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A UNIFIED CORPS OF ADMINISTRATIVE LAW JUDGES — THE TRANSITION FROM A CONCEPT TO AN EVENTUAL REALITY

MICHEL LEVANT*

I. INTRODUCTION

The concept of a unified corps of federal administrative law judges began to be generally recognized approximately ten years ago. The concept was simple. Transfer approximately 1100 judges from twenty-nine different federal agencies into a single entity. The principal reasons advanced for such a change were to insure judicial independence and to provide significant efficiencies and cost savings.

Although there was a substantial body of literature available on the subject,¹ no document actually provided the specific details of a unified corps for the federal government. What kind of structure would be involved? How would such an entity be managed? How would the expertise of judges at various agencies be preserved? What impact would a unified corps have on the authority of the agencies? These were just some of the many questions that came to mind. But there were few precise answers. One thing was apparent; there was overwhelming support for the concept within the administrative law judge community. It was seen as a significant reform of

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The views expressed in this article are solely those of the author.

1. See UNITED STATES CIVIL SERVICE COMM'N, REPORT OF THE COMM. ON THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES (LA MACCHIA COMM'N REPORT) (1974); FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE, STATEMENT AND RECOMMENDATIONS TO THE UNITED STATES CIVIL SERVICE COMM'N (1973); Lubbers, *A Unified Corps of Administrative Law Judges: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266 (1981); Segal, *The Administrative Law Judge: Thirty Years of Progress and the Road Ahead*, 62 A.B.A.J. 1424 (1976); Davis, *A New Declaration of Independence for Administrative Law Judges*, 17 JUDGES' J. 16 (1978).

the administrative hearing process that was clearly in the public interest.

It became apparent that unless the general concept could be translated into a working blueprint that provided specific answers to the many questions, there would be little hope that the concept could ever become a reality. As Chairman of the National Conference of Administrative Law Judges, Judicial Administration Division, American Bar Association (ABA), the author formed a small drafting committee whose assignment it was to prepare such a detailed document.² It was the Committee's charter to design a unified corps which would maximize the benefits to the administrative process with minimum changes in the existing system. Of particular concern was preserving the review role of the agencies in the process as well as their individual areas of expertise. The Committee thus set out to transfer the trial of cases from twenty-nine agencies to a single entity with centralized management. After much effort and deliberation and extensive consultations with interested groups and persons, a detailed plan for the creation of a unified corps of federal administrative law judges emerged.

Our unified corps proposal was then presented to the Executive Committee of the National Conference of Administrative Law Judges. After extensive debate it was overwhelmingly approved in August, 1982 at the ABA annual meeting. Subsequently, in February, 1983 at the ABA midyear meeting the concept of a unified corps was unanimously approved in principle by the Council of the Judicial Administration Division. The Executive Committee of the Federal Administrative Law Judges Conference as well as the Association of Administrative Law Judges also support the unified corps proposal by a significant majority.

In May, 1983, Senator Howell Heflin, on his own initiative, introduced legislation to establish a unified corps of administrative law judges in the federal government.³ The bill, Senate bill 1275,⁴ with some minor modifications, reflected the proposal which was drafted by our committee. Senator Heflin, who as Chief Justice of the State of Alabama was responsible for creating a unified court system in that state, had long been a supporter of the concept and was well aware of its potential benefits. The introduction of Senate bill 1275,

2. The committee consisted of Judges Nahum Litt, Victor Palmer, Jair Kaplan and the author. Judge I. David Benkin, although not a member of the committee, contributed extensively to this project.

3. 129 CONG. REC. S6610-13 (daily ed. May 12, 1983) (statement of Sen. Heflin).

4. S.1275, 98th Cong., 1st Sess. (1983).

though unexpected at that point in time, was a major step in moving the concept of a unified corps toward eventual reality.

