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Jay S. Bybee

University of Nevada, Las Vegas – William S. Boyd School of Law

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Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana’s Administrative Procedure Act

Jay S. Bybee

I. INTRODUCTION

Structure matters. It drives function, expanding or confining the limits of use. Legal structure matters in administrative law. Whether we are creating new legal structures or redefining old ones, changes in laws affecting government organizations will determine the functions they serve. Sometimes our changes are made deliberately; sometimes changes to one area of the law will inadvertently affect another. Several years ago Senator Daniel Patrick Moynihan recommended that responsibility for federal welfare be shifted from the Department of Health and Human Services to the Department of Labor. Senator Moynihan was not unhappy with the management of HHS, nor was he recommending change for the sake of change. His reasons for the change were more fundamental, more “structural: HHS is in the business of passing out checks; Labor is in the business of stressing work.”

In the past two years, the Louisiana Legislature has adopted several structural changes in Louisiana’s Administrative Procedure Act (“LAPA”). Most notably, Louisiana adopted what is known as a central panel or unified corps of administrative law judges (“ALJs”). The central panel system, which has been adopted in nearly half of the states and has been proposed for the federal system, has a central agency or office that hires and assigns all ALJs; the central agency rotates ALJs among agencies to ensure the ALJs’ independence. Louisiana created the Division of Administrative Law, effective October 1, 1996, within the Department of State Civil Service to employ and manage Louisiana’s ALJs. Previously, each administrative agency hired its own administrative law judges, and the judges worked exclusively for that agency.

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• Professor of Law, Louisiana State University Law Center. B.A., 1977; J.D. 1980, Brigham Young University. I had helpful conversations on this article with John Devlin, Michelle Finnegan, Ken Murchison, and Ben Zeigler, although the views expressed here remain mine alone. I appreciate the fine research assistance of Christine Arbo.

The arguments for the unified ALJ corps are straightforward.\textsuperscript{5} ALJ's who are employees of the Department of State Civil Service will enjoy greater decisional independence. No longer will ALJs be subject to hiring and firing, production quotas, quality-control management, or other supervision by the same agencies that call upon them for their findings and legal conclusions.\textsuperscript{6} When agencies cannot hire or fire ALJs because an agency disagrees with the ALJs findings and conclusions, the ALJs feel more confident of their ability to decide the controversy before them. As a result, we get greater decisional independence and, so the theory tells us, better decisions.

In and of itself, Louisiana's move to a central panel ALJ system would be noteworthy, because the central panel suggests a shift in the way we think about administrative agencies. It affects agency structure and culture, and we would expect to see modest changes in agency behavior, changes that invoke known risks because the central panel has been implemented in so many other states. The Legislature, however, made additional changes in the LAPA which went well beyond the central panel. The APA now provides that, with certain exceptions, "[i]n an adjudication commenced by the [Division of Administrative Law] the administrative law judge shall issue the final decision or order, . . . and the agency shall have no authority to override such decision or order."\textsuperscript{7} This is a substantial shift because the agency no longer controls the result. But not only are ALJ decisions not subject to agency review and reversal, they apparently are not even subject to agency appeal. The APA further provides that "[a] person who is aggrieved by a final decision or order in an adjudication . . ."


proceeding is entitled to judicial review." An agency, however, is not "a person" for purposes of the APA. Accordingly, agencies are not entitled to judicial review of adverse ALJ decisions.

This extreme decisional independence in Louisiana's ALJs is a severe departure from the historical reasons—sometimes in tension—for which we have created different structures in our administrative agencies. First, agencies should have a measure of independence because they are experts in the field and, second, where their expertise is not apparent, the agencies should be politically accountable for their decisions. Louisiana's recent reforms contradict the perceived wisdom, the *raison d'être* for administrative agencies. The LAPA places ALJs in a central pool from which the Division of Administrative Law may rotate them from one agency to another and it makes their decisions the decisions of the agencies, unreviewable by the courts when the ALJs rule against the agencies. The LAPA suggests that ALJs need have no particular expertise, so they may conduct adjudications for any agency, and, moreover, that ALJ decisions should be politically unaccountable. At the very least, the changes portend a legislative vote of no confidence for Louisiana's agencies, which, apparently, no longer can be trusted with the administration of the law.

This new role for Louisiana's ALJs may not fit our traditional models for administrative agencies, but it does fit a model with which we are quite familiar; they look very much like state district judges. In effect, though without formally declaring this to be its intent, the Legislature has created an administrative court of extraordinary authority. We are left to puzzle whether the Legislature has consciously refashioned or inadvertently subverted Louisiana's administrative process.

In this article, I propose to discuss each of these changes as a way of trying to understand how the Legislature is remaking Louisiana's administrative adjudications. These changes alter substantially—at least in theory—the power of Louisiana's administrative agencies. If the Legislature has changed the foundation from which its executive agencies proceed, then it may alter the way the agencies behave in fact, although it is perhaps too early to understand the full impact of these changes. Whatever the Legislature had in mind, the changes are structural, and changes in administrative function will inevitably follow.

11. Lest we think that agency's inability to appeal adverse ALJ decisions was legislative oversight, the Legislature in 1997 amended the definition of "person" to provide that "an agency is a 'person' for the purpose of appealing an administrative ruling," but only in certain limited disciplinary proceedings. 1997 La. Acts No. 1224, § 1 (codified at La. R.S. 49:951(5) (Supp. 1998)).

Under the usual administrative scheme, the fact that agencies cannot appeal adverse rulings was of no consequence since the agency itself generally controlled the outcome and could reverse an ALJ.

12. Louisiana has a bewildering array of agencies. Although the Louisiana Constitution specifies that there cannot be more than twenty departments in the executive branch, La. Const. art. IV, § 1(B); art. XIV, § 6, agencies located within those departments are legion. See 1979 Louisiana State Agencies Handbook (1979 & Supp. 1980).
In Part II, I trace briefly the history of administrative law judges in American administrative procedure so that we will understand where we have come from, why state and federal governments developed the system they did. In Part III, I review each of the recent changes in Louisiana procedure bearing on ALJ independence, discussing how the change departs from prior practice. Finally, in Part IV, I consider how these changes together work to change Louisiana administrative law. I conclude that administrative agencies will likely turn from making policy through adjudication to relying on rulemaking; we thus can expect to see an increase in administrative rules. I suspect that agencies may become far more cautious in their enforcement efforts; the changes will surely deter agencies from bringing some enforcement actions and may tempt Louisiana agencies to underenforce their provisions. The finality of ALJ decisions raises important questions as to the relative deference to be given agencies by the courts. I also question whether the scheme violates separation of powers provisions in the Louisiana Constitution. Finally, I ask what Louisiana's new unified, independent corps of ALJ's can contribute to the state's administrative process that could not be achieved by forcing all agency adjudications into state courts in the first place.

II. A BRIEF HISTORY OF AGENCY STRUCTURE AND USE OF ALJ'S

A history of administrative agencies, state or federal, is well beyond the scope of this article. A brief history will help us understand something about the purposes for administrative agencies and why we have structured them so differently. I am going to begin with federal agencies because so much of state administrative law followed the lead of the federal government.

A. Models for Administrative Agencies

1. The First Century: Agency Accountability

The United States Constitution creates three departments of government—Congress, the President, and the Supreme Court—and it vests distinct powers and responsibilities in each department. Article I of the Constitution vests enumerated legislative power in a Congress, consisting of a House of Representatives and a Senate.\(^\text{13}\) Congress is a \textit{collegial} body, and collegial bodies represent double-edged swords. On the one hand, no single member of Congress, neither the Speaker of the House nor the President \textit{pro tempore} of the Senate\(^\text{14}\) may speak on behalf of their respective chambers, much less on behalf of Congress itself. Only the members of Congress, in Congress assembled, may speak for Congress as the legislative branch of government. This gives Congress

\[^{13}\text{U.S. Const. art. I, § 1.}\]
\[^{14}\text{See U.S. Const. art. I, § 2, cl. 5; § 3, cl. 5.}\]
a broad, representative base. On the other hand, just as no member of Congress
may speak for the whole, no single member of Congress may be held account-
able for the actions of Congress. Members of Congress are elected to office
from their respective districts or states and stand for periodic election in order
to retain those offices. They are accountable to their electorate, but no electorate
of the whole elects or rejects the entire Congress. When we are unhappy with
Congress we have no mechanism for wiping the slate clean, for “throwing the
bums out”; we can only throw our own bum out and hope that everyone else will
do the same. Having to stand for election makes our representatives and senators
accountable to us, but we have no single mechanism for holding the collective
body, Congress, accountable.

Article III creates “one supreme Court, and . . . such inferior Courts as the
Congress may from time to time ordain and establish.”15 The Supreme Court,
like Congress, is a collegial body.16 We may disparage the presence and
influence of a particular justice, but unless he or she can persuade four other
members of the Court to join him or her, the Court, as a constitutional
department exercising the judicial power of the United States, has not acted.
Federal judges are appointed by the President, by and with the advice and
consent of the Senate. Because of the appointment power, the President has
some control over the judiciary. He has, however, no control over any individual
judge, even one he appointed. Once appointed, Article III judges enjoy life
tenure “during good Behavior” and receive compensation which Congress cannot
diminish during their tenure in office.17 As members of a collegial body and
as federal officers not subject to election, recall, or dismissal, federal judges are
even less accountable to us than members of Congress.

