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# A UNIFIED CORPS OF FEDERAL ADMINISTRATIVE LAW JUDGES IS NOT NEEDED

NORMAN ZANKEL\*

## I. INTRODUCTION

Introduction of bills to establish a nationwide Corps of Federal Administrative Law Judges<sup>1</sup> has rekindled debate over the efficacy of, and need for, the sweeping changes which apparently will attend enactment. The bills are endorsed by the Federal Administrative Law Judges Conference (FALJC), a professional association which represents, and admits to membership, all federally-employed administrative law judges.<sup>2</sup>

Many of the affected judges believe that no cogent reasons have been advanced that demonstrate a need to establish such a corps.<sup>3</sup> Principally, the bills are designed to insure administrative law judges' decisional independence.<sup>4</sup> It is asserted, however, that the existing statutes and judicial perception of federal administrative law

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The opinions of the author are his own. They do not necessarily represent the views of members of the National Labor Relations Board or any member of the Board's staff. This article has not been reviewed or approved by the National Labor Relations Board.

1. See S. 1275, 98th Cong., 1st Sess. (1983); H.R. 3539, 98th Cong., 1st Sess. (1983); see also 129 CONG. REC. S6609-10 (daily ed. May 12, 1983) (statement of Sen. Heflin).

2. 129 CONG. REC. S6610 (daily ed. May 12, 1983) (statement of Sen. Heflin).

3. Approximately 820 of the total federal complement of approximately 1150 administrative law judges are employed by the Social Security Administration (SSA). *Id.* The results of a survey conducted among the Federal Administrative Law Judges Conference membership have been cited as a claim that the corps bills are favored by a large majority of present incumbent judges. The poll's results are deceptive. 357 judges responded to the survey. Seventy-six voted against supporting the legislation. While 281 judges voted to support it, 205 of such votes were cast by SSA judges. It is clear the disputes, discussed *infra* text accompanying note 69, between these judges and their agency distorted the survey's results. Disregarding the votes cast by SSA judges would result in seventy-six judges in support of and seventy judges against the corps. See *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 Cong., 1st Sess. 175, 189-90 (1983) (statement of Joseph B. Kennedy, Chairman, Ad Hoc Comm. of Administrative Law Judges) [hereinafter cited as *Hearings on S. 1275*].

4. 129 CONG. REC. S6609-10 (daily ed. May 12, 1983) (statement of Sen. Heflin).

judges comprise satisfactory and sufficient guarantees of such independence.

This article will (1) summarize the proposed legislation; (2) develop the current status of administrative law judges; and (3) analyze the reasons proffered in support of the corps and demonstrate their inadequacy.

## II. BACKGROUND—THE CORPS BILLS

In his floor remarks introducing Senate bill 1275,<sup>5</sup> Senator Howell Heflin observed "Administrative law judges are a significant part of our Federal adjudicatory system." Administrative disputes should be adjudicated in an independent atmosphere free of bias, in order to insure fairness and give credence to administrative decisions. Structural reform of the administrative law judge system is necessary to insure truly independent adjudications.<sup>6</sup> The Senator also stated that his proposal would probably effect cost savings, achieve efficiencies and improve public perception of administrative law judges.<sup>7</sup>

The pending bill creates an "Administrative Law Judge Corps of the United States."<sup>8</sup> Initially, the Corps would consist of all current federal administrative law judges who would preside over all Administrative Procedure Act hearings.<sup>9</sup> They could also accept any other case referred to the Corps by any federal agency or court desiring to make a decision based upon a record developed at a hearing conducted by an administrative law judge.<sup>10</sup>

The Corps would be headed by a chief judge appointed by the President with the advice and consent of the Senate.<sup>11</sup> There would be seven operating divisions, identified by subject area,<sup>12</sup> presumably to preserve the expertise of the present judges, and each division would be headed by a presidentially-appointed division chief

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5. S. 1275, 98th Cong., 1st Sess. (1983). This bill is reprinted at 129 CONG. REC. S6610-13 (daily ed. May 12, 1983). An identical bill, H.R. 3539, 98th Cong., 1st Sess. (1983), is currently pending in the House of Representatives.

6. 129 CONG. REC. S6609-10 (daily ed. May 12, 1983) (statement of Sen. Heflin).

7. *Id.*

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

9. *Id.* (proposing codification at 5 U.S.C. § 562(b)). These powers are specified in 5 U.S.C. § 556(b)(3) (1982).

10. S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 568(a)(3)).

11. *Id.* (proposing codification at 5 U.S.C. § 563(a)).

12. *Id.* (proposing codification at 5 U.S.C. § 564(b)(1)-(7)).

judge.<sup>13</sup> The bill establishes a five-member judicial nominating commission to submit names of qualified candidates for the positions of chief and division chief judges.<sup>14</sup> The number of divisions could be increased by the council, which would consist of the Corps' chief judge and the division chief judges, to a maximum of ten and decreased to not less than four divisions.<sup>15</sup> Additionally, the Council would have authority over appointment, assignment, transfers and reassignment of judges to the various divisions; and to prescribe rules of practice and procedure for conduct of proceedings and business before the Corps.<sup>16</sup> Finally, the bill contains procedures for removal and discipline of administrative law judges.<sup>17</sup> A Complaints Resolution Board, comprised of two judges from each substantive division and elected by the judges of each division, would receive complaints of misconduct.<sup>18</sup> After investigation, the Board could issue advisory recommendations to the Council which, in turn, could file charges against judges with the Merit Systems Protection Board (MSPB).<sup>19</sup> The MSPB, after an opportunity for a hearing on the record, could remove and discipline judges for misconduct, incompetence, neglect of duty, or for physical or mental disability.<sup>20</sup>

There have been earlier efforts to separate administrative law judges from the government agencies who currently employ them. In 1941, such a proposal was studied and rejected.<sup>21</sup> In 1955, the Hoover Commission proposed separation.<sup>22</sup> In 1973, FALJC recommended such separation to the Civil Service Commission.<sup>23</sup> The LaMacchia Commission report suggested study of the feasibility of a corps in 1974;<sup>24</sup> and in 1976 a corps concept was advocated by Bernard G. Segal, former president of the American Bar Association.<sup>25</sup>

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

14. *Id.* (proposing codification at 5 U.S.C. § 566(a)).

