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# NOTE

## EXPANDING THE JUDICIAL POWER OF THE ADMINISTRATIVE LAW JUDGE TO ESTABLISH EFFICIENCY AND FAIRNESS IN ADMINISTRATIVE ADJUDICATION

### I. INTRODUCTION

How is an administrative law judge ("ALJ") to know his role in the modern bureaucracy? On the one hand, the law requires the ALJ to adjudicate legal disputes between the government agency and the individual, and on the other hand, a black-robed member of the judicial branch instructs him that he is out of his jurisdiction. Who wins in this decades-long battle for turf?

Courts typically find that the ALJ has exceeded the scope of his power if he decides a constitutional question. Recently, however, one enlightened court pronounced the propriety of an agency hearing officer's review of constitutional issues raised in an agency case. In *Mowbray v. Kozlowski*,<sup>1</sup> the United States District Court for the Western District of Virginia asserted that an administrative agency's refusal to hear issues of federal law violated the litigant's due process rights under the Fourteenth Amendment.<sup>2</sup> The district court recognized that due process is satisfied when a claimant challenging administrative action in an agency adjudica-

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1. 724 F. Supp. 404 (W.D. Va. 1989), *rev'd*, 914 F.2d 593 (4th Cir. 1990). The court held that Title XIX of the Social Security Act, 42 U.S.C. § 1396a(a)(3) (1988), authorizes the state agency responsible for administering Medicaid benefits to address federal law questions during administrative appeals. *Mowbray*, 724 F. Supp. at 418. In *Mowbray*, Judge Michael determined that the state agency's refusal to hear issues of federal law violated the federal Medicaid Act.

2. *Id.* The court stated:

[o]ne of the rights generally agreed to be included in the general term "Due Process" is the right to a "fair hearing." A hearing from which a discussion of federal law is excluded, particularly where the thrust of the argument is that the state action is illegal under that law, is certainly not a "fair" one.

*Id.*

For a discussion of the requirements of a fair hearing in accord with due process, see *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970). What procedures are due depends on the nature of the government benefit denied.

tive hearing can raise constitutional law issues and contest the legality of federal and state statutes. The court concluded that allowing administrative agencies to consider constitutional and statutory issues initially, rather than waiting to do so on review, would provide for a more "efficient allocation of resources."<sup>3</sup> The benefits of this conclusion are that the agency hearing officer would have the opportunity to review legal issues prior to judicial consideration and could require state compliance with federal or constitutional law.<sup>4</sup>

Although Judge Michael's dictum may not be earth-shattering, the recommendation should grab the attention of black-robed judges and ALJs alike. It is important because administrative agencies and administrative law judges generally lack the power to determine the constitutionality of statutes or questions involving fundamental, constitutional rights raised by claimants.<sup>5</sup> The general rule is applicable in formal administrative adjudications<sup>6</sup> at both the state<sup>7</sup> and federal levels.<sup>8</sup>

3. *Mowbray*, 724 F. Supp. at 418.

4. Judge Michael declared that:

[a]llowing appellants to raise the issue [of federal law or of the state rule's legality] before the state agency gives the state the first crack at considering the issue and perhaps bringing state regulations into compliance. A hearing officer is not bound to accept the appellant's argument; however, making the agency aware of a potential conflict may well prevent the expense of litigation and encourage thoughtful, internal review.

*Id.*

5. Courts have failed to explain sufficiently why administrative agencies do not possess the jurisdiction to review the constitutionality of regulations or statutes. Indeed, in one of the leading cases on the subject, the United States Supreme Court reasoned that the Selective Service System Boards have the authority neither to pronounce regulations nor to pass on the validity of regulations or statutes due to the composition of the boards. *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 242 (1968). According to the Court, such authority is properly denied because the boards are composed of part-time volunteers and the hearings are mostly "nonjudicial." *Id.* at 242-43.

6. Formal administrative adjudications are governed by 5 U.S.C. §§ 556-57 (1988 & Supp. III 1991). The Administrative Procedure Act ("APA") defines "adjudication" as the "agency process for the formulation of" any "final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6), (7).

7. *E.g.*, Mo. CONST. art. 5, § 3; *Bohn v. Waddell*, 790 P.2d 772 (Ariz. T.C. 1990) (administrative body has no power to determine if statute complies with constitution); *Hamilton v. Jeffrey Stone Co.*, 641 S.W.2d 723 (Ark. Ct. App. 1982) (although Worker's Compensation Commission may not have authority to hold challenged statutes unconstitutional, these issues should first be raised at administrative law judge level); *Crocker v. Department of Revenue*, 652 P.2d 1067 (Colo. 1982); *Caldor, Inc. v. Thornton*, 464 A.2d 785 (Conn. 1983), *aff'd*, 472 U.S. 703 (1985); *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249 (Fla. 1987); *Flint River Mills v. Henry*, 216 S.E.2d 895 (Ga. 1975); *HOH Corp. v. Motor Vehicle Indus. Licensing Bd.*, 736 P.2d 1271 (Haw. 1987) (agency cannot determine constitutionality of its enabling statute); *Wilson v. Board of Employment Sec. Div.*, 385 N.E.2d 438 (Ind.), *cert. denied*, 444 U.S. 874 (1979); *Kaufman v. Department of Social and Rehabilitative Servs.*, 811 P.2d 876 (Kan. 1991) (administrative boards/agencies cannot rule on constitu-

Some progressive courts have created exceptions to the general rule that administrative agencies cannot decide constitutional questions. Courts have recognized an agency's authority to address constitutional concerns in, among other matters, tax disputes,<sup>9</sup> retirement cases,<sup>10</sup> town appraisal cases,<sup>11</sup> and abatement adjudications.<sup>12</sup> The New Jersey Su-

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tional questions); *Red River Coors, Inc. v. McNamara*, 577 So. 2d 187 (La. Ct. App. 1991) (Board of Tax Appeals has no authority to determine constitutionality of a statute); *Hartford Accident and Indemnity Co. v. Commissioner of Ins.*, 551 N.E.2d 502 (Mass. 1990) (Commissioner did not have authority to determine motor vehicle liability insurer's claims that residual market insurance system was unconstitutional); *Wronski v. Sun Oil Co.*, 310 N.W.2d 321, 324 (Mich. Ct. App. 1981) (administrative agencies have no power to determine constitutional questions); *Jarussi v. Board of Trustees*, 664 P.2d 316, 318 (Mont. 1983) ("Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers."); *Nebraska Pub. Employees, Local No. 251 v. City of Omaha*, 457 N.W.2d 429 (Neb. 1990) (Commission of Industrial Relations has no authority to vindicate constitutional rights); *Montez v. J & B Radiator, Inc.*, 779 P.2d 129, 131 (N.M. Ct. App. 1989); *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 585 (N.D. 1984); *Herrick v. Kosydar*, 339 N.E.2d 626 (Ohio 1975); *Dow Jones & Co. v. State ex rel. Oklahoma Tax Comm'n*, 787 P.2d 843, 845 (Okla. 1990) ("Within the framework of Oklahoma's tripartite distribution of government powers, the authority to invalidate an unconstitutional enactment resides *solely* in the judicial department.") (emphasis in original); *Board of Pharmacy v. Walgreen Texas Co.*, 520 S.W.2d 845 (Tex. Ct. App. 1975) (administrative agencies have no power to determine constitutionality of statutes); *Commonwealth ex rel. State Water Control Bd. v. Appalachian Power Co.*, 386 S.E.2d 633 (Va. Ct. App. 1989) (if issue falls outside agency's competence such as constitutional and statutory interpretation, little deference is required to be accorded agency's decision); *Prisk v. City of Poulso*, 732 P.2d 1013 (Wash. Ct. App. 1987); *Belco Petroleum Corp. v. Board of Equalization*, 587 P.2d 204 (Wyo. 1978) (administrative agency has no authority to determine constitutionality of statute); see also 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 26:6, at 434 (2d ed. 1983) [hereinafter DAVIS, 1983].

8. *E.g.*, *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."); *Oestereich v. Selective Servs. Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *Buckeye Indus., Inc. v. Secretary of Labor*, 587 F.2d 231, 235 (5th Cir. 1979) ("No administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer."); *Spiegel, Inc. v. FTC*, 540 F.2d 287, 294 (7th Cir. 1976) (FTC exceeded scope of authority in determining Due Process violation because agencies lack expertise to determine the constitutionality of administrative or legislative action); *Finnerty v. Cowen*, 508 F.2d 979 (2d Cir. 1974); *Hillhaven West, Inc. v. Bowen*, 669 F. Supp. 312 (S.D. Cal. 1987) (federal administrative agencies are without power to pass on constitutionality of administrative action); see also 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE, § 20.04, at 74 (1958) [hereinafter DAVIS, 1958].

9. See *In re McCannel*, 301 N.W.2d 910, 919 (Minn. 1980). The court in *McCannel* took note, however, of the general rule that agencies lack the power to determine the constitutionality of statutes and that such issues are determined by resort to the judicial system. *Id.* (citing *Johnson v. Robinson*, 415 U.S. 361, 368 (1973)).

