to a review to determine whether such a scheme violates the separation of powers doctrine.\(^{168}\) In doing so, the court will apply:

[A] flexible review standard when considering whether a statute violates separation of powers. While supreme court decisions . . . have relied, in part, on public policy to affirm legislatively created administrative schemes, they have also been shaped by the existence of adequate judicial checks on administrative actors, the function delegated, ALJ decision appealability, voluntariness of entry into the administrative system, and whether the legislative delegation is comprehensive or piecemeal.\(^{169}\)

As states and cities turn to the Model Act for guidance in creating these administrative schemes, the need is both patent and substantial to have certain safeguards designed to prevent a violation of the separation of powers doctrine. The need arises, in part, because there has been a significant blurring of the nature of independence of judges of the judicial branch and those who adjudicate in the executive branch of government. One striking example can be found in a presentation by former Tennessee Supreme Court Justice Penny J. White. In her eloquent and forceful presentation to an audience of ALJs, Justice White exhorted her audience to pursue the mantle of independence in these words:

But I am here today to nobly proclaim without apology that the greatest impediment to meeting the challenge of equal justice under the law . . . indeed the greatest obstacle to fulfilling that promise, a promise prominently chiseled over the entrance to the United States Supreme Court, penned in documents which breathed life into this nation, recited by citizens vowing their allegiance to this country, the greatest threat to meeting the promise of equal justice under the law is the erosion of the independence of the judiciary.

. . . .

The federal and model state administrative procedure acts, half a century old this year, were largely prompted by concerns for uniformity in administrative procedures. Central to those acts, and to their adoption, were the concerns that procedural guarantees be adequately enforced and the belief that enforcement would help ensure an accurate, fair decision. I suggest to you that a myriad of procedural guarantees: notice, hearing, counsel, witness exam is rendered completely meaningless if the adjudicator of those rights is robbed of judicial independence or devoid of judicial courage.\(^ {170}\)

In support of this proposition, that judicial independence is essential to a fair hearing in the context of proceedings conducted under the APA, Justice

\(^{168}\) Holmberg v. Holmberg, 588 N.W.2d 720, 721–23 (Minn. 1999) (reviewing an administrative child support process that provided ALJs with district court powers, duties, and responsibilities).

\(^{169}\) Id. at 725.

White offers a note citing Redish and Marshall. The authors in that work propose that "due process is inadequately protected when an individual must depend on an adjudicator who lacks salary and tenure protection (such as most state court judges and all ALJs) to protect an entitlement to a life, liberty, or property interest."171 While this may have been an arguable position in 1986, due process jurisprudence has evolved since then, dispelling the notion that the measure of due process to which litigants are entitled in administrative proceedings includes an independent adjudicator possessed of salary and tenure protection, leaving the proposition highly questionable today. Due process does not require an independent ALJ; rather, it requires an adjudicator free from bias and capable of rendering a fair decision based solely upon the record presented during the evidence-gathering stage of the proceedings. As Judge Posner aptly put it:

The test for due process in the sense of procedural minima, as set forth in Mathews v. Eldridge . . . requires a comparison of the costs and benefits of whatever procedure the plaintiff contends is required. The use of cost-benefit analysis to determine due process is not to every constitutional scholar's or judge's taste, but it is the analysis prescribed by the Supreme Court and followed by the lower courts including our own.172

The Model Act offers a means by which this balancing of costs and benefits may take place openly and in a manner that is mindful of the limits imposed upon the executive and legislative branches—that in endeavoring to ensure both an unbiased adjudicator and a public convinced that all parties were justly treated in the administrative forum, the means for delivering effective executive adjudications shall not act in usurpation of the independent judiciary. The preeminent task of the executive

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172. Van Haren, 103 F.3d at 1351 (citing United States v. James Daniel Good Realty Prop., 510 U.S. 43, 53 (1993)). See Zinerman v. Burch, 494 U.S. 113, 127 (1990) (applying Mathews test to determine whether a state mental hospital denied a patient of his due process rights when admitting the patient as a voluntary patient while knowing that the patient was incompetent to give consent); Artway v. Attorney Gen. of New Jersey, 81 F.3d 1235, 1242, 1251 (3d Cir. 1996) (using Mathews test to determine whether registration of sex offender under Megan's Law violates due process because it places the burden of persuasion on the sex offender to prove that he is not dangerous); Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1478-79, 1483 (D.C. Cir. 1989) (citing Mathews in determining whether EPA regulation, which creates informal procedures for administrative hearings, violates due process); McCollum v. Miller, 695 F.2d 1044, 1045-46, 1048 (7th Cir. 1982) (relying on Mathews test to determine whether disciplinary proceedings denied a prisoner of his due process rights); Sutton v. City of Milwaukee, 672 F.2d 644, 644-45 (7th Cir. 1982) (applying Mathews test to determine whether towing a person's illegally parked car without notice and opportunity to be heard violates due process).
adjudicator is to assemble a record upon which the executive may take the full measure of the facts, whether uncontroverted or contested, properly apply those facts to the law, and render a decision based entirely upon that record and solely upon the law as presented through the adversarial or, in some instances, the inquisitorial process. When the legislature and the governor strayed from that path in Nebraska and Minnesota and invested in their ALJs powers matching those of the independent judiciary, the separation of powers was violated, leading to the invalidation of the authority bestowed upon the ALJ and in the case of Minnesota, the central hearing agency.

C. Applying the Lessons Learned

In large measure, the current state of our nation’s central panels reflects the tension between the two models of administrative law Professor Asimow describes in his text: the ALJ’s interest in securing the accouterments of judicial independence (life tenure and an undiminished salary)\(^\text{173}\) and the institutional interest in knowing that executive policy will be implemented through an efficient corps of reliable executive adjudicators who are capable of identifying executive policies and incorporating those policies in the adjudicative process. The evolution of the central panel includes incorporating what we have learned about how best to ensure the promotion of accurate and fair analysis of the law by ALJs, unbiased decision-making by ALJs, and the efficient use of scarce fiscal and human resources.

There are features of the Model Act’s central hearing agency that bear examination if for no other reason than in recognition that over time, the deliberate ambiguities built into the Model Act have given room for inefficient or constitutionally questionable practices to take root. To some, the quintessential need for ALJs to be removed from the investigative and prosecutorial functions of government has been broadened so that it now comes in the form of a demand for the same measure of independence our Constitution invests in the federal judiciary. Agencies, legislators, and the general public have reason to be concerned about such a quest. Consider the observation of then-General Counsel, Health and Human Services, Arthur Fried, when discussing concerns of the Social Security Administration in 1997. In remarks to the NAALJ, Fried recalled the expectations implicit in the APA and how those expectations translated into action:

The APA was passed in concern over administrative impartiality in certain agency decision making. Congress sought to achieve two fundamental goals: to eliminate

agency control over the classification, discipline and conflict with hearing examiners, which is what ALJs were formerly called, and to separate the prosecutorial and adjudicatory functions, which previously had resided in the same person in some agencies.

At that time proposals also were made to separate hearing examiners from the agencies. But instead Congress chose to make the hearing examiners a special class of semi-independent employees, giving the civil service commission control of their salaries, promotion and tenure, while retaining most aspects of employer-employee relationships with the agencies. In this regard Congress sought to create a balance. The Hearing Examiners would have the independence necessary to ensure impartial decision making in the cases before them. The agency heads would have the freedom to promulgate rules regarding the examiners' role as federal employees. What this means is that as long as the duty of impartiality is not impinged, the agency has the right and the responsibility to expect, even to demand, the same professional behavior and dedicated work that it requires from all its employees.

Moreover, administrative law judges are not policy independent. There can be no serious dispute that the Commissioner, and not the [1,500] or so agency adjudicators, has the responsibility for interpreting the law in order to carry out the programs that Congress has assigned to the Social Security Administration. In matters of law and policy the ALJs are subordinate to the Commissioner's responsibility to interpret and apply the statutes and set rules in case of adjudication. While ALJs are delegated the authority to make decisions in individual cases on behalf of the Commissioner, it is the Commissioner who has the responsibility to ensure that ALJ decisions comport with the law and the Agency's rules and policies. If this were not the case, agency rules could be subject to conflicting and varied interpretations and the coherence of the administrative program would be seriously impaired. Different individuals could have different rules applied to their cases without knowing it, based on which ALJ had adjudicated their case, or whether the case was decided at the DDS or the ALJ level. 174

The concerns Fried expresses with respect to Social Security ALJs apply with like force across the spectrum of administrative law. When an ALJ assumes delegated authority, that delegation is limited by the breadth of the authority invested in the chief executive officer or the officer's delegate, typically a cabinet-level official or a department head. Such official must have confidence that the interpretation of the law espoused by the executive branch will be applied by the ALJ through this process of delegation. In this critical respect, the ALJ is not independent, and cannot—consistent with the separation of powers doctrine—exercise independent judicial power to subvert the policies of the executive officer. Were the ALJ to do so, the same uncertainties that Fried describes with respect to SSA ALJs would

surface, and the public would be deprived of a uniform application of the law within the executive branch. To call for the ALJ to aspire to judicial independence, as Justice White and others sympathetic to ALJs have done, offers real potential for the loss of public trust and confidence in the administrative adjudicative process.