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

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

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

18. *Id.* (proposing codification at 5 U.S.C. § 569(c), (d)).

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

20. *Id.* (proposing codification at 5 U.S.C. § 569(a)(1)-(2)).

21. ATT'Y GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 47 (1941).

22. HOOVER COMM'N ON THE EXECUTIVE BRANCH OF GOVERNMENT, LEGAL SERVICES AND PROCEDURES 87-88 (1955).

23. UNITED STATES CIVIL SERVICE COMM'N, REPORT OF THE COMM. ON THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES (LAMACCHIA COMM'N REPORT) app. (1974).

24. *Id.* at 47, 51.

25. Segal, *The Administrative Law Judge: Thirty Years of Progress and the Road Ahead*, 62 A.B.A.J. 1424, 1425 (1976).

In 1981, Jeffrey S. Lubbers, now Research Director of the Administrative Conference of the United States, proposed an experimental pilot program for a corps into which judges of seventeen specified federal agencies would be transferred.<sup>26</sup>

### III. ANALYSIS OF SENATE BILL 1275

One of the arguments advanced in favor of the Corps is that the legislation will serve to correct misconceptions of administrative law judges. An examination of legislative, judicial and public perception of administrative law judges is instructive.<sup>27</sup>

#### A. *The Real and Perceived Independence of Administrative Law Judges—Functions and Responsibilities*

The principal focus of the cited studies and recommendations is decisional independence. Impliedly, at least, an independent corps of administrative law judges is a panacea. Undoubtedly administrative law judges' independence is necessary and public perception of administrative justice needs enhancement.<sup>28</sup> The bill as drafted, however, will not provide the correct vehicle to achieve those purposes.

Federal administrative law judges deal with matters that have an impact on virtually every phase of the national economy and our daily lives. They preside over cases involving bank mergers; labor-management relations; nuclear, oil, electric and gas energy allocation and rates; consumer products; social security benefits claims; worker's compensation; health and safety in mining and industry; interstate trade; securities regulation; international trade; communications; food and drugs; and a host of other matters.<sup>29</sup>

The administrative law judges serve as trial judges.<sup>30</sup> They presently are assigned to a myriad of federal independent and executive branch agencies which enforce or regulate federal laws. When they preside at hearings, these judges have authority to: (1) adminis-

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26. Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 275-76 (1981).

27. See 129 CONG. REC. S6610 (daily ed. May 12, 1983) (statement of Sen. Heflin).

28. Address by Senator Howell Heflin to American Bar Association, Institute of Judicial Administration (July 30, 1983).

29. *Id.*

30. 5 U.S.C. § 556(b)(3) (1982). There is a functional difference, however, between the SSA judges and the remainder of the federal administrative law judge complement. Hearings conducted by the former essentially are non-adversarial and not required to conform to the Administrative Procedure Act. The latter group conduct adversarial hearings.

ter oaths and affirmations; (2) issue subpoenas; (3) rule upon offers of proof and receive relevant evidence; (4) take or cause the taking of depositions; (5) hold pre-hearing conferences for settlement or simplification of issues; (6) regulate the course of the hearing; (7) dispose of procedural requests; (8) question witnesses; (9) consider the facts in the record and the arguments and contentions made, or questions involved; (10) determine credibility and make findings of facts and conclusions of law; and (11) take any actions authorized by agency rule consistent with provisions of the United States Code, Title 5.<sup>31</sup>

### 1. Judicial Perception

Administrative law judges are vested with no less responsibility for maintaining the integrity of our judicial system than the judges commissioned pursuant to Article III of the United States Constitution. The Supreme Court, in 1978, recognized in *Butz v. Economou*,<sup>32</sup> that administrative law judges are "functionally comparable" to judges employed in the judicial branch and conferred on them absolute immunity for judicial acts.<sup>33</sup> In doing so, the Court observed: "There can be little doubt that the role of the . . . administrative law judge is 'functionally comparable' to that of a [constitutional] judge. His powers are often, if not generally, comparable to those of a trial judge. . . ."<sup>34</sup>

In 1980, the Supreme Court, in *Marshall v. Jerrico, Inc.*,<sup>35</sup> again commented upon the role of these judges. The Court observed that the independent administrative law judge is one "whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime."<sup>36</sup>

More recently, United States Court of Appeals Judge Aldisert, in a concurring opinion in *NLRB v. Permanent Label Corp.*,<sup>37</sup> took the time to enunciate the rationale for viewing administrative law judges as unique and highly-respectable decision-makers. Judge Aldisert wrote:

Accepting for purposes of argument that to be impartial judges must be independent of all political or employment pressures, I submit that the view that the [administrative law judges]

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31. *Id.*

32. 438 U.S. 478 (1978).

33. *Id.* at 512-13.

34. *Id.* at 513.

35. 446 U.S. 238 (1980).

36. *Id.* at 250.