Article II of the Constitution vests in a President the executive power of the
United States and the responsibility to “take Care that the Laws be faithfully
executed.”18 The President is the only one of the three departments of
government that is also a person. The President does not belong to a collegial
body; he alone exercises the executive power. The Constitution makes the
President the only principal officer of the government who must stand for
general election.19 The Constitution provides for the removal from office of
members of Congress, justices of the Supreme Court, and the President,20 but
only in the case of the President does removal of a single individual vacate an
entire constitutional department of the federal government. This structure makes

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16. See generally Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution:
17. U.S. Const. art. II, § 2, cl. 2; art. III, § 1.
18. U.S. Const. art. II, §§ 1, 3.
19. Of course, because of the electoral college, the President stands for general election only
in a limited sense. See U.S. Const. amend. XII; Martin Diamond, The Electoral College and the
the President accountable; he bears direct and full responsibility for the actions of the executive branch.

The Founders considered and rejected a proposal for a Council of Revision that would have divided the power of the executive among more than one person.21 Alexander Hamilton wrote in Federalist No. 70 that unity in the executive was "conducive to energy" and that

[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.22

Instead of creating a Council of Revision or a non-binding advisory council—which James Wilson thought "oftener serves to cover, than prevent malpractices"23—the Framers located the executive power in a single figure. As Hamilton pointed out, "plurality in the executive... tends to conceal faults, and destroy responsibility."24 His description of the consequences of dividing authority in the executive branch sounds like modern complaints about Congress:

It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author.25

The Constitution vests the President with the power to act decisively, but the burden of being uniquely responsible for his actions.

Congress, beginning with the very First Congress, recognized that the President could not faithfully execute the law unaided, and it created additional executive offices, bureaus and departments to assist the President in his duties. During the first century of our history, the President remained politically responsible for these agencies. Congress based its model of subordinate agencies on the model of the President as Chief Administrator. Congress created single-headed agencies such as the various offices now in the cabinet (War, State, Treasury, Commerce) and other, non-cabinet agencies (the Post Office, Office of Customs, and Office of Patents and Copyrights).26 These agencies each had a single titular head who alone was responsible for the actions of the agency and, in turn, remained fully accountable to the President. Thus, the first hundred

23. 1 Farrand, supra note 21, at 97.
25. Id.
years of our history are marked by reliance on single-headed agencies. It was
the model of administrative decisionmaking we knew best: the President, the
governor, the mayor. We wanted our chief administrators where we could find

them. 27

2. The Reform Period: Agency Independence

The arrival of the Industrial Revolution changed many things, not the least
of which was our conception of what government could plausibly do. 28
Transportation and communication brought the coasts closer; it facilitated
interstate trade, and it cast a spotlight on industry rather than agriculture.
Farmers, in particular, saw their influence erode and felt at the mercy of
more modern transportation. Transportation—principally the railroads—gave
farmers access to markets they could not reach before. But the railroads
exacted a heavy price in the form of monopoly profits. Farmers unwilling
to pay the railroads’ rates lost their markets to their neighbors who
were. 29

The earliest efforts to regulate railroad service belonged to the states. 30
These early commissions often served ad hoc and mainly as fact-finding advisors
for state legislatures. 31 When, in 1886, the Supreme Court held that the states
could not regulate interstate railroad traffic within their borders, 32 Congress
stepped in and created the Interstate Commerce Commission. The ICC was the
first regulatory commission designed to address national concerns; it was also the
first important multi-member commission. During the debates over creation of
the ICC, Senator Morgan of Alabama queried where the ICC fit in our
governmental structure:

27. Louisiana’s constitutional structure, like that of many other states, follows the general
principles of this model. See La. Const. art. II, § 1 (“The powers of government of the state are
divided into three separate branches: legislative, executive, and judicial.”). One difference between
Louisiana’s executive branch and that of the federal government is that Louisiana has located other
constitutional officers in the executive branch besides the governor. The Attorney General, Secretary
of State, and Agriculture Commissioner, for example, are elected officers who enjoy independent
constitutional status. La. Const. art. IV, § 7 (secretary of state); § 8 (attorney general); § 10
(commissioner of agriculture).

This structure means that Louisiana’s executive branch is not unitary—the governor does not
control the executive branch to the same degree as the President. Thus, Louisiana’s attorney
general—unlike his federal counterpart—is accountable to the people directly, and not through the
governor. This structure does not affect my point that collegial bodies give us expertise or political
consensus, while single-headed agencies gives us political accountability.


29. Robert L. Rabin, Federal Regulation in Historical Perspective, 38 Stan. L. Rev. 1189,
1197-1208 (1986).


31. Id. at 23. Professor Cushman notes that these fact-finding commissions were typically
composed of more than one official. Id.

Perhaps [the commissioners] ... are autocrats. But we ought to know what they are. . . . It is the first bill I have ever known to be brought into the Senate . . . where the authors of it were not willing to enter into a definition as to whether the powers they conferred . . . were . . . upon officers of the executive . . ., legislative . . ., or judicial department[s] . . . 33

The ICC was as much a product of the industrial and scientific revolution as the problems it was created to address. The new multi-member agency was built on a new administrative model: Though it seemed to exercise executive power, the Commission, like Congress, was made collegial in order to offer its scientific expertise; like the judiciary, the Commission was made largely free of political pressure or reprisal. 34 What the ICC offered us was informed, dispassionate decisionmaking. No longer did commissioners serve at the pleasure of the President. The independent regulatory commissions offered expertise, not political accountability.

The ICC proved so popular that it was followed by other multi-headed boards and commissions such as the Federal Reserve Board (1913), the Federal Trade Commission (1914), the Tariff Commission (1916), the Water Power Commission (1920), the Commodities Exchange Authority (1922), the Federal Radio Commission (1927), the Federal Power Commission (1930), the Food & Drug Administration (1931), and the Federal Home Loan Bank Board (1932). With President Franklin Roosevelt’s New Deal in 1932 came a whole rash of independent commissions, including the Federal Deposit Insurance Corporation (1933), the Farm Credit Administration (1933), the Federal Communications Commission (1934), the Securities and Exchange Commission (1934), the National Labor Relations Board (1935), the Bituminous Coal Commission (1935), the Federal Maritime Administration (1936), and the Civil Aeronautics Board (1938). 35 The Court proved very supportive of the efforts of the political branches and responded with great deference to these agencies’ decisions. 36 It

33. Cushman, supra note 30, at 57 (quoting 17 Cong. Rec. 4422 (1887)).
34. See Landis, supra note 28, at 16-17. With the independent regulatory agencies what we wanted was expertise and scientific management. In contrast to our earlier theories of government, we were not as concerned with their political accountability. Not only did Congress create collegial commissions, it often provided that the President could not remove commissioners except for cause, and Congress gave the commissioners fixed tenure and a term that ensured that the commissioners would serve beyond the immediate term of the President who appointed them. See Humphrey’s Ex’r v. United States, 295 U.S. 602, 55 S. Ct. 869 (1935).
36. See, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S. Ct. 456, 465 (1951) (“even as to matters not requiring expertise a court may [not] displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.”); Skidmore v. Swift, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944) (“interpretations . . . of the Administrator under this Act, while not controlling upon the courts

was a romantic era for government generally, and in our minds we idealized the role of the independent agencies.

3. The New Reform: Back to Accountability

The 1960s saw a more cynical view of independent agencies. One significant theory suggested that when agencies became the guardians of their powerful wards, instead of a disciplining force, the agencies were "captured." Thus, what we needed was not agency independence, but political accountability. During this era, Congress returned to the model of single-headed agencies. Better that agencies answer to the President than that they be formally independent of the President and (informally) answerable to industry.

Congress created a number of single-headed agencies within existing executive departments: the Federal Highway Administration (1966), the Federal Railroad Administration (1966), the National Highway Transportation Safety Administration (1970), the Occupational Safety and Health Administration (1970), and the Mine Enforcement and Safety Administration (1973). Congress also created several free-standing agencies: the Environmental Protection Agency (1970), the National Credit Union Administration (1970), and the Equal Employment Opportunity Commission (1972). Unlike the independent commissions created during the New Deal, the new free-standing agencies were largely single-headed agencies accountable to the President.

4. Modern Trend: Independent Accountability?

The modern trend looks to the best of both of these models and may yet discover the worst. Congress has created relatively few new agencies in the past years. Two represent the strangest animals yet: independent single-headed agencies—agencies that vest extraordinary power to a single, unaccountable individual. The first of these is the revamped Social Security Administration. In 1994, Congress freed the Social Security Administration from the Department

by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."); NLRB v. Hearst Publications, 322 U.S. 111, 130, 64 S. Ct. 851, 860 (1944) (the "task [of defining statutory terms] has been assigned primarily to the agency created by Congress to administer the Act."); overruled in part on other grounds, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 112 S. Ct. 1344 (1992); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 61 S. Ct. 845, 852 (1941) ("courts must not enter the allowable area of . . . [agency] discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.").


38. Rabin, supra note 29, at 1193.

of Health and Human Services. A single commissioner will continue to head the Social Security Administration and will serve for a six year term. The Commissioner appears to be accountable to Congress alone. No longer does the President have the power to direct the actions of the Commissioner or remove her except for "neglect of duty or malfeasance in office," and her budget requests go straight to Congress, bypassing ordinary budget review at OMB.

The second example has become, unfortunately, quite familiar to us: the Office of the Independent Counsel. The Independent Counsel operates only loosely under the guidelines of the Department of Justice and serves until the matter has been fully investigated and prosecuted to his satisfaction. Short of the Independent Counsel’s gross misconduct in office, no one except Congress can remove the Independent Counsel.