It should at the same time be noted that when Arthur Fried presented his views in the symposium reported above, the NAALJ also gave the podium to an SSA ALJ, Ronald G. Bernowski. ALJ Bernowski invoked the widely-cited language of *Butz v. Economou*\(^{175}\) in support of the proposition that an administrative law judge was functioning comparable to that of a trial court judge. His comments were offered in part to respond to a series of concerns centered on conflicts over differing interpretations of case law, and the role of the ALJ to independently construe that law:

> With regard to agency rules, we understand completely that within the framework of administrative law, that it is both the duty and the responsibility of the agency to promulgate rules under the Administrative Procedure Act. We also understand that administrative law judges are bound to follow these rules. But we have difficulty with agency rules that are not consistent with the law.

We are concerned with the ethical conflict that this may cause the judge. Because as judges and lawyers, and as members of various local bar associations, we are subject to the canons of professional responsibility of these local regulatory groups. These professional canons generally provide that lawyers have a responsibility to follow the law, as does our Federal oath of office. If the Commissioner requires that established circuit law not be followed in the promulgation of an agency rule, does that not cause the judge to elect between either following the law or the Commissioner? If this conflict should occur, and judicial misconduct is filed against a judge in a local bar association, what position will the agency take? Is the agency going to defend the judge in the disciplinary proceeding? Will the agency pay for the cost, which can be substantial? If the judge loses in the disciplinary proceeding, will the agency make the judge whole, because the license to practice law is of particular and substantial value to the judge.\(^{176}\)

ALJ Bernowski’s proposal was that given the status of ALJs, “the proper standard of conduct for measuring the performance of administrative law judges is the diligence and work effort standard such as those codified in the American Bar Association standards of judicial conduct.”\(^{177}\) To these concerns, it is perhaps now prudent to add concerns the SSA ALJ may have in the event the Commissioner construes law in a manner that is inconsistent with the view of union officials representing the interests of over 1,000 Social Security Administration ALJs through the International Federation of

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177. *Id.* at 56.
Professional and Technical Engineers (IFPTE); as well as the concerns the general public may have when they learn that the ALJ presiding over their hearing may be directed by that union to reject a position taken by the Commissioner.\footnote{See Press Release, International Federation of Professional and Technical Engineers, ALJs Join Union, at http://www.ifpte.org/alj.html (Nov. 9, 1999) (on file with author). On September 24, 1999, the Federal Labor Relations Authority (FLRA) concluded the process by counting the ballots to certify IFPTE as the sole collective bargaining agent for more than 1000 Federal Judges. In an unprecedented turnout 799 judges voted for representation while only 101 did not favor a union at this time. The IFPTE was chartered by the AFL-CIO in 1918 to represent professional and technical workers and now represents more than 5,000 workers in many white collar occupations in federal and state government along with workers in private industry. IFPTE represents federal workers in the following agencies: Department of Defense, Library of Congress, Department of Energy, Department of the Interior, Army Corp of Engineers and NASA.}

Presumably, ALJs who are union members would look to their union leadership for guidance in determining whether to give effect to, for example, a decision by the Commissioner not to acquiesce in a construction of Social Security regulations adverse to the Administration. Non-acquiescence in this context may arise when, for example, an agency’s rules or enabling legislation are construed in one federal appellate circuit as permitting an award of attorneys fees. If the agency makes the determination that the rationale of the one appellate circuit should be questioned and similar issues raised in other appellate circuits, the agency head would instruct the agency’s ALJs to reject the one appellate court’s reasoning for those cases that arise in all other appellate court jurisdictions. Obviously, no judge of the judicial branch of government would tolerate instructions as to how to apply or interpret such a statute (except through well-recognized jurisprudential controls found in the doctrine of stare decisis). The ALJ, on the other hand, has not been invested with judicial authority independent of the agency head, and as such, must follow the mandate of the agency head and construe the law consistent with the agency’s interpretation of the law (even if, in Judge Bernowski’s view, the agency head was wrong in his or her construction of the law).

Consider the instance where a central panel director, instead of an agency head, interprets a statute by choosing one of two possible constructions and announces that this construction should be followed by all of the ALJs in the panel. What course should an ALJ take when one appellate circuit issues an opinion rejecting the Chief ALJ’s construction? In the minds of some ALJs, the circuit court’s decision would determine the issue and there would be no basis for continuing to follow the Chief ALJ’s interpretation. Yet our system
of appellate review permits the Chief ALJ (as well as the agency head) to pursue appellate review in support of the Chief ALJ’s construction, provided this pursuit takes place in appellate jurisdictions other than the one having already decided the issue. Ultimately, the Chief ALJ may indeed be wrong in the construction of the law, but she or he is nonetheless empowered to direct the cadre of ALJs to follow his or her construction in those jurisdictions where the issue remains open for analysis. This is the case with the United States Department of Agriculture (USDA) on the question of whether attorney fees can be awarded under the Equal Access to Justice Act (EAJA).

In *Lane v. USDA*, the court of appeals held that proceedings before the USDA’s National Appeals Division (NAD) are subject to the provisions of Section 554 of the APA and, in turn, held that prevailing plaintiffs are entitled to recover their attorney fees from the USDA pursuant to the EAJA.179 The court of appeals rejected the agency’s claims that the NAD statutes are a separate, comprehensive statutory scheme that contain express procedures for conducting hearings and held that EAJA does apply and attorney fees can be awarded.180 The Director of the NAD sought to further challenge this analysis, not in proceedings in the Eighth Appellate Circuit—where the ruling was thereafter complied with—but in jurisdictions outside of that appellate circuit where no controlling legal authority addressed the point, exercising the agency’s rights under the non-acquiescence doctrine. The Supreme Court recognized the value of this doctrine in *United States v. Mendoza*.181 Justice Rehnquist observed in that case that allowing the federal agency the option to continue to test the merits of its interpretation of the law against that of the jurisdiction that ruled contrary to the agency makes sense, because to do otherwise “would deprive this Court [i.e., the Supreme Court] of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.”182 Nonetheless, the NAD’s decision to not acquiesce raised sharp concerns by its hearing officers. Wendell Fennell and Fred Young, hearing officers with the Social Security Administration, equated the NAD’s decision to continue to challenge the EAJA ruling as a threat to the judicial independence of all NAD hearing officers.

Congress183 intended for the Administrative Procedure Act (APA) and the Equal Access to Justice Act (EAJA) to apply to the NAD Hearings; however, the

179. 120 F.3d at 109; see also 5 U.S.C.§ 554 (1994).
180. See *Lane*, 120 F.3d at 108.
183. In a footnote, Fennell and Young wrote:
agencies' attorneys erroneously promulgated rules that were in conflict with Congressional intent. These rules were allowed to stand (internally) as controlling law until recently overturned by the Courts in *Lane v. USDA*. The District Court first ruled that the APA and EAJA applied to the NAD hearings and that the applicable regulation promulgated by the USDA was in error. This ruling was upheld by the Eighth Circuit. The APA assists in fostering the independence of the NAD and in leveling the playing field for the program participants in their appeals before the NAD. The matter of APA applicability has been a controversy since the Agriculture Credit Act of 1987. In the early stages of the NAS, the Hearing Officers were told not to use the words *due process* or *fairness*. Yet it seems obvious to the reasonable mind that the independence and very existence of the NAD (and the NAS) is directly tied to fairness (due process). The OGC's disconnect of the NAD and the APA is just another way of separating the NAD from judicial independence.

A great concern currently pervasive within the federal government is non-acquiescence by the agencies as to Federal District and Appellate Court rulings. The agencies have stubbornly taken the position that they need not comply with rulings unless the U.S. Supreme Court has spoken. Apparently, the agencies prefer to litigate the matter in the District and Appellate Courts for as long as possible or to defy the rulings until the matter is settled, if ever, in the Supreme Court. In the case of *Lane*, it appears that this non-acquiescence policy will be the strategy of the NAD leadership and the Office of General Counsel.

If the agency leadership and its alter egos are allowed to reverse the meaning of the language of controlling law and coerce the Hearing Officers into rendering decisions that favor the agency's position, judicial independence and fairness within the NAD will be non-existent.

The hearing officers' concerns certainly raise a valid point: should the agency have disregarded the ruling, at least in jurisdictions outside of the Eighth Judicial District? Linking this issue to the issue of judicial independence of the individual hearing officer, however, seems inappropriate. While a court of general jurisdiction can and should consider the merits of the Director's decision to acquiesce or not, the hearing officer's delegated authority to preside over appeals to the NAD does not include the power to reject or disregard the Director's interpretation of the law. Ultimately, the decision not to acquiesce is a wholly executive function. The decision should rest squarely on the shoulders of the Director, and once the

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The NAD bill that originated in the Senate (S. 1425) expressly mandated that the APA apply; however, in conference with the House, much of the Senate's specific language was dropped. However, the enacted bill never contained language that prohibited APA application. The *Lane* court correctly construed the non-specific language of Pub. L. No. 103-354 to imply application of the APA.


