

# EXECUTIVE BRANCH ADJUDICATIONS IN PUBLIC SAFETY LAWS: ASSESSING THE COSTS AND IDENTIFYING THE BENEFITS OF ALJ UTILIZATION IN PUBLIC SAFETY LEGISLATION

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It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.<sup>1</sup>

—Oliver Wendell Holmes, Jr.

## I. INTRODUCTION AND PREMISES

Among the powers of the legislative branch is the power to create inferior courts.<sup>2</sup> In the exercise of this power, Congress not only establishes courts of the judicial branch, but also from time to time invests in the executive branch the power to adjudicate a wide range of issues, including many that are closely related to public safety. In this process of delegation, the legislative branch cedes to the executive branch real judicial power: it transfers to the executive branch not only the *authority* to adjudicate, but also the *responsibility* to ensure fair treatment of all whose cases are brought to the forum. This delegation, in turn, is replicated throughout the nation in state and local governments, forming a complex fourth branch of government that is heavily dependent upon public trust

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1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard University Press 1963) (1881), *quoted in* JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW* 2-3 (5th ed. 2002).

2. U.S. CONST. art. III, § 1.

and confidence in the abilities of the executive branch adjudicators to provide a fair hearing to all participants.

In the aftermath of the attacks on the United States on September 11, 2001 (“9/11”), the executive and legislative branches of government have begun to reevaluate how to better protect the public. Through legislative initiatives like the USA PATRIOT Act<sup>3</sup> and the Homeland Security Act,<sup>4</sup> and through executive orders and regulatory changes, the federal government has begun the process of examining weaknesses in our public safety systems, and has inspired like action in state and local governments nationwide. Inevitably, with these reassessments will come a need for innovations in the manner by which governments treat those responsible for making threats to our public safety, and to those who may be accused of making such threats.

This Article examines changes in executive adjudication, primarily at the state level, in the wake of the attacks of 9/11. It takes as its first premise the idea that lawmakers have reacted to the attacks by transferring substantial judicial power to the executive branch, in order to grant to the executive (Governor or President) additional resources to preempt threats to our national security, at all levels of government. Through an examination of federal and state legislation implemented in reaction to the attacks, the Article proposes that this genre of legislation recognizes that the administrative and executive power of government can be an effective and very efficient means of providing prompt and meaningful process in legislative schemes designed to provide homeland security.

Its second premise is that while the executive branch is capable of providing all process that is due (and then some), among the various administrative law systems there are significant differences in the amount of protection these systems provide against governmental overreaching. Executive adjudication systems like the central panel of administrative law judges, for example, vary widely in key components—such as the level of independence attributed to the adjudicator and the institutional structure used to provide adjudicative services. This Article suggests that these variations may make a significant difference in public confidence in the administrative law system, particularly where citizens are required to surrender long-held constitutional protections, such as those guarding against unwarranted searches and seizures, the ability to confront one’s accusers, and access to an impartial adjudicator when faced with threats to protected liberty or property interests.

The third premise of the Article is intertwined with its goal: in order for lawmakers to craft effective adjudication measures that use the executive branch as adjudicator, care must be taken to select those administrative systems that foster public confidence while still serving the administration effectively and efficiently. Threats to public safety in the United States must be addressed at all stages: in advance of the threat, during any emergent situation, and after the fact.

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3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered titles and sections of the U.S.C.) [hereinafter USA PATRIOT Act].

4. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C.) [hereinafter Homeland Security Act of 2002].



At each stage administrative processes will play an ever-increasingly important role in law enforcement and homeland security. Striking a proper balance between individual liberty and public safety will require that lawmakers identify the administrative processes most likely to win public support. That balance will be achieved only by carefully crafting highly responsive and adaptive administrative adjudication systems designed to ensure prompt and effective hearings in a manner consistent with our national legacy of affording due process to all.

## II. RETOOLING ADJUDICATIVE ROLES IN THE WAKE OF 9/11

Shortly after the terrorist attacks against the United States on 9/11, lawmakers throughout the country responded by examining a wide range of public safety systems. Their search was intended to detect weaknesses in threat detection, border insecurity, and any number of public safety systems that were weak enough to allow enemy assailants into the United States. Government surveillance tools were sharpened and executive authority to gather information was exponentially expanded through the USA PATRIOT Act. Border security, immigration, transportation regulation, and banking quickly became the focus of measures designed to enhance our nation's security infrastructure. At the state and local level, lawmakers quickly enacted legislation designed to provide for public safety in the event of additional attacks, while at the same time enacting legislation complementary to the federal legislative initiatives.

In these schemes, there is a conscious and deliberate effort to shift both decision-making and fact-finding power to the executive branch. This shift makes sense: the executive branch has long been entrusted with decision-making powers, and administrative process anticipates that the exercise of such powers should, generally, be conducted through an open and adversarial process, such as through "some kind of hearing."<sup>5</sup>

### A. *Identification of Judicial Power in the Executive Branch*

Because the tools used most by these executive branch decision-making offices are also used in the judicial process—including notice of charges, an opportunity to be heard, the right to have counsel present, etc.—the process is characterized as quasi-judicial. As the Supreme Court observed in the context of proceedings under the federal Administrative Procedure Act,

[t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions.<sup>6</sup>

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5. Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1267 (1975) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974)).

6. *Butz v. Economou*, 438 U.S. 478, 513 (1978) (citing 5 U.S.C. § 556(c) (1976)).

But true judicial power is not so freely granted; indeed, such power is intended to be largely confined, subject to restraint in the form of the requirements of separate functions of government from executive, to legislative, to judicial. While Congress has the power to create inferior courts and make judicial appointments, the Constitution imposes important limits to such power. By limiting this power, the Framers “could ensure that those who wielded it were accountable to political force and the will of the people.”<sup>7</sup> This power of appointment is necessarily concentrated, as a means of preserving the democratic force necessary to a three-part government: “The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers’ conclusion that widely distributed appointment power subverts democratic government.”<sup>8</sup>

Thus, we see that when Congress delegates to the executive branch a judicial power, it must do so cognizant of the need to maintain accountability through the democratic process. In *Freytag v. Commissioner*, the Court examined the creation of the United States Tax Court,<sup>9</sup> which permitted the court’s Chief Judge to appoint inferior “special trial judges.” Against a challenge that the assignment of complex tax cases to such a judge violated the Appointments Clause of the Constitution,<sup>10</sup> the Court observed that the power delegated by Congress to this court was indeed judicial: “Our cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States.”<sup>11</sup> Unlike typical administrative adjudicative bodies, however, the Tax Court’s “exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions and provides the limit on the diffusion of appointment power that the Constitution demands.”<sup>12</sup> The Tax Court’s decisions are reviewed by the court of appeals and not, as in the case of appeals taken under the federal Administrative Procedure Act (APA), by the district court, and are subject to a standard of review different from that applicable under the APA: the court of appeals reviews Tax Court decisions “in the same manner and to the same extent as decisions of the district court in civil actions tried without a jury.”<sup>13</sup>

*Freytag* makes clear that a key component of congressional delegation of judicial authority is whether the authority granted is judicial in nature. The Court explained this power thus: “[t]he Tax Court exercises judicial, rather than executive, legislative, or administrative power. It was established by Congress to interpret and apply the Internal Revenue Code in disputes between taxpayers and the Government. By resolving these disputes, the court exercises a portion

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7. *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991).

8. *Id.* at 885.

9. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (codified as amended at 26 U.S.C. § 7441 (1988)).

10. U.S. CONST. art. II, § 2, cl. 2.

11. *Freytag*, 501 U.S. at 889.

12. *Id.* at 892.

13. 26 U.S.C. § 7482(a)(1) (2000).



of the judicial power of the United States.”<sup>14</sup> Noted also is the absence of any competing role: it is “neither advocate nor rulemaker. As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions.”<sup>15</sup> Thus, we know that in the exercise of these decision-making powers, a process is judicial in nature if it resolves disputes between the government and the governed by construing applicable authorities through an adjudicative process that is structurally separated from roles of advocacy or rulemaking.

### B. *The “Judicial” Nature of Post-9/11 Delegations*

Drawing upon the definition of judicial power from *Freytag*, the legislative initiatives taken after 9/11 warrant some study. Notably, have lawmakers transferred judicial power to the executive branch in an effort to strengthen the hand of the executive officer? Has Congress given the President power to engage in a deliberative and adjudicative process that until this point was within the province of the judicial branch? And if so, have appropriate checks and balances been built into the new structures to provide for the integrity of the newly configured adjudication systems?

The abrogation of a judicial role in favor of a role by the executive branch is unmistakable in Military Order of November 11, 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism (“the Order”).<sup>16</sup> By this Order, the President “suspend[ed] the rights of indictment, trial by jury, appellate relief and habeas corpus for all non-citizen persons accused of aiding or abetting terrorists.”<sup>17</sup> The Order anticipates the creation of military commissions that will try suspected terrorists, and only the Secretary of Defense will sit in review of the final decisions of these commissions.<sup>18</sup> Similarly, in the USA PATRIOT Act, the Attorney General is directed to take into custody “any alien that he has ‘reasonable grounds to believe’ is ‘engaged in any other activity that endangers the national security of the United States.’”<sup>19</sup> Instead of using established immigration procedures, “[i]f an immigrant is detained for purposes related to immigration under this provision, there is no statutory or constitutional authority to control the length of the detention. This has frequently resulted in the indefinite detention of non-resident foreigners in U.S. detention facilities and prisons with no remedy.”<sup>20</sup>

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14. *Freytag*, 501 U.S. at 890-91.

15. *Id.* at 891.

16. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Detention of Non-Citizens].

17. John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”*: A Constitutional Analysis of the USA PATRIOT Act and the Justice Department’s Anti-Terrorism Initiatives, 51 AM. U. L. REV. 1081, 1118 (2002).

18. *Id.* at 1119 (citing Detention of Non-Citizens, *supra* note 16, at 57,836).

19. *Id.* at 1126 (citing USA PATRIOT Act § 412, 8 U.S.C. § 1226a (Supp. II 2002)).

20. *Id.* at 1127.

Perhaps more closely akin to traditional administrative process, the Attorney General has the authority under the USA PATRIOT Act to seize assets without due process, upon determining that the property belongs to someone whom the Attorney General determines “has planned, authorized, aided, or engaged in such hostilities or attacks against the United States.”<sup>21</sup> This authority, according to the Attorney General, is designed to permit the government to “follow the money,” and to do “more than a freeze. We must be able to seize.”<sup>22</sup> The statute’s terms “do not grant judicial review for these seizures, and any judicial review of a determination based on classified information will be conducted *ex parte*.”<sup>23</sup>

### C. State-Based Legislation in Response to 9/11

Largely following the lead of the Homeland Security Act,<sup>24</sup> states have taken legislative action focusing on information and infrastructure protection, transportation security, science and technology, and emergency response. According to Professor O’Reilly, each state has laws in effect for civil defense and emergency preparedness, and all but three as of 2002 were participants (to varying degrees) in the Emergency Management Assistance Compact (“EMAC”).<sup>25</sup> The EMAC is an interstate compact designed to provide the means for states to share resources and information in time of emergency, “whether arising from natural disaster, technological hazard, man-made disaster, civil emergency aspects of resources shortages, community disorders, insurgency, or enemy attack.”<sup>26</sup> Basing its actions upon legislative findings that there is a need for “intergovernmental planning and programming at the state level,” shortly after the attacks of 9/11, the District of Columbia, for example, joined the forty-eight states that are now members of the EMAC.<sup>27</sup>

Law enforcement schemes were broadly reexamined by the states in the aftermath of the attacks, with a particular eye towards public safety enforcement programs. Minnesota Commissioner of Public Safety, Rich Stanek, summarized that state’s efforts to address gaps in the regulation of transportation and licensing that seemed to contribute to shortfalls in homeland security. Commissioner Stanek identified licensing weaknesses which surfaced after the attacks:

In the weeks and months before September 11, local law enforcement in various states had contact with several of the hijackers. Unfortunately,

21. USA PATRIOT Act, § 106, 50 U.S.C.A. § 1702(a)(1)(C) (West 2002).

22. Whitehead & Aden, *supra* note 17, at 1128 (quoting *Homeland Defense Before the Senate Comm. on the Judiciary*, 107th Cong. (2001)) (written testimony of the Hon. John Ashcroft, Attorney General)).

23. *Id.* (citing USA PATRIOT Act § 106, 50 U.S.C.A. § 1702(c)).

