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I. INTRODUCTION

Ten years ago administrative law judges were so well hidden from America's justice system that they were sometimes called "the hidden judiciary."[1] Yet this administrative judiciary continues to play a major role in deciding not only decisions regarding individual financial well-being but policy decisions as well. There are more than 4,000 federal and state administrative law judges.[2]

Administrative law judges serve numerous agencies at both the state and federal levels, resolving often complex disputes between agencies and the public in such diverse areas as commerce, communications, health and safety, social security and rates for gas, electric and telephone service. Although their decisions are "initial decisions" subject to review, in practice most become the final agency opinion; what they decide thus affects the daily lives of virtually everyone.

Historically, administrative adjudication has evolved from a time in which hearing examiners were used merely to improve efficiency by gathering facts for use by agency officials.[3] In the more

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1. *See, e.g.*, Mans, *Selecting the Hidden Judiciary;*, 63 JUDICATURE 60 (1979).

2. The hearing process in both systems often emphasizes legal representation and the use of evidentiary and procedural rules. Particularly in administrative regulatory adjudication, administrative law judges now resemble judges in their duties as finders of fact or as decision makers or both.

3. See Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 DUKE L.J. 389, 391-92.

recent period of judicialization, the hearing process more closely resembles the formal, independent model of our general jurisdiction courts.[4]

However, this evolution did not resolve the question of the status of administrative law judges — are they agency employees or are they members of an independent judiciary that is assigned to the administrative system of justice? This conflict has come to the forefront in the last seven years, during which a series of events have precipitated proposed legislation and litigation that consistently call into question the role of the administrative law judge.[5]

During the Carter Administration, vigorous attempts were made to enact legislation that would have provided for a fixed term of office and mandatory performance evaluations for administrative law judges.[6] Several groups of administrative law judges have sued their agency, the Social Security Administration, concerning what the judges deemed to be illegal evaluations of their performance.[7] Professor Victor Rosenblum states in his article for this symposium:

> Push has been coming to shove recently in sectors of the relationships between administrative law judges and employing agencies, with conflicts at the Social Security Administration in the visible forefront. The lure and trauma of battle over the power of agencies to prescribe and sanction methodologies and outputs for administrative law judges have left in limbo implementation of earlier consensus-oriented proposals for incremental improvements in the selection and monitoring of the judges and have, instead, placed priorities on legal jousts before the Merit Systems Protection Board (MSPB) and the federal courts.[8]

Most of the attention has been focused on the federal administrative law judge and the literature dealing with the changing federal administrative system is voluminous. Comparatively little attention

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4. These actions were embodied in the 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)). For an in depth discussion of the role of the federal administrative law judge, *see* V. ROSENBLUM, THE ADMINISTRATIVE LAW JUDGE IN THE ADMINISTRATIVE PROCESS: INTERRELATION OF CASE LAW WITH STATUTORY AND PRAGMATIC FACTORS IN DETERMINING ALJ ROLES, *printed in* SUBCOMM. ON SOCIAL SECURITY OF THE HOUSE COMM. ON WAYS AND MEANS, 94TH CONG., 1ST SESS., RECENT STUDIES RELEVANT TO THE DISABILITY HEARINGS AND APPEALS CRISIS 171 (Comm. Print 1975).

5. *See infra* text accompanying notes 29-40.

6. *See infra* text accompanying notes 29-34.

7. *See infra* text accompanying notes 35-40.

8. Rosenblum, *Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. NEW ENG. L. REV. 593, 593-94 (1984) (footnote omitted).

has been paid to state administrative agencies. Yet state administrative agencies attempt to regulate the quality of life, and substantially more lawyers argue before state agencies than before federal ones. Thus, some of the same issues of efficiency and fairness that affect the federal system now affect states as well, and they are working to resolve these issues in a new way. The approach that eight states have implemented is the central panel system in which judges are not employed by the agencies providing the cases they hear but by a distinct agency created solely to manage the state's administrative law judges. Each central panel states' administrative procedure act defines the panels' jurisdiction of agency business.[9]

Thus, while federal administrative law judges at the federal level continue to battle their agencies over the question of whether they are an independent judiciary, the states are now providing an experimental model for the federal government to explore.[10] The central panel notion brings into focus three general but critical issues surrounding the administrative process. The first issue has to do with fairness and the question of which approach is the most equitable from the vantages of both the agency and the individual parties to a dispute. The second question is which approach to delivering administrative adjudication provides the most competent but also independent as well as an unbiased administrative law judge. The third issue is which system can provide equity to all parties and do so in the most cost-effective way in this era of shrinking resources.