A final hybrid we should note is the unusual jurisdictional overlap between the Occupational Safety and Health Administration (OSHA), which is a single-headed agency within the Department of Labor, and the Occupational Safety and Health Review Commission (OSHRC), a multi-headed, independent commission. OSHA bears responsibility for promulgating regulations and bringing enforcement actions, but adjudications are held before OSHRC. An employer who contests OSHA’s citation may appear before an ALJ employed by OSHRC. OSHRC reviews, in its discretion, the initial decisions of its ALJs. The lower courts initially divided over which of the question, in the event of a difference of opinion between OSHA and OSHRC, to which agency (if either) should the courts defer? In 1991, the Supreme Court held that courts should defer to

42. 42 U.S.C. § 904(b) (1994).
OSHA, not OSHRC.48 "[W]hen a traditional, unitary agency uses adjudication to engage in lawmaker by regulatory interpretation, it necessarily interprets regulations that it has promulgated." By contrast, the Commission exercised "nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context."49

Finally, we have what appear to be multi-headed executive agencies. The Defense Base Closure and Realignment Commission made recommendations to the President on military base closures. The President either approved for closure the entire list or he disapproved the entire list and the Commission started over.50 The Commission gives the controversial base closure decisions an air of detached expertise, while the President becomes politically accountable for the ultimate decision.

B. Administrative Law Judges: Some Parallel History

1. The Origins of ALJ's

The early history of ALJs lacks the same sense of drama as the creation of the independent agencies, but the history is surprisingly similar, although slightly out of sync. In the early days of federal agencies, the agency principals acted as finders of fact; the commissioners themselves heard the facts in disputed cases and decided the law.51 "[T]he reason for agency-head review of hearing-officer decisions was not primarily to correct 'factual' mistakes of the hearing officers, but to maintain control over policy development and application.”52 Informally, commissioners relied on agency employees to assist them in making factual and legal determinations. These employees served much the same function as a judicial law clerk, advising the principal who makes the ultimate decision. The formal precursors of our modern ALJs were hearing examiners, created by

49. 499 U.S. at 154, 111 S. Ct. at 1178.
51. The Attorney General's Final Report noted the variety of means in which agencies employed their hearing examiners:

      ... In most of the agencies the person who presides is an adviser with no real power to decide. In a few agencies the hearing officer's or board's decision is conclusive unless appealed by the parties to the head of the agency or unless the agency head itself takes the case up for consideration after initial decision. In one instance initial decision by the hearing officer is final without provision for administrative appeal. In another case there is no appeal to the agency as of right, and the decision of the hearing officer is final unless discretion is exercised to grant a request for review.

Final Report, supra note 26, at 44. See also Simeone, supra note 5.
52. Gifford, supra note 47, at 980.
Congress in 1906 in the ICC in order to "subdelegat[e]... fact-finding duties and [offer] greater functional specialization."\textsuperscript{53}

The real expansion of ALJs arrived with the New Deal as new agencies were created and their powers fearfully increased. Given the agencies' broad mandate, hearing examiners became essential, so Congress routinely authorized agencies to employ hearing examiners. In some cases Congress dictated the powers of hearing examiners, while in other cases the agencies themselves prescribed the examiners' role. These duties extended from merely advising the agency to conducting full blown trials.\textsuperscript{54}

The organized bar saw this expansion in the role of hearing examiners as an attack on the role of neutral decisionmakers in settling disputes. In the 1930s the American Bar Association sought to make the procedures used by agencies more like court procedures; to separate the adjudicative functions within agencies from the agencies' other responsibilities; and to increase the professional qualifications of hearing examiners to make them independent of agency influence. At one point the ABA evidently endorsed the idea of a United States administrative court.\textsuperscript{55} The administrative court would have worked the complete separation of hearing examiners from agencies and would have placed real power—the power to make findings and initial recommendations—outside of executive branch agencies. In 1937 President Roosevelt's Committee on Administrative Management issued its report and proposed something of a compromise. It recommended that personnel within an agency be separated according to their adjudicative or investigative functions.\textsuperscript{56}

2. **Statutory Control of ALJs**

In 1941, the Attorney General's Committee on Administrative Procedure issued its highly influential report. The Attorney General's *Final Report* took a strong position on ALJs remaining within the agency's structure: "Efficient conduct of the work demands that hearing officers specialize in the work of specific agencies... Specialization is one of the fundamentals of the administrative process." The *Final Report* also made clear what the structural role of the ALJ was—"the hearing commissioner is in a very real sense acting for the head of the agency."\textsuperscript{57} The *Final Report* recognized that ALJs should


\textsuperscript{54} Lloyd D. Musolf, Federal Examiners and the Conflict of Law and Administration 47-56 (1953); Verkuil et al., *supra* note 5, at 799-800; Pops, *supra* note 53, at 170-71.


\textsuperscript{57} *Final Report*, *supra* note 26, at 47.
exercise "[i]ndependence of judgment"—in the sense that ALJs should be impartial—but it also recommended that ALJs remain in the control of the agencies whose head they represented.  

The Committee's recommendations became the basis for the federal Administrative Procedure Act, which Congress enacted in 1946. The APA represented a compromise between those, like the Attorney General, who viewed the role of the hearing examiner as an integrated part of the process of executive branch enforcement, and those, such as the ABA, who thought hearing examiners should follow a more formal judicial model. The compromise was nowhere more evident than in one of the congressional reports accompanying the bill that became the APA. The report stated that Congress intended to make hearing examiners "a special class of semi-independent subordinate hearing officers." There was real irony in the juxtaposition of the words "independent" and "subordinate."

The present federal APA provides that hearings at which the agency receives evidence may be presided over by the agency itself, one or more members of the body comprising the agency, or an administrative law judge. Although agencies have the primary responsibility for their ALJs, the Office of Personnel Management has some role in the hiring and retention of ALJs. The federal APA contains several provisions that contribute to the decisional independence of hearing officers. Each agency is authorized to appoint "as many administrative law judges as are necessary" to conduct the adjudicatory proceedings of the agency. Agencies must assign cases to ALJs "in rotation." Although ALJs do not enjoy life tenure as Article III judges, they have nearly the same job security and may be dismissed "only for good cause established." An agency must keep separate its prosecutorial and adjudicatory personnel. ALJs may not be responsible to, or subject to supervision by, anyone performing investigative or prosecutorial functions for the agency, nor may they "perform duties inconsistent with their duties and responsibilities as administrative law judges." So strict is this "separation of functions" requirement that certain agency

58. Final Report, supra note 26, at 47.
60. See Ramspeck, 345 U.S. at 132 (quoting Administrative Procedure Act—Legislative History, S. Doc. 79-248, at 192 (1945)).
61. 5 U.S.C. § 556(b) (1994). Employees presiding at agency hearings may administer oaths, issue subpoenas, rule on offers of proof, take depositions, hold settlement conferences, and make recommended or initial decisions. 5 U.S.C. § 556(c) (1994).
64. Id.
65. Id. § 7521(a).
66. Id. § 554(d)(2).
67. Id. § 3105.
employees may not communicate with ALJs outside the record; that is, some
intra-agency communications are ex parte communications just as if received
from non-agency interested parties. 68 Although there has been a great deal of
discussion over whether to create a unified ALJ corps in the federal system, 69
federal ALJs remain under the immediate control of their hiring agency. 70

C. State APAs and ALJs

In 1961 the National Conference of Commissioners on Uniform State Laws
issued the Model State Administrative Procedure Act ("1961 MSAPA"), which
followed and improved upon the federal APA. 71 More than half of the
states—including Louisiana—based their state APA's on the 1961 Model State
Act. 72 The National Conference of Commissioners issued a second Model State
APA in 1981 ("1981 MSAPA"), 73 but Louisiana has not adopted it. As
Professor Dakin observed just prior to Louisiana adopting portions of the 1961
MSAPA, "Louisiana comes relatively late to the enterprise of preparing a general
agency procedure act but consequently has the benefit of much legislative
experience elsewhere." 74

The 1961 MSAPA did not make any recommendations with respect to ALJs.
This was apparently because of the "bewildering heterogeneity of the functions
and responsibilities of hearing officers in state agencies." 75 The 1961 MSAPA
recognized the role ALJs in fact played, but only as a matter of reflected light. 76
Instead of proposing a model for state ALJs, or even a couple of models, the

68. Id. § 554(d)(1).
70. Agencies that are "occasionally or temporarily ... insufficiently staffed with administrative law judges" may borrow ALJs with consent of other agencies. 5 U.S.C. § 3344 (1994).
71. See 1 Frank E. Cooper, State Administrative Law, at 7-13 (1965); Arthur E. Bonfield, The Federal APA and State Administrative Law, 72 Va. L. Rev. 297, 301 (1986). The first MSAPA was issued in 1946 and was adopted by twelve states. Id. at 299 & n.14.
75. Cooper, supra note 71, at 331.
76. See, e.g., 1961 MSAPA § 13 (referring to "members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case").
1961 MSAPA simply left state ALJs where it found them. Because of this omission from the 1961 MSAPA, it is not surprising that when Louisiana adopted its APA in 1967 it included no reference to hearing officers. Like the 1961 MSAPA, the Louisiana Legislature simply left the responsibilities of ALJs to agency innovation or ad hoc legislative action.