24. Jonathan Thessin, *Recent Development, Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513, 513 (2003).

25. James T. O’Reilly, *Planning for the Unthinkable: Environmental Disaster Planning in an Age of Terroristic Threats*, 9 WIDENER L. SYMP. J. 261, 270 (2003).

26. Emergency Management Assistance Compact, Pub. L. No. 104-321, § 1, 110 Stat. 3877, 3877 (1996).

27. D.C. CODE ANN. §§ 7-2331, 7-2332 (2001).



law enforcement did not know whom they were dealing with because of a failure to use technology. Consider the following three examples:

(1) In July 2001, Mohammed Atta, considered the leader of the September 11 hijackers, was stopped by police in Tamarac, Florida, and ticketed for an invalid license. Atta ignored the ticket and a bench warrant was issued for his arrest. When Atta was stopped again for speeding a few weeks later in a nearby town, neither his warrant nor the fact that he was on a CIA “watch list” came up on the police officer’s squad car computer. Atta was released with only a warning.

(2) In August 2001, Hani Hanjour, who was aboard the airliner that crashed into the Pentagon, was stopped for going 50 miles per hour in a 30 miles-per-hour zone. Police released Hanjour with only a traffic ticket because they did not know he had entered the United States on a student visa, failed to provide INS officials with a valid address, and never actually attended any classes.

(3) Just two days before the September 11 attacks, Ziad Samir Jarrah, believed to have piloted the airplane that crashed into the field in Pennsylvania, was pulled over by Maryland state troopers for going 90 miles per hour in a 65 miles-per-hour zone. Jarrah gave officers a valid driver’s license but with an invalid address. Again, the police officer did not know that Jarrah was on a CIA watch list. The officer simply let the eventual terrorist go on his way. After September 11, the car that Jarrah was driving was found parked at the Newark, New Jersey, airport. Jarrah’s speeding ticket was still in the glove compartment.<sup>28</sup>

The adjudicative tasks relevant to these three examples, including the adjudication of minor traffic citations, frequently fall to administrative law judges. Even before 9/11, state traffic schemes ceded to the executive branch fact-finding responsibilities over minor traffic cases. Given the ubiquity of administrative processes affecting driver licensing, it would seem inescapable that administrative adjudicators will at some point be responsible for making initial findings of fact concerning the rights of drivers who may come under increased scrutiny based on post-9/11 legislation. If, as Commissioner Stanek writes, “[i]nformation is the most valuable weapon the United States can possess in the War on Terrorism,”<sup>29</sup> then it would seem likely that at one or more points in the processing of such information an executive branch adjudicator will be among those who are responsible to appreciate the import of such information.

In another example, improving communication among adjudicators in sister states is a large part of the goal of the Driver License Compact (DLC) and Nonresident Violator Compact (NRVC), which are agreements between the states to promote highway safety by sharing and transmitting driver and conviction information.<sup>30</sup> These acts, like the EMAC, recognize state and local

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28. Rich Stanek, *Essay on Terrorism: Minnesota Responds to the Clear and Present Danger*, 29 WM. MITCHELL L. REV. 739, 741-42 (2003).

29. *Id.* at 742.

30. *See, e.g.*, OHIO REV. CODE ANN. § 4510.61 (Anderson 2004) (driver license compact) and

responsibilities in information sharing, responsibilities that would have proved highly relevant in responding to the kind of threats posed by the three suspected terrorists described by Commissioner Stanek.

In addition to enacting legislation that recognizes the need to cooperate among sister states, many states have enacted laws recognizing the innovations wrought by the Homeland Security Act.<sup>31</sup> For example, Colorado recently enacted legislation that requires its Office of Preparedness, Security and Fire Safety to “create and implement terrorism preparedness plans.”<sup>32</sup> Among several legislative changes made in the wake of 9/11, New York made it a crime to engage in “money laundering in support of terrorism.”<sup>33</sup> Vermont recently enacted legislation to

provide the state with tools to protect it and its citizens against terrorism, to allow Vermont to cooperate with other states and the federal government to prevent acts of terrorism, and to achieve these goals without infringing upon the constitutional and civil rights which make both our nation and our state so worth defending.<sup>34</sup>

Louisiana responded by investing additional power not only in the Governor, but also locally with the parish presidents. Louisiana Revised Statute § 29:722 (2004), designates the state military department as the state’s homeland security and emergency preparedness agency and authorizes the creation of local organizations for emergency preparedness. This confers upon “the Governor and upon the parish presidents the emergency powers provided in this chapter” to “reduce vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from natural or man-made catastrophes, riots, acts of terrorism, or hostile military or paramilitary actions” and to require coordination of these efforts with those of the federal government and other state governments and “private agencies of every type.”<sup>35</sup>

Perhaps the most patent example of post-9/11 legislation having the potential to give rise to executive branch adjudication responsibilities is from Nevada, where the legislature “refocused attention on the importance of domestic preparedness for acts of terrorism and related emergencies,” enacting legislation that would protect against cyber-terrorism, energy, telecommunications and water infrastructures, continuity of government, inter-governmental communication among first responders, government identification cards, and statewide coordination.<sup>36</sup>

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OHIO REV. CODE ANN. § 4510.71 (Anderson 2004) (nonresident violator compact).

31. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C.).

32. COLO. REV. STAT. § 24-33.5-1604 (2003).

33. N.Y. PENAL LAW § 470.21 (Consol. 2004).

34. VT. STAT. ANN. tit. 13, § 3501 (West 2004).

35. LA. REV. STAT. ANN. § 29:722 (Lexis 2004).

36. NEV. REV. STAT. 239C.010 (2004).



#### *D. Characteristics of Legislative Reform*

Each of the foregoing legislative schemes crafted in response to 9/11 have the potential for adjudicative action. If we accept as a threshold the standard imposed by constitutional jurisprudence, then a hearing will be required whenever the governmental action falls within the state's administrative procedure act, or the action has the potential to adversely affect a liberty or property interest. Less troubling of the two is the instance where legislation expressly provides for review by existing administrative adjudicators. In such cases, the path for redress against threats to liberty or property interests is at least well marked—typically the state's administrative procedure act articulates the procedures to be used and the interests to be protected. More difficult is when a legislative scheme calls for governmental action but is silent with respect to whether executive branch adjudication is to be provided.

To make a determination of whether some kind of hearing is required, we need to recall that the Due Process Clause (as applied to the states through the Fourteenth Amendment) applies only to individualized decisionmaking and only when the governmental action threatens a deprivation of a property or liberty interest.<sup>37</sup> “The limitation that the Due Process Clause only applies to individualized decisionmaking dates back to . . . the early 1900s. The Court has continued the distinction between individualized deprivations of property or liberty, which require due process, and policy-based deprivations affecting a class of individuals, which do not.”<sup>38</sup> The power to quarantine, for example, may be exercised in such a manner as to not give rise to due process interests, unless it amounts to individualized decisionmaking.<sup>39</sup>

Assuming the governmental interest involves individualized decision-making, the core question at the outset is whether the legislation adversely affects a property or liberty interest. The Supreme Court stated in *Roth* that “[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”<sup>40</sup> Upon a claimed violation of a property right, the claimant must “have more than an abstract need or desire” for the benefit, and must have “more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”<sup>41</sup> A liberty interest, on the other hand,

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37. See WILLIAM FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE* 250-56 (2d ed. 2001).

38. *Id.* at 251 (citing *Londoner v. Denver*, 210 U.S. 373 (1908); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915)).

39. See Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 *IDAHO L. REV.* 273, 331-32 (1994); but see *State ex rel. McBride v. Superior Court for King County*, 174 P. 973 (Wash. 1918) (individual subject to quarantine granted habeas corpus hearing).

40. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

41. *Id.* at 577.

denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>42</sup>

Thus, a liberty interest is found in an array of governmental action, including actual restraint on freedom, as in the case where the Attorney General proposes to detain aliens,<sup>43</sup> and when the state highway patrol administers a breathalyzer/sobriety test as a result of a roadside stop.<sup>44</sup>

Emerging as perhaps the broadest of executive powers are those powers intended to respond to threats to public health. Also developed in the wake of 9/11, the Model State Emergency Health Powers Act (the "Model Act")<sup>45</sup> proposes state-level responses to emergency health threats, "including those caused by bioterrorism and epidemics."<sup>46</sup> This model act calls for comprehensive planning at the state level, for responding to public health emergencies, and "grants specific emergency powers to state governors and public health authorities."<sup>47</sup> It identifies executive responsibilities for early detection of health emergencies and investigation through enhanced access to private medical records; it authorizes and regulates the "care, treatment, and housing of patients, and [the destruction of] contaminated facilities or materials"; and empowers the executive to "provide care, testing and treatment, and vaccination to persons who are ill or who have been exposed to a contagious disease, and to separate affected individuals from the population at large to interrupt disease transmission."<sup>48</sup> By its own terms, the Model Act recognizes the need to balance individual interests against the common good, by providing "state and local officials with the ability to prevent, detect, manage, and contain emergency health threats without unduly interfering with civil rights and liberties."<sup>49</sup>

These emergent legislative schemes all invest in the executive branch a level of decision-making authority expressly aimed at determining individual liberty

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42. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

43. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (regarding an alien's liberty interest in challenging indefinite and potentially permanent detention).

44. *Mackey v. Montrym*, 443 U.S. 1 (1979) (applying the *Mathews* due process analysis for deprivation of liberty interests after refusal to participate in alcohol-related breath testing).

45. The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities, THE MODEL STATE EMERGENCY HEALTH POWERS ACT (2001 Draft), *reprinted in* J.L. MED. & ETHICS 324 (2002) [hereinafter MSEHPA].

46. *Id.* at 328, pmb1.

47. *Id.*

48. *Id.*

49. *Id.*



and property rights. Not all expressly provide, however, for administrative process, or for any kind of hearing. As a result, governmental decisionmakers and those who find themselves subject to public safety laws may need to anticipate the role of executive adjudicators in these emergent schemes: we need to determine when a hearing will be necessary, and whether the executive branch adjudicator should be used as the initial finder of facts.

*E. Adjudication Responsibilities of the Executive Branch in Public Safety Cases*

Given the ubiquity of agency actions and the firmly entrenched role of executive adjudication in so many public safety programs, it makes sense to recognize the adjudication responsibilities attendant to such a role. Certainly not all executive public safety schemes will include a fact-finding process, but when they do and when the process implicates those liberty or property interests protected by the state or federal constitutions, care must be taken to give effect to the relevant procedural protections.

When employed to preside over a fact-finding proceeding, the executive adjudicator simultaneously must promote the agency's role in implementing policy while serving as the principal protector of the participants' due process rights. Unlike the judicial branch adjudicator, who is a generalist and not a specialist, "the administrative law judge and the agency heads (together with their staff) are familiar with technical issues and equipped to draw specialized inferences based on their experience."<sup>50</sup> The specialist adjudicator presides over a fact-finding process that, too, is specialized and possesses its own formalities. Most notable in the administrative process is the expectation that decisions by the adjudicator will be reduced to writing, with findings of fact and conclusions of law articulated in the decision-making process. The executive adjudication is modeled after judicial branch evidentiary process, but there are some significant distinctions:

Judges characteristically approach the question of how much process is due in terms of the extent to which an administrative proceeding must adopt the panoply of procedural formalities that are found in court trials. Judge Friendly, in his very useful article, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975) listed the following ingredients of judicial due process: (1) an unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; (3) opportunity to present reasons why the proposed action should not be taken; (4) the right to present evidence, including the right to call witnesses; (5) the right to know opposing evidence; (6) the right to cross-examine adverse witnesses; (7) [a] decision based exclusively on the evidence presented; (8) right to

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50. STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 743 (5th ed. 2002).

counsel; (9) requirement that the tribunal prepare a record of the evidence presented; and (10) requirement that the tribunal prepare written findings of fact and reasons for its decision.<sup>51</sup>

These are the core characteristics of executive branch fact-finding processes, and by their very nature they permit a substantial diversity of approaches and procedures. Applied to emerging legislative schemes enforcing public safety laws, this core group of characteristics will serve to guide lawmakers, providing a set of structural minimum requirements for any executive adjudication system that might emerge in the wake of 9/11.

