ESTABLISHING FEDERAL ADMINISTRATIVE LAW JUDGES AS AN INDEPENDENT CORPS: THE HEFLIN BILL

Victor W. Palmer

Edwin S. Bernstein

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation
I. Introduction

At the annual banquet of the Federal Administrative Law Judges Conference on May 14, 1983, Senator Howell Heflin announced that two days earlier he had introduced a bill to establish administrative law judges as an independent, unified corps. The Senator discussed the importance of the administrative judiciary and the need for its functions to be performed in an independent atmosphere, free of bias, in order to assure fairness and give credence to its decisions. Senator Heflin stressed that "these judicial officers must be free from any association or personal obligation to any party or agency in order that every litigant to the process be afforded fairness and due process. The mere appearance of bias and prejudice smacks at the vital concept of fairness and due process."¹

---

Senator Heflin noted that the use of similar systems in several States had resulted in substantial savings and efficiencies that he expected the federal government would experience once his bill, Senate bill 1275, was enacted.\(^2\)

This article will describe the status of administrative law judges in the federal government; analyze Senate bill 1275; review the testimony before the Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee; and evaluate the arguments in support of and in opposition to Senator Heflin's bill.

II. THE PRESENT STATUS OF FEDERAL ADMINISTRATIVE LAW JUDGES

There are 1,134 administrative law judges serving in the federal government today.\(^4\) They hear and decide cases that "permeate every sphere and almost every activity of our national life [and] have a profound effect upon the direction of our economic growth."\(^5\)

Professor Kenneth Culp Davis estimates that the use of administrative judges began in 1789 with the appointment of officers to determine which soldiers were "disabled during the late war" and customs officers who were authorized to "estimate the duties payable" on imports.\(^6\)

But 1946 is the true year of birth for today's federal administrative law judge. That is the year the Administrative Procedure Act (APA) was enacted.\(^7\)

Under the APA, administrative law judges presently hold career appointments pursuant to a system of merit selection.\(^8\) They are the only government officers, apart from certain agency heads or officials who are provided for specially under other specific statutes, who may conduct rulemaking and adjudicative hearings when agency ac-
tion is based on substantially evidence of record. Their functions have been held to be "functionally comparable" to those of trial judges which entitles them to absolute immunity from liability arising out of their judicial acts.\textsuperscript{10}

The APA was enacted in response to charges that "the practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution."\textsuperscript{11}

The change in the status of administrative law judges\textsuperscript{12} effectuated by the APA, was first reviewed by the Supreme Court in \textit{Ramspeck v. Federal Trial Examiners Conference}.\textsuperscript{13} In that case the Supreme Court traced the history of these Article I officers and the

\begin{itemize}
  \item \textsuperscript{9} Butz v. Economou, 438 U.S. 478, 513 (1978).
  \item \textsuperscript{10} \textit{Id.} at 516.
  \item \textsuperscript{12} In 1978, the APA was amended to substitute the title "Administrative Law Judge" for the earlier designation "Hearing Examiner." Act of March 27, 1978, Pub. L. No. 95-251, §§ 2, 3. 92 Stat. 183, 183-84.
  \item \textsuperscript{13} 345 U.S. 128 (1953).
\end{itemize}
controversial nature of their positions. The APA's legislative history demonstrates that there had been much stronger support for the creation of a fully, independent administrative judiciary than that indicated by the majority opinion in *Ramspeck*. The final report of the Attorney General's Committee, for example, contains an express recommendation by the minority members for complete separation of the adjudicative function in cases involving agency prosecution of complaints against private parties:

Hearing and deciding officers cannot be wholly independent so long as their appointments, assignments, personnel records, and reputations are subject to control by an authority which is also engaged in investigating and prosecuting. Of course, this dependence may be diminished by various devices, as the Committee has very rightly attempted. We think it clear, however, that such dependents (sic) cannot be eliminated by measures short of complete segregation into independent agencies.

Concern over administrative impartiality antedating the 1946 enactment of the APA had led to earlier congressional responses. In 1939, Senator Norris introduced a bill to create a separate administrative court. A succession of bills offering various remedies were introduced in Congress between 1933 and 1946; and, during the interim between the appointment of the Attorney General's Committee pursuant to the directions of President Roosevelt, and the issuance of its formal report, Congress actually passed one of them—the Walter-Logan bill. It was vetoed by President Roosevelt on December 18, 1940, and the veto was sustained by the House. When this event was later discussed by Justice Jackson in *Wong Yang Sung v. McGrath*, however, he concluded that though the President vetoed the bill, he recognized the need for reform. Justice Jackson should be given independence and tenure within the existing Civil Service system.

*Id.* at 130-32.

20. *Id.* at 39.
said of the APA itself: "The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. . . ."

The alternatives before Congress and the methodology selected to secure the independence of the administrative judiciary is described in the legislative history of the APA, as follows:

The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section (section II of the APA) thus takes a different ground than the present situation in which examiners are mere employees of an agency, and other proposals for a completely separate "examiners' pool" from which agencies might draw for hearing officers. Recognizing that the entire tradition of the Civil Service is directed toward security of tenure, it seems wise to put that tradition to use in the present case. However, additional powers are conferred upon the Commission.

When the Supreme Court, in Butz v. Economou held administrative law judges to be "functionally comparable" to trial judges, it stressed that they resolve conflicts of an adversarial nature "every bit as fractious as those which come to court," and have comparable powers to issue subpoenas, rule on proffers of evidence, regulate the course of hearings, and make or recommend decisions. The opinion went on to list the APA's provisions designed to guarantee the independence of administrative law judges: The Office of Personnel Management and the appointing agency-employer controls their pay; cases must be assigned to them in rotation so far as practicable; no party may consult with them ex parte concerning a fact at issue in

---

21. Id. at 40-41.

Of the several administrative evils sought to be cured or minimized, only two are particularly relevant to issues before us today. One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other. . . .

More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.

Id.


24. Id. at 512-13.
a hearing; they may not be responsible to, supervised by, or directed
by agency agents or personnel performing investigative or prosecu­tion functions; they may not perform duties inconsistent with their
duties as administrative law judges; and they may be removed only
for good cause established and determined by the Merit System Pro­tection Board after a hearing on the record.25

But the insulation from agency pressures that the APA affords
administrative law judges is far from complete. The Supreme Court
in its earlier decision in Ramspeck, upheld the right of the Civil
Service Commission26 to classify "the examiners into grades, with
salaries appropriate to each grade, . . . in each federal agency using
examiners. This classification ranged from just one grade in several
agencies to five grades in two agencies."27 The majority conceded
that the Commission had employed wholly subjective specifications
when it classified the grades as "moderately difficult and important,""dif­ficult and important," "unusually difficult and important," "ex­ce­dingly difficult and important," and "exceptionally difficult and
important."28 Nevertheless, the majority upheld this practice under
which the employing "agency shall decide if there is a vacancy to be
filled, and further that the agency shall decide if this vacancy is to be
filled by promotion from among the present examiners."29

