



Office of the Chairman
Administrative Conference of the United States

Administrative Conference of the United States



Recommendations
and Reports

1992

Volume II

Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished by direct action on the part of the affected agencies or through legislative changes.

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TABLE OF CONTENTS

I. The Importance of Studying the Federal Administrative Judiciary	779
A. Introduction	779
B. The Constitutional Status of Federal Administrative Judges	781
C. The Significance and Variety of Decisions Made by the Administrative Judiciary	784
D. The Scope of the Federal Administrative Judiciary Covered by This Study ¹	785
1. The ALJ in Context	786
2. The Emerging Category of "Administrative Judge"	788
E. Rationalizing the Use of ALJs: Mixed Signals from Congress and the Courts	790
1. The Due Process Limits on Decider Impartiality	792
2. Congressional Reactions to Decider Formality	794
F. Introduction to Decider Independence in the Context of Disability Benefits Determinations	795
II. Historical Background to This Study	798
A. The Origins of Hearing Examiners Prior to the Enactment of the APA	799
B. Administrative Law Judges Under the APA ²	803
C. Immediate Post-APA Developments Affecting Hearing Examiners ³	804
1. Congressional Experimentation with Separation of Functions: The Taft-Hartley Act and the Communications Act	805
2. The Recommendations of the Second Hoover Commission, Task Force on Legal Services and Procedures (1955)	806
D. Congressional Attitudes Towards the Use of ALJs During the 1970s	808

¹Parts of this section and sections E and F appeared in Verkuil, *Reflections Upon The Federal Administrative Judiciary*, 39 U.C.L.A. L. REV. 1341 (1992).

²The APA employed the term "examiners" when it established the office known today as administrative law judge. In 1972 the Civil Service Commission, by regulation, adopted the title of administrative law judge. 37 Fed.Reg. 16,787 (1972). In 1978, Congress established the new title by statute. Pub. L. No. 95-251 §2(a)(10), 92 Stat. 183 (1978). For convenience, the term administrative law judge is used throughout, except where use of the earlier term helps the exposition.

³The initial appointment "fiasco" is treated, *infra*, Chapter II(H).

E. Evolution of Benefit Adjudication Over Time	815
1. Longshore and Harbor Workers Compensation Act and Related Legislation	817
2. Veterans Benefits Distinguished	818
3. Social Security Disability Adjudication Compared	820
F. Evolution of Nonbenefit Adjudication Over Time	823
1. Use of Intermediate Review Boards	823
2. The Split-Enforcement Model of Regulation	824
G. The Growth of Benefit Adjudication and the Decline of Economic Regulatory Adjudication as a Vehicle for Major Policymaking	824
1. The Regulatory Model That Gave Rise to the Office of Independent ALJs	824
2. The Growth of Benefit Adjudication	825
3. The Regulatory Model Has Diminished with Deregulation	827
4. Rulemaking as a Principal Regulatory Technique and the Problems Afflicting It	827
5. The Share of ALJs Deciding Regulatory Adjudications Has Diminished	828
6. Benefit Adjudications Predominate	829
H. The Historical Background to the Selection Process and to the Present Protections for Independence	830
1. The APA on the Selection of Hearing Examiners	832
2. The Initial Appointment "Fiasco"	833
3. Organization, Appointments, and Evaluations of ALJs: Past Studies, Reports, and Recommendations	836
a. The 1954 Report of the President's Conference on Administrative Procedure	836
b. The 1962 Conference Study	838
c. The 1969 Conference Study and Recommendation	841
d. The Scalia Approach	842
III. The Variety of Administrative Adjudications and Administrative Judges	843
A. NLRB/EEOC Enforcement Adjudication	843
B. Licensing Adjudication by FERC and NRC	849
1. The FERC Adjudication Process	849
2. The NRC Adjudication Process	850

C. Sanctions and Civil Penalty Adjudication	852
1. Immigration Adjudication	852
a. The DOJ ALJs	853
b. Immigration Judges	854
(i) Deportation Hearing	854
(ii) Bond Redetermination Hearing	855
(iii) Exclusion Hearing	855
c. Asylum Officers	856
2. Security Clearance Adjudications	857
3. Merit Systems Protection Board (MSPB) Adjudications	859
4. Use of Non-ALJ Decisionmakers in Civil Money Penalty Proceedings	861
D. Benefit Adjudication: Social Security and Veterans' Claims	863
1. The Social Security Administration	863
2. The Department of Veterans Affairs	863
3. Benefit Adjudication Process Comparisons	864
E. Adjudicating Claims Against the Government: Boards of Contract Appeals and the Claims Court	866
1. Background on Boards of Contract Appeals (especially ASBCA)	866
a. Purposes, Jurisdiction and Organization	866
b. Role of Under Secretary of Defense (Research and Engineering)	867
c. Procedures Employed	868
d. Appeals from ASBCA Decisions	869
e. Statutory Basis for the Appointment of Administrative Judges and Hearing Examiners	869
f. Independence of BCA Administrative Judges	870
2. Background on the United States Claims Court	871
3. A Comparison of the Independence of BCA AJs and Court of Claims Judges	873
IV. Empirical Study of the Roles and Attitudes of the Federal Administrative Judiciary	876
A. Methodology	876
B. Profile and Motivation	878
1. Background and Training	878
2. Motivation	882
3. Qualifications and Selection	888
C. Habits of Office	890
1. Preparation	890
2. The Integrity of the Office	892
3. Administrative Responsibilities	895

D. Techniques for Presiding	896
1. Prehearing	896
2. Building a Record	899
3. Conduct of the Hearing	904
4. Reaching a Decision	907
5. The Result of the Initial Adjudication	912
6. Administrative Review Process	913
E. Across-the-Board Measures of Performance	915
F. Relationship with Agency Hierarchy and Others in the Agency	916
1. Structural Relationship	916
2. Policy Relationship	918
a. Adequacy of Agency Policy Guidance	919
b. Interference with Individual Judgment in the Name of Policy Dominance	921
G. Attitude Towards Their Jobs	923
1. Perception of Their Function	923
2. Comparison with Other Adjudicators	925
3. Attitude Towards Proposed Reform Ideas	926
H. Summary of Observations About Perceived Problems	927
V. The Selection Process For Agency Adjudicators	931
A. Development of the ALJ Selection Process	931
B. The ALJ Rating and Appointment Process	939
1. The Rating Process	939
2. The Appointment Process	941
C. Results of the Selection Process--ALJ Demographics	944
1. Women and Minorities	944
2. Recruitment of Attorneys From Private Practice	949
D. The Selection Process for Non-ALJ Adjudicators	950
E. Proposed Modification of the ALJ Selection Process	954
1. Streamlining of the Examination	955
2. OPM's Role	956
3. Shifting the Other Parts of the Exam to the Hiring Agencies	959
4. The Role of Veterans Preference in ALJ Selection	960
5. Specialized Experience	964
F. Conclusion	967
VI. The Scope and Degree of ALJ and Non-ALJ Independence	967

A. Advantages of Independence	967
1. The Constitutional Requirement--Avoidance of Bias	967
a. Personal Interest in Case Outcome	969
b. Personal Bias	971
c. Prior Exposure to Adjudicative Facts	972
d. Prior Position on Legal Issues or Legislative Facts	973
e. Separating Functions	974
2. Greater Public Acceptance	979
3. Enhanced Status Helps Recruitment and Control of Hearings	980
B. Safeguards of Independence	981
1. Statutory Safeguards Applicable to ALJs	981
2. Safeguards Applicable to AJs	983
C. Potential Adverse Consequences of Independence	985
1. Scope of Control Over Policy	986
2. Potential Interdecisional Inconsistency	991
3. Extent of Control Over Productivity and Quality	992
D. Agency Power to Constrain ALJ and Non-ALJ Discretion	993
1. Productivity Enhancement Measures	994
2. Efforts to Assert Control Over Policy Components of Adjudicatory Decisions and to Enhance Interdecisional Consistency	996
a. By Legislative Rule	997
b. By Formal Review	1004
c. By Precedent	1005
d. By Interpretative Rule	1005
e. Informal Pressure	1007
E. Establishing an Appropriate System of Performance Evaluation for ALJs	1011
1. The Current Prohibition Against Performance Appraisal of ALJs	1011
2. The 1978 GAO Study	1014
3. Lawsuits By and Against ALJs	1016
4. The Conference Supports Management Norms for ALJs	1021
5. A Proposed Approach	1023
6. Evaluation of Judicial Performance at the State and Federal Level	1027
7. Conclusion	1031

VII. Effects of ALJ and Non-ALJ Decisions	1032
A. The APA Model	1032
1. Statutory Interpretation	1033
2. Policy Decisions	1034
3. Findings of Fact	1035
B. Departures from the APA Model	1038
1. Allocation of Greater Decisionmaking Power to ALJs	1038
2. The Split-Enforcement Model	1040
3. The Corps Proposal	1041
VIII. Developing Standards for When to Use ALJs as Presiding Officers	1046
A. The Random Nature Of ALJ Use	1047
1. Comparing Deciders in Sanction and Penalty Cases	1048
2. The Use of ALJs and AJs in the Benefits and Licensing Areas	1050
3. The Use of ALJs and AJs in Cases For Monetary Damages Against the Government	1051
B. The Qualified Case for Conversion of AJs to ALJs	1052
IX. Conclusions and Recommendations	1056
Recommendations	1058
Appendices	1063
Bibliography	1121

Report for Recommendation 92-7

The Federal Administrative Judiciary

**Paul R. Verkuil, Daniel J. Gifford, Charles H. Koch, Jr.,
Richard J. Pierce, Jr., and Jeffrey S. Lubbers**

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About the Authors

Paul R. Verkuil

President, American Automobile Association

Daniel J. Gifford

Robbins, Kaplan, Miller & Cerisi Professor
University of Minnesota Law School

Charles H. Koch, Jr.

Dudley W. Woodbridge Professor
Marshall-Wythe School of Law
College of William and Mary

Richard J. Pierce, Jr.

Paul J. Kellner Professor
Columbia University School of Law

Jeffrey S. Lubbers

Research Director
Administrative Conference of the United States

I. The Importance of Studying the Federal Administrative Judiciary

A. Introduction

This study was commissioned by the Administrative Conference of the United States (the Conference) at the request of the Office of Personnel Management (OPM). OPM had both short-term and long-range goals in mind when it made its request of the Conference. Its immediate need was for a study of the selection and appointment process for administrative law judges (ALJs). The agency has long been concerned about the criteria used to examine candidates for ALJ positions, and is interested in receiving objective suggestions for change from outside the agency. This study took on greater significance when OPM said it was closing the ALJ register until the study is completed so as to incorporate any suggested changes in a new register.¹

At the same time, OPM requested a broad examination of the current and future role of the ALJ in the administrative process. Director Newman requested that the Conference include in its study "a clear delineation of the current 'landscape' of administrative adjudication; an analysis of the evolving role of the ALJ and other agency adjudicators from 1946 to the present," as well as an evaluation of agency adjudication procedures and a survey of agency and practitioners' attitudes towards Administrative Procedure Act (APA) adjudicators.² The Conference responded by appointing a team of consultants (the authors of this study) to conduct the work requested by OPM.

In preparing this study the team received invaluable advice and guidance from Bill Olmstead, Gary Edles and Nancy Miller of the Conference staff and from John Frye, formerly an administrative judge at the Nuclear Regulatory Commission (NRC) (now an ALJ at the Occupational Safety and Health Review Commission (OSHRC)), who had earlier completed a report for the Conference on the use of administrative judges (non-ALJs) in the

¹See memorandum to Heads of Departments and Agencies employing ALJs from Constance Berry Newman, Director of OPM, July 9, 1991. The Director noted that the 700 eligible candidates on the register would meet all hiring needs for the next year or so.

²*Id.*

administrative process.³ In addition to those mentioned, the team was aided by numerous government officials in the agencies studied and by a group of ALJs and administrative judges who served as commentators on outline drafts of the study.

This study has tried to respond to the short- and long-term needs stated in the OPM/Conference agreement. It takes a broad view of the administrative judiciary and its changing role in the administrative process. After an extensive review of the relevant historical background in Chapter II, the range of administrative deciders is considered and the traditional, ALJ-conducted, formal hearing process is set in context against the panoply of federal administrative decisions (Chapter III). To learn first hand about the qualifications, aspirations and role of many varieties of "administrative judges," detailed surveys were made of a broad sample of the universe of deciders. The results of this survey, presented in Chapter IV, tell us much about what has heretofore been a largely anonymous corps of deciders. The ALJ selection process is described in detail in Chapter V, and Chapter VI addresses the important issue of the scope and degree of decisional independence. Chapter VII discusses the APA model of adjudication and departures from it, and factors for using ALJs as presiders and deciders are sketched out in Chapter VIII.

The study contains recommendations that would, if adopted, have an immediate and precise effect on the OPM/ALJ selection process. In these recommendations, OPM can find suggestions for changing not only the criteria for ALJ selection, but also for shifting the allocation of agency responsibility for making the selection itself. Proposals are also advanced to improve the current limited system for oversight of ALJ performance. This study also ranges into far more extensive (and therefore more tentative) recommendations concerning the appropriate role of ALJs and other administrative deciders in the future. An attempt has been made throughout to examine and bring more regularity to the existing crazy quilt of decider qualifications and adjudicatory responsibilities.

The theme of this report is that addressing issues about the ALJ selection process and devising an appropriate approach to performance evaluation can substantially resolve agency concerns about increased use of ALJs, and can promote uniformity and consistency in the administrative process.

It is hoped that this study will enlighten and aid the agencies, Congress and the Executive branch in their decisions about using administrative law judges.

³See Frye, *A Survey of Non-ALJ Hearing Programs in the Federal Government*, Report to the Administrative Conference (Aug. 1991), reprinted in 44 ADMIN. L. REV. 261 (1992) (hereinafter Frye Report).

Throughout this study the team members were consistently impressed by the professional qualities of the federal administrative judiciary, broadly defined.

B. The Constitutional Status of Federal Administrative Judges

This study uses the term "federal administrative judiciary" to highlight both the significance of the deciders involved and the scope of their decisionmaking mandate under our federal system. While they are distinct from our federal judiciary in fundamental respects, these administrative deciders, whether they have the statutory appellation of administrative law judge or are known generally as administrative judges, are nevertheless a vital part of the federal decision system. Without them the federal judiciary would be unable to fulfill its constitutional function.

The sheer volume of the administrative caseload--which dwarfs that of the federal court system--requires that federal administrative judges of whatever label continue to bear the initial brunt of the federal decision workload. The federal court system would be unable to maintain its primary role of constitutional and statutory interpretation without an extensive administrative decision system. For this reason, suggestions for reform of the federal court system have invariably moved in the direction of adding to the federal administrative workload, not detracting from it.⁴

But there are continuing pressures--that are difficult to overcome--to expand federal court jurisdiction over administrative functions. A few years ago the issue before Congress was whether to provide judicial oversight of the Veterans Administration (VA) disability benefits program, which had theretofore avoided judicial scrutiny. Despite ambivalence on the part of the executive and judicial branches,⁵ Congress did provide for limited judicial review of Veterans Administration (now Department of Veterans Affairs (DVA)) disability decisions.⁶

One of the constant themes in discussions of judicial branch versus executive branch (or administrative) decisionmaking is that of first class and

⁴Much of the attention for shifting judicial workload to the administrative process has involved the social security disability system, which has a heavy impact on the federal district courts. See Report of the Federal Courts Study Committee 17-18, 28, 55-59 (April 2, 1990) (Advocating creation of an Article I Court of Disability Claims).

⁵The Department of Justice convened a conference in the role of the courts, with judicial as well as executive branch members, to try to rationalize the pressures to expand federal court jurisdiction. See Council on the Role of the Courts ().

⁶See discussion in Chap. III(D)(3) *infra*.

second class "justice." The implication is that somehow federal administrative justice cannot measure up to that provided by the federal courts. While no one can gainsay the value of the federal judiciary, there is much also to be said for the federal administrative judiciary. In their respective spheres of responsibility an argument can be made that administrative deciders are equal to or even superior to federal judges. It is not heresy to suggest that administrative deciders with extensive subject matter expertise may have a decisionmaking edge.

Article III requires, of course, that the judicial power of the United States be located in Courts whose judges enjoy life tenure and protection against reductions in salary.⁷ The Constitution also recognizes that Congress may create "legislative" courts that lack the guarantees of independence accorded to the judicial branch. These courts are created pursuant to Congress' power in Article I. In addition to Article I courts, such as the Tax Court and Claims Court, Congress also has the power to create administrative agencies whose judges are the focus of this study. These agencies have time-honored roles to play in a parallel system of justice that is subject to only limited judicial oversight.⁸ For the purposes of this study, the emphasis will be placed not upon the agencies themselves but upon the administrative deciders who work for the agencies. These deciders serve as a constant challenge to the role of the federal courts established pursuant to Article III.

Ever since *Crowell v. Benson*,⁹ the role of an agency and its administrative deciders has been analogized to that of judicial adjuncts like masters, commissioners and bankruptcy judges. The constitutional issue has been how far the federal courts must go in reviewing the decisions these agencies render. In the development of this doctrine the courts gradually provided increased recognition to the role and status of administrative law judges.¹⁰ While it is true that administrative deciders have the benefits of neither the life tenure nor presidential appointment accorded federal judges,¹¹ they have developed other attributes of independence.

⁷U. S. Const., Art. III, Sec. 1. (Life tenure is subject of course to the requirement of "good behavior".)

⁸There has long been a question of how far the federal courts must go to oversee the decisions of administrative agencies and Article I tribunals. See Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

⁹285 U.S. 22, 51 (1932). See Fallon, *supra* note 8, at 924-25.

¹⁰See *Butz v. Economou*, 438 U.S. 478 (1978).

¹¹When the Administrative Procedure Act was created in 1946, presidential appointment of what were then called "hearing examiners" was specifically rejected. See discussion in Chapter II(H).

Indeed, it might be said that the administrative deciders rendering decisions for the agencies and Article I courts have come to enjoy greater degrees of independence than was contemplated by the APA in 1946. It is now possible to say that some administrative deciders—notably ALJs—enjoy protection of tenure that render them almost as independent as their more heralded counterparts on the federal bench.

In a recent opinion, the Supreme Court emphasized that administrative deciders employed by the Tax Court have important roles to play under the Constitution.¹² In *Freytag v. CIR*, the Court held that special trial judges—and perhaps by extension administrative judges in all agencies with comparable responsibilities—are "inferior officers" who must be appointed pursuant to the Appointments Clause.¹³ Under that clause, officers must be appointed by "Heads of Departments" or "Courts of Law." In a case of first impression, the Supreme Court decided that the tax court was a court of law under the Constitution. By so doing, the Court established that the term "Courts of Law" was not limited to those courts established under Article III.¹⁴ This interpretation was challenged by some members of the Court,¹⁵ but the essential point remains: many administrative judges, whether they be labeled ALJs or something else, are now constitutionally recognized "officers."

Administrative adjudicators are therefore a category of constitutional decider worthy of sustained examination and even renewed respect. As this study will demonstrate, there is a cadre of federal administrative deciders working quietly and even anonymously that deserves recognition for performing a critical part of the adjudicative work often thought to reside solely in the federal courts. This study is about the status of administrative judges as much as anything. How they are selected, treated, perceived, rewarded and managed will affect what kind of judicial system we ultimately deserve. They cannot be ignored if we are to understand how our government works.

¹²*Freytag v. CIR*, 111 S. Ct. 2631 (1991).

¹³Art. II, Sec. 2 cl. 2.

¹⁴111 S. Ct. at 2644. Whether administrative agencies, as opposed to Article I courts, may also be labeled "Courts of Law" depends upon whether they play an exclusively judicial or adjudicative role. See *id.* at 2645. Some agencies might be disqualified on this standard because they engage in significant amounts of rulemaking, a legislative function.

¹⁵Justice Scalia would have called the Tax Court chief judge a "Head of Department" rather than accept the majority's court of law analysis. *Id.* at 2650-56.

C. The Significance and Variety of Decisions Made by the Administrative Judiciary

The federal judiciary and the federal administrative judiciary can be compared at many levels. But first they must be defined. The federal judiciary as used in this study includes the judicial adjuncts like masters and bankruptcy judges who help district judges in their work. Administrative judges (AJs) is a term used both to distinguish non-ALJs from ALJs and to refer to the universe of administrative deciders, depending on context.

The fact that administrative judges sit in agencies that decide large numbers of cases that, but for their intervention, would otherwise fall to the federal judiciary is a significant measure of the relationship. But the kinds of cases decided also bear comparison. In many respects, the adjudicative caseload of federal agencies and departments, which is managed at the hearing stage by administrative judges, looks much like the cases that arise in the federal courts.

Obviously agencies and AJs do not decide criminal cases; under our Constitution only the federal (or state) courts may act to deprive persons of physical liberty. But administrative agencies do make many determinations that affect a person's liberty and property interests. These cases are comparable to those that appear as an initial matter on the federal courts' civil docket. Moreover, within the federal administrative scheme, these case types may be heard initially by either ALJs or the amorphous category of administrative judges. While ALJs might be thought to be to AJs as federal judges are to magistrates, there seems to be no pattern to the kinds of cases ALJs decide. While it might be argued that the more independent and better-compensated ALJs should be reserved for the cases that implicate more substantial individual interests, in practice this does not necessarily occur. To establish these hypotheses, types of cases need to be set against qualifications of administrative judges.

The cases decided by administrative agencies can be ranked in terms of the importance of individual interests¹⁶ in the following way: (1) enforcement, penalty or sanction cases; (2) entitlement or benefits cases; (3) regulatory, ratemaking and licensing cases; and (4) contract claims against the government. These categories reflect a hierarchy of individual interests, yet each is decided by administrative judges with a variety of qualifications. In the first category are the traditional independent agency enforcement actions that involve formal APA hearings before ALJs (such as in proceedings at the Federal Trade Commission (FTC)). But this category also includes status

¹⁶The practice of evaluating interests and procedures in administrative decisions has been done for years. See Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975); Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

determinations by agencies such as the Department of Justice in immigration matters, or the Department of Defense (DOD) in security clearance matters, where neither APA formal hearings nor ALJ deciders are currently required. While the individual interests at stake are not as great, entitlement or benefits cases are also divided in their use of formal procedures or ALJ decisionmakers. The Social Security Administration (SSA), for example, employs the largest (by far) group of ALJs to decide its cases, whereas the Veterans Administration decides similar cases without the use of ALJs.¹⁷

In the regulatory or licensing category the variety is virtually infinite. Relative formality reigns in major licensing cases before the Federal Energy Regulatory Commission (FERC) and other independent agencies where ALJs are active; in other agencies, such as the Nuclear Regulatory Commission (NRC), licenses are issued without ALJs presiding; in still others, such as the Department of Agriculture, procedural and decider informality is common.¹⁸ In the fourth category, claims against the government, the Boards of Contract Appeals and the Courts of Claims decide similar cases with varying degrees of decider formality.

In each of these categories, substantial private interests are adjudicated in a variety of procedural formats with ALJs presiding in some, and AJs presiding in others. It is one of the purposes of this study to understand these differences and suggest ways to rationalize them—at least with regard to the kind of deciders involved. Chapter III is devoted to explaining the case types introduced here.

D. The Scope of the Federal Administrative Judiciary Covered by This Study¹⁹

To define the universe of the administrative judiciary, some limits must be placed on the scope of inquiry. At the outset, the study must limit itself to those administrative judges—whether labeled ALJs, AJs, hearing examiners or something else—who actually preside at some kind of hearing, whether formal or informal.²⁰ Excluded from this study are the millions of decisions rendered

¹⁷See Chapter III(D) *infra*.

¹⁸See Frye Report 83-93 for a full discussion.

¹⁹Parts of this section and sections E and F appeared in Verkuil, *Reflections Upon The Federal Administrative Judiciary*, 39 U.C.L.A. L. REV. 1341 (1992).

²⁰See Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (defining the components of informal hearings). There has been some scholarly study of the ALJ, notably that of now Justice Scalia and Professor Rosenblum. See, e.g., Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979); Rosenblum, *Contexts and Contents of "For Good Cause" as*

by untold numbers of deciders who adjudicate public rights, opportunities or obligations in nonconfrontational and often non-face-to-face ways.²¹ These deciders are, as a practical matter, truly the invisible, rather than hidden, judiciary and are not yet susceptible to systematic study.

The two categories of administrative deciders for whom aggregated data exist are the established ALJs anointed by the APA to preside over formal hearings,²² and the far more open-ended category of AJs.

1. The ALJ in Context

Administrative law judges as a group are among the most talented, well trained and deeply entrenched adjudicators in our system, even when compared to the federal and state judiciary. Although there has been little increase in their ranks since 1978, there are currently almost 1,200 ALJs employed by 30 federal agencies.²³ The Social Security Administration employs more than 850.²⁴ By comparison, there are about 636 federal district judges. If bankruptcy judges and magistrates are included within the definition of the federal trial bench, then the total number (1,250) would approximate the size of the ALJ corps.²⁵ While it is impossible to compare workloads in any meaningful way, the ALJs probably decide as many, if not more, "cases" as their federal judicial counterparts.²⁶ In terms of compensation, the ALJs as a

Criterion for Removal of Administrative Law Judges: Legal and Policy Factors, 6 W. NEW ENG. L. REV. 593 (1984).

²¹Deciders in this category may include those who make initial grants or denials of benefits (such as National Science Foundation applications), of rights of access to government facilities (for example, the park rangers who control access to national parks), and similar officials. They can be distinguished from the administrative judiciary by the fact that they render their decisions in a nonhearing context. This does not mean, of course, that they are outside the ambit of due process concern if their decisions affect private rights or benefits. See Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. REV. 739 (1976).

²²Under the APA, when a statute requires agency adjudications "to be determined on the record after opportunity for agency hearing," ALJs or the agency head must preside. 5 U.S.C. §§554, 556-57 (1988). In 1972 the term ALJ was substituted for hearing examiner. See 37 Fed. Reg. 16787 (1972). See Cramton, *A Title Change for Federal Hearing Examiners? A Rose by Any Other Name...*, 40 GEO. WASH. L. REV. 918 (1972).

²³According to OPM, in May 1978 there were 1,078. Since then, the number has fluctuated between 989 and the current high water mark of 1,185. See the graph included in this report.

²⁴Statistics provided by OPM as of May 1, 1992 (the precise total was 1,185 on that date, of which 866 were in the Social Security Administration).

²⁵See chart in Appendix I. Statistics provided by Federal Judicial Center as of August 1, 1992 (636 federal district judges, 291 bankruptcy judges and 323 magistrates).

²⁶The Director of the Administrative Office of the U. S. Courts reports that for the year ending June 30, 1991, there were 207,742 civil cases and 47,035 criminal cases filed in the

group cost the government \$100 million per year (with an average salary of about \$83,000).²⁷ By contrast, the 636 federal district judges (at a salary of \$125,000 each) cost \$80 million per year. If the salaries of bankruptcy judges and magistrates are added in (at \$115,092 each), their services cost the government another \$70 million. Thus, the federal investment in ALJs is two-thirds that of the entire investment in the trial level judiciary. This is a significant commitment of resources to a cadre of deciders who often go overlooked in the universe of federal decisions.

Rate of Growth
ALJs in the Federal Government



As the government has a right to expect, ALJs are impressively credentialed. As is discussed in greater detail in Chapter IV, many of them attended "prestigious" law schools and most graduated in the top quarter of

district courts. ²³ *The Third Branch* 1-3 (1991). Unfortunately, there is no comparable reporting of ALJ caseload, but the 30 agencies presided over by ALJs can be estimated to produce over 300,000 cases per year (with the bulk of them (250,000) in the Social Security Administration) based on earlier studies. See Lubbers, *Federal Agency Adjudicators: Trying to See the Forest and the Trees*, 31 *FED. BAR NEWS & J.* 383, 384, (1984) showing ALJ caseload in 1982/83 to be about 30,000 outside the SSA). See also discussion at note 35 *infra*.

²⁷ALJs are compensated in three categories: AL-1 (3 total), AL-2 (35) and AL-3 (1147), See Appendix 1. There are six steps in the AL-3 category based upon length of service. In 1991 the average salary was \$82,364 per ALJ with a 3-1/2% raise in January 1992). Telephone interview with Bobby Bell, OPM Office of ALJs (October 25, 1991).

their class.²⁸ While they themselves acknowledge their prestige is less than federal judges,²⁹ by education, training and experience, they are probably no less qualified than bankruptcy judges and magistrates, if not the federal bench. Moreover, ALJs, unlike federal district judges, are not chosen in a political way, but instead by an elaborate selection system administered by OPM. Their tenure and compensation are more secure than that of bankruptcy judges or magistrates, as they do not serve terms but are, in effect, granted life tenure subject only to removal for good cause or to reductions in force.³⁰ Thus, as a practical matter, ALJs rank almost as high as the federal bench in terms of job security. These protections provide ALJs with the independence of judges in many respects, although they are by definition bound by the decisional authority of the agencies for whom they work.

2. The Emerging Category of "Administrative Judge"

There are other administrative deciders who do work similar to that of ALJs but who are not comparably protected in their independence nor compensated at similar levels. The Frye Report collected valuable data on non-ALJ hearings and presiding officers.³¹ In sum, whereas the ALJs as a group rival the federal trial judiciary and adjuncts in number and compensation, there is another group almost twice the size of the ALJ corps that decides more cases, but does so with less prestige, compensation and job security. This may be the real hidden judiciary.³²

²⁸See Paula Berger, *JUDGES IN SEARCH OF A COURT: CHARACTERISTICS, FUNCTIONS AND PERCEPTIONS OF FEDERAL ADMINISTRATIVE LAW JUDGES* 106-11 (1984) (based on 1978 survey data). See ALJ survey, question #36 (Appendix IV A).

²⁹*Id.*

³⁰Bankruptcy judges serve term appointments of 14 years and magistrates serve 8-year terms. An ALJ may be removed "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing." 5 U.S.C. §7521 (1988). There have been only a few such removals since the APA was enacted. Therefore, ALJs enjoy a tenure not significantly different in practice from the members of the federal bench. In fact, a Senate committee has noted, "In essence individuals appointed as [ALJs] hold a position with tenure very similar to that provided for federal judges under the Constitution." S. REP. 95-697, 95th Cong. 2d 1st Sess. 2 (1978) reprinted in U.S.C.C.A.N. 496-97.

³¹See Frye Report.

³²See Lubbers, *Management of Federal Agency Adjudication* at 35-36 (American University Symposium May 16, 1991); Robie & Morse, *The Federal Executive Branch Adjudicator: Alive (and Well) Outside the Administrative Procedure Act?*, 33 FED. BAR NEWS & J. 133 (Mar. 1986).

In an effort to determine the universe of non-ALJ hearings conducted by federal agencies, the Conference conducted a survey in 1989.³³ The survey results showed that there were 83 active case types involving almost 350,000 cases annually that were conducted outside the APA formal hearing setting by non-ALJs.³⁴ These cases involved over 2,600 presiding officers, either on a full-time or part-time basis, who ranged in grades between GS-9 and GS-16.³⁵ Thus, the non-ALJ "corps" is about twice as large as the ALJ corps, with a decision load equal to that of ALJs.³⁶ We can now identify with some accuracy the decision world of federal administrative law, at least at the hearing level.³⁷ These data invite a series of more detailed inquiries.

When the non-ALJ hearing data are disaggregated, they reveal a concentration in only a few case and decider types. By far the largest category of cases was in the Executive Office of Immigration Review of the Department of Justice (DOJ), which accounted for about 152,000 of the 350,000 cases (approximately 45 percent of the total). This office employed about 76 full time "administrative judges."³⁸ By contrast, the next largest category of cases was in the Department of Health and Human Services (HHS) where presiding officers employed by insurance carriers (whose numbers were not calculated) decided 68,000 cases per year or 20 percent of the total caseload.³⁹ The third largest category was in the Department of Veterans Affairs (DVA), which decided 58,000 cases per year (17 percent). These deciders, involved in

³³The survey dated June 28, 1989, asked all agencies to list information about deciders who conducted oral hearings not required by statute to be on the record. See Frye Report, App. A.

³⁴Frye Report at 4-5.

³⁵*Id.*, at App. B.

³⁶Estimating the number of ALJ hearings is difficult because statistics are not collected outside the SSA context, where over 250,000 ALJ decisions were rendered in 1990. See SSA Office of Hearings and Appeals, Key Workload Indicators 3rd Quarter FY 1991, at p. 2. The last effort to collect ALJ adjudication statistics for all agencies was done in 1980 by the Administrative Conference. See *Federal Administrative Law Judge Hearings 1976-78* (July 1980), documenting about 20,000 ALJ decisions outside SSA.

³⁷By drawing the line at "some kind of hearing" we exclude, of course, the potentially larger category of nonhearing decisions made informally by the federal government that are beyond the scope of this article. See note 20 *supra*.

³⁸Frye Report at App. B. The number of Immigration Judges is now approaching 100. Discussion with Chief Judge William Robic, January 29, 1992.

³⁹*Id.* The use of private deciders as hearing officers in Medicare reimbursement cases was upheld over due process challenge in *Schweiker v. McClure*, 456 U.S. 188 (1982). The due process requirements for decider impartiality are discussed at Chapter I (E)(1), VI(A) *infra*.

disability and benefits determinations, ranged widely in experience, grade and (the presence of) legal training.⁴⁰

These three agencies account for more than 80 percent of the caseload studied⁴¹ and offer a remarkable variety of decider qualifications, from administrative judges to nonlawyer and even nongovernmental examiners. The hearing procedures employed range from the equivalent of formal APA hearings, to informal processes from which there is no appeal. These decisions are often similar to the kinds of decisions traditionally made by ALJs.⁴² There appears to be no obvious reason why the presiding official in these case types is sometimes an ALJ and sometimes a non-ALJ. Moreover, it is also not clear what case characteristics should trigger the use of APA formal hearings with ALJ presiders as opposed to less formal non-ALJ hearings and presiders.

E. Rationalizing the Use of ALJs: Mixed Signals from Congress and the Courts

The search for answers as to why ALJs do not appear to be used in a systematic way begins with Congress, but also extends to the courts. The APA intended to leave the decision to employ ALJs to agency-specific legislation by stating that ALJs would only be required where statutes called for "on the record" hearings. Of course the APA was drafted against a background of existing statutes so the "on the record" requirement instantly applied to many regulatory agencies in 1946.⁴³ The first task the Civil Service Commission (CSC) faced in 1947 was determining whether incumbent hearing examiners at these agencies were qualified to serve as "hearing officers" under

⁴⁰Frye Report at p. 4. The DVA employs 44 lawyers and 22 nonlawyers at grade GS-15, who sit in panels of three as the Board of Veterans Appeals. It also employs 1,692 part-time nonlawyers whose grades range from G-9 to GS-13. See Frye Report at App.B.

⁴¹The other significant categories of cases are those conducted by the Coast Guard in the civil penalty arena (navigation, marine safety and pollutant discharges), which number about 20,000 and are decided by 10 nonlawyer Coast Guard officers. (The high caseload per decider is explained by the fact that only about 7 percent of the total go to hearing.) See Frye Report at 43-45. Other significant caseloads involve EEOC, which uses about 79 GS-11 to GS-14 attorneys to decide about 6,227 cases, and the various agency boards of contract appeals, which use about 80 attorneys (grades ranging between GS-14 to GS-18) to decide some 5,000 cases.

⁴²The similarity of the case types will be discussed in terms of the SSA and VA disability process at Chapter I (F), *infra*.

⁴³Pub. L. No. 404, ch. 324, 60 Stat 237 (1946) (codified at 5 U.S.C. §§551-552, 553-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1982)).

the APA.⁴⁴ Once in place, however, Congress has not always been willing to expand the number of agencies required to use APA hearing examiners.

In *Wong Yang Sung v. McGrath*,⁴⁵ the Supreme Court held that the due process clause might impose protections upon decider independence similar to those required by the APA. The decision was quickly challenged by legislative action, which rejected using ALJs as presiding officers in immigration and deportation cases. The Court subsequently acceded to this legislative reversal.⁴⁶ By stopping short of equating due process requirements with the need for formal hearings under the APA, Congress and the courts greatly reduced the potential role of the ALJ. In retrospect, however, the decision to decouple the use of ALJs and formal hearings from the due process clause seems the only sensible course. The "due process revolution" of the 1970s inspired by *Goldberg v. Kelly*⁴⁷ would surely have swamped the administrative decision process had ALJs been required every time procedural due process was invoked.⁴⁸

In the 1970s another development expanded the potential use of ALJs. The Social Security Administration had long utilized ALJs even though the APA on-the-record hearing requirements may not have required it to do so. In 1956 Congress instituted the Social Security disability program which markedly increased the number of ALJ cases. By the 1970s the number of disability determinations skyrocketed with the advent of expanded coverage.⁴⁹ It became

⁴⁴The failed attempt individually to review the qualifications of these 197 incumbent hearing officers rather than accept them as a group is told in Fuchs, *The Hearing Examiner Flasco under the Administrative Procedure Act*, 63 HARV. REV. 737 (1950). See also Scalia, *The ALJ Flasco-A Reprise*, 47 U. CHI. L. REV. 57 (1979) (discussing current problems of appointment and grading of ALJs). See also Chapter V *infra*.

⁴⁵339 U.S. 33 (1950).

⁴⁶*Marcello v. Bonds*, 349 U.S. 302 (1954).

⁴⁷397 U.S. 254 (1970). *Goldberg* created a "due process revolution," in Henry Friendly's words, by specifying in detail the procedural ingredients required to satisfy due process in the informal administrative setting (i.e., revocation of AFDC payments). Ironically, however, *Goldberg* mandated little in terms of decider independence, requiring only that deciders not have previously participated in decisions they are called upon to review. 397 U.S. at 271. See generally, Verkuil, note 16 *supra*, at 750-52.

⁴⁸The demise of the right-privilege distinction and the concomitant rise in the number and kind of interests protected by due process, see e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972), created a potential landslide of due process adjudications at the state as well as federal level that could potentially have been included within the APA formal hearing requirements. The realization that the administrative decision system could be overwhelmed by these new procedural rights undoubtedly contributed to the Court's modification of them in cases like *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁴⁹In 1972 Congress established the Supplemental Security Income (SSI) program. In doing so, it did not initially require ALJs to preside over SSI cases. See House Comm. on Ways and

quickly apparent that the number of ALJs making disability determinations would far outstrip those making all formal decisions in government.⁵⁰ The remarkable thing about this expanded use of ALJs was that it emerged without APA compulsion because no on-the-record hearing was mandated in the disability context. And, in *Richardson v. Perales*,⁵¹ the Court made it clear that the so-called "three-hat role" of the ALJ (representative of claimant, the government and impartial decider) was entirely consistent with statutory and constitutional norms.⁵²

Thus, a new category of ALJs who presided over benefit rather than regulatory decisions emerged. These ALJs had the unusual distinction of conducting informal, nonadversarial hearings; in return they received a lower grade (GS-15 rather than GS-16).⁵³ Presiding over informal, nonlawyer-dominated hearings was a departure for ALJs who traditionally had been associated with the trial-type process contemplated by APA formal adjudication procedures. But different though it may have been, this category expanded the use of the ALJs dramatically. It also raised the prospect of other uses of ALJs in nonformal hearing settings,⁵⁴ and in effect expanded the relevant talents ALJs needed to preside effectively.

1. The Due Process Limits on Decider Impartiality

While endorsing the use of ALJs in the relatively informal setting of SSA disability proceedings, the Court was at the same time accepting a low threshold for decider independence outside the APA formal hearing context.

Means, Social Security Amendments of 1971, H.R. Rep. No. 92-231, 92d Cong. 1st Sess. 156 (1971). Later Congress converted SSI hearing officers into ALJs. See Pub. L. No. 92-216 §371, 91 Stat. 1559 (1977). (Codified at note to 42 U.S.C. §1383 (1988)). See discussion in Chapter II.

⁵⁰In a sense, the SSA disability story demonstrates what might have happened had Congress accepted the Court's invitation in *Wong Yang Sung* to equate due process hearings with APA formal hearings more generally. Today almost three out of four ALJs make SSA disability determinations. If SSA had not decided to utilize ALJs, the number and influence of those deciders would have been sharply reduced.

⁵¹402 U.S. 389 (1971).

⁵²The three-hat role was necessitated by the fact that in those days there were few attorneys for claimants and none representing the government. Obviously, had the formal hearing requirements of the APA been mandatory, the separation-of-functions requirements would have forbidden the ALJ to assume total control of the process.

⁵³Only recently has the two-grade ALJ structure been replaced. See note 27 *supra*.

⁵⁴For example, the use of ALJs to preside over APA informal rulemaking or as members of agency appeals boards has long been advocated but not readily embraced.

In *Arnett v. Kennedy*⁵⁵ a divided Court allowed a government employee to be disciplined by the employee's superior for making statements against that superior. Justice White in dissent expressed the view that this kind of bias in a decisionmaker had not been accepted under due process standards since *Bonham's case*.⁵⁶ Similarly, in *Withrow v. Larkin*,⁵⁷ the Court accepted in the state informal hearing context the potential conflict of interest that exists in combining the investigatory and adjudication function in a single entity.⁵⁸ For due process purposes the Court seems willing to narrow the bias or conflict of interest inquiry into one involving only pecuniary interests.⁵⁹

Moreover, the Court has encouraged the experimentation with creative decision techniques that question the need for any kind of government deciders, let alone ALJs. In *Schweiker v. McClure*,⁶⁰ the Court accepted, against due process challenges alleging bias, the use of nonlawyer, privately contracted deciders to resolve medicare reimbursement claims.⁶¹ This decision in effect contradicted established notions of decider formality by not only privatizing the deciders but also placing them beyond the exclusive control of the legal profession. Moreover, the Court refused to mandate an administrative or judicial appeal process as part of a due process requirement.⁶²

⁵⁵416 U.S. 134 (1974).

⁵⁶*Id.* at 171. In *Bonham's case*, 8 Cokr 114a, 118a, 77 Eng. Rep. 646, 652 (1610), Lord Coke announced the fundamental proposition of natural justice that no man can be a judge in his own cause.

⁵⁷421 U.S. 35 (1975).

⁵⁸The Court may have reasoned that this combination of functions at the state level had its counterpart in the organizational structure of many independent federal agencies, such as the FTC, where the Commission in effect approves the commencement of investigations and issuance of complaints by its enforcement staff and then sits in judgment on the resulting case.

⁵⁹In *Gibson v. Berryhill*, 411 U.S. 564 (1973) the distinction is made clear. The fact that a private board of optometrists was authorized by state law to regulate their competitors (with possible pecuniary benefit) condemned the arrangement under due process standards. See also *Tumey v. Ohio*; 278 U.S. 510 (1927). *Ward v. City of Monroeville*, 409 U.S. 57 (1972). These cases are discussed in Chapter VII.

⁶⁰456 U.S. 188 (1982).

⁶¹Justice Powell likened the private deciders in the case to government officials: "The hearing officers involved in this case serve in a quasi-judicial capacity, similar in many respects to that of administrative law judges." 456 U.S. at 195. [Justice Powell's analogy may be overstated. ALJs have a higher status than the private contract deciders involved in hearing reimbursement cases.]

⁶²*Id.* at 198-99. Subsequent to this decision Congress provided for an appeal to an ALJ in cases where the amount in controversy is \$500 or more. Pub. L. No. 99-509, §9341(b) (1986). (Codified as amended at 42 U.S.C. §1395(b)(2)(B) (1988)). This is yet another illustration of the different view that Congress and the courts often take about the necessity for formality in deciders or process.

It is fair to say that by the 1990s the Court has moved in the direction of greater decisional freedom under the due process clause. From its earlier position of equating due process to formal APA hearings in *Wong Yang Sung*, it moved beyond the *Goldberg* requirement of specifying procedures for due process purposes to a world where the informal process of infinite variety can be readily accepted. In this environment the decider need not be APA-qualified, nor must the APA formal hearing process serve as a baseline. But this informal process, which is not defined by the APA, remains an amorphous competing model.⁶³ The only informal adjudication process contained in the APA is the bare bones procedural guidelines of section 555.⁶⁴ Much work remains to be done on the question of whether an informal process can be generalized from existing agency practices.

2. Congressional Reactions to Decider Formality

Over the last 40 years Congress has sent inconsistent signals about the use of ALJs. Except perhaps in the civil money penalty area, Congress has not added significantly to those agency statutes that require "on the record" hearings even though that invitation to the expanded use of ALJs was the basic premise of the APA.⁶⁵ And Congress does, of course, accept, if not endorse, the large category of non-ALJ administrative judges that exist throughout government.⁶⁶

On the other hand, Congress has increased the independence and stature of existing ALJs in several significant ways. In accepting the Civil Service Commission's conversion of APA hearing examiners to administrative law judges, it did far more than merely approve a title change.⁶⁷ This decision in effect legitimated a federal administrative judiciary, and elevated the sights of all administrative deciders. Recently, of course, Congress also boosted the

⁶³See Gardner, *The Procedures by Which Informal Action is Taken*, 24 ADMIN. L. REV. 155 (1972).

⁶⁴See e.g., *P.B.G.C. v LTV Corp.*, 496 U.S. 633 (1990). See also Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978).

⁶⁵Of course, the fact that Congress accepted the use of ALJs in the SSA disability hearing process even without the on-the-record requirement has vastly enhanced their number and influence.

⁶⁶Congress also approves by statute the specific use of non-ALJs in contexts where ALJs are also used, such as Veterans Administration and Merit Systems Protection Board. In the latter situation, ALJs and non-ALJs are used to decide disciplinary cases (ALJs only being required to hear cases involving other ALJs).

⁶⁷In 1978 Congress amended the U.S. Code to endorse the title administrative law judge that had earlier been adopted by the Civil Service Commission. Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183; 37 Fed.Reg. 16, 787 (1972).

status of ALJs by approving a new pay structure that combined all nonmanagerial ALJs into a seniority-based pay schedule and increased their salary.

These achievements also suggest that ALJs have received crucial support from the organized bar.⁶⁸ The bar has steadfastly insisted that the value of decider independence can best be served by using ALJs in the formal hearing setting. Lawyers quite naturally seek to place the administrative process close to the judicial process with which they are most comfortable. The current debates in Congress surrounding the desirability of an independent ALJ Corps are part of this ongoing effort to judicialize the administrative process.⁶⁹ The merits of the proposed legislation that would create some sort of ALJ corps will be discussed in greater detail in Chapter VI. For the purposes of this introductory chapter it is sufficient to note that Congress will inevitably play a key role in deciding the qualifications and benefits of administrative judges, broadly defined. It will also decide when ALJs are a necessary component of the decision process. It is hoped that this study will assist Congress as well as the agencies in deciding when and how to call upon ALJs or other administrative judges.

F. Introduction to Decider Independence in the Context of Disability Benefits Determinations

Ambivalence towards use of ALJs is tied ironically to the attribute that many would assert is their greatest asset: strict independence from participant or agency control. This was certainly the attribute that motivated the drafters of the APA to create the formal adjudication process in 1946.⁷⁰ But while the APA protected the ALJ from improper agency control over the decision process, it also ensured that the outcome of the decisions ALJs presided over rested formally in the agency head's hands.⁷¹ This compromise over the

⁶⁸The ABA has long supported enhancing ALJ independence as well as expanding their role. For example, in 1986 the ABA gave an award to Social Security ALJs for upholding the integrity of administrative adjudication. See Bono, *Administrative Report, Judges' J.*, Winter 1992, at 23, 41.

⁶⁹S.594 101st Cong. 1st Sess., 135 Cong. Rec. 2711-13 (1989). One can also read the recent legislation to subject the decisions of the Veterans Administration to (limited) judicial review as further evidence of Congress' interest in judicializing the administrative process. See Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105, 38 U.S.C. §§3404.

⁷⁰Before the APA, hearing examiners were described by Congress as biased and partisan. See Scalia, *The ALJ Flasco - A Reprise*, 47 U. CHI. L. REV. 34 (1979).

⁷¹The final decision is that of the agency and no deference is due the ALJ's decision. See 5 U.S.C. §557.

functions ALJs perform under the APA serves to confuse their role today. The ALJ is independent during the course of the decision process, but once a decision is made, it is not granted the respect of automatic finality or even deference.

Today, disputes over ALJ independence are rarely about fundamental issues such as *ex parte* contacts or agency coercion; the current level of disputes has become almost trivialized by squabbles over perquisites and benefits.⁷² However, legitimate agency reservations about the ability to control the performance of ALJs under the APA are growing--and in the process spawning varieties of non-ALJ deciders. Because the courts have made it clear that decider independence is not a serious due process issue, agencies (and Congress itself) are free to seek more efficient decider alternatives. In this setting the question becomes whether using ALJs is good policy, not whether ALJs are necessary to satisfy fundamental notions of fairness. To answer the question, we carefully examine the independence factor.

As anyone who labors in the academic community will attest, the security of tenure has costs as well as benefits. That is no less true with regard to ALJs. Once one passes the point where independence is a due process desiderata, it becomes an issue that is part of any tradeoff between management efficiency and decider prerogatives. Today that is the arena within which the issue is debated. Much of the debate can be captured in the long-running saga of SSA's attempts to place productivity and quality control standards on its ALJs when deciding disability cases.

Since social security judges decide so many cases with similar fact patterns, apply a single legal standard and are assigned randomly, SSA naturally wants to impose uniform standards of case management so as to achieve greater comparability of outcome. A decision system with more than 250,000 cases annually and that employs more than 850 ALJs is not one that can ignore the search for systemic solutions. But these management techniques have a tortured history. The agency has used decision "quotas" to try to regularize the number of cases decided by each ALJ per month. And in light of the fact that the cases are randomly assigned, it has experimented with "goals" for

⁷²See Moss, *Judges Under Fire - ALJ Independence at Issue*, A.B.A.J., Nov. 1991 at 56, 59 (documenting ALJ complaints over agency assignment of parking spaces and attendance at training conferences). See also GAO, *Administrative Judges--Allegations of Interference by the Department of Interior*, GAO/GGO-93-6 (October 1992).

allowance rates as well. Over the years, the SSA and its ALJs have struggled over the proper parameters of these management standards.⁷³

There is no doubt that from a management perspective, productivity and even allowance rate goals are sensible control mechanisms. However, when faced with a corps of independent deciders who view themselves as the functional equivalent of federal district judges, and who are willing to go to court and to Congress to defend their claims to independence, there is not too much as a practical matter an agency can do to force caseload management. Indeed, this seems to have been the conclusion reached by SSA and its Office of Hearing and Appeals. It has jettisoned controversial techniques such as workload quotas and nonacquiescence in court of appeals decisions.⁷⁴ The agency has apparently abandoned quotas and allowance rate goals because they are of limited use in a system of independent deciders.⁷⁵ Acceptance of ALJ independence can also be assumed because in the last 5 years no ALJs have sued the agency.⁷⁶

The SSA-ALJ experience is the prime example of the tension between management control and decider independence. Tension has lessened primarily because of the strength of the ALJs on the independence issue. The political lessons of this experience are clear: management techniques are no match for claims of independence. Once the ALJ is chosen as a decider, judicial-type prerogatives place control over the process in his or her "court." The decision arena reflects a setting where modes of individual decisionmaking prevail over attempts to regularize outcomes on a statistical basis. But imagine another reality. Suppose ALJs were not chosen to decide disability cases,

⁷³See *Nash v. Bowen*, 869 F.2d 675 (2d Cir. 1989) cert denied 493 U.S. 812 (1989), (upholding agencies setting of "reasonable production goals"); *Assn. of ALJs, Inc. v. Heckler*, 594 F. Supp. 1132 (D.D.C. 1984) (criticizing the agency's use of allowance rate goals). See also *SSA v. Goodman*, 19 M.S.P.R. 321 (1984) (rejecting removal of an ALJ based upon demonstrated low productivity—less than 50% of agency-wide average of 31 cases per month). These cases are discussed in more detail in Chapter V.

⁷⁴The agency has also had its fights with the courts. To help achieve uniform policy it has refused to accept as precedent some decisions of federal courts. This practice has attracted the ire of the courts, Congress and the bar. See *Eureicher & Revez, NonAcquiescence by Federal Administrative Agencies*, 98 *YALE L. J.* 679 (1989). The agency's nonacquiescence policy was significantly limited by regulation in 1990. See 55 *Fed. Reg.* 1990 (January 11, 1990).

⁷⁵Conversation by author with Michael Astruc, General Counsel, HHS, December 12, 1991.

⁷⁶This lack of ALJ lawsuits has also been paralleled by a significant drop in appeals to the federal district court from ALJ decisions from over 29,000 in 1984 to about 7,000 in 1990. See *Annual Report of the Director of the Administrative Office of the U.S. Courts* 7 (1990). Another factor affecting appeal rates to the federal courts may simply be that the rate of ALJ decisions favorable to the claimant has gone up from less than 50% in the 1970s to over 62% in 1990. See *SSA-OHA, Key Workload Indicators*, at 2 (3Q 1991).

would management techniques be easier to implement and would the outcomes be different? To obtain some perspective on this question, it is useful to examine the history of the ALJ program. Special attention will be given to the evolution of the ALJ's role from primarily an "examiner" in regulatory cases to now, most frequently, a decider of benefit claims.

II. Historical Background to This Study

This section examines the history and development of the position of federal administrative law judges, the principal adjudicating position created by statute whose use is mandated in many adjudications. Identifying the historical concerns that have given rise to the creation and widespread use of this position will help (1) in assessing of the role of that position in the circumstances of today's adjudicatory caseload, (2) in evaluating the need for or desirability of any change or modification of the characteristics of that position, (3) in assessing the need for or desirability of an expansion (or contraction) of the ALJ position to embrace the functions performed by non-ALJ adjudicators, and (4) in improving the process by which such officials are selected.

The federal officials we know today as federal administrative law judges and who preside at adjudications in a number of federal agencies bore the title of hearing examiner when their position was first established by the Administrative Procedure Act in 1946. In 1972 the Civil Service Commission (CSC), by regulation, changed the title of hearing examiner to administrative law judge,⁷⁷ and in 1978, Congress established the new title by statute.⁷⁸

The appointment of administrative law judges is overseen by the Office of Personnel Management (OPM) through a process overtly designed (i) to exclude politics from appointment decisions and (ii) to obtain the most qualified persons. Until the enactment of the Federal Employees Pay Comparability Act of 1990, OPM was vested by law with the authority to make all decisions governing pay of ALJs, to insulate them from agency influence. Since the 1990 legislation establishes that ALJ pay is to be determined on the basis of length of service, the compensation of ALJs remains outside the ability of agencies to affect. Finally, ALJs may be dismissed for cause only after a hearing before the Merit Systems Protection Board.

In addition to ALJs, there are numerous federal officers who preside over various kinds of adjudications within the federal bureaucracy but whose

⁷⁷37 Fed.Reg. 16,787 (1972).

⁷⁸Pub. L. No. 95-251 §2(a)(10), 92 Stat. 183 (1978).

decisional independence is not so well protected as that of ALJs. In a recent report to the Conference, Administrative Law Judge John H. Frye, III identified 2,692 such non-ALJ presiding officers, 601 of whom have no other duties.⁷⁹

A. The Origins of Hearing Examiners Prior to the Enactment of the APA

Although the APA created hearing examiners who were statutorily protected in several ways from agency influence upon their factfinding, persons known as hearing examiners presided at adjudications before enactment of the APA, and the term "examiner" was used at least as early as 1906. Legislation amending the Interstate Commerce Act in 1906 (the Hepburn Act) authorized the appointment of examiners who would possess powers to receive evidence. The Interstate Commerce Commission immediately used its newly conferred power to appoint examiners, and in 1907 it appointed a Chief Examiner.⁸⁰ Sharfman reports that in 1917 the Commission began the practice of having examiners prepare proposed reports from which the parties might seek review and by 1919 the practice extended to most formal rate cases.⁸¹ In 1914 the legislation establishing the Federal Trade Commission (FTC) gave that Commission the power to appoint examiners. This provision was copied in the Shipping Act of 1916 and thereafter in the enabling legislation of many regulatory agencies.⁸²

The roles and duties of examiners were not always clearly confined to a purely judge-like role during the several decades prior to enactment of the APA. Although examiners generally tended to preside over trial-type hearings for the agencies, they sometimes performed investigatory duties and, in some agencies, they consulted extensively with superiors about how cases before them should be decided. Writing 9 years after the FTC was established, Henderson (the historian of the FTC) observed that it was then customary for the precomplaint investigation of a case to be conducted by one of the Commission's examiners.⁸³ Henderson's report of this use of examiners shows

⁷⁹Frye Report, Appendix B, p.1.