By contrast, the 1981 MSAPA formally recognized the widespread use of state ALJs and wrote them into the model act.77 Generally, the MSAPA prescribed a role for ALJs sympathetic with their historical federal roles—an initial decisionmaker, whose judgment is subject to revision by the agency head.78 The 1981 MSAPA also took note of an important innovation in the states, the development of the central panel.79 Pioneered in California in the 1940s and adopted, in some form, by some twenty states,80 the central panel system provides for a central office that hires and assigns state administrative law judges. The theory is a simple one: A central panel gives ALJs greater decisional independence because the ALJs do not depend on agency heads for their employment. Decisional independence is not the same as an independent decision. It is a matter of degree. Even in central panel systems, an ALJ’s decision will be subject to agency review and reversal, even if the ALJ’s employment will not.81

III. LOUISIANA’S REFORMS: CENTRAL PANEL OR ADMINISTRATIVE COURT?

From the principles and brief history discussed in the previous section, three models for administrative law judges emerge: (1) ALJs as judicial law clerks, (2) ALJs as initial factfinders subject to appeal within the agency, and (3) ALJs as an administrative court entitled to deference for its own expertise. After discussing these models, I then turn to Louisiana’s recent legislation and attempt to classify its latest reforms.

77. See, e.g., 1981 MSAPA § 4-202(a).
78. See, e.g., 1981 MSAPA § 4-215(a), (b); § 4-216(a).
79. 1981 MSAPA § 4-301.
81. 1981 MSAPA § 4-216(a).
A. ALJ Roles

1. Judicial Law Clerk Model

We can describe the traditional role for ALJs as the Law Clerk Model. Law Clerks for federal and state judges serve an increasingly influential function in the judicial system. Although I say "increasingly influential," the function remains informal rather than formal. Neither federal law nor state law (that I am aware of) vests governmental authority in judicial law clerks.\footnote{United States district court judges are authorized to appoint law clerks, 28 U.S.C. § 752 (1994), but a "law clerk has no statutorily defined duties." Fredonia Broad. Corp., Inc. v. RCA Corp., 569 F.2d 251, 255 (5th Cir. 1978).} They advise; they do not decide.\footnote{See United States v. George S. Bush & Co., 310 U.S. 371, 379-80, 60 S. Ct. 944, 946-47 (1940) (recommendations of the Tariff Commission were not reviewable until acted upon by the President or Congress); Crowell v. Benson, 285 U.S. 22, 51-52, 52 S. Ct. 285, 291-92 (1932) (advisory nature of certain findings by masters does not interfere with the Article III responsibilities of the courts). See also Jay S. Bybee, Advising the President: Separation of Powers and the Federal Advisory Committee Act, 104 Yale L.J. 51, 101-03 (1994) (describing the difference, for purposes of separation of powers, between merely advising and requiring advice to be accepted).} Typically, a law clerk will orally advise a judge on particular cases or issues and may draft opinions. Often, judges will ask a law clerk to draft an opinion for the judge's review. The judge may accept the draft without revision, accept part of it, ignore it, or even disagree with it entirely. Whatever the judge decides in chambers with respect to the clerk's draft opinion, the draft opinion is only a draft. It is not publicly released, it is not subject to response by counsel for the parties, it may not be used to impeach the judge's own opinion.\footnote{See In re Corrugated Container Antitrust Litig., 614 F.2d 958, 968 (5th Cir. 1980) ("a law clerk's views cannot be attributed to the judge for whom the clerk works").} Only when the judge issues the opinion as his own does the opinion become law of the case—and whether the law clerk wrote some of the opinion or every word of it, the judge accepts full responsibility for the opinion.

The origins of ALJs fit well within this model. As I discussed in the prior section, the agencies turned to hearing examiners because the agency principals could not personally conduct all of the agency's hearings. The examiners conducted the hearings in the place of the agency administrator or commissioners, but the ultimate decision reposed in the agency principals.\footnote{See, e.g., La. R.S. 47:1992(F)(3) (Supp. 1998) (Orleans Parish [Board of Assessment Review] "may create one or more hearing officers, any one of whom shall be a member of the board of review and who may conduct all required public hearings of the board with or without the presence of the other members, provided that no final action may be taken by such board of review unless a quorum is present."); La R.S. 3:4107(A) (1987) (Dairy Stabilization Board may designate a hearing officer to conduct the hearing and "present the entire record of the proceeding to the board for disposition.").} By using hearing examiners, the agency did not commit any formal authority to the examiners—the examiners could not issue final decisions, only initial decisions subject to approval or revision by the agency. A good example is found in the
procedures governing the Office of Alcoholic Beverage Control: "whenever a
hearing [within the Office of Alcoholic Beverage Control] is conducted by a
person designated by the commissioner to hold the hearing... [the record] shall
be made and certified by the hearing examiner to the commissioner for his
consideration and decision." \footnote{86}

Depending on the agency, and the level of confidence an agency has in any
particular ALJ, an agency may in fact give great credence and deference to an
ALJ’s findings and conclusions, but there is no legal reason that they must—just
as a judge may in fact rely (or not) on a law clerk’s draft opinion. \footnote{87} This
principal has long been a fixture of American administrative law. In \textit{Universal
Camera Corporation v. NLRB}, the United States Supreme Court sustained the
NLRB’s reversal of its hearing examiner even though the examiner had taken
live testimony from witnesses. \footnote{88} The Court rejected the argument that the
relationship between ALJ and agency was analogous to that of a special master
and district court. Under the \textit{Federal Rules of Civil Procedure} a district court
“shall accept the master’s findings of fact unless clearly erroneous.” \footnote{89} By
contrast, the Court said, “[t]he responsibility for decision thus placed on the
Board is wholly inconsistent with the notion that it has power to reverse an
examiner’s findings only when they are ‘clearly erroneous.’” \footnote{90}

The Law Clerk Model recognizes the primacy of the agency head and
subordinates the role of the ALJ. The Model is certainly consistent with a

Control; same); La. R.S. 26:919 (Supp. 1998) (Commissioner of the Office of Alcohol and Tobacco
Control; same); La. R.S. 51:2232(6) (Supp. 1998) (“Hearing examiner” means one or more person
or commissioners designated by the [Louisiana Commission on Human Rights] to conduct a hearing.
The commission shall have the sole power to determine qualifications of the examiner.”). See also
La. R.S. 33:4755.5(B) (1988) (chairman [of the New Orleans Housing Commission] shall set a date
for hearing the matter within thirty days, shall notify the members of the commission, and shall
appoint a hearing officer from the staff of the commission or from the City’s Department of Law.”);
appoint an independent hearings officer.”); Southern Shell Fish Co. v. Office of Public Health, 703
So. 2d 1321, 1323 (La. App. 1st Cir. 1997).

An interesting variation is the Louisiana Advisory Commission on Pesticides. The Commissioner
convenes the commission and appoints a hearing officer to preside. The \textit{Commission} makes the
initial determination, and the \textit{Commissioner} makes the final decision. Only if the Commissioner’s
classification differs from the Commission’s must his opinion be in writing. La. R.S. 3:3214 (1987).

87. One difference between an ALJ’s opinion and a law clerk’s opinion is that the ALJ’s
opinion may be considered part of the record for purposes of judicial review. See 5 U.S.C. § 557(c)

90. 340 U.S. at 492, 71 S. Ct. at 467. See also Matter of Cecos Int’l, Inc., 574 So. 2d 385,
388 (La. App. 1st Cir. 1990), \textit{writ denied}, 576 So. 2d 18 (1991) (rejecting the argument that
Secretary of DEQ cannot overrule hearing officer unless the Secretary finds manifest error; decision
based on LAPA before recent amendments).
central panel approach, as the experience of several states demonstrates, but it is not a particularly aggressive use of the central panel. It creates modest institutional independence in ALJs, but not decisional independence.

2. The Appellate Review Model

In the Appellate Review Model, the ALJ serves a broader, more formal role. The ALJ serves as the initial decisionmaker, and the decision bears a presumption of finality until the agency, acting in more of an appellate role, modifies or reverses the ALJ’s decision. In some agencies, the ALJ’s decision will become final—technically, it becomes the decision of the agency—unless the agency determines to review the decision. A good example is found in Title 30, which governs the Louisiana Department of Environmental Quality: “An order or decision of a hearing officer [at DEQ] becomes final thirty days after the last notice is given . . . . However, the secretary [of DEQ] may reserve the right to make the final decision.” In some agencies, an ALJ’s findings of fact are entitled to some standard of deference. The agency may reverse the ALJ, but (unlike the law clerk model) it must explain itself publicly. Under this model, the agency has the last say, but an agency decision that ignores the findings and conclusions of an ALJ is more vulnerable on appeal.

91. See Michael Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1114 (1992); Levinson, supra note 5, at 242; Kauper, supra note 5, at 560 n.122. See also In re Kallen, 455 A.2d 460 (N.J. 1983) (ALJ may not refuse remand from agency head to receive more evidence); In re Certain Sections of the Uniform Administrative Procedure Rules, 447 A.2d 151, 156 (1982) (“Administrative law judges have no independent decisional authority. Any attempt to exercise such authority would constitute a serious encroachment upon an agency’s ability to discharge its regulatory responsibilities.”).

92. See Zeigler, supra note 80, at 7-9. See also Capital Utils. Corp. v. Louisiana Pub. Serv. Comm’n, 708 So. 2d 368 (La. 1998) (affirming decision of PSC in which the Commission disagreed with ALJ and remanded the decision to a different ALJ).