The majority opinion next interpreted the APA's requirement
that "examiners shall be assigned to cases in rotation so far as practi­
cable."30 The majority believed that this did not require mechanical
rotation, but permitted assignments to be made on the basis of "the
experience and ability of the examiner available."31

Finally, the majority held that an agency may dispense with the
services of administrative law judges "for lack of funds, personnel
ceilings, reorganizations, decrease of work and similar reasons"
through "reductions-in-force," under which judges holding the low­
est number of "retention credits" may be removed from office "for
good cause" within the meaning of the APA.32

Justice Black, with whom Justices Frankfurter and Douglas

25. Id.; see also 5 U.S.C. §§ 554(d), 3105, 7521 (1982).
26. The Civil Service Commission was the predecessor of the Office of Personnel
Management and the Merit Systems Protection board.
27. Ramspeck, 345 U.S. at 135.
28. Id. at 136-37.
29. Id. at 138.
30. Id. at 139 (emphasis in original).
31. Id. at 139-40.
32. Id. at 142-43.
concurring, vigorously disagreed with the Ramspeck majority opinion:

I agree with the District Court and the Court of Appeals that the regulations here sustained go a long way toward frustrating the purposes of Congress to give examiners independence. . . . The distinctions depended upon to support the different classifications are so nebulous that the head of an agency is left practically free to select any examiner he chooses for any case he chooses. . . . And administrative agencies are permitted to attribute choice of a particular examiner for a particular case to considerations whether "complex legal, economic, financial or technical questions or matters" are merely "moderately complex," "fairly complex," "extremely complex," "exceptionally complex," or just "complex." I think all these conceptualistic distinctions mean is that the congressional command for a nonagency controlled rotation of cases is buried under words.33

But, the Ramspeck majority is still the controlling interpretation of the actual parameters of protection from agency pressures that the APA provides to administrative law judges. Those who argue that the APA's protections are so all-embracing that there is no need to completely separate administrative law judges from their present agency employers, necessarily ignore Ramspeck. They ignore concerns embodied in calls for the establishment of an administrative court by the recommendations of the Second Hoover Commission in 1955,34 the Ash Council in 1971,35 and then Solicitor General Robert H. Bork in 1977.36 They also overlook the 1974 report of the La Macchia Committee which stopped short of recommending anew the formation of an administrative court and opted instead for the establishment of a "unified corps."37

33. Id. at 144-45 (Black, J., dissenting) (footnotes omitted).
34. Comm'n on Organization of the Executive Branch of the Government, 84th Cong., 1st Sess., Report to the Congress Vol. VI, at 84 (1955). The recommended court would have consisted of three sections: Tax (which would involve transferring this function from the Executive to the Judicial Branch); Labor (replacing the NLRB); and Trade (replacing the FTC and certain other regulatory agencies). Hearing Examiners would have been replaced by Hearing Commissioners serving as the Court's trial division. Id.
35. President's Advisory Council on Executive Organization, A New Regulatory Framework 53 (1971). This proposed an administrative court having jurisdiction over appeals from transportation, securities, and power agencies. Id.
36. Dep't of Justice Comm. on Revision of the Federal Judicial System, The Needs of the Federal Courts (1977). The Bork Committee proposed that non-Article III tribunals be created which "could consist of an Article I trial division . . . and an administrative court of appeals. The trial division could serve the function now served by administrative law judges. . . ." Id. at 7-11.
37. United States Civil Service Comm'n, Report of the Comm. on the
It is this latter recommendation which the Heflin Bill would implement.

III. THE HEFLIN BILL: ITS PURPOSE AND PROVISIONS

The essential purpose of the Heflin bill is to remove administrative law judges from the supervision and control of the agencies where they are presently employed, and establish them instead, as an independent, unified corps.\(^{38}\)

The Corps would initially be divided into seven divisions in keeping with present, major specialties of administrative law.\(^{39}\) Each division would be headed by a division chief judge required by the bill to be an expert in the division's field of adjudication, demonstrated by having at least five years of experience as an administrative law judge assigned to cases of the type to be handled by the division.\(^{40}\) The division chiefs, together with the chief judge of the

---


\(^{39}\) S. 1275, 98th Cong. 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 564(b)). These divisions would be organized in the following manner:

1. Division of Communication, Public Utility and Transportation Regulation

2. Division of Health, Safety and Environmental Regulation
   Occupational Safety and Health Review Commission, Federal Mine Safety and Health Review Commission, National Transportation Safety Board, Environmental Protection Agency, Department of the Interior, National Oceanic and Atmospheric Administration, Coast Guard.

3. Division of Labor Relations
   National Labor Relations Board, Federal Labor Relations Authority.

4. Division of Benefits Program
   Social Security Administration.

5. Division of Securities, Commodities and Trade Regulation

6. Division of Labor
   Department of Labor.

7. Division of General Programs
   Drug Enforcement Administration, Department of Housing and Urban Development, Food and Drug Administration, Bureau of Alcohol, Tobacco and Firearms, Maritime Commission, U.S. Postal Service, Merit Systems Protection Board.

\(^{40}\) Id. (proposing codification at 5 U.S.C. § 564(c)).
Corps, would govern the Corps' affairs and operations as a collegial council. 41

Administrative law judges are presently examined by the Office of Personnel Management (OPM) which certifies the top three candidates to individual agencies for appointment to available positions as employees of those agencies. 42 The bill would preserve the present system of merit selection through OPM-administered examination of candidates. 43 It would serve to enlarge the list of eligibles from the best three to the best five candidates for each vacancy. This would increase opportunities for women and ethnic minority candidates who are less likely to be entitled to veteran's preference. 44 Existing administrative law judges would be transferred to the Corps upon the commencement of its operation and each would be assigned to a division after consideration of the areas of specialization in which the judge had served. 45 The judges would be paid uniform salaries, 46 though slightly higher salaries would be provided for the chief judge and the division chiefs.

Additionally, the bill would screen applicants for the chief judge of the Corps and the division chief judge positions by creating a five-person Judicial Nomination Commission. 47 The Commission would determine, for each vacancy, the three best qualified applicants, who had been administrative law judges for at least five years, and forward those names to the President for his appointment by

41. Id. (proposing codification at 5 U.S.C. § 565(a)).
44. OPM grades all candidates for administrative law judge positions in accordance with scores obtained in a full day written examination, an oral interview by a three person panel, and vouchers furnished by lawyers and judges familiar with their abilities and qualifying experience. Candidates who served in the armed forces have five points added to their scores and disabled veterans and other preference eligibles, married or related to disabled veterans, have ten points added under civil service laws. See 5 U.S.C. §§ 2108, 3309 (1982).
46. Id. (proposing codification at 5 U.S.C. § 567). The pay provisions in the bill are couched in technical terms, but when translated provide a salary in the amount many senior administrative law judges now receive.
47. Id. (proposing codification at 5 U.S.C. § 566(a)). This commission would be appointed by the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, the Chief Judge for the United States District Court for the District of Columbia Circuit, the Chairman of the Administrative Conference of the United States, the Chairman of the Administrative Law Section of the American Bar Association, and the President of the Federal Administrative Law Judges Conference. Id. (proposing codification at 5 U.S.C. § 566(b)).
and with the advice and consent of the Senate. The bill also recognizes the Presidential power to reject any list of names designated for any one position, and to request the Commission to submit another.48

Once its members are appointed,49 the Council would have powers similar to those possessed by individual agencies over administrative law judges.50 The bill, however, provides added responsibilities and duties to the Council.51 Responsibility is also conferred upon the Council to make appropriate arrangements for continuing judicial education and training.52

Inasmuch as the legal specialties that concern agencies may change in the future, as will the number of judges needed to hear their cases, the Council is authorized to change the number and jurisdiction of the divisions.53 In order to preclude the Council from completely converting the judges into “generalists,” it may not reduce the number of divisions to less than four. On the other hand, to prevent a regressive movement toward employment of judges as “super-specialists,” the Council may not increase the number of divisions to more than ten.54

The agencies would continue to have review power over decisions of the judges.