II. THE BILL

Senate bill 1275, entitled the "Administrative Law Judge Corps Act" would establish a unified corps of administrative law judges, separate and apart from the other government agencies.⁵ The principal provisions of the bill are summarized:

A. All administrative law judges appointed pursuant to the Administrative Procedure Act,⁶ would be transferred to the Corps as of the effective date of the Act.⁷

B. A chief administrative law judge would be appointed by the President with the advice and consent of the Senate, from among qualified administrative law judges recommended by a "Judicial Nomination Commission" comprised of five members named by representatives of the courts, the Administrative Conference of the United States, the American Bar Association and the Federal Administrative Law Judges Conference.⁸

C. The Corps would be comprised of not more than ten but not less than four divisions. Initially the bill proposes the following seven divisions reflecting areas of specialization:

- (1) Division of Communications, Public Utility and Transportation Regulation;
- (2) Division of Health, Safety and Environmental Regulation;
- (3) Division of Labor;
- (4) Division of Labor Relations;
- (5) Division of Benefits Programs;
- (6) Division of Securities, Commodities and Trade Regulation;
- (7) Division of General Programs and Grants.⁹

Each judge would be assigned to a division in accordance with his or her particular expertise.¹⁰

Each division would have a chief judge nominated by the Judicial Nomination Commission and appointed by the President with

5. *Id.* The bill has been reprinted in 129 CONG. REC. S6610-13 (daily ed. May 12, 1983).

6. 5 U.S.C. § 3105 (1982).

7. S.1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 562).

8. *Id.* (proposing codification at 5 U.S.C. §§ 563, 566).

9. *Id.* (proposing codification at 5 U.S.C. § 564(a), (b)).

10. *Id.* (proposing codification at 5 U.S.C. § 564(c)).

the advice and consent of the Senate.¹¹

D. The policymaking body of the Corps would be the council of the Corps and would consist of the chief judge of the Corps and each division chief judge. The council would be vested with broad authority to conduct the business of the Corps.¹²

E. The bill would provide that new judges be appointed to the Corps under the present merit selection system from a register of qualified applicants maintained by the Office of Personnel Management.¹³

F. The jurisdiction of the Corps would extend to all cases now being heard under the Administrative Procedure Act and any other cases referred to it by agencies and courts that desired to have a decision on a record developed at a hearing conducted by an administrative law judge.¹⁴

G. The bill would provide procedures for the removal and discipline of administrative law judges. In addition to preserving such provisions under the APA, it would establish a "Complaints Resolution Board," composed of three judges elected by members of the Corps, to initially consider, and to recommend appropriate action to be taken upon, complaints against the official conduct of judges.¹⁵

H. The chief judge of the Corps would be directed to make a study of the various types and levels of agency review to which decisions of administrative law judges are subject and to report to the President and the Congress not later than two years from the effective date of the bill. This provision is intended to explore ways, for example through a certiorari procedure, by which administrative law judge decisions may be accorded a greater degree of finality in order to expedite the process.¹⁶

III. THE CASE FOR A UNIFIED CORPS

The enactment of the Administrative Procedure Act (APA) in 1946 brought much needed reform to the administrative process.¹⁷ Pursuant to the Act, administrative law judges¹⁸ are selected on the

11. *Id.* (proposing codification at 5 U.S.C. § 564).

12. *Id.* (proposing codification at 5 U.S.C. § 565).

13. *Id.* (proposing codification at 5 U.S.C. § 567).

14. *Id.* (proposing codification at 5 U.S.C. § 568).

15. *Id.* (proposing codification at 5 U.S.C. § 569).

16. *Id.* § 3.

17. Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (current version at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1982)).

18. Administrative law judges were known as "hearing examiners" until 1971

basis of merit under a unique system for judicial selection. Administrative law judges are provided with a form of tenure in that they are removable only for good cause after hearing.¹⁹ Moreover, they may not be required to perform duties inconsistent with their judicial function.²⁰ Their pay levels are prescribed, independent of agency recommendations or ratings by the Office of Personnel Management, rather than by individual agencies.²¹ Perhaps most important, the APA requires judges to conduct proceedings in an impartial manner.²² The provisions of the APA brought needed safeguards to the administrative process.

A number of significant changes have taken place, however, over the past thirty-eight years that now call for further measures to improve the system. For instance, in June, 1947 there were approximately 200 administrative law judges in the federal government.²³ Today there are approximately 1134.²⁴ The Social Security Administration alone went from thirteen judges in 1947 to approximately 750 today.²⁵ The one notable decline is in the number of judges assigned to economic regulatory agencies, a decrease from 125 in 1947 to approximately 80 today.²⁶

The nature of the proceedings have also changed over the years. In 1947 over sixty percent of administrative proceedings involved ratemaking, licensing, and other forms of rulemaking by the various economic regulatory agencies.²⁷ More recently those agencies accounted for less than seven percent of hearings conducted by administrative law judges.²⁸ Today, the overwhelming majority of cases involve enforcement actions or claims for social security benefits.²⁹

Administrative proceedings have become generally more formal

when the Civil Service Commission approved a change in the title. 37 Fed. Reg. 16,787 (1982). The title of "Administrative Law Judge" was formally conferred by an Act of Congress in 1978. Act of March 27, 1978, Pub. L. No. 95-251, §§ 2-3, 92 Stat. 183, 183-84.