184. *Id.* at 217–18 (citations omitted).
decision is made and disseminated, it should be the standing order of the day, applicable to all who serve in the agency, hearing officer and ALJ alike.

As ALJ Bernowski cast the question in terms of what he perceives as the "ethical conflict" that arises when "agency rules . . . are not consistent with the law," the issue has profound implications. Who is deciding that the agency rules are not consistent with the law? In the instance described above, the hearing officer deemed himself the appropriate judge of whether EAJA applies to NAD proceedings, comforted perhaps by the decision in Lane. If the ALJ or the ALJ's union representative makes the unilateral decision that an agency rule is not consistent with the law, however that determination may come about, then under Bernowski's rule there has been an ethical violation, and the ALJ who followed the agency's rule in conflict with Bernowski's rule (or the analysis of the union's lawyer) would be at risk, facing a possible ethical violation charge. To the extent the ALJ abided by the union's interpretation of the law, the union representative would be invested with the power to determine whether the agency has adopted a rule that is "not consistent with the law," and would presumably instruct the ALJ to disregard the rule, to give it its "proper" construction as decided by the union's leadership, and would provide the support needed to defend the ALJ's refusal to follow the Commissioner's interpretation of the law. All of this would, presumably, take place with no disclosure to any litigant who is or may be affected by the construction of the controverted rule. There should be some thought given to whether, at a minimum, the litigants appearing before such an ALJ would be entitled to notice if an issue in dispute in the litigant's case is also at issue then being addressed through the collective bargaining process.

Judge Bernowski and the IFPTE are not alone in actively seeking to insulate ALJs from employer-agency overreaching. A recent decision arising from a section 1983 action filed by a former state workers' compensation ALJ produced a decision that the "decisional independence" of the ALJ may give rise to First Amendment free speech rights, which must be considered when determining whether the ALJ was wrongfully terminated. The termination was allegedly based upon the employer's claim that the ALJ "raised issues sua sponte and went outside her role by making a ruling on [the] constitutionality of a portion of an Arkansas statute." Without attempting to distinguish the role of an ALJ from that of a trial judge, the court held that:

[J]n the case of persons having a judicial role, that any supervisory authority [must] be exercised in a principled, lawful manner, and in good faith, rather than in some flagrantly arbitrary or tainted mode. At least to that limited extent I believe the First Amendment decisional independence of trial judges will and should be protected.\textsuperscript{188}

The court also noted, however, that the closest analogy available to it when balancing the interests of the ALJ with those of her employer is that of the professor at a state university:

I found a compelling analogy between First Amendment academic freedom claims in the teaching profession and the assertion here of First Amendment rights of a judicial officer who claims interference with her decisional independence. There is now an appellate decision using the same analogy and recognizing a viable claim deserving trial when a hearing officer was discharged, allegedly because his rulings in inmate cases failed to meet a statistical conviction goal advocated by his superiors.\textit{Perry v. McGinnis}, 209 F.3d 597 (6th Cir. 2000). As in the teaching cases, it was assumed in\textit{Perry} that some routine employee speech is protected, and that the issues were of more than "parochial concern" unworthy of First Amendment analysis.\textsuperscript{189}

After explaining why the ALJ's claim warranted a trial, the court went on to express the standard likely to apply in such a trial.

Having decided that plaintiff's First Amendment claim deserves an answer on the merits, I do agree with defendants that one possible approach to the merits is outlined simply and soundly in the\textit{Lovelace} case [which] holds that a teacher's grading standards must, as a matter of employment law, generally yield to the standards set by the school administration. . . . The teacher was rightfully terminated for insisting on a grading scale disapproved by the administration. First Amendment balancing was used in a fact-specific manner and the First Circuit ruling was essentially that "insubordination in refusing to grade as directed—would not be protected." In other words, managerial rights and duties outweighed the free speech interests.\textsuperscript{190}

The court's reliance on\textit{Lovelace} is useful in that it may give some guidance as to how best to guard against any possible violation of an ALJ's First Amendment rights while still ensuring the ALJ abides by the limits of delegated authority. In\textit{Lovelace v. Southeastern Massachusetts University}, the plaintiff was a university professor, serving under a three-year contract, who claimed that the reason his contract was not renewed was because he refused to inflate his grades or lower his expectations and teaching standards.\textsuperscript{191} He claimed that, in response to student complaints that homework assignments were too time-consuming and that plaintiff's courses were too hard, defendants first threatened not to renew plaintiff's contract

\begin{footnotes}
\item[188] \textit{Id.} at 1133.
\item[189] \textit{Id.}
\item[190] \textit{Harrison II}, 111 F. Supp. 2d at 1133 (discussing\textit{Lovelace v. Southeastern Mass. Univ.}, 793 F.2d 419 (1st Cir. 1986)).
\item[191] 793 F.2d 419 (1st Cir. 1986).
\end{footnotes}
unless he appeased the students and then carried out their threat when plaintiff refused to lower his standards. This, he said, interfered with his academic freedom which, plaintiff maintained, is protected by the First Amendment. The court rejected the claim, and described the balance needed between the teacher’s First Amendment rights and the need for the university to perform its institutional tasks.

To accept plaintiff’s contention that an untenured teacher’s grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission. The first amendment [sic] does not require that each non-tenured professor be made a sovereign unto himself. In the context of either a central panel or an agency ALJ, the risk similarly exists that the ALJ will seek to become “a sovereign unto himself” in the name of judicial independence, and disassociate the ALJ’s legal analyses from those espoused by the current administration. The problem may become exacerbated when the ALJ serves many years and throughout several executive administrations; each embracing political and legal analyses that are different from the other. The ALJ will then be in a position to have ruled using one set of analyses in one administration and then be directed to adopt a contrary set of analyses in service to the later administration. If the ALJ exercises true judicial independence and chooses from among these conflicting analytical approaches without regard to the direction of the executive administration, then the electoral mandate—the voice of the people through which the executive officer obtained her or his office—will not be realized and indeed the ALJ will elevate the position to that of a sovereign.

This anecdotal evidence, i.e., the presence of an intermediary union representative negotiating on behalf of Social Security Administration ALJs, the investiture of free speech rights as a personal entitlement of an ALJ, and the blurring of roles as between the adjudicators of the executive and judicial branch, all militate towards framing a central panel system that is turned towards the decision-making process. These relatively recent developments give rise to a need for some study of the status quo, including a review of the Model Act, that will permit legislators to anticipate claims by ALJs seeking increasingly broad latitude to decide in a manner not dependent upon supervisory direction or agency prerogatives, in the name of “judicial independence” of the executive adjudicator. Whether and when such claims should be accommodated should be given the study it deserves, and if

192. See Lovelace, 793 F.2d at 425.
193. Id. at 426.
194. Id.
language supplemental to the Model Act will address these innovations, then such language should be presented to the ABA in the form of a modification or supplement to the Model Act. Even with just this nascent effort on the part of ALJs seeking to force the mantle of independence on their station, there is reason to look ahead and plan accordingly. It would appear to be all but inevitable that the unbridled prosecution of the individual interests of ALJs will increasingly take center stage through the threat and occasions of strikes, personal and employment-related lawsuits, and the like, eclipsing the interests of litigants, agencies, and the public at large, all in the name of the pursuit of "judicial independence" of the ALJ. These factors must weigh heavily on states contemplating the move to a central hearing agency.

V. THE MODEL ACT, THE MODEL STATE APA, AND A PROPOSAL FOR CHANGE

To the extent there is tension between those who perceive the role of the ALJ under the judicial model and those who see it under the institutional model, the Model Act offers some ameliorative and conciliatory guidance. For the institutionalist, there is a useful means for enlisting the aid of the public as a whole, with the option to establish an advisory council consisting of agency designees, designees from the attorney general, the state bar association, and representatives from the general public, as well as from the legislature and governor's office. For the judicial model proponent the existing Model Act requires the Chief ALJ to "protect and ensure the decisional independence of each administrative law judge" and calls for the Chief and all subordinate ALJs to be "subject to the code of conduct for administrative law judges," recalling but two of several means by which the Model Act has offered a neat hybrid of both institutional and judicial models. Yet there are gaps in the Model Act, gaps which take on increased significance as the modern central panel matures. Again, ALJs typically are not "sissies;" they are determined to clear a path and upon that path find the means by which to render a fair and impartial decision upon each case presented to them. The draft resolutions that follow are suggested as a means of addressing some of the more likely problems that can arise when a state makes the decision to move to a central panel from a state of decentralization.