37. 657 F.2d 512 (3d Cir. 1981).

are not sufficiently independent or competent is now so shopworn as to be totally obsolete. To the contrary, [administrative law judges], though not yet annointed with life tenure, enjoy an independence that in my view is plainly sufficient to satisfy reasonable doubts.

For example, although [administrative law judges] are considered agency personnel, they are selected by the Office of Personnel Management (OPM) independently of any agency recommendation or rating, 5 U.S.C. § 5362, and cannot be removed from office without a hearing establishing good cause before the Merit Systems Protection Board, 5 U.S.C. § 7521. Their pay is controlled by the Civil Service Commission. [Administrative law judges] can be disqualified from a case only upon petition by either the agency or a private party. 5 U.S.C. § 556(b). Similarly, cases are assigned on a rotating basis so that the agency cannot "fix" the result by choice of judge. 5 U.S.C. § 3105. They are not subject to the whim of the agency. [Administrative law judges] are strictly independent of investigative or prosecutorial personnel in the agency. 5 U.S.C. § 554(d).

Moreover, the selection process for [administrative law judges] should inspire more respect for this office than is generally extended by Article III judges; it is a process that requires rigorous inquiries into the background and competence of the candidates. Applicants must supply twenty professional references. A minimum seven years of litigation experience is required to meet the threshold selection requirement. A test opinion must be drafted and evaluated on the basis of many factors including clarity and conciseness. . . . Finally, after the various scores have been combined, applicants considered tentatively eligible are interviewed by a special panel usually composed of an OPM official, an attorney qualified in the field of administrative law, and an agency official. This committee submits a recommendation to the director of OPM who makes final eligibility determinations among qualified candidates. Once appointed to an agency, an [administrative law judge] is not subjected to the usual probationary employment period for agency employees, further insuring [administrative law judge] independence. 5 U.S.C. § 3321. . . .

The rigors of the selection procedure and the statutory protections of [administrative law judge] independence suggest to me that the federal judiciary need not look down its collective nose at [administrative law judge] decisions.<sup>38</sup>

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38. *Id.* at 527-28.

## 2. Congressional Perception

Congress has recognized the need of administrative law judges to possess decisional independence. Relevant legislative history demonstrates Congress's concern for preservation of those judges' independence from influences, especially agency influences, that might in any way reduce that independence.<sup>39</sup> That concept was embodied as a major reform within the federal Administrative Procedure Act (APA).<sup>40</sup> Congress took as its mission the assurance of fairness in the full range of administrative action affecting the public. It was especially concerned with the trial-type hearing which came to be governed by sections 5 through 8 of the APA.<sup>41</sup> It recognized a need to allay public "suspicions . . . that the submittals of private parties are not fully considered, that the views of agency personnel are emphasized without opportunity for private parties to meet them, and that matters outside the record are often the real grounds for decision."<sup>42</sup>

Prior to the APA's enactment, Congress had before it a system in which administrative trials were held before agency employees, subject to agency control respecting classification pay, promotion and tenure; individuals in a "dependent status."<sup>43</sup> "There were no reliable safeguards to ensure the objectivity and judicial capability of presiding officers. . . . [T]he power of the agencies to control and influence such personnel made questionable the contention of any agency that its proceedings assured fundamental fairness."<sup>44</sup> There was no statutory professional corps of administrative law judges. Agencies could assign employees to preside over a trial one day, and administer a program the next.

Congress addressed these concerns in enacting section 11 of the APA.<sup>45</sup> It vested the judges<sup>46</sup> with the duty to exclusively preside at

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39. See ATT'Y GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 272 (1941).

40. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1982).

41. ATT'Y GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 272 (1941).

42. *Id.* quoted in Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 FED. B.J. 351, 354 n.7 (1967).

43. *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 130 (1953).

44. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 AD. L. REV. 109, 111 (1981).

45. Pub. L. No. 79-404, § 11, 60 Stat. 237, 244 (1946) (current version at 5 U.S.C. § 7521 (1982)); see *Nash v. Califano*, 613 F.2d 10, 14-15 (2d Cir. 1980).

46. The hearing examiner title was changed administratively to "Administrative

trial-type hearings; and made their compensation outside of agency control. Administrative law judges became subject to removal only for good cause, after a hearing on the record, subject to judicial review<sup>47</sup>—a procedural right unique to federal civil servants serving under Article I of the Constitution.<sup>48</sup> All other federal employees are removable prior to hearing and must pursue their hearing and review rights after their employment ceases.<sup>49</sup>

Section 11 drew upon “the more ancient wisdom grounded in history and contained in Article III, which safeguards federal judicial independence through still more stringent compensation and tenure provisions.”<sup>50</sup> Just as the independent judiciary was “structurally insulated from the other branches to provide a safe haven for individual liberties in times of crisis,”<sup>51</sup> so Congress intended administrative law judges to act as a bulwark for administrative litigants, as “a critical check on potentially excessive or unauthorized regulation.”<sup>52</sup> Within their sphere, the judges were given a role “functionally comparable” to that of a federal trial judge.<sup>53</sup> These provisions were the very heart and sole of the new act.<sup>54</sup>

The APA’s guarantee of independence not only recognized the unique status of administrative law judges within the executive branch, but also invested their decisions with authority earlier withheld by reviewing courts, who had considered the judges as “not sufficiently independent or competent” to deserve deference.<sup>55</sup>

By 1953, the Supreme Court had noted the new guarantees of administrative law judges’ independence: Congress intended to provide tenure for hearing examiners within Civil Service concepts.<sup>56</sup> They were not to be paid, promoted, or discharged at the whim or

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Law Judge” in 1971, *see* 37 Fed. Reg. 16,787 (1982), and was later adopted by Congress. Act of March 27, 1978, Pub. L. No. 95-251, §§ 2, 3, 92 Stat. 183, 183-84.