19. 5 U.S.C. § 7521 (1982).

20. 5 U.S.C. § 3105 (1982).

21. 5 U.S.C. § 5362 (1982).

22. 5 U.S.C. § 556(b) (1982).

23. Lubbers, *supra* note 1, at 268.

24. OFFICE OF PERSONNEL MANAGEMENT, TOTAL NUMBER OF ALJs ON BOARD BY GRADE AND AGENCY AS OF NOVEMBER 21, 1983.

25. *See id.*; Lubbers, *supra* note 1, at 268.

26. *See* OFFICE OF PERSONNEL MANAGEMENT, TOTAL NUMBER OF ALJs ON BOARD BY GRADE AND AGENCY AS OF NOVEMBER 21, 1983; Lubbers, *supra* note 1, at 268.

27. Lubbers, *supra* note 1, at 268.

28. *Id.*

29. *Id.*

and very much like trials in courts of law, with judges often presiding in robes and applying *Federal Rules of Evidence*. The judicialization of administrative proceedings is the result of the nature of the proceedings and the demand for due process.³⁰ In *Butz v. Economou*,³¹ the Supreme Court recognized that administrative law judges performed a role "functionally comparable" to that of traditional judges.³²

In recent years it has become apparent that a division of interests and a conflict of functions separates judges from agencies. Agency staffs appear regularly in proceedings before judges as parties in interest; moreover, agency programs are affected by the judges' decisions. There is also a basic conflict in functions between agencies and their judges in that agencies operate in the legislative and executive sphere while the role of the judges and the administrative hearing process is principally judicial in nature.³³

This changed environment has brought about a need for a new approach to the administrative hearing process. Given the significant increase in the number of cases and in the number of administrative law judges, improved management to facilitate the prompt disposition of cases has become imperative. It is essential that flexibility in the overall utilization of judges be provided to accommodate the fluctuating volume of varying types of cases. It is also desirable in a period of budgetary limitations to explore ways in which the cost of the system may be reduced. Moreover, in recent years there have been some disturbing incidents involving encroachment upon judicial independence³⁴ that prompt the consideration of additional safeguards.

The unified corps proposal has been offered to address some serious problems now confronting the administrative hearing process. An examination of the principal objectives of the bill and the expected benefits follows.

A. *More Efficient Management of the Hearing Process*

The most compelling reason for establishing a unified corps is the enhanced management efficiency that would be realized. Under the present system, twenty-nine agencies within the federal govern-

30. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); see also Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

31. 438 U.S. 478 (1978).

32. *Id.* at 513.

33. *Id.* at 513-14.

34. See *infra* text accompanying notes 48-56.

ment have their own staffs of administrative law judges varying in number from one at the Drug Enforcement Administration to approximately 750 at the Social Security Administration.³⁵ Actually, five agencies have a single judge³⁶ and fifteen agencies have six judges or fewer.³⁷ Regardless of the number of judges assigned, each agency maintains complete administrative support staffs and independent physical facilities for them, including hearing rooms. One need not be a management expert or undertake an exhaustive study to imagine the amount of duplication that currently takes place and the savings that might be gained from merely centralizing the administrative support functions and from eliminating duplicative and under-utilized manpower and physical facilities. Fundamental precepts of good management make this apparent.