For two years from the date the Corps begins its operations, proceedings would continue to be conducted under the rules of prac-

48. Id. (proposing codification at 5 U.S.C. § 566(e)(5)). Professor Abraham Dash noted this to be a novel methodology for screening judicial applicants, but since the bill acknowledges the President's right to reject, it should, in his opinion, withstand challenges that it unduly limits executive appointment powers contrary to the Constitution. See infra note 66.

49. The bill provides for a five year term for the Chief Judge of the Corps but is silent as to the terms of the division chiefs. S. 1275, 98th Cong., 2d Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 563(a)). However, the Federal Administrative Law Judges Conference proposed that they also serve five year terms that should be staggered to avoid undue interruption of the workings of the Council. Judge V. Palmer, Chairman of the Committee on the Corps of the Federal Administrative Law Judges Conference, Prepared Statement Presented at the Senate Hearings on S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 29 (June 23, 1983).


52. Id. (proposing codification at 5 U.S.C. § 565(d)(6)).

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

54. Id. (proposing codification at 5 U.S.C. § 564(a)).
ESTABLISHING AN INDEPENDENT CORPS

After two years, the Council is authorized to prescribe uniform procedural rules. At that time, it also would report its findings and make recommendations for appropriate legislative reforms that would make review of the judges' decisions more efficient and accord greater finality to their decisions. A separate study and report is required for each division. This should cause the Council to take a hard look at the true nature of the various forms of administrative decisionmaking. It would require the Council to make distinctions between administrative adjudications where fairness and public satisfaction outweigh the need to accommodate agency efficiency.

The Corps would have jurisdiction over all matters presently required by the APA to be conducted by an administrative law judge in lieu of hearings conducted by the agency or its members. The proposed legislation also confers jurisdiction upon the Corps to hear any other case referred by federal agencies and courts for determination on a hearing record.

The legislation provides for the removal, suspension, reprimand, or disciplining of judges on the basis of incompetence neglect of duties, or misconduct. Judges may also be removed or suspended for physical or mental disability. Under present law, an administrative law judge may be removed, suspended, reduced in grade or pay, or furloughed for up to 30 days upon a showing of good cause by the employing agency in a hearing before the Merit Systems Protection Board. The language in the bill uses the more explicit language employed by Congress to subject bankruptcy judges to removal proceedings. To assure that complaints against

55. Id. (proposing codification at 5 U.S.C. § 565(d)(7)).
56. Id. § 3.
57. Id.
58. In his illuminating work on this subject, Professor Paul R. Verkuil, Dean of Tulane University School of Law, recognizes adjudications involving the imposition of sanctions as clearly being of this nature. See Verkuil, The Emerging Concept of Administrative Procedure, 78 COLUM. L. REV. 258, 295 (1978).
60. Id. (proposing codification at 5 U.S.C. § 568(d)).
61. Id. (proposing codification at 5 U.S.C. § 569(a)(1)).
62. Id.
64. See 28 U.S.C.A. § 153(b) (West Supp. 1983). These provisions were enacted as appropriate to judges appointed pursuant to Article 1 of the Constitution who, unlike judges appointed pursuant to Article 3, do not have life tenure. See also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).
the judges are investigated fairly and expeditiously, the bill provides for their processing by panels of administrative law judges for a system of peer review.65

IV. THE SENATE HEARINGS ON SENATE BILL 1275

The Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, has convened two hearings on Senate bill 1275.66

The Subcommittee heard first from a panel of administrative law judges, introduced by Judge Edwin S. Bernstein, President of the Federal Administrative Law Judges Conference.67 Judge Bernstein emphasized that Senate bill 1275 was supported by each of the three organizations which represent administrative law judges: the Federal Administrative Law Judges Conference,68 the National Conference of Administrative Law Judges,69 and the Association of Administrative Law Judges, Inc.70

Judge Victor W. Palmer testified at length as Chairman of the Federal Administrative Law Judges Conference's Unified Corps Committee. He urged the enactment of Senate bill 1275 to redress urgent, critical problems adversely affecting Americans. Specifically, he called attention to those seeking Social Security benefits, facing the loss of licenses to engage in federally regulated businesses, those

65. S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 569(c)-(g)). The bill's peer review system is akin to that now applicable to federal district court and circuit court judges, pursuant to 28 U.S.C.A. § 372(c) (West Supp. 1983). This system's prototype has recently been implemented by the United States Department of Labor to handle complaints involving its administrative law judges.

66. The Subcommittee consists of Senator Charles E. Grassley, Chairman (R. Iowa), Senator Howell Heflin, Ranking Minority Member (D. Ala.), Senator Paul Laxalt (R. Nev.), Senator Arlen Specter (R. Pa.), and Senator Max Baucus, (D. Mont.). The hearings were held on June 23 and September 20, 1983.

67. See id. at 4-24. The panel consisted of Judge Edwin S. Bernstein, Judge Victor W. Palmer, Chief Judge Duane R. Harves, and Judge Frank B. Borowiec.

68. The Federal Administrative Law Judges Conference (FALJC) includes nearly 800 members and represents judges in each of the twenty-nine federal agencies that hold hearings conducted by administrative law judges. Id. at 4.

69. The National Conference of Administrative Law Judges includes both federal and state administrative law judges as its members. It is a constituent of the American Bar Association's Judicial Administration Division which, at its 1983 mid-year meeting, passed a resolution favoring the establishment of federal administrative law judges as a separate, independent and unified corps. Id.