47. Administrative Procedure Act of 1946, ch. 324, § 11, 60 Stat. 237, 244 (1946) (current version at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562).

48. *Id.*

49. *See* 5 U.S.C. § 7513 (1982); *Arnett v. Kennedy*, 416 U.S. 134, 145-46 (1974).

50. *Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980); *see Butz*, 438 U.S. at 514; *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 132-33 (1953).

51. *Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980).

52. *Hearings on H.R. 6768 Before the House Comm. on Post Office and Civil Service*, 96th Cong., 2d Sess. 27-28 (1980) (statement of Christopher McNaughton).

53. *Butz*, 438 U.S. at 513.

54. *See Butz*, 438 U.S. at 514; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 51-53 (1950); *see also Zwerdling, Reflections on the Role of an Administrative Law Judge*, 25 AD. L. REV. 9, 13 (1973).

55. *Permanent Label Corp.*, 657 F.2d at 527.

56. *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 142 (1953).

caprice of the agency or for political reasons.<sup>57</sup>

In addition to these provisions, the APA prohibits administrative law judges from engaging in *ex parte* communications regarding facts in issue unless all parties are notified and given an opportunity to participate in those discussions; prevents supervision by someone who performs investigative or prosecutorial functions in their agencies; and proscribes review of administrative law judges' decisions by agency personnel who performed investigative or prosecutorial activities in the particular case under review.<sup>58</sup>

Congress, in some areas, has provided even greater assurances of administrative law judges' independence. For example, the Federal Mine Safety and Health Review Commission and the Occupational Safety and Health Review Commission contain separate corps of judges whose decisions are final, subject only to discretionary appellate review by those Commissions.<sup>59</sup> The review standard imposed on the Federal Mine Safety and Health Review Commission is the same as that which Article III courts apply to the Commission itself.<sup>60</sup> Additionally, the National Labor Relations Act expressly provides for strict separation of the NLRB General Counsel and his staff from the five-member Board, its staff and the administrative law judges assigned to that agency.<sup>61</sup>

### 3. Public Perception

This element is the most difficult to evaluate. Its components are varied and derive from a variety of factors. Judicial and legislative pronouncements affect the public view of administrative law judges, and media reports of these judge-conducted hearings also have an impact.

The most accurate reflection of public perception should emanate from personal confrontations between individual citizens and administrative law judges. Because the confrontations are few, the manner in which the public perceives administrative law judges is principally dependent upon the reports of the administrative judiciary received from legal practitioners and other on-the-scene observers. The available evidence, admittedly sparse, tends to demonstrate

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57. *Id.*

58. 5 U.S.C. §§ 554, 556, 557 (1982).

59. 30 U.S.C.A. § 823 (West Supp. 1983); 29 U.S.C.A. § 661(i) (West Supp. 1983).

60. *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 90-92 (D.C. Cir. 1983) (findings by the Commission's administrative law judges are final and conclusive).

61. 29 U.S.C.A. § 153 (West 1973 & Supp. 1983).

that administrative law judges generally enjoy a positive position in the administrative process.

There are references to administrative law judges as the "hidden judiciary."<sup>62</sup> Ostensibly, that characterization connotes a negative aura. It is equally susceptible, however, to the opposite conclusion. It readily imparts a feeling that these judges are performing their functions at acceptable levels. The absence of a public display of dissatisfaction, except regarding the Social Security Administration,<sup>63</sup> with the performance of the administrative process is rather compelling evidence that administrative law judges presently dispense judicious, fair, objective and competent administrative justice. It does not matter that individual members of the public are unaware of the distinction between administrative law, or other, judges. To them, anyone invested with the title "judge" has certain plenary authority. The fine distinctions between judges are irrelevant.

Two examples of public perception are noteworthy. Both examples were presented to the Senate subcommittee which conducted hearings on Senate bill 1275 on September 20, 1983. When presenting the views of the National Association for the Advancement of Colored People (NAACP), Althea T. L. Simmons, NAACP Washington D.C. Bureau Director commented: "In our opinion, the idea that the independence of Administrative Law Judges is compromised by their relationship with a particular agency, past or present, is without merit."<sup>64</sup> In a similar vein, Judge Joseph B. Kennedy of the Federal Mine Safety and Health Review Commission, testified:

at a recent meeting of the Committee on Practice and Procedure before the National Labor-Relations Board of the Section of Labor and Employment Law of the American Bar Association, a group composed of both management and union labor law practitioners. Those present virtually unanimously expressed their opposition to establishment of a corps of administrative law judges. If there were any real indications that administrative law judges are not independent of the agencies whose cases they hear, the attorneys who practice before the agencies would have been the first to seek changes in the present system.<sup>65</sup>

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62. U.S. News & World Report, Nov. 1, 1982, at 56; Rich, *Central Panels of Administrative Law Judges: An Introduction*, 65 JUDICATURE 233, 233 (1981); Lubbers, *supra* note 44, at 109.

63. *See infra* text accompanying note 69.

64. *Hearings on S. 1275, supra* note 3, at 163 (statement of Althea T. L. Simmons, Director, Wash. Bureau, NAACP).

65. *Id.* at 179 (statement of Hon. Joseph B. Kennedy).

I echo these remarks. Those who argue that public perception needs improvement are guided by a base of an inherently fallacious assumption that the existing system engenders its broad disdain. There simply is no evidence that this assumption is correct. The information available relative to the approximately nineteen federal administrative agencies, other than the Social Security Administration (SSA) does not support such an assumption.