⁸⁰L. Sharfman, IV THE INTERSTATE COMMERCE COMMISSION 73 (1937).

⁸¹*Id.*, at 73-74.

⁸²K.C. Davis, 3 ADMINISTRATIVE LAW TREATISE §17:11 (2d ed. 1980). Musolf identifies 15 regulatory statutes in which the language of the Hepburn Act conferring power upon examiners was replicated between 1920 and 1940. L. Musolf, FEDERAL EXAMINERS AND THE CONFLICT OF LAW AND ADMINISTRATION 52-53 (1953).

⁸³G. Henderson, THE FEDERAL TRADE COMMISSION 51 (1924).

that examiners were not then viewed as personnel committed solely to judging, but were apparently considered to be open to a wider range of tasks that the Commission found helpful. The Attorney General's Committee staff monograph on the Interstate Commerce Commission (ICC) reported that in the Loans and Reorganization Section of the ICC's Bureau of Finance, the proposed reports of examiners frequently bore the imprint of the Bureau Director and his staff.⁸⁴ The practice of examiners consulting with agency officials about proposed reports was also followed extensively in the ICC's Bureau of Formal Cases.⁸⁵

The pre-World War II practice of the Federal Communications Commission (FCC) requires a special word. Prior to late 1938, the FCC employed a staff of examiners, one of whom presided at Commission hearings and prepared a report with findings and recommendations that served as the focus of oral argument before the Commission. Because the examiners were unable to reflect the Commission's policies in their reports, however, those reports failed to serve their intended purpose. In late 1938, therefore, the Commission abolished its staff of examiners and entrusted the task of presiding over hearings to attorneys from its Legal Department, usually the attorney who had been in charge of the case from the beginning. Unless a separate Commission attorney was appointed (which generally occurred in complex cases), the presiding attorney conducted direct examination of Commission witnesses and cross-examination of other witnesses. That attorney then assisted in the preparation of an institutionally-formulated proposed decision, which served as the focus of oral argument before the Commission.⁸⁶

In the late 1930s, the regulatory agencies, a primary tool of the New Deal program, came under increasing attack for bias. Critics pointed to these agencies as possessing powers of investigation, prosecution and adjudication, and argued that the combination of all these powers in the same institution impeded fair adjudication.⁸⁷

These criticisms resulted, first, in the Congressional passage of the Walter-Logan bill in 1940,⁸⁸ a bill designed to constrain the power of the federal

⁸⁴See S.Doc. No. 10, *Administrative Procedure in Government Agencies*, Part 11 Interstate Commerce Commission, 77th Cong., 1st Sess. 59 (1941).

⁸⁵See S. Doc. No. 10, *Administrative Procedure in Government Agencies*, Part 11 Interstate Commerce Commission, 77th Cong., 1st Sess. 26-29 (1941).

⁸⁶This description of FCC practice is taken from S.Doc. No. 136, *Administrative Procedure in Government Agencies*, Part 3 Federal Communications Commission, 76th Cong., 3d Sess. 22-37 (1940).

⁸⁷This history is reviewed in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478-79 (1951).

⁸⁸H.R. 6324, 76th Cong., 1st Sess. (1940).

agencies. Although President Roosevelt vetoed the Walter-Logan bill, he promised that administrative reform would be undertaken as a result of the then-pending studies of the Attorney General's Committee to Study Administrative Procedure.⁸⁹ That Committee had been appointed in 1939 at the direction of the President and had undertaken the most extensive study of administrative procedure ever conducted. Ultimately, through the recommendations of the Attorney General's Committee, the critics' concerns were addressed in the federal Administrative Procedure Act, enacted in 1946.

The problem to which the critics were reacting was created by several circumstances. First, in the 1930s, adjudication was the principal method agencies used to promulgate policies.⁹⁰ Second, the functions of investigation, prosecution and adjudication were generally combined within the same agency; the agency head was responsible for overseeing all agency operations; and the agency head generally sat as the final adjudicating tribunal. The agency head had to sit as the final adjudicating tribunal to control agency policy, because it was in adjudications that agency policy was formulated and applied. Similarly, the agency head had to supervise investigations and complaint-issuance decisions to ensure that the proper kinds of cases came before the agency for adjudication. That is to say, in the view of the agencies, their power to make policy through adjudications would be an empty one unless they could ensure that cases raising the issues calling for policy decisions were brought before them.

Although the agencies believed they needed the powers of prosecution and adjudication to properly exercise their policy functions, the critics tended to see the regulatory agencies as inherently biased institutions in which a fair trial was unlikely. Indeed, the critics tended to perceive that agencies bent the facts to reach predetermined results.

When the Attorney General's Committee addressed the difficulties engendered by the combination of prosecutorial and adjudicating functions in a single agency, it devised a solution which, in its general form, was subsequently incorporated into the APA. That solution, in significant part, involved a two-part focus, first, towards evidentiary factfinding for which hearing examiners were primarily responsible; and second, towards policymaking, which belonged exclusively to the agency. Accordingly, the Committee proposed controls designed to protect the fairness and accuracy of evidentiary factfinding. The Committee recommended that hearing examiners presiding at the reception of evidence generally be insulated from all duties inconsistent with the judging function. The Committee further recommended

⁸⁹86 Cong. Rec. 13942-43 (1940).

⁹⁰See discussion in Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 969-70 (1991).

that these examiners issue proposed reports embodying their resolution of the factual issues, and they recommended several steps designed to ensure that these examiners exercised their independent judgment in resolving the factual issues, free from agency pressure or intimidation. Under the Committee's proposals, the agency would exercise its policy role in reviewing the decisions of the hearing examiners.

Even though the agency might reverse a hearing examiner's decision for policy reasons, the parties and the public would have had the benefit of a visibly independent determination of the evidentiary facts. It would then be clear to all that the evidentiary facts were found fairly and accurately. The application of policy at the agency level would then be seen for what it was: a policy determination rather than a skewing of evidentiary factfinding for policy reasons.

In 1939-40, the Attorney General's Committee to Study Administrative Procedure examined the operations of more than 20 federal agencies. The Committee staff prepared a monograph on each agency, and on the basis of the staff monographs, the Committee issued its Final Report in January 1941.⁹¹

The Committee addressed the problems posed by combining prosecutorial and investigative functions with adjudicative or deciding functions in the same institution. As noted, in the initial decision of an adjudication, the Committee's proposed solutions involved using a class of hearing examiners who would be "insulated from all phases of a case other than hearing and deciding."⁹² Moreover, the Committee sought to provide these examiners with the kind of status and protections against agency coercion or influence that would encourage them to exercise independent judgment in their determinations of evidentiary facts.

To achieve the desired degree of examiner independence, the Committee used two devices: first, recommending that they be well compensated, and second, recommending that they hold office for a term of 7 years and that they could be removed only for cause. In addition to promoting independence of judgment, the Committee believed that these job characteristics would help attract persons of independent judgment to seek employment as examiners.

Because subsequent disputes over agency interference with ALJ independence have raised issues about the degree to which ALJs are properly independent of the agencies for which they work, it needs to be emphasized that, in the view of the AG Committee, the use of independent hearing examiners would not divest the agencies of their control over policy, since the

⁹¹Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, Final Report, S. Doc. No. 8, 77th cong., 1st Sess. (1941) (hereafter referred to as "Final Report").

⁹²Final Report 56.

agencies retained the power to reverse hearing examiner decisions upon review. The use of independent hearing examiners, however, would guarantee the fairness of the evidentiary-factfinding process.

B. Administrative Law Judges Under the APA⁹³

At the time Congress enacted the Administrative Procedure Act, regulatory agencies generally formulated policy in adjudications, as they had been doing during the preceding decades. A major concern of the APA, accordingly, was to ensure that such policy formulation did not jeopardize fair and accurate evidentiary factfinding. Following the broad outlines of the Attorney General's Committee's recommendations, the APA imposed strict separations-of-functions provisions in adjudications; it required that decisions in evidentiary hearings be made on the record and it limited the scope for official notice. Finally, in the APA, the Congress redesigned the office of hearing examiner to ensure that these presiding officers—who were then termed "examiners" and who today are "administrative law judges"—would perform their evidentiary factfinding function free from agency coercion or influence.

Under the APA, unless the agency or an agency member presides at the reception of evidence, the presiding officer must be an ALJ provided with tenure in office and protection against agency retribution.⁹⁴ Moreover, in addition, the APA specifically disallows ALJs presiding in adjudications from being subject to the direction or control of officials in charge of investigation or prosecution in that case.⁹⁵ The ALJ decision is also subject to *de novo* review by the agency.⁹⁶ This procedural format ensures that the evidentiary facts will be found in the first instance by an official not subject to the agency's control. At the same time, the format ensures that the agency retains full power over policy, a power it can exercise when it performs its reviewing function. Thus, policy responsibility remains exclusively with the agency while the public has assurance the facts are found in the first instance by an official not subject to agency coercion.

⁹³The APA employed the term "examiners" when it established the office known today as administrative law judge. In 1972 the Civil Service Commission, by regulation, adopted the title of administrative law judge. 37 Fed.Reg. 16,787 (1972). In 1978, Congress established the new title by statute, Pub. L. No. 95-251 §2(a)(10), 92 Stat. 183 (1978). For convenience, the term administrative law judge is used throughout, except where use of the earlier term helps the exposition.

⁹⁴5 U.S.C. §556(a) (1988).

⁹⁵5 U.S.C. §554(d) (1988).

⁹⁶5 U.S.C. §557(b) (1988).

Section 11 of the APA provided that as many examiners as necessary should be appointed by and for each agency. At the time of the APA's enactment, there were 196 hearing examiners distributed among the federal agencies as follows: Department of Agriculture 3; Civil Aeronautics Board 30; Civil Service Commission 1; Federal Maritime Board 5; Federal Communications Commission 11; Federal Power Commission 8; Federal Trade Commission 20; Food and Drug Administration 3; Social Security Administration 13; Department of Labor 2; Bureau of Indian Affairs 10; National Labor Relations Board 33; Interstate Commerce Commission 47; Securities and Exchange Commission 6; Alcohol and Tobacco Tax Division 4.⁹⁷ Hearing examiners, accordingly, were assigned primarily to the economic regulatory agencies, because it was in those agencies that most of the APA adjudication occurred. A more complete explanation is that those agencies had been the subject of widespread expressions of concern about commingling prosecutorial and adjudicating functions; and it was those agencies, therefore, that had the greatest need to show that the office of independent hearing examiners was not skewing evidentiary factfinding for policy reasons.

C. Immediate Post-APA Developments Affecting Hearing Examiners⁹⁸

In the immediate aftermath of the enactment of the APA, the Supreme Court gave a wide scope to the APA adjudication provisions. In 1950 the first case reached the Supreme Court under the APA. In that case, *Wong Yang Sung v. McGrath*,⁹⁹ the Court gave an expansive reading to the provisions governing formal adjudication. Under the Court's ruling the provisions of §554 would be triggered when an adjudicatory hearing is required not only by statute directly, but by the Constitution. As a result, the Court ruled the formal adjudication provisions of the APA applied to deportation proceedings where the due process clause of the Constitution required a hearing but the statute did not explicitly do so. Thus §554, which governs formal adjudications, was brought into play. Not only does §554 itself impose strict

⁹⁷These data are from the President's Conference on Administrative Procedure, Appointment and Status of Federal Hearing Officers, Draft Report of the Committee on Hearing Officers, Appendix D (1954). The 1947 Annual Report of the Civil Service Commission reported conditional appointments to 197 hearing examiner positions on June 11, 1947 rather than the 196 figure used above. U.S. Civil Service Comm'n, 64th Ann. Rep., 30 (1947).

⁹⁸The initial appointment "fiasco" is treated, *infra*, Chapter II(H).

⁹⁹339 U.S. 33 (1950).

separation-of-functions requirements on presiding officers, it also mandates the application of §556, which requires adjudication by independent ALJs.

All these requirements were incompatible with the procedure the Immigration and Naturalization Service (INS) employed in deportation hearings. Under the Court's ruling in *Wong Yang Sung*, the INS had to restructure its practices to comply with the APA.

Following up its ruling in *Wong Yang Sung*, the Court made similar rulings in *Riss & Co. v. US*, 341 U.S. 907 (1951), applying the APA to require that independent hearing examiners preside in motor carrier expansion certificate hearings under the Interstate Commerce Act, and in *Cates v. Haderlein*, 342 U.S. 804 (1952), extending the APA to Post Office fraud proceedings. Congress reacted to the *Wong Yang Sung* decision by enacting legislation explicitly making the APA inapplicable to deportation and exclusion proceedings.¹⁰⁰ In 1955, in *Marcello v. Bonds*,¹⁰¹ the Court upheld against constitutional attack the validity of legislation providing non-APA procedure for deportation and exclusion proceedings.

1. Congressional Experimentation with Separation of Functions: The Taft-Hartley Act and the Communications Act

In 1947, the year following the enactment of the AFA, Congress passed the Taft-Hartley Act,¹⁰² which amended the National Labor Relations Act, and which, among other things, imposed a strict separations-of-functions structure upon the administration of the Labor Act.

Under the Taft-Hartley Act, the General Counsel of the National Labor Relations Board was made independent from the Board through provision for appointment by the President with the consent of the Senate and for a term of years. Because the General Counsel supervises the issuance of complaints, the Taft-Hartley Act eliminated any appearances of unfairness arising from the

¹⁰⁰Congress reacted to *Wong Yang Sung* by excluding deportation and exclusion proceedings from §§554, 556 and 557 of the APA in a Supplemental Appropriations Act of 1951. Subsequently, in §242(b) of the Immigration and Nationality Act of 1952, Congress provided substitute procedures for exclusion and deportation. Under the 1952 Act, special inquiry officers were substituted for hearing examiners qualified under the APA. 66 Stat. 209, 8 U.S.C. §1252(b). Anticipating the procedural provisions of the 1952 Act was H.R. 6652, 80th Cong., 2d Sess. (1948), which was proposed when some lower courts had reached the same result as *Wong Yang Sung*. See H.R. Rep. No. 2140, 80th Cong., 2d Sess. (1948). Although the separation-of-functions provisions of the APA are omitted, many other provisions of the APA have analogues in the 1952 Act. See *Marcello v. Bonds*, 349 U.S. 302 (1955).

¹⁰¹349 U.S. 302 (1955).

¹⁰²Ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§141-87 (1988)).

earlier structure, which had combined in the Board the functions of overseeing prosecution and adjudicating.

In amendments to the Communication Act enacted in 1952,¹⁰³ the Congress forbade hearing examiners presiding in Communications Act proceedings to consult with others about any matter whatsoever. As a result, hearing examiners were more insulated from staff assistance on policy questions or background information than §554 of the APA required.

The result of this isolation was that the examiners had to operate in ignorance of new policy developments within the agency. Accordingly, their decisions could not reflect those developments and, to the extent that those developments were relevant to the Commission's decision, the examiners' decisions could not focus argument before the Commission on these issues. This insulation of hearing examiners may have exacerbated examiners' ignorance of relevant policies, since the Commission's substantive standards during this period were generally acknowledged to be unclear and in flux.¹⁰⁴ By 1962, the experiment was deemed a failure and Congress repealed the 1952 legislation, restoring Communications Act adjudication to governance by the APA.¹⁰⁵

2. The Recommendations of the Second Hoover Commission, Task Force on Legal Services and Procedures (1955)

In 1955 the Task Force on Legal Services and Procedures of the Second Hoover Commission reconsidered some of the ground traversed by the Attorney General's Committee and the APA. The Task Force recognized the difference between evidentiary factfinding and policymaking and sought to employ this distinction to improve agencies' operational efficiency.

In the Task Force's view, hearing examiners should normally be expected to bear the responsibility for finding evidentiary facts. Indeed, the Task Force found wanting the provision of §557(b) that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision, except as it may limit the issues on notice or by rule." Rather than entrust the agency with full responsibility over the decision, the Task Force believed that the division between the initial decision and agency

¹⁰³66 Stat. 712, 721 (1952)

¹⁰⁴The isolation of hearing examiners under the 1952 Communications Act amendments created a problem similar to that existing prior to 1938. In the pre-1938 period, Commission examiners' unfamiliarity with Commission policies caused examiners' reports to be misleading and an unsound basis for oral argument to the Commission. In 1938, the Commission responded to that problem by abolishing its staff of examiners and using an institutionally-prepared proposed decision as the focus of argument before the Commission. See Chapter II(A) *supra*.

¹⁰⁵75 Stat. 420 (1961).

review should correspond to the division between the decision of evidentiary facts and policy. Thus, the Task Force recommended that the agency should restrict review of hearing examiners' decisions to policy matters and to cases in which the examiners' decisions were not supported by substantial evidence.¹⁰⁶

The Attorney General's Committee had originally taken the view that the agency generally ought to accept the decision of the hearing examiner except for policy questions or egregious mistakes of fact.¹⁰⁷ In enacting the APA, the Congress clouded the relationship of the agency to the hearing examiners with the above-quoted provision of §557(b). The Task Force reverted to the approach of the Attorney General's Committee. The Attorney General's Committee had made use of a two-tier decisional process primarily to deflect criticisms that evidentiary factfinding appeared to be skewed for policy reasons. That model was designed so that evidentiary facts could be determined by an independent adjudicator, while leaving the review stage for the agency's application of policy. The Committee almost certainly was motivated by efficiency considerations when it recommended the agency should normally accept the factual decisions of hearing examiners, although its recommendations were couched in the language of the relative decisional advantages hearing examiners possess when they decide factual issues upon evaluating witness credibility. Under the Task Force recommendations, that two-tier adjudicatory process—as it was embodied in the APA—would be modified in a manner consistent with the Attorney General's Committee's objective of providing a visibly unbiased decisionmaker to determine evidentiary facts.¹⁰⁸ Implicit in the Task Force recommendation was the view

¹⁰⁶Commission on Organization of the Executive Branch of the government, Task Force Report on Legal Services and Procedure, 203-06 (1955) (Recommendation No. 49 and supporting argumentation).

¹⁰⁷The Committee concluded:

"In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown. And in the event that the agency does find facts contrary to those found by the hearing commissioner, the agency's opinion should articulate with care and particularity the reasons for its departures, not only to disclose the rationale to the courts in case of subsequent review but to assure that the agency will not carelessly disregard the decision of the hearing commissioner." Final Report 51.

¹⁰⁸As a practical matter, the Task Force's recommendations appear to be most applicable in an agency whose caseload is not so large as to make it infeasible for the agency head to control policy by sitting as the final administrative review tribunal.

A problematic aspect of the Task Force recommendations concerns the enforcement of the limitations on review. If the substantial evidence standard—which the Task Force recommended

that by ensuring that effect is normally given to the ALJ decision, decisional resources will be efficiently employed.

D. Congressional Attitudes Towards the Use of ALJs During the 1970s

During the period from the late 1950s through most of the 1970s, Congress vacillated over the desirability of requiring ALJs to adjudicate benefit claims. The Social Security disability program was established in 1956. Although the heavy adjudicatory caseload to which the program gave rise was predicted in the legislative history of the Act, the Act was administered with ALJs, probably because ALJs had been used by the Social Security Administration to resolve the relatively small numbers of disputes that arose under the old age and survivors program the SSA had been administering since before the APA.¹⁰⁹

as governing agency review of hearing examiners—is to be an operational constraint, then alleged agency failures to conform to the substantial evidence standard would become additional grounds for judicial review of agency decisions. Adding these grounds to the concerns of courts conducting judicial review would apparently foster controversy, thereby undermining the efficiency objective underlying the Task Force recommendations.

¹⁰⁹The right of a claimant to a hearing in conjunction with a denial of his claim under the old age and survivors insurance program had been established in the 1939 amendments to the Social Security Act. At that time the Act was administered by a three-member Social Security Board, located within the Federal Security Agency. The then-applicable procedures were extensively described in a staff monograph prepared for the Attorney General's Committee. S. Doc. No. 10, Administrative Procedure in Government Agencies, Part 3 Monograph on the Social Security Board, 77th Cong., 1st Sess. (1941). Applications for benefits were initially reviewed in the adjudication section of the Board's Bureau of Old Age and Survivors Insurance. That section had 170 adjudicators (each of whom disposed of from 12 to 15 cases per day) and 60 reviewers who acted as a check on the adjudicators. Denied claims were entitled to reconsideration, by different personnel from those who made the initial negative decision. After a negative decision on reconsideration, a claimant was entitled to a hearing. At the time of the AG Committee's staff monograph, no such hearings had as yet been held. The monograph reported, however, that the Social Security Board had selected 12 referees, one for each of the Board's 12 regions. Decisions of the referees would be appealable to a three-person Appeals Council.

Apart from the old age and survivors insurance system, which was entirely administered by the federal government, the Social Security Board oversaw grants-in-aid to the states in conjunction with programs involving old age assistance, aid to dependent children, aid to the blind, unemployment compensation administration and employment service. State administration of these programs had to meet federal standards. Although differences between a state and the federal government were usually worked out in negotiations, federal funding could be terminated after state noncompliance was formally determined in a hearing before the Social Security Board.

By 1958, the large volume of disability cases on the adjudication calendar caused Congress to enact emergency legislation authorizing the Department of Health, Education and Welfare (HEW) to appoint non-ALJs to help decide these cases.¹¹⁰ The measure authorized non-ALJ adjudication through December 31, 1959. A similar measure enacted the following year authorized non-ALJ adjudication through December 31, 1960.¹¹¹

In 1972, when Congress established the supplemental security income (SSI) program, it considered whether ALJs should be required to preside at adjudications, and concluded negatively. The House Report stated:

Your committee recognized that many qualified persons who would be capable of hearing issues that arise under the program may not meet the specific requirements for appointment as hearings examiners under the Administrative Procedure Act, but might be a good source of examiners to hear issues arising under the program. Therefore, under your committee's bill, the Secretary would establish the requirements to be used in selecting examiners. Although the examiners would not be selected under the conditions set forth in the Administrative Procedure Act, full hearings would otherwise be conducted in accordance with the requirements of such act which include, for example, the right to submit evidence, to cross examine witnesses, to be heard by an impartial examiner, and to a decision based on the hearing record.¹¹²

The Committee's approach was embodied in the law as enacted. Included in the new legislation was a provision which stated that:

To the extent that the Secretary finds it will promote the achievement of the objectives of this title, qualified persons may be appointed to serve as hearing examiners in hearings under subsection (c) without meeting the specific standards prescribed for hearing examiners by or under subchapter II of chapter 5 of title 5, United States Code.¹¹³

As of the date of the monograph, only a handful of such hearings had been held, and all of those hearings apparently were presided over by the Board itself. See *id.* at 29.

¹¹⁰Pub. L. No. 85-766, 72 Stat. 864, 878 (1958).

¹¹¹Pub. L. No. 86-158, 73 Stat. 339, 352 (1959).

¹¹²Social Security Amendments of 1971, Report of the Comm. on Ways & Means, H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 156 (1971).

¹¹³Pub. L. No. 92-603 §1631(d)(2) (previously codified in 42 U.S.C. §1383).

By permitting non-ALJs to preside at SSI (i.e., Title XVI) cases, but not taking any action to modify the preexisting understanding that ALJs were required to preside at Title II (old age, survivors and disability benefits) cases, the quoted provision injected an element into SSA administration with unexpected consequences. Writing in 1975 for the Disability Claims Process Task Force, its Chair observed that about 40% of SSI disability hearings involved denials of both Title XVI (SSI) and Title II (old age, survivors and disability insurance) benefits.¹¹⁴ Since the above legislation permitted non-ALJs only in Title XVI adjudications, adjudications that involved both Titles XVI and II were deemed to require ALJs. The Chair also pointed out that the proportion of adjudications involving Titles XVI and II claims was larger than expected. As a result, the number of cases that could be handled by non-ALJs was smaller than anticipated. The Chair concluded, however, that potential inefficiencies resulting from the inability to assign cases involving both Titles XVI and II to non-ALJs were minimal, so long as there was a significant backlog for all types of cases.¹¹⁵

The problem of not allowing non-ALJs to preside at adjudications involving both Titles XVI and II may have been exacerbated by the Civil Service Commission's position that it lacked the legal authority to appoint ALJs to hear Title XVI cases. In a report to the Conference, Professor Victor Rosenblum detailed the conflict over this issue between then HEW Secretary Casper Weinberger and then CSC Chair Robert Hampton, in fall 1973.¹¹⁶ Expressing his desire to establish an administrative structure that could handle a large volume of expected adjudications, Weinberger appeared anxious to expand existing decisional mechanisms (ALJs) rather than experiment with the new office of non-ALJ decisionmakers. He was concerned the new office might not attract quality personnel and might be seen by the beneficiary class as second-class decisionmakers.

Rosenblum suggested that CSC Chair Hampton initially indicated a willingness to respond affirmatively to Weinberger's request for more ALJs, but that Hampton's initial position was changed by the full Commission, after protests from the Chairman of the Conference of Administrative Law Judges, the President of the Federal Administrative Judges Conference and the

¹¹⁴G.L. Boyd, Report of the Disability Claims Task Force, printed in Subcommittee on Social Security, H.R. Comm. on Ways and Means, Recent Studies Relevant to the Disability Hearings and Appeals Crisis 1, 142 (1975).

¹¹⁵*Id.*

¹¹⁶V.G. Rosenblum, The Administrative Law Judge in the Administrative Process: Interrelations of Case Law with Statutory and Pragmatic Factors in Determining ALJ Roles, printed in Subcommittee on Social Security, H.R. Comm. on Ways and Means, Recent Studies Relevant to the Disability Hearings and Appeals Crisis 171, 225-227 (1975).

Chairman of the Committee of Administrative Law Judges of the Federal Bar Association.¹¹⁷ The CSC then took the view that SSI hearings were not governed by the APA, and that as a result, the CSC had no authority to appoint ALJs to hear SSI adjudications.

By 1975 the Senate Finance Committee was complaining that the CSC's interpretation had exacerbated the SSA's hearing caseload problem and had effectively made the 1972 legislation counterproductive. In recommending changes in the legislation the Committee reasoned as follows:

The first provision of the bill would amend Section 1631(c) of the Social Security Act to provide the same rights to hearing and administrative and judicial review with respect to claims under title XVI (Supplemental Security Income) of the Act as apply to title II (social security) and title XVII (medicare) claims under section 205(b) and 205(g) of the Act. This is necessary to override an interpretation of the Civil Service Commission that the Administrative Procedure Act was not applicable to SSI hearings and which required the appointment of non-APA hearing officers who could not hear social security and medicare cases. This action greatly exacerbated the current hearing crisis and the validity of SSI hearings has been challenged in the courts as second class justice. The committee bill will put this matter to rest by clearly providing on-the-record administrative hearings and judicial review of a parallel nature for social security, SSI, and medicare claimants.¹¹⁸

The accompanying legislation explicitly authorized the non-ALJ hearing officers appointed under the 1972 legislation to preside at all SSA adjudications (Titles II, XVI and XVIII), but provided that the appointments of such hearing officers would terminate no later than December 31, 1978.¹¹⁹

¹¹⁷Rosenblum, *supra*, at 226-227.

¹¹⁸S. Rep. No. 94-550, 94th Cong., 1st Sess. 3-4 (1975)

¹¹⁹Pub. L. No. 94-202 (1976) provided, *inter alia*, that §1631(d)(2) should be struck and that §1631(d)(3) should be renumbered as §1631(d)(2). It then included the following provision:

Two years later, Congress repealed the mandatory December 31, 1978 termination date and by statute converted the hearing officers appointed under §1631(d)(2) into permanent APA-qualified ALJs.¹²⁰

During the same period in which Congress was vacillating about the desirability of requiring ALJs to preside at SSI adjudications, Congress was also legislating with respect to ALJ adjudicators under other programs. In 1972 Congress enacted the Black Lung Benefits Act and amended the Longshore and Harbor Workers Compensation Act (LHWCA). The Black Lung Act amended the provisions of the Coal Mine Health and Safety Act of 1969. The 1972 Act revised the program--initially established under the 1969 statute--for awarding compensation to miners for pneumoconiosis. The revised provisions divided the compensation mechanics into three types, depending upon the period (12/30/69-6/30/73, 7/1/73-12/31/73, and post-12/31/73) in which the claim was filed. First period claims were payable from federal government funds and administered by HEW under the SSA disability procedures. Second period claims were administered by the Labor Department but paid from federal government funds. Third period claims were to be administered under state workers compensation laws, or if they did not provide adequate coverage, then by the Labor Department. Beginning with the third period, the responsibility for payment was to be borne by the employers. Second and third period claims were to be administered by the Secretary of Labor, but in describing the procedures to be followed, the Black Lung Act incorporated the procedures of the LHWCA "as amended."

Until its 1972 amendment, the LHWCA had provided for the adjudication of claims by a deputy commissioner, an agency employee possessing none of the protections of ALJs. In 1972 Congress amended the LHWCA to provide, *inter alia*, that adjudications would be decided by ALJs.¹²¹ In recommending

The persons appointed under section 1631(D)(2) of the Social Security Act (as in effect prior to the enactment of this Act) to serve as hearing examiners in hearings under section 1631(c) of such Act may conduct hearings under titles II, XVI, and XVIII of the Social Security Act if the Secretary of Health, Education, and Welfare finds it will promote the achievement of the objectives of such titles, notwithstanding the fact that their appointments were made without meeting the requirements for hearing examiners appointed under section 3105 of title 5, United States Code; but their appointments shall terminate not later than at the close of the period ending December 31, 1978, and during that period they shall be deemed to be hearing examiners appointed under such section 3105 and subject as such to subchapter II of chapter 5 of title 5, United States Code, to the second sentence of such section 3105, and to all of the other provisions of such title 5 which apply to hearing examiners appointed under such section 3105.

¹²⁰Pub. L. No. 92-216, 91 Stat. 1559 (1977).

¹²¹Pub. L. No. 92-576 §14, 86 Stat. 1251 (1972), codified as amended in 33 U.S.C. §919(d) (1988):

the amendment of the procedural provisions of the LHWCA, the House Committee stated its belief that the administration of the Act "has suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings."¹²² The Committee also indicated that because other provisions of the amending legislation imposed new responsibilities on the Labor Secretary, the Secretary would need to use the deputy commissioners as "full time administrators" who would be released from their hearing duties.¹²³

While the amendment of the LHWCA imposed ALJ-type adjudications on LHWCA claims, the status of black lung adjudication was unclear. The Black Lung Act incorporated by reference the procedures required under the LHWCA "as amended," but the Black Lung Act was enacted in May 1972 while the 1972 LHWCA amendments were not enacted until the following October. Congress was considering both the LHWCA amendments and the Black Lung Act at the same time, so the reference of the Black Lung Act to the procedural provisions of the LHWCA may have been intended to refer to the amendments then in process. Nonetheless, because the LHWCA in force when the Black Lung Act was enacted did not require using ALJs, the Black Lung Act (which incorporated LHWCA procedures) could be construed as not requiring use of ALJ adjudicators. The CSC took the view that the Black Lung Act incorporated the earlier version of LHWCA procedures and, accordingly, refused to appoint ALJs to hear black lung cases.¹²⁴

The Secretary of Labor reacted to the CSC's refusal to appoint ALJs to adjudicate black lung cases by issuing a regulation¹²⁵ authorizing non-ALJs to adjudicate cases under section 415 and Part C of the Black Lung Act (i.e., the second and third period claims administered by the Labor Department).

"Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. . . ."

¹²²H.R. Rep. No. 92-1441, 92 Cong., 2d Sess (1972), reprinted in 3 U.S.C.C.A.N. 4698, 4708 (1972).

¹²³*Id.*

¹²⁴See discussion in Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Eastern Coal Corp., 561 F.2d 632 (6th Cir. 1977); Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Alabama By-Products Corp., 560 F.2d 710 (5th Cir. 1977).

¹²⁵20 CFR §715.101(a)(27)(1976).

Congress, in turn, responded to the CSC by enacting a series of temporary authorizations for adjudications by non-ALJs.¹²⁶ Finally, Congress enacted a joint resolution authorizing non-ALJs to adjudicate black lung claims (under parts B and C of the Black Lung Act).¹²⁷ Uncertainty over black lung adjudication finally was resolved by enactment of the Black Lung Benefits Act of 1977.¹²⁸ The 1977 legislation, by modifying the reference to the LHWCA to read "as amended from time to time,"¹²⁹ made it clear that all changes to the LHWCA procedures regardless of their dates of their enactment were to be incorporated into Black Lung Act adjudications.

Congress' action in revising the LHWCA to require ALJ adjudicators was intended not only to impose those procedures upon LHWCA proceedings and black lung adjudications, but to other programs as well. The Defense Base Act,¹³⁰ the Outer Continental Shelf Lands Act¹³¹ and the Nonappropriated Fund Instrumentalities Act¹³² all incorporate LHWCA provisions (including its procedural provisions). The debates over the 1972 amendments to the LHWCA show Congress' awareness that it was designing a statute that establishes procedure broadly for claims falling under statutes that incorporate the LHWCA procedures by reference. It would probably be wrong to describe the LHWCA procedures as those that Congress determined should govern all administrative proceedings, however, because the LHWCA and the statutes incorporating its procedures all appear to be workers compensation-type statutes.

¹²⁶Pub. L. No. 93-192, 93d Cong., 1st Sess., 87 Stat. 746, 758 (1973); Pub. L. No. No. 93-517, 93d Cong., 2d sess., 88 Stat. 1636 (1974); Pub. L. No. No. 94-206, 94th Cong., 1st Sess., 90 Stat. 7 (1975); Pub. L. No. 94-439, 90 Stat. 1420 (1976).

¹²⁷Pub. L. No. 94-405, 90 Stat. 2428 (1976) [codified in 30 U.S.C. §932a (1988)] provided that:

"Qualified individuals appointed by the Secretary of Labor may hear and determine claims for benefits under part C of title IV of the Federal Coal Mine Health and Safety Act of 1969 [30 U.S.C. 931 et seq.] and under section 415 of such Act [30 U.S.C. 925]. For purposes of this section, the term 'qualified individual' means such an individual, regardless of whether that individual is a hearing examiner appointed under section 3105 of title 5. Nothing in this section shall be deemed to imply that there is or is not in effect any authority for such individuals to hear and determine such claims under any provision of law other than this section."

¹²⁸Pub. L. No. 95-239, 92 Stat. 95 (1978).

¹²⁹Pub. L. No. 95-239 §7(g)(i), 92 Stat. 100 (1978), codified in 30 U.S.C. §932 (1988).

¹³⁰The Defense Base Act, 42 U.S.C. §§1651-1654 (1988), incorporates the LHWCA in §1651(a).

¹³¹The Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1356 (1988), incorporates the LHWCA in §1333(b).

¹³²The Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§8171-8173 (1988), incorporates the LHWCA in §8171(a).

E. Evolution of Benefit Adjudication Over Time

The prevailing pre-World War II view was that benefit decisionmaking was significantly different from regulatory decisionmaking. Thus, the Attorney General's Committee described benefit determinations in the Veterans Administration as institutional decisions in which a "hearing" was only a component of a larger decisional process.¹³³ This description probably fit a process in which an initial evaluation of documents generally disposed of most cases. When a hearing was held, the hearing officers (a "rating board" in the case of the Veterans Administration) were able to use earlier bureaucratic investigation of the case. The sense that the actual hearing constituted only part of a larger process that embodied the prehearing investigation was probably reinforced in the minds of the AG Committee¹³⁴ by the fact that benefit decisionmaking traditionally has been carried out in a largely nonadversarial format. The format was one in which the claimant was not represented by counsel and in which the hearing officer was responsible for bringing out all sides of the case and for drawing on information from the prehearing record.

Traditionally, the claimant in most benefit adjudications is not represented by an attorney. In adjudications before the Veterans Administration, statutory fee limitations have effectively precluded attorneys from representing all but the smallest fraction of claimants,¹³⁵ although most claimants are represented by various veterans' organizations.¹³⁶ In SSA adjudications involving disability claims, the claimants are often financially unable to pay an attorney and, unless the claim includes significant past due payments, even a favorable decision will not provide the funds with which to pay legal fees. The proportion of SSA claimants represented by attorneys, however, is growing. Although as late as 1980 Davis reported that 70% of social security claimants were unrepresented by counsel,¹³⁷ by fiscal 1986 65% of claimants were represented by counsel and another 18% were represented by nonattorneys.¹³⁸

¹³³Final Report 55. See also *Administrative Procedure in Government Agencies*, Monograph (Part 2: Veterans Administration), S.Doc. No. 186, 76th Cong., 3d Sess 22 (1940).

¹³⁴In its Final Report, the AG Committee described benefit adjudications as involving "claimants who often represent themselves and who should be encouraged to tell their own stories as simply and naturally as possible. There, the atmosphere of sympathetic conversation is best conducive to proper administration." Final Report 69.

¹³⁵See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

¹³⁶During fiscal year 1990, 87.6% of appellants before the Board of Veterans Appeals were represented by veterans service organizations, 1.6% were represented by attorneys, and 10.8% were unrepresented. Secretary of Veterans Affairs, Annual Report 47 (FY 1990).

¹³⁷K.C. Davis, 3 *ADMINISTRATIVE LAW TREATISE* §17.13 at 321 (2d ed. 1980). The SSA Office of Hearings and Appeals reported that for fiscal 1980 48% of claimants were represented

When claimants are not represented by counsel in benefit proceedings in the SSA and the Veterans Administration, the proceeding fits the model of a pure inquisitorial proceeding, since the government is also unrepresented. In these circumstances, the proceeding loses the adversary flavor present in a regulatory adjudication. Here, the ALJ is responsible for bringing out all sides of the case, and then making a decision. In 1941 the Attorney General's Committee described the atmosphere of such a hearing as one "of sympathetic conversation."¹³⁹ In 1971, the U.S. Supreme Court reviewed this "inquisitorial" format and found it to be consistent with the requirements of both due process and the APA.¹⁴⁰

Several factors not connected directly with federal adjudication probably have indirectly affected the way the public, the legal profession generally, and federal officials (including ALJs) approach benefit adjudication. The Supreme Court's 1970 decision in *Goldberg v. Kelly*¹⁴¹ may have had symbolic importance extending beyond the particular issues involved in that case. *Goldberg* ratified the broad movement in welfare administration away from one in which social workers exercised significant discretion in administration to a model in which the entitlement of claimants to benefits was determined under sets of relatively precise criteria and administered by clerks.¹⁴² *Goldberg* also set the stage for a rethinking of government benefits as constitutionally protected "property" interests.

As federal benefit programs have moved towards an entitlement format they have tended to move, as well, towards greater formality: the less that discretion enters into benefit decisions, the more are those decisions amenable to judicialization and the more likely are benefit decisions to resemble trial proceedings. The Supreme Court imposed a procedure resembling a trial format on state welfare administration in *Goldberg*. A broad movement towards formality in state welfare administration is likely to influence federal administration in the direction of greater formality as well. Thus, for example, the growing practice of claimants' seeking representation by counsel in disability proceedings reflects a new and apparently increasing awareness by claimants of a need to press their cases and an increasing unwillingness to trust a paternalistic "inquisitorial" procedure. This use of counsel almost

by counsel and 15% were represented by nonattorneys. HHS, Operational Report of the Office of Hearings and Appeals 25 (Sept. 30, 1986).

¹³⁸HHS, Operational Report of the Office of Hearings and Appeals 25 (Sept. 30, 1986).

¹³⁹Final Report 69.

¹⁴⁰*Richardson v. Perales*, 402 U.S. 389, 408-10 (1971).

¹⁴¹397 U.S. 254 (1970).

¹⁴²See Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 YALE L. J. 1198 (1983).

necessarily forces a higher degree of formality upon the proceedings. The more that adjudications involve claimants' use of counsel and the more that counsel exerts influence over the direction of the hearing, the more likely it is that the aggregate adjudicatory burden borne by an agency such as SSA increases, since the presence of counsel and the consequent increased procedural formality will tend to increase the time expended for adjudication of each case.

1. Longshore and Harbor Workers Compensation Act and Related Legislation

Congress enacted the Longshore and Harbor Workers Compensation Act in 1927 to provide workers-compensation type protection to dock workers. That Act has subsequently been extended to cover other groups of workers, and has been as incorporated into other legislation extending workers compensation coverage. District of Columbia employees are protected under the LHWCA and, as noted above, the procedures of the LHWCA have been incorporated into the Defense Base Act, the Outer Continental Shelf Lands Act, the Nonappropriated Fund Instrumentalities Act, and the Black Lung Act.¹⁴³

Until 1972 adjudications under the LHWCA were conducted by a deputy commissioner with review in a federal district court. Under the 1972 amendments, the deputy commissioners retain their prior authority of investigating claims, but adjudication is separated and placed before an APA-qualified ALJ.¹⁴⁴ The ALJ's decision is subject to review by a Benefits Review Board¹⁴⁵ under a substantial evidence standard.¹⁴⁶ Further review lies in a U.S. Court of Appeals.¹⁴⁷ As explained above, the effect of the LHWCA amendments on black lung adjudication was unclear for a 5-year period in the 1970s. This was resolved by legislation in 1977 that specifically incorporated all amendments to LHWCA procedures into the Black Lung Act. Black lung benefit decisions are now made in the same way as other federal workers' compensation decisions. Although the administration of black lung benefits has been moved towards a judicial model by separating adjudication from the

¹⁴³See Chapter II(D) *supra*.

¹⁴⁴33 U.S.C. §919(d) (1988).

¹⁴⁵33 U.S.C. §921(b) (1988).

¹⁴⁶33 U.S.C. §921(b)(3) (1988). Subjecting the ALJ's decision to that of a reviewing administrative appellate tribunal resembles the recommendation of the Hoover Commission Task Force. The LHWCA provision differs from the Task Force recommendation, however, because the Task Force was concerned with review of an ALJ decision by the agency head rather than review by a reviewing tribunal, which was not itself the agency head.

¹⁴⁷33 U.S.C. §921(c) (1988).

investigative work done by the deputy commissioners, the Secretary's responsibility for overall administration of the benefit program appears to be recognized in his absolute power to remove members of the Benefits Review Board.¹⁴⁸

2. Veterans Benefits Distinguished

Veterans benefit adjudication has evolved over the years from a system of relative informality towards greater formality. The Attorney General's Committee monograph on the Veterans Administration described a system of benefit administration under which most claims were decided on the basis of documentary evidence and physical examination without a hearing. The hearings that were held in a small proportion of cases (10%) were considered an adjunct to the file of relevant information, most of which was collected prior to the hearing. When a hearing was held, it was held before one of the "rating boards" that existed in each of 52 regional offices in addition to the Central Disability Board located in Washington, D.C.¹⁴⁹ Rating boards were composed of three specialists: a claims specialist, an occupational specialist and a medical specialist. Appeal from the rating board was to the Board of Veterans Appeals, a 26-member group that sits in 3-member panels.

Recent descriptions of decisionmaking within the Veterans Administration appear remarkably similar to the description contained in the Attorney General's 1940 monograph.¹⁵⁰ A 1985 Supreme Court decision describes a decisionmaking process that involves three-person rating boards (composed of medical, legal and occupational specialists), and requests by the board for claimant's medical records and a medical examination by a VA hospital. Currently, hearings at the regional level appear to be held before a two- or three-member board. An appeal at the regional office level is conducted by a single hearing officer. (A single hearing officer also presides over initial hearings held in conjunction with a proposed reduction in benefits.) Appeal then lies to the Board of Veterans Appeals.

Limitations on attorney fees have always impeded the representation of veterans by attorneys in benefit adjudications but veterans have long been represented by veterans' service organizations. The staff monograph of the Attorney General's Committee reported that in the 10% of cases in which a hearing was held, 70% of the claimants were represented, generally by a

¹⁴⁸*Kalaris v. Donovan*, 607 F.2d 376 (D.C. Cir. 1983), *cert. denied*, 462 U.S. 1119 (1983).

¹⁴⁹*Administrative Procedure in Government Agencies, Monograph (Part 2: Veterans Administration)*, S. Doc. No. 186, 76th Cong., 3d Sess 4 (1940).

¹⁵⁰See, e.g., *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309-311 (1985).

veterans' service organization. Claimants were represented in approximately one-third of the cases appealed. In more recent years the percentage of claimants represented in appeals has risen from the one-third reported in the Attorney General's Committee monograph to 89.2% in fiscal 1990 (87.6% by Veterans service organizations and 1.6% by lawyers).¹⁵¹

There are structural reasons for believing that the claims adjudication process is becoming more formal. The Board of Veterans Appeals, originally created by Executive Order in 1933, was established by statute in 1958. Although this was a step in the direction of formality, the decisions of the Board were expressly exempted from judicial review until 1988.¹⁵² In 1988, Congress established the Court of Veterans Appeals as an Article I Court,¹⁵³ to review Board decisions.¹⁵⁴ The Court of Veterans Appeals Decisions are subject to review on issues of law by the U.S. Court of Appeals for the Federal Circuit.¹⁵⁵

Subjecting Board of Veterans Appeals decisions to judicial review means that those decisions must have support in the record and be accompanied by an explanation satisfactory to the reviewing court. These requirements, in turn, will have an impact upon the procedure below. Moreover, claimants will now have a forum in which to assert their objections to procedural deficiencies at the administrative level. In combination, these aspects of judicial review should exert significant pressures towards greater formality in the procedures before the rating boards and the Board of Veterans Appeals.

The Committee reports on the recent legislation indicate the Board of Veterans Appeals had followed a practice of giving no deference to the prior decision of the Administrator.¹⁵⁶ Such a practice suggests that even prior to the recent legislation, veterans benefit decisions had not been products of a so-

¹⁵¹Sec'y Veterans Affairs, Ann. Rep't 47 (FY 1990). In *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 312 n.4 (1985), the Court referred to 88% of claimants being represented before the Board, in which 86% of the 88% involved representation by veterans service organization and the other 2% involved representation by attorneys.

¹⁵²38 U.S.C. §211(a) (1982) (repealed).

¹⁵³Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988), codified at 38 U.S.C. §§4051-4092 (1988).

¹⁵⁴38 U.S.C. §4052 (1988).

¹⁵⁵38 U.S.C. §4092 (1988).

¹⁵⁶H.R. Rep. No. 963, 100th Cong., 2d Sess 7 (1988). The Committee refers with approval to this practice of no deference. Under the new statute, however, the Board is bound by "the regulations of the Veterans Administration, instructions of the Administrator, and the precedent opinions of the chief law officer." 38 U.S.C. §4004(c) (Supp. 1988). The legislative history suggests, therefore, that the new Board will not be bound by the Administrator's factual decisions but will be bound by the Administrator's policies. This was probably the case prior to the legislation as well.

called institutional or collective process and that the Board possessed and exercised significant decisional independence.¹⁵⁷

3. Social Security Disability Adjudication Compared

Despite the characterization of benefit decisionmaking as largely institutional, Congress has, from the late 1930s, required that Social Security claimants be afforded an opportunity to be heard when disputes about coverage or amounts arose.¹⁵⁸ Accordingly, when the APA was enacted in 1946, it was understood that hearings under the Social Security Act would be presided over by APA-qualified hearing examiners.¹⁵⁹

The relatively small volume of cases SSA handled prior to the enactment of the disability coverage provisions in 1956 made the matter of APA coverage one of less than critical importance. The enactment of the disability program, however, generated a large increase in adjudications, because the standard for disability has proved extremely hard to define at the edges. Since then, the SSA's volume of adjudications has risen dramatically. Under pressure of this rising caseload, Congress in 1958 and 1959 extended two 1-year authorizations to the SSA to employ non-APA hearing examiners.

In 1972 Congress enacted the supplemental security income program. This new program again vastly expanded the SSA's adjudicatory caseload. Perhaps to accommodate this new caseload burden, Congress initially authorized non-ALJ adjudicators for SSI cases. This authorization failed to reap the benefits Congress anticipated, because ALJs were required to adjudicate Title II (old age, survivors, and disability) claims, and Title XVI claims substantially overlapped Title II claims. Although HEW Secretary Weinberger sought to avoid these difficulties by using ALJs to decide SSI cases, the administrative difficulties were made worse due to CSC's refusal to appoint ALJs to decide SSI cases. Congress ultimately reversed its position and required ALJ decisionmakers for SSI cases, but accorded APA-qualified status to the non-ALJs who were appointed under the provisions of the original legislation.¹⁶⁰

It is possible to draw the inference that when Congress extended temporary authorizations to use non-ALJ adjudicators under Title II in the late 1950s, it was recognizing that without those authorizations, ALJs would have been required. It is just as probable, however, that Congress was merely reacting to a crisis: that ALJs had historically been used to preside at SSA adjudications;

¹⁵⁷See Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. Rev. 965, 1004-05 (1991).

¹⁵⁸See Chapter II(D), *supra*.

¹⁵⁹*Id.*

¹⁶⁰*Id.*

that when the disability program was established, APA-qualified ALJs were used to adjudicate disability claims because the SSA had always used ALJ adjudicators; and that when the SSA faced a hearing backlog, Congress' temporary authorization for non-ALJ adjudication was merely intended to provide relief to the SSA without revising the SSA's decisional format. Under such a view, Congress would not have faced the larger question as to whether Title II proceedings were or were not governed by the APA or whether they required APA-qualified ALJs as presiding officers.

With the huge caseloads that the SSA now handles, problems of productivity, consistency and policy control have become matters of high saliency. The SSA has sought to increase decisional workload of the ALJs with significant success. Average ALJ decisions per month have risen from 14 to approximately 38 in fiscal year 1989.¹⁶¹ This emphasis on productivity has not been without conflict, however. SSA efforts to enhance ALJ productivity have been assailed as invasions of ALJ independence, and the SSA has occasionally had to defend the lawfulness of its productivity enhancement efforts in litigation.

In addition to the productivity problems created by the huge SSA adjudicatory caseloads, the extremely high volume of disputes combined with an administrative structure that hampers SSA's attempts to achieve policy control has produced considerable decisional inconsistency throughout the entire program.

The disability program is administered in the first instance by state agencies whose decisions are ultimately appealable to a federal ALJ. The ALJ's decision is appealable to the SSA's Appeals Council (an internal reviewing tribunal whose members are appointed by the SSA)¹⁶² and reviewable by a federal district court. Many ALJs apparently do not accept SSA directives observed by the state agencies, thereby undermining the SSA's ability to control program administration,¹⁶³ and contributing to the significant overall reversal rate in decisions appealed to the ALJs from the state agencies. In addition to the overall inconsistency between the state agency decisions and the ALJ decisions in the aggregate, the decisions of the ALJs have exhibited significant inconsistencies among themselves.¹⁶⁴ This inconsistency is of long

¹⁶¹SSA Office of Hearings and Appeals, Key Workload Indicators 1 (3d Quarter, FY 1991).

¹⁶²See Koch & Kaplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 1987 ACUS 625, reprinted in 17 FLA. STATE U. L. REV. 199, 231-240 (1990).

¹⁶³See Koch & Kaplow, *supra* note 162 at 280; Gifford, *supra* note 157 at 1009.

¹⁶⁴See J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, M. Cartow, SOCIAL SECURITY HEARINGS AND APPEALS 21-24 (1978); R. Dixon, JR., SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION 76-79 (1973).

standing. It has been documented in studies and it has been the subject of sustained attention from the SSA itself and from Congress.

The SSA has attempted to exert control over its vast caseload by increasing the number and complexity of its regulations and other decisional standards. It has also instituted management controls involving, *inter alia*, the independent review and evaluation of selected ALJ decisions.

In 1980 Congress mandated supervisory review of ALJ decisions as part of a quality control program.¹⁶⁵ Based on this legislation, the SSA implemented a program involving review of ALJ decisions by the SSA's Appeals Council on the Council's own motion. Although Appeals Council review helps reduce the inconsistency of ALJ decisions and helps in a limited way to promote the application of SSA policy, the volume of adjudications is so large the Appeals Council cannot be the SSA's prime instrument for achieving decisional consistency and policy conformity. Moreover, the SSA's efforts to subject ALJs with a high grant rate to automatic own-motion review has been criticized as one-sided.¹⁶⁶ During the last 15 years the Appeals Council has instituted review of ALJ decisions on its own motion. One SSA regulation provided for Appeals Council review under standards permitting reversal when the ALJ's decision was not supported by substantial evidence or when broad policy questions were involved.¹⁶⁷ This regulation resembles the recommendation of the Hoover Commission Task Force, which called for agency review of ALJ decisions when the ALJ decision was not supported by substantial evidence or when broad policy questions were present. The substantial-evidence part of that standard is also substantially identical to the standard governing review of ALJ decisions by the Benefits Review Board contained in the LHWCA.¹⁶⁸

Although the SSA regulation provoked a significant amount of litigation, the Appeals Council has been upheld in granting own-motion review so long as its own decision is supported by substantial evidence (even though the ALJ decision was also supported by substantial evidence).¹⁶⁹

¹⁶⁵Social Security Disability Amendments of 1980, Pub. L. No. 96-265, §304(g) 94 Stat. 441, 445-56 (1980)

¹⁶⁶See, e.g., *Barry v. Heckler*, 620 F.Supp. 779, 782 (D. Calif. 1985)

¹⁶⁷20 CFR §404.970(a).

¹⁶⁸33 U.S.C. §921(b)(3) (1988).

¹⁶⁹See, e.g., *Welch v. Heckler*, 808 F.2d 264, 267 (3d Cir. 1986).

F. Evolution of Nonbenefit Adjudication Over Time

1. Use of Intermediate Review Boards

Since the Attorney General's Committee was established, review boards were recognized as an effective means to deal with appeals from many hearing-examiner decisions.¹⁷⁰ In the early 1960s review boards were established for the Federal Communications Commission¹⁷¹ and the Interstate Commerce Commission.¹⁷² After a study of these two boards,¹⁷³ the Conference subsequently endorsed such boards as a way to reduce the burden created by the need to review voluminous caseloads.¹⁷⁴

Review boards have sometimes been criticized for eroding an APA decisional structure designed to confer decisional independence upon the ALJs. According to this argument, a decision made by an "independent" ALJ is undermined when it is subject to revision, not merely by the agency head as contemplated by the APA, but by a board composed of agency officials who do not possess the independence of ALJs.

An answer to this criticism may be that the APA's design is to ensure that the initial decision is made by an adjudicator possessing statutory safeguards over his or her independence. The reason for this is to assure the parties and the public that the evidentiary facts are being decided fairly and accurately. The APA, however, was not designed to enshrine the ALJ's decision. It was designed to protect the ALJ's decision on the evidentiary facts from being skewed for policy reasons. By providing that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision," the APA contemplates that the ALJ's decision is subject to broad-based review by the agency head. When an ALJ's decision is revised by a review board, that board is acting on behalf of the agency head and is exercising the agency head's power of revision.

¹⁷⁰Final Report 53.

¹⁷¹Pub. L. No. 87-192, §2, 75 Stat. 420 (1961) (codified as amended as 47 U.S.C. §155 (1988)). See 47 CFR §0.161 (1990).

¹⁷²Pub. L. No. 87-247, 75 Stat. 517 (1961) (codified as amended at 49 U.S.C. §10322 (1988)).

¹⁷³Freedman, Report of the Committee on Agency Organization and Procedure in Support of Intermediate Appellate Boards: Subparagraph 1(a) of Recommendation 6, in 1 ACUS 125, 128-37 (1971); Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546, 549-58 (1969).

¹⁷⁴Recommendation 68-6, 1 CFR §305.68-6, 1 ACUS 20-22, 122-24 (1968-70).

2. The Split-Enforcement Model of Regulation

Under the Occupational Safety and Health Act, the Secretary of Labor administers a regulatory program that is administered primarily by rulemaking and enforced by the issuance of citations (imposing monetary sanctions) against violators. Employers charged with violating a safety and health standard are entitled to a hearing before an ALJ with review before the Occupational Safety and Health Review Commission, an independent adjudicatory tribunal. The Federal Mine Safety and Health Act employs a similar procedural format. Under both acts policy is formulated in rulemaking, and adjudication is relieved from the burden of policymaking that was borne by the traditionally structured unitary regulatory agencies. ALJ decisions under both acts are reviewed by a reviewing tribunal, which is an agency separate and independent from the enforcement agency.