The purpose of this article is first to describe the operating procedures of existing central panel systems, including the role of the administrative law judge within them. Second, as part of the discussion regarding the administrative law judge role, the article will discuss the notion of performance evaluation. Third, the work will conclude with lessons for the proposed federal central panel of administrative law judges derived from past experiences with evalua-

9. *See* M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES 29 (1983). *See also*, Levinson, *The Central Panel System: A Framework that Separates ALJs from Administrative Agencies*, 65 JUDICATURE 236, 237 nn. 2-3 (1981). The central panel states are: California, Colorado, Florida, New Jersey, Massachusetts, Minnesota, Washington and Tennessee. M. RICH & W. BRUCAR, *supra*, at 2.

10. *See infra* text accompanying notes 52-55. While the state and federal administrative systems are different in terms of number of administrative law judges and the subject matter of hearings, experimental approaches such as the central panel provide working models of different types of organizational structures which serve to translate the expertise of administrative law judges and lawyers into tangible results.

tion in the federal sector and from the state models provided by existing central panel systems.

II. THE CENTRAL PANEL APPROACH: A DESCRIPTION

The central panel system is an approach utilized by eight states and the City of New York and is an option available to the states under the 1981 Model State Administrative Procedure Act.[11] Conceptually, it can be placed between the federal approach to utilization of administrative law judges[12] and that of an administrative court[13] with regard to the degree of separation between administrative law judges and their agencies. Under the central panel arrangement, administrative law judges are employed by an agency created solely for their complete management.[14] Where the system is in effect, use of central panel administrative law judges is either required by agencies delineated in the state's APA or is at the discretion of the state agencies.[15] These administrative law judges are assigned to preside over hearings when state agencies so request.[16] The central panel does not change the power of the administrative law judges; administrative law judge decisions are usually recommended decisions subject to the agencies' adoption.[17]

A. *Advantages of a Central Panel*

Throughout its existence, administrative adjudication has been faced with a tradeoff between providing a fair proceeding for the litigant and providing justice expediently. One result of the tradeoff has been an ongoing tension between agency policymakers and hearing officers who must apply those policies to everyday occurrences. A central pool system attempts to alleviate the tension by separating the hearing officers from the agency officials and thereby better define the role of each.[18]

In these days of government budget accounting, administrative

11. The Model State Administrative Procedure Act was adopted in 1946 by the National Conference of Commissioners on Uniform State Laws to serve as a guide for the states. It was revised in 1961 and most recently in 1981 and has been adopted (with some variations) in at least 28 states.

12. *See supra* note 4 and accompanying text.

13. *See generally* de Seife, *Administrative Law Reform: A Focus on the Administrative Law Judge*, 13 VAL. U.L. REV. 229 (1979).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. M. RICH & W. BRUCAR, *supra* note 9, at 12-13.

agencies are hard pressed to decide how much due process is enough consistent with how much they can afford to give litigants. From a jurisprudential point of view, the central panel approach seeks to provide due process of law through a separation of legislative and judicial powers. But it offers a variety of other advantages, as well, according to its advocates.[19]

It is proposed that:

(a) By more efficiently allocating hearing examiners, the system is less expensive than assigning administrative law judges permanently to one agency. Larger agencies will not have to keep all the administrative law judges they need to handle cases during peak periods. Small agencies will always have administrative law judges available to them without having to pay the larger sums to hire lawyers, for example, to serve as temporary administrative law judges.[20]

(b) If administrative law judges are not under the control of a single administrative agency, proponents say, they may feel compelled to render longer, more reasoned justifications for their decisions.[21]

(c) A central pool allows one administrative staff to handle the bookkeeping related to the employment of administrative law judges. And locating administrative law judges in one office allows administrative cost cutting innovations to be implemented.[22]

(d) A central panel would reduce any administrative law judge bias in favor of the agency to which they would be otherwise assigned, thereby enhancing public confidence in the administrative system.[23]

(e) By providing administrative law judges the opportunity for a diversification of experience, the central panel would help keep administrative law judges from becoming stale due to re-

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19. *Id.* at 13.

20. *Id.* It should be noted that this and most other claimed advantages of the central panel system cannot be conclusively documented. *Id.* at 14.