#### 4. Summary

The courts accord administrative law judges and their decisions, deference and respect.<sup>66</sup> Congress has consistently pursued a course which is designed to afford maximum assurance of decisional independence and special status to administrative law judges.<sup>67</sup> They have been well-insulated from agency influence by statute.<sup>68</sup> The public appears satisfied with their performance. There simply has been no substantive argument or data presented that requires legislative action to improve perceptions of the administrative judiciary.

#### B. *Decisional Independence*

In the backdrop of legislative and judicial protection provided, the argument that the bill provides greater decisional independence to administrative law judges wanes. There are no new indicia of autonomy contained in those bills.

The independence which is substantive and critical is the existence of freedom to find facts and render a decision based upon a judge's personal assessment of the facts and law without fear of retaliation or discrimination based on the resulting conclusions and decisions.

The issue of decisional independence was resolved by enactment of the APA. Other existing statutes, and civil service regulations effectively form the tools by which to recognize that independence and the special status of administrative law judges. What is needed is strict implementation of those mandates; not a change in them.

Only one example of possible improper agency interference has been cited. That is, the nascent situation in SSA. In that agency, the judges have complained that they are being subjected to improper pressures to deny disability benefits by the imposition of production

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66. See *supra* text accompanying notes 32-38.

67. See *supra* notes 39-54 and accompanying text.

68. See *supra* notes 55-61 and accompanying text.

quotas, and by the conduct of unauthorized performance appraisals which result in unfounded disciplinary action against them.<sup>69</sup>

The concerns of the SSA judges are clearly legitimate. Their allegations, alone, clearly tend to undermine public confidence in the administrative judiciary. If true, those allegations seriously detract from the critical elements of decisional independence which Congress has taken decades to develop.

However, problems of SSA judges apparently are unique to them. During the Senate hearings on Senate bill 1275 on June 23 and September 20, 1983,<sup>70</sup> several witnesses appeared and testified. No evidence was presented to show judicial, legislative or public concern that the present administrative process is unfair, except within SSA. If the SSA judges' complaints are justifiable, they arise from their functional differences from other judges, and also SSA's failure to apply the existing administrative law judges protections to its judges; and not from the absence of statutes which prescribe independence. If the APA, and other relevant statutes and regulations, are being ignored in agencies other than SSA, it was incumbent upon the proponents of the Corps to produce such evidence. The failure to do so, belies the claim that there is a generalized lack of decisional independence.

Solution of any problems which may exist within SSA does not depend upon enactment of Senate bill 1275. Two bills, Senate bill 1911<sup>71</sup> and House resolution 3541,<sup>72</sup> are pending which directly address those problems. Senate bill 1911 is entitled a bill "to ensure the independence of certain administrative law judges."<sup>73</sup> The bill proposes to establish a separate new Health and Human Services Review Commission, patterned after the legislation which governs the Occupational Health and Safety and Federal Mine Safety Review Commissions.<sup>74</sup> The bill proposes transfer of all SSA judges to the new commission, effectively removing them from their present condition by which they are subject to executive and administrative supervision.<sup>75</sup> The SSA judges' professional organization has urged favorable action on this bill. In the absence of empirical information

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69. *See, e.g.*, *Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980).

70. The author personally attended the hearings.

71. 98th Cong., 1st Sess. (1983).

72. *Id.*

73. S. 1911, 98th Cong., 1st Sess. (1983).

74. *Compare id. with* 29 U.S.C. § 661 (1976 & Supp. V 1981) *and* 30 U.S.C. § 823 (1976 & Supp. V 1981).

75. S. 1191, 98th Cong., 1st Sess. (1983).

that administrative law judges' independence is threatened in other agencies, it clearly is more efficient and appropriate for Congress to concentrate on methods of solving such problems where they exist than to interrupt a system, developed by careful deliberation and proved successful by experience, where there is no attack upon the judges' independence.

The administrative law judges assigned to the independent commissions such as the Federal Mine Safety Review Commission and Federal Energy Regulatory Commission suffer no patent problems of interference with independence. They all apparently function well under the existing statutory scheme. Thus, to ameliorate whatever problem exists regarding independence of the judges, Congress need only establish the Health and Human Services (HHS) Review Commission. That move, alone, would provide the SSA judges with the safeguards of independence presently enjoyed by all other federal administrative law judges. In this context, there is no need to make structural changes in the administrative judiciary. Establishment of the HHS Review Commission provides the solution to the solitary, vexing issue of administrative law judges' independence. It would be directly responsive to the arguments that any real threat to independence exists, without disrupting the adequate operations of administrative law judges pursuant to the APA.

#### IV. OTHER CONSIDERATIONS

Senate bill 1275 raises other issues that require examination. In their totality, they show that the bill, in its present form, should not be enacted.

##### A. *Administrative Law Judge Expertise*

Clearly, a goal of the legislation is to have a group of administrative law judges who are able to conduct hearings of all types. The bill, however, also recognizes the importance of maintaining expertise in certain areas of the law. The seven enumerated substantive divisions are designed to retain the need for specialization.<sup>76</sup>

The bill's design is flawed. First, preservation of expertise is only symbolic. As earlier noted, the Corps' divisions are temporary.<sup>77</sup> Their number is subject to fluctuation at the whim of the

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76. See S. 1275, 98th Cong., 1st Sess. § 2 (proposing codification at 5 U.S.C. § 564(b)(1)-(7)).