G. The Growth of Benefit Adjudication and the Decline of Economic Regulatory Adjudication as a Vehicle for Major Policymaking

1. The Regulatory Model That Gave Rise to the Office of Independent ALJs

The regulatory model that gave rise to the position of independent ALJs was the one in principal use during the 1930s and 1940s and that generated concern about adjudicatory fairness. The widely expressed concerns about the fairness of regulatory agency adjudications described earlier were based on the fact that the regulatory agencies--as institutions--issued their own complaints and then heard the cases upon which the complaints were issued and adjudicated them. Agencies operating in this manner appeared, at least to the uninitiated, to violate the canon that no one should be a judge in his or her own cause. As previously noted, there were important reasons for combining these prosecutorial and judging functions within one institution: if policy was to be formulated in the process of case-by-case adjudication, then the agency head who was responsible for the development of policy had to be the final agency adjudicator. Moreover, the agency head had to have ultimate control over complaint issuance decisions, so that the cases raising the proper policy issues could be brought before the agency head for adjudication and ultimate resolution of the policy issue.

The Attorney General's Committee sought to eliminate or reduce the perception that the agencies were operating unfairly by recommending that within the large agency organization the functions of investigation and

prosecution be separated from the functions of hearing and judging cases. For our purposes, the most important of the Committee responses to the problem of widespread distrust of the fairness of agency adjudications was the Committee's recommendation that hearing examiners be given the status and degree of independence that would encourage them to exercise independent judgment. This approach of the Attorney General's Committee was incorporated in the APA.

It will be observed that the approach of the Attorney General's Committee and the APA towards independent hearing examiners was a response to a particular widely felt concern with the operation of a particular model of regulation: that of the regulatory agency making policy through the adjudication of cases. This model engendered concern over the fairness of the adjudicatory process; the creation of the office of independent hearing examiner was a response to this concern. The creation of that office helped to ensure that evidentiary fact determinations were not being skewed or otherwise distorted to reach a result ordained by policy.

2. The Growth of Benefit Adjudication

When the Attorney General's Committee recommended the creation of the office of independent hearing examiner, it was focusing on the operation of regulatory agencies. Benefit adjudication was not a matter of primary concern to the Committee, and there is ground for the belief that the Committee viewed benefit adjudication very differently from regulatory adjudication.

Benefit adjudication usually involves the disposition of numerous claims—far too many for both the agency head to sit as an adjudicator and for adjudication to play the primary policy formulation role. For that reason, policy questions generally have to be resolved by regulation, directive, ruling or method other than the unaided use of adjudicatory decisions as precedent. Thus, the model of agency operation giving rise to the creation of independent hearing examiners—the model in which the agency head makes policy in adjudications—does not apply to the administration of benefit programs.

Since the enactment of the APA, federal benefit adjudication has grown astronomically. Benefit adjudication under the aegis of the Social Security Administration in 1947 (when the hearing examiner provisions of the APA became effective) involved a relatively small number of cases and 13 examiners.¹⁷⁵ With the enactment of the disability program in 1956, SSA adjudication grew dramatically. In 1972 Congress enacted the supplemental income program, engendering another huge increase in adjudication. Throughout the 1970s and 1980s, the SSA has been struggling with the

¹⁷⁵See Chapter II(B).

difficulties of administering an adjudicatory caseload running to hundreds of thousands of cases per year: in fiscal year 1973 the SSA's hearing office operated with 420 ALJs who disposed of 68,356 cases (with 36,780 pending).¹⁷⁶ By 1989 that office operated with 694 ALJs and disposed of 302,076 cases (with 159,268 pending).¹⁷⁷

SSA's administration is organized as follows: initial claims are evaluated by state agencies. If a claimant is turned down by the state agency (on initial application and on reconsideration), the claimant is entitled to a hearing before a federal ALJ. The ALJ's decision is subject to review by the Appeals Council, a reviewing body composed of 20 members sitting individually or in panels of 2 or 3.¹⁷⁸ Subsequent review lies in the federal district courts.

Not only is the SSA adjudicatory system in fact completely different from the operation of the regulatory agencies upon which the Attorney General's Committee focused its attention; the sheer volume of the claims adjudicated make it readily apparent that the regulatory model could never possibly be applied to dispose of the SSA adjudicatory caseload. Moreover, the SSA could not even begin to control policy by relying solely upon the Appeals Council. The Appeals Council itself handles tens of thousands of cases per year: in fiscal year 1973, the Appeal Council handled 17,773 cases and by fiscal year 1989, the Council was reviewing 54,895 cases.¹⁷⁹ It has probably already extended itself to the limit in exercising basic review; effective policy control over the volume of cases coming before it is probably beyond its abilities. Moreover, attempts to exercise such control are likely to be impeded by the fact that the Council operates in a large number of panels and thus faces internal coordination problems.

¹⁷⁶SSA, Office of Hearings and Appeals, Key Workload Indicators I (3d quarter, FY 1991).

¹⁷⁷*Id.*

¹⁷⁸Besides its 20 members, the Appeals Council is chaired by the Associate Commissioner for Hearings and Appeals. Another member manages the operations of the Appeals Council under the title of Deputy Chair. The review process involves an initial assessment by analysts from the Office of Appeals Operations. If the analyst recommends denying review, only one member of the Appeals Council will be assigned to the case. If the member concurs with the analyst, then review will be denied. If the member disagrees with the analyst or if the analyst recommends review and the member agrees, the case is reviewed by two members. If the two members agree, their decision is final. If they disagree, the Deputy Chair of the Appeals Council or a designee resolves the matter. Koch, & Koplou, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 1987 ACUS 625, reprinted in 17 FLA. STATE U. L. REV. 199, 236, 253-255 (1990).

¹⁷⁹SSA, Office of Hearings and Appeals, Key Workload Indicators II (3d quarter, FY 1991).

3. The Regulatory Model Has Diminished with Deregulation

The regulatory model that underlay the approach of the Attorney General's Committee and the APA towards independent hearing examiners was employed in the agencies regulating transportation economics: the Interstate Commerce Commission (rail and motor carriage) and the Civil Aeronautics Board (CAB) (air transport). Since the late 1970s, rate regulation in most transportation has been effectively ended. As a result, the CAB no longer exists and the ICC retains only a small portion of the work it once handled.

4. Rulemaking as a Principal Regulatory Technique and the Problems Afflicting It

When it created the Federal Trade Commission in 1914, Congress contemplated the FTC would proceed through case-by-case adjudication to provide content to the open-ended prohibition against "unfair methods of competition," and, in fact, it did so for many years. In 1964, however, the FTC issued its first trade regulation rule. Thereafter, the FTC followed up with numerous trade regulation rules. By 1973, the FTC's power to regulate through rulemaking was confirmed in the courts.¹⁸⁰ Subsequently, Congress explicitly conferred rulemaking power on the FTC.¹⁸¹ Other, newer regulatory statutes—enacted since the mid 1960s—such as the Consumer Product Safety Act,¹⁸² the Occupational Safety and Health Act,¹⁸³ the Federal Coal Mine Health and Safety Act,¹⁸⁴ the National Traffic and Motor Vehicle Safety Act,¹⁸⁵ and the Clean Air Act Amendments¹⁸⁶—contemplate that regulation will take place primarily through rulemaking.

The trend towards increased substitution of rulemaking for adjudication, however, has encountered some severe barriers. Amendments to the Federal

¹⁸⁰*National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. 1973), cert. denied, 415 U.S. 951 (1974).

¹⁸¹Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2193 (1975) (codified as amended at 15 U.S.C. §57a (1988)).

¹⁸²Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified in relevant part at 15 U.S.C. §§2058, 2060 (1988)).

¹⁸³Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified in relevant part at 29 U.S.C. §655 (1988)).

¹⁸⁴Pub. L. No. 91-173, 83 Stat. 742 (1969) (codified in relevant part at 30 U.S.C. §811 (1988)).

¹⁸⁵Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified in relevant part at 15 U.S.C. §1392 (1988)).

¹⁸⁶Pub. L. No. 91-604 §104 (1970) and Pub. L. No. 95-95 §104 (1977) (codified at 42 U.S.C. §7409 (1988)).

Trade Commission Act ostensibly designed to confirm the FTC's rulemaking power have inhibited it by imposing unrealistic procedural requirements on that agency. In rulemaking in which "disputed issues of material fact" arise, the FTC may be required to provide opportunity for extensive cross-examination.¹⁸⁷ Indeed, the lack of clarity of the FTC's procedural obligations exerts overwhelming pressure on it to employ a full judicial trial, because it has no way of predicting how a reviewing court will later construe those obligations. As a result, the advantages of notice-and-comment rulemaking have been negated to a significant degree. Moreover, increasing demands from reviewing courts for reasoned responses from agencies to issues raised in rulemaking proceedings have proved devastating to the rulemaking process. In complex proceedings, courts, urged on by counsel for those objecting to a rule, are with increasing frequency able to find some issue to which the agency has inadequately responded. Critics, therefore, assert that the rulemaking process itself is in jeopardy unless the courts take a more tolerant approach to review of rulemaking.¹⁸⁸

Finally, it should be observed that adjudications involving economic regulatory matters, such as those litigated before the Federal Energy Regulatory Commission, often involve matters of substantial economic consequence. To the extent that procedural barriers erected by the federal courts continue to impede the move towards rulemaking, the importance of adjudication--measured by the economic value of its subject matter--is likely to increase.

5. The Share of ALJs Deciding Regulatory Adjudications Has Diminished

As of May 1992, there were approximately 1,185 ALJs, of which 866--or 73%--worked for the Social Security Administration.¹⁸⁹ In 1979 there were approximately 1,071 ALJs, of which 660--or 62%--worked for the SSA.¹⁹⁰ According to a report issued by the Civil Service Commission, in the period 1972-73, there were approximately 800 ALJs, of which 440--or 55%--worked

¹⁸⁷15 U.S.C. §57a (1988).

¹⁸⁸E.g., Pierce, *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991); Pierce, *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L. J. 300.

¹⁸⁹U.S. Office of Personnel Management (typewritten report, undated). The SSA, Key Workload Indicators 1 (FY 1991), however, shows only 777 ALJs on duty at the SSA for June 1991.

¹⁹⁰See Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. B. NEWS & J. 383, 384 (1984).

for the Social Security Administration.¹⁹¹ In 1962 there were 505 ALJs, of which 164—or 32%—worked for the SSA.¹⁹² In 1947, the total number of ALJs was 196, of which 13—or only 7%—worked for the SSA.¹⁹³ By 1981, Jeffrey Lubbers was able to point out that the profile of ALJ work had drastically changed. Lubbers showed that while the 125 ALJs working for the economic regulatory agencies in 1947 constituted approximately 64% of the ALJs at that time, by 1981 the number of ALJs working for economic regulatory agencies had declined both absolutely and proportionately: in 1981, 109 ALJs worked for economic regulatory agencies and they constituted only 9.7% of the then total of 1,119 ALJs.¹⁹⁴ In a more recent article,¹⁹⁵ Administrative Law Judge John C. Holmes showed that by 1987, the ALJs working for economic regulatory agencies had declined even further, to 67—or 6.8%—of the 980 ALJs who held office in 1987. As of May 1992, it appears that only 55 out of 1,185 ALJs work for economic regulatory agencies, reducing their percentage to approximately 5% of the total.¹⁹⁶

These figures show a dramatic shift in the work of ALJs since the APA was enacted. SSA adjudications, which originally had accounted for the work of only a small fraction of the ALJs now account for the work of almost three-quarters of them. Economic regulatory adjudication, which accounted for the work of almost two-thirds of the ALJs in 1947, accounts for the work of only 5% of the present ALJs.

6. Benefit Adjudications Predominate

According to the Secretary of Veterans Affairs, in 1990 the Board of Veterans Appeals produced 46,556 appellate decisions, but of that number only 1,684 involved formal hearings before the Board and 12,451 involved appealed cases in which hearings were held in the field before regional office personnel acting on behalf of the board.¹⁹⁷ The Board itself is composed of 65 members that sit in 3-member sections composed of 2 legal and 1 medical

¹⁹¹See U.S. Civil Service Commission, Report of the Committee on the Study of the Utilization of Administrative Law Judges, App., p.3 (July 30, 1974).

¹⁹²W.R. Lester, Section 11 Hearing Examiners, Report of the Committee on Personnel, ACUS 25 (Aug. 23, 1962)

¹⁹³Holmes, *ALJ Update, A review of the Current Role, Status, and Demographics of the Corps of Administrative Law Judges*, 38 FED.B.N.& J. 202 (1991).

¹⁹⁴Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 268 (1981).

¹⁹⁵Holmes, *supra* note 193.

¹⁹⁶See OPM, Total Number of ALJs on Board by Grade and Agency as of June 25, 1991.

¹⁹⁷Secretary of Veterans Affairs, Annual Report 46-47 (FY 1990).

members.¹⁹⁸ In a recent report to the Conference, Administrative Judge John Frye estimated that the caseload of non-ALJ federal adjudicators is about 343,200 cases per year. Decisions of the Board of Veterans Appeals appear to constitute about 17% of that total.¹⁹⁹

H. The Historical Background to the Selection Process and to the Present Protections for Independence

Since 1937, when the President's Committee on Administrative Management recommended that adjudicators be separated from investigative and prosecutorial functions in the agencies, the degree and extent to which agency adjudicating officers should be separated from their employing agency has been a subject of almost continual study and dispute. As pointed out below, the Attorney General's Committee went beyond the recommendations of the President's Committee by recommending steps designed to provide hearing examiners sufficient protection from agency influence to encourage and facilitate the exercise of independent judgment in finding facts from evidence in the record of an adjudication. The Committee's recommendations about the profile of examiner job characteristics, however, were shaped by its view of the examiner's work.

The Attorney General's Committee believed that hearing examiners normally do most of their work for a particular agency and that the accompanying specialization was desirable for efficiency reasons:

Efficient conduct of the work demands that hearing officers **specialize in the work of specific agencies**. Some exchange, as we point out, is desirable and will occur. But in the main the work of a hearing commissioner will be with a particular agency. Specialization is one of the fundamentals of the administrative process.²⁰⁰

This specialization probably was the reason the Committee rejected the concept of a separate corps of hearing examiners not attached to specific agencies.²⁰¹ Despite its belief in the benefits of specialization, the Committee

¹⁹⁸Membership on the Board of Veterans Appeals is limited to 65 under 38 U.S.C. §4001(a) (1988). Judge John H. Frye's Study of non-ALJ Hearing Programs indicates that the Board is at full authorized strength. J.H. Frye, III, Survey of non-ALJ Hearing Programs in the Federal Government, App.B, 1-2 (ACUS Aug. 1991).

¹⁹⁹Frye Report at 4.

²⁰⁰Final Report 47.

²⁰¹*Id.*

nonetheless contemplated that hearing examiners could be loaned or exchanged among agencies where the work was not too dissimilar. The principal reason given by the Committee for such exchanges was efficiency; decisional resources would be better employed when an agency unable to support a full-time hearing examiner could borrow one from another agency. A secondary reason given by the Committee was the variety and fresh point of view the practice would provide to examiners.²⁰²

Although the Committee believed that salaries should be substantial, it may have been addressing what it believed to be the normal case of agencies handling relatively small numbers of complex cases, because the Committee left open the possibility that "agencies which deal with many small cases" might be authorized to pay at a somewhat lower scale.²⁰³

The Committee rejected the suggestion that hearing examiners hold office under Presidential appointment. This rejection seems to have been grounded on the Committee's belief that "the agencies themselves should have an important share of the responsibility of selecting the persons who shall be hearing commissioners."²⁰⁴ The Committee contemplated that hearing examiners would be nominated by the agency for whom they would work and then be appointed by a proposed new independent Office of Federal Administrative Procedure.²⁰⁵

The Committee further recommended that hearing examiners be appointed for a term of 7 years at a fixed salary and that during that term they can be removed only for cause.²⁰⁶ Appointment in the manner described together with such tenure would, the Committee believed, provide examiners with conditions conducive to the exercise of independent judgment. The Committee majority selected the period of 7 years as adequate to promote independence on the ground that the judges of many state supreme courts hold office for a similar term.²⁰⁷ Conversely, in recommending appointment for a term of years, the Committee was rejecting indefinite appointments because it wanted to avoid "making impossible the displacement of those who fail to measure up to the standards required of them."²⁰⁸

²⁰²Final Report 49. A loan program, such as the one contemplated by the Committee, is administered by OPM under 5 U.S.C. §3344 (1988).

²⁰³Final Report 46.

²⁰⁴Final Report 47.

²⁰⁵Final Report 47. See also *id.* 196 (proposed bill §302(3)).

²⁰⁶Final Report 46, 196. The Committee Minority recommended that hearing examiners hold office for a term of 12 years. Final Report 238.

²⁰⁷Final Report 48.

²⁰⁸Final Report 47-48.

The Committee also recommended two additional types of appointments: provisional appointments for no more than 1 year and temporary appointments.¹³³ The Committee wanted the option of 1-year provisional appointments to test the actual abilities of possible regular appointees where desirable. The Committee recommended that temporary appointments be made for situations in which caseloads expanded unexpectedly; for agencies afflicted with one or two unusually protracted adjudications; and for agencies with an insufficient number of adjudications to warrant the appointment of even a single full-time hearing examiner. Both provisional and temporary appointments should, the Committee recommended, be made in the manner recommended for regular appointments: agency nomination followed by approval and appointment by the independent body.

1. The APA on the Selection of Hearing Examiners

In the APA, Congress followed the basic approach of the Attorney General's Committee majority in making examiners employees of the particular agencies over whose cases they presided, as well as in subjecting their selection to oversight and supervision by an independent body. In place of the Committee's proposed Office of Federal Administrative Procedure, the Congress vested that oversight and supervision in the Civil Service Commission.¹³⁴ Section 11 of the APA provided that as many examiners as necessary should be appointed by and for each agency, and vested rulemaking power in the Civil Service Commission. Acting under that power, the Commission established methods of appointment, which are discussed later.

Section 11 followed the Attorney General's Committee recommendations in providing (1) that hearing examiners should be removable only for cause established and determined by a body independent of the agency for which they worked and (2) that examiners' compensation should be determined independently from agency influence. Contrary to the Attorney General's Committee, which had recommended that examiners hold office for a term of years, the APA effectively accorded permanent tenure to examiners. Under section 11, the Civil Service Commission would determine the existence of cause for discharging examiners and would prescribe examiner compensation "independently of agency recommendations or ratings."

The Act provided that examiners were to be "assigned to cases in rotation so far as practicable." The Act also provided that agencies occasionally or

¹³³Final Report 48-49.

¹³⁴The functions of the Civil Service Commission overseeing hearing examiner independence have since been vested in the Office of Personnel Management and the Merit Systems Protection Board.

temporarily insufficiently staffed could use examiners selected by the Commission from and with the consent of other agencies. Although the AG Committee contemplated that examiners might be temporarily assigned to other agencies to cover unusual or unanticipated needs, the assignment rotation provision did not appear in the Attorney General's Report. In the Attorney General's Report, the majority had recommended entrusting a chief hearing examiner in each agency with the duty of assigning cases.²¹¹ The minority would have permitted the agency to delegate the assignment function as it saw fit.²¹²

The rotation provision is not unrelated to the matter of selective certification, a matter discussed below. Whereas the issue about selective certification involves the interchangeability of ALJs between agencies, the rotation provision involves the interchangeability of ALJs within each agency. As noted, the Attorney General's Committee had rejected the concept of an independent corps of hearing examiners because it believed that such a concept conflicted with the need to specialize. At the time Congress was considering the APA, it followed the Attorney General's Committee in explicitly rejecting the concept of a separate corps of hearing examiners.²¹³

The rotation provision contemplates that within a given agency, examiners in the rotation pool are interchangeable. The command that examiners be assigned on rotation, however, is qualified by the phrase "as far as practicable." On the authority of this qualifying phrase, the Civil Service Commission promulgated rules establishing several categories of cases, according to their level of difficulty, and provided that examiners would be rotated only within the categories to which they were deemed qualified to decide. Those rules were upheld as consistent with the APA by the Supreme Court in 1953, in *Ramspeck v. Federal Trial Examiners Conference*.²¹⁴

2. The Initial Appointment "Fiasco"

Numerous problems attended the selection of the first set of hearing examiners under the APA. These problems arose because examiners were already in place in most agencies, who, of course, generally wished to remain under the new regime. The Report of the Attorney General's Committee implied that if the Committee's recommendations were followed, the quality of

²¹¹Final Report 199 (Proposed bill §305(2)(a)).

²¹²Final Report 239 (Minority proposed code §309(c)(6)).

²¹³Report of the Senate Committee on the Judiciary, S.Rep. No. 758, 79th Cong., 1st Sess (1945), reprinted in *Legislative History of the Administrative Procedure Act*, S. Doc. No. 248, 79th Cong., 2d Sess. 185, 215 (1946).

²¹⁴345 U.S. 128, 139-40 (1953).

hearing examiners (considered in the aggregate) would improve. Congress, in enacting the APA, similarly expected that revamping the position of hearing examiner to provide more status and independence would result in replacing less qualified hearing examiners with more qualified ones. The problem was how to achieve the objective of improving overall quality while respecting the legitimate expectations of the existing examiners that they would be reappointed if they met proper standards.

Professor Ralph Fuchs, in a now-famous article in the *Harvard Law Review*,²¹⁵ characterized as a "fiasco" the process by which the initial group of APA hearing examiners was selected. In the view of the Attorney General's Committee and the Congress that had enacted the APA, it was desirable to ensure that hearing examiners possessed superior qualifications. By a series of misjudgments, the Commission established an examining process that appeared to operate in a politically biased fashion against the existing examiners and that disqualified 28% of the existing examiners and more than 35% of the National Labor Relations Board (NLRB) examiners.²¹⁶ The existing examiners challenged the results in administrative appeals to the Commission and they made political appeals to Congress. The Commission ultimately backed down almost completely, confirming in APA-tenured positions almost all of the pre-APA examiners.²¹⁷ Thus, the end result was that by confirming in office almost all of the pre-APA examiners, the Commission effectively defeated the expectation that the APA selection process would provide a body of examiners of a quality superior to that of the pre-APA period.²¹⁸

The mistakes made by the Commission in this process were identified by Fuchs as follows. The Commission made inappropriate appointments to the examining board. Its membership included individuals who had publicly expressed hostility to the preexisting examiners as a group, suggesting that substantial numbers of examiners were biased or incompetent. This hostility apparently derived from the belief that many examiners had, in the past, skewed their factfinding for policy reasons. In these circumstances, the examining board became vulnerable to the suspicion that it was allowing its own preconceptions to skew its decisions against incumbent examiners.

²¹⁵Fuchs, *The Hearing Examiner Fiasco under the Administrative Procedure Act*, 63 HARV. L. REV. 738 (1950). See also President's Conference on Administrative Procedure, Report of the Committee on Hearing Officers, Appointment and Status of Federal Hearing Officers 17-20 (1954); Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L. J. 431 (1950).

²¹⁶See Fuchs, 63 HARV. L. REV. at 753-54.

²¹⁷Fuchs, 63 HARV. L. REV. at 755-59.

²¹⁸See Fuchs, *supra*, 63 HARV. L. REV. at 764; Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 58 (1979).

Under the examining system established by the board, incumbent examiners with civil service tenure were entitled to appointment as APA examiners upon their demonstration of adequate qualifications; competitive examination was not required. Among the data before the examining board were the written applications that provided information as to the incumbent examiners' experience and other qualifications. The examining board, in addition, conducted oral interviews. The examining board, however, disqualified from this noncompetitive procedure any preexisting examiner who had held an administrative position, such as that of chief or assistant chief hearing examiner, even though the duties of those persons may have included adjudication of cases. This action appeared consistent with the expressed hostility of some of the examining board members towards the body of preexisting examiners. Moreover, when the results of the examinations disqualified a large proportion of the preexisting examiners for appointment as APA examiners, the suspicion that the examining board was indeed biased against the preexisting examiners appeared to be confirmed. Both the examining board and the Commission, therefore, were on weak ground when the results were challenged administratively and in Congress.

Fuchs also suggested that the examination results were vulnerable because the examining board was rating individuals on imprecisely defined criteria, which therefore gave the examining board wide discretion in performing its evaluation function. Although substantial room for judgment and discretion is undoubtedly necessary when rating individuals on personal characteristics, the wide scope of the examining board's discretion exacerbated the board's vulnerability to charges that it was skewing the results of its examinations in accordance with its own preconceptions. Fuchs suggested that:

[I]t might have been desirable to designate more precisely certain qualities for which the applicants were to be rated, and then to co-ordinate the results with reference to these. Such qualities as knowledge of administrative procedure, ability to handle technical questions during hearings, personal bearing, and objectivity might have been selected for this purpose and have aided somewhat in the difficult task of arriving at comparative judgments summarizing a host of intangible factors. Stenographic notes, or a recording, of each oral interview with at least the status incumbents should have been made, so as to be available in case of an appeal.¹⁴³

¹⁴³63 HARV. L. REV. at 752. Thomas similarly criticized the broad charge given to the board of examiners to determine "qualified and competent" examiners. Thomas, *supra* note 215, 59 YALE L. J. at 459.

3. Organization, Appointments, and Evaluations of ALJs: Past Studies, Reports, and Recommendations

a. The 1954 Report of the President's Conference on Administrative Procedure

A report prepared by a committee chaired by Earl Kintner and whose membership included Richard Doyle, Edwin Reynolds and L. Paul Winings reviewed the status of federal hearing officers in 1954 and made recommendations. The Report of the President's Conference concluded that the Civil Service Commission had abdicated its responsibilities under section 11 of the APA.²²⁰ The Report faulted the CSC for the fiasco involving the initial appointments described in the Fuchs article.²²¹ It faulted the CSC for failing, after the preparation of a register of eligible appointees in 1949, to prepare another register.²²² It faulted the CSC for failing to take steps to raise the standards for examiners.²²³ The Report suggested that the CSC was effectively incapable of evaluating professionals,²²⁴ and observed with dismay that the CSC had been unable to evaluate examiners for promotion within timeframes the Committee believed to be reasonable.²²⁵ Moreover, the Committee suggested that the CSC had employed improper and sometimes perverse criteria for evaluating examiners.²²⁶ Finally, the CSC had effectively allowed a circumstance to develop in which the agencies could, if they so wished, control the compensation of examiners, contrary to the intent of the APA.²²⁷

²²⁰President's Conference on Administrative Procedure, Report of the Committee on Hearing Officers 51 (1954), hereinafter referred to as "President's Conf. Report".

²²¹President's Conf. Report 17-20, 47-48.

²²²President's Conf. Report 47, 60.

²²³President's Conf. Report 49-50.

²²⁴President's Conf. Report 58, 75.

²²⁵President's Conf. Report 51-52, 75.

²²⁶The Committee was disturbed by the fact that the CSC had apparently sought out comments on examiner performance from private attorneys who had practiced before them. The Committee took the view that this practice subjected the examiners to pressures from persons whose cases they were required to judge, thereby threatening their ability to decide impartially. President's Conf. Report 74-75. The Committee was also displeased by the CSC's apparent use of the length of the case records to assess the difficulty of the work handled by examiners. The Committee saw the use of such a criterion as creating an incentive for examiners to expand hearings unduly. *Id.*, at 53-54, 75.

²²⁷Under the CSC's interpretation of the APA, an agency could effectively control the compensation of its examiners by the way it assigned cases. Under the APA, cases are required to be assigned in rotation "so far as practicable." This meant, in the CSC's view, that when an

Because the Committee had concluded that the CSC had been so deficient in performing its responsibilities under the APA, the Committee recommended that the supervision over examiners be removed from the CSC and placed in a new Office of Administrative Procedure.²²⁹ The Committee criticized the system of appointments that purported to constrain agency discretion in appointing examiners to the top three on the register, but that, in fact, permitted agencies to escape the full effects of this constraint.²³⁰ The Committee's approach, however, was not to recommend tightening the constraints on the agencies, but to loosen them. The Committee explicitly rejected the so-called rule of three approach under which an agency was required to choose an ALJ from among the top three ranked candidates of the register,²³⁰ and suggested that numerical scores involving imponderables, such as a candidate's ability to be impartial, were "patently fallacious."²³¹ The Committee then recommended that the new Office of Administrative Procedure have wide discretion over setting the qualifications for examiners and that, after the Office of Administrative Procedure determined the minimum qualifications, the agencies be free to select from the entire list of qualified candidates.²³² Although the Committee took the view that imposing a requirement of specialized knowledge on candidates for examiner would unduly limit the field of eligibles,²³³ its recommendation that agencies be free

agency assigned cases of different degrees of difficulty to different examiners, the CSC would be obliged to classify the different examiner categories accordingly: "According to the Civil Service Commission, if an agency assigns Grade 12 work to a Grade 14 hearing officer, the Commission would be compelled to down-grade the hearing officer to GS-12." President's Conf. Report 76. See also *id.*, at 51.

²²⁹President's Conf. Report 59.

²²⁹An agency thus could fill a vacancy with an examiner from another agency; the agency could appoint a nonexaminer with civil service status; the agency could appoint former employees of the legislative or judicial branches eligible under the Ramapo Act (who would be required to pass a noncompetitive examination); or the agency could request selective certification. If the agency appointed a status nonexaminer, that person would then be required to meet the grade standing of the third person on the register. The appointee, however, would possess the advantage of having his recent experience counted toward his grade while the register candidate's recognized experience was frozen as of the date of the register. In 1954 the register was 5 years old. President's Conf. Report 31-32, 47.

²³⁰President's Conf. Report 64.

²³¹President's Conf. Report 70.

²³²President's Conf. Report 64. This approach (of full register selection) had been previously advocated in Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L. J. 431, 475 (1950).

²³³President's Conf. Report 69.

to appoint any person on the qualified list effectively ensured that agencies wishing to appoint persons with specialized knowledge would be free to do so.

The Committee thought that multiple grades of examiners within any single agency was inadvisable. Multiple grades focused examiners' attention on the process of promotion and the CSC had proved incapable of adequately evaluating professionals for promotion.²³⁴ Moreover, the time and effort expended in the evaluation process and the handling of appeals from those rejected made the promotion process inordinately time consuming and expensive.²³⁵ The Committee rejected the concept of probationary appointments as a threat to the decisional independence of the probationary examiners.²³⁶ Although the Committee acknowledged that the work of examiners differs from agency to agency, it suggested that the existence of different grades of examiners between agencies would engender pressures on the successor organization to the CSC to eliminate the differences. Accordingly, the Committee suggested that a single grade of examiner probably ultimately would prevail throughout the federal system.²³⁷

b. The 1962 Conference Study

Professor Wilbur R. Lester wrote a report to the temporary Administrative Conference in 1962 on "Section 11 Hearing Examiners."²³⁸ Like the AG Committee and the APA itself, Lester rejected the concept of a common pool of examiners who are assigned to an agency on a case-by-case basis.²³⁹ Lester noted that "hearing examiners among the agencies do not form a homogeneous group,"²⁴⁰ and pointed out differences in the tasks of examiners from different agencies.

Despite the heterogeneity of ALJ work from agency to agency, Lester favored raising the compensation of HEW examiners--which were then at the GS-13 level (except for 11 GS-11 examiners in the Bureau of Indian Affairs (BIA))--to equal that of examiners for regulatory agencies. In support of that view, he argued that the difficulties in some aspects of the work of a regulatory examiner over those incurred by a HEW examiner were cancelled

²³⁴President's Conf. Report 76.

²³⁵President's Conf. Report 52, 75.

²³⁶President's Conf. Report 78.

²³⁷President's Conf. Report 77.

²³⁸W.R. Lester, Section 11 Hearing Examiners, Report of the Staff Director, ACUS Committee on Personnel (1962) (hereafter cited as "Lester").

²³⁹Lester, 86-87.

²⁴⁰Lester, 3.

out by the ease of performing other aspects.²⁴¹ He refrained from actually embodying his views in a recommendation, however, because he believed that such a recommendation would not be politically acceptable.²⁴²

Lester reported with disapproval the prior existence of several grade levels within many agencies from 1947 to 1953, the ICC having maintained a five-grade range until 1953 and the CAB having a four-grade range that year.²⁴³ Since January 1961, however, he reported that multiple grades within single agencies had been eliminated, although there still remained four grade levels of hearing examiners, differentiating the examiners among agencies.²⁴⁴ Lester's latest data showed that almost all hearing examiners were then at GS-13 or GS-15, the exceptions being the 11 hearing examiners in the Bureau of Indian Affairs at GS-12, and 13 hearing examiners in the Coast Guard and 1 in the Office of the Alien Property Custodian at GS-14.²⁴⁵ Lester asserted that multiple grades within an agency had been the source of unnecessary anxiety on the part of examiners desiring promotion and the cause of unnecessary inefficiency in causing resources to be spent on evaluating examiners for promotion.²⁴⁶ He recommended that there be but one class of examiner in each agency²⁴⁷ and generally that there be a single class throughout the government since, as he put it, "a hearing examiner is, after all, a hearing examiner."²⁴⁸

Although Lester believed that all hearing examiners should be at the same level, he acknowledged a productivity problem. His recommended solution was supervision by chief hearing examiners in cooperation with an outside Office of Administrative Procedure or Office of Professional Personnel.²⁴⁹ In this way Lester hoped to bring to bear on the supervision of the ALJs the talents of those (other than the agency) who were most familiar with their work.

Lester recommended creating a new outside supervisory office because the CSC had, in his view, demonstrated that it was incapable of evaluating and supervising hearing examiners.²⁵⁰ Moreover, Lester pointed out that the CSC had never hired or promoted lawyers or other professionals. That task had been turned over to the employing agencies, except for hearing examiners.

²⁴¹Lester, 67-68.

²⁴²Lester, 69-70.

²⁴³Lester, 25.

²⁴⁴Lester, 25.

²⁴⁵Lester, 25.

²⁴⁶Lester, 26.

²⁴⁷Lester, 29, 60.

²⁴⁸Lester, 26, 29.

²⁴⁹Lester, 27, 32-50. *See id.*, 47 (new office discussed).

²⁵⁰Lester, 28.

Therefore, Lester argued that a new office be established whose function was overseeing professional federal employment.²⁵¹ In so recommending, he was following the lead of two earlier reports: the Kintner-Doyle-Reynolds-Winings Report of 1954 and the Hoover Commission Report on Legal Services and Procedure.²⁵²

Lester opposed the practice of selective certification, urging that it be eliminated or deemphasized, on the ground that general capabilities and intelligence were more important than skill in the law and policies of a particular agency; and that a capable appointee could learn the law and policy in his first year or so with the agency and draw upon it thereafter.²⁵³ Lester also believed that selective certification produced undesirable inbreeding.²⁵⁴

Lester reported a vast growth in selective certification in the years preceding his report. In 1954, the CSC had granted selective certification to only the Coast Guard, the FCC and the Federal Power Commission (FPC). Since that date, selective certification had been granted to the ICC, the NLRB, the CAB, the Securities and Exchange Commission (SEC), the Federal Maritime Commission (FMC), the Department of Agriculture and the Bureau of Land Management in the Department of the Interior.²⁵⁵ Indeed, Lester reported that over the 7-year period, there were a total of 355 appointments to the position of hearing examiner. Of that total, 158 were appointed pursuant to selective certification. Of the 197 appointments not pursuant to selective certification, 186 were to one Department: HEW.

Lester believed that the appointments process could be improved by using an unranked register and abolishing the Veterans preference and the rule of three.²⁵⁶ Indeed, he claimed that agencies used selective certification to avoid making the poor appointments which the rule of three would otherwise force upon them.²⁵⁷ Lester suggested that if the entire register is not made available to the agency, then that at least the top 10 or 20 names be provided to the agency. He cautioned that the outside office (to replace the CSC) should exercise supervision to ensure that the agency does not use its greater freedom of appointment to reinstate selective certification.²⁵⁸ Lester recommended a practice of probationary appointment of examiners for a period of 1 or 2 years before appointments were made permanent as a way to improve the quality of

²⁵¹Lester, 47-49.

²⁵²Lester, 49.

²⁵³Lester, 79.

²⁵⁴Lester, 27.

²⁵⁵Lester, 43.

²⁵⁶Lester, 30.

²⁵⁷Lester, 43.

²⁵⁸Lester, 80.

appointments.²⁵⁹ The Director of his proposed Office of Professional Personnel would have final authority in determining whether a probationary examiner would receive a permanent appointment.

Lester believed examiners should not work in total isolation and that exchanges of views and information among examiners were healthy and productive.²⁶⁰ He believed agency policies that were not embodied in rules could be communicated to examiners by consultations between the chief hearing examiners and the agency (although not with the prosecuting or investigative parts of the agency).²⁶¹

c. The 1969 Conference Study and Recommendation

In 1969 the (permanent) Administrative Conference adopted Recommendation 69-9, calling for an experimental departure from the system of selective certification; for employment of an experimental intern program for ALJ appointments; and for elimination of the veterans preference in the appointment of examiners.²⁶²

The underlying study suggested that the requirement to select a candidate from among the top three on the register combined with the mechanics of Veterans preference (which adds 5 to 10 points to a score) critically distorted the supposedly merit-based system of appointment.²⁶³ Accordingly, the study recommended that agencies be permitted to appoint an examiner from the top 10 persons on the register and that the Veterans preference be eliminated. The study also endorsed the ABA's suggestion that trial experience be substituted for administrative law experience as a general qualification demanded of ALJ candidates.

The study approached selective certification cautiously. It suggested the possibility that selective certification was being overused, and accordingly recommended that a body outside CSC such as a Conference Committee help them determine the importance of specialized experience for each agency seeking to use or retain selective certification. In cases in which the agency made a case for a less than critical need for specialized experience, the study recommended that extra points be awarded for such experience on the general register.

²⁵⁹Lester, 31, 50, 80-83.

²⁶⁰Lester, 90.

²⁶¹Lester, 91-92.

²⁶²1 ACUS 30 (1968-70); 1 CFR §305.69-9 (1991). In addition, the recommendation called for continued training for hearing examiners (and other government attorneys) and the creation of a center for continuing legal education in government.

²⁶³1 ACUS 381 (1968-70).

The experimental intern proposal was designed to enlarge the pool of potential ALJ appointees. Under the proposal, individuals (lacking some qualifications needed for an ALJ appointment) might be appointed as interns for a 2-year period during which they would receive the additional experience and training needed to bring them into the pool.

d. The Scalia Approach

In a 1979 law review article,¹⁸⁸ then-professor Antonin Scalia argued that the prospect of agency-induced bias in hearing examiners was no longer a serious problem. Scalia argued, therefore, that those constraints on the appointments and employment conditions of hearing examiners that had been written into the APA to counter bias could and should be eliminated in the interests of improving the quality of hearing examiners.

Scalia asserted that ensuring the quality of examiners was the paramount problem. He argued that the persons most capable of evaluating examiner competence are almost necessarily persons inside the agency for whom the examiners work. They will be most familiar with the levels of difficulty posed by the particular cases before the examiners and only people inside the agency will be familiar with the issues essential to evaluating examiner performance.

Scalia's point went beyond the assertion that people within the agency will have the most familiarity with the types of issues that the examiner is handling and accordingly be best able to evaluate the examiner's performance. He also asserted that people outside the agency--including the personnel of the Office of Personnel Management--are generally unable to assess the performance of examiners because they lack the training and experience of judging and, therefore, lack the ability to evaluate judging performance. Furthermore, people outside the agency will not only be unfamiliar with the issues before the agency's examiners, they will be totally ignorant of those issues. The amount of time that would have to be invested to perform a credible evaluation--even if these external officials were otherwise competent--would vastly exceed any amount that could be practically devoted to the task. The result is that performance evaluation, according to Scalia, would probably have to be made by the agencies for whom the ALJs worked. Because Scalia believed in performance evaluation, he argued that the agencies themselves could be trusted to engage in performance evaluation of ALJs, especially if safeguards were taken to exclude prosecutory staffs from the evaluation process.¹⁸⁹

¹⁸⁸Scalia, *The ALJ Fiasco--A Reprise*, 47 U. CHI. L. REV. 57 (1979).

¹⁸⁹47 U. CHI. L. REV. at 77-79. Scalia acknowledged that performance evaluation of ALJs could be readily insulated from improper pressures or influences if it were done by the administrator of a unified corps of ALJs. Scalia, however, believed that such an administrator

III. The Variety of Administrative Adjudications and Administrative Judges

As was introduced in Chapter I, the scope and variety of decisionmaking models and decider qualifications in the administrative setting are numerous and often inconsistent. There appears to be no plan for deciding in what kinds of cases formal processes and ALJs should be used and when informal processes and other administrative judges should be used. Indeed, formal processes presided over by non-ALJs are being established by agency rules. Thus, the APA "on the record" hearing requirement that triggers formal adjudication and ALJ presiders is increasingly inadequate to explain procedural formality or the qualifications of the deciders.

It is the purpose of this chapter to review the variety of decisionmaking models that implicate similar private interests but are decided with differing degrees of procedural and decider formality. Perhaps the most compelling comparison between two systems performing virtually identical functions involves disability determinations by the Social Security Administration and the Veterans Administration.²⁶⁶ The SSA decides large numbers of disability cases using ALJs. The VA, on the other hand decides its disability cases informally and hears decisions before two- or three-person panels of non-ALJ deciders. Moreover the SSA decisions are subjected to close oversight by the district courts, whereas the VA decisions are reviewed by an Article I Court of Veterans Appeals with little federal court oversight.

The lesson of the SSA - VA experience must be that there are different ways to achieve justice in the administrative setting that can be equally successful. The remainder of this chapter explores a variety of decision and decider models that offer examples of cases with comparable private interests but different procedural rules and decider qualifications. The goal is to identify some kind of common denominator. The case studies developed here will be evaluated in Chapter XII, where standards for utilizing ALJs or other administrative deciders will be proposed.

A. NLRB/EEOC Enforcement Adjudication

The Equal Employment Opportunity Commission (EEOC) handles cases of alleged employment discrimination in a number of different ways, depending

would not be as well informed about the work of the ALJs as would the agencies for whom they worked. *Id.* at 79.

²⁶⁶See discussion in Chapter II(E) (3) *supra*, and in Chapter III(D), *infra*.

on the source and kind of discrimination.²⁶⁷ The Commission enforces Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act and the Equal Pay Act. The EEOC bears the structural form of a traditional independent agency in that it consists of five members, each of whom is appointed by the President and confirmed by the Senate to a 5-year term, and no more than three of its members can be members of the same political party.²⁶⁸

In most cases involving alleged discrimination by private employers, EEOC action is deferred until the state agency with jurisdiction over the event is first given an opportunity to resolve the complaint.²⁶⁹ If the state agency has not acted within the allotted time period, the EEOC conducts an investigation to determine whether there is reasonable cause to believe that discrimination has occurred.²⁷⁰ If the EEOC determines that reasonable cause exists,²⁷¹ then the EEOC attempts to eliminate the practice by informal methods of conference, conciliation and persuasion.²⁷² If and when the EEOC determines that efforts at voluntary compliance have been unsuccessful, or at any time (after 180 days subsequent to the filing of the charge) that a charging party so requests, the EEOC will issue a right-to-sue letter, thereby permitting the charging party to seek relief in the courts.²⁷³ In addition to a civil suit brought by the charging party, the EEOC itself may bring suit against an employer.²⁷⁴

Where the employer is a federal government agency, the procedure governing discriminatory employment practices is somewhat different. Indeed, it is with federal government discrimination that the EEOC becomes more of a potential adjudicator. Whereas in matters involving private employers the EEOC is primarily a conciliator, negotiator and--when conciliation and negotiation fail--a litigant, its role vis-à-vis federal agencies takes on more of a supervisory role.

First, all federal agencies are required to have on their staffs officials known as Equal Employment Opportunity Counselors and Equal Employment Opportunity Directors.²⁷⁵ Individuals believing themselves victims of unlawful employment practices are required first to consult with the agency's Equal

²⁶⁷See also Frye Report at 129-36.

²⁶⁸42 U.S.C. §20008-4(a) (1988).

²⁶⁹29 CFR §1601.13 (1991).

²⁷⁰29 CFR §1601.15 (1991).

²⁷¹29 CFR §1601.19, §1601.21 (1991).

²⁷²29 CFR §1601.24 (1991).

²⁷³29 CFR §1601.28 (1991).

²⁷⁴29 CFR §1601.27 (1991).

²⁷⁵29 CFR §1613.204(c) (1991).

Employment Opportunity Counselor.²⁷⁶ If the Counselor is unable to resolve a matter informally, then the complainant is entitled to file a formal complaint with the employing agency.²⁷⁷ The agency's Director of Equal Employment Opportunity then orders an investigation by a person outside that part of the agency in which the complained of events occurred.²⁷⁸ If an agreement is not reached between the complainant and the agency, the complainant is advised of his/her right to appeal to the EEOC.²⁷⁹ The EEOC then assigns an administrative judge (AJ), either 1 of the 79 such judges on its own staff²⁸⁰ or a judge drawn from an agency other than the respondent agency, to hear the case.²⁸¹ The AJ is given the investigative file prepared within the agency (by the agency's Equal Employment Opportunity Director), and may decide to order further investigation by the agency and/or may hold a hearing himself.²⁸² The AJ then makes a recommended decision that (together with the record) is transmitted to the agency head for decision.²⁸³ The agency head's decision is, in turn, appealable to the EEOC.²⁸⁴ EEOC review, however, is generally performed by its Office of Federal Operations.²⁸⁵

Thus, the EEOC role vis-à-vis federal agency employers is one that oversees a system of employer self-correction. Federal agency employers are required to implement a system that will prevent discriminatory behavior from arising and to take corrective action when it occurs. When corrective action fails to satisfy the complaining employee, the agency employer is still given the chance to address and to correct the problem, since the presiding AJ in a formal inquiry directs a recommendation to the head of the employing agency. Only after the agency head has had an opportunity to accept the AJ's recommendations is there an opportunity to appeal to the EEOC.

It is interesting to compare the EEOC procedure involving alleged discrimination in federal employment with the NLRB procedure involving alleged unfair labor practices under the National Labor Relations Act. The

²⁷⁶29 CFR §1613.213 (1991).

²⁷⁷29 CFR §1613.214 (1991).

²⁷⁸29 CFR §1613.216 (1991).

²⁷⁹29 CFR §1613.217 (1991).

²⁸⁰See Frye Report at 131 n. 209; App. B at i.

²⁸¹29 CFR §1613.218(a) (1991).

²⁸²29 CFR §1613.218(b) (1991). Frye reports that EEOC AJs handle a caseload of 6,227 cases per year or an average of approximately 79 cases per AJ. Frye Report at 134 n. 222; App. B at 1. Not all of these cases proceed to a hearing before the AJ, however.

²⁸³29 CFR §1613.218 (1991). After receipt of the recommended decision, the agency head makes the decision on the complaint. 29 CFR §1613.221 (1991).

²⁸⁴29 CFR §1613.231 (1991).

²⁸⁵29 CFR §1613.234 (1991).

five members of the NLRB are, like the five members of the EEOC, appointed by the President and confirmed by the Senate for terms of 5 years.²⁸⁶ The NLRB is charged with the responsibility for preventing unfair labor practices.²⁸⁷ While the NLRB is the agency charged with administering the Labor Act, a person complaining of an unfair labor practice files a charge with one of the Board's Regional Offices, which operates under the supervision of the Board's General Counsel. The General Counsel, although in form acting for the Board, is statutorily independent of it. Indeed, the General Counsel is appointed to that office for a 4-year term by the President with Senate confirmation.²⁸⁸ Thus, the investigative and enforcement arm of Labor Act administration is formally separated from the adjudicating function inherent in the NLRB. There is no corresponding formal separation of functions in the EEOC.

After a charge is filed with the Regional Office, the charge is investigated, and if the Regional Office so decides, a formal complaint will be issued. A hearing is held before one of the NLRB's 83 ALJs,²⁸⁹ with review by the Board and further review in the federal courts of appeals. In fiscal year 1988, the Regional Offices issued 3,450 complaints commencing formal unfair labor practice proceedings, but because most such proceedings are settled, ALJs actually presided at only 835 hearings and issued 628 decisions.²⁹⁰

Although in the pre-APA period, the decisions of NLRB hearing examiners were widely suspected of often being skewed for policy reasons or because the examiners were under the influence of the enforcement unit, today the decisions of the adjudicators presiding in unfair labor practice cases are doubly insulated against the possibility of enforcement-oriented influence. First, the enactment of the APA provided statutory insulation for hearing examiners and their ALJ successors from pressures exerted by the agencies for which they work. Under the APA, agencies cannot dismiss ALJs nor rate them for pay and promotion. These protections were designed to ensure that the determination on evidentiary facts is made impartially by an official whom the public can see is not subject to agency influence. Second, shortly after enactment of the APA, Congress enacted the Taft-Hartley Act, which took investigative and enforcement powers away from the NLRB and vested them in the Board's General Counsel. Today, therefore, the ALJ who presides in an unfair labor practice is doubly insulated from the authority charged with

²⁸⁶29 U.S.C. §153 (1988).

²⁸⁷29 U.S.C. §160 (1988).

²⁸⁸29 U.S.C. §153(d) (1988).

²⁸⁹See Office of Personnel Management, Total Number of ALJs on Board as of June 25, 1991.

²⁹⁰NLRB, 53d Ann. Rep. 2, 8, 191 (Table 3A) (1988).

investigation and enforcement. Those tasks belong to the independently tenured General Counsel. Furthermore, the Board itself, although now reduced to adjudicating, nevertheless remains subject to the provisions of the APA prohibiting it from dismissing its ALJs or rating them for pay or promotion.

The AJ who presides in the EEOC proceeding appears to bear some affirmative responsibility for ferreting out the facts, perhaps in the tradition of an inquisitorial proceeding of the type described in *Richardson v. Perales*. By contrast, the ALJ presiding in the NLRB proceeding tends to resemble a judge, receiving evidence introduced by the contending parties. In both types of proceedings, the presiding officers must make the kind of factual determinations that turn on evaluations of witness credibility. Although their decisions are subject to review and revision, their resolutions of credibility issues are nonetheless important. Indeed, these credibility resolutions may impose practical constraints upon the abilities of the agencies in charge (the EEOC or the NLRB) to reach different results.

The AJs for the EEOC handle a caseload that, on the surface, appears to be close to twice the caseload of the NLRB ALJs. Frye reports that the EEOC AJs handled 6,227 cases,²⁹¹ whereas only 3,450 complaints instituting formal unfair labor practice proceedings were issued in fiscal year 1988.²⁹² Because the EEOC AJs are apparently charged with investigating as well as deciding in the tradition of an inquisitorial proceeding, the EEOC AJ probably bears a substantial burden of negotiation in the cases settled prior to issuance of the AJ recommendation. By contrast, the Regional Office that is prosecuting the unfair labor practice proceeding probably bears most of the negotiation burden, thereby limiting ALJs to the tasks of hearing and deciding. Despite their apparently more limited role, NLRB ALJs presided over only 835 hearings and actually issued only 628 decisions. Averaging the reported caseload among the available adjudicators indicates that an average EEOC AJ handles approximately 79 cases per year or 6.58 cases per month. Allocating the entire 3,450 complaints among the NLRB's ALJs would produce a caseload of 41.56 cases per ALJ per year or 3.46 cases per month. This likely overstates the ALJ task, however, for the reasons stated. In terms of hearings and decisions, the NLRB ALJ averages 10 hearings and 7.56 decisions per year or .83 hearings and .63 decisions per month.

The numbers indicate that the NLRB ALJs handle substantially fewer cases than do the EEOC AJs. The ALJs, however, must resolve difficult contested issues in cases in which the parties are well-prepared and represented by

²⁹¹See note 282 *supra* note.

²⁹²See text at note 290 and note 290 *supra*.

counsel. Moreover, the ALJs operate in a highly formal setting in which parties have the opportunity to cross-examine, make motions, submit briefs and engage in other time-consuming behavior. In addition, the pressures on the ALJs to render carefully wrought and defensible decisions are strong, and the ALJs accordingly take the time necessary to prepare decisions that will stand up to attack. The somewhat less formal methods employed in the EEOC proceedings as well as the reduced role of counsel or the entire absence of counsel allow the EEOC AJs to prepare their recommendations more quickly.²⁹³ Despite the additional burden of carrying on negotiations, the relative informality under which the EEOC AJs operate may nonetheless permit them to bear a numerically heavier caseload. Finally, it should be observed that the very opportunity to help negotiate a settlement may itself assist the AJs to dispose of their caseload with dispatch.

The AJ who presides over the EEOC adjudication lacks the statutory protections of an ALJ. The EEOC rules properly are concerned that the presiding AJ come from outside the agency against which the employment discrimination complaint is made. This rule obviously guards against the kind of agency pressure most likely to arise in an employment discrimination case. The impartiality of the decision is ensured by protecting the adjudicator from agency influence to decide against the complainant. Yet there is nothing in the rule that guards against the EEOC itself exerting pressure on EEOC AJs to decide in favor of the complainant or in any other way that the EEOC wants. The protection afforded to the AJ is thus narrow, but probably adequate. Neither Congress nor the administering agency has seen a need for APA-like insulation of the AJ to achieve actual impartiality and widespread recognition and acceptance of the AJ's impartiality.

The reasons for this difference in protection accorded the AJ in the EEOC proceeding from that accorded the ALJ in the NLRB proceeding are largely historical. As noted, the independence of the ALJ was the answer to complaints that the NLRB's hearing examiners were skewing the evidentiary facts for policy reasons. The APA was designed to protect the integrity of the evidentiary fact determination by protecting hearing examiners (and their ALJ successors) from retribution by the agency. Because there has been no widely-held equivalent concern that the EEOC would coerce its hearing officers into skewing the facts for policy reasons, there has been no reason to replicate the formal protections the APA accords to ALJs. The only protections against

²⁹³Recent amendments to the procedural rules governing federal employee proceedings permit formal discovery, 57 Fed.Reg. 12634 (April 10, 1992), to be codified at 29 CFR Part 1614. It should also be noted that unlike ALJs, EEOC AJs are subject to performance evaluations, one element of which is "quality of decisions." Letter from EEOC Administrative Judge Martin K. Magid to ACUS, June 5, 1992.

agency influence are the narrow ones designed to guard against pressure and influence by the employing agency.

The recent experience of the EEOC may provide a model for administration. Under the EEOC model the adjudicator should be protected from potential pressures emanating from sources likely to be interested in the outcome of the case. That is why the adjudicator cannot come from the agency charged with employment discrimination. But there is no need to insulate the adjudicator more widely than necessary. Note that the EEOC rule contemplates that the likely pressure is case specific: the prohibition extends to appointing an adjudicator from the particular agency against which a complaint has been made. There is nothing in the EEOC rules that contemplates that an adjudicating officer is likely to be subject to continuing pressures from a specific governmental source--as from investigators, for example.

B. Licensing Adjudication by FERC and NRC

Both the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission adjudicate disputes involving energy regulation, including exercise of licensing functions. FERC relies heavily on ALJs, while NRC relies heavily on non-ALJ adjudicatory officers. Unfortunately, the nature of the disputes adjudicated by the two agencies differ in so many other important respects that it is impossible to isolate differences in the two adjudicatory systems that are related to the different types of adjudicatory officers used by each agency.

1. The FERC Adjudication Process

FERC relies exclusively on ALJs to preside over its adjudications and to issue initial decisions. FERC reviews almost all ALJ initial decisions and substitutes its judgment for that of the ALJ with some frequency. FERC review of an initial decision adds considerable delay to the adjudicatory decisionmaking process. Almost all FERC adjudications involve a complicated mix of disputes concerning law, policy, adjudicatory facts, and legislative facts.

FERC's 23 ALJs completed 109 adjudicatory proceedings during the period October 1, 1990 through September 30, 1991. They were also assigned 73 new proceedings during that period. The completed cases were in the following categories: 21 electric rate cases, 2 hydroelectric licensing cases, 9 "other" electric cases (e.g., complaints against utilities and proposed utility mergers), 53 gas pipeline rate cases, 6 disputes involving gas producers, 5

proceedings to certificate (license) gas pipelines, 3 oil pipeline rate cases, 9 appeals of Department of Energy (DOE) remedial orders, and 1 DOE dispute with a contractor or employee.

A typical FERC adjudication involves multiple issues and multiple parties. Scores of separately represented parties each take a different position and presents evidence in support of that position. In the typical case, an ALJ either must resolve disputes concerning allocation of hundreds of millions of dollars in increased costs of gas or electricity or must decide whether a major new facility should be constructed. The stakes rarely are less than \$100 million; occasionally, the stakes are well over \$1 billion.