70. The Association of Administrative Law Judges, Inc., represents the nearly 800 administrative law judges employed at the Social Security Administration. Id.
subjected to ever-increasing civil penalties for breach of federal regulations, and those otherwise dependent upon the fairness and impartiality of hearings conducted by federal administrative law judges.\footnote{Id. at 30-35. The majority of administrative law judges in the federal government are no longer assigned to proceedings involving ratemaking, licensing, or the establishment of agency rules and regulations. \textit{Id.} at 28-29. As a chart attached to Judge Palmer’s testimony demonstrated, only 6.8 percent of them are presently so employed. This is in marked contrast to the time of the APA’s enactment when 63.8 percent were assigned to such cases. \textit{Id.} at 53. Currently, administrative law judges mainly preside over adversarial type hearings and disputed claims in which the employing agency is a real party-in-interest. The change has raised the level of judicial independence needed for the administrative process to be just. \textit{Id.} at 29-31.}

Judge Palmer noted that eight states have transferred their administrative law judges to independent central panels to eliminate any dependency upon agencies whose programs are directly affected by the judges’ decisions. At the same time, the federal government still assigns its administrative law judges to twenty-nine departments and agencies where they are maintained and supported as subordinate employees.\footnote{Id. at 26, 31, 40-41.} He argued that transfer of federal administrative law judges to an independent corps where each would be assigned to a specialized division in accordance with his or her expertise, combined the best features of the present system — specialization and merit selection — with the following four improvements:

1. **Public Perception of Fairness of Hearings**

Assigning judges to a separate, unified corps instead of individual departments and agencies would eliminate the present public perception that administrative law judges, particularly those who were previously staff members, have an institutional bias in favor of the agency. Their separation from the departments and agencies who often appear before them as parties would assure actual fairness and impartiality, and restore the public’s confidence that justice is indeed being done.

2. **More Efficient Use of Administrative Law Judges**

Under the present system, the management of judges and cases is divided among twenty-nine separate departments and agencies precluding the effective assignment of administrative law judges in accordance with the varying peaks and valleys in their case loads. Establishing the judges as a unified corps would enable this highly
trained expert resource within the federal government to be efficiently employed to dispose of administrative proceedings.

3. **Significant Cost Savings**

The establishment of a unified corps would allow improved case load management thereby reducing personnel requirements. Furthermore, substantial savings would be derived by eliminating the replication of hearing facilities and support staffs at the twenty-nine departments and agencies. Additional savings and increased productivity would be achieved through the use of modern office equipment and computers throughout the corps.

4. **Availability of Administrative Law Judges to Assist Overloaded Federal Courts**

The bill expressly authorizes federal courts to refer specialized proceedings to administrative law judges serving as special masters. Under this provision, an existing cadre of administrative law judges would be identified as being immediately available to assist the federal judiciary and provide an inexpensive remedy to the pressing problems now facing the federal courts.73

Judge Duane R. Harves, Chief Hearing Examiner, State of Minnesota, Office of Administrative Hearings, next testified in support of the proposed legislation. He noted that on January 1, 1976, Minnesota created a totally independent hearing agency similar to the unified corps that Senate bill 1275 would establish. He stated that the creation of the centralized Minnesota Office of Hearings had dramatically decreased costs of hearings, increased efficiencies, and decreased the time in which decisions were issued.74 He testified that the division of the office into areas of special expertise had preserved specialization and, in every way, the Minnesota experience had been

---

73. *Id.* at 46.
74. *Id.* at 8-11. Judge Harves supplied statistics showing that the cost of hearings to the Minnesota Public Utilities Commission was reduced from $311,330 in fiscal year 1977, the first year his centralized hearings office was in operation, to $184,219 for fiscal year 1982. The cost of hearings conducted for the Department of Commerce fell from $120,000 to less than $60,000. *Id.* at 87. Despite inflation and the doubling of the salaries paid to hearing examiners, Minnesota has not had to increase the amounts budgeted for his office's operation. *Id.* Moreover, the total staff was reduced by forty percent, with the number of examiners reduced by twenty-seven percent. *Id.* at 88. The length of time for decisions to be issued in workers' compensation cases fell from 101 days following the close of the hearing record in December 1981, to forty-six days in May 1983; and, the average backlog per examiner likewise decreased from fifteen cases to four cases. *Id.* at 89.
a resounding success.75

The final panel member, Judge Borowiec, testified on behalf of the Association of Administrative Law Judges, Inc., and its administrative law judges employed at the Social Security Administration, Department of Health and Human Services.76 He reinforced Judge Palmer's testimony and described the agency pressures that have been brought to bear upon the judges at the Department of Health and Human Services.77 In their opinion, he advised, such agency pressures squarely conflicted with the traditional American standard of justice and the enactment of Senate bill 1275 was essential.

The next panel included Herbert E. Forrest, Esq., and Professor Abraham Dash. Mr. Forrest is a partner in the Washington law firm of Steptoe and Johnson and is President of the Federal Communications Bar Association. Professor Dash is a member of the University of Maryland Law School faculty and has written extensively in the field of administrative law. Both Mr. Forrest and Professor Dash supported the bill.

Mr. Forrest was critical of the present system under which administrative law judges "are housed, sustained, and are ranked as (agency) employees. . . . Not only are they seen as having, but

75. Id. at 9-10. Although unable to appear in person, Judge Howard H. Kestin, Director, State of New Jersey Office of Administrative Law, reported similar dramatic benefits under the New Jersey centralized system established in early 1979. Since that time, the number of hearing officers has decreased from 130 to forty-five, each of whom disposed of an average of 226 cases in fiscal year 1982. Despite inflation, the average cost of processing a case decreased from $540 in fiscal year 1980 to $508 in fiscal year 1982. Id. at 75-77.

76. At present, there are 769 administrative law judges at this agency.


The Subcommittee's principal finding is that the SSA is pressuring its administrative law judges to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program. (The SSA has been successful in its efforts as evidenced by recent statistics showing a dramatic decline in the administrative law judge allowance rate in the past year and a half from 67.2 percent in mid-1982, to 51.9 percent in June 1983). The Subcommittee also finds that the SSA is imposing this pressure through several means including the inequitable and unjustified targeting of only allowance decisions and high allowance judges for review pursuant to an amendment sponsored by Senator Henry Bellmon and passed in 1980 (Bellmon Review), and the use of minimum production quotas and productivity goals.

Id. at III.
they do in fact have, however unconsciously, a bias toward the agency which is often a party to the proceeding, and a partiality toward the view of agency staff." On the merits of whether judges should be specialists, Mr. Forrest stated:

"[I]t makes all trial and appellate judges the greater for their experience that they do not sit with the narrow tunnel vision of specialization, but are exposed, not only to new ideas, and new situations, but also to different views and perceptions of old issues, for example, how different agencies look at ratemaking to derive a more comprehensive, balanced and creative decision. It may not be something that can be demonstrated empirically, but I believe it's there."79

Professor Dash stated that the concept of a unified corps of administrative law judges had been one that was proposed as far back as 1946 when the Administrative Procedure Act came into being, and the essential question was not whether a unified corps of federal administrative law judges should be enacted, but, why it still had not been enacted.80

The final witness at the initial hearing was Loren A. Smith, Chairman, Administrative Conference of the United States. Chairman Smith listed the chief benefits of Senate bill 1275 as increased efficiency, cost savings, greater public confidence in the impartiality and independence of administrative law judges, and diversification of the judges' experience. He further observed that it would allow an objective, credible system to be designed for evaluating the judges' performance, and could lead to a more unified, coherent approach by Congress to agency adjudication. As for the bill's negative implications, he cited reduced expertise, the creation of a new bureaucracy, unforeseen interference with the ultimate decisional responsibility of individual agencies, and the need to devise an equitable system for allocating the judges to the agencies. The latter could be allocated by pro rata sharing of adjudicative costs, to prevent drawing too liberally upon the judges' services when not actually needed. On balance, he favored the corps concept embodied in the bill on efficiency grounds, and suggested that an experimental model might be created first for a four year trial period, to include only those judges in the fifteen smallest agencies.81