10. See *Crawford v. Tennessee Consol. Retirement Sys.*, 732 S.W.2d 293 (Tenn. Ct. App. 1987) (Consolidated Retirement System had the power to consider constitutional questions in making determination concerning retirement rights of members of the Attorneys General Retirement System).

11. See *Alexander v. Town of Barton*, 565 A.2d 1294 (Vt. 1989).

preme Court has found an exception essential, for example, where the agency deems it necessary to resolve questions within its jurisdiction.<sup>13</sup> Another court permitted agency review where the particular agency possesses "unique[] judicial powers" such that its decisions "are accorded the same finality and deference as those of the district court."<sup>14</sup> Although the prevailing view denies administrative agencies the power to review constitutional issues, departures from this rule suggest that ALJs have the ability to provide complete, initial records of both the factual and legal issues raised in a particular case.

As proposed by *Mowbray*, judicial resources may indeed be more efficiently allocated where agency adjudicators have the capacity to consider constitutional and other legal issues. This Note addresses whether state and federal ALJs should have the power to decide constitutional questions during agency hearings. Part II examines the present state of the law and the policies behind the traditional limitations of the powers of agencies and ALJs. Part III illustrates the changes which have occurred in the system through increased adjudicator independence and skill, as well as through reform of the agency hearing process by enactment of the Administrative Procedure Act<sup>15</sup> and the shifts in some states towards delegation of judicial power to ALJs. Part IV recommends granting greater decision-making power to agency adjudicators in order to develop a complete record of all factual and legal issues for greater judicial efficiency and participant satisfaction.

Although judicial review of agency action continues to provide a check on any abuses of agency adjudicative power,<sup>16</sup> the agency hearing would better satisfy due process in many cases if the participants could raise all legal and factual issues in that forum. Further, requiring the ALJ to meet the educational standards required of the black-robed judge would maximize judicial economy and fairness and produce well-reasoned decisions.

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12. See *Newlin Corp. v. Department of Env'tl. Resources*, 579 A.2d 996 (Pa. Commw. Ct. 1990) (constitutional challenges to abatement order issued by Department of Environmental Resources could be adjudicated before Department's Environmental Hearing Board).

13. See *Christian Bros. Inst. v. Northern New Jersey Interscholastic League*, 432 A.2d 26 (N.J. 1981) (administrative agencies have power to consider constitutional issues only if relevant and necessary to resolve questions concededly within their jurisdiction); see also *Roberts v. Coughlin*, 561 N.Y.S.2d 852 (N.Y. App. Div. 1990) (constitutional challenge hinging on factual issues reviewable at administrative level should first be addressed to administrative agency to establish necessary factual record).

14. *In re McCannel*, 301 N.W.2d 910, 919 (Minn. 1980).

15. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 7521 (1988 & Supp. III 1991).

16. The Federal Administrative Procedure Act provides in pertinent part: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (1988). This section continues with a description of the duties and the proper scope of review imposed upon the reviewing court.

Finally, appropriate administrative settlement of legal questions would arguably be preferable to the delay and expense which often impede the litigation process when seeking adequate relief in the judicial system.

## II. PRESENT STATE OF THE ADMINISTRATIVE LAW SYSTEM

It is the general rule in both state and federal administrative law that an agency adjudicator may not address the constitutionality of statutes and agency actions. Examination of the scope of the general rule yields insufficient explanation for such a broad restraint on an ALJ's power. In addition, analysis of traditional perceptions of the administrative agency and its role in our government reveals apprehension without valid foundation for granting any definitive decision-making power to agency adjudicators.

### A. *Scope of the General Prohibition on the Agency's Power*

One of the most frequently cited cases for the rule limiting agency adjudicative power is *Public Utilities Commission v. United States*,<sup>17</sup> in which the United States Supreme Court declared that a state agency could "hardly be expected to entertain" constitutional issues.<sup>18</sup> The Court concluded there that "where the only question [presented] is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right."<sup>19</sup> Thus, the Court pronounced its own proficiency at protecting individual liberties. However, the Court and those courts adopting the rationale of *Public Utilities Commission* have failed to provide convincing reasons for proscribing an agency's power to protect constitutional rights.<sup>20</sup> In *Public Utilities Commission*, the Supreme Court asserted the limitation on the agency's adjudicative powers without divulging the historical bases behind or the legitimate policies for such a rule.

Similarly, in *Oestereich v. Selective Services Board*,<sup>21</sup> the concurring opinion maintained that administrative agencies do not have the jurisdiction to review the constitutionality of statutes.<sup>22</sup> The concurrence noted

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17. 355 U.S. 534 (1958).

18. *Id.* at 539.

19. *Id.* at 540.

20. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Oestereich v. Selective Servs. Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *HOH Corp. v. Motor Vehicle Indus. Licensing Bd.*, 736 P.2d 1271, 1275 (Haw. 1987) ("The law has long been clear that agencies may not nullify statutes.").

21. 393 U.S. 233 (1968).

22. *Id.* at 242 ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies. See *Public Utilities Comm'n v. United States*, 355 U.S. 534, 539 (1958); *Engineers Public Service Co. v. SEC*, 78

that the administrative agency in question did not possess the power to issue regulations or the authority to address the legitimacy of regulations or statutes.<sup>23</sup> Justice Harlan wrote:

Such authority cannot readily be inferred, for the composition of Boards, and their administrative procedures, render them wholly unsuitable forums for the adjudication of these matters: local and appeal Boards consist of part-time, uncompensated members, chosen ideally to be representative of the registrants' communities; the fact that a registrant may not be represented by counsel in Selective Service proceedings, 32 CFR sec. 1624.1(b), seems incompatible with the Boards' serious consideration of such purely legal claims.<sup>24</sup>

In this case, Justice Harlan defended the position that agencies are unfit to resolve constitutional questions on the grounds that the Selective Service Board, the administrative agency in question, was composed of "part-time, uncompensated members."<sup>25</sup> His concurrence implied that only full-time employees could provide adequate forums for claimants, represented by counsel, to challenge the constitutionality of statutes. However, mere part-time status or lack of compensation, without proof that such status illustrates a lack of competence, hardly justifies the general proscription.<sup>26</sup>

The absence of convincing justification for the limiting doctrine suggests that the restriction may exist simply because, in the words of Roscoe Pound, "[e]xecutive justice is an evil."<sup>27</sup> Without a more satisfactory explanation for the restriction than repugnancy towards the concept of the administrative agency itself, the need for greater allocation of power to the agency adjudicator is obvious. As Oliver Wendell Holmes stated:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>28</sup>

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U.S. App. D.C. 199, 215-16, 138 F.2d 936, 952-53 (1943), dismissed as moot, 332 U.S. 788.") (Harlan, J., concurring).

23. *Id.* at 242.

24. *Id.* at 242-43 (footnote omitted).

25. *Id.* at 242.

26. Would the concurrence also then agree that judges who reduce their workload by taking senior status, reflecting a typical part-time position, are any less competent to hear cases?

27. Roscoe Pound, *Executive Justice*, 55 AM. L. REG. 137, 145 (1907). Pound wrote: "It always has been and it always will be crude and as variable as the personalities of officials." *Id.* This critic suggested that "[t]he only way to check the onward march of executive justice is to improve the output of judicial justice till the adjustment of human relations by our courts is brought into thorough accord with the moral sense of the public at large." *Id.* at 146.

28. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

A persuasive and leading authority provides a more plausible basis for proscribing an agency's power to determine constitutional issues. In *Panitz v. District of Columbia*,<sup>29</sup> the Court of Appeals for the District of Columbia acknowledged that a tax assessor, as an administrative officer, holds no inherent power to decide constitutional challenges to a tax. Recognizing that the judiciary alone possesses the inherent power to resolve constitutional questions, the court reasoned that the government's interest in efficiency is paramount to the agency hearing officer's interest in overturning laws which do not conform to his own views as to whether a law violates the Constitution.<sup>30</sup> The court in *Panitz* feared the decline of government order and efficiency should it recognize an inherent power in the administrative agency to invalidate laws for lack of constitutionality. Rather, the court reasoned that even the judiciary exercises sparingly its power to invalidate unconstitutional laws.<sup>31</sup>

However, argument can be made that although agencies lack the inherent power to nullify statutes, legislatures are not precluded from delegating such power to agencies. Indeed, in Minnesota, the legislature delegated to the state worker's compensation court of appeals final authority on questions of law relating to worker's compensation.<sup>32</sup> Still, the power to interpret the validity of administrative rules and the constitutionality of laws remains with the judiciary.<sup>33</sup> Further, by constitutional provision, California delegates to the state Public Utilities Commission broad judi-

29. 112 F.2d 39 (D.C. Cir. 1940).

30. The court stated:

Interruption of the machinery of government necessarily attendant on this function not only cautions the judiciary but argues as well against its exercise by other agencies. It is this consideration for the orderly, efficient functioning of the processes of government which makes it impossible to recognize in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution. Thus it is held that ministerial officers cannot question the constitutionality of the statute under which they operate.