21. *Id.* at 13 (quoting *Hearings on Administrative Law Judge System Before Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 2d Sess. 28, 1980) (Testimony of Judge William Fauver).

22. *Id.* (quoting Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 274 (1981)).

23. *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. 109-10 (1983) (statement of Loren A. Smith, Chairman, Administrative Conference of the United States).

peatedly hearing similar cases. Such diversification could also serve as a recruitment tool so as to attract the best qualified individuals to the administrative law judge position.[24]

(f) Use of a central panel may provide a more objective environment for evaluation of administrative law judge performance. Administrative agencies "would have a less immediate interest in the evaluation of any particular judge, and there would be greater possibility for designing an objective and credible system for performance evaluation."[25]

B. *Disadvantages of the Central Panel System*

The first of two articulated disadvantages is that the central panel office will become a "super-agency"— that is, it will develop collective policies and procedures that usurp the powers of the administrative agencies. Opponents of the central pool claim the idea is another step towards judicialization and is, therefore, another step toward reducing the power of agency officials.[26]

However, some proponents of the approach see this as a benefit. The conflict stems from the tradeoff between due process and administrative effectiveness that administrators claim they need to make and implement policies. Judicialization is, in this view, an unnecessary shackling of that discretion. The further administrative law judges are from the agencies, the greater the shackling of the administrators; yet it is the administrative discretion that some proponents wish to confine by means of the central panel notion.

The second purported disadvantage is related to organizational structure. Opponents think that placing all decisions relating to administrative law judge employment in the hands of just one agency or one central panel director risks creating, or the appearance of creating, a different kind of bias. Central panel directors—often political appointees—are responsible for the decisions relating to hiring, promoting, evaluating and setting salary for administrative law judges. Opponents view this arrangement as potentially creating a nonobjective environment for hearings.[27]

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24. *Id.* at 110.

25. *Id.*

26. *Id.*; Lakusta, *Operations in an Agency not Subject to the APA: Public Utilities Commission*, 44 CALIF. L. REV. 218, 218 (1956).

27. *See* Rich, *Adapting the Central Panel System: A Study of Seven States*, 65 JUDICATURE 246, 251-52 (1981).

III. THE CENTRAL PANEL APPROACH: INDEPENDENCE AND EVALUATION

A goal of the central panel is to promote more objective and efficient adjudication by separating administrative law judges from the agencies they serve. It is one approach intended to balance the need for administrative justice with the goal of efficient and effective administrative action. But the central panel approach has provided only the framework for separating administrative law judges from the agencies. The states have individualized the operating procedures to their larger political and economic environments. The result has been central panel systems that differ along such dimensions as means of funding, the types of agencies served, and the role of the central panel directors. This flexibility is an important characteristic that the federal government and any state interested in implementing the central panel approach must recognize.

Because the central panel system separates the administrative law judge from the agency, the extent to which the system affects the administrative law judge role is an important component when considering the viability of the pool approach and the lessons the approach may have for a proposed federal pool system. Proponents of an administrative judiciary free of agency influence state that administrative law judges deserve the judicial independence granted to state and federal court judges. Evaluation, as much as any other issue, has been seen as a challenge to administrative law judge independence. Legislative initiatives to require evaluation have been successfully defeated and groups of administrative law judges have filed legal actions to stop what they see as illegal performance evaluation.[28] Yet proponents cling to the belief that evaluation will produce a more accountable and therefore more effective administrative system and that that evaluation can be accomplished without placing administrative law judge decisionmaking independence into jeopardy.

Society utilizes evaluation to make basic decisions in both the private and public sectors. People's livelihoods can be enhanced or destroyed depending on whether supervisors check "good" or "poor" on standardized evaluation forms. Bar associations influence the judiciary by releasing results of evaluative bar polls just prior to elections. The evaluation of administrative law judges has also be-

28. *See infra* text accompanying notes 35-40.

come a political factor—an issue that has been subject to congressional inquiry as well as litigation.