78. *Hearings on S. 1275*, supra note 66, at 97.
79. *Id.*
80. *Id.* at 98.
81. *Id.* at 108-12. The Administrative Conference consists of ninety-one members.
At the second hearing on September 20, 1983, Mr. Geoffrey S. Stewart and Mr. Joseph A. Morris testified for the Department of Justice and the Office of Personnel Management.82

Mr. Stewart offered the view of the Department of Justice that a change of such magnitude in the national administrative judiciary called for thorough reflection and detailed empirical study. In the Department's opinion, administrative law judges presently had sufficient protections to assure their independence.83 He also expressed concern that the proposal would create a "generalist corps" of administrative law judges, and would "unnecessarily impede the implementation of agency policies."84 Finally, he presented objections to several details of the bill. He took issue with the creation of a collegially functioning Council consisting of the Corps' chief judge and division chiefs as a means of governing the Corps' operation and appointment of new administrative law judges; the creation of a Complaints Resolution Board to discipline judges under a system of peer review; and the creation of a Judicial Nomination Commission to recommend qualified administrative law judges for presidential appointments as members of the Council.

Mr. Morris argued that the legislation would dilute the agency program expertise of administrative law judges and agencies would not be able to rely upon timely processing of hearing requests. He emphasized that there was a need for "agency administrative control over [administrative law judges]."85 Additionally, he objected to the bill's salary provisions.

Althea T. Simmons, Director of the Washington Bureau of National Association for the Advancement of Colored People questioned whether the bill would promote the independence of administrative law judges or increase their efficiency. In her opinion, the Administrative Procedure Act amply insulated administra-
tive law judges from inappropriate agency control. She acknowledged, however, that with respect to the Social Security judges, "the intrusion of that agency upon the decisional independence of the administrative law judges appears highly inappropriate." The more desirable legislative cure for that problem, in her opinion, was to establish an independent Health and Human Services Review Commission to which all Social Security judges should be transferred. She was also skeptical as to the advantages of judicial "generalists" over "specialists" and expressed concern regarding the potential for politicization of a unified corps of administrative law judges.

Next, John T. Miller, Jr., an attorney with many years of experience in administrative law, testified in support of the Bill. Mr. Miller declared that an administrative law judge corps would assure uniform work loads, thereby enabling better use of administrative law judge time. At present, he continued, each agency and department determines whether funds will be provided for the continuing legal education of their administrative law judges. "At a time when the judiciary throughout the nation has come to recognize the value of such education in terms of more effective and efficient administration of justice, there is an obvious deficiency in the opportunities in the funding of continuing education for federal [administrative law judges]." He expressed confidence that a unified corps would better attend to the need for continuing education and training of administrative law judges. Mr. Miller added that emphasis on expertise is often a misplaced value, stressing the example of federal courts where specific expertise has not been a necessary qualification of judges who review agency decisions.

Acting on behalf of an ad hoc committee of fifteen federal administrative law judges who favored continuation of the status quo, Judge Joseph B. Kennedy testified that the current process provided for sufficient independence of federal administrative law judges. He contended that the situation at Social Security was the only known circumstance in which administrative law judges had been subjected to an inappropriate degree of agency control. He suggested that the establishment of an independent review commission to house Social Security judges would be a more appropriate re-
response to that problem. He disagreed that the bill would result in substantial savings; rather the proposal would "interfere with the agency's ability to perform the functions for which they were created." In his opinion, although the bill purported to create specialized divisions, the existence of those divisions would be temporary and readily altered by vote of the Council of the Corps. He concluded that the proposal would create an unwieldy bureaucracy requiring additional employees.

The next witness was Robert H. Joost who testified as a private citizen supporting the creation of a unified corps of administrative law judges. He remarked that an administrative law judge's federal agency employer almost always appeared before the judge as a litigant and that this necessarily created the appearance of unfairness. Similarly, appropriate agency disciplining of a judge was difficult because it might appear to have improperly affected his or her judicial independence. Mr. Joost then submitted wide-ranging recommendations he believed would improve the bill: transferring responsibility for examining future applicants from OPM to the Corps; expanding the types of legal experience which would qualify applicants; further dividing the divisions of the Corps into more specialized subdivisions or panels; and, creating a class of GS 13/14 "Administrative Examiners" to hear less important cases thereby creating a career ladder for administrative law judges.

The final witness, Professor Victor G. Rosenblum testified that in his 1975 study for the Administrative Conference of the United States, he recommended that the time was not yet right for the creation of an administrative law judge corps. As a witness in 1983, however, he stated: "I'm convinced that now is the hour for such a Corps." He then reviewed his rationale in 1975 and explained how three of the four factors which accounted for his position at that time had significantly changed between 1975 and 1983. The factor he found unchanged was proof that the operation of the administrative law judge program would not be impaired by political corruption or

---

91. Id. at 184.
92. Id. at 191-93. Mr. Joost is a former member of the professional staff of the Senate Judiciary Committee and at present is a hearing officer for the Commodity Futures Trading Commission.
93. Id. at 194. Professor Rosenblum has been a professor of law at Northwestern University since 1958, is a past chairman of the Administrative Law Section of the American Bar Association, and is the current vice-president of the American Judicature Society. His article entitled Contexts and Contents of "For Good Cause" As Criterion for Removal of Administrative Law Judges: Legal and Policy Factors also appears in this symposium.
other improper influences.\textsuperscript{94}

One factor which had changed was the failure of a compromise made between the Administrative Conference and the Civil Service Commission in 1962. Under that compromise the Administrative Conference had refrained from recommending removal of the hearing examiner program from the Commission on the basis of its promise to institute improvements responsive to a detailed critique of the Commission's operation of the program by Professor Wilbur Lester, then staff director of the Administrative Conference's Committee on Personnel.\textsuperscript{95} Professor Rosenblum stated that the Commission's promise was not kept:

The period of constructive implementation of the Conference's 1962 recommendation which was exemplified by such promising steps as utilization of a comprehensive written examination, involvement of renowned practitioners and members of the academic community in the oral phase of the examination, addition of trial experience as one basis for qualification for appointment, and establishment of the La Macchia Committee to study multiple dimensions of the status and utilization of administrative law judges, has long since lapsed into limbo.

The change in agency title in 1979 from Civil Service Commission to Office of Personnel Management and the division of functions between OPM and the Merit Systems Protection Board wrought no concomitant renewal of reformist energy or zeal. . . .

General Accounting Office studies of management of the administrative law process offer no reason to believe that [OPM] has made a salient priority of the implementation or evaluation of proposals for improving roles, functions and performance of [administrative law judges]. On the contrary, GAO has been overtly critical of management of the administrative law process.\textsuperscript{96}

Another factor which had changed was the development of empirical data substantiating the achievement of major benefits through implementation of central panel systems in seven states. The new evidence, he found, demonstrated "clearly that the corps concept is practicable and feasible."\textsuperscript{97}

\textsuperscript{94} Id. \\
\textsuperscript{95} Id. at 194-95; see W. LESTER, REPORT ON SECTION II HEARING EXAMINERS TO THE COMMITTEE ON PERSONNEL OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 28 (1962).