*Id.* at 42. The court advanced the notion that "[l]ikewise, it has been held that an administrative agency invested with discretion has no jurisdiction to entertain constitutional questions where no provision has been made therefor." *Id.*; see also *Engineers Pub. Serv. Co. v. SEC*, 138 F.2d 936 (D.C. Cir. 1943) (adopting the language in *Panitz*).

31. *Panitz*, 112 F.2d at 41 ("there can be little doubt that it represents the highest exercise of judicial power, and one that even the judiciary is reluctant to exercise.").

32. MINN. STAT. § 175A.01, subd. 5 (1984) (the agency has "sole, exclusive, and final authority for the hearing and determination of all questions of law and fact arising under the worker's compensation laws").

33. See *Quam v. State*, 391 N.W.2d 803, 809 n.6 (Minn. 1986). There, the court recognized:

[w]hile the statutory grant of jurisdiction to the WCCA [Worker's Compensation Court of Appeals] is broad, it could not include the power to adjudicate the adherence of agency rules to their statutory parameters. This function is solely within the judicial province and cannot be assumed by an agency tribunal without violating constitutional principles of separation of powers.

*Id.* (citing MINN. CONST. art. III, § 1; U.S. CONST. art. I, § 1, art. II, § 2, art. III, § 1).

cial powers<sup>34</sup> and by statute restricts judicial review to examining whether the agency's decisions violate a litigant's federal or state constitutional rights.<sup>35</sup>

Courts have also been unwilling to recognize judicial powers in agency adjudicators because of the assumption that agency hearing officers are inferior to black-robed judges. In *State ex rel. New Orleans Canal Banking Co. v. Heard*,<sup>36</sup> a Louisiana court articulated the presumption of constitutionality of statutes and contended that the "subordinate executive functionaries" must treat the statutes as constitutional until a court determines otherwise.<sup>37</sup> The court upheld the position that the second-class status of the administrative agent precludes reliance on the agent to form a comprehensible and orderly conclusion regarding the validity of the law. However, the court offered little guidance as to the reasons for assuming that the administrative agency is subordinate in the first place.

### B. *Historical Perceptions of the Administrative Agency*

Although one cannot discern from the present state of the law any substantial justification for the limiting doctrine, several theories can explain the apprehension about granting agency adjudicators the authority to decide constitutional questions. Public skepticism exists for several possible reasons, including: the absence of the proper check and balance on the agency's abuse of power; the lack of conclusiveness in the decisions of agency adjudicators; the distinctions perceived between judges and ALJs; and the overall ineffectiveness in the administrative process.<sup>38</sup> These factors, discussed below, contribute to what some call an ongoing "crisis" in the administrative process itself.<sup>39</sup>

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34. CAL. CONST. XII, § 22.

35. CAL. PUB. UTIL. CODE, §§ 1756-1760.

36. 18 So. 746 (La. 1895).

37. *Id.* at 752. The court stated that "in a well-regulated government obedience to its laws by executive officers is absolutely essential and of paramount importance. Were it not so, the most inextricable confusion would inevitably result." *Id.*; see also *State ex rel. Chicago, R.I. & P. Ry. v. Becker*, 41 S.W.2d 188, 190-91 (Mo. 1931) (quoting *Heard* in support of the proposition).

38. See James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1041 (1975) [hereinafter Freedman].

39. *Id.* The author suggests that "[e]ach generation has tended to define the crisis in its own terms, usually by focusing upon a major question that has attracted its attention and reforming impulses." *Id.*

## 1. The Origins of the Federal Administrative Agency

During the New Deal era, the public perceived the administrative agency as a useful vehicle for carrying out government policies.<sup>40</sup> The federal administrative agencies were created to perform executive, legislative and judicial tasks and to act as liaisons between citizen and government, moderating controversies which involved complex issues.<sup>41</sup> The agencies instituted public policies and afforded remedies to citizens injured by the abuse of agency power.<sup>42</sup>

In their early history, administrative agencies appointed hearing examiners from among their own employees to conduct dispute resolution hearings apart from judicial tribunals. Agencies could overlook the decisions made by these examiners, however, and make *de novo* determinations regarding the disputes.<sup>43</sup> This oversight power often rendered the examiner's decision a worthless exercise in adjudication and guaranteed that the agency's decision usually would prevail over participant satisfaction and procedural fairness. The agency bias thus displayed seems to have provided one of the bases for congressional reform.

The enactment of the Federal Administrative Procedure Act of 1946 ("APA")<sup>44</sup> elevated the status of federal hearing examiners and increased their independence from the employer agencies. Under the APA, the agency hearing was designed to provide an alternative to court resolution "for reasons of convenience" because the conflicts generally arose out of the administrative agency's dealings with individual cases and such disputes involved technical aspects of the agency's procedures and rules.<sup>45</sup> However, the APA did not allay public concern that the very existence of the administrative agency posed a threat to the necessary division of powers among the executive, legislative and judicial branches.

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40. *Id.*; see also DAVIS, 1958, *supra* note 8, § 1.04, at 27. The notion of an administrative agency first appeared by way of congressional enactment of two statutes in 1789; one taxed imports, Act of July 31, 1789, ch. 5, 1 Stat. 29 (1789), and one related to claims for military pensions and veterans benefits, Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95 (1789). See Freedman, *supra* note 38, at 1045; DAVIS, 1983, *supra* note 7, § 1:07, at 17.

41. MALCOLM C. RICH & WAYNE E. BRUCAR, *THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES* 8 (1983) [hereinafter RICH & BRUCAR].

42. Rich and Brucar suggest that the administrative "process has, for nearly a century, helped establish public policy while providing administrative procedures to protect against perceived abuses of power by governmental agencies." *Id.* at 1.

43. *Id.* at 8.

44. 60 Stat. 327 (1946).

45. DAVIS, 1958, *supra* note 8, § 1.05, at 38.

## 2. A Jealous Judiciary and Separation of Powers

It is emphatically the province and duty of the judicial department to say what the law is.<sup>46</sup>

Chief Justice John Marshall pronounced the preeminence of the Article III courts in resolving matters of law as he interpreted the Constitution's mandate for the separation of powers among the executive, legislative and judicial branches.<sup>47</sup> Recent attempts to delegate to the administrative adjudicator the power to resolve constitutional questions have encountered criticism against empowering the agency with such authority that "will give impetus to the movement to abrogate or limit this power of the courts."<sup>48</sup> This apprehension reflects an unnecessary guarding by the judiciary of its power — unnecessary considering the proper checks and balances inherent in our system of government.

Although the doctrine of separation of powers represents a long-standing "political maxim,"<sup>49</sup> the Constitution does not command that courts

46. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

47. Article III, Section 1 of the United States Constitution provides that:

The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1. It has been noted, however, that when the Chief Justice pronounced the duty of the judiciary, critics repudiated the notion that the judiciary held the right to determine the constitutionality of a duly enacted statute. See *State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers*, 94 So. 681, 682 (Fla. 1922). The court in *Atlantic Coast Line* related that "[g]reat publicists, including Mr. Thomas Jefferson, Spencer Roan, Niles, of Niles' Register, and others denied the right of the courts to pass upon the constitutionality of a regularly enacted statute. Andrew Jackson also thundered against it." *Id.*

48. *Atlantic Coast Line*, 94 So. at 682. The court in *Atlantic Coast Line* adhered to the presumption that statutes are constitutional until judicially declared otherwise. *Id.* at 683.

49. James Madison explained that the doctrine of separation of powers represented a "political maxim" among early Americans who feared the reign of tyranny if all government power were vested in or acquired by one body. THE FEDERALIST No. 47, at 323 (James Madison) (Jacob E. Cooke ed., 1961). Madison borrowed from Montesquieu to illustrate his "political maxim":

When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner. . . . Were [the power of judging] joined to the executive power, *the judge* might behave with all the violence of an *oppressor*.

*Id.* at 326 (emphasis in original); see also LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 32 (1965).

Addressing the people of New York in 1788, Madison acknowledged:

One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive and judiciary departments ought to be separate and distinct.

must initially determine questions of law regarding either public or private rights.<sup>50</sup> Without a constitutional prohibition, other entities may permissibly address legal and constitutional questions. The constitutional framers must have realized that a complete segregation would produce an ineffective operation of government and would prove impossible to maintain.<sup>51</sup>

In the absence of an express prohibition on the exercise of such powers, administrative agencies should be able to perform both rule-making functions in executing their programs, as well as independent quasi-judicial functions in settling conflicts as long as ALJs are guided by fairness. The separation of powers doctrine incorporates this notion of fairness in government relations with individuals. Accordingly, the person who administers the rules does not judge the fair application of those rules.<sup>52</sup>

Nevertheless, public sentiment has traditionally opposed the accumulation and exercise of judicial powers by an administrative agency. Al-

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. . . The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.

THE FEDERALIST No. 47, at 323-24. The principle is well-grounded in the constitutional delegation of authority to the courts to interpret laws and not expressly to the executive or the legislature.