Beyond the issue of administrative support and physical facilities, there is the equally important matter of matching judicial resources to varying agency case loads. Today, in a climate of deregulation, a number of agencies' case loads have been drastically reduced, while others have persistently heavy backlogs. To cite an example, the Department of Labor which employs eighty judges currently has a two and one-half year backlog in black lung cases alone.³⁸ It is known that there are judges at other agencies that would be free to hear some of these cases. The backlogs persist, however, because there is not an effective mechanism for matching resources to case loads on a government-wide basis. Instances of voluntary and temporary loan arrangements in the past have not proven to be satisfactory as there is a reluctance among agencies to participate in loans of judges lest they concede that their case loads are insufficient to justify the maintenance of their entire individual staffs.³⁹

Maintaining separate staffs of judges at each and every agency, disregarding the degree of their utilization and the need for their services on a government-wide basis, is senseless in these times of

35. OFFICE OF PERSONNEL MANAGEMENT, TOTAL NUMBER OF ALJS ON BOARD BY GRADE AND AGENCY AS OF NOVEMBER 21, 1983.

36. *Id.* They include: Bureau of Alcohol, Tobacco & Firearms, Department of Housing and Urban Development, Department of Commerce, Drug Enforcement Administration and Food and Drug Administration. *Id.*

37. *Id.*

38. Conversation with the Honorable Nahum Litt, Chief Administrative Law Judge, United States Department of Labor, January, 1984.

39. The Office of Personnel Management (OPM) established a "mini-corps" of three judges several years ago to service the occasional needs of agencies. The mini-corps, however, was abandoned because of OPM budgetary limitations.

severe budgetary constraints. That significant benefits can be achieved from the centralized management of judicial resources is not merely a hope of the proponents. There is empirical evidence to support such expectations. Eight states⁴⁰ have already adopted the central management model with great success.⁴¹ Both New Jersey⁴² and Minnesota⁴³ have led the way in perfecting the central panel system. The savings and economies they have achieved are matters of record.⁴⁴

The achievable efficiencies from the central management model not only result in improved and more prompt service to the public but are also translated into significant monetary savings. These are examined next.

B. *Cost Savings*

No specific or detailed study has been made to determine the cost savings that would be achieved under a unified corps at the federal level. Nevertheless, potential cost savings may be fairly estimated on the basis of given assumptions. Such estimates indicate substantial economies. Given the current caseload and the expected efficiencies of the unified corps system, the number of administrative law judges now employed may be reduced. The annual cost per year to maintain an administrative law judge is approximately \$125,000 for both salary and support. Thus, if it is assumed that one year's attrition of judges is five percent or fifty-five judges, and that these judges were not replaced, an annual cost savings of almost \$7,000,000 could be realized. Based on state experiences, this estimate is somewhat conservative.⁴⁵

Another potential cost saving would result from the consolidation of administrative staffs of the twenty-nine agencies. While hard to quantify, if it is assumed that there is a reduction of only one employee earning \$20,000 per year from each agency, an additional

40. California (1945), Colorado (1976), Florida (1974), Massachusetts (1974), Minnesota (1976), New Jersey (1979), Tennessee (1974), Washington (1982). See M. RICH & W. BRUCAR, *THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES* 28 (1983).

41. See Levinson, *The Central Panel System a Framework that Separates ALJs from Administrative Agencies*, 65 *JUDICATURE* 236 (1981).

42. See H. KESTIN, *THE NEW JERSEY PERSPECTIVE ON ADMINISTRATIVE ADJUDICATIONS* (1983).

43. See Harves, *Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota*, 65 *JUDICATURE* 257 (1981).

44. H. KESTIN, *supra* note 42, at 3-4; Harves, *supra* note 43, at 263.

45. H. KESTIN, *supra* note 42, at 3.

saving of \$580,000 per year in direct salary alone would be saved. In addition, indirect expenses from fringe benefits, for example, would also be saved. Again, this represents a very conservative estimate.

Additional savings would be realized from the consolidation and elimination of certain physical facilities such as office space and equipment, selected regional offices, and unneeded duplicative hearing rooms. Precise quantification of this item is difficult. Assuming, however, that approximately seventy million dollars is currently expended for the support of approximately 1100 judges, exclusive of judges' salary, it is not unreasonable to expect that a reduction of five percent, or a savings of \$3,575,000, might be achieved on facilities alone.⁴⁶

Thus, on the basis of these estimates, savings exceeding ten million dollars per year at the outset would appear to be realistic.