In the late 1970's, there were attempts by the Carter Administration and members of Congress to apply the precepts of evaluation to administrative law judges. Evaluating the performance of these administrative judges was to be the fuel to make them more accountable. But, as the usual case when evaluation is applied, there was little that was definitive in terms of goals and criteria. The administrative law judges were outraged and lobbied heavily against the legislative actions.[29]

One bill which provided for evaluation was Senate bill 262.[30] When it was proposed during the late 1970's, it prescribed no substantive standards for administrative law judge status and tenure and would have required evaluation of judges by the administrator of the Administrative Conference of the United States in accordance with the standards and processes prescribed. All administrative law judges would be subject to removal or reduction in grade for "unacceptable performance."[31] In addition, administrative law judges appointed after the effective date of the bill would have been appointed for terms of ten years subject to reappointment by the administrator of the Administrative Conference upon determination of each case as to whether the administrative law judge was "affirmatively qualified to be reappointed."[32]

The bill would have established performance review boards, at least half of whose members would be administrative law judges. The administrator was to establish performance appraisal systems for administrative law judges, setting standards for:

> the evaluation of whether any administrative law judge [had] performed the duties of his office in a fair, impartial, and effective manner. The performance standard [would have], to the maximum extent feasible, permit[ted] the evaluation of job performance on the basis of criteria related to duties and responsibilities of administrative law judges.[33]

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29. Despite vigorous efforts by the Carter administration, no bill proposing terms of office and evaluation was successful. It is useful to discuss these efforts, however, because they provide instruction on the problems of implementing evaluation procedures.

30. S. 262, 96th Cong., 2d Sess. (1980).

31. *Id.* § 4322(b).

32. *Id.* § 4323(b).

33. *Id.* § 4322(b). Under § 4322(c), the number and composition of performance review boards is not otherwise specified, except that a board conducting an evaluation of any particular administrative law judge may not have as a member any individual who is an employee of the agency employing the administrative law judge.

The performance review board would have been required to conduct evaluations during the third and tenth years of administrative law judge terms. The evaluation report issued during the tenth year of the term, would include a recommendation regarding reappointment. The findings of any evaluation would have been provided to the administrative law judge in a written report "and, if applicable, to the chief administrative law judge for the agency in which the administrative law judge [was] employed."[34]

In addition to legislative efforts to impose evaluation on administrative law judges at the federal level, litigation has also been utilized by Social Security administrative law judges to dispute the use of performance evaluation. In *Nash v. Califano*,[35] the Court of Appeals for the Second Circuit was asked to deal with the issue of whether an administrative law judge had standing to sue when an agency allegedly interfered with his or her decisional independence. The district court judge had ruled that Simon Nash, an administrative law judge, for the Social Security Administration, had not suffered the injury-in-fact required for standing when he was subjected to the bureau's program of monitoring, reviewing, and allegedly controlling administrative law judge decisions. Among other contentions, Judge Nash complained that arbitrary monthly production quotas had been established by the agency and that what the agency designated as a "quality assurance program" was in reality an attempt to direct a number of decisions awarding or denying social security benefits. Administrative law judges deviating from the average fifty percent reversal rate from all decisions were allegedly counselled and admonished to bring their rate in line with the national average on payment sanctions.[36]

Judge Kaufman closed the panel's unanimous decision that Judge Nash had standing to sue with the following admonition to the district court on remand:

> By providing an authoritative delineation of the respective rights and powers of the parties to this litigation, and by recognizing that good administration must not encroach upon adjudicative independence, the district court on remand will have the opportunity to advance the principle goal of judicial and cause that judicial administration: reduction of delay without compromise to the demands of due process, of which judicial independence is but

34. *Id.* § 4322(c).
35. 613 F.2d 10 (2d Cir. 1980).
36. *Id.* at 13.

one, important part.[37]

Nash was recently distinguished, however, by the Seventh Circuit Court of Appeals in the case of *D'Amico v. Schweiker*.[38] In that case, seven Social Security administrative law judges filed a complaint in federal district court seeking to enjoin the Social Security Administration from compelling them to apply a new agency policy regarding repayment of disability benefits received after cessation of a disability. The district court judge dismissed the case on the merits, but the Seventh Circuit held on appeal that the administrative law judges lacked standing to sue. In so doing, Judge Posner distinguished *Nash* although it appears that, in actuality, he may have simply been disagreeing with the Second Circuit. He described the Second Circuit's opinion as having challenged "housekeeping as distinct from substantive directives."[39] Unlike *Nash*, the *D'Amico* action placed the judicial officer "in the position of taking sides in controversies that he is supposed to adjudicate impartially."[40]

The Merit Systems Protection Board (MSPB) recently added fuel to the fire over the status of federal administrative law judges. In April, 1983, in *Social Security Administration v. Goodman*,[41] an administrative law judge of the MSPB recommended the removal of an administrative law judge at the Social Security Administration due to unacceptably low productivity. The Board reversed, stating that if an agency's case rests upon comparative productivity statistics, "proof of their validity is an essential element of the agency's cases."[42]

In *Social Security Administration v. Brennan*,[43] the MSPB found that an administrative law judge's independence did not "provide immunity from appropriate supervision."[44] According to the opinion, administrative law judges were not justified in refusing to comply with reasonable management instructions that did not affect their ability to render impartial adjudication.[45]

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37. *Id.* at 17-18.