Many FERC adjudications require a hearing that lasts 2 to 3 months and yields a record well in excess of 10,000 pages. The task of writing an initial decision based on such a record is extremely demanding. The elapsed time between close of the hearing and issuance of an initial decision varies from 2 months to 1 year, depending on the complexity of the case and the length of the record. In addition, FERC ALJs issued 1,653 procedural and interlocutory orders during the 1990 fiscal year. The typical disputed issues are economic and environmental.

In selecting a new ALJ, FERC looks for heavy trial experience, a background in regulation of economic activity, good writing ability, judicial temperament, and proven negotiating ability. It has difficulty identifying individuals who meet all these criteria, however. It relies on training to fill any gaps in prior experience. Almost all FERC's ALJs had extensive prior experience in government. In most cases, that experience included extensive involvement in some form of regulation of economic activity.

2. The NRC Adjudication Process

NRC relies heavily on non-ALJ adjudicatory officers. At the end of fiscal year 1990, NRC had 30 administrative judges (AJs) and 2 ALJs. Nine of the AJs are lawyers. The other AJs have advanced degrees in public health, environmental science, engineering, physics, or medicine. In the bulk of cases, NRC assigns a panel of three adjudicatory officers. One member of the panel is an ALJ or a lawyer AJ; the other two have advanced degrees in science or engineering. NRC AJs are not protected by the statutory safeguards of independence that apply to ALJs. In fact, however, NRC voluntarily refrains from any effort to evaluate the performance of its AJs. As a result, its AJs are as independent as its ALJs. When it convenes a panel, NRC uses its ALJs and its lawyer AJs interchangeably. Occasionally, it assigns an ALJ to hear a civil penalty case alone if the subject matter does not warrant convening a panel.

All NRC adjudicatory officers are members of the Atomic Safety and Licensing Board Panel (ASLBP). The ASLBP and the use of three-judge panels drawn from the ASLBP is specifically authorized by the Atomic Energy Act, 42 U.S.C. §2241 (a):

[n]otwithstanding the provisions of sections 7(a) and 8(a) of the Administrative Procedure Act,...establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act....

The use of three-judge panels has obvious advantages and disadvantages. The main disadvantage is cost. Obviously, three judges cost more than one. The main advantages are higher quality decisionmaking and greater public acceptance of decisionmaking. Those advantages are attributable both to the common sense notion that three minds are better than one and to the differing educational background and expertise of the three judges. The agency is confident that the advantages outweigh the disadvantages because: (1) most of its adjudications involve complicated scientific disputes, and (2) its adjudications often provoke extreme public controversy.

Traditionally, NRC's adjudicatory docket has been dominated by applications to construct or to operate nuclear power plants. It completed 560 cases of this type between 1962 and 1990. Each such case is extraordinarily complicated and contentious, with numerous disputes concerning physics, engineering, health, safety, and environmental impact. Although the NRC's figures indicate that construction permit proceedings averaged about 12 months (for all cases from 1962-91) and operating license permit proceedings averaged 53 months (for all cases from 1982-91), the time for completing such proceedings has increased markedly by the end of the period. In 1990, for example, the generating plants at issue cost in excess of \$3 billion each, a construction permit proceeding completed in that year required 76 months, and two operating permit proceedings averaged 97 months to complete.

By fiscal year 1990, the case mix had changed considerably because of the absence of any new applications to construct or operate nuclear power plants during the 1980s. In February 1990, NRC completed adjudication of 40 cases. The caseload mix was: initial operating license (2), construction permit

(1), enforcement (19), material license (5), operating license amendment (6), and other (10). Almost all NRC adjudications are complicated and contentious, but most are not as massive as licensing and construction cases. Thus, for instance, the average enforcement case requires 8.5 months from date of convening a panel to date of conclusion. NRC's staff of adjudicatory officers has declined as its caseload has declined.

NRC selects all AJs and ALJs based on recognized achievement in their respective fields of endeavor. ALJs and lawyer AJs are required to have 7 to 10 years of litigation experience before federal or state courts or agencies. A selection committee reviews all applicants and submits the names of three qualified applicants to the five Commissioners, which makes all appointments to the ASLBP.

C. Sanctions and Civil Penalty Adjudication

1. Immigration Adjudication

There are three separate corps of adjudicators in the Department of Justice (DOJ) who preside over immigration and related cases. The largest group, known as immigration judges (IJs) (officially "special inquiry officers"),²⁹⁴ were in existence prior to enactment of the APA. Issues concerning their role and independence led to two landmark cases interpreting the separation-of-functions requirements of the APA.²⁹⁵ In 1983, to help assuage continuing concerns about the independence of IJs, the Department created an independent Executive Office for Immigration Review" (EOIR) and placed the IJs (as well as its reviewing board, the Board of Immigration Review) in it.²⁹⁶ There are currently 88 IJs headed by a Chief Immigration Judge and five Assistant Chiefs.²⁹⁷

²⁹⁴See 8 U.S.C. §1101 (b)(4). See 8 CFR §1.1 (e) which provides that the terms can be used interchangeably. Legislation introduced in the Senate, S. 2099, 102nd Cong. 1st Sess., *reprinted in* 137 Cong. Rec. S. 18417 (daily ed. November 26, 1991), would officially change the name to "immigration judge."

²⁹⁵See *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) (APA adjudication provisions apply to deportation hearings and hearing officers may not be assigned other investigative duties) and *Marcello v. Bonds*, 349 U.S. 302 (1955) (1952 legislation making special inquiry officers subject to district director supervisor supersedes APA separation-of-functions provisions and does not violate due process.)

²⁹⁶48 Fed. Reg. 8039 (February 25, 1983), codified at 8 CFR Part 3 (1991).

²⁹⁷Interview with Chief Immigration Judge William R. Robie, February 1992.

In 1986, the passage of the Immigration and Control Act of 1986 (IRCA) created two new categories of on-the-record APA proceedings: cases involving sanctions against employers for hiring illegal aliens²⁹⁸ or for discriminating against individuals (other than illegal aliens) because of their national origin.²⁹⁹ The Department currently has four ALJs who are also lodged in EOIR under the managerial supervision of a Chief Administrative Hearing Officer (CAHO) (there is no Chief ALJ).³⁰⁰

The newest group of adjudicators are "asylum officers" assigned to adjudicate all asylum claims under regulations promulgated in July 1990.³⁰¹ There are about 120 asylum officers located in 7 asylum offices.³⁰² INS has received authorization to hire about 100 more officers.³⁰³ These officers are not in EOIR; they report to an INS Branch Chief within INS' Central Office of Refugees, Asylum and Parole,³⁰⁴ who, in turn, reports to the Deputy Commissioner.

The three types of immigration adjudicators at the Department of Justice form a microcosm of the U.S. government's administrative adjudicators: ALJs, non-ALJ semi-specialized adjudicators, and highly specialized non-ALJ adjudicators.

a. The DOJ ALJs

Other than two ALJs in the DOJ's Drug Enforcement Administration, the only ALJs in the DOJ are the four assigned to hear employer sanction, discrimination, and document fraud cases in the EOIR.³⁰⁵

The most unusual facet of the ALJ's role in these cases is the extra degree of finality given to their decisions. In employer sanction and document fraud cases, there is no statutory right to appeal the decision of the ALJ. Rather, the

²⁹⁸IRCA §101, adding section 274A to the Immigration and Nationality Act, codified at 8 U.S.C. §1324a (1988).

²⁹⁹IRCA §102, adding section 274B to the Immigration and Nationality Act, codified at 8 U.S.C. §1324b (1988). The Immigration Act of 1990 added a new category of ALJ hearings—in cases involving allegations of document fraud, section 274C, codified at 8 U.S.C. §1324c.

³⁰⁰The role of the CAHO is described at 28 CFR §68.2 (1991).

³⁰¹55 Fed. Reg. 30680 (July 27, 1990) codified at 8 CFR Part 208 (1991).

³⁰²See "INS Opens Asylum Offices Amid Large Backlogs, Charges of Inadequate Funding," 68 *Interpreter Releases*, April 8, 1991 401-403 (April 8, 1991).

³⁰³[Published reports.]

³⁰⁴See 8 CFR §308.1(b).

³⁰⁵The Department of Justice conducts very few formal adjudications. See 28 CFR §24.103 (1991), listing the Department's formal adjudicatory proceedings covered by the Equal Access to Justice Act.

Act authorizes the Attorney General to "review" the decision within 30 days.³⁰⁶ This authority has been delegated to the Chief Administrative Hearing Officer.³⁰⁷ The Department's regulations provide that any party may, within 5 days of the ALJ's decision file a written request for review by the CAHO.³⁰⁸ The CAHO then has 30 days to issue an order that adopts, affirms, modifies, or vacates the ALJ's decision, which becomes the Attorney General's final order.³⁰⁹ In discrimination cases, there is no administrative review--the ALJ's decision is final agency action.³¹⁰

The role of the CAHO, both in managing the ALJs and reviewing ALJ decisions is an interesting one, perhaps worth further study.

b. Immigration Judges

The IJs adjudicate the bulk of immigration decisions for the U.S. government.³¹¹ The three principal types of immigration proceedings conducted by IJs are deportation hearings, board redetermination hearings, and exclusion hearings.³¹² Occasional hearings involving rescission of permanent residence status, prevention of departure of an alien from the United States, or disciplinary proceedings against attorneys and other representatives, are also held.

The three main types of hearings are as follows.³¹³

(i) Deportation Hearing

A deportation case usually arises when INS alleges that a respondent entered the country illegally by crossing the border without being inspected by an immigration officer. Deportation cases also occur when INS alleges that a

³⁰⁶8 U.S.C. §1324a(e)(6) (1988). For a good description of the process see Schmidt, "Establishing an Employer Compliance Program Under IRCA" in *Immigration Briefings* No. 88-3 (1988) (Federal Publications, Inc.).

³⁰⁷28 CFR §68.51 (1991).

³⁰⁸*Id.*

³⁰⁹*Id.*

³¹⁰8 U.S.C. §1324b(i)(1) (1988); 28 CFR §68.52(2)(b) (1991).

³¹¹Not counting, of course, the many informal decisions, made by, among others, State Department consular officers on visa applications. See Nafziger, Report to the Administrative Conference of the U.S., 1989 ACUS 587, reprinted as *Review of Visa Denials By Consular Officials*, 66 Wash. L. Rev. 1 (1991).

³¹²This comment and much of following discussion derived from a letter from William R. Robie, Chief Immigration Judge to Jeffrey S. Lubbers, Research Director, ACUS, October 12, 1989, responding to non-ALJ adjudication survey.

³¹³Slightly edited quotation from Robie letter (page 1 and 2 of attachment), *supra* note 312.

respondent entered the country legally with a visa but then violated one or more conditions of the visa. For example, a visitor who comes to the United States for a specified time period but stays in the country beyond the visa expiration date violates a condition of the visa and is subject to deportation proceedings.

When INS becomes aware of a respondent whom it believes to be deportable, it issues a charging document called an Order to Show Cause (OSC). A deportation proceeding actually begins when the OSC is filed with an IJ office. In such proceedings, the government, represented by INS, must prove that a respondent is deportable for the reasons stated in the OSC.

(ii) Bond Redetermination Hearing

The INS may detain a respondent who is in a deportation proceeding and condition his/her release from custody upon the payment of a bond to ensure the respondent's appearance at the hearing. When this occurs, the respondent has the right to ask an Immigration Judge to redetermine the bond. In a bond redetermination hearing, the IJ can raise, lower, or maintain the amount of the bond, or eliminate it altogether, or change any of the conditions over which the IJ has authority. The bond redetermination hearing is completely separate from the deportation hearing. It is not recorded and has no bearing on the existing deportation proceeding.

(iii) Exclusion Hearing

An exclusion case involves a person who tries to enter the United States but is stopped at the point of entry because the INS finds the person to be inadmissible. This situation can occur, for example, when an INS officer believes the applicant's entry papers are fraudulent.

To place an applicant for admission to the United States in exclusion proceedings, the INS issues a charging document referred to as an "I-122" and files it with an IJ. Unlike in deportation proceedings, the INS has sole jurisdiction over the custody status of an applicant in exclusion proceedings. The INS District Director can either detain the applicant or parole the applicant into the country (i.e., release him/her from detention and allow him/her to remain free until the hearing is completed). In either case, the applicant technically has not entered the country. In the course of the exclusion proceedings, the burden of proof is on the applicant to prove admissibility to the United States.

The caseload of the Office of Immigration Judges is quite high. In fiscal year 1989, the Office received 152,370 cases (120,000 deportation cases,

14,000 exclusion cases and 18,000 bond redetermination cases).³¹⁴ According to the Chief Immigration Judge, the intake varies with changes in immigration law and court cases requiring readjudication of certain nationalities' cases, but he estimates that about 135,000 cases are decided each year by his corps.³¹⁵

IJ positions are classified as Attorney Examiners in the 905 civil service series.³¹⁶ They are appointed by the Attorney General with the recommendation of the Chief Immigration Judge. IJs are GS-15 positions with the exception of the Chief who is in the Senior Executive Service. However, legislation has recently been introduced to raise the pay of IJs to that equivalent to,³¹⁷ or just below,³¹⁸ that of ALJs.

IJs are required to be members of the bar in good standing of any state or the District of Columbia. They must have 6-1/2 years of professional legal experience and may be required to have various "selective placement factors."³¹⁹ These factors and the IJ hiring process are described in Chapter VI(D), below.

The Chief Immigration Judge indicates that IJs are "not subject to performance appraisal," nor have quantitative case-processing goals been established.³²⁰ However, the Chief does approve master and individual calendars of hearings, which allows him to monitor workloads and to give appropriate comments to the judges.³²¹ In terms of qualitative review, the only such review is the substantive, appellate review exercised by the Board of Immigration Appeals.³²²

c. Asylum Officers

The Refugee Act of 1980 created a statutory right of asylum for aliens in the United States or seeking to enter the United States who could demonstrate

³¹⁴Robie letter (page 4 of attachment).

³¹⁵Interview with Chief Judge Robie, February, 1992.

³¹⁶Robie letter (page 4 of attachment).

³¹⁷H.R. 2630, 102nd Cong. 1st Sess., June 12, 1991 (by Mr. Ortiz). (IJs shall be treated "in the same manner as ALJs" for purposes of compensation.)

³¹⁸S. 2099 (*supra* note 294) which would place IJs into six pay levels (IJ-1 to IJ-6) tied to a percentage of level 5 of the SES pay schedule. This would be just below the pay of ALJs who are tied to level IV of the Executive Schedule.

³¹⁹Robie letter, *supra* note 312, at page 5 of attachment.

³²⁰*Id.* at page 6 of attachment.

³²¹*Id.*

³²²*Id.*

a "well-founded fear of persecution. . . on account of race, religion, national origin, membership in a particular social group or political opinion."³²³

To implement the Refugee Act, the Attorney General in July 1990 promulgated regulations for asylum adjudication.³²⁴ Under these procedures, applicants who apply prior to the initiation of deportation or exclusion proceedings file with the INS and have the claim heard by an asylum officer. Applicants who file for asylum in the course of deportation or exclusion proceedings will continue to have the claim heard by the IJ. Prior to the establishment of this separate group of Asylum Officers, pre-IJ claims of asylum were heard by examiners in District Directors' offices.

Following the 1990 Act, the INS moved quickly to hire and train about 120 full- and part-time officers. However, a large backlog built up. As of April 1991 the backlog was 108,500 cases.³²⁵

Asylum officers are classified as GS-9, 11 and 12³²⁶ and only a few are lawyers. The procedures for the "interview" conducted by the Asylum Officers are set out in 8 CFR §208.9 (1991). The proceeding is nonadversarial, although the applicant may be represented by counsel or another representative and may submit affidavits. Presentation of oral statements and oral testimony of witnesses is at the discretion of the officer. It is essentially an inquisitorial proceeding.

2. Security Clearance Adjudications

Reviews of denials of security clearances for Department of Defense contractors are heard by non-ALJ adjudicators in the Directorate for Industrial Security Clearance Review (DISCR), which is part of the DOD.³²⁷ Cases come to DISCR when the Defense Industrial Security Clearance Office cannot affirmatively determine that it is clearly consistent with the national interest to grant or continue a security clearance for access to classified information by individuals employed by certain federal contractors. All individuals who will have access to classified material in connection with their work must have the

³²³8 U.S.C. §1101(a)(42) (1988). See generally, Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990); 1989 ACUS 233.

³²⁴See note 301, *supra*. The regulations followed the basic thrust of ACUS Recommendation 89-4, "Asylum Adjudication Procedures," 1 CFR §305.89-4 (1991) based on the Martin study, *supra* note 323.

³²⁵See *Interpreter Releases* (April 18, 1991) *supra*, note 302.

³²⁶See "INS Recruits Asylum Officers," 67 *Interpreter Releases* 1159 (October 15, 1990).

³²⁷Much of the information in this section comes from a letter response to a 1989 Conference survey of non-ALJ hearing programs in the federal government. Letter (with attachments) from Leon J. Schacter, Chief Hearing Examiner, DISCR, to Jeffrey S. Lubbers, Research Director, ACUS, July 13, 1989.

appropriate security clearance. An individual whose clearance is not granted or continued may request a hearing by DISCR.

DISCR consists of eight hearing examiners and a Chief Hearing Officer, a number of "prosecuting" attorneys, and a three-member appeal board, all under the control of a Director. All are attorneys, appointed by the General Counsel of DOD. Hearing examiners do not also serve as prosecuting attorneys.

The procedures used in DISCR's approximately 650 cases per year are relatively formal, but are not APA processes. The process derives from Executive Order 10865,³²⁸ which provides some basic procedural protections. Among those protections are provision to the applicant of (1) a written statement of the reasons why a clearance may be revoked or denied; (2) an opportunity to respond to that statement in writing; (3) the right to assistance of counsel; (4) an opportunity to submit direct and rebuttal evidence and, with some exceptions, to cross-examine adverse witnesses, either orally or through written interrogatories; and (5) a written decision stating the findings on each of the allegations.³²⁹ The relevant DOD regulations state that the presiding officer's functions are to be exercised impartially, and provide somewhat more detailed procedures, including appeals from a presiding officer to an appeal board.³³⁰

Hearing examiners are grade 15 attorneys, on the general merit schedule. They are subject to performance appraisals by the Chief Hearing Examiner, who, in turn, is reviewed by the Director of DISCR. Among the factors considered in performance appraisals are the numbers and complexity of completed cases, and supervisory review of decisions after issuance, including consideration of the proper application of DOD policies and legal principles. Among the other "critical elements" are "assur[ing] that proceedings are fair and impartial," "assur[ing] quality determinations," and "assur[ing] timeliness and productivity."³³¹

There has been some criticism of the review process from former DISCR presiding officers and concerns raised relating to the level of independence and

³²⁸25 Fed. Reg. 1583 (Feb. 1960).

³²⁹*Id.* at ¶ 3.

³³⁰32 CFR Part 155 (1991). See also DOD Directive 5220.6 (August 12, 1985). These rules were recently amended. 57 Fed. Reg. 5383 (Feb. 14, 1992).

³³¹May 19, 1990, letter to Hon. Don Edwards, Chair, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, and Hon. Gerry Sikorski, Chair, Subcommittee on Civil Service, Committee on Post Office and Civil Service, U.S. House of Representatives from Leon J. Schachter, Director, DISCR.

separation of function in a program that adjudicates such serious interests.³³² The House Civil Service Subcommittee of the Committee on Post Office and Civil Service is drafting legislation to modify the system.³³³

3. Merit Systems Protection Board (MSPB) Adjudications

The MSPB employs one of the larger groups of non-AJ adjudicators in the government.³³⁴ The Board employs 66 administrative judges³³⁵ in its 11 regional offices who preside over, and make initial decisions in, numerous types of personnel appeals involving federal employees.³³⁶ The MSPB also employs one administrative law judge one of whose important functions is to hear and initially decide actions brought by agencies against ALJs.³³⁷

Although AJ cases are not heard under the APA hearing provisions,³³⁸ the hearings are on-the-record, trial-type hearings essentially similar to those conducted under the APA.³³⁹

During fiscal year 1988, MSPB AJs held 1,278 hearings and issued 7,124 initial decisions.³⁴⁰ Initial decisions are subject to petitions for review to (or own-motion review by) the full Board, which may allow oral argument in its

³³²The American Bar Association has approved a resolution calling for the use of APA procedures in DISCR proceedings. See ABA House of Delegates Resolution 101/134 (August 1989).

³³³Discussion with subcommittee staff members.

³³⁴Much of the information in this section is derived from a letter response to a 1989 Conference survey of non-AJ hearing programs in the federal government. Letter (with attachment) from Mark Kelleher, Director of Regional Operations, MSPB to Jeffrey Lubbers, Research Director, ACUS, July 24, 1989.

³³⁵MSPB considers their "official title" to be "Attorney-Examiner, GS-905" and their "working title" to be "Administrative Judge." Letter, *supra* note 334 (attachment p.2).

³³⁶The different types of appeals are listed in 5 CFR §1201.3 (1991). See also 5 U.S.C. 7701(a)(1) (1988).

³³⁷Pursuant to 5 U.S.C. §7521 (1988); 5 CFR 1201.131 (1991).

³³⁸5 U.S.C. §554(a)(2) exempts cases involving "the selection or tenure of an employee, except (an ALJ)" from the hearing provisions of the APA, thus permitting MSPB to use non-AJ. Under 5 U.S.C. §7701(b), the MSPB is empowered to assign such hearings to itself, an ALJ or an employee designated by the Board to hear such cases. In removal cases, that employee must be "experienced in hearing appeals." *Id.*

³³⁹See Rules of Practices and Procedures, 5 CFR Part 1201 (1991) and 5 CFR Part 1209 (1991) (whistleblower cases).

³⁴⁰Letter, *supra* note 334 (attachment p.1). See also Lunenburg, *The Federal Personnel Complaints, Appeal and Grievance Systems: A Structured Overview and Proposed Revisions* 78 Ky. L. J. 1, 62-67 (1989-90).

discretion.³⁴¹ MSPB decisions are reported in the West United States Merit Systems Protection Board Digest.³⁴²

MSPB AJs are employed as GS-13 to GS-15 attorneys in accordance with schedule A appointment authority.³⁴³ AJ performance is also subject to review. The Regional Director (Chief Administrative Judge) completes an annual performance appraisal for each AJ.³⁴⁴ As part of this review, each AJ is required to adjudicate a minimum number of appeals per year. As of 1989, minimally satisfactory performance was 80-84 cases per year; fully satisfactory was 85-100; and exceeds was 101-120.³⁴⁵ The Regional Director also is responsible for ensuring that all decisions undergo a quality review prior to issuance.³⁴⁶

In at least one litigated case, an MSPB AJ has been terminated due to unacceptable performance. The reviewing court upheld the firing and the legitimacy of the Board's quality review program.³⁴⁷

Regardless of the merits of this case, there has been some critical comment about the lack of independence of Board AJs³⁴⁸ and legislation is pending to afford AJs most of the protection of ALJs without making them ALJs.³⁴⁹

³⁴¹*Id.*

³⁴²*Id.*

³⁴³*Id.* (attachment p.2). The letter goes on to say that "the methods used for selecting applicants may include recruitment from a Vacancy Announcement, college recruitment, reassignment of in-house attorneys, and inquiries from unsolicited outside applicants." *Id.* In a subsequent letter, the Board explained that it had erroneously mentioned "college recruitment" and had intended to say law school recruitment. Letter from Mary L. Jennings, Acting General Counsel to Jeffrey Lubbers, September 3, 1992.

³⁴⁴*Id.*

³⁴⁵*Id.*

³⁴⁶*Id.* (attachment p.3).

³⁴⁷*Fuller v. United States of America*, (Mem. opinion, D.D.C. Civil Action No. 84-1699, December 19, 1985) (Gesell, J.), "Quality review subjected plaintiff's work to close analysis, disclosing serious deficiencies, particularly her lack of analytical ability and her inconsistencies in applying facts to precedents." (Memo. op. at p.6).

³⁴⁸*See, e.g.,* Lunenburg, *supra* note 340 at 117, n. 557. "The Board's administrative judges are currently excepted service attorneys serving at the will of the Board. Affording these officials the protections in terms of salary and tenure of administrative law judges is an additional possible change that might alter perceptions of the Board and ease the way for exclusive MSPB jurisdiction [in mixed cases, now shared with EEOC]."

³⁴⁹*See, H.R. 3879*, "The Merit Systems Protection Board Administrative Judges Protection Act of 1991" (by Mr. Gekas), 102nd Cong., 1st Sess. The bill would require cases to be assigned to AJs by rotation, prohibit them from performing inconsistent functions, entitle them to pay prescribed by OPM independent of agency rating, include them in the section 7521 disciplinary scheme used for ALJs and bar performance appraisals.

4. Use of Non-ALJ Decisionmakers in Civil Money Penalty Proceedings

In the last two decades, Congress has frequently replaced the traditional civil enforcement statutes that permitted agencies to collect civil money penalties only after federal district court trials with provisions authorizing "administrative imposition" of penalties involving ALJ adjudication.³⁵⁰ By 1986, there were over 200 such statutes.³⁵¹

Although virtually all the administratively-imposed civil money penalty processes involve the use of ALJs and formal hearing procedures, there are a small number of cases, in the environmental enforcement area, for which Congress has authorized the use of non-ALJ hearing officers, and non-APA hearing procedures, in the imposition of relatively small levels of money penalties.³⁵² Several of these programs are administered by EPA, although the Coast Guard and the Corps of Engineers also administer similar types of penalty programs. The non-ALJ penalty programs generally are limited to smaller penalties; more formal procedures are required as the level of penalties increases. In most cases, informal procedures may be used for penalties up to \$25,000, although in at least one case, the upper limit is \$125,000. Congress' expressed intent in enacting these programs was to make the penalty imposition process more flexible and shorter. In so doing, Congress was responding to agency (EPA) pleas that subjecting all civil penalties to APA procedures would lead to "lengthy and laborious" proceedings and "require creation of a new layer of bureaucracy" (presumably meaning additional ALJs).³⁵³

³⁵⁰In so doing, Congress was following ACUS Recommendation 72-6, "Civil Money Penalties as a Sanction," 1 CFR §305.72-6 (1992), reaffirmed by Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR §305.79-3 (1992).

³⁵¹See "Table of Statutes Authorizing Enforcement Through Administrative Imposition of Civil Penalties," at 200 Cong. Rec. 513009 (Daily ed. Sept. 19, 1986). The trend has, if anything, accelerated since 1986. See Fair Housing Act Amendments of 1988, Pub. L. No. 1-00-430, 102 Stat. 1619 (1988); Financial Institution Reform, Recovery and Enforcement Act, Pub. L. No. 101-73 (1989); Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429 (1990).

³⁵²The information in this section is derived from Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Administrative Penalties* (Draft Report to the Administrative Conference, November 3, 1992). Among the statutes authorizing such processes are the Clean Water Act, Safe Drinking Water Act, Oil Pollution Act, and "Superfund."

³⁵³*Superfund Reauthorization: Judicial and Legal Issues, Oversight Hearings before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee*, 99th Cong., 1st Sess. 64 (1985), as cited by Funk, *id.*, (draft report at 24).

Presiding officers are not ALJs, but in most of the programs, they are attorneys.³⁵⁴ There is no prohibition against their having involvement in other enforcement activities, and in fact most of them are experienced enforcement attorneys. However, they are not to have had prior connection to the particular case. They are evaluated by their supervisors, who are generally the regional counsels. The position of presiding officer is not currently a full-time responsibility in any of the agencies.

An opportunity for a hearing is available under all these non-APA civil penalty programs. Although the precise hearing procedures vary to some degree from one program to another, they all provide for notice to the defendant; in some cases interested members of the public are also allowed to participate. The presiding officers are responsible for conducting a hearing and issuing a recommended decision. The rules currently in force in EPA significantly limit the hearing officers' discretion, however.³⁵⁵ Certain limited "information exchange" is permitted, as is the right to introduce testimony as to liability, but testimony on the amount of penalty is circumscribed. Not only may a presiding officer not hear a challenge to final state or EPA action, he or she may not dismiss a complaint.

In the EPA program (and in the program administered by the Corps of Engineers), a presiding officer's recommended decision is sent to the Regional Administrator (or District Engineer) for final decision.³⁵⁶ There is no further administrative appeal.

Although it remains to be seen whether these non-APA procedures will withstand challenge, it is noteworthy that this movement away from ALJs is occurring in the enforcement area, an area traditionally associated with the expectation of substantial procedural protection.

³⁵⁴The Coast Guard "hearing officer" need not be an attorney. However, the hearing officer may not be involved in other enforcement activities.

³⁵⁵56 Fed. Reg. 29,995 (1991)(consolidated proposed rules to be field-tested for a year). Discretion is not so limited at the Corps or Coast Guard. See 33 CFR §326 (1991) (Corps of Engineers); 33 CFR Subpart 1.07 (1991) (Coast Guard).

³⁵⁶In the Coast Guard program, the "hearing officer" issues a final decision that may be appealed.

D. Benefit Adjudication: Social Security and Veterans' Claims

This section will briefly compare the benefit adjudication system at the Social Security Administration, which uses ALJs, with that at the Department of Veterans Affairs, which does not.³⁵⁷

1. The Social Security Administration

The Social Security Administration employs more than 850 ALJs, almost three-quarters of all of the ALJs in the federal government. These ALJs annually hear more than 250,000 cases involving eligibility for social security and certain disability benefits.

The adjudication process for these cases is generally as follows: Eligibility decisions are initially made by non-ALJ employees of the state disability determination services. An applicant whose claim for benefits is denied after reconsideration may appeal to an ALJ at the SSA. The hearing at SSA is a nonadversarial hearing in the sense that no one serves as an advocate for denial of the claim. About 80% of all claimants are represented by a lawyer or lay representative. The ALJ has the responsibility to ensure that the record is complete, as well as to make a decision on the claim. A dissatisfied claimant may appeal the ALJ's decision to the SSA Appeals Council, which hears appeals in three-member panels on a discretionary basis. The final agency decision is appealable to federal district court.

The extremely large numbers of cases, as well as the substantial number of ALJs making decisions, poses problems of consistency. SSA has also made a number of unsuccessful efforts to manage the workload of its ALJs.³⁵⁸

The history of SSA's use of ALJs is discussed in Chapter II.

2. The Department of Veterans Affairs

There is a disability decision system of comparable magnitude to SSA that does not employ ALJs. The Department of Veterans Affairs handles about 4.5 million claims annually. The agency initially decides these cases by using more than 1,600 nonlawyer deciders serving on rating boards of two or three persons in regional offices. This group is comparable to the state officials who initially decide SSA disability cases. Obviously, the latter are less susceptible to management control by SSA because they are not directly employed by the

³⁵⁷These procedures are set out in more detail at Chapter II(E)(2) (SSA) and II(E)(2) (DVA), *supra*.

³⁵⁸See discussion Chapter VI(E)(*infra*).

agency. Thus, the DVA disability system has the additional advantage of more control over the initial application stage.

Appeals from DVA initial decisions go to a regional office hearing officer who sits alone. There are about 42 such hearing officers throughout DVA. A law degree is not required to serve in this position. Appeals from the DVA regional offices go to the Board of Veterans Appeals (BVA), which sits in three-person panels (two GS-15 lawyers, one GS-15 medically trained official). These panels are designated as nonadversary in nature, although hearings are sometimes held.³⁵⁹ There are 66 BVA members and they render over 44,000 decisions annually.³⁶⁰ There is no judicial appeal on the merits from the BVA decisions, although the Court of Veterans Appeals has recently been installed as an Article I court of limited review.³⁶¹

3. Benefit Adjudication Process Comparisons

There are many comparisons and contrasts between SSA and DVA. First, they have in common a massive decision burden; second they must apply a complicated disability standard to myriad individual circumstances. They contrast in that the DVA deals with a designated portion of the public that Congress specifically wants to benefit, thus making it a more paternalistic system overall, whereas the SSA deals with the needs of the population as a whole. Another difference is that unlike social security claimants, veterans may be deemed partially disabled, thus limiting the incentive to appeal.

There is no easy way to decide whether one system renders "better" or more correct decisions than the other. Both have elaborate internal mechanisms for achieving fair and efficient decisions. The further corrective of judicial review has been available more expansively over SSA than DVA decisions, however. When ALJ decisions are reversed in significant number by the district courts,³⁶² a further control on decision quality exists that did not by definition apply to previously nonreviewable BVA decisions. BVA

³⁵⁹See 38 CFR §§3.102, 3.103 (1991).

³⁶⁰Statistics provided to author by DVA personnel, October 1991.

³⁶¹See 38 U.S.C. §§4051-52 (1988); Pub. L. No. 100-687, 102 Stat. 4105, Veterans' Judicial Review Act of 1988. See also, Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings*, 41 AD. L. REV. 365 (1989).

³⁶²Over the years the district courts have reversed/remanded substantial numbers of SSA decisions. For example, in 1984 and 1985 the reversal rate alone reached 50% of the cases brought to the district courts. By 1991, the reversal rate had fallen to around 20%. See Civil Actions Report SSA/OHA (Nov. 27, 1991).

decisions are currently reviewed by an Article I Court of Veterans Appeals, which has performed a quality control function since 1988.⁹⁸

As a practical matter one can only conclude that the two decision systems are different, not better or worse. BVA members are not ALJs (although they would like to be⁹⁹) and they sit in panels. This latter consideration is one that is worthy of further study. The advantage of panels is that they tend to decide by consensus and therefore are more likely to reach a more correct (or less extreme) result.¹⁰⁰ This should be even more true in circumstances where one of the three panelists is medically trained, since medical issues are central to the disability determination.¹⁰¹

A disadvantage of panels could be that they are more costly in terms of decision resources. The cost need not be triple since only one opinion is written and methods for achieving decisional efficiency are readily developed by the panelists.¹⁰² Moreover, if one takes a rough cut at the number of cases decided by the BVA versus individual ALJs at the Social Security Administration, the productivity issue seems to disappear. The 66 BVA members decide about 44,000 cases per year, an average of 666 cases per member annually (or 55 cases per BVA member monthly).¹⁰³ This total compares with the ALJ "suggested" monthly average of 31 cases.¹⁰⁴

⁹⁸Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988). See Stichman, *supra* note 361 (1989).

⁹⁹BVA members currently serve terms of 6 years and they have asked Congress to convert them to ALJs with lifetime tenure. See H.R. 3950, 102d Cong., 1st Sess. (1991).

¹⁰⁰In research done on SSA decisionmaking, regression analysis showed that reformulating ALJs in panels of three tended to cut off the tails of extreme grants or denials. See J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil & M. Carrow, *Social Security Hearings and Appeals* 21-27, 43-46 (1978).

¹⁰¹The Court of Veterans Appeals appears to have limited the significance of the medically trained BVA panel member by requiring panels to refute medical evidence only through consideration of other expert medical evidence and not through general conclusions reached by the panels and their medically trained members. See *Colvin v. Derwinski*, No. 90-196 U.S. Court of Veterans Appeals (March 8, 1991). This ruling could well encourage the DVA to discontinue the use of medical members on panels and instead utilize them as experts. Discussion by author with DVA officials. But there is no evidence that the removal of medically trained members from BVA panels would lead to better decisions; in fact, the presence of these decision experts can give credibility to the decision process that is lacking in the SSA program.

¹⁰²See Mashaw *et al*, *supra* note 365, at 43-45.

¹⁰³The BVA denies benefits in about 75 percent of the cases it reviews, a denial rate significantly higher than SSA-ALJs who deny only about 35 percent. See note 76 *supra*.

¹⁰⁴If one simply divides the number of ALJs assigned into the cases decided in 1990 (258,181 + 696) the average is approximately 371 cases per ALJ per year, or 30.9 per month. See SSA-OHA Key Work 10 and Indicators 1-2 (3Q 1991). If one recognizes, however, that many of the BVA cases involve appeals and not hearings, whereas all the SSA ALJ cases are at

This comparison of two similar decider schemes suggests several conclusions. If ALJs are not necessarily better or more efficient deciders than BVA members, what is their advantage in this context? When many similar cases have to be decided in circumstances where consistent outcomes are desirable, maximum independence of deciders may not be an institutional asset.³⁷⁰ It is at least arguable, in other words, that the great value of the ALJ--that of decisional independence--is diminished in a system where caseload management must be the critical variable. This does not mean of course that ALJ independence is without value. Indeed, the case for decider qualifications varies with the kind of case to be decided. ALJ independence can be a crucial ingredient to fair decisionmaking in circumstances where institutional pressure may affect outcomes on the individual case.

E. Adjudicating Claims Against the Government: Boards of Contract Appeals and the Claims Court

1. Background on Boards of Contract Appeals (especially ASBCA)

a. Purposes, Jurisdiction and Organization

Congress intended the Boards of Contract Appeals (BCAs) to serve as quasi-judicial bodies providing expeditious and inexpensive resolution of contract disputes. There are a dozen agency boards with about 80 administrative judges. The Armed Services Board of Contract Appeals (ASBCA) with 37 judges is the largest. BCAs provide an alternative forum to the United States Claims Court for contractors wishing to appeal final decisions rendered by agency contracting officers.

The BCA's jurisdiction is derived from the Contract Disputes Act (CDA) of 1978.³⁷¹ Under the CDA, BCAs can now hear breach of contract claims as

the hearing level then the discrepancy in caseload productivity may be understandable. The SSA also utilizes an appeals council that decides about 40,000 cases per year. See SSA/OHA Disability Filings and Appeals, FY 1990.

³⁷⁰This is of course a much debated issue. On one side are the representatives of claimants who believe fervently that judicial review of ALJ decisions is the best way to ensure correctness; on the other side is scholarly research that suggests an internally managed system is the best way to create overall norms of correctness or at least consistency. See J. Mashaw, *BUREAUCRATIC JUSTICE--MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983).

³⁷¹41 U.S.C. §§601-613.

well as those "arising under" a contract. Following the Federal Courts Improvement Act of 1982 and the Competition in Contracting Act of 1984, the Board now shares, for the most part, concurrent jurisdiction with the United States Claims Court. The Equal Access to Justice Act granted the BCAs jurisdiction to award attorneys fees; previously the Claims Court was the only forum in which such fees could be sought.

With one exception, the BCAs litigate only post-award contract disputes.³⁷² Bid protests, or award controversies, are generally litigated before the GAO, the Claims Court, and U.S. District Courts.

The ASBCA resolves disputes for the Defense Department and several other agencies, including the Agency for International Development, the Department of Health and Human Services, NATO and the State Department.

The Board consists of 37 administrative judges. There is one chair and three vice chairs. These positions are potentially successive 2-year terms. Appointment of the chair and vice chairs, according to the Charter, is made by the Under Secretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement. There are eleven divisions, each with a division head. There are no part-time AJs, but retired AJs are sometimes brought on to hear appeals; they can draw up decisions but cannot sign on to a decision.

The Board's Recorder and staff administer the docket and distribute the incoming correspondence and pleadings. Aside from the AJs, the only other attorneys providing legal assistance are four law clerks, the Recorder, Chief Counsel and three commissioners. There is also additional paralegal, secretary/legal staff assistant, and computer, docket and file support.

Previously, the AJs monitored their own cases and ensured that appeals either proceeded in an orderly and timely fashion or were removed from the docket with or without prejudice, as appropriate. This responsibility has been delegated to the commissioners, and AJs are able to spend more time processing, hearing, and deciding appeals.

b. Role of Under Secretary of Defense (Research and Engineering)

The Under Secretary, with the Assistant Secretaries of the Military Departments responsible for procurement, appoints the chair and vice chair of the Board. The same individuals must also approve all methods of procedure and rules and regulations for the preparation and presentation of appeals and issuance of opinions adopted by the ASBCA.

³⁷²The General Services Administration BCA does have jurisdiction over bid protests involving computer contract awards.

The ASBCA Charter states that the Board shall operate under general policies established or approved by the Under Secretary of Defense (Research and Engineering). The Chair is unaware of any specific policies that have any significant impact on the ASBCA. He stated that DOD leaves ASBCA alone.

c. Procedures Employed

There can be no jurisdiction for an appeal to the Board without a decision by the contracting officer. Either the government or the contractor can assert a claim, but only the contractor may appeal the contracting officer's decision to the Board. The appeal must be taken within 90 days from date of receipt to the decision or within 12 months if made to the Claims Court. Appeals are not bound by the contracting officer's findings and proceed *de novo*.

Notice to the ASBCA Board that an appeal is to be taken is all that is needed to docket the appeal. The contractor's complaint follows within 30 days, with the government's answer following within another 30 days. For claims above \$50,000, the contractor must certify that the claim is made in good faith, the supporting data are accurate and the amount requested accurately reflects the contract adjustment for which it believes the government is liable.³⁷³ Parties can elect to have an appeal decided upon the record, but if either party requests a hearing the Board will grant the request.

The contracting officer compiles an "appeals file" to which either party can add. Parties can contest the addition to the appeals file. Discovery can be made through interrogatories, depositions, requests for admissions, or other means. Parties are encouraged to engage in open discovery without significant board interaction. Administrative judges can compel discovery by exclusion of evidence and issuance of subpoenas.³⁷⁴ Although hearing procedures may appear informal, according to one commentator they "typically resemble practice in the Federal District Courts."³⁷⁵

The ASBCA Charter states that "[d]ecisions of the Board shall be by majority vote of the members of a division participating and the chair and a vice chair, unless the chair refers the appeal for decision by the senior deciding

³⁷³Contractors can elect an "accelerated" procedure for claims of \$50,000 and below. There is a 180-day limit within which the Board must render a decision. Claims of \$10,000 and below can follow an "expedited" procedure with a 120-day limit. See ASBCA, Rule 12.

³⁷⁴The Board cannot issue a contempt order. According to Rule 21 "in the case of contumacy or refusal to obey a subpoena...the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board...to give testimony or produce evidence or both." Failure to obey the order will be punishable by the Court.

³⁷⁵See Steven Schooner, *Boards of Contract Appeals Disputes Procedures* 3-43 (1989) (unpublished L.L.M. thesis, George Washington University).

group.³⁷⁶ The senior deciding group consists of division heads and the chair and vice chair.³⁷⁷

The Chair does not participate in appeals.³⁷⁸ One of the vice chairs sits in the Chair's place, but the Chair can appoint himself if necessary.

d. Appeals from ASBCA Decisions

A contractor may appeal a decision from the Claims Court or a board to the U.S. Court of Appeals for the Federal Circuit. The CDA permits the government to appeal adverse board decisions as well as adverse Claims Court decisions. The standard of review for board decisions is based on substantial evidence, while for Claims Court decisions it is a "clearly erroneous" standard. These standards for review reflect the traditional distinction between administrative and judicial review standards and are not significantly different in practical effect.³⁷⁹

Statistics regarding appeals to the Federal Circuit from the latest year available (fiscal year 1987) show that of 44 appeals disposed of, 21 were affirmed, 10 reversed, 2 vacated and 10 dismissed.³⁸⁰ If dismissals are equated with affirmances this amounts to an overall affirmance rate of 75%.

e. Statutory Basis for the Appointment of Administrative Judges and Hearing Examiners

Board administrative judges were created by the CDA, under Title 41 of the U. S. Code, not under Title 5. However, CDA Section 607(b) states that members of agency boards (AJs) "shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to Section 3105 of Title 5, with an additional requirement that such members shall have

³⁷⁶See Charter paragraph 4.

³⁷⁷Schooner refers to a study that prompted the removal of the ASBCA's Chair from participation in all board decisions and use of three-judge rather than five-judge decisions. Schooner p. 5-15.

³⁷⁸Interview on January 15, 1992.

³⁷⁹See discussion in Section VI *infra*.

³⁸⁰Statistics provided by ASBCA Chair Williams. Chair Williams stated that the fact that a vice chair participates in every appeal makes for a considerable degree of accuracy and consistency in Board decisions. He felt this was much preferable to the single judge decisions of the Claims Court. However, he could not say this difference was reflected in a lower reversal rate for ASBCA by the Appeals Court for the Federal Circuit. He believes that because of the wide jurisdiction of the Federal Circuit the judges have little experience in the area of contract disputes; he stated that several years ago the ASBCA did exhibit a better rate than the Claims Court, but added that the numbers could easily change because of the lack of contract experience.

had not fewer than five years experience in public contract law." Board AJs are contract specialists, ALJs are not. AJs are not subject to reassignment by the Office of Personnel Management.³⁸¹ Board AJs are in a separate pay classification that provides for salaries that are slightly higher than the pay of comparable ALJs.³⁸²

According to the Charter "[i]t shall be the duty and obligation of the members of the [ASBCA] to decide appeals on the record of the appeal to the best of their knowledge and ability in accordance with the law and regulation pertinent thereto."³⁸³

Hearing examiners are also used by some boards to "conduct hearings, accept or exclude evidence, render or draft decisions, and interact with the litigants."³⁸⁴ Section II(c) of the Preface to the ASBCA Rules state that a "[h]earing may be held by a designated member (Administrative Judge), or by a duly authorized examiner." The ASBCA uses them infrequently.³⁸⁵

The ASBCA does not now employ full-time hearing examiners. They are used very rarely (the Chair estimates six cases a year) and only on an ad hoc basis. The three commissioners and, occasionally, the Chief Counsel may be called upon to act as hearing examiners.³⁸⁶

f. Independence of BCA Administrative Judges

According to the ASBCA Charter "the Board will be serviced by the Department of the Army for administrative support for its operations as required." This support includes budgeting, funding, fiscal control, manpower control and utilization, personnel administration, security administration,

³⁸¹See Schooner, p. 1-28. The selection process for ASBCA Administrative Judges is fully described in Chapter V (D).

³⁸²See 5 U.S.C.A. §5372a(b) (1992). This pay schedule, enacted in 1990 (Pub. L. No. 101-509) at the same time as the new ALJ pay schedule, provides that rank and file members of BCAs are paid 94% of level IV of the Executive Schedule. Nonmanagement ALJs are paid from 65-90% of level IV, depending on seniority.

³⁸³Schooner states that "[b]oard judges often gain their experience as government counsel representing the agency before a board. The percentage of individuals leaving private practice to become members of BCAs remains small. Schooner also refers to a "major league/farm team" relationship between large and small boards in which AJs serve apprenticeships with smaller boards applying for positions at the larger boards. Schooner, p. 5-17.

³⁸⁴Schooner, p. 1-30.

³⁸⁵The Chair "appoints hearing examiners only to the extent that they will preside over hearings," typically "where the dispute presents routine legal and evidentiary issues and does not impose a monetary limit on the amount in dispute which can be heard by an appointed examiner." Schooner, p. 1-32.

³⁸⁶Interview dated January 15, 1992.

supplies, and other administrative services. The Departments of the Army, Navy, Air Force and the Office of the Secretary of Defense will participate in financing the Board's operations on an equal basis. Requests are made by the Board as the need arises and considered by the Army. The Chair stated that no significant influence could be exerted on the Board through these purely administrative services.³⁸⁷

The Charter also specifies that the chair of the Board will furnish the Secretary of Defense and the Secretaries of the Military Departments an annual accounting of the Board's transactions and proceedings for the preceding fiscal year. Quarterly reports of appeals received, cases heard, opinions rendered, pending matters and other information are submitted to the Under Secretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement. The Chair was unaware of what use these reports were put to, but speculated that they were a management tool, used to evaluate the efficiency of the Board and the need for any changes in rules or regulations.

While contracting officers render decisions that the contractor appeals, the procuring agency or military department provides the legal personnel to litigate the appeal. Paragraph 5 of the ASBCA Charter limits AJ exposure to government trial attorneys, stating "it shall not be necessary for the Board, unless it otherwise desires, to communicate with more than one trial attorney in each of the departments or agencies concerning the preparation and presentation of the appeals and the obtaining of all records deemed by the Board to be pertinent thereto."

Communications between litigants and the Board are dealt with in ASBCA Rule 34. It prohibits *ex parte* communications regarding any matter at issue in an appeal but does not exclude *ex parte* communications concerning the Board's administrative functions or procedures.

2. Background on the United States Claims Court

The United States Claims Court, an Article I court, was created to succeed the U.S. Court of Claims in 1982 by the Federal Courts Improvement Act.³⁸⁸ The Claims Court consists of 16 judges appointed by the President, with the advice and consent of the Senate.³⁸⁹ Each judge of the Claims Court is appointed for a term of 15 years, and may be reappointed. Judges on the

³⁸⁷*Id.*

³⁸⁸Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified throughout numerous sections of the United States Code). The Claims Court can trace its origin to that of the Court of Claims, which had been established over 100 years before. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

³⁸⁹28 U.S.C. 171(e).

Claims Court must be younger than 70. Judges may be removed during the term for which they are appointed only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.³⁹⁰

The Court's judicial power with respect to the cases before it, except congressional references cases, is exercised by a single judge.³⁹¹

The judge presiding over the case has full authority to dispose of the case. The decisions of the Court of Appeals for the Federal Circuit and those of its predecessor, the Court of Claims, are binding upon the Claims Court. Trials are conducted in accordance with the Federal Rules of Evidence, but are not required to follow the Federal Rules of Civil Procedure.³⁹²

The Claims Court's jurisdiction primarily arises under the Tucker Act.³⁹³ Under that Act, the Claims Court's jurisdiction is limited to suits for claims of money against the government. Suits for money may fall under one of two forms: (1) plaintiff is seeking the return of funds mistakenly paid to the government; or (2) plaintiff is seeking payment of money that he or she contends the government owes and that the government refuses to pay.³⁹⁴ In addition, the Claims Court possesses jurisdiction over any counterclaim or setoff asserted by the United States, not limited to those arising from the same transaction or to a claim that would fall under the Tucker Act.³⁹⁵ The government is not limited by any statute of limitations.

³⁹⁰See 28 U.S.C. 171, 172(a), 176(a), 178(b).

³⁹¹28 U.S.C. 174. Cases filed in the Claims Court are randomly assigned to a judge by the Clerk of the Court, with no consideration given to the subject matter of the case and the particular expertise of the judge. RUSCC 77(f). Exceptions are made for related cases, which are assigned to the judge who was assigned the earliest case. RUSCC 77(f).

³⁹²28 U.S.C. §§2503(b), 2505. The Court adopted rules in October 1, 1982, which follow the Federal Rules of Civil Procedure but reflect the differences in jurisdiction. Miller, *The New United States Claims Court*, 32 CLEVELAND ST. L. REV. 7, 15 (1983-84).

³⁹³See 28 U.S.C. §1491.

³⁹⁴Cohen, *Claims for Money in the Claims Court*, 40 CATHOLIC U. L. REV. 533, 534 (1991). The Tucker Act itself does not give rise to a substantive right to recover money from the government; instead, that right must be found in some other source of law, such as the Constitution, a statute, a regulation, or a contract with the government. *United States v. Mitchell*, 463 U.S. 202, 216 (1983).

³⁹⁵See *Continental Management, Inc. v. United States*, 208 Cl. Ct. 501, 527 F.2d 613 (1975).

The caseload of the Claims Court since its inception is as follows:³⁹⁶

	<u>FILINGS</u>	<u>DISPOSITIONS</u>	<u>PENDING</u>
FY 83	779	797	1778
FY 84	672	829	1621
FY 85	774	774	1621
FY 86	813	669	1765
FY 87	815	669	1911
FY 88	763	764	1910
FY 89	717	691	1936
FY 90	787	793	1933
FY 91	732	724	1964

Government contract cases as a percentage of filings are as follows:

	<u>FILINGS</u>	<u>DISPOSITIONS</u>	<u>PENDING</u>
	% of total filings	% of total dispositions	% of total pending
FY 83	29	27	26
FY 84	36	32	27
FY 85	39	32	31
FY 86	44	37	34
FY 87	42	37	36
FY 88	49	37	41
FY 89	47	45	42
FY 90	43	45	41
FY 91	48	45	42

3. A Comparison of the Independence of BCA AJs and Court of Claims Judges

A natural assumption might be that the judges of the Claims Court exercise more independence than administrative judges appointed to agency boards.³⁹⁷

³⁹⁶This chart excludes congressional reference cases.

³⁹⁷Stephen Schooner refers to criticism that smaller BCAs exhibit an agency bias. The Agriculture Board in particular has drawn criticism for its inflexible and inconsistent position regarding the mailing address on notices of appeals (refusing to maintain jurisdiction over appeals mailed to contracting officer). Schooner, p. 1-15.

The General Accounting Office reviewed the ASBCA in an effort to determine whether bias existed.³⁹⁸ The ASBCA and General Services Administration disputed the GAO report's conclusion that legislation would be needed to protect ASBCA judges from removal by DOD.³⁹⁹ The GAO report was referred to by the Ninth Circuit in *United States v. General Dynamics Corporation*,⁴⁰⁰ in reversing a district court stay of a criminal prosecution of a defense contractor pending a referral under the primary jurisdiction doctrine, to the ASBCA for interpretation of the contract upon which the criminal charges hinged.

The Appeals Court stated that the district court failed to note that the "ASBCA is intended to be independent of the Department of Defense."⁴⁰¹ For several reasons, the court decided, the CDA itself "forecloses any argument that Congress, in drafting the CDA, created a statute that grants regulatory authority to the boards of contract appeals or requires them to have primary jurisdiction over issues of contract interpretation arising in criminal litigation."⁴⁰² Thus, the courts viewed the BCA as having a narrower scope of authority than other administrative entities such as independent agencies.⁴⁰³

³⁹⁸*The Armed Services Board of Contract Appeals Has Operated Independently.* GAO/NSIAD-85-102, B-198620 (23 Sept. 1985). See Schooner, p. 1-16. GAO found that although the Board receives funding from the Army, Navy, Air Force, and the Defense Logistics Agency, DOD exercised no centralized control over the Board's activities. GAO concluded that DOD had sufficiently divided oversight responsibility for the Board among its officials and agencies so that any attempt to apply pressure or impair the Board's independence would probably require concerted effort of several individuals within the Department of Defense. The private bar agreed that the Board decides disputes independent of external pressure. GAO recommended that the Office of Personnel Management should select, appoint, and protect judges from removal in the same manner as ALJs. Although various bills have been introduced to implement these suggestions, no legislation has resulted.

³⁹⁹According to the Federal Contracts Report (Vol. 44, No. 17, p. 799, BNA Inc., 10/28/85).

[I]they contended that the Contract Disputes Act authorizes the Office of Personnel Management to implement a system to protect ASBCA members. OPM, however, maintains that because board members occupy attorney positions, they may be removed from their posts without a hearing before the Merit Systems Protection Board. Since a "lack of clarity" exists regarding removal provisions, GAO stood by its conclusion that further legislation is necessary if ASBCA members are to be insulated from agency control like administrative law judges.

⁴⁰⁰828 F.2d 1356 (9th Cir. 1987).

⁴⁰¹828 F.2d 1364.

⁴⁰²828 F.2d 1364.

⁴⁰³See *United States v. General Dynamics Corporation*, 828 F.2d 1356, 1365 (9th Cir. 1987).

Perhaps due to criticism from entities like GAO and to some extent the courts, the boards have formalized their procedures in an effort to make their AJs more independent. If one judges by the popularity of the ASBCA versus the Claims Court there seems to be little reason to disturb the present arrangement.⁴⁰⁴ Litigants seem to favor BCA AJs for their expertise in contracts litigation. By contrast, Claims Court judges need not have significant experience in contract law as a prerequisite to appointment to the bench, and they must concentrate on a greater variety of disciplines due to the wider jurisdiction of the Court. Administrative judges must have 5 years of government contracts experience and they continue to specialize in such matters once on the Board. The evidence seems to suggest that attorneys who specialize in government contracts prefer to litigate before the boards while attorneys that do not specialize prefer the Claims Court.

Another distinction, which is reminiscent of the earlier discussion comparing VA and SSA decisionmaking,⁴⁰⁵ is that while Claims Court decisions are issued by one judge, board decisions (other than expedited decisions that have no precedential effect) are collegial. These collegial decisions by contract specialists are said to lead to greater consistency and fewer surprises.⁴⁰⁶

The BCA - Court of Claims judge comparison reveals a strong preference for specialized administrative judges rather than generalist Article I judges by those most familiar with the process. This preference does not mean of course that ALJs, who can be similarly specialized by adjustments in the selection and appointment process, would not be preferable on the independence scale to the currently employed AJs. This seems to be the conclusion of GAO, which recommended that OPM administer the appointment process for BCA AJs--a result that would bring those deciders much closer to their counterpart ALJs. If the ALJ selection process can be reformed to meet the needs of entities like ASBCA there seems to be little reason to continue the distinction between AJs and ALJs in the BCA process. The virtues of enhanced independence and sustained specialization are achievable and desirable.