C. *Judicial Independence*

The establishment of a unified corps would do much to insure judicial independence, both real and perceived, of administrative law judges. The APA undoubtedly brought about a significant improvement in insulating judges from agency influence. Indeed, many judges have long enjoyed complete decisional independence.⁴⁷ In more recent times, however, there have been some disturbing incidents in which agencies have encroached upon judicial independence. The most flagrant and recent example of agency interference occurred at the Social Security Administration and resulted in a lawsuit by the Association of Social Security Administration Judges against that agency.⁴⁸ The case is currently pending in the Federal District Court for the District of Columbia before Judge Joyce Hens Green, where it has been alleged that the agency sought to influence judges' decisions.⁴⁹ In addition, the agency brought actions against administrative law judges for failing to produce a fixed number of

46.

137,500,000	(present total costs for 1100 Judges 125,000 × 1100)
– 66,000,000	(total salary based on \$60,000 average 1100 × \$60,000)
<hr/>	
71,500,000	(facilities and support costs)
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.05	
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\$3,575,000	(potential savings).

47. *Butz*, 438 U.S. at 511-14.

48. *Association of Admin. Law Judges v. Heckler*, No. 83-124 (D.D.C. filed Jan. 19, 1983).

49. *Id.*

cases per month.⁵⁰

A well publicized incident in which an agency intruded upon a judge's decisional independence involved a reprimand against a judge by the Department of the Interior in 1977.⁵¹ The judge was reprimanded for issuing a decision prescribing penalties in a case pending before him, contrary to the wishes of the agency.⁵² The cost to the judge to rectify this impropriety was substantial, notwithstanding that the Federal Administrative Law Judges Conference defrayed \$5,000 of his legal fees.

Another incident that came to public attention involved a Federal Trade Commission judge hearing the *Kellogg Co.* case⁵³ who sought to retire during the pendency of the case.⁵⁴ The Commission entered into an arrangement with the judge to continue to pay him an annual salary after retirement despite the fact that other sitting judges were available to hear the case. Kellogg's attorneys brought this arrangement to the attention of Congress, inferring that one of the motivating issues was the retention of a judge sympathetic to the Commission.⁵⁵ After legislative oversight hearings, the Commission vacated the administrative law judge's initial decision which had dismissed the complaint and refused to proceed further in the matter.⁵⁶ It is submitted that, if administrative law judges were no longer assigned to individual agencies, such incidents would be avoided.

In addition to the need for protecting judicial independence, there is the matter of the public's perception of a judge as an independent decisionmaker that is no less important. After all, if the public perceives that judges assigned to particular agencies have an agency bias, the fact that such judges actually enjoy decisional independence does not instill confidence in the fairness of the process. It is well known that many who come into contact with the administrative process have serious doubts about its objectivity, particularly when they perceive the judge as an agency employee who sits on the bench with an agency seal above him.⁵⁷ It is believed that the as-

50. *See, e.g.*, *SSA v. Goodman*, No. HQ75218210015 (MSPB Feb. 6, 1984); *SSA v. Brennan*, No. HQ75218210010 (MSPB Feb. 6, 1984).

51. 43 Op. Att'y Gen. 1 (1977).

52. *Id.*

53. *Kellogg Co.*, 99 F.T.C. 8 (1982).

54. *Administrative Law Judge Program of the F.T.C.: Hearing Before the Subcomm. on Investigation of the Senate Comm. on Post Office and Civil Service*, 96th Cong., 2d Sess. 94 (1980) (Statement of Ernest Barnes, C.A.L.J. (FTC)).

55. *Id.*

56. *Id.*

57. Segal, *supra* note 1, at 1426.

signment of administrative law judges to an independent entity, separate and apart from the agency, would greatly enhance the public's perception of the impartiality of the administrative hearing process.

D. *Assisting the Federal Courts*

Another potential benefit to be realized from the establishment of a unified corps that has not been readily recognized would be its availability to render assistance to the overburdened federal judiciary. Over the years, there have been isolated instances where administrative law judges have been appointed to serve as special masters for the federal courts.⁵⁸ However, the assignment of administrative law judges to individual agencies has prevented them from being considered as an independent trial judge resource within the federal government that would be available to provide temporary relief to the federal courts when needed. In addition to the extremely heavy case loads currently facing the federal courts, there are, for example, additional categories of cases, such as false claims/statements cases under \$100,000, the prosecution of which has been deferred due to the heavy demands it would impose upon the Justice Department and the federal courts. Last year, Senator Roth proposed civil penalty legislation to deal with this problem suggesting that hearing officers, such as administrative law judges, might be used to hear these cases.⁵⁹ Objections were raised asserting that hearing officers assigned to agencies with which the defendants were doing business would not be impartial.⁶⁰ Administrative law judges assigned to a unified corps would not carry this impediment. There are undoubtedly other areas in which a unified corps might be utilized to relieve the federal courts.