50. See Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682, 1686 (1977) [hereinafter Note, *The Authority of Administrative Agencies*]. The author correctly observes that "there is nothing in the judicial power clause which has been held to require that preliminary determination of questions of law — whether relating to private or public rights — be made in an article III court or in any court at all for that matter." *Id.* In the absence of an express prohibition in the Constitution or from Congress, an agency could derive by implication the authority to address the constitutionality of legislative or administrative action, subject to judicial review.

51. See JAFFE, *supra* note 49, at 29 ("If the exact form given to [the separation of powers] at any one moment of its history were taken as a literal prescription, it would strangle the process of government. But it was never meant so."). While the concern for the monopoly of power by one branch is valid, the author suggests that the drafters of the Constitution must not have intended a total division of command. *Id.*

James Madison argued that although the Constitution distinguished the executive, legislative, and judiciary, it did not proscribe the execution by the separate branches of various powers common to one of the other branches. THE FEDERALIST No. 48, at 335 (James Madison). Madison quotes Thomas Jefferson's *Notes on the State of Virginia* that "no barrier was provided between these several powers," *id.*, suggesting the interplay between the three branches. See also JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY* 260-61 (1978) [hereinafter *CRISIS*] ("The Constitution requires that the legislative, executive, and judicial powers be separated to the extent necessary to prevent the emergence of tyranny from the concentration of too much power in a single person or institution. But the lines that the Framers drew between the exercise of the respective powers are not rigid ones . . ."); DAVIS, 1958, *supra* note 8, § 1.09, at 70-71.

52. PETER L. STRAUSS, *AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 14 (1989). Here, the author relates the theory of the separation of the judicial from the executive and legislative branches to the theory of "natural justice" under British common law.

though the Constitution does not expressly prohibit the exercise of such powers, the law reflects the public's apprehension.<sup>53</sup> Indeed, courts have declared that Congress may not grant to a "non-Article III" court, such as an administrative agency, the jurisdiction to determine a "private right, that is, the liability of one individual to another."<sup>54</sup>

Analysts of the administrative process have offered a more comprehensive review of the functions of agencies, as well as suggestions for improving the administrative process.<sup>55</sup> In 1941, the Attorney General's Committee on Administrative Procedure addressed recommendations for a complete separation of agency functions but suggested that an internal separation of functions between hearing officer and agency investigator would better contribute to the objectivity and effectiveness of the hearing process.<sup>56</sup> The Committee's report, which proposed to separate the judicial functions from the prosecutorial functions within each administrative agency, formalized the adjudication process, created the role of the independent hearing examiner, and provided the groundwork for the enact-

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53. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

54. *Crowell v. Benson*, 285 U.S. 22, 51 (1932). Now, however, administrative agencies can adjudicate cases involving "private rights" as long as their decisions are subject to review, and as long as the parties are not entitled, at common law, to a jury trial on the issue. *JAFFE*, *supra* note 49, at 91.

Similar to the concerns expressed by the judiciary, President Roosevelt's special committee, appointed in 1937 to review the administrative process, criticized agencies for forming "a headless fourth branch of government," undermining the doctrine of separation of powers because of the multiple functions performed by the agencies. REPORT OF THE PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT 39 (1937). One author admits that although the fervor over this encroachment on the separation of powers has subsided in recent years with the enactment of the APA in 1946, "the conceptual concern that it expressed has not been laid to rest," noting that the doctrine has served as an impediment to the growth of the administrative process. *See Freedman, supra* note 38, at 1049.

55. In 1939, President Franklin D. Roosevelt requested United States Attorney General Murphy to designate a committee to analyze the exigency of refinement in the administrative law field. *See ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE*, S. DOC. NO. 8, 77th Cong., 1st Sess. 1 (1941) [hereinafter REPORT].

56. "The proposal is accordingly made that the deciding powers of Federal administrative agencies should be vested in separate tribunals which are independent of the bodies charged with the functions of prosecution and perhaps other functions of administration." *Id.* at 55. The Committee urged that "an internal separation of function can afford substantially complete protection against the danger that impartiality of decision will be impaired by the personal precommitments of the investigator and the advocate." *Id.* at 57.

The Committee recognized the important role which agencies play in promoting public policy. The report indicated that the Attorney General's Committee considered "the distinguishing feature of an 'administrative' agency the power to determine, either by rule or by decision, private rights and obligations." *Id.* at 7. The power to determine an individual's private rights would seem to include fundamental constitutional rights.

ment of the APA in 1946.<sup>57</sup> The report asserted that separation of powers would not be offended if hearing examiners supplied accurate and complete records of the factual and legal issues raised in the hearings. Yet, public hostility towards the very concept of administrative regulation itself continued to bolster skepticism of an agency's competency to perform tasks other than administering executive agency policies.

### 3. Distrust of Regulation

Public uncertainty regarding the regulation process itself reflects another plausible theory behind the traditional attack on an agency's existence.<sup>58</sup> One commentator asserted that:

[w]hen a nation cannot find the intellectual wherewithal to formulate a coherent ideology on an issue as fundamental to its values as the balance to be struck between a free market and state regulation, such regulation as it does authorize will always be subject to philosophic as well as pragmatic question.<sup>59</sup>

In light of the public ambivalence towards the appropriate role of administrative agencies, federal legislation has defined the purposes to be served by the agencies in vague terms. The absence of explicit delegation by the legislature has forced agencies to draft and implement their own governing policies,<sup>60</sup> has invited public rebuke,<sup>61</sup> and has created administrative inefficiency. Public uncertainty as to the appropriate scope of an agency's power and legislative failure in defining that scope illuminate the policies behind the absence of agency adjudicator authority to consider statutory and constitutional issues.

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57. See RICH & BRUCAR, *supra* note 41, at 8. The authors note that "[t]he Committee report marked an emerging emphasis on formalized adjudication within the administrative system. The process was to utilize an independent examiner to provide a semblance of separation of powers within the administrative process." *Id.*

58. See Freedman, *supra* note 38, at 1053 ("[t]he imprecision of the ideology that justifies the existence of administrative agencies reflects the basic ambivalence of our society toward the process of regulation").

59. *Id.* at 1053-54.

60. See *id.* at 1054.

61. *Id.* Congress's failure to delegate specific powers to the agencies renders the agencies "vulnerable to the private interests they were created to regulate." *Id.* at 1055. Freedman suggests that Congress is to blame for the criticism of the agencies and the criticism has had negative implications on the legitimacy of the administrative process. He further suggests that the negative implications are "not the result of any inherent qualities of the administrative process itself." See CRISIS, *supra* note 51, at 263. If, as Freedman suggests, agency examiners do not suffer from an inherent absence of the skills needed to conduct hearings, then administrative adjudication can provide a complete factual and legal record with satisfactory resolutions.

#### 4. Distinctions Between Black-Robed Judges and ALJs

Contrasts between the black-robed judge and the agency ALJ may also explain the ambivalence which impedes greater delegation of power to agency adjudicators. While the judge must uphold the Constitution and abide by *stare decisis*,<sup>62</sup> the ALJ must answer to his agency employer, and the ALJ's decisions often remain vulnerable to agency manipulation.<sup>63</sup> The judge commands respect from the litigants because the law, either federal or state, mandates his impartiality. On review, the appeals court defers to the decision of the judge below unless there has been a clear abuse of discretion. The administrative hearing examiner, however, has not traditionally commanded such public respect because his attachment to the agency creates the perception that he is not truly impartial, and because the agency may disregard what it deems an unfavorable decision.<sup>64</sup>

Distinctions between the judge and the ALJ can be removed, however, through effective detachment of the ALJ from the agency whose actions he must review.<sup>65</sup> As administrative agencies grow and continue to adjudi-

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62. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2808 (1992) ("the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable") (citation omitted).

63. It is accurately stated:

[t]he federal judge is, after all, the personification of the judicial branch of the government: a robed authority figure who can demand and receive respect and obeisance even from presidents. . . . ALJs, on the other hand, in spite of being called judges and functioning as such, are subject to doubts about their independence due in part to their employment status as agency personnel.

Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus On Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 110 (1981).

64. One commentator has argued for separation of the ALJ from the authority of the agency:

Consider . . . the unavoidable appearance of bias when an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party. One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder.

Bernard G. Segal, *The Administrative Law Judge*, 62 A.B.A.J. 1424, 1426 (1976).

Another author notes, "[t]he fact that agency employers are often named litigants or interested parties in the proceedings ALJs conduct, prevents full public confidence in the impartiality and the fairness of those proceedings." Victor W. Palmer, *The Evolving Role of Administrative Law Judges*, 19 NEW ENG. L. REV. 755, 798 (1984). The APA promised that administrative proceedings would be conducted with greater fairness. See *id.* at 761-62.

65. See, e.g., VA. CODE ANN. § 9-6.14:14.1(A) (Cum. Supp. 1992). This section provides in pertinent part:

cate more conflicts between government and citizen, it becomes more evident that ALJs should be accepted as impartial adjudicators capable of articulating legal conclusions.