### III. CALCULATING COSTS AND BENEFITS IN ADMINISTRATIVE PROCEEDINGS

When it engages in fact-finding in an administrative proceeding, the executive branch uses many of the tools traditionally employed by courts, including cross-examination, control over the introduction of evidence, and established burdens of proof, among other judicial tools. Unlike courts of the judicial branch, however, the executive adjudicator is by definition and design not independent of the executive branch. Also, unlike the trial court judge, who most often is a generalist, the executive adjudicator is usually a specialist, chosen for her or his expertise in one or more complex disciplines administered by the agency. Further, unlike the trial court process, there is no system of adjudication by peers through a jury; rather, the agency model provides for adjudication through appointed decision-makers, fact-finders who are by experience and training familiar with the relevant science, regulatory scheme, benefit program, or technology at hand. Further, unlike the jurist who attains his or her judicial position through political appointment or direct popular election, the executive adjudicator may have secured his or her position simply by filing a well-timed application with an agency in need, and may from that point forward be insulated from meaningful public accountability through the protections of civil service or collective bargaining.

Thus, there are both costs and benefits that adhere to using the executive adjudicator in public safety cases that involve fact-finding adjudications. One immediate and self-evident benefit inuring to the executive officer (i.e., to the Governor or President) is that the executive is empowered to directly select fact-finders, and—depending on how ALJ appointments are made—need not seek approval of the appointment from the judiciary, the legislature, or the public. There is no uniform set of credentials an executive branch adjudicator must possess, not even training in the law is required. This allows for some flexibility in the appointment of persons who can serve as adjudicators. The executive is able to appoint persons who are likely to accomplish the policy aims of the executive officer without being limited to lawyer applicants.

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51. *Id.* at 830-31 (internal footnote omitted).



A. *The Costs and Benefits of Using Executive Adjudicators:  
Flexibility and Adaptability*

One benefit of appointment flexibility is that candidates for the position of executive adjudicator may be more thoroughly possessed of knowledge of the programs being administered, at least when compared with candidates whose key credential is a license to practice law.

The cost of this benefit, however, is that the successful candidate may be wholly unfamiliar with the historical context of due process rights as applied in the adjudication setting. A substantial amount of legal training during law school is dedicated to teaching the historical and theoretical concepts that are relevant to administrative hearings, including due process, equal protection, procedural fairness, and the use of evidence in adversarial and inquisitorial proceedings. If a program opts to hire non-attorneys as ALJs or hearing examiners, the adjudicator may be wholly lacking in an understanding of these complex aspects of adjudication. Further, when the adjudicator is required to be licensed to practice law, the public is assured that in his or her dealings as an adjudicator, the ALJ or examiner will conform to not less than the minimum levels of professionalism, ethics, and efficiency required of lawyers in that jurisdiction.

The unlicensed adjudicator, on the other hand, may stand to suffer no consequence if he or she engages in action that would be considered unprofessional if attributed to a licensed attorney. Instead of a code of professional responsibility, the unlicensed adjudicator might be subject only to state civil service rules, and then only if those rules are fairly precisely drawn to include the practice of agency adjudication.

Another benefit (at least from the perspective of the executive officer) of utilizing executive branch adjudicators is the fact that the adjudicator is not wholly independent of the executive branch, but is instead part of that branch of government. Whereas a judicial branch judge is free to (indeed is expected to) interpret law and policy independent of the view espoused by the agency, the ALJ is merely required to apply the law as interpreted by the agency.<sup>52</sup>

B. *Independence vs. Impartiality of Executive Branch Adjudicators—  
the Due Process Question*

Few subjects engender more spirited debate than the question of ALJ independence, and with good reason: to the extent the ALJ is viewed as a means for implementing policy through adjudication, the executive officer can correctly insist that the adjudicator's conclusions of law and policy not be independently arrived at, but must instead be drawn from the agency's point of view. As one court explained when upholding a peer-review system against a claim that such a system interfered with Social Security ALJs' decisional independence:

Policies designed to insure a reasonable degree of uniformity among ALJ

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52. See *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) ("Policies designed to insure a reasonable degree of uniformity among ALJ decisions are not only within the bounds of legitimate agency supervision but are to be encouraged.").

decisions are not only within the bounds of legitimate agency supervision but are to be encouraged. . . . It is, after all, the Secretary who ultimately is authorized to make final decisions in benefit cases. An ALJ is a creature of statute and, as such, is subordinate to the Secretary in matters of policy and interpretation of law. Thus, the Secretary's efforts through peer review to ensure that ALJ decisions conformed with his interpretation of relevant law and policy were permissible so long as such efforts did not directly interfere with "live" decisions (unless in accordance with the usual administrative review performed by the Appeals Council). The efforts complained of in this case for promoting quality and efficiency do not infringe upon ALJs' decisional independence.<sup>53</sup>

Thus, it is a misstatement of law to posit that due process requires that the ALJ be insulated from policy directives or free to ignore the construction of law espoused by the agency he or she serves. Not surprisingly, however, rank and file ALJs tend to take issue with any claim that the agency interpretation of controlling law must be adopted by the adjudicator. Consider what one state ALJ wrote about judicial independence of the executive branch adjudicator:

One of the central tenets of our legal system is the due process concept that decision-makers must be independent, in order that they can be neutral and impartial in their decisions. They must avoid, and should be shielded as much as possible from, any influences that might in any way compromise such independence, neutrality and impartiality—in order that every person . . . can receive equal justice based on the law and not on preconceived notions or improper influences.<sup>54</sup>

Here the claim is that a "central tenet" of due process is that all decision-makers must be independent, yet for executive branch adjudications there is no authority for this proposition, rendering its validity as a "central tenet" suspect if applied to ALJs.

1. *The Dependent Nature of Administrative Adjudicators.*—To the contrary, the Supreme Court has clearly endorsed the use of executive branch decisionmakers who were wholly *dependent* upon the agencies they serve, and in some instances even dependent upon the private industries involved in the regulatory scheme, as long as the adjudicators were unbiased. For example, the Court in *Schweiker v. McClure* upheld a practice of reimbursing hearing officers employed by private insurers for reviewing Medicare claims as agents of the U.S. Department of Health and Human Services, even though the hearing officers were employees of the private carriers.<sup>55</sup> Due process did indeed play a significant role in the Court's decision, but it did so with respect to bias of the adjudicator, not the adjudicator's independence.

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53. *Id.* (citations omitted).

54. Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, 17 J. NAT'L ASS'N OF ADMIN. L. JUDGES 1, 24 (1997).

55. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).



In *Schweiker*, the Court did not support the assertion that all decisionmakers must be independent nor that they must be shielded from influences that may compromise their independence: “The hearing officers involved in this case serve in a quasi-judicial capacity, similar in many respects to that of administrative law judges. As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.”<sup>56</sup> The Court thus recognized these adjudicators as serving in the same quasi-judicial role as that of ALJs, but it then rejected the notion that these hearing officers needed to be independent of the agencies they served or were disqualified due to their close ties to the carriers: “Due Process is flexible and calls for such procedural protections as the particular situation demands.”<sup>57</sup> Rejecting claims that the dependent relationship between the agency and the adjudicator violated the Due Process Clause, the Court wrote that “appellees adduced no evidence to support their assertion that, for reasons of psychology, institutional loyalty, or carrier coercion, hearing officers would be reluctant to differ with carrier determinations. Such assertions require substantiation before they can provide a foundation for invalidating an Act of Congress.”<sup>58</sup> The Court considered the appellee’s claims of the need for an independent executive adjudicator, and then rejected those claims

in light of the strong presumption in favor of the validity of congressional action and consistently with this Court’s recognition of “congressional solicitude for fair procedure” . . . [and held that] Appellees simply have not shown that the procedures prescribed by Congress and the Secretary are not fair or that different or additional procedures would reduce the risk of erroneous deprivation of . . . benefits.<sup>59</sup>

*Schweiker* has repeatedly been cited as authority supporting the proposition that in administrative adjudications, the executive adjudicator need be neither independent nor insulated from agency direction or control.<sup>60</sup>

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56. *Id.* at 200 (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972)).

57. *Id.*

58. *Id.* at 197 n.10.

59. *Id.* at 200 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979)).

60. *See Ferreras v. Ashcroft*, 160 F. Supp. 2d 617, 633 (S.D. N.Y. 2001) (quoting *Bertrand v. Sava*, 684 F.2d 204, 212-13 (2d Cir. 1982) (In immigration proceedings: “[T]he Attorney General’s exercise of his broad discretionary power [to release unadmitted aliens under 8 U.S.C. § 1182(d)(5)] must be viewed at the outset as presumptively legitimate and bona fide in the absence of strong proof to the contrary.”); *D’Amato v. Apfel*, No. 00Civ. 3048 (JSM), 2001 U.S. Dist. LEXIS 9459, at \*15-16 (S.D. N.Y. July 10, 2001) (quoting *Schweiker*, 456 U.S. at 195) (citations omitted) (In proceedings before the Social Security Administration: “The Commissioner acknowledges that due process requires an impartial decision-maker in administrative proceedings. However, there is a presumption of honesty and integrity in those who serve as adjudicators for administrative proceedings. Furthermore, this presumption of integrity can be overcome only by ‘a showing of conflict of interest or some other specific reason for disqualification.’”)).

2. *The Accountability of Administrative Adjudicators.*—Not only may the executive officer retain close ties to the agency adjudicator, because the executive officer and the agency head are both publicly accountable for proper implementation of legislative policy, either also may reject conclusions of policy and law offered by the adjudicator if the adjudicator fails to conform to the interpretation of the law as expressed through the agency head or the executive officer. As one commentator observed, in the context of hearings conducted under the federal APA:

The top officials of an agency are appointed to make, to interpret, and to apply policy choices, and they are held accountable for their actions in various forums. The agencies, with strong judicial backing, have read the somewhat equivocal provisions of the APA to maintain this broad grant of authority and its corresponding accountability. Specifically, the Act has been construed to permit the agency heads to reverse determinations of hearing examiners relatively freely. Because the APA bars contact and consultation only with the trial staff during intra-agency review, the heads of agencies still may use other members of their staffs to make final decisions. Most agencies with large adjudicatory loads maintain special opinion-writing sections not institutionally separate from the agency heads for this purpose. The result has been final actions with little consideration of the hearing examiner's recommendations or of anything else that went on at the trial level.<sup>61</sup>

Thus, the opinion-writing staff of an agency may be wholly separate from and sit in review of the agency adjudicator, able to reject or modify the legal constructions expressed by the ALJ or hearing examiner. This process is warranted because ultimately it is the agency head (and his or her President or Governor) who must account to the people for the agency's judgment.

Considered in the context of state-based executive adjudications in public safety cases, the diminished independence of ALJs is reflected in the decision of the New Hampshire Supreme Court in *Asmussen v. Commissioner, New Hampshire Department of Safety*.<sup>62</sup> *Asmussen* was a state hearings examiner whose docket included cases involving the state department of safety, including cases involving driver challenges to administrative license suspensions arising out of citations for driving while under the influence.<sup>63</sup> By statute the department's assistant commissioner had ultimate supervisory authority over the bureau of hearings, which employed *Asmussen*. The assistant commissioner was concerned that hearings examiners were "conducting hearings . . . with the formalities of a court proceeding, and that police officers were losing cases on technical grounds."<sup>64</sup> The assistant commissioner met with the hearings examiners

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61. William F. Pedersen, Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 1005-06 (1978) (citations omitted).

62. 766 A.2d 678 (N.H. 2000).

63. *Id.* at 685.

64. *Id.*



(including Asmussen), and “instructed them not ‘to act like judges’ and not to conduct hearings as if they were courtroom trials.”<sup>65</sup> He specifically instructed the examiners to admit hearsay and directed that the rules of evidence would not apply to administrative license suspension hearings, adding that the examiners

were not to dismiss hearings automatically on technical grounds such as failure of the police officer to state that the road where the driver was arrested was a public way. Rather, they were to reopen the hearing first and allow the police officer an opportunity to introduce the required proof. Moreover, they were instructed to ask questions to develop the evidence and assist the officer in meeting his or her burden of proof.<sup>66</sup>

These and other directions were communicated both during the assistant commissioner’s meeting with the examiners and through a memo issued after the meeting. The directives, not surprisingly, concerned the examiners, and some allegedly communicated about the directives *ex parte* with members of the defense bar. The assistant commissioner then held another meeting and informed the examiners “that if they could not carry out department policies, they could resign, but they could not undermine the policies.”<sup>67</sup> The examiners apparently were effective in conveying to the defense bar their concerns about these directives, because several defendants facing administrative license suspensions filed a joint petition seeking declaratory relief in voiding the terms of the directive.<sup>68</sup>

Drawing upon language in the New Hampshire Constitution that “it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit,”<sup>69</sup> the court first confirmed that this language applies to hearings examiners acting as “quasi-judicial officers.”<sup>70</sup> Further, the court noted the state’s constitution “mandates . . . an independent judiciary so that the adjudication of individual controversies is fair and remains uninfluenced by outside forces.”<sup>71</sup> However, the court distinguished hearing examiners from judges, reflecting upon the hearing examiners’ duty to engage in policy-making:

Thus, the principal issue raised on appeal is the extent to which the assistant commissioner may exercise supervisory authority in a manner that affects the independence of quasi-judicial hearing examiners. “A judge is a member of a separate and independent branch of government, bound only to decide cases in accordance with the constitution and laws of New Hampshire and of the United States.” The hearings examiners in this case, by contrast, are employees of the department of safety, an executive branch agency, and their “impartiality” must be considered

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65. *Id.*

66. *Id.* (citation omitted).