\textsuperscript{96} Hearings on S. 1275, supra note 66, at 195-96.

\textsuperscript{97} Id. at 196-97. The seven States are California, Colorado, Florida, Massachusetts, Minnesota, New Jersey and Tennessee. See generally M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN
Professor Rosenblum concluded that the Civil Service Commission and its successor, the Office of Personnel Management, had failed to follow through on the LaMacchia Committee recommendations and failed to develop an effective administrative law judge program: a “fresh start through the corps concept is warranted, promising and practicable in Senate bill 1275.”

V. THE ARGUMENTS FOR AND AGAINST ENACTMENT

Persuasive arguments for the establishment of federal administrative law judges as an independent, unified corps through enactment of Senate bill 1275 have been advanced by the practicing bar, eminent professors of law, and the administrative law judges.

Opponents, however, argue that with the exception of the Social Security Administration (SSA), there is no evidence of agency interference with the judicial functions of administrative law judges. They suggest that the more appropriate legislative response would be to vest jurisdiction over social security cases in a new, independent review commission to which administrative law judges now employed by SSA would be transferred. Additionally, opponents have articulated fears that enactment of the bill will lead to politicization of the administrative law judge system, a reduction of agency efficiency through agency loss of control of their dockets, the replacement of “specialists” by “generalists,” and the creation of an even more expensive, unwieldy bureaucracy.

The strength of the arguments favoring the Corps’ establishment perhaps are measured best in the context of these doubts and fears.

A. Interference With Judicial Functions of Administrative Law Judges by Agency Employers

Witnesses who testified in support of the Heflin bill did not un-

---

98. Hearings on S. 1275, supra note 66, at 197-98. See supra note 37 and accompanying text. This study was conducted by a panel of administrative law judges chaired by the Civil Service Commission’s then Deputy Counsel.


100. See supra text accompanying notes 88-89.

101. See supra text accompanying note 92-99.

102. See supra text accompanying notes 67-77.

103. See supra text accompanying notes 82-87.
undertake a comprehensive survey of practices at every federal department and agency which interfere with the judicial functions of administrative law judges in their employ. The focus on agency interference and pressuring was restricted to the practices at the SSA, the current subject of extensive media coverage\(^{104}\) and a congressional oversight hearing which resulted in the issuance of a severely critical report.\(^{105}\)

The report documented SSA's pressuring of its administrative law judges to decide against claims by the disabled.\(^{106}\) It charged that pressure was exerted through the use of minimum production quotas, targeting decisions by high allowance judges for agency review, improperly using internal guidelines to bind its judges, and prohibiting them from following selected court precedents.\(^{107}\) A New York Times editorial\(^{108}\) also charged that these practices by the SSA were in response to a decision by the administration to eliminate fraudulent claims and reduce the $18 billion year expended to pay 4 million workers and their dependents. SSA's responsiveness to the administration's policies caused it to use its position as the employer of administrative law judges to interfere with their judicial functions.\(^{109}\)

Every federal agency where administrative law judges are employed is motivated to be responsive to its administration's policies. It is more difficult, however, to document equivalent pressuring by other agencies. Because SSA employs 769 administrative law judges\(^{110}\) in approximately 100 offices, it necessarily communicates its policy in writing. Other agencies, that have a smaller cadre of judges located in a single office, communicate orally. Even so, instances of interference with the judicial functions of administrative law judges by other agencies have surfaced.\(^{111}\)

In 1976, the Undersecretary of the Interior disagreed with a de-

\(^{104}\) See, e.g., Give the Disabled a Grandfather, N.Y. Times, Oct. 18, 1983, at A30, col. 1.; Public Broadcasting Station Documentary, Who Decides Disability? (June 20, 1983) (Transcript available through WGBH-TV, 125 Western Avenue, Boston MA 02134).

\(^{105}\) See supra note 77.

\(^{106}\) Id.

\(^{107}\) Id.


\(^{109}\) Id.


cision by an administrative law judge at that agency. Instead of simply reversing the decision, as was the agency's right, the Undersecretary placed an official reprimand in the judge's personnel file, placing the judge's qualifications under a cloud and hindering his opportunities for future promotion or new employment. The reprimand was later expunged pursuant to an opinion by the Attorney General, but only after the expenditure of considerable legal fees which the Federal Administrative Law Judges Conference helped to defray. In finding that the reprimand conflicted with the APA, the Attorney General nonetheless recognized the right of an agency to reprimand its judges as well as its right "to assign or withhold parking spaces, . . . establish working hours, [and] assign secretarial assistance."113

Administrative law judges at every federal agency are vulnerable to such discipline. The fact that wrongful actions may eventually be reversed after costly litigation provides little comfort.

Although the APA requires administrative law judges to be assigned to cases in rotation,114 the Supreme Court in Ramspeck interpreted the modifying words "so far as practicable" to allow assignments on the basis of "the experience and ability of the examiner available."115 This interpretation has permitted questionable agency practices in making case assignments. PATCO v. Federal Labor Relations Authority,116 contains a disturbing finding respecting the assignment of the Air Controller's strike case: "On August 4, 1981 [Federal Labor Relations Authority (FLRA) members] . . . met with [FLRA's Chief Administrative Law Judge]. . . at lunch to discuss the procedural aspects of the PATCO case. During that discussion, it was suggested that [the Chief Judge] . . . appoint a capable judge, preferably himself, to hear the PATCO case . . . ."117 FLRA's Chief Judge complied and assigned the case to himself.

On September 5, 1980, in a hearing before the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, FTC's Chief Judge testified that all eleven of the FTC's administrative law judges, at one time or another, served as staff attorneys at the Commission.118 He further confirmed that in

112. Id.
113. Id.
115. 345 U.S. at 139-40.
116. 685 F.2d 547 (D.C. Cir. 1982).
117. Id. at 619.
118. Administrative Law Judge System: Hearings Before the Subcomm. for Consum-
August 1978, the FTC judge assigned to a case involving the Kellogg Company advised the agency of his plans to retire. The FTC retained him on the case through a special contract which gave him both his pension and salary while he served "at the will of the appointing officer." Kellogg, upon being informed of the arrangement, vigorously objected and the judge was replaced.

Agency rules of practice are typically prepared by their general counsel. This can result in rules that favor the agency over the other parties who may appear before its administrative law judges. The Heflin bill's provisions for the establishment of uniform rules of practice by the Corps, led one agency official to make this enlightening protest:

§ 565(d)(7) authorizes the policymaking body of the Corps to "prescribe the rules of practice and procedure for the conduct of proceedings before the Corps." As Oliver Wendell Holmes once said, "substantive law is secreted in the interstices of procedure." The effect of § 565(d)(7) will be to surrender, in subtle ways, part of the Agency's substantive rulemaking authority to the Corps.