⁴⁰⁴Schooner refers to an American Bar Association study that found that "actions filed in the Claims Court represented a small fraction of the total numbers of appeals filed in the contract appeals boards during the same period...the ASBCA alone docketed over five times as many appeals as the Claims Court during the period studied." Schooner, p. 1-9.

⁴⁰⁵See Chapter III (D), *supra*.

⁴⁰⁶See Schooner, p. 1-10.

IV. Empirical Study of the Roles and Attitudes of the Federal Administrative Judiciary

As discussed, administrative adjudicators in the federal system represent a wide range of formalized status and preside over adjudications of varying levels of judicialization. The formal break comes between ALJs and other adjudicators, lumped here under the term administrative judges (AJs). The basic difference is that ALJs are formally protected by the APA whereas other adjudicators are formally still part of the agency staff. We reviewed and compiled data on work environments and attitudes of both types of adjudicators so our recommendations reflect some understanding of both views.

A. Methodology

Of the many studies of ALJs, we found four empirical studies particularly helpful. Interestingly, each was undertaken at about the same time--the late 1970s or early 1980s. While each study is somewhat dated, we believe their observations are still valuable. We also conducted our own study in an effort to compare current perceptions with many of those uncovered in the earlier studies.

The most useful study was conducted by Paula Phillips Burger, entitled "Judges in Search of a Court: Characteristics, Functions, and Perceptions of Federal Administrative Law Judges." It is the result of a Ph.D. dissertation, but was undertaken with the cooperation of the Administrative Conference. Published in 1984, the data were collected in a survey conducted in 1978. Questionnaires were sent to 839 ALJs, and about 50% (427) responded. This study is referred to as the "Burger Study."

Another useful study, entitled "Validation of the Administrative Law Judge Examination," was conducted by Amiel Sharon for the Office of Personnel Management.⁴⁰⁷ It was completed in 1980. As its title suggests, its primary goal was to develop the basis for evaluation of the ALJ examination process. (The examination process, it must be noted, encompasses all the evaluative factors used to build the ALJ roster, including but not limited to written and oral examinations). Questionnaires were sent to 556 ALJs and 51% returned completed questionnaires.

⁴⁰⁷Office of Personnel Management, "Validation of the Administrative Law Judge Examination," Rep. 80-15 (June 1980).

This study focused on the functions ALJs performed. A draft list of 110 activities ALJs typically conducted was identified from Merritt Ruhlen's *Manual for Administrative Law Judges* (1974). Five panels of ALJs revised the list to identify the knowledge, skills, abilities and other personal characteristics that might be used to measure satisfactory performance. Three statistics were developed for 141 activities: (1) the percentage of ALJs who responded that they engaged in that activity; (2) the mean (average) perceived importance of the activity; and (3) the mean perceived level of judgment required to perform the activity. This study is referred to as the "Sharon Study."

A third study that contributed some useful information was undertaken by the General Accounting Office (GAO), entitled "Survey of Administrative Law Operations."⁴⁰⁸ It was completed and published in about 1978. The questionnaire was apparently sent to more than 800 ALJs, and 747 responses were received. This study is referred to as the "GAO Study."

The fourth study was conducted by Donna Price Cofer, and reported in a book, *Judges, Bureaucrats, and the Question of Independence: A Study of the Social Security Administration Hearing Process*. The questionnaire was administered in 1982 and the results published in 1985. As the title suggests, the study focused on the Social Security Administration. It is valuable nonetheless for our more general survey because of the dominance of SSA adjudicators among ALJs. At the time, about two-thirds of the ALJs were employed by the SSA and now SSA ALJs constitute about three-quarters of the ALJ pool. This information coordinates with our survey and the Burger study, which attempted, where significant, to distinguish the responses of SSA ALJs from those of non-SSA ALJs. This study is referred to as the "Cofer Study."

We endeavored to update much of the information gleaned from these four studies through our own survey. Our survey was based to a considerable extent on the Burger study. We benefitted from Dr. Burger's cooperation in recreating her survey for use in ours. However, we also sought information relevant to observations derived from the other studies. To these, we added some of our own questions. The results of our survey are referred to as the "1992 ALJ Survey."

In our survey we categorized ALJs along functional lines. We separated SSA ALJs from the other ALJs because SSA ALJs so dominate the pool.

We sent our survey to some 1,150 sitting ALJs and 610 (about 53%) responded. We compiled the data in three different forms. First are the responses from all ALJs surveyed {Appendix IV-A}. Second are the responses

⁴⁰⁸GAO, "Administrative Law Process: Better Management is Needed," FPCD-78-5 (May 15, 1978) at App. II.

from SSA ALJs [Appendix IV-B]. Third are the responses from non-SSA ALJs. [Appendix IV-C].

Those holding the position of ALJ are not the only adjudicators in the federal system. Recently John Frye completed a study of some 2700 non-ALJ adjudicators for the Conference.⁴⁰⁹ We included these other adjudicators in our study of the federal administrative judiciary and have relied on Frye's work to identify and describe the various non-ALJ adjudicators.

For convenience, we refer to all these non-ALJ adjudicators as "administrative judges" or "AJs." There are no studies of AJs similar to those of ALJs. Thus, to compare the information about work environment and attitudes that we had for ALJs, we surveyed a selected sample of AJs. To the extent possible we attempted to match the basic questions asked in the four previous ALJ surveys and our own. This study is referred to as the "AJ Survey" [Appendix IV-D].

For this survey, we selected six agencies that employ a large number of AJs.⁴¹⁰ AJs from these agencies provided 264 responses of 380 requests, for a response rate of 69%.

Below are observations derived from the ALJ studies and the AJ study. These observations are grouped according to the following headings: profile and motivation, habits of office, techniques for presiding, performance evaluation of the process, relationship with the agency hierarchy, and attitudes towards the job.

B. Profile and Motivation

1. Background and Training

Burger summarized her findings regarding the background and training of ALJs:

The academic records of ALJs offer no support to those who suggest that the best and the brightest move out of government service or cannot be enticed into it. In fact, the

⁴⁰⁹Frye Report, *supra* note 3.

⁴¹⁰The selected agencies were the Board of Veterans Appeals, Equal Employment Opportunity Commission, Merit Systems Protection Board, Board of Patent Appeals and Interferences, Executive Office of Immigration Review, Defense Department Armed Services Board of Contract Appeals, Trademark Trial and Appeal Board (Trademark), and Nuclear Regulatory Commission Atomic Safety and Licensing Board Panel.

academic records of the ALJs in the survey population are rather impressive.⁴¹¹

This conclusion is based on her findings that more than 90% of ALJs graduated in the top half of their law school class, about 60% in the top quarter, and some 30% graduated in the top 10%.⁴¹² About 20% of the ALJs surveyed were members of law review,⁴¹³ and some 20% graduated from one of 15 "prestige" law schools.⁴¹⁴ About the same percentages of federal district court judges are graduates from "prestige" law schools.⁴¹⁵

The 1992 ALJ Survey found that 93% of the current ALJs graduated in the top half of their class.⁴¹⁶ Slightly lower percentages than reported in the earlier studies graduated in the top 10% (about 23%) and the top quarter (about 48%). About 17% of the ALJs were members of law review.⁴¹⁷

By comparison, the AJ population surveyed has slightly less impressive credentials but still represent an impressive group. As with ALJs, almost 90% of the AJs graduated in the top half and almost 50% graduated in the top quarter of their class. They were slightly below the ALJs in the other categories. About 20% graduated in the top 10%;⁴¹⁸ more than 11% were members of law review;⁴¹⁹ and some 13% of the AJs graduated from the "prestige" law schools identified in the Burger Study.⁴²⁰ About a quarter of the AJs attended Washington area law schools, compared with about 15% of the ALJs.⁴²¹

⁴¹¹Burger at 109.

⁴¹²Burger at 110.

⁴¹³*Id.*

⁴¹⁴Burger at 107.

⁴¹⁵Burger at 108.

⁴¹⁶1992 ALJ Survey, response 36.

⁴¹⁷1992 ALJ Survey, response 37.

⁴¹⁸AJ Survey, response 3.

⁴¹⁹AJ Survey, response 4.

⁴²⁰AJ Survey, response 2. Although such lists are always disputable, for purposes of comparison, we used the Carter Report list relied on by Dr. Burger. Those 15 prestige law schools are: Chicago, Columbia, Cornell, Duke, Harvard, Michigan, Northwestern, NYU, Pennsylvania, Stanford, Texas, University of California at Berkeley, UCLA, Virginia, and Yale. Burger, chart at 107 n.c.

⁴²¹Compare AJ Survey, response 2 with Burger at 108.

The Burger Study found that about one-third of the ALJs undertook graduate training in addition to law school.⁴²² The 1992 ALJ Survey found that almost 30% had such training in addition to law school.⁴²³

About one-third of the AJs have had some graduate training.⁴²⁴ Only about 5% of the AJs did not attend law school and, hence, this training was usually in addition to law school.⁴²⁵

The Burger Study found that the typical ALJ was around 46 at the time of appointment and almost 70% had served less than 10 years, with only 7% serving more than 20 years.⁴²⁶ The GAO Study discovered that 59% were between 46 and 60, and 83% were between 41 and 65.⁴²⁷ Burger concluded that "our data showed little evidence of a group of gray eminence who had become calcified over long years of being on the bench."⁴²⁸ The 1992 ALJ Survey found that 94% of the current ALJs are over 45.⁴²⁹ These are spread fairly evenly among 5-year periods. Seventy percent have served less than 15 years.⁴³⁰

The average age of a sitting AJ is 49.⁴³¹ However, the range is fairly wide.⁴³² The youngest is 30 and the oldest is 74. About 60% of them are between 41 and 51.

The experience of the ALJ population is more diverse than many believe. The Burger Study found that the division between those coming from private practice and those coming from government was about equal.⁴³³ The GAO Study confirmed this diversity. It found that about one-third came from private practice and another third from an agency other than the one at which they served as an ALJ.⁴³⁴ The 1992 ALJ Survey found that 36% would classify their primary professional experience as private practice.⁴³⁵

⁴²²Burger at 111.

⁴²³1992 ALJ Survey, response 38. (Since almost all attended law school, this training was in addition to law.)

⁴²⁴AJ Survey, response 5.

⁴²⁵AJ Survey, response 2.

⁴²⁶Burger at 143.

⁴²⁷GAO Study, response #4.

⁴²⁸Burger at 143.

⁴²⁹1992 ALJ Survey, response 5.

⁴³⁰1992 ALJ Survey, response 2.

⁴³¹AJ Survey, response 7.

⁴³²Standard deviation of 8.7.

⁴³³Burger, chart at 132.

⁴³⁴GAO Study, response #18.

⁴³⁵1992 ALJ Survey, response 25a.

While a large percentage of ALJs came from other than the employing agency, Burger found that, when corrected for SSA, in which many ALJs came from other agencies, somewhat more than half came from the employing agency.⁴³⁶ Those coming out of private practice had rarely appeared before either the employing agency or other federal agencies.⁴³⁷

Regardless of their prior experience, Burger found that almost 80% of the ALJs viewed their experience as "general trial/litigation."⁴³⁸ The GAO Study also found that about 80% had prior trial experience.⁴³⁹ About three-quarters of the ALJs in that study considered trial experience very important with most of the remainder finding it somewhat important.⁴⁴⁰ The 1992 ALJ Survey found that almost 80% characterize their experience as litigation.⁴⁴¹ Almost all consider trial experience important, with 72% considering it very important.⁴⁴²

Our AJ Survey asked more open-ended questions about the nature of the AJs' primary professional experience. Still, the results indicate considerable diversity. The answers fall into 57 categories.⁴⁴³ Although some of these categories are quite similar, overall they demonstrate a significant range. The vast majority list legal experience. Other occupations represented are: engineer, scientist, physicist, university professor, and various types of medical professions. About 14% classify their experience as trial attorney, with another 7% describing their experience as general practice. About 23% call themselves former government attorneys, with several of the other categories also suggesting government experience. About 8% had been either judges or examiners. There is not the same level of opinion among AJs that trial experience is important, and only 19% feel it is indispensable.⁴⁴⁴

Both in terms of years at the agency and in service as an AJ, our survey found a wide range. Three-quarters had been at the agency from 1 to 11 years, with fairly even distribution among those years.⁴⁴⁵ Similarly, about three-quarters have been AJs for from 1 to 11 years with fairly even distribution among those years.⁴⁴⁶ (The longest tenure was 31 years.)

⁴³⁶Burger, chart at 139.

⁴³⁷Burger, chart at 141.

⁴³⁸Burger, chart at 133.

⁴³⁹GAO Study, response #25.

⁴⁴⁰GAO Study, response #26.

⁴⁴¹1992 ALJ Survey, response 25b.

⁴⁴²1992 ALJ Survey, response 17h.

⁴⁴³AJ Survey, response 9.

⁴⁴⁴AJ Survey, response 20h.

⁴⁴⁵AJ Survey, response 11.

⁴⁴⁶AJ Survey, response 11.

Any number of sources support the conclusion that the ALJ corps is overwhelmingly white and male. The 1992 ALJ Survey found that 94% are male and 6% female.⁴⁴⁷ It found that 94% are white, 3% Hispanic and the remaining 3% divided evenly among African-Americans, Asians, and Native Americans.⁴⁴⁸

Our survey of the AJ population found that it is also predominantly white and male. About 80% are male and about 84% are white.⁴⁴⁹ Nine percent are African-American, 3% Hispanic, 3% Asian and 1% Native American.

The Burger Study suggests considerable diversity in social status and other areas. Moreover, the ALJ population represents considerable social mobility. Burger found that while only a quarter came from blue collar backgrounds, in over three-quarters of their childhood homes, the primary wage earner did not have a college degree and over one-third did not have a high school diploma.⁴⁵⁰ Protestants were underrepresented as compared to the population as a whole.⁴⁵¹ Political party affiliations show that 46% were Democratic, 22% Republican and 21% Independent, with some small percentage claiming no preference.⁴⁵² Regardless, ALJs are less political than federal judges.⁴⁵³ The vast majority saw themselves as moderate but the entire spectrum was represented.⁴⁵⁴ Neither of our recent surveys sought this type of information.

The GAO Study found that about three-quarters of the ALJs had the advantage of the veterans' preference.⁴⁵⁵ That percentage, however, is decreasing. The 1992 ALJ Survey found that 65% received veterans' preference for their appointment as ALJs.⁴⁵⁶ We found that about 18% of the AJs received veterans' preference for their appointment as an AJ.⁴⁵⁷

2. Motivation

The first insight into ALJ motivation comes from those factors that motivated the ALJs to seek their offices. Burger inquired into such factors.⁴⁵⁸

⁴⁴⁷1992 ALJ Survey, response 26.

⁴⁴⁸1992 ALJ Survey, response 27. Compare actual statistics, *infra*, Chapter V (c)(1).

⁴⁴⁹AJ Survey, response 5.

⁴⁵⁰Burger, chart at 113 & 115.

⁴⁵¹Burger, chart at 117.

⁴⁵²Burger, chart at 121.

⁴⁵³Burger, at 122-126.

⁴⁵⁴Burger, chart at 128.

⁴⁵⁵GAO Study, response #20.

⁴⁵⁶1992 ALJ Survey, response 28.

⁴⁵⁷AJ Survey, response 10.

⁴⁵⁸Burger, chart at 78.

She found that almost all rated independence as important, with 87% rating it as very important and almost 12% rating it as moderately important. ALJs rated the challenge of the job second, with about 95% finding that either very important or moderately important. The next two factors were salary and prestige, both of which were rated very important or moderately important by more than 80% of the ALJs. Government employment and perquisites were somewhat of a factor. Most rated desire for advancement within the agency and travel as not important.

The 1992 ALJ Survey found that 89% of the ALJs rate independence as a very important factor with most of the remainder rating it important.⁴⁵⁹ Almost all also rate challenge of the job as at least important.⁴⁶⁰ Most rate salary, prestige and enjoyment of government service as important.⁴⁶¹ The perquisites of office are considered relatively unimportant.⁴⁶²

The views of AJs are much the same. About 81% rate independence of the job as very important and 97% rate it as at least moderately important.⁴⁶³ Challenge of the job also rates second with AJs, with about 80% seeing it as very important and the remaining 20% as moderately important.⁴⁶⁴ Only about 32% think salary very important but 88% think salary is at least moderately important.⁴⁶⁵ Similarly, only 25% think prestige very important in seeking to become an AJ, but 83% rank it at least moderately important.⁴⁶⁶

In the AJ Survey, we also asked the AJs to rank the three most important factors in their decision to become an AJ.⁴⁶⁷ Independence of the job ranks first with 54% of the AJs and within the top three for 89%. Challenge of the job ranks first with only 31% of the AJs but is ranked within the top three by 89%. Salary ranks first with only 5% and in the top three with 43%. Prestige ranks first with only 1.2% and in the top three for 21%. Four AJs rank policy goals and only one ranks having influence as first. Only 10% ranked policy goals and having influence among the first three.

Particularly interesting, most ALJs in the Burger Study rated commitment to policy goals and desire to have influence as not important, with most of the remainder rating those factors as only moderately important.⁴⁶⁸ Most ALJs in

⁴⁵⁹1992 ALJ Survey, response 20a.

⁴⁶⁰1992 ALJ Survey, response 20b.

⁴⁶¹1992 ALJ Survey, response 20c-c.

⁴⁶²1992 ALJ Survey, response 20f.

⁴⁶³AJ Survey, response 21a.

⁴⁶⁴AJ Survey, response 21b.

⁴⁶⁵AJ Survey, response 21c.

⁴⁶⁶AJ Survey, response 21d.

⁴⁶⁷AJ Survey, response 21.

⁴⁶⁸Burger, chart at 78.

the 1992 ALJ Survey rate influence and policy goals as unimportant, with most of the remainder rating those factors as only somewhat important.⁴⁶⁹ Similarly, over half of the AJs rate these two as of little or no importance, with most of the remainder rating them as only moderately important.⁴⁷⁰ These responses suggest an inherent neutrality and a commitment to individual justice rather than carrying forward a personal social agenda.

Burger's findings with respect to ALJs' perception of their job confirm this observation.⁴⁷¹ The ALJs did not see either educating the public or making agency policy as important parts of their jobs. The 1992 ALJ Survey found that more than 91% consider making policy no part of their job and two-thirds consider educating the public not part of their job.⁴⁷²

On the other hand, almost all conceive their function as including factfinding, making credibility determinations and guaranteeing due process.⁴⁷³ A very large percentage find their job to a great extent involves "applying" agency policy and exercising substantive expertise.⁴⁷⁴ Interpreting statutes is considered at least moderately important by almost 90% of the ALJs.⁴⁷⁵ Factors that might be considered somewhat less policy neutral--balancing interests, protecting the public interest and clarifying agency policy--receive rather mixed response, but few find these very important.⁴⁷⁶ Burger's findings were similar.⁴⁷⁷ Obviously, some ALJs, perhaps varying by agency, perceive this limited policy involvement as marginally part of their jobs.

Our AJ survey produced similar results.⁴⁷⁸ Almost all AJs find that their job to a great extent involves factfinding and guaranteeing due process and about 85% consider that their job, making credibility determinations. About three-quarters find that their job to a great extent involves applying agency policies and regulations, applying substantive expertise, and interpreting statutes. Almost 90% find that bringing efficiency to the agency proceedings is either a large part or some part of their job. Some 86% list factfinding and 76% list guaranteeing due process among the top three most important functions.

⁴⁶⁹1992 ALJ Survey, response 20g & h.

⁴⁷⁰AJ Survey, response 21g & h.

⁴⁷¹Burger, chart at 289.

⁴⁷²1992 ALJ Survey, response 9i & j.

⁴⁷³1992 ALJ Survey, response 9a-c.

⁴⁷⁴1992 ALJ Survey, response 9d & e.

⁴⁷⁵1992 ALJ Survey, response 9f.

⁴⁷⁶1992 ALJ Survey, response 9h, k & l.

⁴⁷⁷Burger, chart at 289.

⁴⁷⁸AJ Survey, response 15.

AJs also do not consider making agency policy as part of their job.⁴⁷⁹ Eighty-six percent said that their job does not include making policy to a significant extent, and most of the rest said their job includes policymaking only to some extent. On the other hand, almost 80% consider that their job, to a great extent involves "applying" agency policy, and the rest think that their job includes that function to some extent. About one-third think that their job to a great extent involves clarifying agency policy, and another third think it does to some extent. They divide about evenly among the three possibilities (great extent, some extent, no significant extent) on whether balancing interests is part of their job. About half think that their job does not involve protecting the public interest.

Like ALJs then, AJs see their job as involving adjudicating the individual disputes before them as impartially, fairly and efficiently as they can. While they recognize that they should apply agency policy, they do not believe they should engage in policy-type functions in their individual adjudications. In sum, they see their function in terms similar to any other judge.

The GAO Study provides insights into the specific factors of the job that motivate ALJs. It asked what the ALJs sought to gain from "superior performance."⁴⁸⁰ Superior performance was defined as "rendering the best possible decisions in the shortest period of time." Not surprisingly, over half found compensation as extremely desirable, with almost all the rest finding it desirable. Almost all found office surroundings a desirable benefit from superior performance.

Less tangible "rewards" also seem to motivate ALJs, however.⁴⁸¹ Almost all found desirable the respect of their peers, additional authority and a feeling of contribution to the body of administrative law. They also appeared motivated by the hope that superior performance would avoid frequent modification of their decisions and pressure from agency officials. They did not seem to be motivated by potential envy of their peers.

The GAO Study also attempted to discover whether the ALJs thought these benefits accrued from superior performance.⁴⁸² It appears that they did not believe the tangible benefits were realized. They did feel more often rewarded in terms of the perceived intangible benefits of superior performance.

The GAO Study also attempted to measure the negative impact of certain aspects of the job.⁴⁸³ ALJs almost never worried about being asked to do things that were against their better judgment. About 80% responded that they

⁴⁷⁹AJ Survey, response 15.

⁴⁸⁰GAO Study, response #45 part 2.

⁴⁸¹GAO Study, response #45 part 2.

⁴⁸²GAO Study, response #45 part 1.

⁴⁸³GAO Study, response #44.

were never or rarely asked to do so; whereas about 5% said they were often or usually asked to do so.

The 1992 ALJ Survey, however, shows that 34% now believe they are being asked to do things that are against their better judgment, with 12% being frequently asked to do so.⁴⁸⁴ Many of these may be in SSA. Thirteen percent of the SSA ALJs report that they are frequently asked to do things against their better judgment and another 29% are occasionally asked to do so.⁴⁸⁵ Only 6% of the non-SSA ALJs report that they are frequently asked to do things against their better judgment, with another 13% saying they are asked to do so occasionally.⁴⁸⁶

Responses from the AJs were more positive than those from the ALJs. About three-quarters reported that they are never or rarely asked to do things in their work that are against their better judgment.⁴⁸⁷ Most of the rest said they are only sometimes asked to do so and only about 4% said they are often or usually asked to do so.

ALJs generally do not feel they have too little authority to carry out their functions nor that too much review interferes with their job, but 22% frequently think so and another 27% occasionally do.⁴⁸⁸ Some 29% find that their caseload frequently interferes with the quality of their work and another 40% believe it occasionally does so.⁴⁸⁹ These percentages are higher for SSA ALJs.⁴⁹⁰

The GAO Study received similar responses.⁴⁹¹ ALJs in that study did not feel that they had too little authority. About one-quarter responded that the amount of work often interferes with quality and almost 40% responded that this sometimes occurs.

About 60% of the AJs feel that they never or rarely have too little authority to carry out their work and another quarter only sometimes feel a lack of authority.⁴⁹² However, almost three-quarters feel that the amount of work may interfere with quality at least sometimes.⁴⁹³ And more than two-thirds feel that the workload is too heavy.⁴⁹⁴

⁴⁸⁴1992 ALJ Survey, response 15c.

⁴⁸⁵1992 ALJ Survey, SSA only, response 15c.

⁴⁸⁶1992 ALJ Survey, non-SSA, response 15c.

⁴⁸⁷AJ Survey, response 27e.

⁴⁸⁸1992 ALJ Survey, response 15b.

⁴⁸⁹1992 ALJ Survey, response 15a.

⁴⁹⁰1992 ALJ Survey, SSA only, response 15a.

⁴⁹¹GAO Study, response #44-2 & #44-4.

⁴⁹²AJ Survey, response 27b.

⁴⁹³AJ Survey, response 27a.

⁴⁹⁴AJ Survey, response 27h.

The GAO Study found that about 85% of ALJs said that "on occasion" they felt they were not fully qualified to handle their jobs, with another 11% having these feelings sometimes or rather often.⁴⁹⁵ In the 1992 ALJ Survey, no ALJs report that they frequently feel they are unqualified and only 2% reported that they occasionally have those feelings.⁴⁹⁶ It is difficult to interpret this change of attitude.

Most AJs also feel they are qualified to do their job.⁴⁹⁷ About 11% rarely or sometimes feel they are not qualified.

Burger found that the ALJs were generally satisfied with their job.⁴⁹⁸ Over 97% were satisfied with their position and duties and over three-quarters of these were very satisfied. About 94% were satisfied with the substantive area of law and 77% with the conditions of employment. Burger also found that, "The 38 percent of judges at the SSA who expressed dissatisfaction...with the conditions of employment depressed the overall figure."⁴⁹⁹

The 1992 ALJ Survey found that only 65% report that they are very satisfied with their job but the remainder said they are somewhat satisfied.⁵⁰⁰ Almost all are satisfied with nature of their duties, with 81% being very satisfied.⁵⁰¹ Almost all are satisfied with the substantive area of the law.⁵⁰² However, over half are either not satisfied or only somewhat satisfied with the conditions of employment.⁵⁰³ The responses for SSA ALJs vary little from the overall responses.⁵⁰⁴

AJs seemed to be more satisfied with their jobs.⁵⁰⁵ Ninety-nine percent are satisfied with their duties, with 77% being very satisfied. Almost 100% are satisfied with the substantive area of law, with 75% very satisfied. About 80% are satisfied with conditions of employment but only 34% are very satisfied. In sum, 97% are satisfied overall.

⁴⁹⁵GAO Study, response #44-7.

⁴⁹⁶1992 ALJ Survey, response 15g.

⁴⁹⁷AJ Survey, response 27g.

⁴⁹⁸Burger, at 86-87.

⁴⁹⁹Burger, at 87.

⁵⁰⁰1992 ALJ Survey, response 22d.

⁵⁰¹1992 ALJ Survey, response 22a.

⁵⁰²1992 ALJ Survey, response 22c.

⁵⁰³1992 ALJ Survey, response 22b.

⁵⁰⁴1992 ALJ Survey, SSA only, response 22.

⁵⁰⁵AJ Survey, response 25.

3. Qualifications and Selection

The performance of adjudicators depends on their qualifications and the extent to which the selection process seeks those with the relevant qualifications. Therefore it is useful to understand what adjudicators themselves perceive to be crucial qualifications.

Burger asked the ALJs to rank 14 characteristics as indispensable, important or of little or no importance.⁵⁰⁶ Her study reveals that almost all ALJs perceive integrity, judicial temperament, and analytical skills as indispensable.⁵⁰⁷ A majority would add writing ability. She noted some surprise that a majority also rated appearance and personality values as important. Indeed, 83% rated a sense of humor as at least important.

The results of the 1992 ALJ Survey were much the same. Almost all current ALJs rate integrity, judicial temperament, and analytical skills as very important.⁵⁰⁸ Almost all would rate writing ability as at least important.⁵⁰⁹ They also rate appearance and sense of humor as important.⁵¹⁰

Our AJ Study showed that almost all AJs rate integrity, analytical skills and reasoning ability as indispensable.⁵¹¹ They also all rate writing ability as at least important, with 73% finding it indispensable. About 70% rate public speaking ability as at least important but only 19% find it indispensable.⁵¹² Almost all rate judicial temperament as at least important. More than 80% rate neat personal appearance and about 70% rate sense of humor as at least important.⁵¹³

The GAO Study showed that ALJs considered experience important. Almost 80% thought that 7 years' experience was merely adequate, with about 17% finding even that experience insufficient.⁵¹⁴ Almost all felt that 2 years' experience as a trial lawyer or in administrative law was no better than

⁵⁰⁶The qualifications were: integrity, judicial temperament, analytical skill, writing ability, trial experience, personal appearance, sense of humor, administrative law experience, substantive experience, public speaking ability, technical expertise, law school honors, bar association participation, and political experience.

⁵⁰⁷Burger, chart at 63.

⁵⁰⁸1992 ALJ Survey, response 17a, d & l.

⁵⁰⁹1992 ALJ Survey, response 17j.

⁵¹⁰1992 ALJ Survey, response 17f & g.

⁵¹¹AJ Survey, response 20.

⁵¹²AJ Survey, response 20k.

⁵¹³AJ Survey, response 20f & g.

⁵¹⁴GAO Study, response #21.

adequate.⁵¹⁵ About 60% considered some experience as a staff attorney either very important or somewhat important.⁵¹⁶

Three-quarters of those responding to the 1992 ALJ Survey consider experience practicing administrative law important.⁵¹⁷ About 80% of the AJs consider experience practicing administrative law as at least important but only about 20% consider it indispensable.⁵¹⁸

The GAO Study showed that 73% of the ALJs considered trial experience very important, while most of the rest considered it somewhat important.⁵¹⁹ Burger found that about 95% of the ALJs rated trial experience specifically as at least important, with over half considering it indispensable.⁵²⁰ Almost all those responding to the 1992 ALJ Survey consider trial experience as at least important, with 72% finding it very important.⁵²¹ About three-quarters of the AJs rate trial experience as at least important, but only 19% consider it indispensable.⁵²²

The results of the Burger Study as to the ALJs' view of the value of substantive or technical expertise are somewhat ambiguous.⁵²³ A very small percentage viewed such expertise as indispensable but about one-half viewed these as important. On the other hand, one-third found substantive experience unimportant and more than half found technical expertise unimportant. Most current ALJs consider experience in the substantive area important, with more than one-quarter finding it very important.⁵²⁴ Most also consider technical expertise important, with 24% finding it very important.⁵²⁵ One would expect considerable difference among agencies but still these views question the general importance of specifically relevant experience and expertise.

Almost 90% of the AJs consider experience in the substantive area as at least important but only one-third find it indispensable.⁵²⁶ About 80% consider technical expertise as at least important and about one-quarter find it indispensable.⁵²⁷

⁵¹⁵GAO Study, response #22.

⁵¹⁶GAO Study, response #27.

⁵¹⁷1992 ALJ Survey, response 17c.

⁵¹⁸AJ Survey, response 20c.

⁵¹⁹GAO Study, response #26

⁵²⁰Burger, chart at 63.

⁵²¹1992 ALJ Survey, response 17h.

⁵²²AJ Survey, response 20h.

⁵²³Burger, chart at 63.

⁵²⁴1992 ALJ Survey, response 17e.

⁵²⁵1992 ALJ Survey, response 17i.

⁵²⁶AJ Survey, response 20e.

⁵²⁷AJ Survey, response 20i.

The GAO Study inquired into the ALJs' attitudes towards the selection criteria in place at that time.⁵²⁸ About three-quarters believed that trial experience contributed most to selection.⁵²⁹ After that, most thought that the oral panel, written examination and recommendations had the most effect. About 65% thought that it was at least somewhat likely that the then-current appointment process favored government attorneys.⁵³⁰

Most current ALJs consider that the selection criteria are relevant to their duties.⁵³¹ Only a little more than half, however, find them very relevant. While several parts of the examination are considered burdensome, only the OPM/CSC supplementary qualifications statement is uniformly considered burdensome.⁵³²

Over 60% of the AJs feel that the selection criteria they faced have the same relevance to their position as that of ALJs.⁵³³ Interestingly, however, almost 30% think that their selection criteria are more relevant than those used for ALJs.

The 1992 ALJ Survey found that almost three-quarters of the ALJs feel that mediocrity among ALJs is a problem, but only 17% think it is a serious problem.⁵³⁴ Most AJs do not think mediocrity of AJs is a serious problem, but a third would at least agree it is a problem.⁵³⁵

C. Habits of Office

1. Preparation

ALJs seem fairly conscientious in keeping up with the various authorities that might affect their decisions. The Burger Study found that almost all ALJs read relevant court decisions and the final decisions of their agencies.⁵³⁶ More than 70% read court decisions frequently and over 60% read final decisions of their agency frequently. In addition, two-thirds read commercial services and

⁵²⁸GAO Study, response #17.

⁵²⁹GAO Study, response #17-6.

⁵³⁰GAO Study, response #24.

⁵³¹1992 ALJ Survey, response 19.

⁵³²1992 ALJ Survey, response 18.

⁵³³AJ Survey, response 28g.

⁵³⁴1992 ALJ Survey, response 23g.

⁵³⁵AJ Survey, response 26g.

⁵³⁶Burger, chart at 224.

half of those did so frequently. Two-thirds also read opinions of other ALJs and half of those did so frequently.

Sharon also reported a high level of conscientiousness. He found that almost 90% discussed issues with other ALJs³³⁷ and participated in professional associations of ALJs. Almost all reported maintaining professional expertise by reading books and journals, and participating in continuing legal education.³³⁸ Almost all also attended seminars and professional meetings.³³⁹

The 1992 ALJ Survey found some dropoff in background preparation. Of the current ALJs, 54% frequently read relevant court opinions and another 41% occasionally do so.³⁴⁰ Fifty-four percent frequently read final agency decisions and 33% read those decisions on occasion.³⁴¹ A little more than half read commercial services, with only 16% frequently doing so.³⁴² About two-thirds read decisions of other ALJs, with 26% doing so frequently.³⁴³ Less than half consult with other ALJs.³⁴⁴

Our study found that many AJs engage in background preparation. Almost all read final agency decisions frequently.³⁴⁵ About 90% read decisions of other presiding officers.³⁴⁶ And almost all read federal court decisions at least occasionally, with over three-quarters reading them frequently.³⁴⁷ Over 80% use commercial services or industry publications at least occasionally.³⁴⁸

Of the sources of information, Burger found that ALJs considered commercial services, independent research and law review articles as the three most important sources of information.³⁴⁹ They considered memoranda from agency counsel, communications from the chief ALJ and research by law clerks to be the least important.

³³⁷Sharon, response #122.

³³⁸Sharon, response #125.

³³⁹Sharon, response #126.

³⁴⁰1992 ALJ Survey, response 10a.

³⁴¹1992 ALJ Survey, response 10b.

³⁴²1992 ALJ Survey, response 10d.

³⁴³1992 ALJ Survey, response 10a.

³⁴⁴1992 ALJ Survey, response 10f & g.

³⁴⁵AJ Survey, response 13b.

³⁴⁶AJ Survey, response 13a.

³⁴⁷AJ Survey, response 13c.

³⁴⁸AJ Survey, response 13d.

³⁴⁹Burger, chart at 247.

2. The Integrity of the Office

Burger found a good deal of disagreement among ALJs as to the scope of permissible activities outside the adjudicative process.⁵⁵⁰ Most thought working for procedural change was appropriate and almost two-thirds found lobbying Congress and suggesting policy changes to be appropriate.⁵⁵¹ Most thought talking to the media during a hearing was inappropriate and almost two-thirds thought talking to the media after the final decision was inappropriate. They split almost evenly among the three choices—appropriate, questionable and inappropriate—regarding social contacts with the agency staff or the private bar.

The 1992 ALJ Survey found some consensus on appropriate conduct in several areas. Most think suggesting procedural change and working for changes in substantive policy is appropriate.⁵⁵² Most think lobbying Congress on behalf of ALJs is appropriate.⁵⁵³ About three-quarters think suggesting proceedings, investigations, or study is appropriate.⁵⁵⁴ Almost all think talking to the media about the case, during, after or after the final decision is inappropriate.⁵⁵⁵ Almost none talk to the media about their decisions.⁵⁵⁶ Most think social contacts with agency staff or private attorneys are inappropriate, but many think this practice is somewhat appropriate.⁵⁵⁷

AJs agree with ALJs concerning permissible activities outside the adjudicative process. Almost 90% think suggesting procedural changes to the agency and about 70% think suggesting policy changes to the agency are at least appropriate.⁵⁵⁸ About three-quarters think suggesting other investigations or studies to the agency is at least sometimes appropriate. Some 70% consider lobbying Congress on behalf of AJs is at least sometimes appropriate.⁵⁵⁹ Almost all consider that talking to the media during the hearing is inappropriate.⁵⁶⁰ About three-quarters think talking to the media after the case is over is still inappropriate.⁵⁶¹

⁵⁵⁰Burger at 323.

⁵⁵¹Burger, chart at 324.

⁵⁵²1992 ALJ Survey, response 24g & h.

⁵⁵³1992 ALJ Survey, response 24i.

⁵⁵⁴1992 ALJ Survey, response 24j.

⁵⁵⁵1992 ALJ Survey, response 24b-d.

⁵⁵⁶1992 ALJ Survey, response 13b.

⁵⁵⁷1992 ALJ Survey, response 24e & f.

⁵⁵⁸AJ Survey, response 18g, h & j.

⁵⁵⁹AJ Survey, response 18i.

⁵⁶⁰AJ Survey, response 18b.

⁵⁶¹AJ Survey, response 18c & d.

Despite some disagreement as to what activities are permissible for ALJs per se, ALJs see themselves as judges and apparently conduct themselves in accordance with that perception.⁵⁶² To test the latter assertion, Burger explored activities at the post-decisional stages in the administrative adjudicative process. She reasoned:

[I]f ALJs saw themselves as judges, rather than administrators, their involvement in the adjudicative process would be severely constrained once their initial or recommended decision had been completed. On the other hand, if ALJs adhered to a bureaucratic model, we should expect that their involvement after the hearing and decision stage would be greater and would follow less formal, structured routes.⁵⁶³

She concluded from the evidence: "The judicial role orientation appears generally respected by both agency officials and the ALJs themselves."⁵⁶⁴

The 1992 ALJ Survey found that ALJs do not participate in the decision after the hearing. Few participate in oral argument, talk to agency staff, help prepare documents or observe oral argument.⁵⁶⁵ A very few supply written clarification and study briefs.⁵⁶⁶ The only post-hearing activity that a significant number engage in is assisting in writing the final agency decision.⁵⁶⁷

Almost all ALJs in the Burger Study also reported that they did not participate after their decision.⁵⁶⁸ Sharon generally confirmed this behavior. He found that only 16% of the ALJs assisted in writing the final agency decision.⁵⁶⁹ Burger also found that ALJs rarely participated in such actions as the administrative appeals process or decision.⁵⁷⁰ Some studied the appellate briefs but only "for educational purposes."⁵⁷¹ They avoided further contact with a case once it left their jurisdiction.

AJ conduct after issuing their decisions is similarly isolated. Almost all responded that they do not participate in oral argument or talk to news

⁵⁶²1992 ALJ Survey, response 21a.

⁵⁶³Burger at 319-320.

⁵⁶⁴Burger at 320.

⁵⁶⁵1992 ALJ Survey, response 13a, d, f, g.

⁵⁶⁶1992 ALJ Survey, response 13c & e.

⁵⁶⁷1992 ALJ Survey, response 13h.

⁵⁶⁸Burger, chart at 321.

⁵⁶⁹Sharon, response #120.

⁵⁷⁰Burger, chart at 321.

⁵⁷¹Burger at 323.

media.⁵⁷² More than 90% reported that they rarely or never supply written clarification, talk with agency staff, help prepare documents, or observe oral argument. About a quarter reported that they frequently assist in writing the final opinion.⁵⁷³ About a third at least occasionally study appeal briefs but only 8% frequently did so.⁵⁷⁴

ALJs' social and professional contacts also support the claim that they not only perceive themselves in a judicial role but behave under the constraints of that perception. Burger found that very few ALJs had agency contacts outside their own office.⁵⁷⁵ Indeed, whereas almost 70% had office contacts with other ALJs in their office, social contacts were occasional or not at all. Over 90% reported that they did not have even office contacts with agency counsel or the head of the agency.⁵⁷⁶ The 1992 ALJ Survey, however, found that almost half talk to agency staff about cases, with 22% frequently doing so.⁵⁷⁷

Burger found that contacts outside the agency were similarly constrained. Although some ALJs reported office contacts with private attorneys, over 80% reported no social contact with private attorneys, and the remainder reported only occasional such contacts.⁵⁷⁸

The 1992 ALJ Survey found that current ALJs rarely communicate about their cases outside the agency, with only about 15% doing so even occasionally.⁵⁷⁹ However, about three-quarters of the current ALJs reported attending professional meetings and seminars, with only 8% doing so frequently.⁵⁸⁰ More than a third talk to the private bar about the agency, with only 3% doing so frequently.⁵⁸¹

AJs apparently feel under similar constraints. Over half rarely or never communicate with the staff about a case.⁵⁸² Yet, 29% occasionally have such communications and 14% have them frequently. More than 90% rarely or never communicate about their cases with those outside the agency.⁵⁸³

Many AJs engage in more general professional contacts. Almost half at least occasionally talk to members of the private bar about agency

⁵⁷²AJ Survey, response 17a-d; f-g.

⁵⁷³AJ Survey, response 17h.

⁵⁷⁴AJ Survey, response 17e.

⁵⁷⁵Burger, chart at 333.

⁵⁷⁶Burger, chart at 333.

⁵⁷⁷1992 ALJ Survey, response 10i.

⁵⁷⁸Burger, chart at 333.

⁵⁷⁹1992 ALJ Survey, response 10j.

⁵⁸⁰1992 ALJ Survey, response 10o.

⁵⁸¹1992 ALJ Survey, response 10m.

⁵⁸²AJ Survey, response 13i.

⁵⁸³AJ Survey, response 13j.

procedures.⁵⁸⁴ Over 90% report attending professional meetings or seminars, although only 20% do so frequently.⁵⁸⁵

Most AJs think that social contacts with agency attorneys or private attorneys is at best only sometimes appropriate and about 40% think that such contacts are inappropriate.⁵⁸⁶ Those in the EOIR are particularly adamant about their distance from the immigration bar. (Their strong expression was no doubt generated by a mistake in our characterization of them on our survey form.)

While the isolation described above is the result of informal constraints, some external communication could constitute illegal *ex parte* communication. APA §557(d) contains rather detailed prohibitions against such communications for ALJs.

It appears that ALJs are rarely approached through *ex parte* communication. Burger found that over 80% of the non-SSA ALJs reported that such efforts occurred rarely if ever.⁵⁸⁷ The SSA ALJs reported a slightly higher incidence of such efforts, but still almost 70% reported that they occurred rarely or not at all. Sharon found that 67% of the ALJs reported efforts to disclose and otherwise take appropriate steps regarding *ex parte* communication.⁵⁸⁸

While AJs' proceedings might not technically be controlled by APA §557(d), only 12% of the AJs reported that they are occasionally approached through *ex parte* communications and only 1% reported they are frequently approached.⁵⁸⁹

3. Administrative Responsibilities

The Sharon Study found that about three-quarters of the ALJs reported performing supervisory functions.⁵⁹⁰ About two-thirds recruit, select and appraise performance of staff.⁵⁹¹ Some 27% serve on interview panels for prospective ALJs.⁵⁹² Current ALJs average about 9% of their time on administrative duties.⁵⁹³ Over 60% of the AJs reported that they spend at least

⁵⁸⁴AJ Survey, response 13m.

⁵⁸⁵AJ Survey, response 13o.

⁵⁸⁶AJ Survey, response 18e & f.

⁵⁸⁷Burger, chart at 265.

⁵⁸⁸Sharon, response #124.

⁵⁸⁹AJ Survey, response 14p.

⁵⁹⁰Sharon, response #135.

⁵⁹¹Sharon, response #140.

⁵⁹²Sharon, response #141.

⁵⁹³1992 ALJ Survey, response 8f.

5% of their time on administrative duties and almost 90% spend from 1 to 10% of their time on such duties.⁵⁹⁴

Sharon found that most ALJs managed their own caseload.⁵⁹⁵ About three-quarters prepared reports on the status of cases.⁵⁹⁶

D. Techniques for Presiding

We sought to determine how administrative adjudicators conduct hearings and whether ALJs and AJs differ in the way they proceed to a decision. These observations are organized into categories of prehearing, building a record, conduct of the hearing, reaching a decision, results of the initial adjudication and the administrative review process.

1. Prehearing

The GAO Study showed that ALJs did not feel they should participate in the decision to investigate or issue a complaint.⁵⁹⁷

The GAO Study found that the agencies divided about in half as to whether they required financial disclosures.⁵⁹⁸ It appears, however, that these statements were not used to assign cases. Only 4.4% of the ALJs knew that they were and 45.9% knew that they were not. Because it seems likely that ALJs would know if the statements were used to make assignments, the large percentage of those who did not know suggests that the statements were not so used for their assignments as well.

The Sharon Study inquired into how ALJs prepared for a hearing. He found that about 90% examined the pleadings and considered prehearing conferences.⁵⁹⁹ Over 90% engaged in preparatory research of the law and relevant subject matter, including consulting with experts.⁶⁰⁰ The ALJs considered both activities very important and requiring a high level of judgment. He also found that more than 80% of the ALJs examined evidence prior to hearings, and they considered this activity both very important and requiring considerable judgment.⁶⁰¹

⁵⁹⁴AJ Survey, response 19f.

⁵⁹⁵Sharon, response #136.

⁵⁹⁶Sharon, response #137.

⁵⁹⁷GAO Study, response #7-3.

⁵⁹⁸GAO Study, response #6.

⁵⁹⁹Sharon, response #1.

⁶⁰⁰Sharon, response #2, see also #49.

⁶⁰¹Sharon, response #48.

Burger found that ALJs usually engaged in some prehearing conference.⁶⁰² The GAO, however, found that ALJs did not use prehearing conferences in the "typical" case.⁶⁰³ Only about 20% said that they did so. Almost half did use a prehearing conference in "long" cases. The 1992 ALJ Survey found that over half the ALJs use a prehearing conference, with a quarter doing so frequently.⁶⁰⁴

As might be expected, the total result is considerably skewed by the SSA practice. Fifty-seven percent of the ALJs in non-SSA agencies currently use prehearing conferences frequently and another 28% use them occasionally.⁶⁰⁵ At SSA, however, almost half of the ALJs never or rarely use prehearing conferences and only 7% frequently use them.⁶⁰⁶ The Cofer Study, however, found that SSA ALJs believed they should use prehearing conferences in complex cases.⁶⁰⁷

Most AJs at least occasionally hold prehearing conferences. About 85% reported doing so, with about 60% doing so frequently.⁶⁰⁸

The GAO Study indicated that prehearing discovery was used in about 80% of the typical cases.⁶⁰⁹ In almost 90% of those cases, discovery was "extensive"⁶¹⁰ and contested.⁶¹¹ Sharon found that almost 80% of ALJs issued subpoenas and ruled on discovery matters.⁶¹² They considered this activity only moderately important, but they found it required a high level of judgment. Ninety-five percent of the SSA ALJs responding to the Cofer Study found considerable value in their subpoena power.⁶¹³

Sharon found that 65% of the ALJs authorized interrogatories but did not consider that activity very important, nor did they feel it required much judgment.⁶¹⁴ SSA ALJs were split on whether interrogatories should be used more often in their adjudications.⁶¹⁵

⁶⁰²Burger, chart at 215.

⁶⁰³GAO Study, response #13-7.

⁶⁰⁴1992 ALJ Survey, response 12a.

⁶⁰⁵1992 ALJ Survey, non-SSA, response 12a.

⁶⁰⁶1992 ALJ Survey, SSA only, response 12a.

⁶⁰⁷Cofer Study, at 219.

⁶⁰⁸AJ Survey, response 14a.

⁶⁰⁹GAO Study, response #13-9.

⁶¹⁰GAO Study, response #13-10.

⁶¹¹GAO Study, response #13-11.

⁶¹²Sharon, response #28, see also #81.

⁶¹³Cofer Study, at 165.

⁶¹⁴Sharon, response #14.

⁶¹⁵Cofer Study, at 165.

The 1992 ALJ Survey found that only 7% of the current ALJs order depositions frequently and another 17% occasionally.⁶¹⁶ Sharon found that less than 50% of the ALJs ordered depositions and they considered this activity moderately important.⁶¹⁷ Burger found that, except in a few agencies, depositions were rarely ordered.⁶¹⁸ Only in the Coast Guard and the FCC did over half the ALJs order them frequently. In all agencies, only 13% of the ALJs ordered them frequently, 38% ordered them occasionally, and almost 50% rarely or never ordered them. In the SSA, no ALJs ordered them frequently and only 16% ordered them even occasionally. SSA ALJs did not support increased use of depositions.⁶¹⁹ About two-thirds of the ALJs reported that they rarely or never order depositions.⁶²⁰

The GAO Study demonstrates how much prehearing activities can contribute to expediting the case. In more than 80% of the typical cases, major portions of the facts were stipulated in prehearing.⁶²¹ The ALJs in the Sharon Study reported that only 60% elicited stipulations.⁶²² The GAO Study found that issues were stipulated in only about one-third of cases, whether short, typical or long.⁶²³

The GAO Study reported that in almost three-quarters of the typical cases, written testimony was submitted before the hearing.⁶²⁴ Not surprisingly, this percentage dropped off for long cases, but only down to two-thirds.

The Sharon Study found that 69% of the ALJs determined what information should be furnished by the parties, and they considered this activity both very important and requiring considerable judgment.⁶²⁵ According to the GAO Study, prehearing conferences usually resulted in disclosure of witness lists and synopses of the testimony.⁶²⁶ This exchange was slightly more likely to occur in short cases than in long cases. Sharon found that 56% of the ALJs sought exchange of evidence and witness testimony.⁶²⁷

ALJs are apparently very reluctant to short-circuit the opportunity for a hearing by granting summary judgment. Only 3% reported in the 1992 ALJ

⁶¹⁶1992 ALJ Survey, response 12b.

⁶¹⁷Sharon, response #14.

⁶¹⁸Burger, chart at 214.

⁶¹⁹Cofer Study, at 219.

⁶²⁰ALJ Survey, response 14b.

⁶²¹GAO Study, response #13-12.

⁶²²Sharon, response #23.

⁶²³GAO Study, response #13-15.

⁶²⁴GAO Study, response #13-13.

⁶²⁵Sharon, response #36.

⁶²⁶GAO Study, response #13-14.

⁶²⁷Sharon, response #12.

Survey that they do so frequently and another 26% reported that they do so on occasion.²²² Sharon reported that about half of the ALJs issued summary decisions and that they considered this activity extremely important, requiring considerable judgment.²²³ Burger, however, found that only one-third reported granting summary judgments even occasionally and more than two-thirds granted them rarely or not at all.²²⁴ SSA ALJs were even less likely to grant summary judgment. Overall, less than 3% of all ALJs reported granting summary judgment frequently. Indeed, the ALJs of only three agencies, FCC, ICC and SSA, reported granting summary judgment frequently. Few AJs reported that they frequently grant summary judgment but about a quarter reported that they sometimes do so.²²⁵

The GAO Study found that for 99% of the time prehearing activities did not result in settlement of long or typical cases.²²⁶ Settlements were reached in short cases less than 10% of the time. The Sharon Study found that only 35% of the ALJs initiated or participated in settlement, but they considered it both very important and requiring considerable judgment.²²⁷ Only about a third in that study approved, disapproved or certified settlement to the agency, but they considered this activity both very important and requiring considerable judgment.²²⁸

The 1992 ALJ Survey found that 18% of the ALJs report that their job to a great extent involves settling controversies and another third consider that it does so to some extent.²²⁹ More than half of the AJs reported that their job involves effecting the settlement of controversies to a great extent.²³⁰ Almost another one-third think that effecting settlement occurs to at least some extent.

2. Building a Record

It is an essential doctrine of administrative law that presiding officials have an affirmative duty to ensure that the record is sufficient. They may not sit back and rest on the lawyers' performance. This, of course, is particularly

²²²1992 ALJ Survey, response 12p.

²²³Sharon, response #97.

²²⁴Burger, chart at 239. Under current regulations SSA ALJs do not issue "summary judgments" although they may deny a request for review, 20 CFR §§404.957, 416.1457; or issue a decision without holding a hearing in specific situations, 20 CFR §§404.948, 416.1448.

²²⁵AJ Survey, response 14o.

²²⁶GAO Study, response #13-8.

²²⁷Sharon, response #24.

²²⁸Sharon, response #33.

²²⁹1992 ALJ Survey, response 9g.

²³⁰AJ Survey, response 15g.

true in those processes in which one or both sides of the controversy are not represented.

Current ALJs apparently recognize their importance in ensuring an adequate record. The 1992 ALJ Survey found that over 90% of the current ALJs feel that taking an active role in developing the record is appropriate, with 69% feeling that it is very appropriate.⁶³⁷ As might be both hoped and expected, the SSA ALJs feel an even higher duty to do so, with 77% considering that duty to be very appropriate.⁶³⁸ Most AJs also find this function appropriate, with 63% finding it very appropriate.⁶³⁹

The Sharon Study suggests that almost 90% of the ALJs tried to ensure an accurate recording of the testimony.⁶⁴⁰ The Burger Study suggests, however, that ALJs were not very aggressive in building the record.⁶⁴¹

The SSA process represents one significant modification of the confrontational adversarial adjudication model. In those adjudications, no one serves as advocate for the denial of benefits, and often the claimant appears without representation. Therefore, the ALJs must ensure the record is complete on both sides of the controversy. Many SSA ALJs object to this procedure, which requires them to represent both sides of the controversy as well as to decide the case; in other words, to wear "three hats." The Cofer Study found that 60% of the SSA ALJs objected to that approach.⁶⁴²

Not surprisingly, the 1992 ALJ Survey found that most SSA ALJs said that wearer of three hats is an appropriate description of their job, with 53% saying it is very appropriate.⁶⁴³ In contrast, only about a quarter of the non-SSA ALJs consider that term an appropriate description, with only 15% saying it is a very appropriate description.⁶⁴⁴

The processes employing AJs apparently do not generally put them in this position. Some 64% stated that "wearer of three hats" is not an appropriate description of their function.⁶⁴⁵

An alternative to confrontational adjudications might be a process that requires the government to ensure that a complete docket is presented to the decisionmaker, much like the continental administrative adjudicative model. A

⁶³⁷1992 ALJ Survey, response 24a.

⁶³⁸1992 ALJ Survey, SSA only, response 24a.

⁶³⁹AJ Survey, response 18a.

⁶⁴⁰Sharon, response #55.

⁶⁴¹Burger, at 214 - 243.

⁶⁴²Cofer Study, at 162.

⁶⁴³1992 ALJ Survey, SSA only, response 21f.

⁶⁴⁴1992 ALJ Survey, non-SSA, response 22f.

⁶⁴⁵AJ Survey, response 23f.

majority of the SSA ALJs, however, felt that a well-developed case file could not replace adversarial confrontation.⁶⁴⁶

Many ALJs hold hearings as appeals of decisions reached at some other level. The record compiled at this other level is often important. However, three-quarters of all ALJs feel that the record is not adequate to support the decision at the other level, with 39% finding the record frequently not adequate.⁶⁴⁷ About three-quarters also think that the record is not adequate to prepare them for their hearing, with 44% finding that this frequently occurs.⁶⁴⁸

SSA ALJs reported an even poorer performance at the other level. Ninety-three percent consider the record inadequate to support the decision at the other level, with over half finding the record frequently inadequate for that purpose.⁶⁴⁹ Ninety-two percent consider the record inadequate to prepare them for their hearing, with 56% finding the record frequently inadequate for that purpose.⁶⁵⁰

Administrative law tenets generally provide that rules about the admissibility of evidence should not control in administrative hearings. The Sharon Study, however, found that 95% of the ALJs ruled on the admissibility of evidence.⁶⁵¹

In contrast to the formality of trial, administrative law urges that evidence should be admitted for whatever it is worth. The expert administrative decisionmakers can then judge how much weight to give the information. The theory is that more information is better and that the danger caused by low admission thresholds is mitigated by the quality of the decisionmakers.