67. *Id.* at 686.

68. *Id.*

69. *Id.* at 692 (quoting N.H. CONST. art. 35).

70. *Id.*

71. *Id.* (quoting *Petition of Mone*, 719 A.2d 626, 633 (N.H. 1998)).

within the context of the policy-making responsibility that officials of the agency, including the assistant commissioner, hold.<sup>72</sup>

Specifically, the court recognized that in the act of policy-making the executive officer may indeed express an interpretation of the law, and that interpretation of law is binding on the examiners:

On issues of policy and legal interpretation, hearings examiners are subject to the direction of the agency by which they are employed, and their independence is accordingly qualified. Influence ordinarily is not deemed improper unless it is aimed at affecting the outcome of a particular proceeding. Thus, the assistant commissioner's "efforts . . . to ensure that [the hearing examiners'] decisions conformed with his interpretation of relevant law and policy were permissible so long as such efforts did not directly interfere with 'live' decisions."<sup>73</sup>

### *C. Implicit in the Balance: The Integrity of ALJs*

This is not to argue that the legal analysis of ALJs and hearing examiners should be dismissed as unimportant. To the contrary, the analysis is a critical part of the adjudicative process and should reflect the highest level of intellectual and judicial processing—it is the heart of the administrative process, and if it lacks integrity and credibility the process will fail for want of public support.<sup>74</sup> What it does suggest, however, is that the adjudicator must recognize the significance of agency interpretation of law and policy. In the absence of such recognition, both the agency and the public at large are left unsure of whether the adjudicator is actually applying institutional doctrine or is, instead, pursuing policies that suit his or her personal views but arbitrarily contradict the agency's interpretation of the law.

In sum, the benefits of executive adjudication include the ability to employ a highly flexible workforce of persons familiar with factually complex and technically-driven governmental programs; the ability to delegate to this workforce responsibility for finding facts through an adversarial or inquisitorial process; the ability to require uniform application of law and policy to adjudicated facts; and the ability to dissolve the workforce after the exigent circumstances requiring such adjudication passes. The costs associated with these benefits include a diminution of the degree of decisional independence possessed by the finder of fact with respect to issues of law, accompanied by the possibility that the public will feel disenfranchised or deprived of an independent (and thus presumably unbiased) adjudicator.

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72. *Id.* (quoting *Appeal of Seacost Anti Pollution League*, 482 A.2d 509, 517 (N.H. 1984) (Brock, J., concurring specially)).

73. *Id.* at 692-93 (internal citation omitted) (quoting *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989)).

74. See Christopher B. McNeil, *Critical Factors of Adjudication: Language and the Adjudication Process in Executive and Judicial Branch Decisions*, 23 J. NAT'L ASS'N OF ADMIN. L. JUDGES 411, 412-13 (2003).



*D. Executive-Judicial Collaboration: Judicial Branch Supervision of Administrative Process*

Because it is not the product of an independent analysis but is instead the result of applying agency policy to impartially determined facts, an executive branch adjudication merits special handling when presented to the judicial branch, once the agency's role is at an end. Judicial branch adjudicators are obliged to take into account that the proceedings at the agency level may have included evidence that would have been inadmissible in proceedings conducted under the state's rules of civil procedure and rules of evidence. Courts likewise need to recognize the role of the judicial branch in serving as a check against statutory and regulatory schemes that violate constitutional rights—a role unavailable to most agencies, whose adjudicators do not generally have the power to invalidate either statutes or regulations no matter how patently unlawful. Judicial review of agency action after an administrative hearing is frequently the first opportunity afforded to litigants who seek an independent assessment of the constitutional validity of agency action. Nevertheless, the review by courts is subject to significant restraint, amounting to deference by courts to agency construction of both fact and law.

Applied in the context of responding to terrorist threats or action, judicial review of agency decisionmaking could quite plausibly be severely tested. Challenges to quarantine orders based on the deployment of biological weapons, for example, or challenges to decisions imposing mass restrictions on travel based on reports of breaches of national or state security, or challenges to agency action based on intelligence gathered under the auspices of the Homeland Security Act and USA PATRIOT Act (and their state-based correlatives) could easily strain our judicial system beyond its known limits. If these challenges must first be raised in an administrative forum, then the role of courts becomes even more vital, and the need for inter-branch collaboration becomes profound.

*Goldberg v. Kelly*<sup>75</sup> confirmed that the judicial branch is fully equipped to address the ways and means of distributing justice through agency adjudication. Indeed, *Goldberg* presents a similar query, involving not threats to public safety but threats to sustenance and support for millions of persons in desperate need of financial and social welfare benefits. Where *Goldberg* describes the process required for the government to terminate public assistance payments to a particular recipient,<sup>76</sup> the threat of terroristic action will require courts to determine the process required when the state or federal government proposes to restrict travel or access to medical support, financial resources, information, or even to the courts.

Key to this collaboration between the judicial and executive branch is the degree to which the courts will defer to the executive adjudicator, both with respect to factual findings and with respect to applicable law. Guided by

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75. 397 U.S. 254 (1970).

76. *Id.* at 261, 266-67.

*Chevron*<sup>77</sup> we know a number of tests may be invoked to determine how much deference courts should give to agency adjudication. Indeed, the diversity of approaches available to courts in reviewing agency action suggests (at least at the federal level) the lack of a cohesive body of law applicable to the process of judicial review of agency action.<sup>78</sup>

Despite the array of approaches available to courts in the exercise of judicial review over agency adjudication, such review will likely be of significant importance in serving as a check over impermissibly broad use of executive adjudicative power. Telling is the Court's construction of the Authorization for Use of Military Force resolution (AUMF),<sup>79</sup> which authorized the President to use "all necessary and appropriate force" against persons associated with the 9/11 attacks.<sup>80</sup> In *Hamdi v. Rumsfeld*,<sup>81</sup> the Court examined the suspension of the writ of habeas corpus with respect to an individual who allegedly was a United States citizen captured in Afghanistan and transported to a United States Navy facility in Virginia. Although the Court was unable to agree on an opinion, it held by two different majorities that the AUMF provided the executive branch with some authority to detain United States citizens as enemy combatants, but in doing so the detainee had a right to an administrative hearing that would afford him or her at least an opportunity to present evidence that he or she was not an enemy combatant.<sup>82</sup> The Court held that "although Congress authorized detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that determination before a neutral decisionmaker."<sup>83</sup>

In *Hamdi*, the detainee presented his claim before an Article III court, seeking relief under 28 U.S.C. § 2241, which the Supreme Court found to allow "some opportunity to present and rebut facts" and retains in courts "some ability to vary the ways in which they do so as mandated by due process."<sup>84</sup> Here the government argued against the courts having any role, asserting that "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict'

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77. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (concerning the deference afforded to agency interpretation of its own regulations); *see also* *United States v. Mead*, 533 U.S. 218 (2001) (concerning an agency's summary rulings); *Christensen v. Harris County*, 529 U.S. 576 (2000) (concerning an agency's interpretive rules and summary rulings); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (concerning an agency's interpretive rules).

78. *See* RICHARD J. PIERCE JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 390 (4th ed. 2004) ("The Court has addressed the scope of *Chevron* issue several times since *Mead*, but its subsequent opinions merely illustrate the murky nature of the *Mead* test and the continued existence of widely differing views among the Justices.").

79. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

80. *Id.* § 2.

81. 124 S. Ct. 2633 (2004).

82. *Id.* at 2635.

83. *Id.*

84. *Id.* at 2644.



ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme.”<sup>85</sup> The Government argued that the courts should accept factual claims without exercising judicial power: “[u]nder this review, a court would assume the accuracy of the government’s articulated basis for . . . detention . . . and assess only whether that articulated basis was a legitimate one.”<sup>86</sup>

Recognizing that this case involved the “tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right,”<sup>87</sup> the Court applied traditional due process doctrine and evaluated the need to assess “‘the risk of an erroneous deprivation’ of the private interest if the process were reduced and the ‘probable value, if any, of additional or substitute safeguards.’”<sup>88</sup> Thus, even in the context of executive action to detain a person suspected of enemy combatant status, administrative process is warranted, for “the risk of erroneous deprivation of a citizen’s liberty in the absence of sufficient process here is very real.”<sup>89</sup> In this way the Court makes plain the judiciary’s role in serving as a check on executive branch adjudication, here in the context of enemy combatant status:

In so holding, we necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.<sup>90</sup>

Thus, even in an environment charged with extreme threats to public safety, there is a familiar role for the courts which employs traditional due process tools to protect against overreaching by the government. Despite the exigent circumstances attendant to the “war on terror,” the decision-making process employed by the government in *Hamdi* nonetheless is subject to traditional due process measures, including meaningful oversight of the executive decision-making process by the independent judiciary.

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85. *Id.* at 2645 (citing Brief for Respondents at 26).

86. *Id.*

87. *Id.* at 2646.

88. *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

89. *Id.* at 2647 (noting the Brief for *AmeriCares et al.* as *Amici Curiae*, at 13-22, which states that “[t]he nature of humanitarian relief work and journalism present a significant risk of mistaken military detentions”).

90. *Id.* at 2650 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

#### IV. STRUCTURING EXECUTIVE BRANCH ADJUDICATIONS TO MEET THE DEMANDS OF A POST-9/11 WORLD

##### A. *Alternative Approaches in Executive Branch Adjudication*

Not all administrative adjudication schemes are alike, and their differences can be of importance when crafting systems designed to meet emergent public safety needs. Furthermore, one cannot help but believe the beleaguered Assistant Commissioner of the New Hampshire Department of Public Safety in *Asmussen* would have preferred not to have rampant hostility directed toward his attempts at achieving a unified corps of qualified and effective hearings examiners.<sup>91</sup> If experience and logic suggest a more effective and efficient means of producing a cadre of ALJs or hearing examiners for use in times of emergent threats to public safety, it perhaps makes sense to recommend that lawmakers choose those options most likely to achieve the desired effect, while endeavoring to avoid those approaches that seem to guarantee a hostile reaction by the incumbent adjudicators.

A review of current case law and literature suggests that a set of structural variables exist that may be of particular importance to lawmakers when creating a public health or safety-related administrative adjudication scheme. The first variable is global, focusing on the institution in which the adjudicator operates, distinguishing between internally employed or appointed adjudicators and those employed by a central panel of adjudicators who are part of the executive branch of government but are not actually employed by the agencies for which they hear cases. The other is a set of subordinate variables that include controls over ex parte communication, training of the adjudicator, the weight to be given by the agency to the ALJ's decision, and the scope of judicial review in the appeal of the agency's final order. The impact of these subordinate variables changes depending on whether the adjudicator is internally placed or is part of a central panel.

1. *The Importance of Structure: Appointment of the Executive Adjudicator in Public Safety Adjudication Schemes.*—When facing the need to create an adjudicative scheme that might be well-suited to use adjudicators from the executive branch, lawmakers first must delegate fact-finding authority and then must determine who will wield that authority (or leave that determination to the executive branch itself). The menu of options has grown substantially since the 1940s and the emergence of the modern administrative state. At one end of the spectrum, the adjudicator may be the very person appointed by the Governor or President, and may sit in judgment without benefit of any form of further delegation. Because this approach generally is impractical (and particularly so in the case of safety-related adjudications like those involving driver licensing, health and safety permitting, and other high-volume administrative adjudications), there more often than not will be some delegation to an examiner or ALJ. The question then becomes to what degree should the agency control the adjudicator?

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91. See *supra* text accompanying notes 62-73.