195. See Model Act, supra note 1, § 1-12 (discussing State Advisory Council on Administrative Hearings).
196. Id. § 1-5(a)(4).
197. Id. § 1-6(a)(10).
A. A Draft Resolution

The following items are not original with the author; rather, they were first circulated in July 2000 by Maryland's Chief ALJ Hardwicke, at a meeting of the State Administrative Law Committee of the ABA's National Conference of Administrative Law Judges in New York. It should also be noted, emphatically, that the items are not, in any manner, a reaction to concerns raised in this article. Rather, the items have been culled from a review of a very deliberate and thoughtful process which took place in part in 1991–1992 through the effort of the Commission to Revise the Administrative Procedure Act, an ad hoc commission established by William D. Schaefer, then Governor of Maryland. Although the items that follow form the nucleus of what the author hopes will be a national review of the Model Act, that is not their original intended use. The items were originally created in response to a call to review the Maryland Administrative Procedure Act and appeared for the first time in a report of the Commission published September 1, 1992. A distilled list then appeared as a draft resolution circulated in New York on July 6, 2000, at the committee meeting of the State Administrative Law Committee of the National Conference of Administrative Law Judges. They are reproduced here to give both impetus and direction to the review of the Model Act. The suggestions that follow are not by any means authoritative or exclusive; rather, they are intended to serve as starting points for discussion, each suggesting that there is a need for a particular kind of detail that warrants attention when a state begins the study of how best to provide executive adjudicative services to administrative agencies. What preceded this listing is but a sample of the lessons learned thus far, including the need to give effect to the separation of powers doctrine as well as the need to respect the desire of all who serve as ALJs to preside over a fair forum (and to have it recognized as such). Again, these are offered not as a fait accompli but as the first draft of suggestions for regulations or, where appropriate, statutory changes to supplement the Model Act. Individual state APAs may well have addressed any or all of

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these points, in which case the covered point need not be treated in the Model Act's enactment. 200

**Item 1.**  *A declaration of policy providing that the purpose of the Administrative Procedure Act is to ensure the right of all persons to be treated in a fair and unbiased manner in the resolution of disputes in administrative proceedings in order to effect prompt and efficient government.* 201

Note that this declaration reflects the dual purpose of an office of administrative hearings: to ensure prompt, fair, and impartial hearings and to do so in a fiscally responsible, efficient manner. Nothing in the Model Act speaks to these two goals nor is there a comparable provision in the Model State APA. In explaining the need for such a policy statement when recommending changes to the Maryland APA, the Commission stated, in part:

> In revising the APA, the Commission recognized the importance of developing a statute that would enable the State to meet its objective of providing fair and unbiased hearings. At the same time, the Commission was cognizant of the need, particularly through the OAH, to provide cost savings through improved efficiencies. Many safeguards that ensure both fair and unbiased hearings and governmental efficiencies have been built into the new APA and are discussed in more detail below. However, the Commission also decided that Maryland's citizens and business community would benefit by incorporating expressly these two objectives in a Declaration of Policy for the revised APA statute. 202

**Item 2.**  *Definitions as appropriate* 203

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200. The Draft Hearing Agency Proposal states: This proposal is based upon the premise that that existing administrative procedures should be clarified providing for greater efficiency, economies and effectiveness of state administrative action, particularly, in the spirit of the creation of independent central hearing agencies. This proposal fills a need to establish processes whereby executive agencies will work harmoniously with central hearing agencies within their respective spheres of responsibilities all to the end that all administrative processes will be conducted fairly, promptly and efficiently. The draft resolution based on this proposal is: "Be it resolved by the American Bar Association that each state with an independent office of administrative hearings should supplement its Administrative Procedure Act by adding the following amendments expressed herein as concepts."

*Id.*


Item 3. A provision for representation by non-attorneys before the central hearing agency and before the agency.

In the Report of the Commission, the question of representation by counsel occupies a substantial amount of space, reflecting an active debate concerning the use of non-lawyers to act as party representatives in proceedings before the state’s central panel. The discussion referred to past experiences where using non-lawyers “is appropriate and helps promote flexible due process,”204 including certain matters involving grievance hearings in which union members traditionally were permitted to represent the interests of employees belonging to unions; instances under certain federal entitlement programs in which by federal law non-attorneys are permitted to provide representation in contested case hearings including the following: hearings conducted under the auspices of the state’s Patients’ Bill of Rights; certain inmate grievance hearings; certain hearings involving involuntary admissions to mental health facilities, forced medication proceedings, and the like; certain proceedings involving automobile insurance cancellation, surcharge and non-renewal cases under the Department of Insurance; and certain hearings involving the Home Improvement Commission and the Maryland Occupational Safety and Health cases.205

Thus, it appears there have been substantial encroachments into the use in Maryland of non-lawyer representatives in certain classes of adversarial proceedings. Such an erosion of the rules prohibiting the unauthorized practice of law was troubling to the court in Holmberg v. Holmberg,206 as it diminishes the judiciary’s supervisory control over these proceedings and the participants when the participants (i.e., the unlicensed advocate-representative) exercise power for the benefit of others, without having to be subject to regulations which otherwise limit licensed advocates. To the extent revisions of the Model Act or collateral changes to a state’s APA can do so, the concerns express by the court in Holmberg should be given effect, and the practice of expanding the use of unlicensed persons to fill the role of attorneys should end or be curtailed. The Model Act is silent with respect to representation by non-lawyers, and the Model State APA permits any party to participate in the hearing “in person or, if the party is a corporation or other artificial person, by a duly authorized representative.”207

204. REPORT OF THE COMMISSION, supra note 198, at 13.
205. See id. at 15.
206. 588 N.W.2d 720, 726 (Minn. 1999).
207. MODEL STATE APA, supra note 42, § 4-203(a) (1981).
Item 4. 
A provision for a time frame within which decisions must be issued.\text{\textsuperscript{208}}

In the Report of the Commission, the commissioners recommended setting a time limit of ninety days after the hearing as the due date for the ALJ’s decision; “[t]his time limit gives the OAH adequate time to prepare well reasoned decisions without impinging upon the due process rights of parties.”\text{\textsuperscript{209}} There was, however, language that would permit additional time upon approval from the Chief ALJ.\textsuperscript{210} In a jurisdiction with an APA that is silent on the due date of the report, this addition would provide welcome guidance to the parties and would aid in the process of evaluating ALJs. Care should nonetheless be given to consult any deadline provisions in the substantive law being applied. For example, special education cases under the IDEA require the final report to be rendered within forty-five days of the date the request for a due process hearing is filed.\textsuperscript{211} The Model Act is silent as to any time frame for the issuance of reports; the Model State APA provides that:

A final order or initial order pursuant to this section must be rendered in writing within [90] days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown.\textsuperscript{212}

Item 5. 
A provision for interplay between regulations of the central hearing agency and procedural regulations of the agencies with the requirement that the central hearing agency regulations shall govern in the event there is a conflict.\textsuperscript{213}

In its note on this point, the Commission expressed a clear preference that the central hearing agency’s procedure and practice rules would control over conflicting agency procedures and practice rules. At the same time, however, it noted “that many agencies have procedures required by Federal or State law, and that some mechanism was needed for resolving conflicts between these procedures and the OAH rules of procedure.”\textsuperscript{214} The Model Act is silent as to the hierarchy of authority between the procedural rules of

\textsuperscript{209} Report of the Commission, supra note 198, at 20.
\textsuperscript{210} See id.
\textsuperscript{212} Model State APA, supra note 42, § 4-215(g).
\textsuperscript{214} Report of the Commission, supra note 198, at 21.
the central panel and the agency. The Model State APA anticipates the creation of a central hearing agency and provides that if such an agency exists, it is authorized to "establish procedures and adopt forms, consistent with this Act, the model rules of procedure, and other provisions of law, to govern administrative law judges." There is no provision, however, for resolving conflicts between procedural rules of the central hearing agency and the party agency.