The opponents of a unified corps have belittled this potential benefit as an "absurdity" since they note that Senate bill 1275 contains no specific provisions creating the mechanics for transferring cases from the federal district courts.⁶¹ This assertion displays a distinct lack of vision. It is submitted that once a unified corps is cre-

58. *See, e.g.,* NLRB v. TUPCO, Nos. 75-185, -1371, slip op. (5th Cir. Apr. 29, 1982) (Order of Reference to Special Master); NLRB v. Turbodyne Corp., No. 78-1009, slip op. (5th Cir. Feb. 12, 1981) (Report of Special Master); Florida Steel Corp. v. NLRB, Nos. 75-4027, 76-1743, - 3835, slip op. (5th Cir. Mar. 13, 1980) (Report and Recommendations of Special Master).

59. *See* S. 1566, 98th Cong., 1st Sess. (1983).

60. *See* Letter from Public Contracts Section, American Bar Association, to Senator Roth 15 (Apr. 20, 1982).

61. *Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 98th

ated and is perceived as an independent trial bench, there would be ample opportunity to undertake necessary technical arrangements to permit federal district courts to call upon the corps for assistance.

E. *Additional Benefits*

The present system under the APA provides a means of disciplining or removing judges for good cause;⁶² however, it does not offer a mechanism for making judges cognizant of minor deficiencies in judicial performance that may be readily corrected. Senate bill 1275 provides for the creation of a "Complaint Resolution Board," composed of three judges, which would be empowered to informally consider complaints made against judges and to recommend remedial action.⁶³ It is envisioned that this Board could be used as an indirect method for correcting deficiencies, thus bringing about a significant improvement in judicial performance.

Another benefit to be derived from a unified corps is the opportunity for the uniform training of judges. It has long been recognized that an effective way to achieve improvement in judicial performance is through training and continuing education.⁶⁴ Under the current system, certain agencies permit their judges to avail themselves of training opportunities at the National Judicial College and at other institutions; however, many agencies do not. A unified corps would facilitate the establishment of a uniform training program for all federal administrative law judges.⁶⁵

Additionally, Senate bill 1275 provides for a much needed prescription of management authority. Though agencies have designated chief judges,⁶⁶ the APA does not explicitly provide for such a position. The only authority now vested in chief judges is that which may be delegated to them by their respective agencies. As a result, there is a wide divergence of management authority exercised by chief judges. Moreover, some chief judges are reticent to assert management authority in the absence of a specific APA provision. This

Cong. 1st Sess. 183 (1983) (statement of Joseph B. Kennedy, Chairman, Ad Hoc Comm. of Administrative Law Judges) [hereinafter cited as *Hearings on S. 1275*].

62. 5 U.S.C. § 7521 (1982).

63. S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 569), reprinted in 129 CONG. REC. S6612 (daily ed. May 12, 1983).

64. Segal, *supra* note 1, at 1428.

65. S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 565).

66. At least five agencies have designated their sole judge as "chief judge."

would be remedied by the corps bill.⁶⁷

IV. THE OPPOSITION

The transition from the concept of a unified corps toward its realization has sparked some opposition. As will be shown, the objections raised, for the most part, either mischaracterize the proposal or are lacking in merit.

A. *Specialized Expertise*

One of the principal objections is that a unified corps would render all judges "generalists" and thus would eliminate specialized agency expertise.⁶⁸ This assertion, no matter how often repeated, is simply without merit. Senate bill 1275 provides for a multi-divisional structure for the very purpose of preserving expertise among the judges.⁶⁹ Neither the fact that one division may bring together the common specialties of several agencies, nor the fact that judges assigned to a particular division may be called upon to hear cases temporarily from another division, support the allegation that all the Corps' judges will become generalists, or warrant the charge that there will be a general dilution of expertise. Sound management dictates that judges possessing an expertise in a given field would continue to serve therein as warranted by caseload requirements. For example, it would make no sense to assign National Labor Relations Board (NLRB) judges, who have a specialized expertise in the field of labor relations, to Federal Energy Regulatory Commission hydroelectric licensing proceedings. Obviously, if there were a substantial reduction in the number of NLRB proceedings, those judges would have to hear other types of cases and to develop an expertise in a new field of law. It is submitted that administrative law judges have the capacity to readily adapt to changing requirements and by doing so, they would bring new insights to agency proceedings.