The results of the Burger Study suggested that ALJs were more formalistic regarding admissibility than is consistent with administrative law theory. Only about 5% of the non-SSA ALJs frequently admitted information for "whatever it is worth," while almost two-thirds rarely or never did so.⁶⁵² The picture was quite different in the SSA. There, some 40% frequently did so and another 40% occasionally did so.

The 1992 ALJ Survey shows a convergence, with the non-SSA ALJs becoming somewhat less formalistic and the SSA ALJs becoming somewhat more so. Only 11% of the current non-SSA ALJs frequently admit evidence for what it is worth but another 30% do so occasionally.⁶⁵³ In contrast, 22%

⁶⁴⁶Cofer Study, at 216.

⁶⁴⁷1992 ALJ Survey, response 11a.

⁶⁴⁸1992 ALJ Survey, response 11b.

⁶⁴⁹1992 ALJ Survey, SSA only, response 11a.

⁶⁵⁰1992 ALJ Survey, SSA only, response 11b.

⁶⁵¹Sharon, response #82.

⁶⁵²Burger, chart at 220.

⁶⁵³1992 ALJ Survey, non-SSA, response 12m.

of the SSA ALJs frequently admit evidence for what it is worth and another 37% occasionally do so.⁶⁵⁴

About one-quarter of the ALJs frequently admit evidence for "whatever it is worth" and another one-third reported that they occasionally do so.⁶⁵⁵ Less than half reported that they rarely or never do so.

Hearsay evidence has often been the focus of attention in the debate over the applicability of the rules of evidence to administrative adjudications. Cofer summarized the SSA ALJs' opinion of hearsay evidence:

Hearsay evidence was upheld with some confidence as only 27 percent saw the hearsay rule as too broad, allowing the Agency a means of avoiding the expense of obtaining more reliable evidence. Nor did the ALJs perceive hearsay to be an obstruction to identifying the issues of the case or to artificially prolong the proceedings; only 22 percent thought this to be so.⁶⁵⁶

The Sharon Study reported that 90% of the ALJs took official notice where appropriate, but they considered this activity of only moderate importance, requiring only moderate judgment.⁶⁵⁷ The Cofer Study found that SSA ALJs rarely use official notice.⁶⁵⁸

The Sharon Study found that 70% of the ALJs requested information in addition to discovery.⁶⁵⁹ The Burger Study, however, found that very few non-SSA ALJs requested additional evidence, whereas almost half rarely or never did so.⁶⁶⁰ Once again, SSA practice was very different. About 80% of the SSA ALJs requested additional evidence. Even considering the difference in procedures, this observation suggests that most ALJs were not as active in supplementing the record as they might be under the APA.

The 1992 ALJ Survey found all ALJs more aggressive in seeking evidence than did the Burger Study. About 63% of the current ALJs frequently ask for additional evidence and another 24% occasionally do so.⁶⁶¹ The contrast between SSA and non-SSA ALJs continues. Sixty-seven percent of the non-SSA ALJs reported that they ask for additional evidence, with about a quarter

⁶⁵⁴1992 ALJ Survey, SSA only, response 12m.

⁶⁵⁵AJ Survey, response 14m.

⁶⁵⁶Cofer Study, at 165.

⁶⁵⁷Sharon Study, at 84.

⁶⁵⁸Cofer Study, at 221.

⁶⁵⁹Sharon, response #52.

⁶⁶⁰Burger, chart at 225.

⁶⁶¹1992 ALJ Survey, response 12d.

doing so frequently.⁶⁶² In contrast, 85% of the SSA ALJs frequently ask for additional evidence, with all the rest doing so occasionally.⁶⁶³

Almost a third of the AJs request additional information frequently and more than 80% request such information at least occasionally.⁶⁶⁴

ALJs seem to have become somewhat less aggressive as to legal issues. Sharon found that 85% directed counsel to research questions of law or policy,⁶⁶⁵ and 74% directed staff to do so.⁶⁶⁶ He found that 87% directed counsel to brief specific legal issues.⁶⁶⁷ Burger found that more than one-third requested briefs frequently and more than one-half ordered briefs occasionally.⁶⁶⁸ Almost all SSA ALJs ordered briefs only occasionally or not at all.⁶⁶⁹ The current ALJs ask for briefs about three-quarters of the time, 28% doing so frequently. SSA ALJs are less likely to do so than non-SSA ALJs.⁶⁷⁰ About a quarter of the AJs request briefs frequently and almost half do so on occasion.⁶⁷¹

The 1992 ALJ Survey found that 38% of the ALJs receive written "testimony" frequently and another 38% do so occasionally.⁶⁷² SSA ALJs are somewhat more likely to do so than non-SSA ALJs.⁶⁷³

Cofer found that SSA ALJs favored more written evidence. Fifty-six percent agreed that more written evidence should be used and another 20% were neutral on that issue.⁶⁷⁴ Eighty-five percent, with 10 percent neutral, however, opposed substituting oral argument for testimony.⁶⁷⁵

⁶⁶²1992 ALJ Survey, non-SSA, response 12d.

⁶⁶³1992 ALJ Survey, SSA only, response 12d.

⁶⁶⁴AJ Survey, response 14d.

⁶⁶⁵Sharon, response #99.

⁶⁶⁶Sharon, response #100.

⁶⁶⁷Sharon, response #104.

⁶⁶⁸Burger, chart at 225-227.

⁶⁶⁹Burger, chart at 226.

⁶⁷⁰Compare 1992 ALJ Survey, SSA only, response 12c with 1992 ALJ Survey, non-SSA, response 12c.

⁶⁷¹AJ Survey, response 14c.

⁶⁷²1992 ALJ Survey, response 12n.

⁶⁷³Compare 1992 ALJ Survey, SSA only, response 12n with 1992 ALJs survey, non-SSA, response 12n.

⁶⁷⁴Cofer Study, at 218.

⁶⁷⁵Cofer Study, at 218.

3. Conduct of the Hearing

An administrative adjudicator's duty is to ensure a complete record carries forward into the conduct of the actual hearing. ALJs are expected to be active during the hearing. Of course, the quality of the representatives of the various interests may affect the ALJ's aggressiveness at the hearing. Hence, conclusions about the performance of this function must be tempered by the relative competence of the lawyering. Nonetheless, even assuming adjudicators' attitudes towards aggressive conduct of the hearing are a function of both their view of their role and the performance of representatives, this information might affect the judgment as to the nature of the adjudicator in a given administrative process.

In response to our general question, over two-thirds of the current ALJs consider it very appropriate to take an active role in developing the record, with most of the remainder saying it is somewhat appropriate.⁶⁷⁶ The SSA ALJs are more likely to think so than the non-SSA ALJs.⁶⁷⁷ Two-thirds of the AJs believe it is completely appropriate for them to take an active role in developing the record.⁶⁷⁸ Most of the remainder believe it is at least sometimes appropriate.

Burger found that almost 60% of the non-SSA ALJs frequently questioned witnesses and almost all the remainder questioned them occasionally.⁶⁷⁹ Almost all SSA ALJs questioned witnesses frequently, again as might be expected. The 1992 ALJ Survey found that almost all current non-SSA ALJs questioned witnesses, with 64% doing so frequently.⁶⁸⁰ It found that 96% of the SSA ALJs question witnesses frequently.⁶⁸¹ The Sharon Study found that 96% of the ALJs examined witnesses and that they considered this activity important and requiring considerable judgment.⁶⁸² Over two-thirds of the AJs reported that they frequently question witnesses, and about 20% reported that they do so occasionally.⁶⁸³

The Sharon Study found that 76% of the ALJs *called* witnesses and considered that activity important, requiring considerable judgment.⁶⁸⁴ Burger,

⁶⁷⁶1992 ALJ Survey, response 24a.

⁶⁷⁷Compare 1992 ALJ Survey, SSA only, response 24a with 1992 ALJ Survey, non-SSA, response 24a.

⁶⁷⁸AJ Survey, response 18a.

⁶⁷⁹Burger, chart at 230.

⁶⁸⁰1992 ALJ Survey, non-SSA, response 12i.

⁶⁸¹1992 ALJ Survey, SSA only, response 12i.

⁶⁸²Sharon, response #21.

⁶⁸³AJ Survey, response 14i.

⁶⁸⁴Sharon, response #72.

however, found that few non-SSA ALJs called witnesses.⁶⁸⁵ The Burger Study shows that 85% of the non-SSA ALJs rarely or never called witnesses. On the other hand, 60% of the SSA ALJs called witnesses frequently and almost 30% called them occasionally. The 1992 ALJ Survey finds a similar practice among current ALJs. About a quarter of the non-SSA ALJs call their own witnesses; whereas over 80% of the SSA ALJs call their own witnesses.⁶⁸⁶

Very few AJs reported that they call witnesses. Seventy-nine percent reported that they rarely or never do so and most of the remainder reported that they do so only occasionally.⁶⁸⁷

Sharon found that about two-thirds of the ALJs determined the need for expert witnesses.⁶⁸⁸ The 1992 ALJ Survey found that most current ALJs require experts.⁶⁸⁹ The SSA and non-SSA ALJs differ considerably, however. Almost all SSA ALJs require experts, with 80% doing so frequently; whereas less than half of the non-SSA ALJs do so.⁶⁹⁰

Almost half of the AJs reported that they at least occasionally require experts.⁶⁹¹ Only about 10% do so frequently.

Cofer found that SSA ALJs considered government-paid expert witnesses to be as reliable as others.⁶⁹²

Sharon found that 84% of the ALJs established limits on cross-examination.⁶⁹³ They considered this activity moderately important, requiring only a moderate amount of judgment. He also found that 97% of the ALJs exercised reasonable control over verbose, evasive, cumulative or irrelevant testimony.⁶⁹⁴ They considered this activity moderately important, requiring only moderate judgment.

⁶⁸⁵Burger, chart at 232.

⁶⁸⁶Compare 1992 ALJ Survey, SSA only, response 12j with 1992 ALJ Survey, non-SSA, response 12j.

⁶⁸⁷AJ Survey, response 14j.

⁶⁸⁸Sharon, response #50.

⁶⁸⁹1992 ALJ Survey, response 12c.

⁶⁹⁰Compare 1992 ALJ Survey, SSA only, response 12c with 1992 ALJ Survey, non-SSA, response 12c.

⁶⁹¹AJ Survey, response 14c.

⁶⁹²Cofer Study, at 165. Because of the questions she asked on this issue, the results are ambiguous. In the most pertinent questions, she asked: "The ALJ should put more weight on the claimant's own physician's diagnosis of the claimant than that of the state-paid consulting physician." Her computation of the weighted answers was 35% agreeing but 38% disagreeing and another 26% neutral. Perhaps, this indicates nothing more than a general practice of judging the credibility of these witnesses as any others.

⁶⁹³Sharon, response #69.

⁶⁹⁴Sharon, response #74.

The Sharon Study reported that 94% of the ALJs controlled improper conduct of counsel and others.⁶⁹⁵ They considered this activity moderately important, requiring a moderate amount of judgment.

The extent to which adjudicators feel the need to go "off-the-record" indicates their commitment to the formality of the process. An adjudicator who views the process in less judicialized terms will find less need to protect the "record" from tainted information. Burger found that almost all non-SSA ALJs went off the record at least occasionally and one-third did so frequently.⁶⁹⁶ The three agencies in which the ALJs were likely to go off the record were FERC, NLRB and SEC. Almost all SSA ALJs reported that they go off the record only occasionally or not at all. The 1992 ALJ Survey found that SSA ALJs rarely go off the record, but non-SSA ALJs are inclined to do so at least occasionally.⁶⁹⁷ Over half of the AJs reported that they go off the record occasionally and another 17% reported that they do so frequently.⁶⁹⁸

Burger reported that almost three-quarters of the ALJs in all agencies rarely or never found the need to afford *in camera* treatment.⁶⁹⁹ Sharon, however, found that about two-thirds did so and 84% took some steps to safeguard confidential, privileged and sensitive materials.⁷⁰⁰ Few current ALJs proceed *in camera*.⁷⁰¹ About two-thirds of the AJs reported that they rarely or never hold *in camera* proceedings and most of the remainder do so only occasionally.⁷⁰²

The two groups follow the same practices with respect to interlocutory appeals. Burger found that ALJs rarely certified questions for interlocutory appeal⁷⁰³ and Sharon found that less than a third performed this function at all.⁷⁰⁴ The 1992 ALJ Survey found that 92% of current ALJs either do not certify questions or found the question did not apply to them.⁷⁰⁵ Eighty-eight percent of the AJs report that they rarely or never certify interlocutory appeals, with most of the remainder doing so only occasionally.⁷⁰⁶

⁶⁹⁵Sharon, response #76.

⁶⁹⁶Burger, chart at 234.

⁶⁹⁷Compare 1992 ALJ Survey, SSA only, response 12g with 1992 ALJ Survey, non-SSA, response 12g.

⁶⁹⁸AJ Survey, response 14g.

⁶⁹⁹Burger, chart at 235.

⁷⁰⁰Sharon, response #92 & #93.

⁷⁰¹1992 ALJ Survey, response 12h.

⁷⁰²AJ Survey, response 14h.

⁷⁰³Burger, chart at 235.

⁷⁰⁴Sharon, response #95.

⁷⁰⁵1992 ALJ Survey, response 12k.

⁷⁰⁶AJ Survey, response 14k.

4. Reaching a Decision

How do administrative adjudicators come to a decision? Each of the studies contributes to the answer to this question.

Of course, an important decisional function of an adjudicator is evaluating the evidence. The Sharon Study asked ALJs what they used to evaluate evidence and the importance of each of these evaluative techniques. Almost all listed demeanor, credibility, probative value and competence.⁷⁰⁷ They considered each of these to be extremely important and they felt that each required considerable judgment.

Almost 100% of current ALJs in all agencies consider the facts of the case to be a very important influence on their decisions.⁷⁰⁸ The Burger Study received the same response from past ALJs.⁷⁰⁹ Almost all of the AJs report that their evaluation of the facts is a very important influence on their decisions, as is the applicable statute.⁷¹⁰

The Burger Study distinguished the responses of non-SSA ALJs and those of SSA ALJs.⁷¹¹ Because the SSA process involves a specific type of proceeding and those ALJs are so dominant it is useful to consider separately the findings about some of the decisional elements.

The Burger Study found that almost all non-SSA ALJs considered the applicable statute to be very important and 90% considered published agency decisions very important.⁷¹² The 1992 ALJ Survey received the same response.⁷¹³ Over two-thirds consider court precedent and agency regulations very important. Ninety-two percent of current ALJs consider agency regulation as very important and 84% consider court precedent important.⁷¹⁴

The Burger Study found that the factors influencing SSA ALJs were similar but varied slightly.⁷¹⁵ SSA ALJs considered facts very important. Published agency decisions had significantly less influence, while agency regulations retained the same level of influence as with non-SSA ALJs. SSA ALJs also seemed to consider court precedent somewhat less important.

⁷⁰⁷Sharon, response #85-88.

⁷⁰⁸1992 ALJ Survey, response 16o.

⁷⁰⁹Burger, chart at 308.

⁷¹⁰AJ Survey, response 16o and 16a.

⁷¹¹Burger, compare chart at 309 with chart at 310.

⁷¹²Burger, chart at 309.

⁷¹³1992 ALJ Survey, non-SSA, response 16a.

⁷¹⁴1992 ALJ Survey, non-ALJs, response 16b & c.

⁷¹⁵Burger, chart at 310.

The 1992 ALJ Survey found that 92% of the SSA ALJs consider statutes very important and 96% consider agency regulations very important.⁷¹⁶ All consider court precedent important, with 85% considering precedent very important.⁷¹⁷

Similarly, almost all AJs consider the applicable statute very important.⁷¹⁸ About 90% of the AJs find published agency regulations, federal court precedent and published agency opinions very influential.⁷¹⁹

The Burger Study found that personal perceptions did appear relatively important.⁷²⁰ Almost all ALJs found personal standards of fairness either very important or moderately important. Most found personal concepts of public interest either very important or moderately important. About two-thirds felt that their perceptions of the agency's policy goals were important to their decisions.

Eight-two percent of the current ALJs reported that personal standards of fairness were important.⁷²¹ Less than half found public interest important.⁷²² And less than half found that their perception of agency policy goals are important.⁷²³

Fewer AJs reported that their personal standards of fairness are an important influence on their decisions. Still, about three-quarters found that factor important.⁷²⁴ Fewer than half felt that their ideas of public interest are important and only a third think their perception of agency policy goals are important.⁷²⁵ Moreover they are slightly more inclined than the ALJs to consider the latter two personal factors inappropriate to consider.

Decisions of other ALJs were rated as either moderately important or not important by non-SSA ALJs.⁷²⁶ Sharon found that over three-quarters of the ALJs read the decisions of other judges in their agency but did not consider them very important.⁷²⁷ The 1992 ALJ Survey found that 38% of the current

⁷¹⁶1992 ALJ Survey, SSA only, response 16b & c.

⁷¹⁷1992 ALJ Survey, SSA only, response 16c.

⁷¹⁸AJ Survey, response 16a.

⁷¹⁹AJ Survey, response 16b, c & d.

⁷²⁰Burger, chart at 309.

⁷²¹1992 ALJ Survey, response 16m.

⁷²²1992 ALJ Survey, response 16l.

⁷²³1992 ALJ Survey, response 16k.

⁷²⁴AJ Survey, response 16m.

⁷²⁵AJ Survey, response 16l & k.

⁷²⁶Burger, chart at 309.

⁷²⁷Sharon, response #115.

ALJs think that other ALJs' opinions are not important and only 6% find those opinions to be very important.³²²

Burger found that about two-thirds of the ALJs considered staff positions important but only about 10% found them to be very important.³²³ About 16% found it inappropriate to consider staff positions. The 1992 ALJ Survey found that only 7% of the current ALJs think staff positions are very important, with 36% finding them somewhat important, and more than a quarter finding staff positions inappropriate to consider.³²⁴

Burger found that *public* statements by agency officials carried little weight with most ALJs.³²⁵ Over three-quarters of the ALJs considered *private* statements of agency officials to be inappropriate to consider and the rest found such statements unimportant.³²⁶ The 1992 ALJ Survey found that a majority of the current ALJs think that consideration of both private and public statements of agency officials is inappropriate.³²⁷

Burger found that some ALJs in all agencies took some notice of public opinion but very few found it important.³²⁸ The 1992 ALJ Survey found public opinion has little influence.³²⁹ About 52% feel that it is inappropriate to consider public opinion.³³⁰

Only 7% of the current ALJs found statements from Congress important, with only 2% finding such statements very important.³³¹ More than half considered such statements inappropriate for consideration.³³² Burger found that more than two-thirds of all ALJs found consideration of statements made by members of Congress to be inappropriate and most of the remainder thought them to be of no importance.³³³

The 1992 ALJ Survey found that positions of others in the agency influences SSA ALJs to a similar but slightly different extent. The Burger Study agreed for past ALJs.³³⁴ Both staff positions and opinions of other

³²²1992 ALJ Survey, response 16g.

³²³Burger, chart at 309.

³²⁴1992 ALJ Survey, response 16f.

³²⁵Burger, chart at 309.

³²⁶Burger, chart at 309.

³²⁷1992 ALJ Survey, responses 16h & i.

³²⁸Burger, chart at 308.

³²⁹1992 ALJ Survey, response 16n.

³³⁰*Id.*

³³¹1992 ALJ Survey, response 16j.

³³²*Id.*

³³³Burger, chart at 308.

³³⁴Burger, chart at 310.

ALJs had less influence with SSA ALJs.⁷⁴¹ Like other ALJs, SSA ALJs consider statements of agency officials, members of Congress and public opinion of little importance to their decisions.⁷⁴²

In general, AJs respond to much the same influences as ALJs.⁷⁴³ Over half of the AJs consider decisions of other presiding officers to be important, but only 15% think they are very important.⁷⁴⁴ Fewer than half of the AJs considered staff positions important and more than a quarter felt that it is inappropriate to consider staff positions.⁷⁴⁵ Almost two-thirds of the AJs consider public statements by agency officials to be inappropriate to consider and almost all the rest think those statements are not important.⁷⁴⁶ Three-quarters of the AJs find private statements by agency officials inappropriate to consider with most of the rest considering them unimportant.⁷⁴⁷ Less than 7% of the AJs find public opinion important and almost three-quarters feel it is inappropriate to consider.⁷⁴⁸ More than two-thirds of the AJs consider statements by members of Congress to be inappropriate to consider and almost all the rest think those statements are not important.⁷⁴⁹

The Cofer Study concluded that SSA ALJs tended to bias their decisions in favor of the claimants. She based this conclusion on the fact that where the evidence is of equal weight on both sides, 60% of the ALJs would rule in favor of the claimant.⁷⁵⁰ This practice is contrary to the APA, which places the burden of proof with the "proponent of a...order," in this case the claimants.⁷⁵¹ Cofer observed that "a substantial portion of the ALJs must perceive that the process as a whole is weighted against the claimant in borderline cases."⁷⁵²

The GAO Study found that ALJs rarely engaged in research on agency policy, legal precedent or technical issues.⁷⁵³ They almost never did so in short cases and did so only about a third of the time in long cases. Sharon,

⁷⁴¹Compare 1992 ALJ Survey, SSA only, responses 16f & g with 1992 ALJ Survey, non-SSA, responses 16f & g.

⁷⁴²Compare 1992 ALJ Survey, SSA only, responses 16i, j & n with 1992 ALJ Survey, non-SSA, responses 16i, j & n.

⁷⁴³AJ Survey, response 16.

⁷⁴⁴AJ Survey, response 16g.

⁷⁴⁵AJ Survey, response 16f.

⁷⁴⁶AJ Survey, response 16h.

⁷⁴⁷AJ Survey, response 16i.

⁷⁴⁸AJ Survey, response 16n.

⁷⁴⁹AJ Survey, response 16j.

⁷⁵⁰Cofer Study, at 168.

⁷⁵¹APA §556(d).

⁷⁵²Cofer Study, at 168.

⁷⁵³GAO Study, response #13-15.

however, reported that 96% of the ALJs researched legal and policy from statutes, judicial decisions and the agency, and that they considered this activity extremely important, requiring considerable judgment.⁷⁵⁴

One argument for housing adjudicators in the relevant agency is that they have access to expertise. One indication of the importance of this factor is the extent to which the adjudicator obtains technical assistance outside the adjudicative proceeding.

Burger asked where ALJs obtained their technical information.⁷⁵⁵ Most of the ALJs found hearing processes, testimony and exhibits to be very important sources of technical assistance. Some made extensive use of agency resources outside the actual hearing. Nearly half found agency research reports to be either very important or moderately important.⁷⁵⁶ About a quarter found consultation with agency experts to be either very important or moderately important. Sharon found that 41% of the ALJs consulted professional and technical experts and considered those consultations to be important.⁷⁵⁷ Cofer reported that 90% of the SSA ALJs said they consulted agency staff in less than a quarter of the cases.⁷⁵⁸

Thus, ALJs use agency staff not involved in the adjudication, but the availability of such resources may not be very important. However, the GAO Study found that most ALJs thought improved administrative and/or technical support would improve the administrative process.⁷⁵⁹

The Cofer Study of SSA ALJs inquired into whether consultations with agency staff not engaged in the adjudications should be disclosed. She found: "Eighty-two percent of the ALJs agreed that any such information should be revealed to the claimant, although 90 percent indicated that they were involved in such consultations in only 0-24 percent of their cases."⁷⁶⁰

The Sharon Study found that almost 90% of the ALJs considered proposed findings of fact and conclusions of law.⁷⁶¹ Moreover, they considered proposed findings extremely important and the use of such findings to require considerable judgment.

⁷⁵⁴Sharon, response #114.

⁷⁵⁵Burger, chart at 250.

⁷⁵⁶Burger, chart at 250.

⁷⁵⁷Sharon, response #51.

⁷⁵⁸Cofer Study, at 166.

⁷⁵⁹GAO Study, response #7-9.

⁷⁶⁰Cofer Study, at 166.

⁷⁶¹Sharon, response #113.

5. The Result of the Initial Adjudication

Written or "initial" decisions are not required under the APA, §557(b). Therefore, an administrative adjudicative process could use ALJs to merely compile the record and submit it to the agency head without decision. However, Burger found that most administrative adjudicative programs did not use this system. Ninety percent of the ALJs in all agencies rarely or never merely certified the record to the agency head for decision.⁷⁶² Sharon reported that less than a quarter did so.⁷⁶³ The 1992 ALJ Survey found that only 4% of the current ALJs even occasionally certify the record.⁷⁶⁴ Almost all of the AJs reported that they rarely or never certify a decision to the agency head.⁷⁶⁵

Burger found that over three-quarters of both non-SSA and SSA ALJs rarely or never delivered oral decisions.⁷⁶⁶ Sharon reported that slightly fewer than half the ALJs did so.⁷⁶⁷ The 1992 ALJ Survey found that few current ALJs deliver oral decisions.⁷⁶⁸ Almost two-thirds of the AJs report that they rarely or never deliver oral decisions, but about a third reported that they frequently do so.⁷⁶⁹ The GAO Study, however, found that most ALJs thought more oral or "per curiam" opinions would improve the process.⁷⁷⁰

Thus, written decisions are by far the norm. Sharon reported that almost all ALJs prepared and issued written decisions and orders.⁷⁷¹ They considered this the most important part of their job and found that doing so required the most judgment of any of their activities.

To whom are these decisions directed? Burger reported that almost all ALJs directed their decisions to the parties in the dispute.⁷⁷² Obviously, appellate authorities would be of some concern to ALJs, but only about a third reported that administrative reviewers or federal judges were a very important audience for their decisions.⁷⁷³ Those outside the relevant decisionmaking process were not considered important. Considered unimportant audiences by most ALJs were industry, the public, the bar, Congress, interest groups and

⁷⁶²Burger, chart at 242.

⁷⁶³Sharon, response #119.

⁷⁶⁴1992 ALJ Survey, response 12i.

⁷⁶⁵AJ Survey, response 14i.

⁷⁶⁶Burger, chart at 240.

⁷⁶⁷Sharon, response #117.

⁷⁶⁸1992 ALJ Survey, response 12o.

⁷⁶⁹AJ Survey, response 14n.

⁷⁷⁰GAO Study, response #7-10.

⁷⁷¹Sharon, response #118.

⁷⁷²Burger, chart at 316, item 1.

⁷⁷³Burger, chart at 316, items 2 & 3.

other ALJs.⁷⁷⁴ These responses add support to the conclusion that ALJs focus on the specific controversy before them and are not particularly interested in doing more than resolving the particular dispute.

6. Administrative Review Process

The GAO Study found that about three-quarters of the ALJs thought that greater finality for ALJs' decisions would, to a great extent or better, be an improvement.⁷⁷⁵ The Cofer Study reported that most SSA ALJs believed that theirs should be the final decision of the agency and that the record should close after the ALJ's decision.⁷⁷⁶ Interestingly, some AJs do have final decisionmaking authority.

Burger offered these observations about the practicality of administrative review:

[H]eavy caseloads have an impact on the uniformity of the law. Just as busy appellate courts provide only limited supervision of the lower courts' work, so too are agency reviewing authorities constrained by the pressure of numbers from scrutinizing all ALJ's decisions....Less is known about the basis on which agency heads select cases for discretionary review [than appellate courts], a matter complicated by differences in agency structure and procedures. Nonetheless, in most of the agencies the majority of ALJ decisions are not reviewed and become the final agency decisions. The degree of independent judgment they exercise is thus of paramount importance for ALJs and for other federal judges as well.⁷⁷⁷

The 1992 ALJ Survey found that about one-third of the ALJs are bothered by too much review.⁷⁷⁸ About three-quarters of the AJs are rarely or never bothered about this, and only 10% of the AJs are often bothered by too much review.⁷⁷⁹

The GAO Study found that administrative review occurred in about half of the typical cases.⁷⁸⁰ The percentage varied greatly as between short and long

⁷⁷⁴Burger, chart at 316, items 4, 5, 6, 7, 8 & 9.

⁷⁷⁵GAO Study, response #7-2.

⁷⁷⁶Cofer Study, at 170.

⁷⁷⁷Burger, at 362.

⁷⁷⁸1992 ALJ Survey, response 15d.

⁷⁷⁹AJ Survey, response 27d.

⁷⁸⁰GAO Study, response #13-19.

cases. Slightly more than 10 percent of the short cases were appealed but almost three-quarters of the long cases were appealed.

The GAO Study found that administrative appeal is a matter of right in the processes presided over by about one-third of the ALJs.⁷⁶¹ In about 23% of the adjudications, review is a matter of discretion. A majority of the ALJs reported administrative review occurred in their agency based on the agency's own motion and on requests by the parties.⁷⁶² About 60% reported that administrative review is *de novo review*, but only 8% reported that review would result in a *de novo hearing*.⁷⁶³

The opinion of the administrative review authority should be one avenue of communication between the ALJs and the head of the agency. The GAO Study, however, found that less than 60% of the ALJs perceived that they receive formal feedback from the administrative review authority. Over 30% of the ALJs reported no feedback.⁷⁶⁴

Although the GAO Study attempted to inquire about the ALJs' perceptions as to why their decisions are reversed by the administrative review authority, the information obtained is ambiguous. Of importance is that three-quarters responded that the review never took facts out of context to reach a preconceived decision, and another 12% said the reviewing authority seldom did so.⁷⁶⁵ The reviewing authorities apparently rarely found that the ALJs misapplied the law or committed factual error. The ALJs apparently perceived that the review authority either interpreted the same facts differently or found other facts to be determinative. Thus, it seems that most reversals were the result of a different interpretation of the factual record.

The 1992 ALJ Survey found that almost half of the ALJs think that the lack of clear standards for review is a problem.⁷⁶⁶ Almost three-quarters of the ALJs feel that lack of agency standards for review of their decisions is not a problem.⁷⁶⁷ Nonetheless, one-quarter did respond that the absence of review standards is either sometimes or frequently a problem.

The GAO Study found that over half of the ALJs responded that at least sometimes those who review their decisions were not nearly as qualified as they were.⁷⁶⁸ The 1992 ALJ Survey found that 62% of the current ALJs think that those who review their work are not nearly as qualified as they, with 29%

⁷⁶¹GAO Study, response #38.

⁷⁶²GAO Study, response #38 attachment X.

⁷⁶³GAO Study, response #39.

⁷⁶⁴GAO Study, response #40.

⁷⁶⁵GAO Study, response #41.

⁷⁶⁶1992 ALJ Survey, response 14f.

⁷⁶⁷ALJ Survey, response 24f.

⁷⁶⁸GAO Study, response #44-9.

frequently thinking so. Cofer found that many SSA ALJs believed that the review authority was less qualified than they.⁷⁸⁹ Sixty-nine percent of the current SSA ALJs think that officials who review their work are not nearly as qualified as they, with 34% frequently thinking so.⁷⁹⁰

The 1992 ALJ Survey found that 62% of the ALJs think that review by unqualified persons is a problem, with 33% thinking this is frequently a problem.⁷⁹¹ The current SSA ALJs find this to be more of a problem than current non-SSA ALJs.⁷⁹²

Almost half the AJs never have the feeling that those who review their work are not almost as qualified as they are.⁷⁹³ However, one-quarter sometimes feel that way, and 14% often or always feel that way. Almost two-thirds report that review by persons who they consider unqualified was not a problem.⁷⁹⁴

E. Across-the-Board Measures of Performance

Study of actual practice demonstrates that it is difficult to evaluate adjudicator performance across programs. The cases and the applicable law vary so extensively that the search for general performance standards seems futile. The difficulty is in developing some generalized measure of what might be called the "intellectual complexity" of adjudications in various programs. Given this foundational weakness, it is difficult to make relative judgments about delay and efficiency of caseload resolution.

Recognizing this difficulty, Burger attempted to develop surrogate measures of such complexity but her attempt does not seem to support a reliable system for generalized performance evaluations.⁷⁹⁵

The GAO Study attempted some measure of the relative complexity of types of cases and among programs. Again these measures are so unsatisfactory as to be of little value in our estimation. The study asked questions about the amount of time, pages of transcripts, number of parties, number of witnesses and length of hearing as to cases the ALJs considered

⁷⁸⁹Cofer Study, at 170.

⁷⁹⁰1992 ALJ Survey, response 15i.

⁷⁹¹1992 ALJ Survey, response 14i.

⁷⁹²Compare 1992 ALJ Survey, SSA only, response 14i with 1992 ALJ Survey, non-SSA, response 14i.

⁷⁹³AJ Survey, response 27i.

⁷⁹⁴AJ Survey, response 24i.

⁷⁹⁵Burger at 190.

short, typical and long.⁷⁹⁶ The range of the results were so great as to be meaningless. For example, a short case might have between 1 and 5,000 pages of transcripts and a long case might have between 1 and 25,000 pages of transcripts. It seems impossible to draw any conclusions from this information.

We are driven to the conclusion that relative study of these types of data is of little value. Performance improvement, if possible at all, must be taken on a process-by-process basis. Because of these definitional and measurement difficulties, neither of our surveys attempted to delve into information aimed at evaluation.

One performance evaluation idea explored in the GAO Study was the evaluation of ALJs by an independent panel of attorneys. Not surprisingly, almost three-quarters of the ALJs disagreed with this proposal.⁷⁹⁷

F. Relationship with Agency Hierarchy and Others in the Agency

The adjudicators' relationship with the agency must be viewed from two perspectives: the structural relationship, including supervision and management practices, and the policy relationship, including the system through which the agency hierarchy communicates its policy judgments and the adjudicators incorporate those policy judgments into their decisions. Recommendations aimed at coordinating the role of the initial adjudicators within the greater adjudicatory bureaucracy could be informed by the adjudicators' attitudes and opinions as to both aspects of the relationship.

1. Structural Relationship

The Burger Study gives us some information about the ALJs' perceptions of the structural relationship. These answers were found in her inquiries about the problems ALJs perceived. Probably the question most likely to relate to structural relationship in the minds of ALJs is whether they felt they confront "too close supervision." Almost all the ALJs found that not to be a problem.⁷⁹⁸

The 1992 ALJ Survey asked the same question of current ALJs. Almost 90% of the ALJs found that the prospect of too close supervision is either not

⁷⁹⁶GAO Study, response #13.

⁷⁹⁷GAO Study, response #10.

⁷⁹⁸Burger, chart at 346 & 365.

a problem or not applicable.⁷⁹⁹ However, 61% found that agency interference is a problem, with 26% finding it to be a frequent problem.⁸⁰⁰

Almost 80% of the AJs report that too close supervision is not a problem, with most of the remainder reporting that it is only sometimes a problem.⁸⁰¹ Some AJs do have some complaints regarding the structural relationships. While about two-thirds of the AJ's do not agree that agency interference is a problem, 11% strongly agree and another 23% agree.⁸⁰²

Burger observed: "Of the roughly 6 percent of the total number of ALJs in our sample who claimed that they were too closely supervised, all but one of the judges worked for SSA."⁸⁰³ The Cofer Study reported that SSA ALJs did feel a tacit pressure to limit their grants.⁸⁰⁴ The current SSA ALJs find close supervision to be only a slightly more frequent problem than non-SSA ALJs.⁸⁰⁵

Almost every agency had some management information system that gives the status of each case assigned to each ALJ, according to the GAO Study.⁸⁰⁶ Most reported that these systems reported the number of cases handled by each ALJ.⁸⁰⁷ At the SSA, the ALJs had to meet some quota of cases each month. Not surprisingly, the Cofer Study found that most SSA ALJs objected to these quotas.⁸⁰⁸

The GAO Study reported that the ALJs believed that management information systems might increase productivity and were not likely to decrease productivity or motivation.⁸⁰⁹ Those systems did seem to increase peer pressure to increase productivity.⁸¹⁰

The GAO Study found that the ALJs did believe, however, that such systems adversely affect quality.⁸¹¹ The 1992 ALJ Survey found that 69% of the ALJs think caseload burden interferes with quality.⁸¹² SSA ALJs

⁷⁹⁹1992 ALJ Survey, response 141.

⁸⁰⁰1992 ALJ Survey, response 23a.

⁸⁰¹AJ Survey, response 241.

⁸⁰²AJ Survey, response 26a.

⁸⁰³Burger at 364.

⁸⁰⁴Cofer Study, at 171. SSA ALJs grant a benefit by reversing the initial denial by local offices and, hence, SSA ALJs' "reversal" rate is, in fact, the rate at which they grant benefits.

⁸⁰⁵Compare 1992 ALJ Survey, SSA only, response 141 with 1992 ALJ Survey, non-SSA, response 141.

⁸⁰⁶GAO Study, response #29.

⁸⁰⁷GAO Study, response #34.

⁸⁰⁸Cofer Study, at 223.

⁸⁰⁹GAO Study, response #36.

⁸¹⁰GAO Study, response #36-7.

⁸¹¹GAO Study, response #36-5.

⁸¹²1992 ALJ Survey, response 15a.

responded to the Cofer Study that productivity requirements affected the quality of their decisions.⁸¹³ The 1992 ALJ Survey found that 78% of the SSA ALJs think that caseload interferes with quality, with 36% thinking it frequently does so.⁸¹⁴ More than one-third of the ALJs think that workload burdens interfere with quality often or almost all the time.

The GAO Study reported that ALJs would generally favor a uniform weighted caseload index, similar to that used in federal district courts.⁸¹⁵

The GAO Study asked whether ALJs would consider it to be an infringement on their independence for the administrative review authority to advise them that they had written illogical opinions, misapplied the law, inaccurately cited the facts, written a poor quality opinion, or written a wrong opinion.⁸¹⁶ About one-third of the ALJs would consider any of these to be an infringement on their independence. However, it appears that review authorities very rarely do any of these.⁸¹⁷ Of these, only communication that the law has been misapplied was noted by more than 10 percent of the time. The others occurred only between 1 and 4% of the time.⁸¹⁸

2. Policy Relationship

The real questions about the relationship between the agency hierarchy and the adjudicators focus on policy control. The policy relationship raises questions of special complexity. Various fairness values, including uniformity of results, require that the agency have dominance over policy questions. The adjudicators themselves recognize the need for policy guidance. The problem lies at the margin between mechanisms for ensuring application of the agency's policy and overreaching interference in the adjudicators' independent judgment. Thus, we explore the policy relationship from two perspectives: the adjudicators' views of the adequacy of agency policy guidance and their views of the interference in independent judgment in the name of policy dominance.

⁸¹³Cofer Study, at 171.

⁸¹⁴1992 ALJ Survey, SSA only, response 15a.

⁸¹⁵GAO Study, response #37.

⁸¹⁶GAO Study, response #43.

⁸¹⁷GAO Study, response #42.

⁸¹⁸GAO Study, response #42.

a. Adequacy of Agency Policy Guidance

Burger reported that ALJs did not find lack of policy direction to be a problem.⁸¹⁹ About three-quarters said that it was not a problem and another 19% found it to be only somewhat a problem. Only 6.5% found it to be a significant problem. Burger observed, however:

While only a small percentage of the ALJs deemed it of significant consequence, we had not anticipated that so many ALJs would acknowledge a need for clearer direction. Comments by the ALJs suggested that at issue was not the need for specific instruction but for greater consistency on the part of the agency head which would produce great legal certainty. Judges at the CAB, FCC, FERC, ICC, EPA, and at some of the smaller or single-judge agencies took their agency to task for failing to show a clear sense of policy direction.⁸²⁰

The 1992 ALJ Survey found that current ALJs see lack of policy direction as more of a problem. Thirty-five percent think it is occasionally a problem and another 9% think it is a frequent problem.⁸²¹

AJs do not generally believe that lack of policy guidance is a problem. Two-thirds of the AJs report that lack of policy direction from the agency is not a problem.⁸²² Still, one-third do find this to be either sometimes or frequently a problem. Similarly, about three-quarters do not agree that inadequate policy guidance is a serious problem at their agency but about one-quarter agree or strongly agree that inadequate policy guidance is a problem at their agency.⁸²³

The 1992 ALJ Survey found that agency regulations are the primary source of policy direction. Ninety-six percent of the ALJs think such regulations are very important to their decisions, with the rest finding regulations somewhat important.⁸²⁴ Almost 90% of the AJs feel that agency regulations are very important to their decisions and the rest think those regulations are moderately important.⁸²⁵

⁸¹⁹Burger, chart at 346, item 8.

⁸²⁰Burger, at 353-354.

⁸²¹1992 ALJ Survey, response 14e.

⁸²²AJ Survey, response 24e.

⁸²³AJ Survey, response 26i.

⁸²⁴1992 ALJ Survey, response 16b.

⁸²⁵AJ Survey, response 16b.

The impact of precedent in administrative decisionmaking has always been controversial. In agencies with few cases and thorough opinions by both ALJs and the review authority, some commitment to precedent or at least a requirement of reasoned change of position seems inevitable. In "mass justice" programs, such a commitment is not only rarely feasible but may, in fact, create injustice where as a practical matter only a few parties are aware of the prior decisions.

For this reason, it is useful to note the difference perceived by SSA ALJs and non-SSA ALJs in the influence of prior agency decisions. Burger found that 87% of the non-SSA ALJs consider published agency decisions a very important source of policy.⁸²⁶ Burger reported that about 70% of the SSA ALJs found published decisions to be only moderately important or not at all important.⁸²⁷ The 1992 ALJ Survey found that almost all non-SSA ALJs consider that published agency opinions are important, with 84% saying they are very important.⁸²⁸ SSA ALJs rate such opinions important less often, with only 58% considering those opinions to be very important.⁸²⁹ About 90% of the ALJs consider published agency opinions to be very important to their decisions.⁸³⁰

Cofer found that SSA ALJs favored an effort to create a system of organizing representative cases in order to make using prior decisions practical in the SSA context.⁸³¹ The impracticality of systematic access to these decisions may be one major reason precedent carries less weight with SSA ALJs.

The Cofer Study suggested that the SSA ALJs did not agree with the agency's nonacquiescence policy and most would apply a court decision rather than the agency's regulations.⁸³²

Burger found that most non-SSA ALJs considered communications from the chief ALJ to be either very important or moderately important sources.⁸³³ SSA ALJs did not rely on these sources.

Burger's inquiries regarding "patterns of communication" suggest that ALJs do not often seek outside advice on difficult cases.⁸³⁴ Very few of them

⁸²⁶Burger Study, at 255.

⁸²⁷Burger Study, at 255.

⁸²⁸1992 ALJ Survey, non-SSA, response 16d.

⁸²⁹1992 ALJ Survey, SSA only, response 14d.

⁸³⁰ALJ Survey, response 16d.

⁸³¹Cofer Study, at 169.

⁸³²Cofer Study, at 168. Since her study, SSA has modified its nonacquiescence policy, *see* 55 Fed. Reg. 1990 (January 11, 1990), codified at 20 CFR §§404.985, 410.670c, 416.1485 (1992).

⁸³³Burger Study, at 255.

⁸³⁴Burger, *chart* at 262.

consulted either the chief ALJ or other ALJs for help with such cases. The 1992 ALJ Survey found that 21% of the current ALJs consult with superiors about difficult cases.⁸³⁵ SSA ALJs are slightly more likely to do so than non-SSA ALJs.⁸³⁶ About one-third of all ALJs consult with other ALJs either during or before a hearing but few do so frequently.⁸³⁷

Slightly fewer than 50% of the AJs report that they rarely or never consult with superiors about difficult cases.⁸³⁸ But more than one-third do so occasionally and 17% do so frequently. About half the AJs occasionally consulted with other AJs prior to hearing with 29% doing so frequently.⁸³⁹ About 40% of the AJs occasionally consult with other AJs during the hearing, and a third do so frequently.⁸⁴⁰

This information suggests that ALJs are inclined to resolve individual controversy as best they can and let the review stages of the adjudicative process resolve the policy questions. AJs seem more willing to seek advice, especially from their peers.

b. Interference with Individual Judgment in the Name of Policy Dominance

Burger inquired into actual interference in ALJ decisionmaking in several different ways. First, she asked the general question whether ALJs perceived any "threats to independent judgment." She also asked the more specific question whether they perceived "pressure for different decisions." She observed that virtually all of the ALJs who identified any of these problems were employed by the SSA.⁸⁴¹

As to the question of threats to independent judgment, only 1.5% of the non-SSA ALJs responded that it was a significant problem and another 1% responded that it was somewhat of a problem.⁸⁴² Thus, 97.5% of the non-SSA ALJs responded that this interference was not a problem. As to the question of pressure for difference decisions, only 1% of the non-SSA ALJs responded that it was a significant problem and 1.9% responded that it was somewhat of a problem. Thus, 97.1% of the non-SSA ALJs responded that such

⁸³⁵1992 ALJ Survey, response 10e.

⁸³⁶Compare 1992 ALJ Survey, SSA only, response 10e with 1992 ALJ Survey, non-SSA response 10e.

⁸³⁷1992 ALJ Survey, responses 10f & g.

⁸³⁸AJ Survey, response 13e.

⁸³⁹AJ Survey, response 13f.

⁸⁴⁰AJ Survey, response 13g.

⁸⁴¹Burger, at 364.

⁸⁴²Burger, chart at 365.

interference was not a problem. A plausible conclusion is that the few non-SSA ALJs who perceive these problems have individual problems with specific agencies, and this is not a systemic problem.

While most SSA ALJs did not perceive the specific problem of pressure for different decisions, almost half perceived the more vague problem of threats to independence.⁸⁴³ As to the more specific question of pressure for different decisions, 6.7% of the SSA ALJs found it to be a significant problem and 12% found it to be somewhat of a problem. As to the more general question of threats to independence, 27.9% of the SSA ALJs found it to be a significant problem and 16.7% found it to be somewhat of a problem. Thus, only 55.4% of the SSA ALJs felt no threats to their independence. The Cofer Study confirmed the existence of this perception on the part of SSA ALJs. She reported that 70.1% of the SSA ALJs agreed that there was agency pressure against allowances.⁸⁴⁴ However, this pressure was not overt or direct.⁸⁴⁵

The 1992 ALJ Survey did not find as positive a situation. Fifteen percent of the non-SSA ALJs responded that threats to independence are a problem, with 8% saying it is frequently a problem.⁸⁴⁶ Nine percent responded that pressure to make different decisions is a problem, with only 4% finding it to be a frequent problem.⁸⁴⁷ In contrast, 34% of the SSA ALJs find threats to independence to be a problem, with 21% saying it is a frequent problem.⁸⁴⁸ Twenty-six percent find they are under pressure to make different decisions, with 10% finding that to be a frequent problem.⁸⁴⁹

ALJs report pressure to be less of a problem than current ALJs. About 80% report that pressure for different decisions is not a problem, and most of the remainder report that it is only occasionally a problem.⁸⁵⁰ Only 2% reported that it is frequently a problem. About 70% report that threats to independence of judgment are not a problem.⁸⁵¹ However, 18% report that it is occasionally a problem and 10% reported that it is frequently a problem.

Taken together, these data suggest that protection aimed at ensuring independence in addition to that now available must be agency, or perhaps even individual, specific. That is, across-the-board solutions are less likely to solve the current problems. A solution capable of sensitivity to individual

⁸⁴³Burger, chart at 365.

⁸⁴⁴Cofer, at 223.

⁸⁴⁵Cofer, at 171.

⁸⁴⁶1992 ALJ Survey, non-SSA, response 14m.

⁸⁴⁷1992 ALJ Survey, non-SSA, response 14h.

⁸⁴⁸1992 ALJ Survey, SSA only, response 14m.

⁸⁴⁹1992 ALJ Survey, SSA only, response 14h.

⁸⁵⁰ALJ Survey, response 24h.

⁸⁵¹ALJ Survey, response 24m.

circumstances seems much more appropriate. One such approach might be an administrative adjudicator ombudsman office, perhaps in OPM, to deal with these individual problems.

G. Attitude Towards Their Jobs

1. Perception of Their Function

Obviously, ALJs' perceptions about the nature of their office is an important determinant of performance. The Sharon Study found that 97% of the ALJs considered the conduct of an orderly hearing in a judicial manner and assurance of fundamental fairness and due process to be the most important activities they perform.⁸⁵² They also believed this function required an extremely high level of judgment.

Burger asked the open-ended question: "How would you describe your role in the administrative process?" Almost all ALJs responded in some fashion that they were "judges."⁸⁵³ We asked the same question of current ALJs and they responded in much the same way.⁸⁵⁴ We also asked the same question of AJs and they, too, responded in much the same fashion.⁸⁵⁵

Burger asked a question regarding the description of their role, with specific answers.⁸⁵⁶ A statement that ALJs were "judges," "decision-makers" or "factfinders" who were "important" and "independent" received the votes of about 82% of those who answered that question. In contrast, only about 5% described themselves as a "cog."

We asked the same question of current ALJs. Ninety-six responded that "judge/adjudicator" best describes their role.⁸⁵⁷ More than 90% described their role as "decision-maker" and "fact-finder."⁸⁵⁸ Ninety percent said that "independent" very much describes their role and the remainder found that term somewhat descriptive.⁸⁵⁹ Few current ALJs describe their role as "cog"

⁸⁵²Sharon, response #57. (The mean rating of 4.8 was by far the highest importance rating in the survey, except for preparing a written decision.)

⁸⁵³Burger at 296.

⁸⁵⁴1992 ALJ Survey, response 6.

⁸⁵⁵AJ Survey, question 22, for example:

⁸⁵⁶Burger, chart at 296.

⁸⁵⁷1992 ALJ Survey, response 21a.

⁸⁵⁸1992 ALJ Survey, responses 21d & e.

⁸⁵⁹1992 ALJ Survey, response 21c.

or "referee."⁸⁶⁰ Most think their role is "important," with 62% thinking that a very apt description of their role.⁸⁶¹

We asked the same question of AJs, again with similar results.⁸⁶² Virtually all think "judge/adjudicator," "decision-maker," and "fact-finder" are very appropriate descriptions of themselves. Ninety-one percent describe themselves as independent. Almost 90% think they are important, but 31% feel that description is only somewhat appropriate. Perhaps more telling is the fact that three-quarters think a description as a "cog" is inappropriate and only 3% think that description very appropriate.⁸⁶³ Only one-third feel "wearer of three hats" is either a very appropriate or somewhat appropriate description. Few find the description of "referee" as more than somewhat appropriate, with 44% saying it is inappropriate.

We asked the current ALJs to rank certain aspects of their function. The three most important are marshalling the facts (85%), making credibility determinations (71%), and guaranteeing due process (68%).⁸⁶⁴ When asked the most important influences on their decisions, 78% said evaluation of the facts, 58% said applicable statutes, and 53% said published agency regulations.⁸⁶⁵

When asked to rank the three most important perceptions of their job, 86% of the AJs rank marshalling facts among the top three and 76% so rank guaranteeing due process.⁸⁶⁶ When asked to rank the three most important influences on their decisions, 84% selected the applicable statutes, 69% selected judicial precedent and 54% selected evaluation of facts.⁸⁶⁷ Again AJs see their job in much the same way as other judges.

In contrast, neither group of adjudicators sees its function as significantly involved with policymaking. The studies indicate that ALJs do not often seek to effect changes in agency policy. Burger found that only 4.5% of the ALJs frequently suggest policy changes and only 31.5% occasionally do so.⁸⁶⁸ The 1992 ALJ Survey found that 2% of the current ALJs frequently suggest policy changes and another 22% occasionally do so.⁸⁶⁹

⁸⁶⁰1992 ALJ Survey, response 21g & h.

⁸⁶¹1992 ALJ Survey, response 21b.

⁸⁶²AJ Survey, response 23.

⁸⁶³One of these described themselves as a "vital cog."

⁸⁶⁴1992 ALJ Survey, response 9.

⁸⁶⁵1992 ALJ Survey, response 16.

⁸⁶⁶AJ Survey, response end of 15.

⁸⁶⁷AJ Survey, response end of 16.

⁸⁶⁸Burger, chart at 267.

⁸⁶⁹1992 ALJ Survey, response 10k.

AJs are slightly more likely to suggest policy changes. Whereas 54% report that they rarely or never do so, 44% reported that they do so on occasion.⁸⁷⁰

In short, the vast majority of both ALJs and of AJs perceive themselves as judges, performing the same functions as judges in the same manner and under the same constraints. Indeed, Burger observed:

Although key differences between ALJs and other federal judges have been noted, our data have provided no evidence that the art of judging is any more mechanical when practiced within the administrative process than within the federal judicial system. It was therefore not surprising to see that several of the problems which ALJs identified in their work related to the central judicial system of finding and applying the law.⁸⁷¹

She goes on to state: "One is struck by how many problems administrative law judges share with the judges of our Article III courts."⁸⁷² One might extend that remark to AJs.

2. Comparison with Other Adjudicators

The 1992 ALJ Survey asked current ALJs to compare themselves with federal judges and non-ALJ adjudicators.⁸⁷³ Most feel they have less authority and prestige than federal judges. They feel more bound to agency policy and less independent. They think they have less impact on public policy. Otherwise, they do not make a clear distinction. They feel they have more authority, prestige, and freedom in reaching a decision and independence than AJs. They feel they handle more complex cases and more than half feel they have a greater caseload burden. More than half think they have more impact on public policy. They generally think they are bound to agency policy equally or less than are AJs.

We asked the AJs to compare their position with that of ALJs.⁸⁷⁴ They divided almost equally among greater, the same or lesser regarding independence from agency supervision and authority. More than two-thirds think they have less status than ALJs. Almost 60% think they have a greater

⁸⁷⁰ AJ Survey, response 13k.

⁸⁷¹ Burger, at 353.

⁸⁷² Burger, at 362.

⁸⁷³ 1992 ALJ Survey, response 30 & 31.

⁸⁷⁴ AJ Survey, response 28.

caseload burden. About half think they have the same duty to follow agency policy, but about 28% think they had less of a duty to do so.

3. Attitude Towards Proposed Reform Ideas

The 1992 ALJ Survey found that 76% want separation from the agency.⁸⁷⁵ Seventy-six percent think the absence of a corps is a problem.⁸⁷⁶ The GAO Study found that 73% of the ALJs agreed that an independent corps would be, to a great extent or better, an improvement.⁸⁷⁷ The Cofer Study found that 83% of the SSA ALJs favored the idea of an ALJ corps.⁸⁷⁸ The Burger Study found almost 70% favored an independent corps.⁸⁷⁹ Less than half, however, favored an independent corps without substantive distinctions among ALJs. They apparently recognized the need for specialization and expertise.

The GAO Study found that about 85% of the ALJs disagreed with the proposal for set terms for ALJs.⁸⁸⁰ Even with renewal upon a review by an independent panel of attorneys, most ALJs would not favor such a program.⁸⁸¹

A large percentage, 66%, favored an administrative trial court, completely judicializing the administrative adjudicators.⁸⁸² The GAO Study found that 72% favored to a great extent or better the establishment of an administrative court system. Burger observed: "[C]ritics are equally concerned that the end result of removing judicial functions from the agencies would be good procedures and bad policy."⁸⁸³ We might observe that procedures that create bad policy are not "good" no matter how much they conform to our legal customs.

A prior study of the SSA in 1977 recommended a three-ALJ panel that would preside over hearings and make the determination by majority rule.⁸⁸⁴ The Cofer Study reported that 82% of the SSA ALJs opposed this recommendation.⁸⁸⁵

⁸⁷⁵1992 ALJ Survey, response 23i.

⁸⁷⁶1992 ALJ Survey, response 23k.

⁸⁷⁷GAO Study, response #7-1.

⁸⁷⁸Cofer, at 227.

⁸⁷⁹Burger, chart at 414.

⁸⁸⁰GAO Study, response #11.

⁸⁸¹GAO Study, response #12.

⁸⁸²Burger, chart at 414.

⁸⁸³Burger at 412.

⁸⁸⁴Jerry Mashaw *et al.*, *Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System* 43-45 (1978).

⁸⁸⁵Cofer Study, at 226.

The GAO Study found that few ALJs believed that eliminating the APA formal hearing requirements for certain programs would result in an improvement in the administrative process.⁸⁸⁶ SSA ALJs surveyed in the Cofer Study believed in formalized procedures.⁸⁸⁷ She observed:

Forty-one percent of [those who favored formal proceedings] indicated that they felt the claimant's rights would be better protected in a more formal hearing environment, while almost 20 percent felt a more formal hearing would be a more efficient hearing. For the ALJs disagreeing with the notion of a more formal hearing, the most common reason was that the ALJs would seem less approachable and that the formality would tend to intimidate the claimant. Close to 30 percent felt that formality would hamper efficiency. Thus, ALJs on both sides of this issue viewed it from the claimant's perspective but with very different outcomes.⁸⁸⁸

Cofer found that about two-thirds of the SSA ALJs supported adversarial hearings and that those ALJs felt that an adversarial environment would "result in evidence being presented in a clearer and more accurate fashion."⁸⁸⁹

Thirteen percent of the current ALJs think that compromise of formal procedures is frequently a problem; the remainder divided fairly evenly over whether it was a problem at all.⁸⁹⁰ Seventy-six percent feel that increase in judicial power is necessary.⁸⁹¹

Over three-quarters of the ALJs do not believe failure to follow formal procedures is a serious problem.⁸⁹² Only 5% strongly agree that it is a serious problem.