38. 698 F.2d 903 (7th Cir. 1983).

39. *Id.* at 907.

40. *Id.*

41. No. HQ75218210015 (MSPB Apr. 6, 1983) (recommended decision), *rev'd*, No. HQ75218210015 (MSPB Feb. 6, 1984) (final decision).

42. No. HQ75218210015, slip op. at 19 (MSPB Feb. 6, 1984) (final decision).

43. No. HQ7521820010 (MSPB June 17, 1983).

44. *Id.*, slip op. at 7.

45. *Id.*

IV. LESSONS TO BE LEARNED BY THOSE PROPOSING A FEDERAL CENTRAL PANEL

The federal experience with evaluation of administrative law judges has not been a good one. The proposed legislation of the late 1970's, the *Nash* and *D'Amico* litigation, and the *Goodman* administrative action are all indicative of a festering discontent among the nation's administrative judiciary.

In contrast, performance evaluation is part of the central panel system, albeit some programs are more vigorous and more influential than others. One question is whether the differences in acceptance and response to evaluation has more to do with the attitudes of state hearing officers in contrast to those of federal administrative judges or whether it has more to do with the method of evaluation used by central panel systems. Professor Victor Rosenblum, a prominent administrative law scholar, has concluded that federal administrative law judges have been unwilling to accept evaluation at least in part because the programs proposed were not specifically designed for application to administrative judges.[46] Yet this phenomenon is not uncommon. Evaluation has become an industry in and of itself during the last twenty years. An article probing alternative conceptions of evaluation identifies seven such conceptions: evaluation as applied science; as system management; as decision theory; as assessment of progress toward goals; as jurisprudence; as descriptive portrayal; and as rational empiricism.[47]

But despite the vast array of purposes for which evaluation has been regarded as magic elixir, the authors recognize a major conflict between those who believe that a consensus on values can be fashioned and those who believe that evaluation "has been largely unsuccessful in resolving differences among groups who disagree on values."[48]

This type of conflict can result in organized revolt such as that of federal administrative law judges or it can result in the complete disregard of evaluation results. Despite the abundance of credible literature discussing it, evaluation does not have a uniformly understood meaning. The term "evaluation" carries so many contexts and purposes that proposals merely stating that programs or people are

46. Rosenblum, Evaluation of Administrative Law Judges: Aspects of Purpose, Policy, and Feasibility (Dec. 1983) (unpublished report to the Administrative Conference) (cited with permission of the author).

47. Glass & Ellett, *Evaluation Research*, 31 ANN. REV. OF PSYCHOLOGY 211 (1980).

48. *Id.* at 219.

to be evaluated often meet fierce resistance by those who fear that generalized evaluations will be used more for abuse than for constructive use.

However, these and other problems notwithstanding, evaluation appears to be here to stay. The trend in both the private and public sectors is to use evaluation to "reduce uncertainties, improve effectiveness, and make decisions with regard to what those programs, personnel, or products are doing and affecting."[49] Related to this trend is the upcoming consideration by Congress of the proposed federal central panel with its overarching question of why an existing system which has operated for nearly forty years (that is, since the enactment of the APA) needs a major overhaul. Past experiences involving the evaluation of federal administrative law judges and the evaluation procedures utilized by on-going central panels provide lessons for policymakers.

A. *Lessons From Past Experiences at the Federal Level*

One of the largest problems with performance evaluation is that before it will work effectively, the particular mode and methodology in which it is delivered must be linked to the particular type of job or person to be evaluated. "At both conceptual and operational levels, evaluation scholars have endowed the term with multifaceted context and contents, so that generalized proposals for evaluation of particular programs or personnel carry little that is definitive about what is intended or what will endure."[50] Senate bill 262's methods of evaluation, similarly, did little to match its methodologies to the particular profession that it was to evaluate. Neither the bill nor its history provided any systematic appraisal of the administrative law judges programs, strengths, weaknesses, history, experiences, consequences, and alternatives that would provide a foundation for the shift to a term of years.