### III. RELEVANT ASPECTS IN THE PRESENT STATE OF THE LAW

Legislative developments in the field of administrative law, beginning with the adoption of the Administrative Procedure Act in 1946, reflect an emphasis on improving the performance and effectiveness of agencies. The federal and state acts, as well as the central panel system adopted in several states, create opportunities for ALJs to excel in administrative adjudication and to closely attend to the legal rights asserted by hearing participants.

#### A. *Adjudicative Independence*

The public must be assured of the adequacy and equity of the administrative process<sup>66</sup> in order for the suspicion surrounding regulation and agency adjudication to dissipate. Public confidence in the administrative process improves if agency hearing officers are required to be proficient at analyzing and resolving complex factual and legal issues. The federal APA, which Congress adopted in 1946, and the Model State Administrative Procedure Act ("MSAPA"), approved by a majority of states,<sup>67</sup> have

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[i]n all hearings conducted in accordance with § 9-6.14:12, the hearing shall be presided over by a hearing officer selected from a list prepared by the Executive Secretary of the Supreme Court and maintained in the Office of the Executive Secretary of the Supreme Court. . . . The Executive Secretary shall have the power to promulgate rules necessary for the administration of the hearing officer system.

*Id.*

66. See *CRISIS*, *supra* note 51, at 262 ("Public skepticism of administrative expertise is part of a larger loss of faith in many traditional sources of public and social authority.")

67. The National Conference of Commissioners on Uniform State Laws ("NCCUSL") originally adopted the Model State Administrative Procedure Act ("MSAPA") in 1946. See ARTHUR E. BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* § 1.1.3 (1986); 9C U.L.A. 179 (1957). In 1961, the NCCUSL revised the original version of the MSAPA in light of the growth of state activities and the suggestions for balancing individual fairness and governmental efficiency. 15 U.L.A. at 140-41 (Master ed. 1990). Subsequently, the NCCUSL approved the 1981 revision of the Model Act to reflect: the increased complexity in state administrative law; the outgrowth of various state agencies; the judicial recognition of legislative delegation of authority to the agencies; and the modification of due process requirements as announced by the United States Supreme Court. *Id.* at 4.

Currently, more than half of the states have an administrative procedure act based on or substantially similar to the original version of the MSAPA or one of its revisions. See 15 U.L.A. 137, 137 (Master ed. 1990) which lists 28 states and the District of Columbia as having adopted such statutes. See, e.g., ALA. CODE §§ 41-22-1 to -22-27 (Repl. Vol. 1991); ARIZ. REV. STAT. ANN. §§ 41-1001 to -1066 (1992); ARK. CODE ANN. §§ 25-15-201 to -15-214 (Michie Repl. Vol. 1992); CONN. GEN. STAT. ANN. §§ 4-166 to -189 (West 1988); D.C. CODE ANN. §§ 1-1501 to -1510 (1981); GA. CODE ANN. §§ 50-13-1 to -13-3 (1990); HAW. REV. STAT. §§ 91-1 to -18 (Repl. Vol. 1985); IDAHO CODE §§ 67-5201 to -5218 (1989); ILL. REV. STAT. ch.

provided avenues by which hearing officers can develop more complete hearing records.

Former American Bar Association ("ABA") President Elihu Root advocated the expansion of administrative agencies in a 1916 address under the theory that agencies provide effective forums for settling disputes with government in the age of advanced industry and social change.<sup>68</sup> Later, both the ABA and the Report of the Attorney General's Committee led Congress to enact the APA in 1946.<sup>69</sup> The APA was designed to reform administrative procedures for greater efficiency while maintaining judicial oversight.<sup>70</sup> Similarly, the MSAPA, adopted in a majority of states, is designed to guarantee an equilibrium between governmental efficiency and the protection of individual interests.<sup>71</sup> It is submitted that the APA has achieved fairness in administrative proceedings "because Congress, in drafting its central provisions, struck a workable balance between prescribing fundamental principles of fair procedure and permitting administrative agencies the freedom to adapt these principles to the disparate patterns of their regulatory responsibilities."<sup>72</sup> Congress enacted the APA to augment the influence of the federal agency hearing officer, now entitled administrative law judge ("ALJ"),<sup>73</sup> to a judicial posture and

127, ¶¶ 1001 - 1021 (1981); IOWA CODE ANN. §§ 17A.1 - .23 (West 1989); LA. REV. STAT. ANN. §§ 49:950 - 971 (West 1987); ME. REV. STAT. ANN. tit. 5, §§ 8001 to 11008 (West 1989); MD. STATE GOV'T CODE ANN. §§ 10-201 et seq. (1984); MICH. COMP. LAWS ANN. §§ 24.201 - 24.315 (West 1981); MISS. CODE ANN. §§ 25-43-1 to -43-19 (1991); MO. ANN. STAT. §§ 536.010 to .150 (Vernon 1988); MONT. CODE ANN. §§ 2-4-101 to -4-711 (1990); NEB. REV. STAT. §§ 84-901 to -920 (1990); NEV. REV. STAT. §§ 233B.010 - 233B.150 (Repl. Vol. 1990); N.H. REV. STAT. ANN. §§ 541-A:1 to :22 (Cum. Supp. 1991); N.Y. A.P.A. LAW §§ 100 - 501 (McKinney 1984); OKLA. STAT. ANN. tit. 75, §§ 250 - 323 (West 1987); OR. REV. STAT. § 183.310 et seq. (Repl. Vol. 1991); R.I. GEN. LAWS §§ 42-35-1 to -35-18 (1988); S.D. CODIFIED LAWS ANN. §§ 1-26-1 to -26-41 (1985); TENN. CODE ANN. § 4-5-101 et seq. (Repl. Vol. 1991); VT. STAT. ANN. tit. 3, §§ 801-849 (1985); WASH. REV. CODE ANN. §§ 34.05.001 to .05.902 (West 1990); W. VA. CODE §§ 29A-1-1 to 29A-7-4 (Repl. Vol. 1986); WIS. STAT. ANN. §§ 227.01 - .26 (West 1982); WYO. STAT. §§ 16-3-101 to -3-115 (1990).

DAVIS, 1983, *supra* note 7, § 1.10, at 36-37 adds the following: FLA. STAT. ANN. § 120.50 et seq. (West 1982); IND. CODE ANN. §§ 4-21.5-1-1 to .5-6-4 (Burns Repl. Vol. 1991); MASS. ANN. LAWS ch. 30A, §§ 1 -18 (Law. Co-op. 1985); and N.M. STAT. ANN. §§ 12-8-1 to -8-25 (Michie Repl. Vol. 1988).

68. See DAVIS, 1958, *supra* note 8, § 1.04, at 25. President Root proposed a greater delegation of authority to agencies because they "furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation." *Id.* (citing 41 A.B.A.R. 355, 368-69 (1916)).

69. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5362, 7521.

70. The Act had the force "to satisfy the political will for reform, to improve and strengthen the administrative process, and to preserve the basic limits upon judicial review of administrative action." DAVIS, 1958, *supra* note 8, § 1.04, at 30.

71. 15 U.L.A. 5 (Master ed. 1990) (Prefatory Note to 1981 MSAPA).

72. CRISIS, *supra* note 51, at 266.

73. Congress approved modifying the title hearing examiner to administrative law judge through amendment to the Administrative Procedure Act. S. REP. No. 697, 95th Cong., 2d

to provide a guarantee of the hearing examiner's competency and impartiality.<sup>74</sup> Under the APA, the ALJ does not serve as a mere figurehead to the agency but resolves agency disputes<sup>75</sup> in an expeditious and inexpensive manner.<sup>76</sup> Typically, the ALJ renders an initial decision following a hearing, which becomes the agency's final decision subject to a timely motion of appeal to the agency.<sup>77</sup> Through the federal APA, Congress granted the ALJ independence from a particular agency, reduced the risk of agency tampering with the ALJ's conclusions customary of pre-APA administrative proceedings, and expressed its overall confidence in the system.

Another example of the increased independence of the agency adjudicator is the adoption of the central panel system. The central panel system, adopted by several states, pursues objectives similar to those of the federal APA but employs different methods in balancing administrative effi-

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Sess. 1 (1978), reprinted in 1978 U.S.C.C.A.N. 496, 496. The Senate report explains that the "change is necessary to provide consistency in terminology and eliminate confusion on the part of the public about the role played by those officers." *Id.* at 4, reprinted in 1978 U.S.C.C.A.N. 496, 499.

74. One commentator noted that "[p]rior to the APA, there were no reliable safeguards to ensure the objectivity and judicial capability of presiding officers in formal administrative proceedings" because the agencies nominated their employees to serve as hearing examiners. Lubbers, *supra* note 63, at 111 (derived from Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 *FED. BAR. J.* 351, 355 (1967)) (citation omitted). Additionally, the agencies did not specifically enumerate the duties of the hearing examiners, and thus the APA was instrumental in "[r]eshaping the role" of the hearing officer. *Id.*

75. The APA was "designed to assure that the presiding officer will perform a real function rather than serve merely as notary or policeman. He would have and should independently exercise all the powers numbered in the [APA]." BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 105, at 301 (1976) (citing Administrative Procedure Act of 1946: Legislative History 207, 5 U.S.C. § 551 et seq.).