93. La. R.S. § 30:2050.16(B) (Supp. 1998). Professor Murchison has recently questioned the validity of this section in light of the recent changes in the LAPA. Kenneth M. Murchison, Recent Changes in Procedures of the Department of Environmental Quality, 57 La. L. Rev. 855, 862, 872-76 (1997) [hereinafter, Murchison, Recent Changes]. See also La. R.S. 46:236.5(C) (Supp. 1998) (authorizing appointment of hearing officers to hear paternity and support matters; if no exceptions to hearing officer’s recommendations, the matter becomes final and appealable to the court of appeals); La. R.S. 47:1992(D) (1990) (determinations by assessment board of review are final unless appealed to the tax commission); 1998 La. Acts No. 114, § 25 (decision by hearing officer is suspended pending final decision by the Louisiana Gaming Control Board).

94. See Tex. Gov’t Code Ann. § 2001.058(e) (Vernon Supp. 1998) (“A state agency may change a finding of fact or conclusion of law made by the administrative law judge . . . only if the agency determines . . . . [listing requirements]”; this provision has been amended, but remains in effect for adjudications begun prior to September 1, 1997; see id. note).

95. See Aylett v. HUD, 54 F.3d 1560, 1566-67 (10th Cir. 1995) (requiring HUD to explain its reversal of ALJ on credibility questions). See also Asimow et al., supra note 72, at 547-48; Levinson, supra note 5, at 242 (noting states in which the ALJ’s decision is “presumptively correct”).

96. See, e.g., Texas World Serv. Co. v. NLRB, 928 F.2d 1426, 1430 (5th Cir. 1991) (“when
The degree to which a reviewing court will credit the disagreement between the agency principals and the ALJ depends on whether the disagreement involves matters of fact, law, or policy. An agency that disagrees with an ALJ in matters of policy or construction of agency regulations or the agency’s organic statute is on much stronger ground than an agency that disagrees with an ALJ over matters of fact, at least where the ALJ made credibility judgments and the agency has not carefully explained itself.\textsuperscript{97} Florida provides a good example of this kind of review. As to those conclusions of law and construction of regulations “over which [the agency] has substantive jurisdiction,” the agency may reject the ALJ’s conclusions in whole or in part.\textsuperscript{98} However, “[t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence . . . .”\textsuperscript{99} This kind of scheme commits to the agency the right to establish policy and interpret its own statutes and rules, but recognizes the ALJ as the first trier of fact. It does not strip the agency of the power to reverse the ALJ even as to matters of fact, but it requires the agency to explain itself.

In general, even under the Appellate Review Model, the courts will give greater deference to the agency than to an ALJ, but the ALJs have greater authority than under the Law Clerk Model. The Appellate Model sees the ALJ as an integrated part of the agency’s decisionmaking process and gives the ALJ his or her due. The Appellate Review Model is quite conducive to the central panel approach because the ALJ is already seen as an independent decisionmaker within the process. Vesting the authority to hire and supervise ALJs outside the agency does not compromise the agency’s mission, since the agency must formally address an ALJ’s initial decision.

3. The Administrative Court Model

Finally, the model that gives the least deference to the agency and the greatest to the ALJ is the Administrative Court Model. In this case, the ALJ becomes an independent decisionmaker. The agency has no power to reverse the ALJ; rather, the ALJ is in the same position \textit{vis-à-vis} the agency that a United

\textsuperscript{97} See Wollerson v. Department of Agriculture, 436 So. 2d 1241, 1243 (La. App. 1st Cir.), \textit{writ denied}, 441 So. 2d 1221 (1983) (“When [the Civil Service Commission’s] hearings were conducted before a hearing examiner, courts have applied a less restrictive standard of review and have made an independent review of the record to determine whether the conclusion of the Commissioner was arbitrary, capricious, or manifestly wrong.”). \textit{See also} Allen v. State Bd. of Dentistry, 543 So. 2d 908, 915 (La. 1989); Bosarge v. New Orleans Street Dept., 459 So. 2d 693, 698 (La. App. 4th Cir. 1984) (Redmann, C.J., dissenting).


States District Court would be to a United States Attorney. A United States Attorney must bring enforcement actions before the district court and receives no special treatment even though both the United States Attorney and the United States District Judge are presidential appointees and employees of the United States government. Maine and Missouri have adopted some form of administrative law court, and OSHRC, MSHRC and, perhaps, the Court of Veterans' Appeals may be such courts within the federal system. This is a proposal that has been around for some time, but has not found widespread acceptance.

There are a couple of provisions among Louisiana's administrative agencies that approach the independence of an administrative court. For example, the Department of Fisheries and Wildlife has two options for assessing civil penalties for persons unlawfully taking fish, wild birds, or wild mammals. The Department may file a civil suit, or it may proceed by an "adjudicatory hearing." When the Department conducts such a hearing "[e]ither party may appeal from a ruling of the administrative hearing officer to the district court." Although the statute does not say that the hearing officer's determination is unreviewable by the agency, the fact that either party may take an appeal is strong evidence that the agency may not review the hearing officer's decision, except as a party in the district court. Because the hearing officer is an employee of the Department of Wildlife and Fisheries, the officer is not, strictly speaking, an administrative court. The unreviewability of the hearing officer's decision, however, gives the officer the independence of such a body.

100. See Rich & Bruccar, supra note 5, at 10.
101. 38 U.S.C. § 7252(a) (1994) (the court has "exclusive jurisdiction" to review decisions of the Board of Veterans' Appeal. "The Secretary may not seek review of any such decision."). See also Gifford, supra note 47, at 1004-05 (discussing deference, if any, the Court of Veterans' Appeals should give decisions of the Board of Veterans' Appeals).
103. But see Gifford, supra note 47, at 971-72 (describing other "alternative" processes involving ALJs outside the agency structure).
104. La. R.S. 56:40.3(B) (Supp. 1998).
105. La. R.S. 56:40.3(D) (Supp. 1998).
106. See also La. R.S. 13:2575-76 (Supp. 1998) (municipalities and parishes may employ hearing officer to conduct hearings and issue orders for public health, housing, fire code, environmental and historic district violations; appeals are to the district court); La. R.S. 17:3621.3 (Supp. 1998) (state superintendent of elementary and secondary education shall appoint a hearing officer for debt collection matters; all appeals go to the Nineteenth Judicial District for East Baton Rouge Parish).
The Administrative Court Model raises some interesting questions over which body—the agency enforcing the provisions or the administrative court issuing the final decision—is entitled to deference before a reviewing court. Consider the Wildlife and Fisheries structure discussed above. If the hearing officer and the agency disagree over either the facts or the interpretation of the agency's regulations, who prevails? To whom does the district court defer? The ultimate answer to this question may depend on the nature of the issue before the reviewing court, whether the issue is one of fact, law or policy. This model challenges the idea that we create administrative agencies to bring expertise to the process; we have never demanded that judges of general jurisdiction have any particular expertise.\footnote{See Antonio Scalia, The ALJ Flasco—A Reprise, 47 U. Chi. L. Rev. 57, 61 (1979) ("our system for selecting article III judges makes no pretense (or at least no convincing pretense) of being based primarily upon merit or performance.").} The Administrative Court Model presents us with a hybrid, in which we value the agency for its expertise in promulgating regulations and deciding when to bring enforcement actions, but we want independent reassessment of the agency's judgment.

With the Administrative Court Model we may fairly ask why have an administrative court at all? An administrative court may have expertise in administrative procedure, and experience may bring its members some familiarity with regulatory matters, but judges are not regulators. If ALJs have no more expertise than regular state or federal court judges, then why have the administrative court at all? And if we can obtain independent review of agency action in federal or state court, what does the Administrative Court add except for an additional level of review?\footnote{See Verkuil et al., supra note 5, at 1042: Congress originally assigned adjudication of some types of disputes to Article I agencies rather than to Article III courts to further several goals: (1) to take advantage of specialized expertise; (2) to provide a less formal and less expensive means of resolving some types of disputes; (3) to attain a higher degree of interdecisional consistency in adjudicating disputes that arise in administering national regulatory and benefit programs; and (4) to allow agencies to control the policy components of administrative adjudications. By adopting the [Unified] Corps proposal, each of those goals would be abandoned in favor of an administrative adjudication system designed to replicate the Article III courts.}

B. Louisiana's Recent Changes to the APA

1. The Division of Administrative Law

As I mentioned in the prior section, the 1961 MSAPA contained no provisions for ALJs. When Louisiana adopted much of the 1961 MSAPA in 1967, it followed suit. Until the recent amendments, the Louisiana APA contained but a single reference to "administrative hearing officer," and the term was found in a section addressed specifically to oil and gas development added
to the APA in 1991. The role of ALJs in the LAPA was implicit, not explicit. There are, of course, numerous references to "hearing officer" or "hearing examiner" scattered throughout the Louisiana Revised Statutes, but each of these references relates to specific agencies.

In 1995, the Louisiana Legislature enacted Acts No. 739, creating a new Division of Administrative Law within the Department of State Civil Service. The Director of the division, who must be appointed by the governor and confirmed by the Senate, employs the ALJs for the Division. The Legislature specified that ALJs must be licensed to practice law in Louisiana and have practiced for at least five years. The Act grants ALJs new powers to conduct prehearing conferences and specifies grounds for disqualification and withdrawal of ALJs. The Division will "handle all adjudications in the manner required by the Administrative Procedure Act," and such adjudications "shall be resolved exclusively as required" by the Act and the APA. Significantly, the Act exempts from the Division's jurisdiction the office of workers' compensation and the office of regulatory services within the Department of Labor, the entire Department of Agriculture, certain adjudications by the Assistant Secretary of the Office of Conservation, the Public Service Commission, and all state professional and occupational licensing boards. Somewhat ambiguously, the Act provides that "[a]ny board or commission authorized by law to conduct hearings may continue to hold such hearings." It is not clear what this last provision refers to, but evidently the Legislature contemplated that some boards and commissions may, but are not obligated to, request that an ALJ conduct adjudication.