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

council<sup>78</sup> and they are subject to change immediately upon enactment.<sup>79</sup> Second, the subject-matter groupings within the divisions is contrary to the purported aim of expertise preservation. Some of the divisions contain such an amalgam of substantive legal subjects that would require judges expert in one area of the division to undertake extensive training to become competent in another subject.<sup>80</sup>

For example, the Division of General Programs is designed to hear cases currently heard by administrative law judges assigned to the Drug Enforcement Administration and the Merit Systems Protection Board. These areas are plainly unrelated to one another. The former involves regulation and control of potentially dangerous drugs, while the latter deals with labor relations problems between federal employees and their employers. Their substantive underpinnings are patently dissimilar. Each area contains wholly separate specialized and technical knowledge.

It is not suggested that most of the present administrative law judges are not sufficiently endowed with an ability to conduct complete, fair and impartial hearings and issue decisions in both areas. Yet certainly, such transitions will not be easy. A system requiring study and re-education is inefficient and contrary to the fundamental goal of the administrative law system. Separate agencies were established by Congress precisely to assure the development and maintenance of entities imbued with a high level of expertise in specialized legal subjects. A merger of certain areas with others diminishes the congressional intent and operational features which have withstood the tests of time and experience. Needed expertise could be improperly diverted if the Corps' Council, in its wisdom, were to make substantial changes in the composition of the divisions by contraction. NAACP spokeswoman Simmons told the senators at the September, 1983 hearings that

[O]ne of the more troubling aspects of [Senate bill] 1275 is the destructive impact it would have upon the level of expertise possessed by [administrative law judges]. . . . Aside from the initial assignment of current [administrative law judges] to divisions, there is no requirement that [they] be assigned to the division in which they possess expertise. . . .

Our legal system, both judicial and administrative, is becoming increasingly more complex and without [administrative law

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78. *Id.*

79. *Id.*

80. *See id.*

judges] experienced in the specific area of the law . . . [the public] . . . is apt to suffer. . . . [W]ithout an experienced [administrative law judge] familiar with the purposes the particular legislation was intended to accomplish, the subtle nuances of the law, the elements of the various legal doctrines that apply, and what information must be elicited to apply those doctrines, *those least able* to secure experienced, usually more expensive, representation will suffer. One of the prices paid for a 'generalist' judge is the heavy burden which falls upon the parties to 'educate' the judge.<sup>81</sup>

Malcolm Rich, while employed as a research attorney at the American Judicature Society, cogently observed that whether administrative law judge specialized expertise is necessary "probably depends on the type of case—a rate-making proceeding may require more technical expertise than a case involving eligibility for benefits."<sup>82</sup>

The tenuous existence of the seven divisions contained in Senate bill 1275 reduces the opportunity for fair consideration of the nature and type of cases as a factor in utilization of expertise. Assignment of hearing priorities and transfer of judges among the divisions is left to the Council's discretion.<sup>83</sup> The most well-intentioned implementation of that authority could impede enforcement of laws by assigning judges out of their areas of expertise to divisions which the Council has deemed to require priority action.

Redistribution and realignment of judges in such circumstances could conceivably be detrimental to agencies that must hear and decide cases under a particular statute. If agencies lose control of their enforcement obligations, the provisions of Senate bill 1275 which purportedly preserve expertise become illusory.

### B. *Cost Effectiveness*

It has been urged that a unified corps will result in substantial cost savings and efficiencies. That assertion is undocumented. No cost analysis apparently has been made or presented. Instead, this bare assertion is drawn from recent experience among some states which have adopted central panel systems. In particular, the signifi-

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81. *Hearings on S. 1275, supra* note 3, at 162-63 (statement of Althea T. L. Simmons) (emphasis in original).

82. Rich, *Adapting the Central Panel System: A Survey of Seven States*, 65 JUDICATURE 246, 253 (1981).

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

cant cost savings made in Minnesota have been cited.<sup>84</sup>

During testimony at the June, 1983 Senate hearings, Duane R. Harves, Minnesota Chief Hearing Examiner, conceded "it has been somewhat difficult to determine the actual cost savings . . ." <sup>85</sup> achieved by operation of a central panel system. He stated that significant cost savings were realized from centralization of the Minnesota hearing officers into an office independent of the agencies it services.<sup>86</sup> Nonetheless, it is difficult to fully assess how much of the savings are directly attributable to centralization. Mr. Harves stated that Minnesota realized a ten percent reduction in the office caseload since the central panel system was installed.<sup>87</sup> That reduction directly resulted from legislative budget cutting.<sup>88</sup> Another thirty-five percent reduction in caseload was ascribed to legislation which reduced the number of hearings required to be held.<sup>89</sup> Mr. Harves cited actual cost reductions, in dollar amounts, in certain enumerated state agencies. None exceeded fifty percent.<sup>90</sup> Assuming the forty-five percent caseload drop results in an equal percentage of cost reduction, the total cost decrease is not as substantial as heralded by the proponents of Senate bill 1275. Moreover, the cost of operating the new centralized office does not appear to have been factored into the statistics of the reductions discussed. The addition of those sums undoubtedly would further diminish the overall amount of reduced costs evolving from the Minnesota consolidation.

Malcolm Rich observed, regarding costs of central panel systems, that there is a "striking . . . lack of hard data on budgetary issues [and] . . . most views on the budgetary issue are not based on financial studies; necessary data is often unavailable."<sup>91</sup> Those observations were made in 1981. Today, more specific fiscal data surely is available. It is unclear whether any effort has been made to search for such information. Mr. Harves' Senate remarks, two years after Mr. Rich's observations demonstrate that more recent, though not altogether complete, statistics are available. The seemingly insufficient investigation into this area cannot be used in support of the legislation. Those who advocate enactment of Senate bill 1275 bear

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84. *Hearings on S. 1275, supra* note 3, at 84-90 (statement of Hon. Duane R. Harves, Minnesota Chief Administrative Law Judge).

85. *Id.* at 85.