One author poses "that the hearing examiner program [of the APA] helped to bridge the dichotomies between earlier judicial and administrative conceptions of decision-making and helped to substitute cooperation for conflict in court-agency relationships." See Victor G. Rosenblum, *Changing Judicial Perceptions of Administrative Decision-Making and of the Status of Administrative Law Judges: Interrelations of Case Law with Statutory and Pragmatic Factors in Determining ALJ Roles*, 15 *THE JUDGES J.* 64, 65 (1976).

76. See DAVIS, 1958, *supra* note 8, § 1.04, at 39. Under the APA, the adjudicative process reflects "a procedure which keeps the role of the lawyers to a minimum. Of course, the administrative process is by no means always fast and inexpensive, but the prevailing belief has been that it is." *Id.*

77. 5 U.S.C. § 557(b) (1988). This section specifically provides that "[w]hen the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule." *Id.*

Section 4-215(b) of the MSAPA provides that if the presiding officer is not an agency head, then he shall provide an initial decision which becomes final unless a litigant moves for an appeal under § 4-216. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-215(b).

ciency, ALJ independence, and due process.<sup>78</sup> The central panel system, for example, establishes a pool of ALJs, independent of a particular agency, from which an agency requests the services of an ALJ.<sup>79</sup> Proponents contend that ALJ impartiality and competence are guaranteed under the central panel approach because the system eliminates any tendency by the ALJ to favor agency policy when making the adjudication.<sup>80</sup>

However, the movement towards the central panel approach has not been accomplished without resistance. The Attorney General's Committee on Administrative Procedure did not recommend that hearing examiners, now ALJs,<sup>81</sup> comprise a "separate corps" independent of a specific agency.<sup>82</sup> The committee reasoned that the duties of the ALJ require specialization in the particular agency in order to maximize efficiency.<sup>83</sup> Critics of the central panel have charged that ALJs are required to perform various tasks in their respective agencies and that creating a central panel would add little to the protection of ALJ independence.<sup>84</sup> Nevertheless, ten states<sup>85</sup> have adopted a central panel system as an alternative to in-

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78. RICH & BRUCAR, *supra* note 41, at 11. The authors suggest that "[t]he New Jersey system, . . . based upon the concept of an independent administrative judiciary, goes further toward ensuring fair, high caliber decisionmaking than the federal approach and those of other states which rely upon agency affiliated hearing examiners to act as judges in cases where their employers have a stake in the outcome." *Id.* (quoting Kestin, *Reform of the Administrative Process*, 92 N.J.L. 35 (1980)).

79. See ABRAMS, *Administrative Law Judge Systems: The California View*, 29 ADMIN. L. REV. 487, 512 (1977).

80. See SEGAL, *supra* note 64, at 1424 (suggesting that the total separation of the ALJ from the agency would draw more adept applicants to the ALJ position and would strengthen the current system).

81. Public Law No. 95-251 substituted "hearing examiners" with "administrative law judges." 5 U.S.C.A. § 556(b)(3) (West 1992) (Historical and Statutory Note), *as amended by* Pub. L. No. 95-251, § 29(a)(1), Mar. 27, 1978, 92 Stat. 183.

82. See REPORT, *supra* note 55, at 47.

83. *Id.*

84. STRAUSS, *supra* note 52, at 96.

85. States with a central panel system include: California, CAL. GOV'T CODE §§ 11370.2, 11502 (West 1992) (Office of Administrative Hearings); Colorado, COLO. REV. STAT. § 24-30-1001 (1988) (Division of Hearing Officers); Florida, FLA. STAT. ANN. § 120.65 (West 1992) (Division of Administrative Hearings); Massachusetts, MASS. ANN. LAWS ch. 7, § 4H (Law. Co-op. 1988) (Division of Hearing Officers); Minnesota, MINN. STAT. ANN. § 14.48 (West 1988) (Office of Administrative Hearings); New Jersey, N.J. STAT. ANN. §§ 52:14F-1 to :14F-11 (West 1986) (Office of Administrative Law); Tennessee, TENN. CODE ANN. § 4-5-321 (1991) (Administrative Procedural Division). See RICH & BRUCAR, *supra* note 41, at 28 (Table of Summary of Key Features of Central Panel Systems).

Authors Bonfield and Asimow also list Iowa, North Carolina and Washington as adopting the central panel approach. See ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE & FEDERAL ADMINISTRATIVE LAW, § 3.4, at 176 (1989); see also MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-301(a)-(b), 15 U.L.A. 1, 98-99 (master ed. 1990) (creating an office of administrative hearings with a director appointed by the governor, states have the option to adopt the provision requiring admission to the state bar or a license to practice law in the United States as a prerequisite to an ALJ position).

tra-agency administrative adjudication. These states place ALJs in an entirely independent agency which supplies them at the request of other agencies to administer substantive laws.<sup>86</sup> The legislative purposes outlined in the statutes creating the central panels emphasize due process in the adjudications and require professionalism of the ALJs.<sup>87</sup> By removing the ALJ from an arena where he is more susceptible to the influence of an agency head and agency policies, the central panel system provides a method for guaranteeing fair adjudicative procedures. With the transfer to a separate corps, the need for examiner specialization in a particular field decreases and the levels of independence and impartiality increase.<sup>88</sup>

Legislative proposals have been presented to Congress to create a separate federal corps of ALJs similar to the central panel systems established in several states. The Administrative Law Judge Corps Act,<sup>89</sup> introduced by Senator Howell Heflin, would establish a special corps of ALJs assigned to one of eight statutorily enumerated divisions to conduct federal proceedings.<sup>90</sup> The corps of ALJs would supplant the current system of

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86. RICH & BRUCAR, *supra* note 41, at 12. The independent agency runs a type of temporary service, contracting ALJs out to the various state agencies when they request an adjudicator to conduct the hearings. In this manner, the ALJs do not serve one master, and bias in favor of one agency is reduced. *Id.* Only in a few circumstances, including social service cases in Colorado and state employee discipline questions in Minnesota, can private parties request a hearing from the central panel. *Id.* at 41. The jurisdictions of the central panels vary, with some states requiring agencies enumerated in the state APA to use the central panel and other states permitting, but not requiring agencies to use the pool ALJs. *Id.* at 27.

87. The purposes articulated in New Jersey's central panel legislation provide an accurate statement of the goals of each state in adopting the method. The legislative purpose reads: [t]he legislative goal embodied in this bill is to create a central independent agency staffed by professionals with the sole function of conducting administrative hearings. This will tend to eliminate conflict of interests . . . promote due process, expedite the just conclusion of contested cases and generally improve the quality of administrative justice.

*Id.* at 22 (citing N.J. STAT. ANN. § 52:14F-1 (West 1986)).

88. Segal, *supra* note 64, at 1425.

89. S. 826, 102nd Cong., 1st Sess. (1991). This legislation was referred to the Senate Committee on the Judiciary which reported the bill out of committee without amendments on April 30, 1992. *See* S. REP. No. 272, 102nd Cong., 1st Sess. (1992). However, the Senate failed to take further action before adjournment at the end of its session in October, 1992.

90. The bill, S. 826, proposes to create the following divisions:

- (1) Division of Communications, Public Utilities and Transportation Regulation;
- (2) Division of Safety and Environmental Regulation;
- (3) Division of Labor;
- (4) Division of Labor Relations;
- (5) Division of Health and Benefits Programs;
- (6) Division of Securities, Commodities and Trade Regulation;
- (7) Division of General Programs; and,
- (8) Division of Financial Services Institutions.

Under the bill, the Council of ALJ corps would assign ALJs to a particular division. The Council, which constitutes the policymaking body for the corps, consists of the Chief Judge, appointed by the President with the consent of the Senate, and the division chief judges. In

administrative agency adjudication and consolidate all ALJs within a centrally located office in Washington, D.C. Like the state central panel system, this separate corps could promote greater adjudicative consistency and fairness yet satisfy critics who emphasize the need for specialization. Under the legislation, each ALJ would be assigned to a division concentrating on a particular subject matter.

### B. *Skills of the Present-Day Adjudicator*

The federal and state Administrative Procedure Acts authorize ALJs to perform a variety of judicial-like functions.<sup>91</sup> These tasks include receiving relevant evidence,<sup>92</sup> issuing subpoenas, regulating the hearing process<sup>93</sup> and establishing findings of fact and conclusions of law.<sup>94</sup> Because these functions resemble those performed by judges, many states require the ALJ to have a law degree with several years of "qualifying experi-

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addition to assigning ALJs to divisions, the Council appoints persons to the position of ALJ; prescribes rules of practice, after notice and comment, for the conduct of proceedings before the corps; issues rules for the assignment of cases; and establishes continuing education programs to guarantee that the ALJs have sufficient training in the particular field of an agency.

91. For a description of the ALJ, his duties and his relationship to Article III judges, see Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 377-80 (1986).