The bill did not state why the standards dictated by the federal APA needed to be changed and, furthermore, did not elaborate on the specific criteria that would be at the core of the evaluation process. The overall result was outrage and vigorous general opposition by the nation's administrative law judges.[51] Applying an evaluation

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49. M. PATTON, PRACTICAL EVALUATION 15 (1982).

50. Rosenblum, *supra* note 46.

51. Numerous administrative law judges testified before congressional subcommittees in opposition to the bills. Other administrative law judges filed position papers with the legislatures and speeches denouncing the bills were common.

system or any other type of major change modifies the duties and authority of many people — in this case, both administrative law judges and agency personnel. The many facets of administration must be considered, including the fact that the administrative process today more closely resembles general jurisdiction courts than it did at the time of the passage of the federal APA. The events surrounding Senate bill 262 is a reminder that evaluation must include realistic measures that are administered objectively and used only for the purposes communicated in advance to those being evaluated.

B. *Lessons from the Central Panel Approach*

Opponents of any type of evaluation of administrative law judges cite general jurisdiction judges as examples. According to this view, other judges are not evaluated formally because they must enjoy absolute independence if the judicial system is to remain impartial. For the same reasons, opponents of evaluation state that administrative law judges should not be evaluated.

Proponents of the evaluation of administrative law judges claim that administrative law judges should be accountable for their actions; accountability, in their view, can only be accomplished through the evaluation of administrative law judge performance. Evaluation of administrative law judges in the central panel states is part of the duties of the directors of the central panel agency. For the most part, these evaluations take the form of annual reviews which, in most states, bear upon salary increases granted to administrative law judges.[52]

Evaluation is very much a part of most central panel administrative law judges careers. But does evaluation affect their decision-making independence? By using a questionnaire mail survey, a recent study asked central panel administrative law judges whether the presence of a performance evaluation system would jeopardize their independence. More judges strongly disagree with the idea that performance evaluation would jeopardize their independence than those who agree.[53] This is somewhat surprising in light of the fairly uniform opposition to performance evaluation on the part of the federal administrative law judges. The same study tabulated the responses to the question by state. The results vary substantially, suggesting that the state central panel judges' viewpoints are not

52. *See*, M. RICH & W. BRUCAR, *supra* note 9, for a discussion of various evaluation systems used among the central panel systems.

53. *Id.* at 49, 61.

fashioned by an organized response to the notion of performance evaluation but, rather, by their individual experience.[54] Note then, that in the State of New Jersey, where evaluation is among the most rigorous of any of the central panel states, nearly three-fifths of the responding administrative law judges stated that the presence of a mechanism of evaluating their performance would not jeopardize their independence.[55]

In all central panel systems, performance evaluation is allowed, but by virtue of the structure of the system, the central panel provides a centralized location from which the evaluation of administrative law judges is conducted. Another important point is that evaluation is the responsibility of the director of the central panel. This means that the sensitive job of evaluating performance is directed by an individual who has day-to-day supervisory contact with the administrative law judges. Through utilization of both the evaluator's judgment and the collection of standardized forms, the system provides the opportunity for an informed decision that will be accepted by the administrative law judges as being factual and objective.

V. CONCLUSION

The notion of performance evaluation has not been accepted by the federal administrative law judge community while it is very much a part of the existing central panel approach. In asking why such a difference exists, legislators should look to the state models for possible answers. It should be noted also that the federal government provides a totally different environment for a central panel system than any state administrative process. As Jeff Lubbers of the Administrative Conference stated:

> [a] platoon of 41 New Jersey judges may work well, but 1100 federal [administrative law judges] may make for an unmanageable corps. Furthermore, five federal agencies now employ nearly 1000 [administrative law judges] and the other 24 employing agencies average fewer than 7 judges each. Proponents of any reform must bear the burden of attending to the practical details of its proposed application to such a bulk of our judiciary.[56]

Yet, despite the differences between the state and federal sys-

54. *Id.* at 49.

55. *Id.* at 48-49.