**Item 6.** A provision that the citizen has the right to be represented by counsel at an administrative proceeding.²¹⁶

As the Commission noted, some consideration must be given to those instances where a question may arise as to whether litigants have the right to be represented by an attorney.²¹⁷ There is no reference to such a right in the Model Act. The Model State APA provides that "[w]hether or not participating in person, any party may be advised and represented at the party’s own expense by counsel or, if permitted by law, other representative."²¹⁸

**Item 7.** Provisions for content of notices to citizens and to agencies of a proposed action or pending action.²¹⁹

According to the Commission, prior to the creation of Maryland’s central panel, the agency would be responsible to mail both the notice of agency action and the notice setting forth information about the time and location of any hearing. Maryland’s APA did not provide a means for separating these two functions once the OAH was created, so a change to the APA was needed to permit the OAH to send notices of the hearing date and time. Nothing in the Model Act addresses the role a central hearing agency would have in giving notice of an evidentiary hearing. Under the Model State APA, notice of the hearing is to be given by the “presiding officer,”²²⁰ whereas notice of the agency’s proposed action may be given either by “the agency or the presiding officer.”²²¹

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²¹⁵. MODEL STATE APA, supra note 42, § 4-301(e)(3).
²¹⁸. MODEL STATE APA, supra note 42, § 4-203(b).
²¹⁹. See, e.g., MD. CODE ANN., STATE GOV’T § 10-208(b).
²²⁰. MODEL STATE APA, supra note 42, § 4-206(a) (notice of hearing).
²²¹. Id. § 4-102(d).
Item 8. A provision for whether such notices should, in addition to furnishing citizens with nature of contested case and telling the place of hearing, contain other due process provisions.\footnote{222}

Beyond giving notice of the time, place, and location of the hearing, this provision embraces the role of a central hearing agency in serving the public; it directs the central hearing agency to actively promote greater public understanding of the law by requiring the agency to give notice as to the rights and obligations of those appearing before the central hearing agency. In its draft, the Commission identified these items for inclusion in the central agency’s notice to participants:

[T]he date, time, place, and nature of the hearing; the right to call witnesses and submit documents or other evidence; any applicable right to request subpoenas for witnesses and specify their costs, if any, associated with a request; that a copy of the hearing procedure is available on request and specify the costs associated with such a request; any right or restriction pertaining to representation; that failure to appear for the scheduled hearing may result in an adverse action against the party; and that, unless otherwise prohibited by law, the parties may agree to the evidence and waive their right to appear at the hearing.\footnote{223}

The proposals also provided that the notice of hearing and the notice of agency action could be consolidated as one document and provided that it was not sufficient notice for the agency to publish notice of the agency action in the Maryland Register. There was also specific language detailing the manner in which notice of the agency action or of the hearing could be given, and the consequences of the responding party’s failure to provide the prosecuting agency a correct mailing address.

The Model Act is silent with respect to the nature of notices needed to fairly alert participants as to the substance and process of the administrative hearing. The Model State APA includes similar provisions for notices of hearing.\footnote{224}

\footnote{222}{See, e.g., Md. Code Ann., State Gov’t § 10-208(b)(1) (contents of notice).}
\footnote{223}{Id. § 10-208(b).}
\footnote{224}{Section 4-206 of the Model State APA provides:
(a) The presiding officer for the hearing shall set the time and place of the hearing and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter.
(b) The notice must include a copy of any pre-hearing order rendered in the matter.
(c) To the extent not included in a pre-hearing order accompanying it, the notice must include:
(1) the names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;
(2) the name, official title, mailing address and telephone number of any counsel or}
**Item 9.** A provision that all hearings shall be open to the public unless federal or state law requires otherwise.\(^{225}\)

This codifies existing practice in Maryland,\(^{226}\) but the Model Act does not address whether hearings should be open to the public. The Model State APA provides that:

The hearing is open to public observation, except for the parts that the presiding officer states to be closed pursuant to a provision of law expressly authorizing closure. To the extent that a hearing is conducted by telephone, television, or other electronic means, and is not closed, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear or inspect the agency’s record, and to inspect any transcript obtained by the agency.\(^{227}\)

**Item 10.** A provision pertaining to the admissibility of evidence if it is hearsay.\(^{228}\)

employee who has been designated to appear for the agency;
(3) the official file or other reference number, the name of the proceeding, and a general description of the subject matter;
(4) a statement of the time, place, and nature of the hearing;
(5) a statement of the legal authority and jurisdiction under which the hearing is to be held;
(6) the name, official title, mailing address, and telephone number of the presiding officer;
(7) a statement of the issues involved and, to the extent known to the presiding officer, of the matters asserted by the parties; and
(8) a statement that a party who fails to attend or participate in a pre-hearing conference, hearing, or other stage of an adjudicative proceeding may be held in default under this Act.

d) The notice may include any other matters the presiding officer considers desirable to expedite the proceedings.

e) The agency shall give notice to persons entitled to notice under any provision of law who have not been given notice by the presiding officer. Notice under this subsection may include all types of information provided in subsections (a) through (d) or may consist of a brief statement indicating the subject matter, parties, time, place, and nature of the hearing, manner in which copies of the notice to the parties may be inspected and copied, and name and telephone number of the presiding officer.

**Model State APA, supra note 42, § 4-206.**


In the Report of the Commission, the recommendation is that language be added to the APA to codify existing law that hearsay may be accepted as evidence.\(^\text{229}\) The Model Act is silent with respect to the applicability of the rules of evidence and as to the admissibility of hearsay. The Model State APA provides that:

Upon proper objection, the presiding officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. In the absence of proper objection, the presiding officer may exclude objectionable evidence. Evidence may not be excluded solely because it is hearsay.\(^\text{230}\)

**Item 11.** *A provision that if the central hearing agency renders a recommended decision, the final decision must identify and explain any change, modification and amendment to the recommended decision.*\(^\text{231}\)

When the central panel adjudicator issues a recommended decision, the receiving agency need not follow the recommendation. In those instances, Maryland law permits a party to file exceptions to the recommendation, and thereafter, the agency renders its final decision. The Commission recommended that in those instances where the agency opted not to follow the recommendation of the central panel adjudicator, the agency must explain its reasons.\(^\text{232}\) The Model Act provides that “[i]n reviewing a proposed (initial, recommended) decision or order received from the administrative law judge, the agency head or governing body shall not modify, reverse or remand the proposed decision of the administrative law judge except for specified reasons in accordance with law.”\(^\text{233}\) The Model Act is silent with respect to any obligation on the part of the agency receiving an ALJ’s recommendation to explain the agency’s rejection of the ALJ’s findings of fact, conclusions of law, or recommendation. The Model State APA requires an articulation of the rationale behind an agency’s final decision.\(^\text{234}\)

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\(^{229}\) See Report of the Commission, supra note 198, at 23.

\(^{230}\) Model State APA, supra note 42, § 4-212(a).


\(^{233}\) Model Act, supra note 1, § 1-11.

\(^{234}\) See Model State APA, supra note 42, § 4-215(c).

A final order or initial order must include, separately stated, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency’s discretion, for all aspects of the order, including the remedy prescribed and,
Item 12. A provision that there be a clearly articulated standard of proof for administrative hearings. Thus, if there is no statutory standard in specific categories of cases, the Administrative Procedure Act may specifically provide for some other standard such as of clear and convincing evidence or a preponderance of the evidence.\textsuperscript{235}

In Maryland, at the time the Commission issued its report, there was no uniform standard of the degree of proof needed to prevail in a proceeding under the APA.\textsuperscript{236} Bernstein v. Real Estate Comm'n,\textsuperscript{237} a Maryland Court of Appeals case, held that a preponderance of the evidence is the standard; the Commission "determined that it is in the public interest to incorporate in the APA a clearly articulated standard of proof. The Commission decided that the best way to accomplish this goal was to codify case law by specifying that preponderance of the evidence is the standard."\textsuperscript{238} It left open the door, however, for the use of the "clear and convincing evidence" standard if called for by regulation, statute or constitutional provision.\textsuperscript{239} The Model Act is silent with respect to the appropriate standard of proof. The Model State APA provides that findings of fact:

\textquote*[M]ust be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a civil trial. The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence.\textsuperscript{240}

\begin{footnotes}
\item 235. See, e.g., Md. Code Ann., State Gov't §§ 10-213, 10-217 (setting out the rules of evidence for Maryland administrative disputes).
\item 236. See Report of the Commission, \textit{supra} note 198, at 25.
\item 237. 156 A.2d 657 (Md. 1959).
\item 239. \textit{Id}.
\item 240. Model State APA, \textit{supra} note 42, § 4-215(d).
\end{footnotes}
Item 13.  A provision that there be a clearly articulated standard of proof for administrative hearings. Thus, if there is no statutory standard in specific categories of cases, the Administrative Procedure Act may specifically provide for some other standard such as of clear and convincing evidence or a preponderance of the evidence. 241

A provision concerning ex parte communications both with respect to hearings held by the central hearing agency and with respect to hearings held by an agency head, board, or commission either on exceptions from the central hearing agency or non-delegated cases. 242

The Commission offered four points with respect to ex parte communications:

1. An administrative law judge or any other presiding officer is not permitted to engage in ex parte communications while a case is pending;

2. A final decision maker may not communicate with a presiding officer who issued a proposed decision in the same case;

3. An agency head, board, or commission, may communicate with members of an advisory staff or counsel provided that these persons are not involved in the contested case being decided by the agency head, board, or commission; and

4. Anyone who is personally aware of an ex parte communication must give notice to all parties in the case and include information about the ex parte communication in the record of the contested case. 243

The Model Act does provide that an ALJ "shall not be responsible to or subject to the supervision, direction or direct or indirect influence of an officer, employee, or agent engaged in the performance of investigatory, prosecutory, or advisory functions of the agency," 244 but it is silent with respect to ex parte communication. The Model State APA provides for specific limitations on the use of ex parte communication, comparable to those set forth by the Commission. 245

241. See, e.g., MD. CODE ANN., STATE GOV’T §§ 10-213, 10-217 (setting out the rules of evidence for Maryland administrative disputes).
244. MODEL ACT, supra note 1, § 1-6(a)(10)(b).
Item 14. A provision that the agency shall have the same right of appeal to a court of law as the citizen from a decision of proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

Id. § 4-213(a).