110. The LAPA refers to an "agency or its subordinate presiding officer" in connection with adjudication. La. R.S. 49:956(4) (Supp. 1998). See also La. R.S. 49:957 (Supp. 1998) (referring to adjudication in which "a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, or the proposed order is not prepared by a member of the agency.").
112. La. R.S. 49:994(A), 995(A) (Supp. 1998). ALJs employed by agencies on October 1, 1996, are transferred to the Division irrespective whether they are otherwise qualified for employment as an administrative law judge under the current law. Id. 49:994(C) (Supp. 1998).
The Director of the Division shall promulgate regulations concerning rules of evidence,118 "[a]dminister and supervise the conduct of adjudications," and "[a]ssist agencies in the preparation, consideration, publication, and interpretation of rules as appropriate pursuant to the Administrative Procedure Act."119 Aside from these responsibilities for adjudications, the Act charges the Director to "[a]ccess information concerning the several agencies to assure that they properly promulgate rules required by law."120

The enumeration of these duties suggests that the Director should take a strong supervisory role with respect to the agencies. It also creates some important ambiguities. For example, the Act does not state how the Director should assist the agencies in interpreting the LAPA or assure that agencies properly promulgate rules. The Director does not have a direct means of enforcing her own interpretation of the law. Unlike its federal counterpart, the Louisiana APA does not have any special provisions for interpretive rules.121 Only by custom, not by direction, have agencies issued interpretive rules;122 yet the new Act gives express license to the Director to "[a]ssist . . . in . . . interpretation," without defining what that means. This section may authorize the Director to issue her own interpretations and then impose those on the agencies through the Division's ALJs. Reviewing courts generally give great deference to an agency's interpretation of its own rules,123 but who has the principal charge to interpret the LAPA? An agency or the Division of Administrative Law?

These are interesting and important questions, but none of these concerns is insurmountable. They simply are the kind of questions that will attend any change of this nature. Several of the new sections in the Louisiana APA are taken verbatim, or nearly so, from the New Jersey Statutes.124 New Jersey

118. Prior to the recent amendments, the Louisiana APA provided:

    Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs.

They shall give effect to the rules of privilege recognized by law. Agencies may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.


121. The federal APA provides that agencies promulgating interpretative rules, general statements of policy, or rules of agency organization, procedure or practice do not have to comply with the general notice and comment provisions. 5 U.S.C. § 553(b) (1996).


124. For example, the LAPA's section 996 is taken from the New Jersey Code, Title 52, section 14F-5. N.J. Stat. Ann. 52:14F-5a-b, d-k (West Supp. 1998). Section 997 of the LAPA is taken from New Jersey Code, Title 52, section 14F-5a.
courts have addressed some of these questions, and the Louisiana courts may find New Jersey's reasoning persuasive. For example, one New Jersey court found that the grant to the director of the equivalent of Louisiana's Division of Administrative Law had been given "broad authority" to develop uniform standards, rules and procedures.\textsuperscript{125} The New Jersey Supreme Court has affirmed the director's authority but subject to the caveat that the office may not adopt rules that will frustrate the essential "decisional authority of the agency itself and thereby undermine its ultimate regulatory responsibilities."\textsuperscript{126} These cases suggest one good, common sense approach to understanding Louisiana's move to a central panel. Under the new Act, the Director of the Division of Administrative Law has been charged with prescribing uniform rules that can be applied by a corps of ALJs that the Director must employ, assign, and evaluate. The Director's immediate interest is the uniform application of the LAPA, and the Legislature has committed the interpretation of the procedures set forth in that Act within her control. Once the Director prescribes those uniform rules, the courts should defer to the Director's interpretation of the LAPA. On the other hand, and notwithstanding the fact that the Act instructs the Director to "assist agencies in the . . . publication[] and interpretation of [their] rules" and assure that agencies "properly promulgate rules required by law,"\textsuperscript{127} the principal responsibility for understanding, promulgating, construing, and enforcing substantive rules should remain with the agencies, and courts should continue to defer to agencies on matters within their expertise.

2. ALJs and Final Decisions

The scheme that I described in the previous paragraph is one good way a central panel could be implemented in Louisiana. But I fudged my analysis in the last sentence of that paragraph: I said the principal duty to construe and enforce substantive rules should remain with the agencies. If the LAPA contained just the central panel provisions I have discussed so far, I would feel confident of my analysis. These changes would have put Louisiana in the mainstream of states that have opted for the central panel system; Louisiana's central panel would be consistent with either the Law Clerk or the Appellate Model. But the LAPA did not stop with those provisions, and as a result, I am quite unsettled in my assessment of the deference that the courts should afford Louisiana's administrative agencies.

The additional language in question is short, but quite dramatic. Section 992.B(2) of the LAPA provides: "In an adjudication commenced by the division, the administrative law judge shall issue the final decision or order, whether or


\textsuperscript{126} In re Certain Sections of the Uniform Admin. Procedure Rules, 447 A.2d 151, 156 (N.J. 1982).

\textsuperscript{127} La. R.S. 49:996(9), (10) (Supp. 1998).
not on rehearing, and the agency shall have no authority to override such decision or order. This is a remarkable provision. It makes an ALJ’s decision unreviewable by the agency itself. This means, in contrast to our years of believing that executive agencies should appropriately promulgate and enforce regulations, the ultimate power to interpret agency regulations and to enforce or not enforce laws and regulations has been turned over to the state’s ALJs. No longer do agency heads have the ability to reverse—under any circumstances, with or without explanation—an ALJ’s decision. Effectively, Louisiana has created an administrative court. This represents a serious shift in administrative theory. It may prove to be a good shift, but there is no question but that this is a dramatic change.

Did the Legislature include Section 992(B)(2) because it wished to deprive state agencies of decisionmaking authority, or did it include Section 992(B)(2) because it believed—mistakenly, in my view—that section important to make the central panel system work? Nothing in the central panel system requires conferring such decisional independence on ALJs. The idea of the central panel is comfortable, though not entirely inconsistent with the Law Clerk Model, which requires little decisional independence since an ALJ’s judgment is subject to complete control by the agency. The central panel also works quite comfortably within the Appellate Review Model, which recognizes the ALJ’s initial decision but leaves to the agency the final decision (including, in some cases, the duty to explain why it disagrees with the ALJ). If the primary aim of the Louisiana Legislature was to deprive administrative agencies of adjudicative decisionmaking


129. See Hunter Indus. Facilities v. Texas Natural Resources Conservation Comm’n, 910 S.W.2d 96, 104 (Tex. App.-Austin 1995) ("Forcing the Commission to accept the hearing examiners’ conclusions of law ... would destroy the Commission’s discretion to interpret the rules that the Commission itself has promulgated."). See generally F. Scott McCown & Monica Leo, When Can An Agency Change the Findings or Conclusions of an Administrative Law Judge?, 50 Baylor L. Rev. 65 (1998).

130. Arguably, the new section repeals, sub silentio, other provisions of Louisiana Revised Statutes that confer final decisionmaking authority on the agency head. See, e.g., La. R.S. 26:920 (Supp. 1998) ("Decisions of the commissioner [of the Office of Alcohol and Tobacco Control] in withholding, suspending, or revoking permits are final and binding on all parties unless appealed in the manner provided by this Section and finally reversed by the courts."); La. R.S. 27:25(E) (Supp. 1998) ("The hearing officer shall render his decision within thirty days after the hearing is conducted. Either party to such hearing may appeal the decision of the hearing officer to the [Louisiana Gaming Control Board]. Such appeal shall be lodged with the board within thirty days of the rendering of the decision and, if lodged, shall be heard and decided by the board within sixty days of such notice."); La. R.S. 30:2050.16(B) (Supp. 1998) ("An order or decision of a hearing officer becomes final thirty days after the last notice is given, with out a request for administrative review being filed. However, the secretary [of DEQ] may reserve the right to make the final decision."); La. R.S. 47:1992(D) (Supp. 1998) ("All determinations by the board of review shall be final unless appealed to the tax commission.").

131. See Levinson, supra note 5, at 238 ("the ALJ may exercise final agency decisionmaking power, pursuant to delegation and subject only to judicial review. Where an ALJ exercises this power, the system functions as an administrative court.").
entirely and to vest such decisionmaking authority in an independent factfinder (but not a court), then the central panel was essential.

I cannot find any other state that has a provision identical to Section 992(B)(2).\textsuperscript{132} The closest provision may be a 1993 revision to the South Carolina APA, in which it adopted a central panel system, but distinguished between judicial review of adjudications before collegial boards or commissions and those before single-headed agencies. The South Carolina APA provides that review of a decision by an ALJ in a case "involving departments governed by a board or commission" must be filed with the board or commission first. Then, "[a] party aggrieved by a final decision of a board in such case is entitled to judicial review of that decision."\textsuperscript{133} By contrast, "[f]or judicial review of any final decision of an administrative law judge of cases involving departments governed by the single director," an aggrieved party may seek judicial review immediately.\textsuperscript{134} In other words, collegial boards or commissions have the right to review and reverse ALJ decisions, but single-headed agencies do not. This is an unusual provision, but there is some logic to it. The arguments for expertise in administrative agencies have always been made most forcefully with respect to independent, collegial bodies. One commentator on the South Carolina scheme suggests that the South Carolina scheme is "a radical departure from the traditional central panel mode. [F]ar from mere institutional independence, or structural freedom to conduct hearings outside of agency control, which is the defining characteristic of all other central panels, South Carolina has given its ALJ Division full decisional independence, or the power to make final, substantive decisions for state agencies."\textsuperscript{135} Another argues that conferring final decisionmaking authority on ALJs in matters before single-headed agencies makes the "arrangement . . . most like the Missouri and Maine administrative court structures."\textsuperscript{136} The South Carolina proposal has its supporters and critics.\textsuperscript{137}

Louisiana has taken South Carolina's novel scheme one step farther because the LAPA draws no distinction between collegial boards and single-headed

\textsuperscript{132} Professor Gifford noted that "Minnesota has experienced difficulty in deciding whether an enforcement agency may appeal the adverse decision of an administrative law judge or hearing officer." Gifford, \textit{supra} note 47, at 971 n.14. Minnesota has evidently corrected the problem by statute authorizing appeal. \textit{Id.}

\textsuperscript{133} S.C. Code Ann. § 1-23-610(A) (Law. Co-op. Supp. 1997). The board or commission's review "must be confined to the record." \textit{Id.} § 1-23-610(D).