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

tems, Senate bill 1275,[57] if enacted, will establish the framework for a central panel of federal administrative law judges. That bill would create a new administrative agency known as the Administrative Law Judge Corps of the United States. As an agency, the Corps would be subject to the various government regulations and administrative housekeeping with which agencies must currently comply.[58] Its Council would consist of members appointed by the President and confirmed by the Senate.[59] The Council would be authorized to prescribe the rules of practice and procedure for the conduct of proceedings before the corps except that procedural rules governing an existing class of proceedings could not be changed for two years without the agency's approval.[60]

As this bill is considered by various congressional committees on its path toward enactment, it is imperative that state central panels be considered as "laboratory experiments" from which the federal administrative system can learn. The central panels provide lessons on issues surrounding implementation of pool systems, including the types of opposition that will no doubt emanate from agencies fearing that their power will be diluted. The state central panels are also pilot programs providing working models of utilizing an administrative law judge for hearing a variety of cases, including both regulatory and benefits adjudication.

Another lesson has to do with evaluation — a topic that in today's world may well come to the forefront of considerations revolving around proposed central panel legislation. One key to any evaluation system is acceptance by those being evaluated that the system is objective and is used for the specific purpose for which the evaluation is intended. The central panel, according to its proponents, provides the opportunity for a much clearer link between the evaluation and its consequences.

Lessons from events surrounding Senate bill 262 and the ongoing central panel programs suggest that, first, the need to change the current system must be carefully analyzed and documented. This should include an examination of budgetary matters. Proponents of the central panel approach believe that their system can deliver unbiased administrative justice at less cost. Budgetary considerations were primary issues among the legislatures that enacted central

57. S.1275, 98th Cong., 1st Sess. (1983); see 129 CONG. REC. S6609-13 (daily ed. May 12, 1983).

58. S. 1275, 98th Cong., 1st Sess. § 2 (1983) (to be codified at 5 U.S.C. § 562(a)).

59. *Id.* (to be codified at 5 U.S.C. § 564(c)).

60. *Id.* (to be codified at 5 U.S.C. § 565(7)).

panels, and cost is just as important at the federal level.[61] Cost justifications used by the states should be examined; aside from gut level reactions and bottom line "before and after" analyses, however, strikingly little data exists. Financial studies need to be conducted that confirm or refute claims that central panel systems can be operated more efficiently while providing equitable proceedings.

Second, lessons indicate that any ongoing evaluation to be part of the proposed federal central panel should be designed at the outset to make it as useful and as accepted by the administrative law judges and agency personnel as possible. Evaluation can and should be used for educational purposes — as a tool to determine where changes need to be made. For example, a new program for behaviorally disordered adolescents, being implemented in the Chicago area, is utilizing a rigorous, operationally defined evaluation system not just to determine whether the program is effective. In addition, the results of the periodic evaluation will become part of the program's therapeutic component.[62] The therapist and family will discuss the evaluation results to determine whether approaches to the problems taken by the therapist and family need to be modified. They will use the results to consider whether the goals of the therapy were realistic and whether the family would benefit by continuing the program in either its current or modified state.

Similarly, a carefully designed evaluation in the administrative adjudication context can be used to identify problems with the system that all administrative law judges may be experiencing. And, in the central panels, the evaluation provides the "excuse" necessary for the administrative law judge to discuss general problems and individual cases with the central panel director (if the evaluation includes a personal interview component).

Another goal of evaluation is to increase the likelihood that the best people are in the positions best suited to them and that they are suitably compensated. But when evaluation is used for reward and punishment of administrative judges, there should be a variety of

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61. For a discussion on budgetary issues surrounding the central panel approach, *see* M. RICH & W. BRUCAR, *supra* note 9, at 23-25.

62. Illinois State Board of Education grant no. U4-20160 awarded to the A.E.R.O. Special Education School District and the Foundation for Educational Research, Inc. The evaluation system includes quantification of past educational records for use as control variables and an on-going data collection effort during the delivery of in-home therapeutic services. The evaluation program was specifically designed to accompany the therapeutic component of this particular program.

measures in addition to the viewpoint of one supervisor, such as the opinions of litigants and attorneys.

In considering a federal central panel, it would be wise for Congress to look at the role of the state central panel directors including the potential bias emanating from a process which allows political figures to have complete control over choosing the director. But in looking at the role of the director, the Congress should consider how using such a familiar figure as the director to conduct performance evaluation may make the system more palatable to administrative law judges.

Senate bill 262 and the central panel system each provide lessons to be learned by policymakers considering a federal central panel system of administrative law judges. If such a system is to be successfully implemented and maintained, we should not ignore those lessons.