A member of a multi-member panel of presiding officers may communicate with other members of the panel regarding a matter pending before the panel, and any presiding officer may receive aid from staff assistants if the assistants do not (i) receive ex parte communications of a type that the presiding officer would be prohibited from receiving or (ii) furnish, augment, diminish, or modify the evidence in the record.

Id. § 4-213(b).

Unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate, directly or indirectly, in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as presiding officer, without notice and opportunity for all parties to participate in the communication.

Id. § 4-213(c).

If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e).

Id. § 4-213(d).

A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal within [10] days after notice of the communication.

Model State APA, supra note 42, § 4-213(e).

If necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication may be disqualified and the portions of the record pertaining to the communication may be sealed by protective order.

Id. § 4-213(f).

The agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, for any violations of this section.

Id. § 4-213(g).
The Commission examined existing case law in Maryland, and noted that in some instances agencies were permitted to exercise a right of appeal from decisions of the OAH, but denied that right in others. Upon analysis of the role of the OAH, the Commission recommended that "when final administrative decisions resolving issues between private parties and the government are issued by the OAH or an agency . . . both parties should be permitted to pursue judicial review of the decision." This would not, however, permit an agency to appeal a final decision if the agency had not participated as a party in the administrative hearing leading to that decision. Neither the Model Act nor the Model State APA has a provision for appellate review by the agency.

Item 15. A provision that on appeal of a contested case decision the appeal shall be heard on the record developed by the agency or central hearing agency and shall not be heard de novo.

In Maryland, there are instances where decisions from an administrative tribunal are subject to de novo review. The Commission reports that foremost in this category are appeals to the Circuit Court from the Workers Compensation Commission. In support of the proposal to limit most provisions for de novo review (albeit leaving intact the status quo for cases on appeal from the Workers Compensation Commission), the Commission noted the common law doctrines supporting the proposition that there should be no de novo review of decisions from administrative adjudications. These included:

Administrative decisions are presumed to be correct and must be reviewed in the light most favorable to the agency;

249. See id.
250. See Model State APA, supra note 42, § 5-106 (standing).
253. See id.
254. See id. (citing Bulluck v. Pelham Woods Apartments, 390 A.2d 1119 (1978)).
The reviewing court may not substitute its judgment for the expertise of the agency in reviewing the agency's decision.\textsuperscript{255} The reviewing court is bound by the record made at the administrative hearing.\textsuperscript{256}

A reviewing court will affirm the administrative action when it concludes that a reasoning mind reasonably could have reached the factual conclusions the agency has reached; and\textsuperscript{257}

The applicable standard of review does not look to whether the administrative agency was right or wrong in reaching its conclusions, but whether those conclusions would reasonably have been made by a reasoning mind.\textsuperscript{258}

The Model Act states only that judicial review of agency decisions "shall occur in accordance with the Administrative Procedure Act [or other specific statutory provision]."\textsuperscript{259} The Model State APA provides for a substantial evidence standard of review.\textsuperscript{260}

\begin{itemize}
\item\textsuperscript{255} See id. (citing A.H. Smith Sand & Gravel Co. v. Dep't of Water Res., 313 A.2d 820 (Md. 1974)).
\item\textsuperscript{256} See id. (citing Aspen Hill Venture v. Montgomery County, 289 A.2d 303 (Md. 1972)).
\item\textsuperscript{257} See REPORT OF THE COMMISSION, supra note 198, at 34 (citing Resetar v. State Bd. of Educ., 399 A.2d 225 (Md. 1979)).
\item\textsuperscript{258} See id. (citing Maryland Fire Underwriters Rating Bureau v. Ins. Comm'r of Maryland, 272 A.2d 24 (1971)).
\item\textsuperscript{259} MODEL ACT, supra note 1, § 1-11.
\item\textsuperscript{260} See MODEL STATE APA, supra note 42, § 5-116.
\end{itemize}

(a) Except to the extent that this Act or another statute provides otherwise:

(1) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity; and

(2) The validity of agency action must be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more of the following:

(1) The agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied.

(2) The agency has acted beyond the jurisdiction conferred by any provision of law.

(3) The agency has not decided all issues requiring resolution.

(4) The agency has erroneously interpreted or applied the law.

(5) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.

(6) The persons taking the agency action were improperly constituted as a decision-making body, motivated by an improper purpose, or subject to disqualification.
Item 16. A provision that the agency head or executive authority shall not directly or indirectly intervene in the functions of the central hearing agency unless such intervention shall be in accordance with provisions of the state Administrative Procedure Act.\(^{261}\)

At the time the Commission issued its report, common law in Maryland permitted an agency to revoke its prior delegation of authority to an ALJ “at any time, even after the final decision in a contested case has been issued by the OAH.”\(^{262}\) Upon analysis, the Commission recommended the creation of a “bright line” that would permit the agency to revoke its delegation “prior to the earlier of the issuance of a ruling on a substantive issue or the taking of oral testimony from the first witness.”\(^{263}\) This point provoked the following comment:

A major consideration in selecting these particular points as the “bright line” was the need to permit agencies to retain cases that may have a significant policy impact or are likely to have substantial precedential value. Agencies have a legitimate concern that they retain the opportunity to set policy through contested cases. Since the OAH was not established to serve as a policy-making agency, if an agency is not party to a case, it might not have the opportunity to find out about significant policy issues in the case prior to the initiation of the matter. Furthermore, no agency would be permitted to revoke a delegation pursuant to this section without first having regulations in effect to govern the criteria and procedures for revocation. The Commission’s proposal would protect the interests of the agencies without

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(7) The agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this Act.

(8) The agency action is:

(i) outside the range of discretion delegated to the agency by any provision of law;

(ii) agency action, other than a rule, that is inconsistent with a rule of the agency; [or]

(iii) agency action, other than a rule, that is inconsistent with the agency’s prior practice unless the agency justifies the inconsistency by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency. [; or] [;]

(iv) [otherwise unreasonable, arbitrary or capricious.]


263. Id. at 19.
exposing parties in contested cases to the possibility of “re-litigating” cases or facing “reversal” of substantive rulings by revocation.264

The Model Act, however, has language that may address this concern. The section entitled Responsibility states:

(a) Except as provided herein, the Office shall administer the resolution of all contested cases [unless the agency head or governing body of any agency hears the case without delegation or assignment to a hearing officer or administrative law judge].

(b) Upon referral by an agency, one or more administrative law judges shall administer the resolution of the matters referred.265

The Model Act also includes an optional provision that would allow the agency to withdraw its delegation of a case in the middle of proceedings:

Where a matter is referred to the Office by an agency, the referring agency shall take no further adjudicatory action with respect to the proceeding, except as a party litigant, as long as the Office has jurisdiction over the proceeding. [Nothing in this subsection shall be construed to prevent an appropriate interlocutory review by the agency nor an appropriate termination or modification of the proceeding by the agency.]266

Item 17. A provision that the central hearing agency shall recognize and apply policies, rules and regulations adopted by the agency in accordance with law in the same manner and to the extent as if the agency itself were holding the hearing.267

Draft language offered by the Commission is as follows: “[i]n a contested case, the Office is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case.”268 This brings to the fore whether an agency is subject to the doctrine of stare decisis. The Model Act is silent with respect to the applicability of prior agency rulings on pending cases, as is the Model State APA. However, the Commission cited the Maryland rule that “an administrative agency is not

264. Id. at 20.
265. MODEL ACT, supra note 1, § 1-3.
266. Id. § 1-10(c).
267. See, e.g., MD. CODE ANN., STATE GOV’T § 10-214(b) (stating that rules, regulations, and rulings are binding).
268. Id.
totally free to disregard its prior policy statements.\textsuperscript{269} In addition, the Commission emphasized that:

\footnotesize{
[T]his provision is not intended, and should not be interpreted, to impose a requirement on OAH to create a data base system of all agency decisions and policies. Such a requirement would impose a substantial administrative and financial burden on OAH. The Commission urges all agencies to use their best efforts to provide the OAH with any such decisions or policies.\textsuperscript{270}
}

\textbf{Item 18.} \textit{A provision that contested cases shall be decided exclusively upon a record kept in each such case.}\textsuperscript{271}

The Commission noted that the drafters of the original Maryland APA chose not to include a provision modeled after section 5-113 of the Model State APA. That section states “judicial review of disputed issues of fact must be confined to the agency record for judicial review . . . supplemented by additional evidence taken pursuant to this Act.”\textsuperscript{272} Furthermore, the drafters omitted an inventory of what should be within the “exclusive basis for agency action.”\textsuperscript{273} In the event the Maryland APA does provide for

\begin{itemize}
\item \textsuperscript{270} Report of the Commission, \textit{supra} note 198, at 24 (construing new § 10-214).
\item \textsuperscript{271} See, e.g., Md. Code Ann., State Gov’t §§ 10-221, 10-222.\footnote{\textsuperscript{272} Model State APA, \textit{supra} note 42, § 5-113 (1981).}
\item \textsuperscript{273} Id. § 4-221(c).
\end{itemize}

(a) An agency shall maintain an official record of each adjudicative proceeding under this Chapter.