86. *Id.* at 87.

87. *Id.* at 88.

88. *Id.*

89. *Id.*

90. *Id.* at 87.

91. Rich, *supra* note 82, at 250.

the burden of producing evidence to support their contentions, or explain why it is not feasible.

In the face of an attempt to effect the widespread reorganization contemplated by Senate bill 1275, in the posture of an existing federal system virtually free of major criticism (except in SSA), reflective study and analysis should precede action on the Corps' bill. To date, a paucity of probative financial evidence has been produced.<sup>92</sup> Surely, the diverse and important interests at stake in federal administrative proceedings deserve more deliberate study to enable the making of the most accurate conclusion whether or not a unified federal administrative law judge corps actually will achieve cost reductions. This issue should not be resolved by mere rhetoric of interested participants.

### C. *Improved Efficiency*

Another argument submitted to support Senate bill 1275 is that it will foster more efficient operation of the administrative process and increase flexibility in assignment of judges to cases. It is asserted that a corps will enable "better correlation to the various peaks and valleys of individual agency caseloads and would eliminate agency overstaffing to meet surges of adjudicative activities in order to avoid backlogs and constituent complaints."<sup>93</sup> As with the cost-savings issue, no documentation was submitted to support this position.

There is some evidence to show that efficiency of operations has not been a motivational element in establishing judges' corps in state jurisdictions. It is only an unsupported assumption that an employment relationship between the judges and their agencies will compromise either decisional independence or the alleged salutary effects of organizational separation. Only four state central panels (California, Colorado, Massachusetts and Tennessee) vest assignment discretion in the panel director.<sup>94</sup> In other central panel states (Florida, Minnesota, New Jersey), the director is required to make hearing assignments based upon the judges' expertise in the subject

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92. In 1981, the states of California, Colorado, Florida, Massachusetts, Minnesota, New Jersey, and Tennessee had some form of central panel in operation. Rich, *supra* note 82, at 249. The proponents of S. 1275 presented only the Minnesota experience. Clearly, the efforts to document cost savings is incomplete.

93. *Hearings on S. 1275*, *supra* note 3, at 27 (statement of Hon. Victor W. Palmer, Chairman of the Corps Comm. of the Federal Administrative Law Judges Conference).

94. M. RICH & W. BRUCAR, *THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES* 50 (1983).

matter of the proceeding.<sup>95</sup> In other states, each employing agency that employs administrative law judges retains assignment discretion.<sup>96</sup> No evidence has been proffered that the administrative process has been made more, or less, efficient by the use of any of these systems.

Also, no documentation was presented to show the present federal procedures lead to overstaffing. In fact, there are safeguards to protect against the condition. Distribution of judges to agencies is controlled by Office of Management and Budget and Congress. The federal agencies must justify their requests for judges to those bodies. No data has been offered which demonstrate that any agency suffers an overstaffing problem.

Staff surplus normally is caused by inaccurate caseload forecasting. Those prognostications depend upon a variety of factors. Such external, uncontrollable, factors as the nation's economic climate, stability and growth of certain industries, human and industrial relations philosophies and practices, national defense posture, research and development activities, and fiscal policies have an impact upon their conclusions. These elements contribute to making the present system subject to error in staffing forecasts.

Nothing in Senate bill 1275 can eliminate the presence of these forces. How centralization of assignment procedures might control them is entirely elusive and unexplained.

Regarding the superior efficiency claimed to exist within Senate bill 1275, it is argued that the Corps would reduce present duplication of support services such as law libraries, case-tracking systems, administrative and clerical personnel, office space and travel offices.<sup>97</sup> That argument bears little merit. Concededly, there may be some amelioration of existing profusion. The attendant "efficiencies", however, would be insubstantial and speculative. Currently, the agencies to which administrative law judges are assigned maintain the enumerated facilities for the benefit of all agency personnel, including the judges.<sup>98</sup> Senate bill 1275 would do nothing to change the agencies' need to provide those services to non-administrative law judges. In reality, Senate bill 1275 merely would effect a transfer of those functions, as they apply to, and are necessary for, the judges to the Corps. As earlier noted, all incumbent judges would be trans-

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95. *Id.*

96. *Id.*

97. *Hearings on S. 1275, supra* note 3, at 26 (statement of Hon. Victor W. Palmer).

98. *Id.*

ferred to the Corps under the scheme of Senate bill 1275.<sup>99</sup> The judges' support requirements will not vanish. In this context, it is entirely possible that the transfer of support services would increase, rather than reduce, overall operational costs and inefficiency.

That a new, patently unwieldy, bureaucracy will emanate from Senate bill 1275 cannot be ignored. The Corps would initially consist of over 1100 judges, over 800 of whom (in SSA) are stationed in approximately 140 locations throughout the country.<sup>100</sup> Additionally, the Corps necessary would have to include law clerks, paralegal personnel, together with clerical and administrative staffs. It has been estimated that the entire employee complement of the Corps would reach 5,000 individuals.<sup>101</sup> Management of such numbers of personnel, most of whom under present conditions are situated in outposts scattered around the nation, poses self-evident conflicts to a claim of efficiency.<sup>102</sup>

Finally, Senate bill 1275 inherently is inefficient. I have earlier alluded to the manner in which the operating divisions will be organized. There is an imbalance in administrative law judges complement among the substantive divisions. For example, the Division of General Programs and Grants will include judges now serving in six agencies (Drug Enforcement Administration, Housing and Urban Development, Food and Drug Administration, Bureau of Alcohol, Tobacco and Firearms, Postal Service and Merit Systems Protection Board).<sup>103</sup> On October 31, 1982, only ten judges were attached to those agencies, *in toto*.<sup>104</sup> In contrast, the Division of Labor Relations (National Labor Relations Board and Federal Labor Relations Authority) will consist of judges from two agencies.<sup>105</sup> On

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

100. *Hearings on S. 1275, supra* note 3, at 180-81 (statement of Hon. Joseph B. Kennedy).