Drawing an example from the federal scheme, ALJs who are employed under the provisions of the federal Administrative Procedure Act are part of the agencies they serve, but enjoy insulation from agency influence to some degree, because their terms of employment are prescribed by the U.S. Office of Personnel Management independently of agency recommendations or ratings.<sup>92</sup> In addition, ALJs under the federal APA are exempt from the performance ratings prescribed for other civil servants, and, also unlike most federal civil servants, ALJs under the APA have tenure without first having to go through a probationary period,<sup>93</sup> and cannot be removed without a formal adjudication.<sup>94</sup> The lack of traditional evaluative tools diminishes the ALJ's accountability to the public and to his or her employer, leading to the potential for abuse by the ALJ against the agency or the public. This is perhaps more of a concern where the affected party to a governmental scheme is weak or powerless due to economic or social status.<sup>95</sup>

In an effort to explore and quantify the relationship between the executive adjudicator and the agencies served by them, the Administrative Conference of the United States (ACUS) in 1992 commissioned the first significant national survey of administrative law judges since the 1981 overhaul of the APA.<sup>96</sup> This survey provided the most comprehensive set of data on ALJ utilization to date. Lending credence to the concerns associated with the lack of ALJ accountability under the APA, Professor Koch noted:

From my participation with the ACUS Study Group, I perceive that the problems involve the failure of an unacceptable number of presiding officials, particularly those in the privileged position of ALJ, to perform their function fairly and with an acceptable level of competence and diligence. As with any large group, there are poor performances and failures of integrity. Unlike other groups, those responsible for the failures here are insulated from criticism. Aggravating the situation is the fact that the individuals most often adversely affected are already very disadvantaged people. We must find a way to monitor the presiding officials so that these individuals are not subjected to breakdowns in the administrative process.<sup>97</sup>

Professor Koch was specifically referring to ALJs from the Social Security Administration as it existed in 1992.<sup>98</sup> There appears to be no similar survey conducted since 1992, so it is not possible to determine whether these concerns continue to pose a threat to the integrity of the administrative process. Koch notes further that one very significant participant in the administrative adjudication process was not surveyed at all: the litigants (and their attorneys).

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92. 5 U.S.C. § 5372 (2000).

93. See 5 C.F.R. § 930.211 (2004).

94. See 5 U.S.C. § 554.

95. Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 272 (1994).

96. *Id.* at 275-77.

97. *Id.* at 272.

98. *Id.* at 271.

This was particularly lamentable, in Koch's view, because he and others involved in the ACUS study "received enough information from other sources to suggest a need to inquire" into the views of those who appear before ALJs.<sup>99</sup> His recommendation that the interests of those whose fortunes are presented to the executive adjudicator should be studied seems to be as appropriate in 2004 as it was in 1992. In Koch's view, "the system does not do enough to assure that the administrative judiciary will be sensitive to those who appear before it."<sup>100</sup> Indeed, one of the recommendations presented later in this Article addresses the want of current information and suggests that new data be gathered to better acquaint lawmakers with accurate information about ALJ effectiveness and accountability, and that such data include reports on participant reaction to the process.<sup>101</sup>

2. *The Tangible Adverse Consequences of Adjudicator Insulation: Lack of Accountability.*—This level of insulation from agency control has produced some telling results. Federal agencies, where possible, avoid using ALJs, and in their place have installed a less well-insulated adjudicator, now generally referred to as an administrative judge, or AJ.<sup>102</sup> In reporting on the results of the ACUS survey, Professor Koch described the key differences experienced by ALJs and AJs in the early 1990s, differences that shed some light on the practical realities of executive branch adjudication in the federal system.<sup>103</sup> Although AJs to this point had not been the subject of any formal studies, by 1992 their ranks in the federal system had swelled to 2700, in contrast to approximately 1150 ALJs,<sup>104</sup> suggesting widespread agency interest in avoiding the use of highly insulated ALJs.

Unlike ALJs, AJs are not covered by the APA provisions regulating ALJs and do not attain the tenure status enjoyed by ALJs.<sup>105</sup> The ACUS study surveyed both ALJs and AJs, gathering data about the adjudicators' perceptions about potential challenges to their independence, asking whether the adjudicators ever were asked to do things that "are against their better judgment," whether they were subject to "too close supervision," and whether they were satisfied with their jobs, among other questions.<sup>106</sup> Despite having less employment security and structural independence,<sup>107</sup> the AJs reported less interference with the performance of their jobs,<sup>108</sup> less anxiety about supervision,<sup>109</sup> and greater levels

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99. *Id.* at 295.

100. *Id.*

101. *See infra* Part IV.C.

102. Professor Koch credits John H. Frye III with coining the term. *See Koch, supra* note 95, at 276 & n.23.

103. *Id.* at 276.

104. *Id.*

105. *Id.* at 278.

106. *Id.* at 277-82.

107. *Id.* at 278.

108. *Id.* at 278 & nn.40-42.

109. *Id.* at 278 & n.39.



of job satisfaction<sup>110</sup> than did the ALJs, leading Koch to conclude:

First, the tension over performance management, here as elsewhere, is inevitable, but this kind of management is more often accepted by presiding officials than some assert. Second, here, as elsewhere, the outward manifestations of this tension are very individualized and must be met with mechanisms that can offer individualized solutions. Third, the structural and formalized solutions are not as effective as less formal approaches.<sup>111</sup>

Twelve years have passed since this survey was taken, and the exponential growth of the administrative state is reason enough to both call for the gathering of new data and to recommend the 1992 data be viewed with some reserve. Nevertheless, based on what we now know about the role of the executive adjudicator, when applied in the context of creating adjudication schemes for public safety cases at the state level, the data discussed by Professor Koch suggests that the structure of the adjudication system may be less important than the means by which individual ALJ concerns about decisional integrity are handled.

Protecting the adjudicator from overreaching by the administrative head—long a goal of Social Security ALJs—seems less pressing a need than ensuring each adjudicator has an effective means of airing his or her employment-related grievances while extending the same kind of protection to those who appear in front of the adjudicator. If our courts repeatedly affirm the proposition that ALJs and hearing examiners are bound to follow the interpretation of law as prescribed by the agency heads, then the agency head is not overreaching when he or she insists the executive adjudicator abide by agency interpretation of the law. If what the ALJ really wants are improvements in job-related benefits like better working hours, safer working locations, a superior parking pass or similar prerequisites of the job, then Koch's suggestion makes even more sense: he specifically recommends maintaining an ombudsman to "not only protect the public from the presiding officials but also [to] protect the presiding officials from oppressive agency management."<sup>112</sup>

The 1992 ACUS study went beyond questions of adjudicator independence, however, and examined a countervailing point: the ability of the structure to "assure that the presiding officials are faithful" to the choices made by those possessing the power to make policy.<sup>113</sup> According to Koch, "[a]gencies increasingly complain that some presiding officials consistently ignore agency policy choices."<sup>114</sup> The concern was borne out in the ACUS data, where according to Koch, "while the ALJs considered themselves bound by agency regulation, they did not feel constrained by less formal expressions of policy."<sup>115</sup>

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110. *Id.* at 278 & n.68.

111. *Id.* at 281.

112. *Id.* at 275.

113. *Id.* at 282.

114. *Id.*

115. *Id.* at 284.

This attitude was of some concern to Koch:

The failure to heed official public statements of policy violates the presiding officials' own view that they should not engage in policymaking. More importantly, as the agency is bound by nonlegislative policy pronouncements, so too are its adjudicators (unlike judges). That is, if they ignore the agency statements of policy, not only are the adjudicators arrogating to themselves a policymaking function but they are violating the law.<sup>116</sup>

As Koch noted, given the willingness of ALJs to disregard the expressions of agency policy, the agencies have a legitimate need to monitor the ALJs' faithfulness to agency policies, but that need has to be met through "a mechanism for assuring policy integrity without creating the appearance of interfering in individual determinations."<sup>117</sup>

*B. Executive Adjudicators: The Internal Model, the Itinerant Contractor, and the Central Panel*

As noted above, the ACUS study examined two kinds of executive adjudicators: the ALJ—a well-defined position expressly provided for by the federal APA, and the AJ—an evolving alternative to the more insulated and less accountable ALJ. Other mechanisms for employing executive adjudicators do indeed exist, however, and should be considered by lawmakers when creating a program that employs executive adjudicators.

1. *The Agency's In-House Adjudicator.*—At one end of the spectrum is the in-house ALJ, i.e., the full-time employee of the agency, whose job description may be limited to hearing agency cases, or may expand beyond that, so that he or she hears agency cases but does so as one of many incidents of employment. Professor Rossi describes this as an "internal" model:

[T]he 'internal' model views the ALJ as operating entirely within the agency. For example, if a regulatory matter involves an investigation and decision to prosecute, when a hearing is requested under . . . [this model], an ALJ within the agency decides the relevant issues of fact and—at least in instances where ALJs are more than mere record-compilers—law. Following issuance of the ALJ's decision, the agency head is given an opportunity to review the ALJ's findings of fact and law. The agency head takes the final agency action or the action can be appealed and reviewed by a court. So, in applying the internal model, a reviewing court evaluates the agency head's reaction to an agency ALJ. The agency may have accepted the ALJ's order or allowed the time for rejecting or modifying the ALJ's order to pass, but the agency has the opportunity to reject or modify the ALJ's proposed findings of fact and law.<sup>118</sup>

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116. *Id.* (citations omitted).

117. *Id.*

118. Jim Rossi, *Final, But Often Fallible: Recognizing Problems With ALJ Finality*, 56 ADMIN. L. REV. 53, 56 (2004).



For example, the Ohio State Medical Board has such an arrangement,<sup>119</sup> albeit with non-statutory provisions for separately housing and managing the adjudicator staff to remove the opportunity for hearing examiners to be involved in either the prosecution or investigation of charges. A key advantage to maintaining in-house adjudicators is their increased level of familiarity with the agency's programs and policies. Under this system, however, participants who take the trouble to find out such things will learn that their judge in licensure proceedings before the Board is an employee of the Board, which may in turn give rise to concerns about fundamental fairness, where the judge is subject to supervision by the very agency that made the decision to investigate and then prosecuted the cause.

2. *The Agency's Itinerant Adjudicator*.—A variant of the internal model, one that retains with the agency the power to specifically name the person who will serve as adjudicator in a given case, is the contract adjudicator model. Under this approach, the agency solicits invitations to qualified persons—either lawyers or not—to serve as agency adjudicators either on a case by case basis, or on a regular, repeating basis. This approach allows the agency to seek out attorneys or others who are familiar with agency programs and who have the skills needed to preside over evidentiary hearings. The use of itinerant contract-based adjudicators allows agencies to keep overhead costs down and, in jurisdictions where it is permissible, allows the agency to hand-pick its adjudicators based on the exigent circumstances attendant to the case at hand. In those states where an alternative centralized panel of full-time adjudicators is available, however, resorting to an ad hoc selection of an adjudicator, if coupled with a potential for additional service as the need arises, may trigger a successful due process claim against the agency.<sup>120</sup>

As with internal employee-adjudicators, the decisions rendered by an itinerant adjudicator will likely be presented as a recommendation and not a final order.<sup>121</sup> The agency thus preserves its ability to accept, modify or reject findings of fact and conclusions of law, and in this way retains public accountability for its final orders. The cost associated with this approach is like that associated with Professor Rossi's internal model; public confidence may be shaken if claims against the adjudicator's impartiality are made based on the contractual ties between the adjudicator and the agency.

3. *The Governor's Central Panel*.—Perhaps the most highly evolved means for implementing a legislative scheme that delegates fact-finding authority to the executive branch is the central panel—a stand-alone entity that supplies agencies with well-trained and qualified administrative adjudicators who are not part of the agency. Something of a novelty in the early 1980s when seven states had central

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119. See OHIO REV. CODE ANN. § 4731.23 (Anderson 2004); OHIO ADMIN. CODE ANN. § 4731-13-03 (Anderson 2004).

120. See, e.g., *Haas v. County of San Bernardino*, 45 P.3d 280 (Cal. 2002).

121. See, e.g., OHIO REV. CODE ANN. §§ 119.07 and 119.09 (Anderson 2004) (prescribing a hearing examiner's report that is presented to the agency head for approval, modification, or rejection).

panels, their use spread after substantial revisions to the Model State Administrative Procedure Act were completed in 1981, such that by 1996 eighteen states had central panels.<sup>122</sup> Professor Flanagan now reports that, twenty-five states and three large cities operate under central panel systems.<sup>123</sup> He also provided us with a definition: “A central panel of ALJs is a cadre of professional adjudicators who are administratively independent of the agencies whose cases they hear, and thus, they are removed from agency influence.”<sup>124</sup>

The curb appeal of central panels is fairly obvious: litigants have their cases decided by someone who is not actually employed by the agency, resulting in a presumptively more fair hearing by a presumptively more independent adjudicator. The concept has its detractors. Professor Koch, for example, considered the shift to a central panel to be an “idea [that] goes in exactly the wrong direction” because it “further insulates the presiding officers from public scrutiny and solidifies the closed club environment” and it fails to confront what Koch saw as “the real problem.”<sup>125</sup> It would “destroy the fundamental advantages of having expert decision-makers experienced with specialized processes.”<sup>126</sup> Agencies too may resist the trend, if only to preserve their ability to implement policy through the adjudication process, with the least amount of risk that an externally appointed adjudicator would misunderstand or misapply that policy.