(b) The agency record consists only of:

1. notices of all proceedings;
2. any pre-hearing order;
3. any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
4. evidence received or considered;
5. a statement of matters officially noticed;
6. proffers of proof and objections and rulings thereon;
7. proposed findings, requested orders, and exceptions;
8. the record prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;
9. any final order, initial order, or order on reconsideration;
10. staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with Section 4-213(b); and
11. matters placed on the record after an ex parte communication.

(c) Except to the extent that this Act or another statute provides otherwise, the agency
instructions as to what the agency record should consist of and what record should be certified, these should be addressed, as the Model Act itself is silent on the points.

Item 19. Delegation of hearing authority.\textsuperscript{274} 

In addition to the discussion in part 16, which concerns the power of an agency to revoke its delegation of a matter to the OAH, the Commission also provides an agency with several options. The agency is authorized to conduct the hearing, delegate the hearing authority to the OAH, or, upon securing written permission from the Chief ALJ, the agency may use the services of a person not employed by the agency to conduct the hearing.\textsuperscript{275} When the agency decides to delegate a matter to the OAH, it may select from a menu of options that describe the scope of the delegation;\textsuperscript{276} those include permission to authorize the OAH to render proposed findings of fact only, a combination of findings of fact and conclusions of law, proposed final orders, or the final decision on behalf of the agency.\textsuperscript{277} Included in the same section is language that reduces the agency's authority to revoke its delegation of authority.\textsuperscript{278} In 1991, the Maryland Court of Special Appeals noted that the power to delegate approval authority "must include implicitly the right to revoke that delegation and overrule a designee's decision when that decision is inconsistent with the policies of the Secretary."\textsuperscript{279} When creating its report, however, the Commission opted instead for its "bright line," described in Item 16 above, by which the power to revoke delegation was limited.\textsuperscript{280} The proposed language provides that "an agency's delegation and transmittal of all or part of a contested case to the [OAH] is final"; moreover, there are only limited exceptions available to agencies which adopt regulations "specifying the criteria and procedures for the revocation of a delegation of a contested case."\textsuperscript{281} As noted above, the "bright line" drawn by the Commission is the earlier of the issuance of a ruling on a substantive issue or the taking of oral testimony from the first witness.\textsuperscript{282}

\footnotesize{record constitutes the exclusive basis for agency action in adjudicative proceedings under this Chapter and for judicial review thereof.}

\textit{Id.}
\textsuperscript{274} \textit{See, e.g., Md. Code Ann., State Gov't § 10-205.}
\textsuperscript{275} \textit{See Report of the Commission, supra note 198, at 18.}
\textsuperscript{276} \textit{See id.}
\textsuperscript{277} \textit{See id.}
\textsuperscript{278} \textit{See id.}
\textsuperscript{280} \textit{See Report of the Commission, supra note 198, at 19.}
\textsuperscript{281} \textit{Id. See also id. app. C at 13 (new § 10-205(d)(1)).}
\textsuperscript{282} \textit{See id. at 19 (construing new § 10-205(d)).}
The Model Act is silent on the process by which an agency may revoke its delegated authority. However, one might argue that the Model Act prohibits such a revocation in light of its instruction that "the Office shall administer the resolution of all contested cases" and "[u]pon referral by an agency, one or more administrative law judges shall administer the resolution of the matters referred." \(^{283}\) The Model State APA has no language directly providing for (or prohibiting) the remand of a matter or the revocation of delegation. \(^{284}\)

**Item 20. Power to adopt regulations.** \(^{285}\)

The Model Act does not discuss whether the central hearing agency can adopt regulations; however, the Commission's Report recommended three things. First, it advised for the inclusion of language that will direct the agency to "adopt regulations to govern the procedures and practice in all contested cases delegated to the [OAH] and conducted under this subtitle." \(^{286}\) Second, it recommended that "each agency may adopt regulations to govern procedures under this subtitle and practice before the agency in contested cases." \(^{287}\) Finally, the Commission instructed that:

[U]nless a federal or state law requires that a federal or state procedure shall be observed, the regulations adopted under paragraph (1) of this subsection [i.e., the regulations adopted by the OAH] shall take precedence in the event of a conflict [between the OAH regulations and those of the agency]. \(^{288}\)

The Model State APA equips the office of administrative hearings with the power to:

Adopt rules . . . (1) to establish further qualifications for administrative law judges, . . . (2) to establish procedures for agencies to request . . . administrative law judges, . . . (3) to establish . . . model rules of procedure, . . . (4) to establish standards and procedures for the evaluation, training, promotion, and discipline of administrative law judges, . . . and (5) to facilitate the performance of the responsibilities conferred upon the office by this Act. \(^{289}\)

\(^{283}\). **Model Act, supra** note 1, §§ 1-3(a), (b).

\(^{284}\). **But see Model State APA, supra** note 42, § 4-215(b) ("If the presiding officer is not the agency head, the presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with Section 4-216.").


\(^{286}\). **Report of the Commission, supra** note 198, app. C at 13 (new § 10-205(A)(1)).

\(^{287}\). **Id.** app. C at 13 (§ 10-205(B)).

\(^{288}\). **Id.** app. C at 13 (§ 10-205(A)(2)).

\(^{289}\). **Model State APA, supra** note 42, § 4-301(e).
CONCLUSION

These twenty proposals form the nucleus of the proposal now under study before the National Conference of Administrative Law Judges. It is hoped that the proposals will be studied and commented upon by those familiar with the administrative adjudicative process. It is additionally desired that the nucleus from that study will develop into a shape suitable for approval by the ABA House of Delegates as a supplement to the Model Act Creating a State Central Hearing Agency, which will in turn provide the sinew needed to support a process that is fair in both appearance and reality. In states where there is no central panel already on the books, the proposals supplement the structure presented through the Model Act and the Model State APA. In addition to these concerns, there are other areas where practice and policy compel the development of statutes and regulations appropriate for inclusion when a state contemplates centralizing its administrative adjudicative professionals. Public trust and confidence in the executive adjudicator rests primarily on the presence of these sound tools of adjudication and administration.

There should, however, be little doubt but that alone, the Model Act is less than is needed when creating a central panel. It, along with the state APA and existing agency regulations, needs to be considered when making a transition to the central panel. Ideally, the details addressed by these proposals will also be considered by states and cities already operating a central panel, because only then will legislators and the executive administration have a more complete understanding of the limitations of existing central panels, along with concrete suggestions for the means by which the limitations can be addressed and, where appropriate, remedied.
APPENDIX

MODEL ACT CREATING A STATE CENTRAL HEARING AGENCY*
(Office of Administrative Hearings)

An act concerning the Office of Administrative Hearings for the purpose of establishing an Office of Administrative Hearings as an independent agency in the Executive Branch in order to provide a source of independent administrative law judges to preside in contested cases; providing for the appointment of a chief administrative law judge; establishing the chief administrative law judge's qualifications, compensation, powers, and duties . . . [other purposes].

BE IT ENACTED BY THE [NAME OF LEGISLATIVE BODY], That the Laws of [STATE] read as follows:

Article [ ] State Government
Subtitle [ ]. Office of Administrative Hearings
Part I. Office of Administrative Hearings

Section 1-1 Scope of Subtitle.

(a) Exceptions—This subtitle does not apply to:
   (1) an agency of the Legislative Branch of the State government;
   (2) an agency of the Judicial Branch of the State government;
   or
   (3) the following agencies of the Executive Branch of the State government:
      (i) the Governor;
      (ii) [exception]; and
      (iii) [exception].

(b) Except as provided in paragraphs (1), (2), and (3) of subsection (a) of this section, this subtitle shall apply to each agency that employs or engages one or more hearing officers or administrative law judges, either full or part-time, to adjudicate contested cases unless the agency has been exempted by the Governor under subsection (c) of this section.

(c) Until one year from the effective date of this statute the Governor temporarily may exempt an agency from this subtitle.

Section 1-2 Establishment and Appointment of Administrative Law Judges.

(a) The Office of Administrative Hearings is created as an independent agency in the Executive Branch of State Government for the purpose of separating the adjudicatory function from the investigatory, prosecutory and policy-making functions of agencies in the Executive Branch. Administrative law judges shall be selected and appointed [by the Governor upon screening and recommendation of a judicial nominating commission] [through competitive examination in the classified service of state employment] [by the chief administrative law judge].