\textsuperscript{135} Zeigler, \textit{supra} note 80, at 2 (emphasis in original).

\textsuperscript{136} Swent, \textit{supra} note 80, at 13 (footnote omitted).

\textsuperscript{137} \textit{Compare} Swent, \textit{supra} note 80, at 14 ("This modification represents an improvement of the first order. Greater efficiency, fairness, economy, public confidence, and quality rulings make up but a short list of the advantages of increased independence.") with Zeigler, \textit{supra} note 80, at 38 ("without any opportunity for the application of expertise, what is the point of having administrative adjudications at all? Doesn't the South Carolina system merely represent the application of administrative discretion without the benefit of specialized expertise?")).
agencies. Any matter decided by ALJs in the Division of Administrative Law is final irrespective of the agency's organization, function, or mission.\textsuperscript{138} Louisiana is left in the strange situation that boards and commissions that conduct their own adjudications may continue to make final decisions; but if a board or commission elects to send an adjudicative matter to the Division of Administrative Law, the ALJ's decision is final.

3. Agencies and the Right of Appeal

In the original LAPA, agencies could not take appeals to state courts. Until recently, Section 951 of the LAPA defined "person" as "any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency."\textsuperscript{139} Under Section 964, "[a] person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review under this Chapter."\textsuperscript{140} Louisiana agencies have never had the right to appeal for one simple reason: agencies controlled their own adjudications; they had the final say and thus had no need to appeal a self-imposed adverse decision.\textsuperscript{141}

Under the new amendments to the LAPA, an ALJ, not an agency, will make the final decision, and yet the agency, having lost the right to issue the final decision, still does not have the right to take an appeal from the ALJ's decision. This is an astonishing provision. There is no chance that this sequence was legislative oversight because in 1997, the Legislature amended the definition of "person." Section 951, with the 1997 change in italics, now provides:

"Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency, except that an agency is a "person" for the purpose of appealing an administrative ruling in a disciplinary action brought pursuant to Title 37 . . . prior to the final adjudication of such disciplinary action.\textsuperscript{142}

Title 37 adjudications deal with state-licensed professionals—attorneys, dentists, funeral directors, auctioneers, plumbers, marine surveyors, and so forth—and were already exempted from the Division of Administrative Law.\textsuperscript{143} In late

\textsuperscript{138} As I previously noted, professional boards are exempted from the Act, and other boards and commissions that would otherwise be subject to the Act may elect to conduct their own adjudications. La. R.S. 49:992(D)(3), 992(F) (Supp. 1998).
\textsuperscript{140} La. R.S. 49:964(A) (Supp. 1998).
\textsuperscript{141} But see In re American Waste and Pollution Control Co., 581 So. 2d 738 (La. App. 1st Cir. 1991) (DEQ appeal from ALJ decision reversing the Secretary of DEQ from acting as a hearing officer).
\textsuperscript{143} La. R.S. 49:992(D)(5) (Supp. 1998) ("State professional and occupational licensing boards
1997, a Nineteenth Judicial District Judge in East Baton Rouge Parish held that the Commissioner of Insurance could not appeal an adverse decision by an ALJ under the LAPA and that "either the First Circuit can straighten it out, or . . . [it should be put] on the agenda for the Special Session to clear . . . up." In February 1999, as this article was going to press, the First Circuit Court of Appeal reversed and remanded. Drawing from very general constitutional and statutory provisions, the court held that the Commissioner of Insurance, as a "constitutionally created position, statutorily charged with the responsibility for regulation of insurance," must have

authority to seek judicial review of matters related to insurance licensing, and in that respect only, is not limited by the [LAPA].

. . . . To deny the Commissioner of Insurance the right to appeal would mean there would be no adversarial proceeding. An ALJ should not make a final decision which is not subject to judicial review in insurance matters.\textsuperscript{145}

The court's statement is more wishful thinking or good policymaking than a careful parsing of the statute. Most telling in this respect, the court thought it "incomprehensible that the public official charged with the authority over insurance licensing, would not have a right of action to appeal an adverse decision of an ALJ involving an insurance license."\textsuperscript{146}

Incomprehensible or not, the idea of state agencies losing the power to issue a final decision and lacking a right of appeal places Louisiana at the fringes of state experimentation in administrative law. It denudes administrative agencies of any opportunity for correction in the state courts, including the Louisiana Supreme Court. An agency that loses before an ALJ has no recourse, even if the ALJ's decision is clearly reversible because contrary to law, clearly erroneous on the facts, or arbitrary and capricious.\textsuperscript{147} Such unfortunate outcomes are the

\textsuperscript{145} Sauvic v. Brown, No. 98-CA-0416 (La. App. 1st Cir. Feb. 19, 1999), at 8, 9. Inexplicably, the court of appeal did not discuss either LAPA section 992(B)(2) (making ALJ decisions final) or section 951(5) (defining "person" entitled to judicial review to exclude agencies).
\textsuperscript{146} \textit{Id.} at 9.
\textsuperscript{147} \textit{See} La. R.S. 49:964(G) (Supp. 1998).
IV. THE CONSEQUENCES OF STRUCTURE

Has the Legislature in fact created an administrative law court of its central panel? The question is not trivial. The Legislature did not say that it was creating such a court, but in my judgement that is what the Legislature did. To judge administrative law and practice in Louisiana from these most recent changes, one could reasonably conclude that the Legislature has stripped agencies of all policymaking authority through adjudication and transferred it to the state’s ALJs, whose judgment must be so valued that the courts must not even see any competing vision offered by the agencies.

Important practical consequences are likely to follow from these changes in Louisiana’s administrative structure. First, Louisiana has effectively realigned the responsibility between executive agencies and ALJs for findings of fact, conclusions of law, and matters of policy. Findings of fact are one area where courts have given greatest deference to agencies. We have seen some states, such as Florida, require courts to give greater deference to ALJ findings where the issue turns on matters of credibility. Agencies, not ALJs, have held primacy in their ability to issue conclusions of law. Policy clearly belongs to

148. A court, anxious to avoid holding that executive agencies have no appellate review, might construe Sections 49:951(5) and 49:964 to mean that agencies have no appeal as of right, but can seek discretionary review. Such argument would find support in Section 964 of the LAPA, La. R.S. 49:964(A) (Supp. 1998) (“A person who is aggrieved by a final decision of an agency in an adjudication proceeding is entitled to judicial review” (emphasis added)), but it seems quite contrary to the 1997 amendment to Section 951. See La. R.S. 49:951(5) (Supp. 1998) (“‘Person’ means any individual [etc.] . . . other than any agency, except that an agency is a ‘person’ for the purpose of appealing an administrative ruling in a disciplinary action brought pursuant to Title 37 . . . .” (emphasis added)).

149. See Allen v. State Bd. of Dentistry, 543 So. 2d 908, 915 (La. 1989) (“because of the agency’s expertise, its findings are entitled to great weight”). Louisiana has statutorily altered this scheme as well. Prior to 1997, agency findings of fact could be reversed only if “[m]anifestly erroneous in view of the reliable, probative, and substantial evidence in the whole record.” La. R.S. 49:964(G)(6) (Supp. 1998). The section now provides that courts may reverse agency findings “[n]ot supported and sustainable by a preponderance of evidence as determined by the reviewing court . . . based upon its own evaluation of the record.” 1997 La. Acts No. 128, § 1 (currently codified at La. R.S. 49:964(G)(6) (Supp. 1998)).

I joined two of my colleagues in urging the Governor to veto this provision. Letter from Kenneth M. Murchison, John Devlin & Jay S. Bybee to Governor Mike Foster, June 10, 1997 (copy in author’s possession). Among other defects, we pointed out that “preponderance of the evidence” is a standard of proof applied to initial triers of fact, not to reviewing courts. We warned that the tension between “preponderance of the evidence” standard and “due regard” instructions might take “[y]ears of litigation . . . to give a precise meaning to these seemingly conflicting directions.”

agencies, but their mechanism for establishing agency policy in adjudication—the agency’s power to issue a final decision—has been stripped from them and placed in the hands of the ALJs.

Louisiana’s realignment of the boundaries has set up its agencies for policymaking conflicts with the state’s ALJs. An agency—take DEQ—may establish policy through rulemaking, only to have ALJs undermine the policy by refusing to enforce the rules, or construing the rules contrary to DEQ’s views. This may lead to regulatory chaos. As Professor Verkuil and others recently observed: “Conferring a high degree of finality on ALJ findings of fact is virtually certain to create interdecisional inconsistency, costly and time consuming battles for institutional hegemony, and policymaking cacophony.” And Verkuil’s observation only questioned finality in ALJ findings of fact. What kind of discordant, raucous noise can we expect when ALJs issue final conclusions of law and establish matters of policy?