### C. *Evaluating the Merits of Central Panel Adjudication in Public Safety Cases*

While an extensive comparison of the central panel variants is beyond the scope of this Article, general observations may be of some use to lawmakers when considering whether to delegate fact-finding authority to the executive branch in response to increased threats to public safety. First, executive control over the fact-finding process increases as the discretion whether or not to use an adjudicator from a central panel decreases. In plain English, if a governor can require cases to be heard through a central panel adjudicator, his or her control over the process increases—but it does so at the expense of control by the individual agencies served.

For example, in Ohio, where there is no central panel, there are over three hundred state agencies, most of which have the power to adjudicate and make findings of fact.<sup>127</sup> In its present decentralized state, the governor has

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122. Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475, 486 (2001).

123. See James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 IND. L. REV. 401, 403-04 nn.13-15 (2005).

124. James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1356 (2002).

125. Koch, *supra* note 95, at 274.

126. *Id.*

127. See BALDWIN'S OHIO ADMINISTRATIVE LAW HANDBOOK AND AGENCY DIRECTORY (2004).



appointment authority—he or she has the ability to appoint board and commission members along with the power to appoint heads of departments. The governor thus has the power to implement policy through adjudications conducted by hearing examiners appointed by each of the individual agencies, but may exercise the appointment power only as vacancies are filled, typically through an attrition process that requires a full four years for complete turnover of appointed positions.

If taken as typical of non-central panel states, Ohio suggests there are significant limits to how effective a newly-elected governor can be in using the administrative adjudicative process to implement policy in a state with decentralized executive adjudicators. For example, when determining whether the adjudicators should receive training or other professional development to respond to emergent threats to public safety, the governor would need to seek assistance from any number of boards, commissions, agencies and departments. Rather than having one key person to go to—the Chief Administrative Law Judge of a central panel—the governor must rely on the effectiveness of any number of different approaches taken by state agencies when hiring and using administrative hearing examiners. Perhaps more than any other lesson learned from the attacks of 9/11, we know that it is critically important to make sure public safety officers and law enforcement officers can bridge gaps created by decentralization of governmental functions. Among all models of executive adjudication, the central panel approach most closely meets those needs because it divests individual agencies of many of the incidents of autonomy, while retaining the power to develop adjudicative systems with the one person actually elected as the state's executive officer—the governor—who in turn appoints the Chief ALJ.<sup>128</sup>

In 1997, the American Bar Association, through its House of Delegates, unanimously adopted the Model Act Creating a State Central Hearing Agency.<sup>129</sup> This template for creating a central panel of administrative law judges or hearing examiners is modeled on the legislation by which Maryland's Office of Administrative Hearings was created.<sup>130</sup> Key attributes of the model central panel are its ability to establish uniform mandatory minimum credentials for the adjudicators; its mandate that a code of ethics be established for all executive adjudicators; its ability to evaluate, train and discipline its adjudicators, and the fact that the Chief ALJ, not the agency, decides which ALJ will hear any particular case.

Neither the Model Act, nor Maryland's Office of Administrative Hearings, nor any existing variant of central panel should be regarded as the one true course to follow when creating a central panel designed to meet emergent public health and safety needs. Indeed, one of the key concerns is occasioned by the want of reliable and current data showing how states use agency adjudication, and how

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128. See, e.g., MD. CODE ANN., STATE GOV'T § 9-1603(a) (2003) ("The Office is headed by a Chief Administrative Law Judge appointed by the Governor with the advice and consent of the Senate.").

129. See MODEL ACT CREATING A STATE CENTRAL HEARING AGENCY (1997), reprinted in McNeil, *supra* note 122, at 541 app.

130. McNeil, *supra* note 122, at 494.

such adjudication is perceived by the public as being fair and effective. There are, however, some characteristics of these panels that warrant particular attention by lawmakers interested in crafting a fact-finding system that will effectively respond to evolving demands for administrative decisionmaking. These characteristics may, in turn, suggest how to examine ALJ utilization in the states to see whether these or other variables might prove especially important in increasing the public's trust and confidence in administrative adjudication while at the same time ensuring the effective implementation of legislative initiatives through executive adjudication.

*D. Critical Factors in Creating Responsive Adjudicative Structures After 9/11*

Apart from the fundamental question of organizational structure, lawmakers should be aware of variables present in adjudicative systems that become prominent when ceding judicial power to the executive branch. Whether the presiding officer is an in-house staff member, a contract adjudicator, or a member of one form or another of central panel, the adjudication process needs to leave in all participants a sense that they have been heard by a fair and unbiased adjudicator. This may be particularly true when the adjudicative scheme involves public safety issues (as contrasted with, for example, utility rate-making or employment benefit programs).

*1. The Unique Character of Public Safety Adjudications.*—A review of the literature suggests a present need to consider the implications of direct threats to public health and safety at the state level. First, in a draft prepared by the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities, the Model State Emergency Health Powers Act (MSEHPA) is offered in recognition of the need for contingencies against a spectrum of emergency health threats, "including those caused by bioterrorism and epidemics," that require "the exercise of essential government functions."<sup>131</sup> The MSEHPA is noteworthy in part because it brings to the fore the range of governmental action—at both the national and local levels of government—that are likely to be implicated in the event of future threats to our homeland security. Under the Act, government officials are authorized to gather data that otherwise might be kept confidential, and they are directed to coordinate efforts among the entire spectrum of governmental entities. They can "use and appropriate property as necessary for the care, treatment, and housing of patients, and to destroy contaminated facilities or materials"; are empowered "to provide care, testing, and treatment, and vaccination to persons who are ill or who have been exposed to a contagious disease"; and are given the authority to "separate affected individuals from the population at large to interrupt disease transmission."<sup>132</sup>

In balancing these powers against the protection of individual liberty and property interests, the MSEHPA recognizes the need to "respect the dignity and rights of persons," requires the use of these emergency powers be "grounded in a thorough scientific understanding of public health threats and disease

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131. MSEHPA, *supra* note 45, at 328, pmbl.

132. *Id.*



transmission,” and at the same time instructs “in the event of the exercise of emergency powers, the civil rights, liberties, and needs of infected or exposed persons will be protected to the fullest extent possible consistent with the primary goal of controlling serious health threats.”<sup>133</sup>

Two provisions under the MSEHPA warrant mention with respect to adjudication. First, the Act invests in the judicial branch, not the executive branch, judicial authority to grant petitions for an order authorizing a quarantine of individuals or groups of individuals.<sup>134</sup> Second, the Act allows public health officials to retain sufficient power to direct isolation or quarantine without judicial approval “if delay in imposing the isolation or quarantine would significantly jeopardize the public health authority’s ability to prevent or limit the transmission of a contagious or possibly contagious disease to others.”<sup>135</sup> The Act imposes a check on the executive by limiting no-notice quarantines to ten days, during which time the public health authority is required to petition a court for authority to continue the isolation or quarantine.<sup>136</sup> Other than this judicial avenue, there is no provision for action by the public health authority to submit to fact-finding or an adjudication of any kind when deciding whether grounds exist for isolation or quarantine.<sup>137</sup>

One author, examining Missouri’s legislative version of the MSEHPA, noted that, at least in Missouri, “[t]here are so many important procedural safeguards that need to be fully addressed in the states’ laws that the Model Act gives no guidance.”<sup>138</sup> The author notes that there are no provisions for protecting the constitutional rights of persons opposed to vaccination on religious grounds, no protection of persons whose immune systems or other conditions render them at greater risk in the event of a forced vaccination, no provisions for the enforcement of quarantine,<sup>139</sup> and no provision for health care responders whose job it would be to care for those in the quarantined area.<sup>140</sup> Indeed, if nothing else, it would seem beneficial at the earliest possible stage for legislators and the executive branch to determine which, if any, of these events warrant the intervention of informed fact-finders as adjuncts to regulatory schemes designed to protect public health in times of epidemic, whether induced by terroristic action or otherwise.

Closely akin to threats of bioterrorism are threats to the environment, whether or not induced by forces hostile to the United States. As one author noted:

The environment and public health goals hold a common value of

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133. *Id.*

134. *Id.* at 341-42, § 605(b) (isolation or quarantine with notice).

135. *Id.* at 341, § 605(a) (temporary isolation and quarantine without notice).

136. *Id.* at 341, § 605(a)(4).

137. *See id.* at 341-42, § 605(a)-(b).

138. Shenna Bradshaw, Note, *Quarantined: Is Missouri Prepared to Sacrifice Some of Its Constitutional Freedoms to Ensure Public Health Safety in an Outbreak?*, 71 U. MO. K.C. L. REV. 939, 952 (2003).

139. *Id.* (“Would there really be armed guards at the home of those quarantined . . . ?”).

140. *Id.* at 951-52.

healthy populations. The threat of bioterrorism requires a partnership of both, building upon the long history of the link between public health and the environment. This existing relationship is key to an effective system of biodefense for the nation, because the use of biological weapons through every environmental pathway poses a potential threat. Contaminations of water, growing crops, grazing cattle, air through inhalation, dermal absorption, or consumption of food or water in the human environment are potential delivery methods.<sup>141</sup>

Like public health, environmental systems have long been the subject of extensive regulation at all levels of government. In describing the shifts in policy wrought by the attacks of 9/11, the Environmental Protection Agency (EPA) announced that its “traditional mission has expanded to include protecting our country against the environmental and health consequences of acts of terrorism.”<sup>142</sup> Through the Department of Homeland Security, the federal government signaled a change in how states should prepare against threats to security; it proposed “three shifts in federalism”:<sup>143</sup>

First, “the Department would set national policy and establish guidelines for state and local governments;” second, the proposal makes the Department of Homeland Security “the lead agency preparing for and responding to . . . biological . . . terrorism,” which takes part of the states’ public health agencies’ responsibility as described in the CDC biodefense plan; and third, the proposal directs that “[t]he new Department would ensure that local law enforcement entities—and the public—receive clear and concise information from their national government,” which again, takes part of the states’ public health agencies’ responsibility in originating their own public health information.<sup>144</sup>

Given these shifts in power, particularly in environmental and health-related fields, it makes sense to anticipate a need for administrative adjudications within the scope of the Homeland Security Act. It is also likely that some of those claims will be resolved through processes that usurp state procedural protections in favor of regional or national processes. It also suggests a need for executive adjudication schemes that work between and among neighboring states, as might arise where a river common to several states is threatened by terroristic contamination.

Remaining uncharted, even through the model offered in MSEHPA, are strategies for anticipating the need for cooperation among states, particularly

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141. Victoria Sutton, *Environment and Public Health in Time of Plague*, 30 AM. J.L. & MED. 217, 217 (2004).

142. *Id.* at 226 (quoting EPA Administrator Christine Todd Whitman’s Sept. 2002 letter appended to EPA, STRATEGIC PLAN FOR HOMELAND SECURITY (2002), available at [http://www.epa.gov/epahome/downloads/epa\\_homeland\\_security\\_strategic\\_plan.pdf](http://www.epa.gov/epahome/downloads/epa_homeland_security_strategic_plan.pdf)).

143. *Id.* at 223.

144. *Id.* (citing OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 2.5 (2002), available at <http://www.whitehouse.gov/homeland/book/index.html>).



neighboring states when subjected to threats that cross geographic borders. State line demarcations are meaningless when a region is responding to a biological threat, whether from terroristic action or careless handling of scientific material. While such threats may not give rise to a federal response, prescient state lawmakers should consider confederated responses, responses based on the needs of two or more states to act in collaboration with each other.

Equally important is the need to understand how best to bridge administrative procedural gaps arising not only among the states, but between the states and the federal government. Legislation drafted in furtherance of protecting homeland security will, by its very nature, include interests that are both local and national in character. When, for example, British health authorities in the fall of 2004 shut down one of two main flu vaccine suppliers to the United States, the public health implications were felt at all levels of government. Professor Richards noted the trend<sup>145</sup> as state and federal public health officials reacted with a number of administrative schemes designed to route scarce vaccines to those most in need.<sup>146</sup> In the absence of any administrative procedure bridging the gap between state and federal interests, the patchwork of approaches is both stark and unsettling.