The NLRB's rules of practice were before the Supreme Court in NLRB v. Robbins Tire & Rubber Co. which upheld the board's right to bar prehearing discovery. However, this one-sided aspect of its rules of practice evoked the following comment from Justice Powell:

I do not read the Act to authorize agencies to adopt or adhere to nonstatutory rules barring all prehearing disclosure of investigatory records. The Court reasons, . . . that such disclosure — which is deemed "premature" only because it is in advance of the time of release set by the agency — will enable "suspected violators" . . . to learn the Board's case in advance and frustrate the

120. *1980 Hearings*, supra note 118, at 117.
121. *Id.*
122. The Department of Agriculture's rules of practice, for example, prohibit its administrative law judges from dismissing on the pleadings, any of the complaints Department lawyers file in enforcement proceedings. 7 C.F.R. § 1.143(b) (1983). Conversely, in proceedings where Agriculture defends petitions seeking relief, the judges are directed to entertain its motions to dismiss petitions for being defective in form. *Id.* § 900.52(c).
123. Environmental Protection Agency Memorandum from Ronald L. McCallum, Judicial Officer, to Virginia Gibbons, Office of Legislation (July 14, 1983).
proceedings or construct defenses which would permit violations to go unremedied. . . . This assumption is not only inconsistent with the congressional judgment expressed in the Federal Rules of Civil Procedure that “trial by ambush”. . . may well disserve the cause of truth, but it also threatens to undermine the Act’s overall presumption of disclosure, at least during the pendency of enforcement proceedings.125

The Senate Subcommittee on Oversight of Government Management described SSA’s refusal to accord precedential weight to selected court decisions as a policy of “non-acquiescence.”126 This policy of non-acquiescence is not limited to SSA.127 The right of agencies to engage in these policies involves complex and difficult constitutional questions.128 Enactment of Senate bill 1275 would not in itself resolve the constitutional problems, but its provisions do call for a study, division by division, examining the ways in which agencies review decisions by administrative law judges. This kind of review undertaken by the Corps’ Council would indeed be an important first step.

Even if no constitutional issues existed, when an agency directs its administrative law judges to ignore otherwise binding court precedents, the judges are being asked to give priority to their duties as employees over their judicial responsibility.129

125. Id. at 253 (Powell, J., concurring and dissenting) (citations omitted).
126. See supra note 77.
127. The Subcommittee indicated that SSA argued “its policy was no different than that of the Internal Revenue Service (IRS).” The Role of the Administrative Law Judge, supra note 77, at 27.
128. The subcommittee report referred to three principal constitutional issues: (1) the doctrine of separation of powers; (2) the doctrine of stare decisis; and (3) the due process rights of litigants. Id. at 28-29. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Yellow Taxi Co. of Minn. v. NLRB, 721 F.2d 366 (D.C. Cir. 1983); Frock v. United States R.R. Retirement Bd., 685 F.2d 1041 (7th Cir. 1982), cert denied, 103 S. Ct. 1185 (1982); S & H Riggers & Erectors, Inc. v. OSHRC, 659 F.2d 1273 (5th Cir. 1981); Jones & Laughlin Steel Corp. v. Marshall, 636 F.2d 32, 33 (3d Cir. 1980); ITT World Communications v. FCC, 635 F.2d 32, 43 (2d Cir. 1980); Ithaca College v. NLRB, 623 F.2d 224, 228-29 (2d Cir.), cert. denied, 449 U.S. 975 (1980); Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 458, 864 (7th Cir. 1980); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979); see also Siedlecki v. Schweiker, 563 F. Supp. 43, 46-48 (W.D. Wash. 1983); Chee v. Schweiker, 563 F. Supp. 1362, 1364-65 (D. Ariz. 1983); Hillhouse v. Harris, 547 F. Supp. 88, 93 (W.D. Ark. 1982), aff’d, 715 F.2d 428 (1983).
129. The Senate Subcommittee stated the problem as follows:

The [administrative law judges] are also detrimentally affected by the SSA’s policy of non-acquiescence. The [administrative law judges] predicament was described in Hillhouse v. Harris, when the court indicated that the [administrative law judges] are caught in the most unenviable position of “trying to serve two masters; the courts and the Secretary of Health and Human Services.”
The problem caused by agency refusals to accede to court decisions interpretory of the laws agencies administer was stated by Professor Jaffe:

The scope of judicial review is ultimately conditioned and determined by the major proposition that the constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system. . . . An agency is not an island entire of itself. . . . The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; . . .

B. Politicization

Those who would maintain the status quo argue that the Corps' establishment must ultimately lead to destruction of the present system for merit appointment of federal administrative law judges. They fear that as administrative law judges stand separate and apart from agencies, and have heightened visibility, there will be a concomitant increase in pressures to discard the merit selection system. They view the bill's provisions for Presidential appointment of the chief judge and division chiefs as a template which will eventually apply to all administrative law judge appointments.

The fear is unfounded. The bill does not alter the present sys-

Moreover, this situation is demoralizing to the [administrative law judges] who know that their judicial efforts may be meaningless. If they adhere to the SSA's non-acquiescence ruling, their decisions may be overturned in Federal court because they failed to follow precedent; and if they adhere to the courts' decisions, their decisions may be overturned by the SSA through the Appeals Council. To say the least, this practice creates a professional and judicial quandary for the [administrative law judge].”


130. In Yellow Taxi Company of Minneapolis v. NLRB, 721 F.2d 366 (D.C. Cir. 1983), the court stated: "No court can overlook an agency's defiant refusal to follow well established law. . . . Some members of the Board have historically arrogated to themselves the authority to 'disagree' with judicial precedent." Id. at 382. In justifying its refusal to give precedential weight to a decision by a United States circuit court, another agency explained the decision was the result of "judicial illiteracy," or the court "was so busy that it brushed the case aside in order to avoid the onerous chore of giving full consideration to the case," or was an attempt to avoid "summary reversal by the Supreme Court" through "disguise" of the court's real motive. In re Shatkin, 34 Agric. Dec. 296, 307-13 (1979) (discussing Economou v. USDA, 494 F.2d 519 (2d Cir. 1974)).


132. See supra text accompanying notes 82-87 & 90-91.
tem of merit selection of administrative law judges. Nor is there any reason to believe that its passage will lead to modification of this system.

The bill requires council members to be selected from administrative law judges who possess five years prior experience. Screening of applicants would be administered by a panel selected by two federal judges, the Chairman of ACUS, and leading members of the bar and the administrative law judge community. These requirements, taken together, make it unlikely that the positions will go to those whose only qualification is loyalty to the political party in power. Moreover, provisions in the bill for processing complaints of incompetence or misconduct are equally applicable to council members and may be instituted by anyone, including administrative law judges who believe their functions have been improperly influenced by council members.

It has also been suggested that placing administrative law judges under the control of politically appointed division chiefs and the chief judge, will lead to politicization of the Corps, but such a system would be far less enmeshed in politics than the present one which subordinates the judges to political appointees. Currently agency heads are committed to the policies of the administration in office, whereas the chief judge and division chiefs of an independent Corps would have no such commitments.