Second, we long ago recognized that agencies may establish policy through either rulemaking or adjudication. The Legislature has effectively cut off adjudication as a means for agencies to establish policy. Thus, we would expect agencies to adopt more regulations, and more specific regulations as a means of cabining ALJs’ discretion. An increase in regulations, in turn, suggests less regulatory flexibility, as agencies try to anticipate different variables and account for them in their rules.

Third, we should expect that agencies will bring fewer enforcement actions or other actions requiring adjudication before ALJs. Since agencies have lost ultimate control over adjudications, they will only reluctantly bring them. This suggests several consequences. One is that agencies will bring fewer “marginal” cases. From some perspectives, bringing fewer marginal cases may be a good result; marginal cases help agencies understand the limits of their authority. On the other hand, marginal cases help set the boundaries for agencies, and

104 S. Ct. 2778, 2781-83 (1984); In re Recovery I, Inc., 635 So. 2d 690, 696 (La. App. 1st Cir.), writ denied, 639 So. 2d 1169 (1994) ("Considerable weight should be afforded to an administrative agency's construction of a statutory scheme that it is entrusted to administer and deference must be awarded to its administrative interpretations.").

151. Verkuil et al., supra note 5, at 1040.


Professors Asimow, Bonfield and Levin note that “[m]ost states appear to follow the principle that agencies generally have discretion to make their law either by order or by rule. . . . A number of states, however, appear to be in the vanguard of . . . requiring agencies to elaborate their law by rule rather than by order.” Asimow et al., supra note 72, at 369. In Florida, for example, agencies must presumptively use rulemaking to create general rules. Fla. Stat. Ann. § 120.54(1)(a) (1998) ("Rulemaking is not a matter of agency discretion. . . . Rulemaking shall be presumed feasible . . . .") See Jim Rossi, The 1996 Revised Florida Administrative Procedures Act: A Rulemaking Revolution or Counter-Revolution?, 49 Admin. L. Rev. 345, 348-49 (1997).
boundaries are important to agencies and the industries they affect. Additionally, agencies may prove cautious about adjudicating even obvious cases because of the possibility that an ALJ will establish policy contrary to the agency’s views and the agency will have no means of correcting the ALJ’s decision in an appeal. Some agencies may decide to send only their marginal cases to ALJs. Such policy would give the ALJs a distorted perspective on DEQ’s overall enforcement policies. Other agencies, such as the Department of Environmental Quality, have the option of bringing a civil enforcement action rather than an administrative adjudication. These changes may encourage DEQ to seek immediate judicial enforcement before the Nineteenth Judicial District despite other drawbacks. Moreover, for agencies that can bring enforcement actions before either an ALJ or a court, it will bifurcate responsibility for establishing policy between the agency and the ALJs.

Fourth, as agencies rely on greater specificity in their regulations and less on adjudication, Louisiana’s agencies will be more likely to settle cases. The threat of adjudication, once a sword for the agencies, may become a sword for private parties who know that the agencies assume the full risk of an adverse decision from which there is no appeal. Furthermore, the changes may prompt outside groups to become parties in support of agency actions. As private parties, these groups might have the right to take an appeal from an adverse ruling even if the agency could not, giving non-governmental groups greater control over the agencies’ litigation strategy. For example, the Sierra Club has greater incentive to intervene in support of DEQ enforcement actions. If DEQ loses before an ALJ, DEQ cannot seek judicial review, but the Sierra Club can. The recent change in the LAPA will encourage more intervention by outside organizations because it gives these organizations control over the vigor with which DEQ’s actions are pursued before the courts.

Fifth, with all due respect to Louisiana’s dedicated administrative law judges, the new changes portend less administrative expertise and less regulatory direction in the adjudicatory process. Central panels of ALJs promise institutional independence. That independence comes at some cost in agency expertise because the ALJs are hired by a central agency and are rotated among various agencies. Indeed, we do not expect the same level of administrative expertise from central panel ALJs that we might expect from ALJs who had been hired by

154. See Kenneth M. Murchison, Enforcing Environmental Standards Under State Law: The Louisiana Environmental Quality Act, 57 La. L. Rev. 497, 543-33 (1997). In civil actions, DEQ bears the burden of proof and the court, not DEQ, determines the penalty. Id. at 543.
155. So long as a party has a “real and actual interest” affected by DEQ’s decision, the party is “aggrieved” and has standing to bring an appeal. See In re E.I. du Pont de Nemours & Co., 674 So. 2d 1007 (La. App. 1st Cir. 1996); In re Recovery I, Inc., 635 So. 2d 690 (La. App. 1st Cir.), writ denied, 639 So. 2d 1169 (La. 1994); Browning-Ferris, Inc. v. City of New Orleans, 627 So. 2d 246 (La. App. 4th Cir. 1993). “Aggrieved” parties include citizens groups organized to enjoy the outdoors. In re BASF Corp., Chemical Div., 533 So. 2d 971 (La. App. 1st Cir. 1988), writ denied, 541 So. 2d 900 (La. 1989).
a particular agency and are familiar with the agency’s mission. 156 Other states have accepted the trade of expertise for independence because, generally, agencies retain the final say; that is, the agency, in the exercise of its expertise, can overrule an independent, but less expert, ALJ. Not so in Louisiana. Centrally hired ALJs (who, the Act states, need have no more than five years experience as an attorney), rotated among state agencies, will have the final say. ALJs may in fact defer to agency expertise, but there is nothing in the LAPA that requires them to do so, and there is the strong suggestion in the LAPA (because decisions adverse to agencies may not be appealed) that the Legislature intends for reviewing courts to defer to ALJs. The ALJs, accordingly, have no apparent obligation to defer to agencies. They may do so as a matter of habit, or because of something they heard in law school, or because it makes good sense, but certainly not because they fear correction by the agency or a reviewing court.

Finally, Louisiana’s new approach challenges traditional separation of powers. 157 While I will not give extended discussion to this point, there are two different ways of conceiving a separation of powers argument here. First, the Legislature has deprived the courts of jurisdiction. Under the Louisiana Constitution the Legislature does not have the power to create an administrative court, and the central panel functions as an administrative court. Article V begins: "The judicial power is vested in a supreme court, courts of appeal, district courts, and other courts authorized by this Article." 158 District courts have "original jurisdiction of all civil and criminal matters" except as "provided by law for administrative agency determinations in worker’s compensation matters." 159 The workers’ compensation exception was added to the Constitution in 1990 to correct for the Louisiana Supreme Court’s decision in Moore v. Roemer. 160 Moore held unconstitutional a 1988 Act vesting exclusive original jurisdiction in worker’s compensation hearing officers. The court determined that at least workers compensation “matters under the original jurisdiction of administrative bodies are civil matters which would otherwise come under the

156. See Asimow, supra note 91, at 1187 ("The strongest argument against an expanded corps of ALJs is based on the criterion of accuracy. Accuracy suffers as specialization and expertise decline."); Scalia, supra note 107, at 62 (recommending that agencies hire ALJs “from within, on the basis of observed performance.”).

157. La Const. art. II, § 1 ("the powers of government of the state are divided into three separate branches: legislative, executive, and judicial."); § 2 ("Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."). Any separation of powers argument must be based upon the Louisiana Constitution, not the United States Constitution. The separation of powers described in Articles I, II and III do not apply to state government, and the Due Process Clause of the Fourteenth Amendment poses no serious obstacle to the changes Louisiana has made. See Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456 (1975).

158. La. Const. art. V, § 1 (emphasis added).

159. La. Const. art. V, § 16(A).

160. 567 So. 2d 75 (La. 1990).
original jurisdiction of the district court.” The supreme court concluded that the Act “eliminated the role of the district courts in worker’s compensation litigation” in violation of Article V, section 16. The court, however, reserved the question of whether matters of “public law, similar to the environmental laws administered by the Department of Environmental Quality in which there is an administrative hearing with appellate review by the appropriate court of appeal” were similarly infirm. While the supreme court has answered that DEQ permit determinations are not civil matters within the meaning of Article V, the courts may have to resolve that question for other administrative matters.

More importantly, the Legislature has deprived the executive of its authority. Agency adjudication has always been thought permissible within a scheme of separated powers because it was adjunct to the exercise of executive power. So long as agencies possessed the authority to review an ALJ’s decision, the decision belonged to the agency, which exercised executive power. The new role for ALJs in the LAPA belies the notion of any exercise of executive authority. Their authority is purely judicial in nature, yet their decisions are executive by nature and tradition.

V. CONCLUSION

Alexander Hamilton wrote in *The Federalist*:

A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution: And government ill executed, whatever it may be in theory, must be in practice a bad government.

In its recent changes to the Louisiana Administrative Procedure Act, the Legislature has undermined the traditions and integrity of Louisiana’s administrative process. It has rendered its administrative agencies feeble. If Hamilton is correct that feeble execution and bad government must follow a feeble executive, then the changes have been ill thought out. If the Legislature has something more profound in mind—that, for example, Louisiana should abandon administrative agencies entirely, or (perhaps more modestly) that agency-directed


162. *Moore*, 567 So. 2d at 77.


adjudications are ineffective or unfair means of establishing state policies—then the Legislature should address those concerns directly and systematically.

We have to ask once again: Why is Louisiana engaged in this fancy dance? to denude the agencies? to enhance judicial control of administrative policymaking? Under the current scheme, Louisiana will likely find that it cannot obtain either administrative expertise or political accountability.