(b) The hearing officers and administrative law judges of the agencies to which this subtitle applies shall become employees of the Office of Administrative Hearings. [The grandfathered hearing officers and administrative law judges are exempt from the qualifications contained in Section 1-6(a)(2).]

Section 1-3 Responsibility.

(a) Except as provided herein, the Office shall administer the resolution of all contested cases [unless the agency head or governing body of any agency hears the case without delegation or assignment to a hearing officer or administrative law judge].

(b) Upon referral by an agency, one or more administrative law judges shall administer the resolution of the matters referred.
Section 1-4 Chief Administrative Law Judge—In General.

(a) The Office is headed by a chief administrative law judge [appointed by the Governor with advice and consent of the Senate for a term of ( ) years], [through competitive examination in the classified service of state employment] who may be removed only for good cause following notice, and an opportunity for an adjudicative hearing and shall continue in office until a successor is appointed.

(b) The chief administrative law judge shall:
   (1) take an oath of office as required by law prior to the commencement of duties;
   (2) devote full time to the duties of the Office and shall not engage in the practice of law;
   (3) be eligible for reappointment;
   (4) receive the salary provided in the state budget [receive a salary in the same amount as that provided by law for a { } court judge];
   (5) be licensed to practice law in the State and admitted to practice for a minimum of five years;
   (6) have the powers and duties specified in this subtitle; and
   (7) be subject to the code of conduct for administrative law judges.

(c) The chief administrative law judge may employ a staff in accordance with the State budget.

Section 1-5 Chief Administrative Law Judge—Powers and Duties.

(a) The chief administrative law judge shall:
   (1) supervise the Office of Administrative Hearings;
   (2) [appoint and remove administrative law judges in accordance with this subtitle (the other option is for the Governor to appoint through a judicial nominating commission as provided by Section 1-2)];
   (3) assign administrative law judges in any case referred to the Office;
   (4) protect and ensure the decisional independence of each administrative law judge;
   (5) establish and implement standards and specialized training programs and provide materials for administrative law judges;
(6) provide and coordinate continuing education programs and services for administrative law judges, including research, technical assistance, technical and professional publications, compile and disseminate information, and advise of changes in the law relative to their duties;

(7) adopt rules to implement this subtitle through rulemaking proceedings in accordance with the Administrative Procedure Act or other law.

(8) adopt a code of conduct for administrative law judges;

(9) monitor the quality of state administrative hearings through the provision of training, observation, feedback and, when necessary, discipline of A.L.J.s who do not meet appropriate standards of conduct and competence, subject to the provisions of Section 1- 6(a)(4) below;

(10) submit an annual report on the activities of the Office to the Governor and to the [Legislature].

(11) [cooperate and assist the State Advisory Council in the discharge of its duties pursuant to Sections 1-12 through 1-14 of this Act.]

(b) The chief administrative law judge may:

(1) serve as an administrative law judge in a contested case;

(2) [establish qualifications for the selection of administrative law judges];

(3) furnish administrative law judges on a contractual basis to governmental entities other than those required to use their services;

(4) accept and expend funds, grants, bequests and services, which are related to the purpose of the Office, from any public or private source;

(5) enter into agreements and contracts with any public or private agencies or educational institutions;

(6) [create specialized subject matter divisions within the Office.]

Section 1-6 Administrative Law Judges.

(a) An administrative law judge shall:

(1) take an oath of office as required by law prior to the commencement of duties;

(2) be admitted to practice law [in the State] [for a minimum of five years];
(3) be subject to the requirements and protections of [e.g.,
classified service of State employment and the State ethics
code];
(4) be removed, suspended, demoted, or subject to disciplinary
or adverse actions including, any action that might later
influence a reduction in force, only for good cause, after notice
and an opportunity to be heard in an Administrative Procedure
Act or other statutory-type hearing and a finding of good cause
by an impartial hearing officer;
(5) be subject to a reduction in force only in accordance with
established, objective civil service or merit system procedures;
(6) receive compensation provided in the State budget [receive
a salary in the same amount as that provided by law for a
(_______) court judge];
(7) not perform duties inconsistent with the duties and
responsibilities of an administrative law judge;
(8) devote full time to the duties of the position and [shall not
engage in the practice of law unless serving as a part-time
administrative law judge];
(9) be subject to administrative supervision by the chief
administrative law judge; and
(10) be subject to the code of conduct for administrative law
judges.

(b) An administrative law judge shall not be responsible to or
subject to the supervision, direction or direct or indirect influence
of an officer, employee, or agent engaged in the performance of
investigatory, prosecutory, or advisory functions for an agency.

Section 1-7 Cooperation of State Government Agencies; Audits;
Selection of Judges.

(a) All agencies of State government shall cooperate with the chief
administrative law judge in the discharge of the duties of the
Office.

(b) The Office shall be subject to audit by [the legislative audit
office under the same rules and rotation by which other State
agencies are audited].

(c) Except in arbitration or similar proceedings as provided by law
or in this subtitle or in regulations adopted under this subtitle, an
agency may not select or reject a particular administrative law judge for a particular proceeding.

Section 1-8 Designation of Administrative Law Judges.

If the Office is unable to assign an administrative law judge in response to an agency referral, the chief administrative law judge shall designate in writing an individual to serve as an administrative law judge in a particular proceeding before the agency [if the individual meets the qualifications for an administrative law judge established by the Office and is subject to the Code of Judicial Conduct].

Section 1-9 Powers of Administrative Law Judges.

An administrative law judge shall have the power to:

(1) issue subpoenas;
(2) administer oaths;
(3) control the course of the proceedings;
(4) engage in or encourage the use of alternative dispute resolution methodologies as appropriate; and
(5) order a party, a party's attorney, or other authorized representative, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay,
(6) perform other necessary and appropriate acts in the performance of duties.

Section 1-10 Decision-making Authority.

(a) The assigned administrative law judge shall render the final decision of the agency not subject to agency review, in all hearings for the following agencies:
   (1) [Name of Agency];
   (2) [Name of Agency]; and
   (3) [Name of Agency].

(b) Except as provided by law, the administrative law judge shall issue a proposed [initial, recommended] decision unless the agency authorizes the issuance of a final decision, as provided in the Administrative Procedure Act.
(c) Where a matter is referred to the Office by an agency, the referring agency shall take no further adjudicatory action with respect to the proceeding, except as a party litigant, as long as the Office has jurisdiction over the proceeding. [Nothing in this subsection shall be construed to prevent an appropriate interlocutory review by the agency nor an appropriate termination or modification of the proceeding by the agency.]

Section 1-11 Proposed Decisions and Orders.

In reviewing a proposed (initial, recommended) decision or order received from the administrative law judge, the agency head or governing body of the agency shall not modify, reverse or remand the proposed decision of the administrative law judge except for specified reasons in accordance with law. Judicial review of agency decisions shall occur in accordance with the Administrative Procedure Act [or other specific statutory provision].

OPTIONAL

Section 1-12 State Advisory Council on Administrative Hearings—Establishment; Composition; Appointment.

(a) There is a State advisory council on administrative hearings.

(b) The council consists of nine members.

(c) Of the nine council members:
   (1) One shall be a member of the Senate of [ ];
   (2) One shall be a member of the House of [ ];
   (3) One shall be the Attorney General or the Attorney General's designee;
   (4) Two shall be directors, secretaries, chief executives, or their designees from agencies involved in the adjudication of contested cases before the Office;
   (5) Two shall be from the general public; and
   (6) Two shall represent the state bar association.

(d) The Governor shall appoint the members specified in subsection (c)(4) through (6) of this section.
Section 1-13 Terms; Compensation; Chair.

(a) (1) The term of a member of the council is four years.
(2) The terms of the members are staggered as required by the terms provided for members of the council on [DATE].
(3) A member is eligible to serve more than one term.
(4) A member shall not be disqualified by virtue of being engaged in the practice of law or appearing regularly as an attorney before the Office.

(b) A member of the council may not receive compensation, but is entitled to reimbursement for expenses under the standard state travel regulations.

(c) The council shall designate a chair from among its members.

Section 1-14 Powers and Duties; Meetings.

(a) The council shall:

(1) advise the chief administrative law judge in carrying out the duties of the Office;
(2) identify issues of importance to administrative law judges that should be addressed by the chief administrative law judge;
(3) review issues and procedures relating to administrative hearings and the administrative process;
(4) review and comment upon rules of procedure and other regulations and policies proposed by the chief administrative law judge;
(5) review and comment on the annual report submitted by the chief administrative law judge; and
(6) conduct a study of agencies which employ hearing officers to adjudicate contested case hearings which have been exempted by the Governor pursuant to Section 1-1(3) and recommend to the Governor those agencies for which such exemption should be continued by [DATE].

(b) The council shall meet at a regular time and place to be determined by the council.
Section 1-15 Effective Date.

That Sections 1-1 through 1-14 shall take effect on [DATE].