92. The formal rules of evidence do not govern administrative proceedings. See 5 U.S.C. § 556(d) (1988). The APA permits the admission of any oral or written evidence but denies immaterial or irrelevant evidence.

93. The APA authorizes the ALJ to:

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on offers of proof and receive relevant evidence;
- (4) take depositions or have depositions taken when the ends of justice would be served;
- (5) regulate the course of the hearing;
- (6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;
- (7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
- (8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;
- (9) dispose of procedural requests or similar matters;
- (10) make or recommend decisions in accordance with section 557 of this title; and
- (11) take other action authorized by agency rule consistent with this subchapter.

5 U.S.C. § 556(c) (1988 & Supp. III 1991).

94. The Code provides that "[a]ll decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c)(3)(A) (1988). In this section, the Code does not expressly prohibit an administrative agency from addressing the constitutionality of statutes. See also REPORT, *supra* note 55, at 50, 199 (proposed legislation).

ence.”<sup>95</sup> Similar to the ALJ in the federal system, the state ALJ carries out his duties separately from those of other agency employees and must adjudicate without bias towards agency policy.<sup>96</sup> Thus, the impartiality and confidentiality required of Article III judges are also demanded of ALJs, who may not communicate *ex parte* with interested persons outside the agency concerning the merits of a case.<sup>97</sup> The provisions of the federal and model state acts assure the litigant that his claims will be reviewed by experienced referees authorized to develop complete records with objectivity and fairness.

The central panel system also emphasizes adjudicative skill and competence without requiring ALJs to be experts in the complexities of the particular agency’s policies. The intended function of the ALJ during administrative adjudication is not to specialize in agency policy but to moderate with impartiality.<sup>98</sup> The central panel approach demonstrates that the ALJ need not demonstrate exceptional skill in comprehending an agency’s technical policies. Rather, the central panel creators emphasize the prominence of fundamental fairness accorded by the ALJ to the adjudication, even at the expense of opposing agency policies.<sup>99</sup> Accordingly, the communication of relevant agency policies to the ALJ and the use of expert witnesses during the hearings are suggested as remedies for the absence of specialization requirements.<sup>100</sup>

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95. See Lubbers, *supra* note 63, at 113. See also RICH & BRUCAR, *supra* note 41, at 10 (describing the 1981 MSAPA § 4-301(b) which requires an ALJ applicant to maintain a license to practice law in the pertinent state or in a United States jurisdiction). The authors list California, Colorado, Florida, Massachusetts, Minnesota, and Tennessee as requiring ALJs to be an attorney at law or “learned” in the law. *Id.* at 51.

96. RICH & BRUCAR, *supra* note 41, at 10. The roles of the federal and state ALJ are very similar.

97. See 5 U.S.C. § 557(d)(1) (1988).

98. Segal, *supra* note 64, at 1425. Segal refutes the argument that ALJs must specialize in the substantive law of a particular agency:

I am no more persuaded by this thesis than I am that we need to have specialized judges in our federal court system . . . [A]dministrative law judges need not specialize, precisely because the lawyer before them so often does and also because expert witnesses — specialists — may be expected to testify. Our system of adjudicating controversies presumes that the advocate will present his case to an impartial fact finder. It is the advocate who should be the expert on the facts in the courtroom.

*Id.*

99. These proponents view ALJs as “generalists,” competent to address a variety of issues. RICH & BRUCAR, *supra* note 41, at 45.

100. Norman Abrams, *Administrative Law Judge Systems: The California View*, 29 ADMIN. L. REV. 487, 503-04 (1977). Supporters of the central panel system propose these arguments to critics who agree with the Report of the Committee on Administrative Procedure that ALJs must be experts in the complexities of the particular agency in order to make adequate conclusions.

The critics reason that without expertise, ALJs will be inefficient in resolving technical issues and will be subject to manipulation by participants who must educate the ALJs as to the facts and substantive law. See RICH & BRUCAR, *supra* note 41, at 45. The authors pre-

### C. *Administrative Hearing Procedures*

Current administrative hearing procedures provide additional support for the recommendation that the ALJ should hold greater decision-making power. For example, the APA permits the administrative litigant to obtain legal representation for assistance during a hearing.<sup>101</sup> The Supreme Court also has suggested that administrative litigants maintain the right to retain counsel for administrative hearings if the litigant so chooses.<sup>102</sup> The presence of attorneys during an administrative hearing creates a courtroom atmosphere and strengthens the need for ALJs to be well-versed in legal analysis.

While the attendance of counsel in an administrative proceeding offers greater protection to the litigant, the attorney's presence may also infect the administrative process with the sophisticated "legalese" and inexpedience common to the judicial system. Attorneys will naturally present both factual and legal issues to an ALJ and will perhaps assert constitutional issues for resolution. In light of the litigant's right to retain counsel and the likelihood that the attorney will assert all legal issues which the attorney believes require determination, an ALJ should be competent to address both factual and legal issues and to draft a complete record. By addressing all issues raised, the ALJ could accord full recognition of a claimant's rights and satisfy the due process required of an administrative hearing.<sup>103</sup>

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sent the argument that "[m]ost of the time, the best judge is the individual who possesses the capacity by way of insight, temperament and knowledge to make fair and constructive use of the expertise of others. A judge should not usually be the source of the information, technical or otherwise, upon which a result is based." *Id.* at 46 (quoting Kestin, *Reform of the Administrative Process*, 92 N.J.L. 35 (1980)).

101. See 5 U.S.C. § 555(b) (1988). This section states that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel." *Id.*

102. *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970). The right to retain counsel if the litigant so desires does not mean, however, that the government must provide the litigant with an attorney.

103. The Supreme Court expounded on the requirements of due process during the administrative process in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In determining whether a trial-type hearing is required, the adjudicator evaluates:

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

*Id.* at 334-35. Nothing short of due process would be acceptable in the administrative hearing where the goals of fairness, accuracy, efficiency, and "participant satisfaction" are paramount. See, e.g., Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279 (1978).

Under the APA, the decisions of ALJs remain subject to review by the agency heads,<sup>104</sup> as well as to review by Article III courts under the doctrine of judicial review.<sup>105</sup> As previously noted, the Constitution entrusts to the judiciary the power to interpret the law.<sup>106</sup> However, it is argued that "fact issues involving due process, equal protection, and . . . other constitutional guarantees will in all probability no longer be subject to court review as a matter of constitutional right."<sup>107</sup> This argument implies that ALJs could be authorized to address legal issues such as constitutional questions. In addition, once the ALJ addresses all of the litigant's legal questions, the appeals process which permits judicial review of the conclusions made by the agency can alleviate any concerns by the parties that the ALJ usurped functions typically performed by the black-robed judge.

Regarding judicial review, critics of the central panel system contend that increased adjudicator independence during hearings is unnecessary because Congress urges deference to the decisions of agencies<sup>108</sup> and emphasizes the significance of agency review. Although it has required judicial deference to the agency's determinations of facts in the record based on a "substantial evidence" standard,<sup>109</sup> the Supreme Court originally expressed distrust of the administrative process by requiring *de novo* review of "constitutional" or "jurisdictional" facts.<sup>110</sup>

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104. See 5 U.S.C. § 557(b) (1988). This section states that "[w]hen the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule." *Id.*

105. 5 U.S.C. § 704 (1988) provides that "[a]gency action[s] made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." *Id.*

106. U.S. CONST. art. III.

107. REPORT, *supra* note 55, at 210 (Additional Views and Recommendations of Messrs. McFarland, Stason, and Vanderbilt). In the Appendix to the Additional Views, McFarland, Stason, and Vanderbilt propose a Code of Standards of Fair Administrative Procedure and recommend that upon judicial review, "due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it." *Id.* at 246-47.

108. *Id.* at 184 (citing Norman Zankel, *A Unified Corps of Federal Administrative Law Judges is Not Needed*, 6 W. NEW ENG. L. REV. 723 (1984)).

109. *Universal Camera v. NLRB*, 340 U.S. 474, 493 (1951) (noting that "[i]t is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of the evidence on the record including the examiner's report."); see also *Lung v. Payne*, 476 U.S. 926, 939 (1986) (*quoted in Martin v. Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171, 1175-76 (1991)) (agency's interpretation of its own regulations receives substantial deference by a reviewing court); *NLRB v. Brown*, 380 U.S. 278, 291 (1965) (due deference is given to agency's determination of fact as long as there is substantial evidence in the record).

110. See *Rosenblum*, *supra* note 75, at 65. The author cites *Crowell v. Benson*, 285 U.S. 22 (1932), as the "prototype" of the lack of deference and overall distrust with which courts

Recently, the Supreme Court has indicated that courts may consider administrative interpretations of statutes on judicial review. The reviewing court may decide that an agency maintains some responsibility for interpreting a statute. In this situation, the judge must determine whether the agency's conclusion is a "reasonable" one.<sup>111</sup> The Court explained the parameters of judicial review of an agency's statutory interpretation in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.<sup>112</sup> The Court held there that upon judicial review, a court must first consider whether Congress has explicitly addressed the exact question under consideration.<sup>113</sup> Where congressional intent is apparent, the court and agency must defer to Congress' guidelines.<sup>114</sup> If the court ascertains that the legislature has not spoken on the precise question, it reviews the agency's conclusion for a "permissible construction of the statute."<sup>115</sup> The Supreme Court's requirement of judicial deference to the reasonable statutory interpretations by agencies lends some support to the argument that the adoption of an independent group of agency adjudicators is unnecessary.