One step in this direction is the development of model rules of administrative procedure for use in proceedings conducted under interstate compacts. The Administrative Law and Regulatory Practice Section of the American Bar Association convened a task force in early 2004, charged with drafting a model APA for use by entities created through interstate compacts.<sup>147</sup> The task force will develop protocols for subscriber states to use when joining interstate compacts similar to the compacts already available to states in regulating driver licensing among member states.

Despite the urgency that would accompany any terroristic attack, there should be some regard given to public reaction to and understanding of substantial

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145. See Professor Edward P. Richards, Louisiana State University Law Center, Medical and Public Health Law Site, *Emergency Measures to Manage the Flu Vaccine Shortage*, at [http://biotech.law.lsu.edu/cases/vaccines/oregon\\_flu.htm](http://biotech.law.lsu.edu/cases/vaccines/oregon_flu.htm) (last visited Feb. 6, 2005).

146. See OREGON DEP'T OF HUMAN SERVS., OREGON INFLUENZA VACCINE EDUCATION AND PRIORITIZATION PLAN 2004-05 (Oct. 8, 2004), available at <http://biotech.law.lsu.edu/cases/vaccines/finalfluplan.pdf>.

The Oregon State Health Officer has determined that, due to an influenza vaccine shortage, adverse and avoidable health consequences to identifiable categories of high-risk individuals could occur. Therefore, assistance with administration of vaccine is warranted to protect these individuals. Under Oregon Revised Statute 433.040, the State Health Officer and the Oregon Department of Human Services (DHS) implement this Oregon Vaccine Education and Prioritization Plan to protect the public during a vaccine shortage. The plan consists of: 1) guidelines for healthcare providers; 2) rules for imposing civil penalties for violation of the guidelines; 3) mobilizing public and private health resources; and 4) notifying health professional boards of violations. This Plan is effective immediately, October 8, 2004, and will stay in effect through March 31, 2005, unless otherwise amended or rescinded.

*Id.*

147. See Ronald M. Levin, *Interstate Compacts and Administrative Procedure*, 29 ADMIN. & REG. L. NEWS, Winter 2004, at 7-9.

deprivations of property or liberty interests. In his article, *When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified*, Professor Gostin notes the value of perception and norms, even during a crisis such as would be launched upon us in the event of another attack:

Primarily, due process helps ensure that compulsory powers are correctly applied. By affording individuals the right to a fair hearing, there is increased certainty that the individual actually is infectious, poses a risk to others, and cannot or will not comply with public health advice. Even if due process cannot always ensure the accuracy of decisionmaking, there is a normative value in granting a right to a hearing. Government demonstrates respect for individuals by allowing them to see the evidence against them and present their case to an impartial fact finder. There is a self-expressive importance to procedural due process; fair procedures allow individuals to convey a sense of grievance that has intrinsic worth. There also is a value to racial, ethnic, or religious groups that feel singled out unfairly for coercion. By allowing members of the group to articulate the perceived unfairness in an open and deliberative process, the group gains a collective sense of being heard.<sup>148</sup>

If we heed Professor Gostin's teaching, then it would behoove the government to anticipate the public's attention and its need to be able to trust the adjudicative systems in place, even during times of local or national strife in response to a terroristic threat or act.

2. *The Need for Current ALJ Utilization Data.*—Before applying Professor Gostin's suggestions and before making recommendations based on this review of the law, some mention should be made about the real limits of this analysis. A premise central to this Article is that the administrative process succeeds only to the extent that people have trust and confidence in it. A large motivating force behind the central panel concept is that separating the adjudicator from the agency decreases the risk of improper governmental influence over fact-finders and does so in a way that the public will both recognize and appreciate. Lacking in this premise, however, is substantial quantitative data; we know neither how ALJs are utilized in the states nor how the public receives them. If one of the other premises of this Article proves true and we find the use of executive branch adjudications increasing as we shift decision-making power from the judicial branch to the executive branch in response to threats to public health and safety, then it would seem to be of critical importance that we gather the data needed to fully inform lawmakers of how best to promote administrative adjudications at the state level.

3. *The Life of the Law is Experience.*—The epigraph to this Article reminds us of Holmes's often-quoted observation that the "life of the law has not been logic: it has been experience."<sup>149</sup> Indeed, it seems few areas of the law are more dependent on experience, and not logic, than are due process analyses in the

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148. Lawrence O. Gostin, *When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105, 1165-66 (2003).

149. HOLMES, *supra* note 1, at 5.



context of administrative law. From its inception, administrative law has defied simple and logical structures, electing instead to nearly self-generate by picking and choosing pieces of legal systems from the judicial and legislative branches, all in an attempt to facilitate the efficient and fair use of executive branch resources. Determining just how much “process” is due under a given set of laws and facts is more art than science, and doing it well under adverse conditions can be both trying and highly rewarding, often at the same time.

An adjudicative system, whether in the executive branch or the judicial branch, must reflect Holmes’s view that experience should guide us. Stated as a question, what experiences can we draw upon when asking lawmakers to give judicial or judge-like powers to the executive branch? How can we wean the public, one that has a deep and abiding trust in notions of justice and due process, away from the judicial model of adjudication so that it will have trust and confidence in fact-finding proceedings conducted not by the judicial branch but instead by the executive branch? It is no answer to pretend the ALJ is a judicial branch adjudicator. Indulging in such pretense may appease ALJs who aspire to be judicial branch judges, but it misleads the public and does not advance the cause of due process. Perhaps a better approach would be to develop the executive branch so that its adjudicators inspire in all participants the sense of justice having been served whenever an ALJ takes the bench.

4. *Why ALJ Utilization Data is Important: Due Process in Agency Adjudications.*—Missing from this equation to date, however, is data that will show how agencies currently use executive adjudicators and how the public receives these adjudicators. ALJ utilization and the public’s perception of the administrative adjudication process are key parts of any comprehensive due process analysis of agency adjudications. Under the three-part test of due process articulated in *Mathews v. Eldrige*,<sup>150</sup> courts will weigh governmental adjudication claims against a standard that asks (1) what are “the private interest[s] that will be affected by the official action,” (2) what is “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,” and (3) what is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>151</sup>

Applying this balancing formula, we see that agency process will be evaluated not by a single easily articulated set of standards, but relatively. How does the process being evaluated on appeal look when compared with other adjudicative processes? What are the risks that the agency might reach an erroneous conclusion based on the process being reviewed? What “additional or substitute procedural safeguards” exist? What are the costs and benefits inuring to the Government, i.e., the “fiscal and administrative burdens,” that additional or substitute processes would entail? Due process thus anticipates comparisons, both by agencies when creating adjudicative schemes and by courts when reviewing the adequacy of such schemes. We therefore want to encourage

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150. 424 U.S. 319, 335 (1976).

151. *Id.*

agencies to compare processes and to consider the fiscal and administrative burdens associated with conducting adjudications so as to better defend the ways and means of a given state's administrative hearing process.

What is missing from this calculus is data: data showing how states use ALJs, and how agencies, the participants, and the public regard ALJ utilization. As noted above, the Administrative Conference of the United States (ACUS) conducted a national survey in 1992 to gather data about federal ALJ and AJ utilization. For that study, questions were presented to 1150 sitting federal ALJs, with 610 (about 53%) responding; 380 questionnaires were sent to AJs, with 264 (about 69%) responding.<sup>152</sup> Because the study concerned the presiding officials' "perception of the potential challenge to their independence, and realistic responses,"<sup>153</sup> it was limited to considering the adjudicator's viewpoint only; the study probed neither the agency nor the litigants, leaving out key elements of a comprehensive analysis of how agencies operate, how they use adjudicators, how the agencies respond to their adjudicators, and how litigants and the public at large regard the process. Nevertheless, the ACUS group of surveys described by Professor Koch provides an important building block upon which a more comprehensive examination of ALJ utilization may be made.

5. *Using ALJ Utilization Data to Build Social Frameworks for Courts and Legislature.*—Data concerning ALJ utilization could be of substantial assistance to states as they develop adjudicative tools designed to meet emergent health and safety adjudication needs, particularly in the aftermath of 9/11. We know little of what kinds of threats will present themselves, but we know there are many ways of responding to those threats (and anticipating them so as to prevent the harm posed by the threats). Data on ALJ utilization could provide what is needed to build what social scientists Laurens Walker and John Monahan call the "social frameworks" that are useful when lawmakers and other decision-makers create legislative systems.<sup>154</sup> This data, if gathered and examined appropriately, could be interpreted through empirical analysis and then used by courts in the due process calculus required by *Mathews v. Eldridge*. Ideally, we would gather data from every state to know better how states use ALJs, in what kind of cases, with what kinds of process, and we would know how effective those processes are in earning the public's trust and confidence.

Walker and Monahan offer some guidance when setting about to construct social frameworks, particularly where the goal is to introduce the results of the analysis in court proceedings. "Frameworks," they explain, "resemble legislative facts as much as they resemble adjudicative facts."<sup>155</sup> Here, the reference to adjudicative and legislative facts comes from Professor Davis, who distinguished

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152. Koch, *supra* note 95, at 276-77.

153. *Id.* at 277.

154. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 568 (1987) (using the term "social framework" to "refer to [the] uses of general conclusions from social science research in determining factual issues in a specific case," *id.* at 560, and providing as examples "cases concerning eyewitness identification, assessments of dangerousness, battered women, and sexual victimization," *id.* at 563).

155. *Id.* at 584.



the two: “When an agency [or court] wrestles with a question of law or policy, it is acting legislatively, . . . and the facts which inform its legislative judgment may conveniently be denominated legislative facts.”<sup>156</sup> In the context of administrative proceedings, whether a material fact is “adjudicative” or “legislative” may make a difference in who—as between the agency head or the ALJ—makes the factual determination.<sup>157</sup> Walker and Monahan apply this in the context of creating tools for use by courts:

Legislative facts, in other words, are facts that courts use when they make law (or “legislate”), rather than simply apply settled doctrine to resolve a dispute between particular parties to a case. While the determination of adjudicative facts affects only the litigants before the court, the determination of legislative facts influences the content of legal doctrine itself, and therefore affects many parties in addition to those who brought the case.<sup>158</sup>

Data about ALJ utilization would be useful in creating legislative facts. For example, if we knew that most state ALJs prepare recommendations only and do not render final orders, and if the data shows strong public support for this approach, then we could use this information in the cost/benefit analysis required under *Mathews*. Against a challenge that the agency’s decision should be rendered by the ALJ and not subject to review by the agency, the agency could present as a legislative fact the high correlation of participant satisfaction with ALJ recommendation authority. The *Mathews* due process test is a hybrid of fact (e.g., what are the different procedural options available throughout the states and when are they used) and policy and law (e.g., what is the likely value of additional protections). Given this hybrid nature, building a social framework using ALJ utilization data to create legislative facts would, potentially at least, allow state courts nationwide to consider national data concerning ALJ utilization. This would be useful when the court has to evaluate a claim under *Mathews* that a given adjudication scheme (perhaps one that did not provide for face-to-face hearings, for example) meets or fails to meet each of the three tests in *Mathews*.

One goal of this Article, then, is to suggest the need for collecting data from all the states that would permit the development of a social framework describing ALJ utilization in the state administrative adjudication process. Such data would include information about which states use ALJs, for what purpose, with what

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156. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942); see *Getty Petroleum Mktg., Inc. v. Capital Terminal Co.*, 391 F.3d 312, 322 n.12 (1st Cir. 2004) (“‘Adjudicative’ facts, which are governed by Fed. R. Evid. 201, are ‘simply the facts of the particular case.’ . . . ‘Legislative facts,’ by contrast, include facts ‘which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.’”) (internal citation omitted).

157. See F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings or Conclusions of an ALJ?: Part Two*, 51 BAYLOR L. REV. 63, 68-69 (1999).

158. MONAHAN & WALKER, *supra* note 1, at 181.

qualifications, with what level of judicial review, and at what cost. It would also include data about user trust and confidence in the adjudicative process as well as data about agency confidence in its own ability to implement policy through the adjudicative process. Such an analysis is currently being considered by the National Association of Administrative Law Judges, in conjunction with the National Judicial College and the LBJ School of Public Affairs. If implemented, such a study may yield data from the first national ALJ utilization survey expressly designed to develop a greater understanding of state administrative adjudication systems.

## V. IDENTIFYING RELEVANT REQUIREMENTS IN AGENCY ADJUDICATION LEGISLATION

In order to prepare lawmakers for the challenges that exist when creating or updating an executive adjudication system, it seems prudent to learn what we can from existing ALJ adjudication programs. In any review of legislation considering the use of ALJs in agency fact-finding, four key requirements merit mention. First, the system must, through continuing education ensure a trained and competent pool of adjudicators. Second, there must be some express provision regarding *ex parte* communication between the adjudicator and the agencies being served. Third, lawmakers must determine whether the ALJ's decision will be binding on the agency. Fourth, the role of the judicial branch and its oversight of agency decision-making must be expressly stated. Meeting these requirements can reassure participants that all protected property and liberty interests will be protected and respected, while at the same time ensuring that even during times of high anxiety due to threats to public safety, executive policy and process requirements will be adhered to.