H. Summary of Observations About Perceived Problems

Questions about independence suggest that ALJs perceive some problem. Seventy-eight percent find a need for independence, with 59% finding it to be

⁸⁸⁶GAO Study, response #7-5.

⁸⁸⁷Cofer Study, at 160.

⁸⁸⁸*Id.*

⁸⁸⁹Cofer Study, at 162.

⁸⁹⁰1992 ALJ Survey, response 23f.

⁸⁹¹1992 ALJ Survey, response 23h.

⁸⁹²AJ Survey, response 26f.

very much a problem.⁸⁹³ Sixty-one percent think that "agency interference" is a problem, with 26% finding it to be a very serious one.⁸⁹⁴

AJs seem to have less concern about the need for independence. They split about equally as to whether this is a serious problem, with 23% strongly agreeing.⁸⁹⁵ Fewer find "agency interference" a problem, with 11% strongly agreeing that it is a problem.⁸⁹⁶

As discussed, few AJs and non-SSA ALJs feel lack of policy guidance is a problem.⁸⁹⁷ SSA ALJs are slightly more likely to see this as a problem.⁸⁹⁸

However, Burger found that almost half the ALJs considered ambiguity in the law to be somewhat of a problem, although only about 8% found it a significant problem.⁸⁹⁹ Further inquiry suggests that this problem seemed to result much more from problems with the statutes than with agency regulations or policy direction.⁹⁰⁰ The 1992 ALJ Survey finds that ambiguity is a problem, but only 19% of the current ALJs find it to be a frequent problem.⁹⁰¹ In contrast, 70% of the AJs report that ambiguity in the law is occasionally a problem, with 13% finding it frequently a problem.⁹⁰²

Satisfaction with management-type relationships with the agency is more ambiguous. In the Burger study, approximately one-third chose each of the three responses--significant problem, somewhat a problem, or not a problem--concerning whether overburdening caseload or pressure for faster decisions were problems.⁹⁰³ Current ALJs find these to be a problem, with only 20% finding caseload not a problem and 40% finding pressure to make faster decisions a frequent problem.⁹⁰⁴ Pressure on output is perceived as much more of a problem in the SSA than in other agencies, with 41% of the SSA ALJs finding caseload a frequent problem and 54% of them finding pressure to make faster decisions a frequent problem.⁹⁰⁵

⁸⁹³1992 ALJ Survey, response 23b.

⁸⁹⁴1992 ALJ Survey, response 23a.

⁸⁹⁵AJ Survey, response 26b.

⁸⁹⁶AJ Survey, response 26a.

⁸⁹⁷Compare AJ Survey, response 24a with 1992 ALJ Survey, non-SSA, response 14e.

⁸⁹⁸1992 ALJ Survey, SSA only, response 14e.

⁸⁹⁹Burger, chart at 346, item 4.

⁹⁰⁰Burger, chart at 356.

⁹⁰¹1992 ALJ Survey, response 14b.

⁹⁰²AJ Survey, response 24b.

⁹⁰³Burger, chart at 346.

⁹⁰⁴1992 ALJ Survey, responses 14c & g.

⁹⁰⁵1992 ALJ Survey, SSA only, responses 14c & g.

AJs are slightly less concerned with pressure for faster decisions,⁹⁰⁶ and slightly more concerned with having too great a caseload.⁹⁰⁷ About a third find lack of procedural uniformity within the agency as a problem, but only 3% think it is frequently a problem.⁹⁰⁸ More than half think the cases are overly complex in the technical sense, but only 5% think that is frequently a problem.⁹⁰⁹

Responses regarding "ambiance," such as status or hearing facilities, are ambiguous.⁹¹⁰ Current ALJs seem satisfied with their salaries.⁹¹¹

The AJs divided at about a third each for strongly agree, agree, or disagree as to whether the following are serious problems: lack of status, poor image; inadequate hearing facilities and staff support; poor salaries, lack of perquisites and need for increase in judicial powers.⁹¹² About two-thirds of the AJs are at least sometimes bothered by the perception that others who perform the same work receive more deference, with more than 45% thinking that often or always.⁹¹³

ALJs seem as likely as many critics of administrative adjudications to count delay as a serious problem. Burger found that only about one-quarter considered it a serious problem, but one-half considered delay somewhat of a problem.⁹¹⁴ The GAO Study found that about two-thirds considered "unnecessary" delay to be a problem.⁹¹⁵ The 1992 ALJ Survey found that almost all current ALJs think delay is a problem, with 41% finding it a frequent problem.⁹¹⁶

AJs seem somewhat less troubled by delay.⁹¹⁷ Only about 20% think that it is frequently a problem. About two-thirds think that it is somewhat of a problem.

The GAO Study asked about the reasons for delay. Several factors contributed to the delay in the ALJs' opinions. Tending to rank first or second in their estimation was the conduct of the parties.⁹¹⁸ About one-third ranked

⁹⁰⁶AJ Survey, response 24g.

⁹⁰⁷AJ Survey, response 24c.

⁹⁰⁸AJ Survey, response 24k.

⁹⁰⁹AJ Survey, response 24d.

⁹¹⁰Generally, 1992 ALJ Survey, response 23.

⁹¹¹1992 ALJ Survey, response 23e.

⁹¹²AJ Survey, response 26c, d, e & h.

⁹¹³AJ Survey, response 27j.

⁹¹⁴Burger, chart at 346.

⁹¹⁵GAO Study, response #15.

⁹¹⁶1992 ALJ Survey, response 14a.

⁹¹⁷AJ Survey, response 24a.

⁹¹⁸GAO Study, response #16.

intentional delay by the parties as either the primary or secondary cause of delay.⁹¹⁹ This contrasted with the other reasons, in which no pattern emerges. Many ALJs believed that lack of penalties was a cause for delay.⁹²⁰ The only other reason that gained disproportionate attention as a cause of delay was agency review.⁹²¹

All studies identified areas in which most administrative adjudicators did *not* perceive a problem. It is useful to reiterate these areas in the positive.

The 1992 ALJ Survey found that few current ALJs think lack of procedural uniformity or overly complex cases are a problem. Seventy-six percent found that questions about procedural uniformity do not identify a problem or are not applicable.⁹²² More found complex cases to be a problem, but only 9% found it to be a frequent problem.⁹²³

Burger found that few ALJs thought too close supervision or pressure to make different decisions were problems.⁹²⁴ Many of those who perceived these problems were with the SSA.⁹²⁵ Overall, current ALJs do not have these problems, but the responses are not as positive.⁹²⁶ These responses suggest that most ALJs do not face undue pressure on their substantive decisions. AJs also have little problem with too close supervision and pressure to make different decisions.⁹²⁷ This may indicate that the relationship with agency on substantive grounds is satisfactory.

Burger found that ALJs did not generally feel a lack of policy direction.⁹²⁸ Three-quarters found it was not a problem and most of the remainder found it only somewhat of a problem. The 1992 ALJ Survey found that 44% of all ALJs consider this to be a problem, with only 9% finding it to be a frequent problem.⁹²⁹ Similarly, three-quarters of the AJs consider inadequate policy guidance not to be a problem, and most of the remainder said it is only somewhat of a problem.⁹³⁰

⁹¹⁹GAO Study, response #16-4.

⁹²⁰GAO Study, response #16-5.

⁹²¹GAO Study, response #16-2.

⁹²²1992 ALJ Survey, response 14j.

⁹²³1992 ALJ Survey, response 14d.

⁹²⁴Burger, chart at 346.

⁹²⁵Burger, chart at 365.

⁹²⁶1992 ALJ Survey, responses 14 h & i.

⁹²⁷AJ Survey, responses 24h & i.

⁹²⁸Burger, chart at 346.

⁹²⁹1992 ALJ Survey, response 14c.

⁹³⁰AJ Survey, response 26i.

V. The Selection Process For Agency Adjudicators

A. Development of the ALJ Selection Process

Prior to enactment of the Administrative Procedure Act in 1946, federal agencies employed a variety of hearing officers to preside over agency proceedings and to make decisions. The APA standardized the procedures for formal adjudications conducted by the agencies. It created a special class of federal employees to conduct these trial-type hearings and to render initial or recommended decisions in such cases. These employees, known today as administrative law judges (originally called examiners), were given various protections and guarantees of independence as described elsewhere in this report.

The APA did not clearly set forth the procedure for appointing these hearing officers. It provided that "there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary."⁹³¹ Thus, as noted by then-professor Antonin Scalia, "it was evidently contemplated that the Civil Service Commission would establish qualifying requirements by general rule, and that the agencies would then select from among all individuals who met those requirements."⁹³²

Instead, however, the Commission issued regulations in 1947 that established a system that went beyond the mere issuance of qualifying requirements; it also provided for ranking individual applicants and limiting agency selection from among the three top-ranked eligible applicants. This system was followed (with some variations and refinements) until 1978 by the CSC, and since 1978, by its successor agency, the Office of Personnel Management.

At first, in 1947, concerns about how new applicants should be handled were obscured by the controversy concerning reexamination of the 196 incumbent examiners at the agencies then coming under the APA.⁹³³

⁹³¹Pub. L. No. 79-404 §11.

⁹³²Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 59 (1979).

⁹³³The following account is derived from Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L. J. 431 (1950). See also Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act*, 63 HARV. L. REV. 737 (1950); Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 FED. BAR J. 351 (1967); and Musolf, *FEDERAL EXAMINERS AND THE CONFLICT OF LAW AND ADMINISTRATION*. The Johns Hopkins University Studies in Historical and Political Science.

Beset by political pressures, the CSC devised one procedure to reexamine incumbent examiners and another to handle new applicants. A six-member Board of Examiners was appointed to process the applications from incumbents. Although the Board was also given jurisdiction over new applicants, the Commission appointed nine regional "associates" to interview and preliminarily grade applicants from around the country. Recommendations by the associates were then acted upon by the Board of Examiners. Decisions by the Board were then issued by the Commission.

In this initial round of examination the CSC divided the examiner positions into five grades, with higher grades given for those with more general legal or judicial experience as opposed to specialized subject-matter experience. Six years of experience was required, consisting of responsible involvement in preparing, presenting or hearing cases in courts or regulatory bodies. An applicant was rated based on his or her description of that experience, submissions of case materials, information obtained through personal qualifications investigations, and performance at an interview before the Board. Agencies were to make their selections from five separate registers, each containing the names of applicants deemed eligible for the five respective grades of examiner positions.

When the results of the examination were announced in 1949, more than 25% of the incumbent examiners were deemed unqualified.⁹³⁴ Others were assigned a grade level that rendered them ineligible for appointment at their agency. New applicants (and certain incumbents without civil service status) were placed in rank order on each of these registers, and the CSC gave agencies about 3 months to replace the unqualified or ineligible examiners.

However, the resulting furor among the incumbents and their supporters (especially at the NLRB where 27 of 41 incumbents were either disqualified or demoted) led to appeals, Congressional pressures, the resignation of the Board of Examiners, and the eventual reinstatement of almost all of the incumbents. In 1950 new lists of eligibles for the five registers (now GS-11 through GS-15) were established, but very few appointments were made, as most incumbents retained their positions.⁹³⁵

The examination was then closed until August 1954.⁹³⁶ All existing eligibles were required to reapply. The qualification and rating factors remained the same, but oral interviews were not required and the personal

Series LXX, Number 1, The Johns Hopkins Press, 1953; reprinted by Greenwood Press, Inc., Westport, CT, 1979. See also discussion at Chapter II(H), *supra*.

⁹³⁴Macy, *supra* note 933, at 367.

⁹³⁵*Id.* at 368.

⁹³⁶See Dullea, *Development of the Personnel Program for Administrative Law Judges*, 25 ADMIN. L. REV. 41, 43 (1973).

qualifications investigation was replaced by more informal confidential written inquiries or references ("vouchers") of people who knew the applicant. In October 1955, the examination was reopened on a continuous basis.⁹³⁷ By 1962, when all eligibles were assigned updated ratings, there were about 500 hearing examiners employed by 22 agencies, ranging from GS-12 to GS-15.⁹³⁸

A series of government studies had, in the meantime, been scrutinizing the hiring process for hearing examiners.⁹³⁹ President Eisenhower's Conference on Administrative Procedure in 1954 made a series of recommendations urging the CSC to create a Bureau of Hearing Examiner Administration (headed by a five-member committee) to oversee the program. In response, the CSC did formally designate a single official to oversee all hearing officer activities. The Conference also urged higher grades and pay for examiners. The 1955 Hoover Commission urged removal of the examiners from the agencies and the transfer of the program from the CSC to a proposed administrative court within the judicial branch. This proposal went unheeded.

More influential was the report of President Kennedy's (temporary) Administrative Conference of the U.S. in 1962, which recommended continued management of the program by the CSC (with evaluation by a successor Administrative Conference). (The Conference's Committee on Personnel had recommended removing the hearing examiner program from the CSC to a new, independent office.) The Kennedy Conference also urged that the grades for hearing examiners be raised, collapsed into two, and limited to one grade per agency. With respect to selection, it urged that candidates be evaluated on the basis of training, experience and oral and written examinations with leading lawyers participating in the evaluation. It recommended exempting the selection of hearing examiners from the veterans preference statute and also urged that the resulting register be unranked and that the initial appointment be probationary.

The Kennedy Conference recommendations quickly led to CSC's appointment of a Director, Office of Hearing Examiners and an Advisory Committee on Hearing Examiners. The Advisory Committee prepared a series of specific recommendations on the recruitment and examination process, which resulted in a new examination with higher general standards of qualification and provisions allowing individual agencies to require additional special qualifications for appointment. The Conference's recommendations

⁹³⁷See Macy, *supra* note 933 at 423 (Chairman of the Civil Service Commission at the time provides a very detailed chronology of the Hearing Examiner Program from June 1946 - June 1966, at 412-428).

⁹³⁸Dulles, *supra* note 936 at 44.

⁹³⁹The following summary is taken from Macy, *supra* note 933 at 374-377.

against use of veterans preference and in favor of an unranked register and probationary periods went unheeded.

The resulting examination, announced in January 1964, set the pattern for the examination procedure that has remained in effect (with some refinements) until today.⁹⁴⁰ It required bar membership and increased the number of required years of qualifying experience from 6 to 7. It also called for a written "mock" decision and oral interviews by three-member panels. On a 100-point scale, a passing score of 80 (before the addition of 5 or 10 veterans preference points were added) was required. The examination was to be opened to new applicants 2 months each year.

By 1973 the system had been refined even more.⁹⁴¹ Two registers were established, at GS-15 and GS-16 levels. Eligibles had to first show the requisite qualifying experience: bar membership for at least the last 7 years, and an aggregate of at least 7 years of either (1) judicial experience; (2) the preparation, trial, hearing or review of formal administrative law cases at the federal, state, or local level, or court proceedings relating thereto; or (3) the preparation and trial or the preparation and appeal of cases in courts of unlimited and original jurisdiction. At least two of those aggregate 7 years of qualifying experience had to have been within the preceding 7 years. In addition, 16 categories of nonqualifying experience were specified in the examination announcement.⁹⁴² Finally, about half of the hiring agencies formally required special subject-matter expertise for selection, and the CSC required documentation of such experience for at least 2 years of the 7 preceding the application. (This process is known as "selective certification.")⁹⁴³

To establish this basic qualifying experience, applicants were expected to supply voluminous information about their previous employment record, the two most important cases worked on and names and addresses of at least 20 individuals to be contacted for personal reference inquiries ("vouchers"). CSC personnel rated applicants' experience and the results of the vouchers on a 100-point scale. The score was adjusted up or down after the written decision and

⁹⁴⁰Dullea, *supra* note 936 at 44-46.

⁹⁴¹See Announcement No. 318, "Administrative Law Judge" U.S. Civil Service Commission (October 1973).

⁹⁴²These were: investigator, adjudicator (sic), rating specialist, claims reviewer, insurance adjuster, conferee, state unemployment insurance supervisor, arbitrator, mediator, moderator, teacher or professor, hearing officer in informal or conference proceedings, clerk of court, legal consultant, officer of any court not of record, and contract officer. See U.S. Civil Service Commission, Announcement No. 318 (October 1973), at 5-6.

⁹⁴³See Miller, *The Vice of Selective Certification in the Appointment of Hearing Examiners*, 20 ADMIN. L. REV. 477 (1968).

oral interview were scored. At that point, veterans preference points, if any, were added. The Commission normally required a score of 80 or above for eligibility.⁹⁴⁴ Those eligibles with the types of special expertise recognized by the selectively certifying agencies were, in effect, asterisked on the registers, and those agencies were permitted to select from the asterisked eligibles.⁹⁴⁵ (Selection by the agencies from the registers was subject to a "rule of three" and other constraints, described below.)

These general standards proved to be quite difficult to meet. In 1973 the Director of CSC's (renamed) Office of Administrative Law Judges reported over 4,000 applications since 1963 with only 20% eligible for inclusion on the register. About 10% of those applicants had actually been appointed. (There were 780 ALJs at that point).⁹⁴⁶

This procedure was in effect until 1984, when the experience requirements were eased and simplified. (See Appendix V C for a summary of the changes.)⁹⁴⁷ Applicants are now required to be attorneys with at least 7 years of experience "preparing for, participating in and/or reviewing formal hearings or trials involving (1) administrative law, and/or (2) litigation at the federal, state or local level."⁹⁴⁸ In addition, applicants have to show either 1 year of qualifying experience equivalent to a position of at least the grade level below the position applied for, or 2 years of experience equivalent to a position two grade levels below.⁹⁴⁹ The Announcement also eliminated some of the listed types of nonqualifying experience⁹⁵⁰ and specifically states that experience as a law clerk, adjudicator, arbitrator, mediator, or professor of law may provide requisite qualifying experience.

Another change made in the 1984 Announcement was to eliminate the formal selective certification procedure for agencies who wish to hire applicants with specialized expertise. Instead, applicants are simply told to indicate their specialized expertise. Agencies are permitted to justify "by job

⁹⁴⁴Dullea, *supra* note 936 at 45.

⁹⁴⁵Announcement No. 318, *supra* note 941 at 9, 18-21.

⁹⁴⁶Dullea, *supra* note 936 at 46-47.

⁹⁴⁷For a detailed description, see Sharon and Pettibone, *Merit Selection of Federal Administrative Law Judges*, 70 JUDICATURE 216 (1987).

⁹⁴⁸See Examination Announcement No. 318, U.S. Office of Personnel Management, Office of Administration Law Judges (May 1984) at p.5.

⁹⁴⁹*Id.* at p.6. The new pay classification, removing ALJs from the GS scale will necessitate some changes in this requirement. See 5 U.S.C.A. §5372a(a) (1992), Pub. L. No. 101-509, November 5, 1990; OPM interim regulations, 56 Fed. Reg. 6208 (February 14, 1991); final regulations, 57 Fed. Reg. 1367 (January 14, 1992); to be codified at 5 CFR §930.210.

⁹⁵⁰*Id.* at p.7. See note 942, *supra*. Specifically, it says that such experience may provide the required "knowledge, skills and abilities."

analysis" that special qualifications enhance performance, and, if OPM agrees, to give "priority consideration" to applicants with those qualifications.⁹⁵¹

The 1984 examination also continued the four components of the procedure that date back to 1964: the evaluation of the applicant's experience, now based on a document called the "Supplemental Qualifications Statement" (SQS),⁹⁵² the vouchers, here called the personal reference inquiry (PRI), the written demonstration (WD), and the panel interview (PI).⁹⁵³ The method of rating some of those components and their relative weights, however, have changed.

Prior to 1984, the applicant's experience counted for 60% of the score, the PRI 40% and the WD and PI served only as minor adjustments of the preliminary score.⁹⁵⁴ In 1984, OPM's Office of Administrative Law Judges, as part of its revamping of the examination, announced that the SQS would comprise approximately 40% of the final rating while the other three components would each comprise approximately 20% (not including veterans preference points).⁹⁵⁵ By 1988, however, OPM indicated that it was assigning 63% of the weight to the SQS and 12.33% to the other three parts.⁹⁵⁶ In December 1990, OPM announced that it was considering a new ratio as follows: SQS (50%), PRI (10%), WD (20%) PI (20%).⁹⁵⁷ These (and other) changes were proposed for implementation in December 1990, but were delayed pending the completion of the present study.

OPM has been quite diligent in the last decade attempting to validate each of the component parts of its examination. The effort began in 1979, partially as a response to increasing numbers of challenges by unhappy applicants that the examination was biased in one way or another.⁹⁵⁸ At that time 60% of the

⁹⁵¹*Id.* at p.8.

⁹⁵²See "Supplemental Qualifications Statement for Administrative Law Judge Positions," U.S. Office of Personnel Management (February, 1984).

⁹⁵³*Id.* at p.11-13.

⁹⁵⁴See Lubbers, *Federal Administrative Law Judges: A Focus on our Invisible Judiciary*, 31 ADMIN. L. J. 109, 114 (1981).

⁹⁵⁵U.S. Office of Personnel Management, Staffing Group, Office of Administrative Law Judges (Winter 1983-1984) p.5.

⁹⁵⁶Memorandum from Craig B. Pettibone, Assistant Director for Administrative Law Judges, OPM, to Chief Administrative Law Judges, Personnel Directors, Bar Associations and OPM Regional Directors, Subject: Status Report on Administrative Law Judge Examination, March 16, 1988 at p.1.

⁹⁵⁷See Announcement of Revisions in Administrative Law Judge Examination, 55 Fed. Reg. 52339, 52340 (December 21, 1990).

⁹⁵⁸See Comments on Revised ALJ examination by Craig B. Pettibone, Assistant Director for Administrative Law Judges, before Chief ALJs (OPM staff paper), September 15, 1983 at p. 1-2. ("Revising the ALJ examination. . . will assure that we have a job-related examination which can be defended against complaints from disgruntled applicants.") Perhaps the most persistent critic

applicant's score was based on the experience rating. Applicants were somewhat mechanically given 50/55/60 points based on their previous or current job title or level. OPM wished to begin rating applicants on the quality of experience in the job rather than simply its title.

With the help of advisory panels of ALJs and personnel specialists, OPM identified 141 tasks performed by ALJs.⁹⁵⁹ After surveying ALJs on the relative importance of these tasks, OPM identified 84 of them as critical. The agency then sought to determine what types of knowledge, skills and abilities (KSAs) were necessary to perform these critical tasks. Eighteen KSAs were further winnowed to the following five, which became the basis for evaluating applicants' SQS: knowledge of rules of evidence and trial procedure; analytical ability, decisionmaking ability; oral communication ability and judicial temperament; and writing ability. Benchmarks of actual achievements ranging from 1 (unacceptable) to 5 (outstanding) for each KSA have been developed by OPM and have been incorporated into rating guides used by OPM examiners who review the SQS application forms submitted.⁹⁶⁰ (A sixth KSA, organizational skills related to management of caseloads, has been tentatively approved by OPM and benchmarks are now being developed.)⁹⁶¹ The effort to "validate" and refine the SQS, has, if nothing else, led to judicial blessing of this portion of the examination as a "valid employment practice."⁹⁶²

OPM has spent just as much time and energy refining its personal reference inquiries (PRIs).⁹⁶³ Formerly, applicants were simply asked for 20 references and the agency sent "vouchers" to each of them asking for a rating on the

has been Jesse Etelson. After unsuccessfully applying for certification as eligible to become an ALJ in 1970, Etelson began a series of appeals and FOIA requests that led to eligibility on the GS-15 register in 1974 but a denial of eligibility on the GS-16 register. He then brought suit against OPM on the ground that his experience was arbitrarily rated too low when compared to private attorneys with similar experience. He eventually prevailed on that point, *Etelson v. Office of Personnel Management*, 684 F.2d 918 (D.C.Cir. 1982). Etelson later was hired as an ALJ and continued his critiques in a law review article, Etelson, *The New ALJ Examination: A Bright, Shining Lie Redux*, 43 ADMIN. L. REV. 185 (1991). Other reported cases include *Dugan v. Ramsey*, 727 F.2d 192 (1st Cir. 1984) (OPM's practice of not counting trial preparation for cases that ultimately settled held to be an abuse of discretion); *Friedman v. Devine*, 565 F. Supp. 200 (D.D.C. 1982) (relief denied to applicant challenging OPM's refusal to credit preparation of advice memoranda as litigation experience).

⁹⁵⁹See Sharon and Pettibone, *supra* note 947 at 217-18.

⁹⁶⁰*Id.* at 219.

⁹⁶¹See *Announcement of Revisions*, *supra* note 957 at 52340.

⁹⁶²See *Curtin v. Office of Personnel Management*, 846 F.2d 1373, 1378 (Fed. Cir. 1988) (OPM's SQS upheld as valid employment practice, regardless of whether objective tests would have been preferable measure of ALJ qualifications.)

⁹⁶³See Sharon and Pettibone, *supra* note 947 at 220.

applicant's various qualifications. Over time, OPM became concerned about the fact that it was widely known that, given the high weight then assigned to this portion of the exam (at that time 40%), only those with the highest ratings on the vouchers could rise to the top of the registers. Accordingly, sophisticated applicants began advising their references to overrate them. To stop this, OPM took two steps: first it began sending questionnaires to persons whose names appeared in the application as opposing counsel or presiding judges whether or not they were listed as references. Second, and most controversially, OPM revamped the questionnaire to use a "forced choice" format. This method required the reference giver to choose from among groups of statements that might best describe the applicant, all of which might appear to be equally favorable, but only certain of which were counted as validly relevant to ALJ behavior. This forced-choice method has been criticized as confusing to reference-givers who have no idea as to the impact of their answers,⁹⁶⁴ but it was laboriously developed by OPM to be bias-free and statistically valid. Ironically, however, even as OPM struggled to make this part of the exam more meaningful, the agency has consistently lowered its weight from 40% to 12.33%--and now has proposed to lower it to 10%.⁹⁶⁵ Responding to the criticism of the forced-choice format, OPM, in December 1990, proposed developing a new PRI that will be more "comprehensible" to reference-givers.⁹⁶⁶

The written demonstration (WD) and panel interview (PI) components of the exam have also undergone a scrubbing by OPM.⁹⁶⁷ The WD requires applicants to write a decision of the type they might be expected to write as an ALJ, but in a 5-hour time period. The case exercise and grading syllabus were developed by a law professor, and points are given based on writing style and organization, general opinion-writing skills, and legal analysis of the issues. OPM examiners are trained in use of the syllabus.

The interviews are conducted by panels consisting of an ALJ, a lawyer from the ABA Section of Administrative Law and Regulatory Practice, and a senior OPM employee. The interview is a structured, 1-hour format used by panelists to develop a consensus score on each of four abilities looked for in this part of the examination: ability to communicate orally, ability to make decisions; ability to analyze and evaluate situations; and ability to deal with people. Training and written guidelines are furnished to the pool of panel members around the country.

⁹⁶⁴See Etelson, *supra* note 958 at 187.

⁹⁶⁵See text at notes 954-57, *supra*.

⁹⁶⁶See Announcement of Revisions, *supra* note 957 at 52340.

⁹⁶⁷See Sharon and Pettibone, *supra* note 947 at 220-221.

B. The ALJ Rating and Appointment Process

1. The Rating Process

It should be obvious from the foregoing that the examination process for new applicants has developed into a complicated, highly-structured process that requires a great deal of time and energy on the part of both applicants and examiners. OPM has thus had to concern itself with workload considerations as it processed applications. Given the large number of applicants relative to actual openings, OPM has tried to limit its workload by staging the grading process so that only those who score above a threshold on the SQS portion of the test are permitted to proceed to the remainder of the exam.⁹⁶⁸

Thus, all applicants who meet the minimum qualifications requirements are given a rating on the quality of their experience, based on their SQS form. Then, as ALJ vacancies are identified in various geographic areas, applicants who have indicated their availability for those areas and who have scored above a certain score (as determined by OPM on an ad hoc basis) are invited to complete the written decision and the panel interviews. At that point, personal reference inquiries are also sent out.

Applicants who complete the examination process are assigned a final numerical score based on the sum of the weighted scores for each portion of the process. The score is converted to a scale of 0 to 100, with 70 required to pass.⁹⁶⁹ Veterans preference points (5 for nondisabled veterans, 10 for disabled) are added to the score, and the applicants are then added to the register. Until recently, there were two registers (one for GS-15 ALJ positions, principally in the Social Security Administration, and one for GS-16 ALJ positions), but with the enactment of ALJ pay reform in 1990, that distinction has been abolished and the two registers have been merged.⁹⁷⁰

In practice, this rating process has led to some administrative headaches for OPM. For example, when the exam was opened in summer 1984, 800 applications were received.⁹⁷¹ About 750 met the legal requirements and all of them were given unadjusted scores on their SQS. (Each of the five KSAs used

⁹⁶⁸See 5 CFR §930.203(d) (1991); Examination Announcement No. 318, *supra* note 948 at 12-13.

⁹⁶⁹*Id.* But see Dullea, *supra* note 936, saying that in his tenure as head of the Office, the passing score was 80. The general requirement that rating schedules for competitive examinations be scaled from 70-100 is found in the Federal Personnel Manual, Chapter 337 ("Examining System"), Subchapter 2-6 (July 14, 1989).

⁹⁷⁰See note 949, *supra*.

⁹⁷¹See Memorandum from Craig Pettibone, OPM, to Chief ALJs, et. al (January 31, 1985).

at that time were rated from 2-5, thus resulting in unadjusted scores from 10-25. The mean score was 19.) Based on initial projections of about 12 vacancies per year, OPM decided to only invite the 70 highest scoring applicants (who scored from 21-24) to complete the exam. The other 680 were advised that they might be invited to do so later if vacancies occurred in geographic areas designated by them in their application, and if their projected final rating might be high enough to allow them to compete with those already on the register who indicated the same geographical availability.

Shortly thereafter, the Social Security Administration advised OPM of its desire to hire 30 ALJs outside the Washington, DC area.⁹⁷² OPM responded by inviting (1) 100 additional applicants who had unadjusted scores of 19-20, and who were 5-point veterans, and (2) all 70 veterans with 10-point preference who had scored less than 20, to complete the exam (if they had also indicated geographical availability outside Washington and a willingness to accept a GS-15 position). By focusing its second invitation on veterans, OPM was, in effect, adding the preference points at the beginning of the rating process, rather than adding them once the full rating was computed. OPM's third invitation maintained this practice by only inviting nonveterans with an SQS of 20 and 5-point veterans who had scored 16-18.⁹⁷³

After the 1987 opening of the exam, OPM dropped its practice of simply using raw SQS scores and began using "maximum projected ratings" (including veterans preference) to decide whom to invite to complete the final ratings process.⁹⁷⁴ With the influx of new eligibles added to the 1984 applicants, OPM announced that "initial certifications [to the agencies for hiring] from the combined groups will, of course, be limited to applicants with final ratings in the mid-nineties or above." Applicants with projected or final ratings below 85.25 were "unlikely to be further examined or receive further consideration."⁹⁷⁵

In 1990, after another internal evaluation of the examination, OPM proposed several changes to the procedure described above.⁹⁷⁶ In addition to adding a sixth KSA to the SQS concerning caseload management, adjusting the relative weights of the four components of the exam, and developing an alternative to the forced-choice method of questioning on the PRI, the agency proposed to "process all applicants through all parts of the examination and add veterans preference points at the end, rather than fully processing those

⁹⁷²See Memorandum from Craig Pettibone, OPM, to Regional Directors, et. al (May 15, 1985).

⁹⁷³See Memorandum from Craig Pettibone, OPM to Chief ALJs, et. al (July 22, 1985).

⁹⁷⁴See Pettibone Memorandum (March 16, 1988), *supra* note 956 at 1.

⁹⁷⁵*Id.*

⁹⁷⁶See Announcement of Revisions, *supra* note 957.

applicants with high scores on the SQS as adjusted for veterans preference.⁹⁷⁷ This change was apparently motivated by the woefully low number of women and minority group appointments to ALJ positions (to be discussed later). Because the examination has remained closed, however, these changes have not been implemented and OPM is apparently awaiting the outcome of this study before reopening the examination.

2. The Appointment Process

Once applicants are fully rated and their names and scores entered onto the register of eligibles, the agency may make its selection. By regulation OPM requires agencies to request a certificate of eligibles when it wishes to fill (other than through a transfer), or create, an ALJ position and be prepared to demonstrate, with a workload analysis, that the position needs to be filled or created.⁹⁷⁸ Thus, OPM, in effect, is the gatekeeper for creation of ALJ positions in each agency. OPM will not approve positions for "nonAPA" hearings, and its requirement for a workload analysis allows it to second guess agency management as to the number of ALJs needed for APA hearings. This may have been necessary when there was a statutory ceiling on the number of "supergrade" (GS-16, 17, 18) positions in the government and some ALJs were supergrades.⁹⁷⁹ But this ceiling was repealed in 1990.⁹⁸⁰ The basis for this gatekeeper function seems less tenable now.

If OPM approves the agency's request, OPM provides a certificate of names from the top of the register (from those who have marked the requisite geographical area). The certificate must contain at least three names per opening, but may contain a larger number to protect against nonacceptances by the top three names. When there are multiple openings at an agency, OPM adjusts the size of the certificate accordingly. The selection must be made from the top three eligibles unless they all decline the position (the so-called "rule of three").⁹⁸¹ If, however, an eligible has appeared on three certificates, within reach of the appointing agency (i.e., within the top three per vacancy) and has been passed over three times in favor of another eligible within the top three, then the appointing agency may request that such person not appear on future certificates.⁹⁸²

⁹⁷⁷*Id.* at 62340.

⁹⁷⁸5 CFR §930.203a(a).

⁹⁷⁹*See* 5 USC §5108 (1988).

⁹⁸⁰Pub. L. No. 101-509, 101 Stat. 1743, amending 5 USC §5108.

⁹⁸¹Required by 5 USC §3318 (1988).

⁹⁸²*See* 5 USC §3317(b) (1988); 5 CFR §332.405 (1991).

The veterans preference in the civil service rules for hiring in the competitive service also applies to these certificates. In addition to the impact of the extra 5 or 10 points on scores, in selecting from the top three, the agency may not pass over a "preference eligible" to select someone else with an equal or lower score, unless special circumstances are presented by the agency and accepted by OPM.⁹⁸³

Because ALJs are appointed as career officials without a probationary period, and are subject to removal only for cause, agencies naturally worry about being constrained in the appointment process by the rule of three and the application of the veterans preference. Various methods for circumventing these restrictions have developed over the years.

Selective certification of eligibles is still permitted by OPM on an agency-by-agency basis. Formerly, as described, almost one-half of the hiring agencies had enumerated special experience criteria that allowed such applicants to be asterisked on the register. Certificates were then given to the agencies of asterisked eligibles. At that point, the rule of three and veterans preference pass-over rules were enforced. This enabled agencies to reach eligibles who were much farther down on the overall register than they could otherwise. Now, however, OPM will entertain agency requests for "selective factors and quality ranking factors," but only if based on "empirical data gathered through job analysis."⁹⁸⁴ A special form (Standard Form 39A, see Appendix V D) listing the special or additional KSAs and their justification must be submitted by the hiring agency's appointing officer. Nor does OPM really publicize this opportunity. (Its otherwise exhaustive 1989 "Program Handbook" on ALJs does not mention this possibility.)⁹⁸⁵ OPM reports that no requests have been filed for this authority since 1984.

The most prevalent way of circumventing the register, however, is through "lateral hiring"--transfer of ALJs between agencies. Transfers can occur either with or without a promotion to a higher grade, subject to OPM's approval.⁹⁸⁶ OPM has recognized that this could provide some "gaming" of the system. For example, an agency may wish to hire an eligible who is too far down the register to be reached by that agency. The solution might be for the eligible to accept appointment as part of a large certificate at another agency in order to transfer to the desired agency. OPM reacted to this possibility by requiring that the transferring judge serve at least 1 year in his or her last appointment.⁹⁸⁷

⁹⁸³See 5 USC §3318(b).

⁹⁸⁴See note 951 *supra*, and accompanying text.

⁹⁸⁵"Administrative Law Judge Program Handbook," U.S. OPM, Office of Administrative Law Judges (May 1989).

⁹⁸⁶See 5 CFR §930.206 (1991).

⁹⁸⁷5 CFR §930.206(c) (1991).

Nevertheless, this was still the preferred route to a judgeship for many applicants, especially before the recent pay changes, when SSA hired off the GS-15 register and SSA judges "did their time" before achieving the desired transfer to a GS-16 agency.

The importance of this method of appointing ALJs is shown by the hiring statistics for the 10 years from 1981-90.⁹⁸⁷ In that time OPM reported that there were 470 hires from the GS-15 register (presumably by SSA), but only 25 hires from the GS-16 register. However, during the same period there were 195 transfers including 83 with promotions. Presumably most of those promotions represented agencies hiring SSA judges and promoting them to GS-16 positions.⁹⁸⁸ There were also 13 "reinstatements" of former ALJs who had temporarily left the government without retiring and 67 "reemployments of retired annuitant ALJs."⁹⁸⁹

Another variation of this is to play the geographic game. An eligible would accept a position in an unpopular area, hoping to achieve a transfer to a desired location, OPM permits this, but specifies that it must be "for bona fide management reasons and in accordance with regular civil service procedures and merit system principles."⁹⁹⁰ It is difficult to measure how often this occurs, although OPM reported 424 "reassignments" in the last 10 years.

How agencies actually decide whom they wish to hire is not well known, but generally it is agreed that agency heads tend to accept the recommendation of the agency chief judge.⁹⁹¹ Appointees are also subject to a background investigation by OPM and security clearance by appointing agencies.

Applicants who obtain ineligible ratings or who are dissatisfied with their final ratings may appeal the rating to OPM's Administrative Law Judge Rating Appeals Panel within 30 days of the final action (or such later time as may be allowed by the Panel). The procedures and makeup of the Panel are not described in the OPM regulations, but the 1984 (and still operative) Examination Announcement provides that the Panel is chaired by the Assistant Director (OALJ) and that the other two members are attorneys in private practice or ALJs, selected by the Assistant Director, who did not participate in

⁹⁸⁷Chart provided by OPM (see Appendix V B). A more up-to-date chart showing all appointments from the OALJ register from 1982-92 showed 477 SSA appointments and 39 other agency appointments. Letter from SSA Associate Commissioner Daniel Skoler to Nancy Miller, ACUS, December 9, 1992.

⁹⁸⁸A few might represent agencies hiring new chief judges from the ranks of other agencies.

⁹⁸⁹See 5 USC 3323(b)(2), added in 1984, permitting this practice.

⁹⁹⁰See 5 CFR §930.205 (1991).

⁹⁹¹See Mans, *Selecting the "Hidden Judiciary: How the Merit Process Works in Choosing Administrative Law Judges (Part I)*, 60 JUDICATURE 60, 73 (August 1979).

the original rating and are not personally acquainted with the appellant.⁹⁹³ The Panel reviews the written record and may affirm the rating, rerate the appellant or remand the record for further development.

C. Results of the Selection Process--ALJ Demographics

A longstanding criticism of the ALJ selection program has been its underrepresentation of women and minorities among the applicant pool, and especially, among appointees.⁹⁹⁴ Another problem has been the relative lack of applications from private, as opposed to government, attorneys.⁹⁹⁵

1. Women and Minorities

The earliest available breakdown on the sex of ALJs (September 1962) shows that of 504 hearing examiners, six (1.2%) were women.⁹⁹⁶ Perhaps this is not surprising since, as late as 1955, the CSC's Examination Announcement for Hearing Examiners still stipulated that "The department or office requesting certification of eligibles has the legal right to specify the sex desired."⁹⁹⁷

Although this type of discriminatory clause is long gone, the statistics regarding women have not improved very much. In March 1990 there were 1,090 ALJs and only 59 (5.41%) were women.⁹⁹⁸ Minorities are similarly

⁹⁹³Examination Announcement No. 318, *supra* note 948 at 16-17.

⁹⁹⁴*See, e.g.,* Wald, *Some Thoughts on Beginnings and Ends: Court of Appeals Review of Administrative Law Judges' Findings and Opinions*, 67 WASH. U.L.Q. 661, 664 (1989) (Chief Judge of D.C. Circuit states she "was shocked to learn of the low percentage of women who have been appointed ALJs.")

⁹⁹⁵*See e.g.,* Park, *Report of the Committee on Personnel in Support of Recommendation No. 17, Recommendations and Reports of the Administrative Conference of the United States* (vol. 1) (1968-1970) 381, 395 ("The Civil Service Commission has had enormous difficulty in attracting private attorneys. . . to take the exam.")

⁹⁹⁶"Vital Statistics on Hearing Examiners as of September 1962" page 4. (In "Material For the Advisory Committee on Hearing Examiners") (1962). (On file with OPM and ACUS.)

⁹⁹⁷*See* Examining Circular EC-17 "Hearing Examiner," U.S. Civil Service Commission (Amended October 11, 1955) at p.3.

⁹⁹⁸This figure actually represents a significant improvement from 1989 when OPM reported 1,024 ALJs and only 38 (3.71%) women. *See* Announcement of Revisions, *supra* note 957 at 52340.

underrepresented. Of the 1,090, 32 (2.93%) were black and 30 (2.75%) were Hispanic.⁹⁹⁹

In 1991 OPM compiled demographic statistics for all ALJ applicants and appointees since 1984 and all eligibles currently on the register. (See Appendix V A). The figures show that among *applicants* 17.43% were women; 90.12% were white, 4.11% were black and 4.5% were Hispanic. Among *appointees*, 11.08% were women; 91.77% were white, 4.11% were black and 3.60% were Hispanic. Among *current eligibles* on the register, 21.13% are women; 90.04% are white, 4.38% are black and 3.98% are Hispanic.

These statistics tend to show that women and minorities are all applying and being appointed in somewhat higher percentages than their current anemic percentages in the ALJ corps. However, the figures remain far below their respective proportions in society, and significantly below their proportions in the legal profession.¹⁰⁰⁰ Moreover, it seems clear that while blacks and Hispanics are being appointed in numbers approximately equal to their rate of applications and their numbers on the register, the same cannot be said for women. Women comprise more than 21% of eligibles on the register and over 17% of all applicants, but only 11% of all appointees.

As shown by OPM's statistics, a key reason for this is the effect of adding veterans preference points. Indeed, among all applicants women and men

⁹⁹⁹From "Statistics on Administrative Law Judges" provided to Jeffrey Lubbers by OPM/OALJ, March 25, 1991.

¹⁰⁰⁰Women received 42.17% of all law school J.D. degrees from ABA-approved law schools in 1990. See "A Review of Legal Education in the United States Fall, 1990 Law Schools and Bar Admission Requirements," American Bar Association at page 65. Since ALJs must have been lawyers for at least 7 years, a better marker might be 1982-83. Figures are unavailable on J.D. degrees for that year, although women constituted 37.4% of enrollees in U.S. law schools in that year. *Id.* at 66. A recent survey of attorneys in the nation's 251 largest firms showed that women constituted 26.2% of all lawyers. Blacks, however, made up only 2% and Hispanics 1.2%. *The National Law Journal*, January 27, 1992 at page 31. Among attorneys in the U.S. government in 1989, OPM reports that 33.32% were women; 6.32% were black and 2.06% were Hispanic. Report of Federal Equal Opportunity Recruitment Program (FEORP), Generic Trends Report 1978 thru 1989, at p.43, U.S. Office of Personnel Management, Career Entry Group, Office of Affirmative Recruiting and Employment (November 1990). Another instructive comparison is with other high ranking government employees. OPM has reported that among the Senior Executive Service at the end of FY 1990, 12% were women and 7.7 were minorities (up from 5.7% women and 5.6% minorities in 1979). See *Federal Times*, December 30, 1991 at page 16. Another recent study by the Congressional Management Association of the top management staff positions in the U.S. Senate found that women held 31% of the jobs, blacks 3.9% and Hispanics 0.5%. See *Federal Times*, December 23, 1991 at page 7. Finally, in 1991 women made up 17.1% of U.S. mayors and 18.2% of state legislators, *Washington Post*, December 23, 1991 at page C3.

achieve almost identical average combined scores on the four parts of the exam (84.43% and 84.42%, respectively) before veterans preference points are added. After the addition of the points, women applicants' average score rises only slightly to 84.58 (reflecting the low number of women veterans applicants)¹⁰⁰¹ while the men applicants' average score rises nearly 3 points to 87.28. Among actual appointees, the effect is even more dramatic: women appointees' combined average score rises from 87.04 to 87.36, while men appointees' average score rises nearly 5 points from 86.03 to 90.72.¹⁰⁰² Overall, of course, it is much more difficult for nonveterans to achieve a score that will result in appointment. The average nonveteran appointee's combined score was 88.07 whereas the average appointee with 10-point veterans preference had an unsupplemented combined average score of 83.71 and the average 5-point veteran appointee had 85.71. These point differentials, when coupled with the rule of three and rule against passing over veterans within the certificate,¹⁰⁰³ obviously can be determinative where the practical range for consideration is 85-100. (OPM has informed us that few if any ALJs have been appointed with scores below 85. This means that applicants with scores from 70-85, roughly the bottom half of the register, have virtually no chance of being appointed.)

It should be pointed out that the percentage of applicants eligible for veterans preference is beginning to drop as applications from World War II and Korean War veterans dwindle, leaving, of course, Vietnam veterans. Of the 809 applications received in 1984, 330, or 41%, were veterans. But in 1987, of the 741 applicants, 240, or 32% were veterans. This is also reflected in OPM's latest statistics. Although 67.47% of all appointees since 1984 were veterans (compared to 39.42% of all applicants), only 22.41% of eligibles on the current register are veterans.¹⁰⁰⁴ This demographic trend should continue

¹⁰⁰¹Statistics provided by OPM to the Ninth Circuit's Gender Bias Task Force shows that of 586 veteran applicants from 1984-1991 only 5 were women. Of 1,083 nonveterans, 284 were women. The figures include some reapplicants. See letter from Lee Willis, OPM to Joan Schaffner, December 9, 1991 at 1.

¹⁰⁰²Another study of this issue showed that the 10 women in the top 100 eligibles on a 1988 register for applicants in the Washington, DC area would have been, on the average, 31 positions higher if veterans preference points were not added to the 61 male veterans' scores, "Administrative Law Judges: Appointment of Women and Social Security Administration Staff Attorneys," General Accounting Office (GAO/GGD-89-5) at 4-5 (October 1988).

¹⁰⁰³See notes 981-82, *supra* and accompanying text.

¹⁰⁰⁴As of 1990, 30.3% of all federal employees were veterans. *DVAAP Trend Data 1983 Thru 1990*, Tab C, Table 1, U.S. Office of Personnel Management Career Entry Group, Office of Affirmative Recruiting and Employment (November 1990). Among nondefense agencies, the number dropped to 22.8%. *Id.* For SES members, as of March 31, 1990 the figure was 36.8%. *Id.* at Tab D, Table 5. This report also shows that there are very few women veterans in the

unless veterans preference is granted in higher numbers than current policy allows to veterans of the recent Persian Gulf war (or the Grenada or Panama actions).¹⁰⁰⁵

The effect of veterans preference on minority hiring is less dramatic but still significant, according to OPM's statistics. Among all applicants since 1984, whites show an average gain of 2.75 points when veteran preference points are added to their average combined score on the exam. Blacks gain 1.63 points and Hispanics gain 2.27. Among actual appointees since 1984, whites gained 4.42 points, blacks 3.13 points and Hispanics gained the most--4.65 points.¹⁰⁰⁶ Among those still on the register, whites gained 1.43 points, blacks 0.46 points and Hispanics 1.00 points. Thus, in each category, whites gain approximately one full point more than blacks and also do significantly better than Hispanics among applicants who have not been appointed.

While the possibility of "gender bias" in the social security program (or any other administrative program) is not the focus of this study,¹⁰⁰⁷ the lack of

federal workforce. Among women employees government wide of all races on March 31, 1990, 3.58% were veterans; among men employees, 51.38% were veterans. *Id.*, at Tab D, Table 6.

¹⁰⁰⁵Most veterans with an honorable discharge who served until the advent of the volunteer army in 1976 are eligible for veterans preference. After 1976, service in a "campaign or expedition for which a campaign badge has been authorized" is required. Military retirees above the rank of major are not covered unless disabled. 5 USC §2108 (1988). Such campaigns include Grenada, Libya, Panama and the Persian Gulf (since July 24, 1987). See Federal Personnel Manual Supplement 296-33, subchapter 7, "Adjudication of Veteran Preference Claims," Figure 7-7b. Legislation has been introduced to cover everyone on active duty during the Persian Gulf War whether or not they were in the war theater. (H.R. 3764, introduced by Rep. Penny). It is estimated that there were about 500,000 American military personnel serving in the Persian Gulf war and 2 million on active duty throughout the world at the time.

¹⁰⁰⁶Strangely, however, once "unknown" is removed from the calculation, Hispanics are appointed at a percentage (3.60%) lower than their percentage of applications (4.50%). Note also that the average adjusted combined score for Hispanic appointees (91.43) is by far the highest among all groups.

¹⁰⁰⁷But see Preliminary Report of the Ninth Circuit Gender Bias Task Force (Discussion Draft, July 1992), Chapter VI "Federal Courts and Administrative Adjudication: Federal Benefits and Immigration Law." See also "Gender in Social Security Disability Determinations," Ninth Circuit Gender Bias Task Force Advisory Committee on Federal Benefits, submitted to ACUS as comments on draft report (June 1992). As Justice O'Connor has commented, "Do women judges decide cases differently by being women? I would echo the answer of my colleague, Justice Jeanne Coyne of the Supreme Court of Oklahoma, who responded that 'a wise old man and a wise old woman reach the same conclusion.' This should be our aspiration: that whatever our gender or background, we all may become wise--wise through our different struggles and different victories, wise through work and play, profession and family." James Madison Lecture, New York University Law School, October 29, 1991 at p. 12 (footnote omitted, emphasis in original). See also, Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L. J. 237 (1989).

women and minority ALJs is a special concern with respect to social security cases given the relatively high percentage of women and minority claimants who participate in such hearings.¹⁰⁰⁸ A 1989 General Accounting Office study documented the low number of women ALJ appointees at SSA (the largest employer of ALJs by far) and concluded that "male veterans have dominated the ALJ appointments."¹⁰⁰⁹ SSA can, however, be more flexible in its hiring because it can, and does, wait until it has numerous vacancies and then seeks a very large certificate, thus enabling it to reach way down into the register. Through this method, SSA has been able to hire a much higher percentage of women ALJs in recent years than other agencies (close to 21% in its last major hiring of a block of 115 ALJs).¹⁰¹⁰

OPM has recognized the problem with respect to the low number of women and minorities among ALJ applicants and appointees,¹⁰¹¹ but it has been reluctant to seek modification in the application of veterans preference to ALJs. Instead, it has preferred to accentuate recruitment of women and minority applicants. Whether this will bear fruit once the examination is reopened is, of course, impossible to tell at this time.

¹⁰⁰⁸Women represent about half of all social security beneficiaries. They represent only 36% of those receiving disability benefits but 68.6% of those receiving SSI benefits (which are financial-need based). See "Social Security Bulletin, Annual Statistical Supplement, 1991" at 234, 288, SSA/DHHS and "1991 GreenBook—Overview of Entitlement Programs," House Comm. on Ways and Means, 102nd Cong. 1st Sess., May 7, 1991 at 64. Demographic data on claimants, or on claimants challenging denials before ALJs, is not readily available although there are indications that a greater proportion of women than men are denied benefits, especially when claiming chronic pain syndrome. Conversation with Peter V. Lee, Researcher, Ninth Circuit Gender Bias Task Force, February 1991. There is also evidence that physicians are significantly less willing to prescribe certain treatments and procedures for women than for men. *New York Times* Editorial, "Take Women's Health to Heart," July 26, 1991.

¹⁰⁰⁹See GAO study cited at note 1002, *supra*, at page 2. The report also noted the difficulty encountered by SSA staff attorneys (most of whom can reach only GS-13 positions at SSA) when they apply for ALJ positions. OPM counts 2 years of GS-13 experience as qualifying but has not rated it highly enough in the SQS portion of the exam to, in practice, allow a high enough final rating for selection (absent veterans preference). Thus, although approximately 230 such staff attorneys ("decision writers") have been placed on the register in the last 2 years, only 21 have been hired by SSA, and all of them had some other experience. Conversation with Lee Willis, Acting Director, OPM Office of Administrative Law Judges, December, 1990.

¹⁰¹⁰Interview with Lee Willis and Bob Bell of OPM/OALJ, July 23, 1991. Summary prepared by Paul Verkuil, July 24, 1991 (page 1).

¹⁰¹¹In its recent Federal Register notice, OPM posed the question "What Can be Done to Improve the Representation of Women and Minority Group Members as Judges?" See Announcement of Revision, *supra* note 957 at 52340.

What does seem likely, however, is that many among the current corps of ALJs, whose average age was 58 in 1988,¹⁰¹² will be retiring soon—mostly likely in 1993-94 after they have obtained their "high three" years of salary under the new pay structure so as to optimize their pensions. This will produce new opportunities for hiring. It is thus important for OPM to have any modifications of its selection process in place by that time.

2. Recruitment of Attorneys From Private Practice

It is quite natural that federal government attorneys would be more likely than their private counterparts to seek ALJ positions. They are in a better position to know about the job, it can represent a higher rung on the career ladder, and federal attorneys often find it difficult to move into private practice. ALJ appointment means a continuation of federal service for the purposes of retirement, leave and other benefits. Moreover, it is equally natural for hiring agencies to tend to prefer to hire government attorneys, especially applicants from their own legal staffs.

Nevertheless, concerns have persisted over the years that the government's ALJ program was harmed by its inability to attract higher numbers of private attorneys. These concerns range from a generalized worry that the talent pool is thereby weakened to the more specific fear that "inbreeding" among agencies' own attorneys can result in biased (however subtly) pro-agency judges.

This concern reached a peak when selective certification was in its heyday in the 1960s and 1970s, as various studies showed that selectively certified appointees were usually government attorneys, often from the agency doing the appointing.

In 1967 only 20 percent of the attorneys on the register were private attorneys,¹⁰¹³ a figure that fluctuated between 10.5% and 34% through 1980. This problem seems to have subsided, however. In 1988, OPM reported that 25.4% of the 741 applicants from the 1987 examination were from private practice (45.7% were federal attorneys and 17.8% were from state or local government).¹⁰¹⁴ Among the 153 applicants hired from 1984-88 (mostly by

¹⁰¹²See ALJ Program Handbook, *supra* note 985 at 4. The 1992 ALJ survey shows that 58% of respondents are 55 and over. Question #5 (appendix IV A).

¹⁰¹³See Miller, *The Vice of Selective Certification in the Appointment of Hearing Examiners*, 20 ADMIN. L. REV. 477, 478-79 n.1. (1968).

¹⁰¹⁴Update From the Office of Personnel Management, "Remarks by Craig B. Pettibone, OPM/OALJ to Federal Administrative Law Judges Conference Twenty Fifth Annual Seminar, September 25-27, 1988, Ocean City, MD at page 4.

SSA), 35% were from private practice (39% were federal attorneys and 25% were from state or local government).¹⁰¹⁵

The disuse of selective certification may have contributed to the small but noticeable reduction in the appointment of federal attorneys to ALJ positions—although it should be noted that very little hiring from the register has taken place in the past decade among the regulatory agencies that once relied on selective certification.

Moreover, the pros and cons of hiring attorneys with specialized experience are not one-sided. SSA, for example, has been strongly pushing OPM to grant more credit to the experience of its own staff attorneys who serve as decision writers for its ALJs.¹⁰¹⁶

What does seem clear is that the number of private attorney applicants is partly a function of recruitment, which, in turn, is heavily influenced by salary considerations. The recent significant pay increase for ALJs, when coupled with the downturn of the economy, has the potential to dramatically increase the attractiveness of ALJ positions to private attorneys.