However, Congress' codification in the APA of a *de novo* standard for judicial review of questions of law in certain circumstances<sup>116</sup> emphasizes

view the administrative hearing process, requiring trials de novo for "jurisdictional facts." *Id.*

111. See STRAUSS, *supra* note 52, at 255; see also *Martin v. Occupational Safety & Health Review Comm'n*, 111 S. Ct. at 1176 (if regulation's meaning is ambiguous, court defers to an agency's "reasonable" interpretation).

112. 467 U.S. 837 (1984).

113. *Id.* at 842.

114. *Id.* at 842-43; see also *id.* at 843 n.9 (noting that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

115. *Id.* at 843.

116. 5 U.S.C. § 706 (1988) states:

[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

. . .

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

*Id.*

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Supreme Court recognized that

[i]n all cases agency action must be set aside if the action [is] "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". . . . And in other equally narrow circumstances the reviewing court is to engage in a *de novo* review of the action and set it aside if it [is] unwarranted by the facts.

a distrust of agency competence.<sup>117</sup> Although judicial deference to administrative findings applies under certain circumstances, the final authority to resolve issues of law continues to rest with the judiciary, particularly if the issue involves the constitutionality of a statute.<sup>118</sup> The Supreme Court's holding in *Chevron* marks a significant step towards the recognition of an ALJ's competency to address the constitutionality of statutes. A complete removal of the agency's influence over the ALJ, which would be effectuated by the central panel system, would only increase public approval for agency review of legal issues.

#### IV. RECOMMENDATION

The foregoing analysis provides a background for discussing whether ALJs should have the authority to address typically legal issues. As a general rule, if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative ruling.<sup>119</sup> Many federal and state courts have not espoused the idea that an agency adjudicator may consider a statute's constitutionality.<sup>120</sup> Indeed, the Supreme Court has ordered that "[s]tate statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly no power to adjudicate Constitutional issues is conferred on the Administrator."<sup>121</sup>

As previously discussed, however, some states have permitted agencies to address the legality of statutes in certain instances. Most notably, in *Southern Pacific Transportation v. Public Utilities Commission*, the Supreme Court of California addressed the question of whether the state Public Utilities Commission could determine the validity of statutes and held that the agency could exercise such power.<sup>122</sup> The majority discussed two lines of reasoning, the first requiring administrative agencies to consider the constitutionality of statutes because agencies must obey the Constitution by affording individuals their constitutional rights. The second, conflicting line of reasoning forbids administrative agencies to deter-

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*Id.* at 413-14 (citations omitted); see also *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[D]e novo review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions.") (citing *Volpe*, 401 U.S. at 415).

117. See 5 U.S.C. § 704 (1988) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

118. See STRAUSS, *supra* note 52, at 255, 257.

119. 4 DAVIS, 1983, *supra* note 7, § 26:6, at 435 (citing *Weinberger v. Salfi*, 422 U.S. 749 (1975)); see also 3 DAVIS, 1958, *supra* note 8, § 20.04, at 74 (administrative agencies may not invalidate the will of the legislature).

120. 4 DAVIS, 1983, *supra* note 7, § 26:6 at 434-35.

121. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944).

122. 556 P.2d 289 (Cal. 1976).

mine the validity of statutes because agencies cannot invalidate legislative intent.<sup>123</sup>

In *Southern Pacific Transportation*, the California court illustrated the difficulty of reconciling the two principles mentioned above by providing the analogous example of a state school board's treatment of the United States Supreme Court's rejection of the separate but equal doctrine in the statutes of another state.<sup>124</sup> The court reasoned that if the school board continued to enforce a statute permitting separate but equal facilities until a court invalidated it, constitutional rights would be deprived. In addition, the court asserted that a school board's enforcement of the Constitution on a case by case basis without regard to whether the statute could be enforced in another case "is wasteful, ignores reality and compels intellectual dishonesty insofar as the administrator must close his eyes to the fact that deprivation of constitutional rights will occur in all cases to which the statute may be applied."<sup>125</sup> The court accurately concluded that it is only when the agency recognizes the invalidity of the statutes that the agency complies with the law.<sup>126</sup>

The principles demonstrated in the court's examination of the agency's propriety in invalidating a statute provide a medium for continuing this debate in other states. The California legislature conveyed its confidence in the administrative process by granting greater judicial powers to an administrative agency. Further, the legislature limited judicial review by the highest state court to a consideration of whether the agency "regularly pursued its authority," and whether the agency action violated the participant's federal or state constitutional rights.<sup>127</sup> Such deference to the ALJ's resolution illustrates California's forward-looking approach to resolving disputes between claimants and administrative agencies.

## V. CONCLUSION

Only the development of a complete record of all issues at hand, including the constitutionality of statutes, attains the efficient allocation of

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123. *Id.* at 290 n.2.

124. *Id.*

125. *Id.* at 291 n.2.

126. *Id.*

Apart from the analogy, the court also stated that the California Constitution and statutes accorded wide legislative and judicial powers to the state agency in question. *Id.* However, the example is important in that it reflects the significance the California court placed on the agency's obligation to strike statutes when necessary.

127. *Id.* The court stated there that "Public Utilities Code section 1732 provides corporations and individuals may not raise matters in any court not presented to the commission on petition for rehearing, reflecting, when read with the judicial review sections, legislative determination that all issues must be presented to the commission." *Id.*

judicial resources advocated in *Mowbray v. Kozlowski*<sup>128</sup> and complies with the law as discussed in *Southern Pacific Transportation*.<sup>129</sup> In all likelihood, however, review by an ALJ of the constitutionality of statutes will not be possible in most states until the purposes of administrative procedure are accepted and the public recognizes the important services provided by ALJs and their agencies.<sup>130</sup>

Through broad recognition that the ALJ is "functionally comparable" to the black-robed judge,<sup>131</sup> much of the concern for impartiality and competence in ALJ adjudication would likely dissipate. Among other advantages, the detection and possible prevention of agency abuses would be facilitated if ALJs could make initial determinations as to legal issues raised in agency hearings.<sup>132</sup> The internal separation of agency functions and increased ALJ independence recommended by the Committee on Administrative Procedure and codified in the APA have already curtailed to some degree an ALJ's bias favoring his agency. The establishment of a central panel in several states serves as an example of the value in establishing agency procedures insulated from agency manipulation.

Whatever the method chosen, removal of the ALJ from the agencies should guarantee adjudicator competence to address legal issues. Further, legislative pronouncement of the ALJ's independence and required legal education should assuage the critics who warn against greater delegation of power to ALJs for reasons of ineptitude, usurpation of judicial functions, violation of separation of powers and bias towards the agency. Because administrative adjudication may serve as simply the first step in the judicial process, agency hearings function much like judicial proceedings in the federal district or state trial court, as ALJ decisions may be appealed to the judicial system if necessary to correct abuse or challenge conclusions.<sup>133</sup> The right of appeal serves as a final check on an ALJ's

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128. 724 F. Supp. 404 (W.D. Va. 1989), *rev'd*, 914 F.2d 593 (4th Cir. 1990).

129. 556 P.2d 289 (Cal. 1976).

130. Lubbers, *supra* note 63, at 109-12. The author notes that "[o]ne indication of the importance of ALJs as lawmakers and law appliers is suggested by the fact that they outnumber by two to one the corps of United States district court judges who preside over the nation's entire federal and criminal trial docket." *Id.* at 109.

131. *Butz v. Economou*, 438 U.S. 478, 513 (1978).

132. See Note, *The Authority of Administrative Agencies*, *supra* note 50, at 1690. The author asserts that allowing agencies to consider the constitutionality of statutes may curb agency excesses by focusing administrative attention on constitutional restrictions. *Id.*

133. One state court has advocated permitting an agency to examine certain legal questions:

While we have strictly confined the power of constitutional review to the judiciary, we have not found the delegation of quasi-judicial powers to executive branch agencies — including the power to determine facts and apply the law thereto — to be a violation of the constitutional provision for the separation of powers of government so long as the determinations of those agencies lack judicial finality and are subject to judicial review.

resolution of important legal and factual issues. Most importantly, the agency adjudication process maximizes judicial economy and satisfies due process by providing a complete record and resolution of all issues raised. A standard of deference like that applied to the agency in *Southern Pacific Transportation* would further facilitate the claimant's interest in swift but thorough settlement of her claim for government benefits.

*C. Stuart Greer*

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Quam v. State, 391 N.W.2d 803, 809 n.6 (Minn. 1986) (citing Breimhorst v. Beckman, 35 N.W.2d 719, 734 (Minn. 1949) (legislative grant of adjudicative powers to exclusive workers' compensation system upheld against separation of powers challenge)).