B. *Physical Facilities and Personnel*

It has been asserted that the creation of a unified corps would require a new agency that "could easily exceed 5000" and that 200

67. See S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 565(d)).

68. *Hearings on S. 1275, supra* note 61, at 162-63 (statement of Althea T. L. Simmons, Director, Wash. Bureau, NAACP).

69. See S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 564(b)).

judges and support staff in the Washington area would be merged "under the same roof," and generally that substantial new physical facilities to house a new bureaucracy would be required.⁷⁰ Someone not familiar with the proposal can easily imagine the need for a new Pentagon to house the Corps. This of course is not the case. Rather than an increase in physical facilities, there would be a significant reduction. Of the 1100 member corps, only approximately 230 judges would sit in the Washington area⁷¹ and existing hearing facilities and office space would be utilized.⁷² To the extent that consolidations would permit the elimination of duplicative facilities, a reduction in physical space would result.

Outside of the Washington area, judges are currently dispersed among approximately 175 regional facilities,⁷³ and thus there are a number of opportunities for consolidation and concomitant space reduction. For example, in New York City and Atlanta, at least four agencies employing administrative law judges currently maintain separate facilities.⁷⁴ Under the present system, each of the twenty-nine agencies maintain full support staffs whether they have one judge or eighty judges.⁷⁵ Contrary to the unsupported assertion that the Corps will require "an additional 4000 support personnel,"⁷⁶ any reasonable assessment of the proposal strongly indicates that a significant reduction of support personnel may be achieved. Moreover, as already noted,⁷⁷ given the current case load, a more efficient system for matching cases with available judicial resources would undoubtedly lead to a reduction in the total number of judges.

C. Agency Policy Implementation

A concern has been expressed that a unified corps would impede implementation of agency policies.⁷⁸ This concern is not well

70. *Hearings on S. 1275, supra* note 61, at 180-81 (statement of administrative law judges in opposition to S. 1275).

71. The author learned this from various discussions with OPM employees and from various records maintained by that agency's Office of Administrative Law Judges.

72. S. 1275, 98th Cong., 1st Sess. § 4 (1983).

73. *See supra* note 71.

74. *Id.* In New York those agencies include the Coast Guard, NLRB, OSHRC and HHS, while in Atlanta they include the Coast Guard, the Labor Department, NLRB and HHS. *Id.*

75. *Id.*

76. *Hearings on S. 1275, supra* note 61, at 180-81 (statement of administrative law judges in opposition to S. 1275).

77. *See supra* text accompanying notes 35-44.

78. *Hearings on S. 1275, supra* note 61, at 295-96 (statement of C.M. Butler III, Chairman, FERC).

founded. At present every judge has an obligation to act consistently with agency policy in the adjudication of agency cases. When a judge fails to do so under the present system, the agency is free to reverse his or her decision. Under a unified corps, the trial judge would continue to have the same obligation with regard to agency policy and the agency would continue to have its ultimate authority. Moreover, in cases in which an agency has not set forth a particular policy and the judge is obliged to chart a new course in arriving at a decision, the record of the case, as well as applicable agency rules and precedent, provide an ample basis for arriving at a meaningful decision, whether the judge is assigned to a particular agency or to a unified corps. It must be understood that judges may not, under any circumstances, engage in extra-record communications with their respective agencies on matters of policy implementation or on any other matter related to a pending proceeding.⁷⁹

D. *Responsiveness*

The creation of a unified corps, it is contended, would prevent the timely processing of hearing requests on the theory that agencies are now better able to control their dockets and judges and to establish an order of priority for the hearing of cases.⁸⁰ Under the present system, an agency generally orders a case to be heard and refers the case to the Office of Administrative Law Judges for the implementation of its order. Cases are then assigned to individual judges by the chief judge in accordance with the APA prescribed system of rotation.⁸¹ Once a case is assigned to a judge for hearing, it is the judge and not the agency that charts the course of the hearing within the parameters of the agency's order. Thus, whether a judge is assigned to an agency, or to a unified corps, once the case is assigned, it is the judge that is in charge of the case until he or she issues an initial or recommended decision.⁸²

To the extent that an agency may request or require a chief judge to hear a particular case or class of cases expeditiously or to give them priority, the agency would have the same opportunity to make such a request or demand of the Corps. There is no reason to assume that the Corps would be less responsive than an agency chief judge under the current system. As a practical matter, if the agency

79. 5 U.S.C. § 554(d) (1982).