C. Reduced Efficiency When Agencies Lose Control of Their Dockets and “Generalists” Replace “Specialists”

Critics of the bill insist that because a unified corps will not be as responsive to agency needs and priorities, case backlogs must result unless agencies retain control over the dockets. As with any other government agency, however, the Corps will be answerable to the President and the Congress for budgeted funds and must be responsive to such criticisms. Virtually every tribunal has procedures for according time priorities to matters requiring expedited treatment. Similar procedures could be mandated for the Corps.

134. See id. § 4.
136. See Hearings on S. 1275, supra note 66, at 133-35 (statement of Geoffrey S. Stewart, Deputy Assistant Att’y Gen., Office of Legal Policy, Dep’t of Justice); id. at 294-95 (statement of C.M. Butler III, Chairman, FERC).
When the Comptroller General studied the administrative law process, he concluded that the delays that have plagued it are not attributable to administrative law judges. There are two major causes for delays in the administrative process — extensive agency review of administrative law judges' decisions and the use of more complex judicial procedures than necessary to resolve some disputes. The positive aspect of reduction in agency control over dockets is that opportunities to manipulate or predict case assignments would end.

Agency officials have also voiced concern that program expertise may be lost through the Corps' establishment. The bill, however, recognizes the importance of specialized expertise and provides for its continuance. The Corps would initially consist of seven divisions which the Council could expand to ten. The Council could also achieve more intensive specialization within the divisions through regulations establishing special panels or sections.

The Corps' divisions have been structured in accordance with major specialties of administrative law. Judges presently employed by federal agencies would be assigned to divisions on the basis of their existing legal expertise. The powers conferred upon the Corps' Council permit it to require new judges or judges seeking transfers to participate in appropriate training programs prior to assignment to a division. Optimally, a division chief would assign complex cases from an agency to judges who previously served there or otherwise have proven expertise in that area. As each judge acquired experience in new fields of expertise, all would eventually be qualified to hear any case assigned to the division.

Many knowledgeable educators, practitioners and members of the judiciary unequivocally state that the importance of specialization is overemphasized. Those who advocate to the contrary, exaggerate the time it would take to learn various specialties of administrative law. As John T. Miller, a private practitioner of the Contract Disputes Act of 1978, promulgated by Office of Management and Budget for all federal boards of contract appeals, establishes both expedited procedures for small claims and accelerated procedures for various other cases. 10 C.F.R. § 1023.20 (1983).


140. One of the authors of this article serves the Department of Agriculture which administers no less than fifty separate statutes. Each time the responsibility for a statute
law who testified at the Senate Judiciary Committee hearing asserted: "It has not been in the Anglo-American tradition to appoint lawyers as judges on the basis of a narrow, and, perhaps, temporary expertise... No lawyer should be appointed an [Administrative Law Judge] who lacks the energy, intellect and discipline to acquire needed expertise."  

D. **The Corps Will Not Be a More Expensive, Unwieldy Bureaucracy**

There is a current perception that an agency, once created, rapidly expands its staff and budget to become a self-perpetuating empire. This is the *ratio decidendi* of the new sunset laws designed to cause agencies to self-destruct unless they can affirmatively demonstrate their ongoing usefulness. Those who oppose the establishment of administrative law judges as an independent, unified corps, project a similar self-aggrandizing scenario.

But the work of the Corps will never be of its own making. Every adjudicative function Congress entrusts to the Executive Branch creates a correlative need for fair and impartial arbiters. The proposed legislation merely assembles, under one supervisory authority, those who hear APA-type proceedings. The work will be there whether or not the Corps is established. The costs of conducting proceedings with a corps in place should be less than under the present system.

There is no practical method at present for assigning judges to proceedings in a meaningful relationship to the actual caseloads at each agency.Offsetting peaks and valleys in agency needs for hearings by administrative law judges are not now adjusted.

The OPM administered loan program has not solved this prob-

---

141. *Hearings on S. 1275, supra* note 66, at 173.
lem. Although an excellent theoretical solution, it conflicts with pragmatic agency concerns. The same reason given by many agencies in opposition to the Corps’ establishment - lack of agency control - often persuades agencies to assign non-APA protected in-house employees to hearings, where possible, rather than borrowing unknown administrative law judges. More importantly, lending agencies must concede that their judges are underworked, which could imply that they have too many judges, prosecuting attorneys and other personnel, and could result in reductions in appropriated funds and staff.

The establishment of a corps should not increase any of the major costs of maintaining administrative law judges. These costs consist of payroll, physical facilities and travel. The Corps’ anticipated consolidation of functions and elimination of duplication should decrease each of these cost components. Merely because the Corps will be a new agency does not mean there will be additional costs. At present, administrative law judges frequently make arrangements through the General Services Administration for the use of hearing room facilities. There would be no change in this practice. The vast majority of administrative law judges are presently located throughout the nation in GSA owned or leased buildings. There would be no reason to move those judges.

The eventual consolidation of administrative law judges located in Washington will decrease costs by reducing the number of square feet required for hearing rooms, libraries, etc. The bill provides for the transfer of support personnel from agencies that now employ administrative law judges. Therefore, the establishment of a corps will not result in the hiring of additional personnel. The employment of modern computers and other equipment by the Corps should eventually reduce the size of its staff.

These anticipated cost savings have been experienced in states which have implemented similar centralized systems of administrative adjudication. Furthermore, as public confidence in the administrative judiciary is increased, appeals to federal courts should
decrease with resulting cost savings to both the executive and the judicial branches of the federal government.

VI. CONCLUSION

Enactment of the Heflin bill would rectify a fundamental conflict between requisites of the Constitution and the present system for employment of federal administrative law judges.

They are presently housed as subordinate employees of agencies which may be motivated to interfere with judicial functions. The most striking example of actual interference is provided by the Social Security Administration. These practices conflict with the Due Process Clause of the Constitution.\textsuperscript{144}

It is no answer to these arguments that the agency interferences were in pursuit of honorable ends which the agency sought to implement in the most efficient manner. "Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials."\textsuperscript{145}

Eight states have now recognized that the role of the administrative judiciary is inconsistent with their employment by individual regulatory agencies and departments of the executive branch.\textsuperscript{146} The use of central panel systems by those states have proven successful and saved money. There is every reason to believe that the federal government would enjoy similar cost savings by establishing its administrative law judges as an independent, unified corps.

Bernard G. Segal, past president of the American Bar Association, perhaps best explained the essential reason why an independent administrative judiciary is needed:

Consider, for example, the unavoidable appearance of bias when

\textsuperscript{144} A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. Our system of law has always endeavored to prevent even the probability of unfairness. The Supreme Court has said that "[e]very procedure which would offer a possible temptation to the average man as a judge... to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510, 532 (1927).


\textsuperscript{146} See supra note 97.
an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party. One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder.

A truly competent and impartial administrative judiciary is a precious prize indeed. But even more than a prize, such an administrative judiciary is essential if our administrative justice system is to function successfully under the crushing weight of new legislation and new cases and in the fishbowl environment in which all of government finds itself as we embark upon our third century as a nation.147

The authors join with Mr. Segal and the many other distinguished members of the bar who favor the corps concept. We believe that enactment of the Hedin bill will assure the fairness of administrative adjudications and result in more efficient employment of administrative law judges with consequential cost savings to the federal government.

---