101. *Id.*

102. A literal interpretation of S. 1275 demonstrates the magnitude of its inherent inefficiency. The Corps is to be located "at the seat of Government"; presumably Washington, D.C. S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 562(a)). Currently, administrative law judges are stationed in widely dispersed areas of the country or are required to travel throughout the nation from bases in the capital. Surely, S. 1275 does not seriously contemplate that each litigant and witness will be required to appear in Washington to be heard. If not, then the potential efficiencies asserted from consolidation are imagined.

103. *Hearings on S. 1275, supra* note 3, at 42-43 (statement of Hon. Victor W. Palmer).

104. *Id.* at 63.

105. *Id.* at 43.

October 31, 1982, there were 123 judges assigned to those agencies;<sup>106</sup> and the Division of Benefits Programs will be formed with judges of only one agency (SSA),<sup>107</sup> to which 820 judges were assigned on October 31, 1982.<sup>108</sup>

It has been asserted that a "collegial structure" of management is established by the bill.<sup>109</sup> A more precise term is "collision" structure. As earlier observed, the chief judge of each of the Corps' substantive divisions will be its managerial body, together with the Corps' chief judge.<sup>110</sup> When perceived needs for professional and non-professional staffing, case-handling priorities, and budgetary requirements are evaluated by each of the division chiefs, unavoidable conflicts will arise. The Council and chief judge are likely to become preoccupied with matters of internal strife, the unravelling of which will be dictated by the imbalance of power implied by the sheer numerical comparisons of judges' complement and caseload within the competing divisions.

Currently, each agency is able to establish its own priorities relative to the performance of its special statutory mandates. Except for the problem within SSA, there are no serious challenges from the administrative law practitioners or the general public that the agencies are not satisfactorily fulfilling their obligations. Viewed in this light, it seems more efficient to leave the present system undisturbed than to create an entity with limitless possibilities of fomenting frustration, anxiety and enmity.

#### D. *Miscellaneous Claims*

It has been urged that independence is questionable because employing agencies provide their judges with such things as office space, parking facilities and travel assistance.<sup>111</sup> Obviously, those items are ministerial and administrative in character. It is straining to use such arguments as proof there is an impediment to decisional freedom.

Finally, at the June, 1983 Senate hearing, it was suggested that the bill "provide[s] new means for assisting our overloaded federal

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106. *Id.* at 63.

107. *Id.* at 43.

108. *Id.* at 63.

109. *Id.* at 41.

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

111. *Hearings on S. 1275, supra* note 3, at 177 (statement of Hon. Joseph B. Kennedy).

courts . . . at their request."<sup>112</sup> Senate bill 1275 authorizes federal courts, as well as agencies, to refer certain types of proceedings to the Corps.<sup>113</sup>

No evidence was produced to show that the federal courts will request such assistance. In any event, the possibility that the administrative law judges might render such assistance is not a persuasive reason to establish the Corps. To be potent, an argument should be directed to show how the various features of the Corps bills improve the *administrative* process.

## V. CONCLUSION

The claimed benefits of Senate bill 1275 are only superficially appealing. Thoughtful analysis demonstrates their inadequacies. Insufficient data has been presented to prove a need for an administrative law judge corps. The available evidence shows the present administrative processes function satisfactorily under the APA.

Congress should not enact Senate bill 1275 or House resolution 3539. Instead, it should take steps to remove the cloud from decisional independence in the only place where it has been shown to be present: SSA. Administrative law judge decisional independence will be reaffirmed by transfer of SSA judges to a Health and Human Services Review Commission. The entire administrative judiciary need not be overhauled.<sup>114</sup>

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112. *Id.* at 27 (statement of Hon. Victor W. Palmer).

113. S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 568(a)(3)).

114. On October 5, 1983, Congresswoman Mary Rose Oakar (Chair, House Subcommittee on Compensation and Employee Benefits, Committee on Post Office and Civil Service), joined by Congressman Clarence Long, introduced H.R. 4090, 98th Cong., 1st Sess. (1983). At this writing, the introduction of an identical bill is being considered in the Senate. H.R. 4090 would transfer administrative law judge pay authority from the Office of Personnel Management to the Commission of Executive, Legislative and Judicial Salaries. *Id.*

The Oakar bill serves to cure a legislative oversight during enactment of the 1978 Civil Service Reform Act, ch. 11, Pub. L. No. 95-454, 92 Stat. 1119 (1978) (codified at 5 U.S.C. §§ 1101-1105 (1982)). Under the 1978 Act, administrative law judges were exempt from the performance appraisal, pay bonus, and other provisions applicable to senior non-administrative law judge officials. *Id.* § 203(a) (codified at 5 U.S.C. § 4301 (1982)). This was proper because work appraisals and monetary influences are inconsistent with decisional independence. H.R. 4090 removes administrative law judges from the pay schedules which apply generally to federal career employees. H.R. 4090, 98th Cong., 1st Sess. (1983). This bill should be passed in conjunction with the HHS Review Commission. Its enactment will complement the administrative law judge exclusion from the Civil Service Reform Act and will signal further cognition of the judicial character and unique status Congress has historically accorded to administrative law judges. H.R. 4090 is supported by the Federal Administrative Law Judges Conference without

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apparent controversy. Favorable action on that bill will reconfirm congressional intent to foster independence for administrative law judges.