80. *Hearings on S. 1275*, *supra* note 61, at 294-95 (statement of C.M. Butler III).

81. *See* 5 U.S.C. § 3105 (1982).

82. Appeals from the judges' interlocutory rulings may be taken to the agency. 5 U.S.C. § 557 (1982).

has a light case load then the prompt processing of cases does not present a problem. On the other hand, if an agency has a very heavy case load, and a fixed number of judges, its ability to expedite cases is extremely limited since expediting one case causes another to be delayed. Under the current system, an agency chief judge can only rely upon a fixed number of judges. Whereas, under a unified corps, there would be available a broader range of resources from which to meet an agency's particular requirements. Thus, it may be seen that a unified corps offers the potential for far greater responsiveness than under the present system as a result of more efficient management and greater resources.

E. *Agency Referral of Cases to the Unified Corps*

It has been suggested that, if a unified corps were established, agencies might refrain from referring cases to it.⁸³ There is no basis for this speculation. It is inconceivable that agencies would eschew the trial services of a unified corps created by Congress for the purpose of providing such services. Moreover, there is a certain volume of cases which must by statute be accorded on-the-record APA hearings.⁸⁴ As for other categories of discretionary cases, there is no reason to believe that individual agency heads or commissioners would want to undertake the additional burden, time, and expense of conducting hearings in often protracted litigation and to deprive themselves of the benefits of highly professional triers of fact because they oppose creation of a unified corps. Interestingly, experience of the state central panels has been to the contrary. For example, the New Jersey central panel, once established and recognized as an entity that can provide efficient trial services, has attracted the full range of cases that had been heard by individual state agencies and has seen its case load double in three years.⁸⁵ Moreover, former Chief Judge Kestin reports that his office has had requests for trial services from state entities that had not previously contemplated utilizing the central panel.⁸⁶

F. *Politicization of the Hearing Process*

It is contended that the diffusion of judges among twenty-nine

83. *Hearings on S. 1275*, *supra* note 61, at 293 (statement of C.M. Butler III).

84. 5 U.S.C. § 554 (1982) (on the record hearings required by substantive statutes). *See* *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 234-38 (1973).

85. H. KESTIN, *supra* note 42, at 2.

86. Discussion with Judge Howard H. Kestin, Director, State of New Jersey Office of Administrative Law.

agencies under the present system tends to isolate them from attempts at large scale politically oriented management, control or influence.⁸⁷ The assertion has been made that the creation of a corps will lead to a politicization of the hearing process.⁸⁸ This assertion is totally unsupported. There is no reasonable basis to assume that judges operating under the management structure proposed in Senate bill 1275 would be especially vulnerable to politicization. On the contrary, it is well known that judicial structures are the least likely to be affected by political influences.

In any event, since agencies are headed by political appointees under the present system, it is difficult to see how a unified corps of administrative law judges selected under a merit system and subject to substantially enhanced safeguards with respect to independence and impartiality could bring about a greater danger of political influence than that which already exists.

V. CONCLUSION

In an era when almost every citizen is affected by the administrative process, the public has a right to demand that the system for conducting administrative proceedings be the most efficient and impartial attainable. It has been amply demonstrated that the present system is neither. Unlike many problems that trouble our society for which there are no simple solutions, the condition affecting the administrative hearing process described herein can be remedied by the establishment of a unified corps. Moreover, the proposed reform does not impose additional costs upon an already strained federal budget; rather, it offers significant cost savings.

A great deal has been heard regarding the need for regulatory reform in the federal government. Senate bill 1275 offers an ideal opportunity to effectuate a much needed reform that promises countless benefits to the public. How long must we wait for a unified corps to become a reality?

87. *Hearings on S. 1275, supra* note 61, at 167 (statement of Althea T. L. Simmons).

88. *Id.*