### A. *Educating the ALJ on Policy and Process*

Whether the ALJ is internal to the agency or a member of a central panel, he or she is valued both because of his or her familiarity with substantive agency programs and because of his or her ability to apply due process principles to the agency's adjudication process. Maintaining that level of familiarity with substance and process is critically important, particularly in emergency management. It is even more critical now that innovative threats to our homeland security may surface with little or no advanced warning. Any legislation that might adversely affect liberty or property rights would need, as a bare minimum, a means of ensuring that the appointed adjudicators are familiar with the public health and safety policies supporting such legislation and understand the nature of due process protections under both state and federal law.

Here, the central panel has clear advantages that should be taken into account by lawmakers when deciding the kind of adjudicator that should be used to hear public safety cases. First, central panels are more efficient and effective at distributing information. Peer-to-peer educational programs, like those provided through the National Judicial College at the University of Nevada—Reno, allow topical and timely dissemination of fundamentals of law and current trends both within the state and across the nation. Within a state's central panel, information



can be passed along among ALJ peer networks. ALJ competence and proficiency is assured through pooled resources like joint continuing professional development seminars, peer review and quality control, in-house training, intranet e-mail, and other peer-to-peer programs.

In contrast, the internal ALJ system described by Professor Rossi<sup>159</sup> must decide, on an agency-by-agency basis, whether to invest in any given educational program. Viewed from the perspective of a governor's chief of staff, this decentralized system of keeping ALJs current on the law is significantly less cost-efficient and may fall materially short if training is required on an ad hoc and emergency basis. Worse yet is the itinerant contractor system, which depends entirely on the individual ALJ's willingness to invest in the cost of relevant continuing education. Neither the internal adjudicator nor the contract adjudicator benefit from the transfer of information between state-wide ALJs who pool information about their collective experience and disseminate that information through an efficient and inexpensive state-wide training system.

The unique nature of public safety hearings—including the need to adapt quickly to emergent and diverse threats—suggests a need to prepare executive adjudicators for highly contingent or uncertain demands. A governor should have confidence that his or her cadre of executive adjudicators can quickly identify administrative needs in response to public health or safety threats and apply known procedural protections when adjudicating issues arising from these needs. One developing trend in furtherance of this concept is the idea of a national certification for administrative law judges.<sup>160</sup> Ideally the certification would attest to the adjudicator's knowledge of state and federal due process rights and reflect the adjudicator's ability to apply those doctrines to any new conditions confronting an executive agency. It would also set minimum qualifications for persons who ask to be ALJs or hearing examiners and minimum continuing education requirements. Even those states whose agencies prefer to use internal or itinerant adjudicators would benefit from having a widely recognized educational credential to rely on when hiring or retaining adjudicators.

### *B. Ex Parte Communication: Before, During and After a Hearing*

When lawmakers consider whether to delegate fact-finding to an executive agency, some thought should be given to the manner in which adjudicators learn about agency policy. A fundamental expectation is that any law, regulation, policy, or directive used by an agency adjudicator must be plainly identified during the hearing process so that all parties know what law is being applied, and so that challenges to such law may be made in a timely and effective manner. It is antithetical to notions of fundamental fairness for the parties to make a presentation to an ALJ based on one set of laws (the publicly known set), only to

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159. See *supra* text accompanying note 118.

160. See NAT'L ASS'N OF ADMIN. LAW JUDGES, STRATEGIC AND LONG-RANGE PLAN, at X(B)(1)(e) (Oct. 11, 2003), available at <http://www.naalj.org/strategicplan.pdf>; National Association of Hearing Officials, *NAHO Certification Program—2005*, at <http://www.naho.org/Certific1.htm> (last updated Feb. 25, 2005).

have the ALJ adjourn after hearing the evidence and then base his or her decision on another set of laws, perhaps expressed only through word of mouth or institutional tradition.

Drawing upon the federal APA for guidance, lawmakers could elect to prohibit *ex parte* communication, at least with respect to formal adjudication proceedings. *Ex parte* communication "relevant to the merits of the proceeding" are prohibited under the federal APA.<sup>161</sup> Professors Pierce, Shapiro and Verkuil explain that the limit on *ex parte* communication in federal APA formal adjudications "obviates any necessity of judging the consequences on an administrator and offers significant protection to litigants from possible unfairness."<sup>162</sup> They go on to explain, however, that section 557(d)(1) of the APA applies only to those in the agency performing investigative or prosecutorial functions; and as a result, "agency heads, or commissioners, by the literal terms of the APA, are free to make contact with ALJs about matters before them."<sup>163</sup>

Lawmakers would be well-advised, then, to determine consciously whether ALJs should be limited to considering only the expressions of law exchanged during the evidentiary hearing, and whether they should be subject to *ex parte* communication on matters then pending before them. In both respects, the result should be a transparent decision-making process, one that permits the parties and the public to know the factual and legal bases for all agency adjudications.

### *C. To Bind or Not to Bind: The Controlling Effect of an ALJ's Decision on the Agency*

Another consideration when delegating adjudicative authority to the executive branch is whether the person who hears the evidence will make the final decision, or whether that person will instead offer a summary of the record for the benefit of the agency head who has retained final decision-making authority. The power of an ALJ to bind the agency is something of a recent development, which has caught the attention of several commentators.

Professor Rossi writes about this development in his article, *Final, But Often Fallible: Recognizing Problems with ALJ Finality*.<sup>164</sup> He discusses both *de jure* finality, where by legislation ALJs are invested with statutory authority to render final decisions, and *de facto* finality, where the burden involved in successfully challenging ALJ findings is so substantial as to render the ALJ's decision final through the use of "presumptions that, in effect, make the ALJ's recommendations final."<sup>165</sup>

The degree of difficulty an agency has in modifying or rejecting an ALJ's findings of fact or conclusions of law is a significant factor in how effectively agency policy may be expressed through adjudication. As Professor Flanagan aptly notes, in those central panels where the ALJ has the power to render a final

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161. 5 U.S.C. § 557(d)(1)(A) (2000).

162. PIERCE ET AL., *supra* note 78, at 71.

163. *Id.* at 495.

164. Rossi, *supra* note 118, at 53; *see also* Flanagan, *supra* note 124, at 1373-76.

165. Rossi, *supra* note 118, at 63.



order, the ALJs

will produce different interpretations and different results of the same issue and will affect both the institution and the litigants. As for the agency, the uncertainty affects all of its actions, before and after they become contested cases. Any inconsistency between the policy articulated by the agency and the policy enforced in contested cases leads to confusion in the law.<sup>166</sup>

This confusion could be significant in adjudicating public safety cases, where both fact and law may be controverted. In public safety cases posing novel questions or questions not yet fully vetted by agency interpretation, it would be up to the ALJ to articulate publicly an agency interpretation of law based on the facts presented in the record. Professor Rossi notes the problem:

From an accountability perspective, allowing a central panel ALJ to trump the agency on [policy issues] is problematic. Central panel ALJs often operate within the executive branch, but they are generally non-political. Unlike the agency, which has substantive regulatory jurisdiction, the central panel has not been delegated the authority to regulate in a specialized area. Agency heads, unlike most ALJs, are political appointees, accountable (through appointments and removal, as well as budgetary oversight) to the executive branch and—perhaps to a lesser, but no less important degree—the legislature (which writes and amends regulatory statutes). The political accountability of agency heads is important to ensuring the public legitimacy of agency action.<sup>167</sup>

Lawmakers can avoid this potential for confusion, by expressly investing in the agency final decision-making authority, even in those systems that employ a central panel.<sup>168</sup>

#### *D. Judicial Deference to Executive Adjudications in Public Safety Cases*

Judicial oversight may be appropriate when an agency completes its fact-finding and makes its final determination of the rights and interests of the participants in an administrative action. Although not constitutionally mandated,<sup>169</sup> judicial review of agency action serves as an important check against governmental abuse and has been widely employed both at the federal and state levels. Given existing jurisprudence permitting adjudication by decisionmakers who are not wholly independent of the interests of parties, only by effective judicial review of agency orders can the legislative branch assure the public of an independent evaluation of both law and fact issues. Yet, when it

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166. Flanagan, *supra* note 124, at 1402.

167. Rossi, *supra* note 118, at 71.

168. See Rossi, *supra* note 118, at 73 (“In reviewing issues of policy, the agency’s reasoning framework should trump the ALJ’s reasoning, or that of any competing expert witness.”).

169. FUNK ET AL., *supra* note 37, at 27 (“[A]lthough most agency actions can be appealed, the [federal] APA recognizes that not all decisions are subject to judicial review.”).

reviews agency action, a court should take into account the procedural path that led to appellate review.

The degree of deference to which an agency's decision is entitled when being reviewed by a court has long been a relevant and sometimes changing factor in administrative law. Professor Rossi alerts us to one such change, occasioned by a trend towards investing final decision-making authority in the ALJ, rather than the agency.<sup>170</sup> While deference to the ALJ in fact-finding seems intuitive (because the ALJ is the only adjudicator who actually observes the witnesses and makes admissibility decisions on questions as they arise during a hearing), such deference to the ALJ seems misplaced with respect to questions of policy and law. Rossi makes the point:

One of the primary reasons for giving weight to the agency interpretation or deferring to the agency is enhanced accountability, to the extent the agency is responsible for enforcing the statutory scheme. Yet, deference to an ALJ final order on issues of statutory interpretation risks undermining agency accountability, particularly where the ALJ and agency do not agree on the merits of a policy choice or statutory meaning. Here, independence and accountability are in sharp tension.<sup>171</sup>

The tension Rossi cites is certain to be present when agencies adjudicate public health and safety claims, particularly as new policies are introduced in response to the attacks of 9/11. The wide array of homeland security issues confronting the nation's executive officers holds the potential for innumerable questions involving the balancing of private liberty and property interests against the common good. Thus, lawmakers would be well advised to consider carefully the degree of deference that should be given when courts review agency decisions. Rossi suggests that courts consider public accountability when deciding how much weight to give to an agency decision, and offers this workable approach:

At a minimum, reviewing courts should give strong weight to the agency's interpretation of law, regardless of how the ALJ decided the legal issue. From an accountability perspective, the deference approach has much to commend, so long as reviewing courts defer to the agency—not the ALJ—on issues of law in final ALJ orders.<sup>172</sup>

In making administrative decisions, the agency's interpretation of law and policy should be expressed as clearly as possible, with as few unintentional inconsistencies as possible. Deferring to the agency on questions of policy and law, as Rossi suggests, would promote a broader understanding of the law and render the decision-making process less prone to the arbitrary action of individual executive adjudicators.

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170. Rossi, *supra* note 118, at 70-73.

171. *Id.* at 74.

172. *Id.*



## VI. RECOMMENDATIONS AND CONCLUSION

Executive branch adjudicators are well possessed of the resources and the skills to serve the nation and its states in times of emergent threats to public safety. Due process tradition has long been entrusted to the “fourth branch” adjudicator, for reasons that include the ability to assemble rapidly, adapt to exigent conditions, and render prompt decisions fairly, doing so all in a manner that is open for all to see. There is every reason to believe that with forethought and diligence, lawmakers will be able to repose in the executive branch substantial fact-finding and decision-making power as the need arises, particularly with respect to legislation designed to protect the public from threats to health and safety.

An essential resource now lacking is a meaningful and comprehensive database reflecting ALJ utilization at the state level. Our lawmakers, working both as separate state sovereigns and working collectively, would benefit from a better understanding of how individual states use ALJs. Equally important, we would all benefit from knowing how administrative adjudication processes are regarded by the public. These adjudications are, in large part, successful only if the public has trust and confidence in the fairness of the proceedings. As politically accountable players in this process, agencies, too, have a stake in this, and they expect the process to be not only fair but effective.

When lawmakers create legislative schemes designed to respond to new threats to public safety, their actions must be guided by the collective experiences of existing administrative adjudication systems. Guided by these experiences and armed with current and accurate ALJ utilization data, lawmakers would then be in a position to create fair and effective health and safety laws—laws that take into account the organizational structure of the executive adjudication system, the strengths and weaknesses of its adjudicators, the hierarchy of authority, and the role of the judiciary in serving as an effective check on the executive branch in administrative adjudications.