D. The Selection Process for Non-ALJ Adjudicators

The Administrative Conference's 1989 survey, reported by John Frye, has documented the growth of non-ALJ adjudication in the federal government.¹⁰¹⁷ Frye counted 2,863 such presiding officers, 601 of whom had no other duties. These adjudicators are, of course, not covered by the Administrative Procedure Act's provisions that led to the OPM selection process for ALJs. The Conference's survey attempted to shed some light on how they are selected, by asking each agency how these non-ALJs were "selected for their position/role." In most instances, the selection process is much less structured than the ALJ program.

One exception to this general rule involves the approximately 80 "administrative judges" who serve on the dozen agency boards of contract appeals. The Contract Disputes Act of 1978, which created these Boards, specifies that board members shall be "selected and appointed to serve in the same manner" as ALJs appointed pursuant to 5 U.S.C. §3105.¹⁰¹⁸

This statutory language has been interpreted by the departments and agencies that have such boards as permitting them (and not OPM) to develop

¹⁰¹⁵*Id.* at 3.

¹⁰¹⁶Discussed in more detail, *infra*.

¹⁰¹⁷Frye, *Survey of Non-ALJ Hearing Programs in the Federal Government*, Administrative Conference of the U.S. (August 1991).

¹⁰¹⁸41 USC §607(b) (1988).

procedures similar to (but not identical to) those employed in the selection of ALJs. OPM has apparently determined that it has no jurisdiction in the selection process. The General Accounting Office in 1985 agreed with this interpretation, and although it found no fault in the selection aspect of the program, urged Congress to give OPM the same general oversight of BCA judges as it has for ALJs.¹⁰¹⁹ The largest BCA is the Armed Services Board of Contract Appeals in the Department of Defense. The ASBCA, with the help of OPM advisers, has developed an examination process that somewhat parallels the ALJ exam, but with some significant differences.¹⁰²⁰ The ASBCA does not focus on trial or administrative law experience, but follows the Contract Disputes Act by requiring 5 years of experience in public contract law.

The rest of the ASBCA process is more streamlined than the ALJ exam.¹⁰²¹ The applicant does not need to complete a written decision. Instead, he or she must submit two written work products and write essays on his or her most significant legal accomplishment and "achievements in influencing others." A dozen references are requested. The ASBCA Chairman assigns a team of three BCA judges who then telephone individuals listed as references, interview the applicant, and numerically rate the applicant on each of 13 "dimensions" (similar to the KSAs used by OPM) to arrive at a combined rating.¹⁰²² Veterans preference is shown by giving veterans the benefit of the doubt on any close calls on a dimension—thus making it easier for veterans to obtain a higher combined rating. That rating is then translated into an eligibility rating (using the terms "highly qualified," "qualified" and "non-qualified"). The Chairman then enters the highly qualified and qualified applicants on the register (alphabetically, without numerical ratings, but with veterans status noted) for selection purposes.¹⁰²³ The examination process is always open, and currently there are several dozen eligibles on the register.

¹⁰¹⁹See "The Armed Services Board of Contract Appeals Has Operated Independently," U.S. General Accounting Office Report to The Chairman, Committee on Governmental Affairs, U.S. Senate (GAO/NSIAD-85-102) (September 23, 1985).

¹⁰²⁰The following description is based on a telephone interview with Paul Williams, Chairman, ASBCA, December 1991.

¹⁰²¹For a detailed description of this process, see "Member, Board of Contract Appeals—Procedures for Qualifications in the Department of Defense," (ASBCA December 1991) on file at the Administrative Conference.

¹⁰²²See "Final Panel Rating" sheet used by ASBCA listing the 13 dimensions (ASBCA, December 1991) on file at the Administrative Conference.

¹⁰²³See note 1050, *infra* for an explanation of how veterans preference is applicable to the hiring of "Schedule A" attorneys in the government.

Although the primary users of this register are the ASBCA and the Army Corps of Engineers BCA, the Chairman permits other agencies to use the list. The Chairman reports that the ASBCA has never selected anyone with a rating below "highly qualified,"¹⁰²⁴ although he is in no position to stop other agencies from doing so.

A similar, competing, register has been developed by the General Services Administration BCA, which is frequently used by the other "civilian" boards. Some agencies reserve the right to use different methods of selection as well.¹⁰²⁵

Another important group of non-ALJ adjudicators, the approximately 80 immigration judges¹⁰²⁶ at the Department of Justice, are also hired in a structured, but much more informal, method. As explained by the Chief Immigration Judge,¹⁰²⁷ IJ applicants must be bar members with 6.5 years of legal experience. "Selective placement factors" include: availability for frequent travel, valid driver's license and willingness to travel by air, knowledge of immigration laws, ability to conduct high volume legal hearings, and knowledge of judicial practices and procedures. Applicants must submit the normal federal civil service application form (SF-171) and/or a current resume along with a statement of preferences from among the 21 field office locations. A computerized "Immigration Judge Applicant File" creates a pool of applicants. When a vacancy arises, a report is created that lists applicants for that location. Applicants are interviewed and a choice is made based on the paperwork, interview and reference checks. In effect, except for the experience requirement and the guidelines offered by the selective placement factors, this boils down to the usual process for hiring Schedule A lawyers,

¹⁰²⁴Indeed a recent Certificate of Eligibles to the ASBCA for the filling of a vacancy listed 27 names, all of whom were rated highly qualified and 17 of whom had veterans preference (including the selectee). (Certificate of July 24, 1990).

¹⁰²⁵A supplementary response to the Conference questionnaire from HUD's General Counsel states that "I wish to clarify that the Secretary currently has no set policy with respect to Board appointment and reserves the option to employ different methods of selection in filling future vacancies while still meeting the statutory and regulatory requirements for qualification. . . ." Letter from Frank Keating to Jeffrey S. Lubbers, Research Director, ACUS, September 27, 1989.

¹⁰²⁶These judges are technically known as "special inquiry officers" (8 USC §1101 (b)(4)). Legislation was introduced to officially change their name to "immigration judges," and to increase their pay to correspond, in stages to 65-90% of the ES-5 rate of pay (just below the pay of ALJs), but was not enacted. See S. 2099, 102d Cong. 1st Sess., reprinted in 137 Cong. Rec. S. 18417 (daily ed. November 26, 1991).

¹⁰²⁷Letter from William R. Robie to Jeffrey S. Lubbers, October 12, 1989, pages 4-5 of attachment.

who are excepted from the competitive civil service hiring rules employed elsewhere in the federal government.¹⁰²⁸

The Merit Systems Protection Board, which employs approximately 70 "Administrative Judges" who hear and decide most federal employee appeals, simply reported that "Positions are filled in accordance with Schedule A appointment authority. The methods used for selecting applicants may include recruitment from a Vacancy Announcement, college recruitment, reassignment of in-house attorneys and inquiries from unsolicited outside applicants."¹⁰²⁹ It should be noted that legislation has been introduced (apparently at the request of the MSPB AJs) to give them most of the attributes of and protections for ALJs, but without altering their appointment process.¹⁰³⁰

The largest employer of non-ALJ adjudicators is the Department of Veterans Affairs, which employs 1,650 claims examiners who serve on rating boards that determine disability issues, and 42 hearing officers who hear initial appeals from rating boards. The claims examiners, who are part-time adjudicators, are merely assigned by supervisors to serve on rating boards. The hearing officers, although they need not be lawyers, are perhaps closer to the ALJ model in that they preside singly and are not assigned duties in "conflict with their status as an impartial and independent decision maker." They are "selected by the Chief Benefits Director from among competitive candidates who meet the qualification requirements established by the GS-930 series."¹⁰³¹

Nearly all the other agencies and departments reporting non-ALJ adjudicator employees¹⁰³² report that their hiring is no different from the usual process for hiring attorneys.

¹⁰²⁸See note 1050, *infra* and accompanying text.

¹⁰²⁹Letter from Mark Kelleher, Director, Office of Regional Operations, MSPB to Jeffrey S. Lubbers, July 24, 1989, page 2 of attachment. But see note 343, *supra*, indicating that the Board mistakenly listed college recruitment.

¹⁰³⁰H.R. 3879, 102d Cong. 1st Sess. (November 22, 1991) (by Rep. Gekas).

¹⁰³¹Letter from Frederick L. Conway, Special Assistant to the General Counsel, Veterans Administration to Jeffrey S. Lubbers, August 14, 1989, page 2 of attachment.

¹⁰³²At least one program, that of the Department of Defense Civilian Health and Medical Program, which has 11 "OCHAMPUS Hearing Officers," uses nonemployees. The Department reports that these officers are "solicited through a firm fixed-price negotiated procurement using source selection process." Letter to Jeffrey S. Lubbers (ACUS) from Gerald A. Wesley, Acting General Counsel, Office of Civilian Health and Medical Program of the Uniformed Services (DOD), June 27, 1989.

E. Proposed Modification of the ALJ Selection Process

It seems clear that there is much to commend the selection process that the Civil Service Commission and its successor, the Office of Personnel Management, have developed and administered for the selection of administrative law judges. It is one of the few attempts to incorporate true "merit selection" processes for judges in our legal system. It has been scientifically "validated" to the point where it seems impervious to legal challenges by disappointed applicants. And it has produced judges who have operated within the administrative law framework, for the most part quietly, competently, efficiently and without scandal. These are not achievements to be lightly dismissed.

Nevertheless, it seems equally clear that the system requires modification. The problem, in a nutshell, is that the hiring agencies do not feel that the current rating system and selection process permits them to hire the best qualified applicants. OPM's largest "customer," the Social Security Administration, is extremely dissatisfied with the process by which applicants are rated and presented to it for selection.¹⁰³³ Moreover, almost all of the other hiring agencies have either largely abandoned the practice of hiring applicants from the register of eligibles in favor of lateral transfers, or they have avoided the use of ALJs altogether. OPM's administrative costs in managing the system are so significant that the agency has kept the examination period closed for long periods. The time and effort required of applicants in seeking the position is inhibiting. Finally, the rating process impedes the recruitment of women and minorities.¹⁰³⁴

All of these deficiencies can and should be addressed soon--before the examination is reopened to accommodate the pent-up backlog of applicants who are likely to be interested in ALJ positions due to the pay increases that resulted from the 1990 pay reform legislation and who will soon be needed to fill vacancies created by the wave of ALJ retirements expected in 1993-94.

In brief, the following reforms are needed: (1) The examination process needs to be streamlined; the basic aspects of the current examination should continue to be administered by OPM, but a significant portion of it should be left to the hiring agency (albeit with appropriate safeguards). The resulting

¹⁰³³See notes 1067-72, *infra*, and accompanying text.

¹⁰³⁴These criticisms are not new. In 1978, the Senate Governmental Affairs Committee reported that "All those interviewed who were familiar with the ALJ selection process criticized it." *Study on Federal Regulation*, Vol. IV, "Delay in the Regulatory Process," 95th Cong., 1st Sess., Committee Print (July 1977) at 107. The Committee also stated, "What is striking about this process is its total inconsistency with the procedures that any rational organization would use to hire lawyers in midcareer for sensitive and responsible positions. *Id.*"

examination process would thus be less burdensome on OPM and on the applicants. (2) Veterans preference in the selection of ALJs should be eliminated or the preference made less determinative. (3) OPM should make it easier for agencies to request that specialized experience be factored into the rating and selection process. (4) A separate register should be created for the hiring of ALJs by the Social Security Administration.

1. Streamlining of the Examination

OPM's Office of ALJs estimates that each application takes the agency about 8 3/4 hours to process.¹⁰³⁵ This does not count the time spent in drafting benchmarks and rating guides, arranging for the syllabus for the written decision, setting up panel interviews, or training the volunteer participants. No cost data are available, although it should be noted that in 1990 the Office of ALJs' budget was \$306,530 and the office had 6 employees.¹⁰³⁶

With this low level of staffing, the Office has not been able to operate a continuously open register since 1983. The examination was reopened in the summers of 1984 (809 applicants) and 1987 (741 applicants), but has been closed since. With a large influx of applicants expected upon the next reopening, the OALJ will clearly have to develop more efficient ways to examine these applicants to meet OPM's goal of reinstating a more frequently opened examination.

A more streamlined examination vehicle developed through state-of-the-art questionnaire design may be one way to help meet OPM's administrative needs while also making it easier on applicants to apply. This idea should be pursued especially because fully 80% of the ALJs surveyed indicated that completing the written application was very (43%) or somewhat (37%) burdensome.¹⁰³⁷ But the level of agencies' criticism of the exam and their machinations to circumvent it show that the problem is more fundamental than mere administrative efficiency. The solution is to shift some of the responsibility for evaluating eligible applicants from OPM to the agencies. To some extent this can be accomplished administratively, but legislation may be needed to fully implement this reform.

¹⁰³⁵Handwritten response by Lee Willis, OALJ to December 5, 1991 letter from Jeffrey Lubbers (ACUS). On file at ACUS. The 8 3/4 hours breaks down as follows: SQS (30 minutes), PRI (15 minutes), WD (6 1/2 hours) and PI (1 1/2 hours). Obviously, it might take the applicant quite a bit longer to complete this process.

¹⁰³⁶Information supplied by OPM/OALJ. In 1982 the office had 7.9 "full-time equivalent" positions and a larger budget (in real dollars) of \$269,250. The Office has historically had an SES or supergrade head, one GS-13, 1-2 GS-12s, a GS-7 secretary, and two clerks. The "deputy" position was abolished in 1985 or 1986. *Id.*

¹⁰³⁷See results on question #18(a) in the 1992 ALJ survey (Appendix IV A).

2. OPM's Role

OPM should continue to determine the minimum qualification requirements for the ALJ position. The current threshold requirements, as eased in 1984, have received little if any criticism.¹⁰³⁸ Indeed 95% of ALJs surveyed felt that the selection criteria are relevant to duties actually performed.¹⁰³⁹

OPM should also continue to rate the experience of applicants through a modified Supplemental Qualifications Statement (SQS). As explained, OPM has been rating applicants on five "knowledges, skills and abilities" (KSAs) and has begun to develop guidelines for a sixth KSA. One ALJ has strongly criticized the overweighting of several of the KSAs. Judge Jesse Etelson has complained that KSA #3 (decision-making ability) as implemented by OPM's rating guidelines underrates the experience of agency staff reviewer-writers in favor of agency advocate-litigators.¹⁰⁴⁰ He also criticized KSA #1 as overemphasizing the value of "knowledge of rules of evidence" (since rules of evidence are liberalized in many ALJ proceedings)¹⁰⁴¹ and KSA #4 ("oral communications ability and judicial temperament") as relating little to ALJ-specific skills.¹⁰⁴²

Although one can agree with aspects of Judge Etelson's more fundamental critique, his complaint that the individual KSAs are inappropriate or improperly weighted is not very persuasive. Indeed, OPM has performed quite admirably in distilling the key factors that both minimally qualify someone to become an ALJ and in developing guidelines for evaluating the experience of such applicants. Where Judge Etelson's critique is most trenchant is his description of OPM's "microcalibration" of the rating scores.¹⁰⁴³

OPM calculates the SQS portion of its rating by having its examiners review the applicant's one- or two-page response on each of the KSAs, using benchmarks and rating guides developed for the purpose. A score of 1 to 5 is assigned each KSA and the score is then totaled into a raw rating on the SQS portion of the exam. Until recently, the SQS portion of the exam counted for 63% of the total final rating (not counting veterans preference points), so the

¹⁰³⁸Although OPM may wish to consider whether applicants with legal experience as arbitrator, mediator, professor of law, or judicial law clerk might possess qualifying experience. Examination Announcement No. 318 now provides that such experience may be qualifying "in rare and unusual instances" (page 6).

¹⁰³⁹Question #19. (Appendix IV A). 52% said "very" relevant; 43% said "somewhat" relevant.

¹⁰⁴⁰Etelson, *supra* note 958 at 189-90.

¹⁰⁴¹*Id.* at 190-91.

¹⁰⁴²*Id.* at 191.

¹⁰⁴³*Id.* at 193.

SQS score was quite important. Indeed, it was so important that OPM has often used this raw score to determine which applicants would even be allowed to complete the rest of the exam.

The proposed reform of the system recognizes the importance of the experience rating, but it would end OPM's involvement at this stage. Ideally OPM would avoid "microcalibration" of its register of eligibles by simply listing *all* of the applicants who achieved higher than the threshold score on the SQS. The lists of eligibles would then appear alphabetically as "eligible for appointment." If desirable or necessary other attributes such as specialized qualifications or veterans preference (see below) might be noted next to each name. Perhaps the Armed Services Board of Contract Appeals selection process could be emulated by dividing the eligibles into "qualified" and "highly qualified" registers. But the main goal would be to get away from the highly microcalibrated ranking system now in use.

Before discussing the other aspects of the current examination (the personal reference inquiry, written decision, and panel interview), it is appropriate to analyze here whether current law permits OPM to simply rate applicants as eligible without assigning them numerical ratings.

As mentioned at the beginning of this chapter, then-Professor Scalia has noted that the original text of the Administrative Procedure Act "evidently contemplated" that the Civil Service Commission would simply establish minimum qualifications for hearing examiners by rule and that the agencies would select from applicants meeting those requirements.¹¹⁴

The current text of the APA, governing OPM and ALJs, is even less demanding on this point since the codification dropped the phrase "qualified and competent" originally used to describe the ALJs agencies may appoint.¹¹⁵ OPM, however, points to various provisions in the Civil Service Reform Act of 1978, codified in Title 5 of the U.S. Code, as requiring a numerical rating system.

OPM considers ALJs to be in the "competitive service." The classification is important because section 3313 requires applicants for professional positions "who have qualified in examinations for the competitive service" to be entered on registers or lists of eligibles "in the order of their ratings, including [veterans preference] points added...."¹¹⁶ No provision of Title 5 specifically

¹¹⁴See note 932, *supra* and accompanying text.

¹¹⁵5 USC §3105 (1988) ("Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.")

¹¹⁶Of course, even under this provision, OPM is not required to conduct all portions of the current examination. It could simply transmute the SQS score onto a 100-point scale and then add the veterans preference points. Moreover, it is also unclear whether a scale of 100 points is

places ALJs in the competitive service, although section 1104 addresses this issue obliquely. It permits the OPM Director to delegate the authority for competitive examinations to agency heads "(except competitive examinations for administrative law judges....") Whether this section *requires* competitive exams for ALJs is, of course, not clear, although OPM cannot be faulted for so interpreting it.¹⁰⁴⁷ But given the obvious difficulties caused by this interpretation, perhaps it is time for OPM to take the position that ALJs (like other attorneys in the federal government) are in the "excepted" service (i.e., excepted from the competitive service).¹⁰⁴⁸

It is true that section 3320 requires that the hiring of lawyers and others in the excepted service be done "in the same manner and under the same conditions required for the competitive service...." However, since 1943, the Civil Service Commission (and now OPM) has been prohibited by statute from requiring that attorney positions be filled pursuant to examination.¹⁰⁴⁹ Thus, if ALJs were to be considered excepted service attorney positions (as are many non-ALJ adjudicators), no numerical rating system would be required.¹⁰⁵⁰

required by law. Obviously, the effect of adding the 5 or 10 points required by section 3309 would be diluted if a 1,000-point scale were used. Nor would such points be so crucial if the applicants' unadjusted scores did not bunch so closely in the 85-95 point range.

¹⁰⁴⁷The legislative history to section 1104 sheds no light on this issue. The new pay legislation, Pub. L. No. 101-509, also removes ALJs from the GS pay schedule normally used in the competitive service.

¹⁰⁴⁸OPM "may except positions from the competitive service when it determines that appointments thereto through competitive examination are not practicable." 5 CFR §6.1 (1991). Agency circumvention of the register might very well provide a basis for such a determination. See also the position of the National Association of Women Judges that "various statutory provisions specifically except ALJs" from the competitive service. Comments of the NAWJ on ACUS Draft Report, June 29, 1992.

¹⁰⁴⁹See Pub. L. No. 101-509, 104 Stat. 1420, for the latest version of the prohibition, in the 1991 OPM appropriations legislation.

¹⁰⁵⁰See Memorandum Opinion for the Associate Attorney General, Veterans Preference Act (5 USC §§2108, 3309-3320)—Application to Attorney Positions, Office of Legal Counsel Opinion #78-45 (August 14, 1978) (1978 Bound Volume at 179-184), concluding that the Civil Service Commission was precluded from requiring the Department of Justice to use a numerical rating system for attorney applicants. The opinion also concluded that the Department was bound to apply veterans preference in attorney hiring "in some fashion." *Id.* at 182. It further concluded that it was sufficient for the Department to positively consider veterans preference by providing that if hiring factors are "equal, or even close, the preference eligible will normally be selected over the nonpreference eligible." *Id.* at 183.

3. Shifting the Other Parts of the Exam to the Hiring Agencies

With respect to the remaining parts of the examination, now administered by OPM (the personal reference inquiry, the written decision and the panel interview), it is recommended that OPM permit the hiring agencies to undertake these tasks as they see fit. Each aspect, following up on references, assessing written work, and the interview, are already customarily undertaken by agencies when they hire other employees, whether they be clerk typists off the competitive registers, attorneys in the excepted service, or members of the Senior Executive Service. Indeed, agencies hiring ALJs under the current system still feel obliged to conduct this sort of follow up with applicants who are on OPM certificates or with judges who are applying for transfers.¹⁰⁵¹

Moreover, these aspects of the examination seem to be more trouble than they are worth to OPM. The personal reference inquiry has always been controversial--in the old days the "voucher system" produced skewed results and the current "forced choice" questionnaire has produced confusion. Over half of the ALJs responding to the survey said this part of the examination was "very" (12%) or "somewhat" (40%) burdensome. OPM has recently proposed reducing the PRI's weight to only 10% of the final rating.¹⁰⁵²

The written demonstration and panel interview both also have their problems. The WD takes 5 hours and is not easy to take, administer or grade. Almost half of the ALJs replied that it was "very" (10%) or "somewhat" (39%) burdensome. Judge Etelson has a point when he complains that a 5-hour exam geared primarily to issue spotting does not really resemble the actual writing of an opinion.¹⁰⁵³ Moreover, there is no reason to suspect that hiring agencies could not sufficiently test or check applicant's writing skills. In this connection, it should be noted that the ASBCA has omitted this aspect in its exam for BCA judges.

The panel interview, although not particularly burdensome for applicants (70% of ALJs responded that it was not burdensome), is an administrative headache for OPM, which must arrange for the participation of a staffer, an ALJ and a private attorney for the interview. Although interviews obviously can be an important ingredient in the selection process, there is no reason the hiring agencies cannot and should not undertake this task, as they do in most hiring decisions.

¹⁰⁵¹According to the 1992 ALJ survey, 72% of respondents said that agency interviews were not burdensome, and only 6% said the question was not applicable. See question #18 (in Appendix IV A).

¹⁰⁵²See note 957, *supra* and accompanying text.

¹⁰⁵³Etelson, *supra* note 958 at 191-92.

In summary, the proposed modification of the examination process for ALJ applicants would assign OPM the responsibility to set minimal qualifications and to rate the experience of applicants to determine their eligibility for selection, but without numerically ranking them. Under this proposal, agencies would be permitted to select from the entire list of eligibles, and agencies would be authorized to follow up on references, request writing samples, and interview applicants.

If, as proposed, hiring agencies were permitted to hire anyone certified as eligible by OPM off the register, the biggest concern is that a form of "cronyism" might develop in the hiring process. To some extent, of course, this concern already exists since most agencies do most of their hiring in a relatively untrammelled way through transfers. But this potential problem can be solved in the same way it is addressed in the hiring of members of the Senior Executive Service--through the use of "executive review boards" that must approve their hiring.¹⁰⁵⁴ OPM could require agencies to establish such boards to be used to review ALJ hiring. For example, such a board could consist of an SES member (e.g., from the agency's personnel office), an ALJ appointed by the Chief ALJ, and the general counsel. This safeguard would help provide a second shield against cronyism and a better guarantee of quality appointments.

4. The Role of Veterans Preference in ALJ Selection

Under the proposed modification of the ALJ selection process, the numerical ranking system would be eliminated, and with it the mechanical addition of veterans preference points. Of course, as with the hiring of attorneys, application of veterans preference would be required, but in a much less mechanical fashion.

If, however, OPM, for whatever reason, found it impossible to implement the proposed elimination of the ranking system, it would be necessary to confront more directly the issue of how the veterans preference operates in the context of ALJ selection.

Extending preferential treatment in the civil service to veterans is obviously a laudable and reasonable social policy. Many veterans need assistance in readjusting to civilian life and those who have served our country deserve some rewards for doing so. This policy is especially justifiable when applied to those who have been drafted and have had to postpone their normal career development. With the advent of the volunteer army, however, and its attendant incentives, the case for hiring preferences becomes somewhat less persuasive. But whatever its merits with respect to entry level positions in the

¹⁰⁵⁴See 5 USC §3393 (1988).

government, veterans preference arguably should not apply to the hiring of such high level, sensitive positions as administrative law judges.

In the first place, applicants for ALJ positions must already be successful lawyers--they are generally not recently discharged veterans who need readjustment assistance.¹⁰⁵⁵ Moreover, if the applicants have previous government service (as most do), they would presumably have already received veterans preference in their initial appointments.¹⁰⁵⁶ Appointment to an ALJ position, for government lawyers, is really a promotion, and veterans preference is normally not applicable to promotions.

Nor can it be seriously questioned that the current system of veterans preference undermines merit selection principles and also decreases the number of women who can be appointed to ALJ positions. Veterans have significantly lower unadjusted ratings on the examination than nonveterans, yet are appointed in much higher percentages. Women applicants, on the other hand, have equivalent unadjusted scores to men, yet receive far fewer veterans preference points and are appointed in disproportionately lower numbers (both as compared to their percentage of applicants and as compared to men appointees).¹⁰⁵⁷

Moreover, OPM's actual statistics show, somewhat counter intuitively, that veterans preference points also fail to help the average minority applicant as much as they do the average white applicant. In short, veterans preference as now practiced in the hiring of ALJs produces less highly qualified appointees and also at the same time serves to depress the appointment of women and minorities to the ALJ corps.

In 1978, when the Civil Service Reform Act created the Senior Executive Service--a group of high-level civil servants whose salary and responsibility approximate those of ALJs--Congress exempted their hiring from the veterans preference laws.¹⁰⁵⁸ The same rationale should apply to the hiring of ALJs,

¹⁰⁵⁵Indeed, one would think that the most likely type of veteran to benefit from this preference in ALJ selection would be a career military lawyer who has retired. However, retired careerists above the rank of major are not eligible for preference unless they are disabled. 5 USC §2108(4) (1988).

¹⁰⁵⁶Moreover, OPM, in calculating qualifying experience, permits ALJ applicants entitled to veterans preference to consider their nonlegal military experience as an extension of the work they were engaged in immediately prior to entering military service. ALJ Examination Announcement No. 318 (May 1984) at p.7. This would assist private sector attorneys who suffered a break in their legal careers due to military service. But it could also lead to anomalies: if a lawyer with a short term of litigating experience joined the military to work on procurement matters for 10 years, the result would be 11 years of highly qualifying litigating experience.

¹⁰⁵⁷See notes 997-1012 *supra*, and accompanying text.

¹⁰⁵⁸See 5 USC §2108(3) ("preference eligible . . . does not include applicants for, or members of, the Senior Executive Service. . . .")

since at the time of the creation of the SES, ALJs, despite their supergrade status, were not included because of concerns that it would be inappropriate to subject them to performance evaluations.

If, however, a similar exemption for ALJ hiring remains infeasible for political reasons, the extent of the preference should be significantly reduced. At present, the 5 or 10 points added to the unadjusted final rating are, in effect, determinative of selection in most instances. As Judge Etelson has observed, it seems silly for OPM to calibrate each applicant's rating to hundredths of a point (e.g., 86.04) and "such microcalibration is rendered even more ludicrous in the context of an examination to which the 5- and 10-point veterans preferences apply, preferences which override, respectively, 500 or 1000 of OALJ's calibrations."¹⁰⁵⁹ In practice, veteran applicants' leapfrog over nonveterans. The average nonveteran's unadjusted final rating is 88.07--much higher than the average 10-point veteran (83.71) or 5-point veteran (85.71). Yet the addition of the points jumps the average 10-point veteran to 93.71 and the 5-point veteran to 90.71.

These bonus points seem way too high in the context of a hiring range that effectively extends from only 85 to 100. Moreover, the preference is compounded by the requirements that agencies select from a certificate of the top three eligibles and that they not pass over a veteran who scores as high as or higher than a nonveteran.¹⁰⁶⁰ Thus, not only do veterans rise to the top of most certificates, agencies have little leeway within the certificates. So it is hardly surprising that while veterans made up only 39.42% of all applicants since 1984, they were 67.47% of all appointees from the register.¹⁰⁶¹ Nor is it surprising that most agencies have sought to do most of their hiring through transfers, not from the register, or that agencies who use non-ALJ adjudicators have devised ways to minimize the impact of veterans preference.

There have been calls for reducing veterans preference in ALJ selection for a long time. As mentioned above, the Kennedy Temporary Administrative Conference recommend an exemption for hearing examiner selection. A 1969 study for the permanent Conference pointed to its "pernicious effect as to the rational ranking of candidates."¹⁰⁶² That study went on to recommend three alternate solutions: a pass-fail register; selection from anyone in the register, but with ratings noted on the register; or enlargement of the rule of 3 to a rule of 15. Conference Recommendation 69-9 states:

¹⁰⁵⁹Etelson, *supra* note 958 at 193.

¹⁰⁶⁰5 USC §3318. This provision also would be rendered inapplicable if ALJ positions were removed from the competitive service.

¹⁰⁶¹See note 1004 *supra*, and accompanying text.

¹⁰⁶²Park, *supra* note 995 at 404.

4. The Veterans Preference Act should be amended to permit the selection of [ALJs] for each vacancy from the top 10 available persons then appearing on the register, determined on the basis of examination and ranking without reference to veterans preference.¹⁰⁶³

No action was taken based on Recommendation 69-9 and the situation continues to cause problems. As Chief ALJ Paul Cross of the Interstate Commerce Commission wrote in 1989:¹⁰⁶⁴

As some of you know, I am interested in the subject of veterans preference in ALJ selection. It is not because I am against veterans preference. Instead, it is my view that veterans are not being truly benefited because there are so few ALJ appointments. The appointment action, some of it massive, is happening elsewhere. One basic reason for this is that most agencies do not want to hire those at the top of the list of ALJ eligibles, especially at the GS-16 level. Meanwhile, our competence, our pay and our status is degraded. As a group, we are too old, too white and almost exclusively male. We are not representative of the general population of highly successful attorneys. There is, in short, a major flaw in the selection process which must be eliminated.

No judge at any other level of government, including any within the greatly increasing number of Federal Administrative Judges, is selected on the basis of veterans

¹⁰⁶³ACUS Recommendation 69-9, "Recruitment and Selection of Hearing Examiners; . . ." 1 CFR §305.69-9 (1989). The American Bar Association adopted a resolution supported by its Section of Administrative Law urging legislation to exempt ALJs from veterans preference in August 1976. Letter from Herbert O. Sledd, Secretary, ABA to Robert Anthony, Chairman ACUS, August 25, 1976. See also the recommendation of the Senate Governmental Affairs Committee, *supra* note 1034 at 130: "In the ALJ selection process (a) the 'rule of three' should be abolished, allowing the agency to select any candidate on the register, (b) veterans' preference should be abolished. . . ." The Civil Service Commission's own Advisory Committee on Administrative Law Judges in 1978 also recommended that ALJs be removed from the coverage of the Veterans Preference Act.

¹⁰⁶⁴Memorandum re "Revalidating the Administrative Law Examination" from Paul S. Cross, Chief ALJ, Interstate Commerce Commission to (OPM) Steering Committee, September 20, 1989. Reproduced in "Social Security Administrative Law Judges - The Need to Change the Administrative Law Judge Examination." Tab 1, Submitted to OPM by the National Treasury Employees Union (September 1989).

preference. Even the judges at the Veterans Department and the Defense Department are not so selected. We too I assert are judges, not clerks and I urge that we fully accept our status.

Moral leadership is required. It is easy to say that the subject of veterans preference is too emotional or too political to confront. However, most veterans who would become ALJ's are not appointed because of the use of various alternative hearing arrangements which include use of Employee Boards, Administrative Judges and Written Procedures. It is grossly hypocritical to insist that ALJ's be veterans while there is a stampede to circumvent the ALJ selection process.

It is high time that the impact of veterans preference in the ALJ selection process be either reduced or eliminated. Ideally, the ALJ selection process should be exempted from the Veteran Preference Act in the same manner as is the SES selection process. In any event, ALJs should be classified as excepted service positions, subject to the same general veterans preference as attorneys but without the mechanical application of veterans preference points that has such a significant impact on the current ALJ selection process. If these steps remain politically impossible, at a minimum, the impact of the preference should be lessened through a reduction in points or elimination of the rule of three requirements.

5. Specialized Experience

As discussed, it used to be standard practice for agencies, with OPM's active concurrence, to "selectively certify" applicants based on specialized experience. The 1979 OPM Announcement for ALJ listed nine agencies and departments that required 2 years of specialized experience in their areas of regulation: USDA, CAB, FCC, FERC, IRS, ICC, NLRB, SEC and the U.S. Coast Guard.¹³⁵ In addition, SSA required a demonstrated proficiency in Spanish and English for its Puerto Rican positions. Persons with such a certification could be provided to these agencies on special certificates, thus bypassing many other eligibles.

In 1984, OPM abandoned this practice. Critics of it included the ABA, which wished to encourage hiring generalist judges and who feared excessive "inbreeding" of pro-agency lawyers. The ALJ organizations, most of whom

¹³⁵Announcement No. 318, Administrative Law Judge, U.S. Office of Personnel Management (October 1979) 18-21.

were supporting the concept of a unified corps of ALJs removed from the agencies, also opposed selective certification--viewing it as antithetical to the unified corps concept.

OPM's 1984 Announcement indicated that agencies could continue to give "priority consideration" to applicants with special qualifications, but only if the agencies "justify by job analysis that special qualifications enhance performance."¹⁰⁶⁶

Since 1984 few agencies have been doing much hiring off the register, so this issue has not been pressed by the agencies, with one glaring exception--the Social Security Administration. SSA, which has been hiring off the register, has repeatedly pressed OPM to make it easier to appoint as ALJs its SSA staff attorneys, known as decision-writers (because in most cases they write the actual decisions for the ALJs who preside over these high-volume cases).¹⁰⁶⁷

In 1988 SSA Commissioner Hardy asked OPM to provide SSA with lists of candidates who had agency-specific experience.¹⁰⁶⁸ OPM's Director Horner replied that SSA first had to justify this request by a job analysis.¹⁰⁶⁹ SSA's internal reaction was that preparation of such an analysis would be costly (estimated at \$100,000) and that it was not a realistic option because to be "acceptable" to OPM, the analysis would require involving ALJs from other agencies "who have a decided interest against establishing any special agency-specific qualifications."¹⁰⁷⁰

In 1989 newly-appointed SSA Commissioner King again raised the issue with OPM, reiterating how important it was to be able to hire ALJs who have a thorough knowledge of Social Security laws and programs.¹⁰⁷¹ Also in that year, the HHS Disability Advisory Committee called on OPM to give SSA a greater say in the selection process and in the development of criteria for SSA ALJs.¹⁰⁷²

This dispute, in part, reflects the problems with the overall selection process discussed above. But it also suggests a more fundamental problem with the goal of treating ALJs as entirely interchangeable and fungible. To a

¹⁰⁶⁶See note 951, *supra*.

¹⁰⁶⁷See GAO study, *supra* note 1002.

¹⁰⁶⁸Letter from Dorcas R. Hardy, SSA Commissioner, to Constance Horner, OPM Director, October 6, 1988 (Reproduced at Tab B of NTEU submission to OPM).

¹⁰⁶⁹Letter from Constance Horner to Dorcas Hardy, November 23, 1988. *Id.* at Tab C.

¹⁰⁷⁰Note to Commissioner Hardy from Louis Enoff, Deputy Commissioner, December 23, 1988. *Id.* at Tab D.

¹⁰⁷¹Letter from Gwendolyn S. King, SSA Commissioner, to Constance Newman, OPM Director, October 23, 1989. *Id.* at Tab E.

¹⁰⁷²Recommendations of the Committee reproduced at Tab F (dated July 25, 1989).

large extent, of course, they are. The loan program¹⁰⁷³ and the prevalence of transfers are ample testimony to the capability of many ALJs to handle a wide variety of cases. Indeed, the recent pay reform legislation, which essentially abolished the longstanding distinction between GS-15 (mostly SSA) and GS-16 ALJs and combined them into one pay level (AL-3, with six sublevels based entirely on seniority), and also thereby collapsed the two registers into one, was a strong push toward fungibility and interchangeability.¹⁰⁷⁴

But even if the idea (best advocated by then-Professor Scalia) of a multi-grade ladder structure for ALJs is completely dead,¹⁰⁷⁵ there is still reason to consider the need for acknowledging specialized expertise in the selection of ALJs.

If the above proposal to allow agency selection of any OPM-qualified eligible is accepted, there would be no need for any extra credit for specialized expertise (although OPM could still be charged with verifying it, as a convenience to agencies). But if the system is not opened up as suggested, OPM should administratively ease its requirements for such extra credit and should permit something closer to the old system of selective certification.

Under either approach, the question of SSA's hiring needs presents special problems. SSA employs almost 80% of all ALJs. Given SSA's importance in the administrative adjudication arena and the strength of its concerns about this issue, OPM should consider developing a separate register for SSA hiring, with additional experience criteria (KSAs) geared to the sort of nonadversarial hearings undertaken by SSA ALJs. Presumably SSA staff attorneys (even GS-12s) as well as the growing bar of SSA private practitioners could score well on such KSAs. Only SSA should be permitted to hire off the register,¹⁰⁷⁶ although applicants could apply to be on both registers. To prevent gamesmanship by other agencies, SSA ALJs could not be hired laterally by other agencies without special safeguards (e.g., reapplication to the "main" register, review by an agency executive review board, a 2-year waiting period).

Development of this separate register would solve the problem presented by the agency that employs almost 80% of all ALJs and would do so without affecting the rating process for other ALJs.

¹⁰⁷³See Scalia, *The Hearing Examiner Loan Program*, 1971 DUKE L.J. 319.

¹⁰⁷⁴See note 949, *supra*.

¹⁰⁷⁵See Scalia, *supra* note 932 at 75 ("A Return to a Multi-Grade Structure").

¹⁰⁷⁶Possibly this register could be opened to other benefits claim handling agencies.

F. Conclusion

The process proposed in this chapter for hiring ALJs is not a novel or radical one. Many of its elements have been proposed before, and it largely corresponds to the one used for hiring other high-level career federal employees. It would maintain the key role for OPM in developing the minimum qualifications for the position and in examining and rating the eligibility of individual applicants, but it would do so much more efficiently, while safeguarding merit selection principles, improving recruitment of desirable candidates and satisfying the concerns of hiring agencies.

VI. The Scope and Degree of ALJ and Non-ALJ Independence

The APA insulates ALJs from potential sources of agency pressure in several ways. Most non-ALJ adjudicatory decisionmakers are not protected by analogous statutory safeguards. Many agencies that use non-ALJ decisionmakers insulate those decisionmakers from potential sources of agency pressure in a variety of ways, however. See Chapter VI (B) of this report.

Conferring on agency adjudicatory decisionmakers a high degree of independence has significant advantages. But going too far in that direction can produce disadvantages as well. The administrative law system has struggled for decades to select, and to implement, a system of adjudication that incorporates the optimal degree of independence of adjudicatory decisionmakers. Any system necessarily reflects a compromise among conflicting goals.

A. Advantages of Independence

1. The Constitutional Requirement--Avoidance of Bias

The primary advantage of ensuring that administrative adjudicators have a high degree of independence from the agencies they serve lies in avoidance of the potential for bias in favor of the agency's interests. Our legal system, indeed the Anglo-American legal tradition, has long placed a high value on adjudication by unbiased decisionmakers. This value underlies the requirement of Article III, §1, that federal "judges...shall hold their offices during good behavior, and shall, at stated times, receive for their services compensation, which shall not be diminished during their continuance in office." Due process requires a neutral, or unbiased, adjudicatory

decisionmaker. Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decisionmaking.¹⁰⁷⁷ The requirement dates back at least as far as seventeenth century England. In *Bonham's Case*,¹⁰⁷⁸ Lord Coke used natural law reasoning to announce the principle that no person can be a judge in his own cause.

The problem lies in defining and applying the neutral decisionmaker requirement. Some forms of bias are permissible, even desirable, in a decisionmaker. Other forms of bias are impermissible. The Supreme Court's decisions on impermissible bias leave Congress and agencies significant flexibility to determine the extent to which they choose to insulate adjudicatory decisionmakers from many forms of potential bias. The Court has held that such decisionmakers need not enjoy the exceptionally high degree of independence the APA accords to ALJs.¹⁰⁷⁹

The due process requirement of a neutral decisionmaker has been supplemented by enactment of numerous statutory prohibitions on impermissible bias. The statutory criteria often are stated in broad terms that mirror the language courts use when they apply the due process requirement of a neutral decisionmaker. As a result, in many cases it is difficult to determine whether a court's conclusion that a decision was infected by impermissible bias is based on constitutional law reasoning or on interpretation and application of a statute that uses broad language to describe impermissible bias.

The concept of "bias" has at least five meanings. Although the five kinds of bias overlap to some extent, the main ideas about bias in an adjudication may be stated in five sentences, each of which deals with one kind of bias: (1) A prejudgment or point of view about a question of law or policy is not, without more, a disqualification. (2) Similarly, a prejudgment about legislative facts that help answer a question of law or policy is not, without more, a disqualification. (3) Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be. (4) A personal bias or personal prejudice, that is an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough and when the bias has an unofficial source; such partiality may be either animosity or favoritism. (5) One who stands to gain or lose by a decision either way has an interest that may

¹⁰⁷⁷See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 171 (1974) (White, J., concurring and dissenting); Verkuil, *A Study of Informal Adjudication Procedure*, 43 U. CHI. L. REV. 739 (1976); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

¹⁰⁷⁸8 Coke 114a, 118a, 77 ENG. REP. 646, 652 (1610).

¹⁰⁷⁹See *Marcello v. Bonds*, 349 U.S. 302 (1955); *Withrow v. Larkin*, 421 U.S. 35 (1975).

disqualify if the gain or loss to the decisionmaker flows fairly directly from the decision.

The core of each of the five propositions is supported by clear and noncontroversial law, except that the first two propositions are sometimes misunderstood, especially the effect of a closed mind on issues of law or policy or issues of legislative fact. With that one exception, the problems about the law of bias do not relate to the soundness of the five propositions but relate to their application and to drawing lines in the borderland of each.

a. Personal Interest in Case Outcome

Bias based on a decisionmaker's personal interest is the easiest of the five forms of bias to understand. One who stands to gain or lose personally and fairly directly by a decision either way is disqualified by reason of interest to participate in the exercise of judicial functions. A disqualifying interest may be pecuniary or may involve the imbalance that is assumed to persist in one who has played the role of advocate in the same case.¹⁰⁸⁰

The basic case on pecuniary interest of an officer with adjudicatory responsibilities is *Tumey v. Ohio*.¹⁰⁸¹ Those accused of violating the prohibition laws were tried before a mayor who was allowed to retain, as his own compensation, costs assessed against defendants who were convicted, but the mayor received no such compensation from defendants who were not convicted. The Court held that the system denied due process: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."¹⁰⁸²

In *Gibson v. Berryhill*,¹⁰⁸³ the Supreme Court held the Alabama Board of Optometry, composed solely of independent practitioners, disqualified from deciding that optometrists who were employed by a company were engaged in "unprofessional conduct" by "aiding and abetting a corporation in the illegal practice of optometry." The Court recited the finding of the district court that

¹⁰⁸⁰18 U.S.C. §208 makes it a crime for an officer or employee of the executive branch to participate in a determination in which he, his relative, or his organization has a financial interest, except that a regulation may make a financial interest "too remote or too inconsequential." Executive Order 11222, as amended by numerous subsequent Executive Orders, and as codified in 5 CFR 735, prescribes "Standards of Ethical Conduct for Government Officers and Employees." For instance, "Employees may not (a) have direct or indirect financial interests that conflict substantially...with their responsibilities and duties as Federal employees..."

¹⁰⁸¹273 U.S. 510 (1927).

¹⁰⁸²*Id.* at 532. See also *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

¹⁰⁸³411 U.S. 564 (1973).

the company "did a large business in Alabama, and that if it were forced to suspend operations the individual members of the Board, along with other private practitioners of optometry, would fall heir to this business."¹⁰⁸⁴ The Court accorded significant deference to the district court's findings. "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes....As remote as we are from the local realities underlying this case and it being very likely that the District Court has a firmer grasp of the facts and of their significance to the issues presented, we have no good reason on this record to overturn its conclusion and we affirm it."¹⁰⁸⁵ In *Friedman v. Rogers*,¹⁰⁸⁶ however, the Court held that a statutory requirement that four of six members of an optometry board be members of a specified organization of optometrists does not violate due process.

Members of a school board whose collective bargaining negotiations with a union had broken down were deemed disqualified by the Wisconsin Supreme Court to adjudicate a question whether to discharge striking teachers. The U.S. Supreme Court reversed, holding that "the Board's prior role as negotiator does not disqualify it to decide that the public interest in maintaining uninterrupted classroom work required that teachers striking in violation of state law be discharged."¹⁰⁸⁷

In *Arnett v. Kennedy*,¹⁰⁸⁸ the Court held that a supervisor is not disqualified from deciding that a government employee should be terminated for alleged wrongdoing even though the alleged wrongdoing consisted of accusations against the supervisor who later adjudicated the dispute. Justice White dissented on the basis that the supervisor was impermissibly biased.

The Court unanimously upheld a system of adjudication that relied primarily on decisionmakers who are employees of private firms in *Schweiker v. McClure*.¹⁰⁸⁹ The government delegated important Medicare decisionmaking to hearing officers employed by insurance companies. A lower court found "intolerable risk of hearing officer bias against claimants."

¹⁰⁸⁴*Id.* at 571.

¹⁰⁸⁵*Id.* at 579.

¹⁰⁸⁶440 U.S. 1 (1979). See also *Marshall v. Jerrico*, 446 U.S. 238 (1980) (fact that agency was allowed to retain all money collected by imposing civil penalties did not disqualify agency's regional administrators from assessing such penalties). The court also pointed out that the Office of ALJs at the Department of Labor had a separate budget and did not benefit from the reimbursement, 440 U.S. 248, n.10.

¹⁰⁸⁷*Hortonville Joint School District v. Hortonville Education Ass'n*, 426 U.S. 482, 494 (1976).

¹⁰⁸⁸416 U.S. 134 (1974).

¹⁰⁸⁹456 U.S. 188 (1982).

The Supreme Court upheld the system because both the claim payments and the hearing officers' salaries were from government funds. It found no evidence that either the insurance carriers or the hearing officers they employed had a source of impermissible bias against claimants.

b. Personal Bias

Personal bias can support disqualification of an adjudicatory decisionmaker as easily as can bias based on personal interest in the outcome of a case. The concept of "personal" bias or prejudice puts the emphasis on an attitude toward persons and does not involve an attitude about issues of fact, law, policy or discretion. Impermissible personal bias includes: (1) bias against an individual based on a prior hostile unofficial relationship with the individual; (2) bias against an individual based on the individual's personal characteristics (e.g., race, religion, or ethnic origin); and, (3) bias toward an individual based on a prior unofficial positive relationship with the individual (e.g., a close friendship or an amorous relationship).

*Berger v. United States*¹⁰⁹⁰ is the major case on disqualification based on personal bias. The Court held six to three that a judge was disqualified for a prejudice against "pro-Germans," including the defendants. The judge had said that "one must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country....I know a safeblower...and as between him and this defendant, I prefer the safeblower."

In the early years of the NLRB, many lower court decisions drew inferences of impermissible personal bias of hearing officers based on the court's perception that the hearing officer was consistently favoring one party to an adjudication. This is an area in which bias is hard to verify or to refute. It is also an area in which personal bias is difficult to distinguish from bias based on a policy preference for or against organized labor. The first form of bias is impermissible. The second form is inevitable. As long as adjudicatory decisionmakers are human beings, they will have biases based on their policy preferences. Generally, the Supreme Court is more reluctant than many lower courts to draw an inference of impermissible bias in this type of situation.¹⁰⁹¹

To be disqualifying, personal bias must have a prior unofficial source. Thus, for instance, a decisionmaker would be disqualified if the bias were the product of a prior personal altercation with a party. Bias that has its source only in a prior official relationship between the decisionmaker and the party is not necessarily disqualifying. The Court recognizes that a decisionmaker often develops strong feelings for or against a party based on official dealings with

¹⁰⁹⁰255 U.S. 22 (1921).

¹⁰⁹¹See *NLRB v. Pittsburg S.S. Co.*, 337 U.S. 656 (1949).

the party or on official exposure to the evidence concerning the party's behavior. The Court acquiesces in bias of this type both because it is inevitable and because the Court believes that a decisionmaker can overcome feelings toward a party that are formed in the course of performing official duties.¹⁰⁹²

c. Prior Exposure to Adjudicative Facts

An adjudicatory decisionmaker can be disqualified for prejudging disputed issues of adjudicative fact--issues of who did what, where, when, how, why, and with what motive or intent.¹⁰⁹³ A decisionmaker is not disqualified simply because of prior exposure to evidence relevant to such adjudicative facts, however.

The line is drawn between an advance commitment about the facts and some previous knowledge of the facts. The best case holding that mere exposure to adjudicative facts is not a disqualification may be *Withrow v. Larkin*.¹⁰⁹⁴ A Wisconsin board in an investigative hearing listened to testimony about Dr. Larkin, and then sent him a notice of "a contested hearing" to determine whether his license to practice medicine should be suspended. At that point the district court held the board disqualified. The Supreme Court held that the board was not disqualified to hold the contested hearing or to make the decision. The Court said: "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'"¹⁰⁹⁵ But it continued:

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication...must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment

¹⁰⁹²See *Withrow v. Larkin*, 421 U.S. 35, 53-55 (1975); *U.S. v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

¹⁰⁹³*Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir 1970).

¹⁰⁹⁴421 U.S. 35 (1975).

¹⁰⁹⁵*Id.* at 47.

that the practice must be forbidden if the guarantee of due process is to be adequately implemented.¹⁰⁹⁶

d. Prior Position on Legal Issues or Legislative Facts

A previously announced position on a disputed issue of law, policy, or legislative fact does not disqualify a decisionmaker. The best case to illustrate this important principle is *FTC v. Cement Institute*.¹⁰⁹⁷ The Commission issued a cease and desist order against use of a multiple basing-point system in selling cement. Before instituting the proceeding, the Commission conducted a full investigation and made reports to Congress and to the President expressing the opinion that the multiple basing-point system was the equivalent of price fixing in violation of the Sherman Act. The companies contended that the Commission had expressed a "prejudgment of the issues" and that it was "prejudiced and biased." The Court upheld the Commission's order. The Court specifically said that it was deciding "on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigation."¹⁰⁹⁸ The facts that were in dispute in the *Cement Institute* case were legislative facts, not adjudicative facts. The Court made no mention of any question of prejudgment about what any particular company had done. Issues about acts or practices of particular companies were either nonexistent or incidental. The central question of fact was whether the multiple basing-point system restrained competition. Prejudgment of legislative facts is not a basis for disqualifying a decisionmaker.¹⁰⁹⁹

¹⁰⁹⁶*Id.* In some circumstances, the cost of assigning separate individuals to investigation and adjudication of a class of disputes seems excessive. In such circumstances the court permits decisionmaking by the investigator. A school principal investigates a claim of student misconduct and then makes a decision. Despite the combination of investigating and prosecuting, such a hearing is consistent with due process under *Goss v. Lopez*, 419 U.S. 565 (1975). The Court also approved investigation and adjudication by the same officers within a prison in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

¹⁰⁹⁷333 U.S. 683 (1948).

¹⁰⁹⁸*Id.* at 700.

¹⁰⁹⁹Other case law supports the *Cement Institute* decision. An outstanding case is *United States v. Morgan*, 313 U.S. 409 (1941), known as the Fourth Morgan case. After the Supreme Court had held in the Second Morgan case, 304 U.S. 1 (1928), that the Secretary of Agriculture had denied a fair hearing to the market agencies of the stockyards, the Secretary vigorously criticized the Court's decision in a letter to the *New York Times*, asserting that the \$700,000 at issue "rightfully belongs to the farmers." The market agencies then charged that the letter disqualified the Secretary from reconsidering the case after it was remanded to him. The Supreme Court rejected the charge:

Courts sometimes have disqualified agency decisionmakers as impermissibly biased when the source of the bias is congressional pressure to find contested adjudicatory facts in a manner preferred by members of the legislature. The leading case is the Fifth Circuit's opinion in *Pillsbury v. FTC.*

1100

e. Separating Functions

Most agencies perform many functions, including policymaking, investigation, prosecution, and adjudication of disputes. At least in some contexts, due process requires some degree of separation of some of these functions. It may be easiest to understand the relationship between separation of functions and due process by thinking about the structure we use for adjudicating criminal cases in the United States. The policymaking function is performed by one institution--the legislature. The investigative function is performed by another institution--the police. Prosecution is performed by another institution--the district attorney. Adjudication is performed by a fourth institution--the courts. Moreover, we use numerous devices to ensure that the adjudicatory decisionmakers--judges--are independent of the other participants in the process and are insulated from political forces. Combining all four functions in a single individual would yield a criminal justice system that would not satisfy anyone's standard of fundamental fairness in adjudicating criminal disputes.

Critics of our system of administrative justice have long used the strict separation of functions among agencies in our criminal justice system as a paradigm for criticism of the fairness of administrative adjudication conducted by typical multi-function agencies. The criticism is usually followed by a demand that the legislature assign the functions of policymaking, investigation, prosecution, and adjudication to separate agencies, or that the courts hold

But, intrinsically, the letter did not require the Secretary's dignified denial of bias. That he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. As well might it be argued that the judges below, who had three times heard this case, had disqualifying convictions. In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption. 313 U.S. at 421.

unconstitutional any system of adjudication implemented by a multi-function agency.¹¹⁰¹

Generally, both legislatures and courts have declined to accept these arguments, for good reason—the analogy on which they are premised is weak at many points. First, the strict agency-based separation of functions approach we have chosen in the criminal justice context is extremely expensive and inefficient. It may be justified in that context because of the extraordinarily high value we place on avoiding the risk of erroneously incarcerating people. It by no means follows that we should select the least efficient and most costly institutional structure for adjudicating disputes concerning social security benefits, personnel decisions, utility prices, environmental regulation, etc.

Second, even in the unique context of criminal adjudication and potential incarceration, some combinations of functions are not inconsistent with fundamental fairness. There is no inherent conflict among the functions of policymaking, investigation, and prosecution. Indeed, district attorneys often perform some investigative functions, and they make many policy decisions in the process of exercising prosecutorial discretion. Even the investigative and adjudicative functions are not inherently inconsistent. Many nations with well-respected systems of criminal procedure assign some investigative responsibilities to judges.

The most obvious potential for conflict arises from combining the prosecutorial function and the adjudicative function. In the criminal justice context, strict separation of these functions makes good sense. Separation of even these functions is much less important in the administrative justice context, however. Many agency adjudications are not analogous to criminal trials. When an agency decides whether an applicant is eligible for a statutory benefit, for instance, no one in the agency performs a function close to that of a prosecutor. Even when the analogy is closer (e.g., a proceeding to decide whether to impose an administrative sanction), the classes of disputes are easily distinguished based on the penalties at stake. No agency has the power to order incarceration.

Third, separation of functions can be implemented at the level of individuals rather than at the agency level. To the extent that combining functions creates a conflict of interest, that conflict is largely a function of psychology and human emotions. No one would want the prosecuting district attorney to decide whether one is guilty, because district attorneys prefer to "win" cases rather than to "lose" cases. It is difficult for anyone who has

¹¹⁰¹See, e.g., Ash Council Report on Selected Independent Regulatory Agencies (1971) (urging reassignment of adjudicatory functions from agencies to an administrative court); President's Committee on Administrative Management (1937) (urging that no agency be given both adjudicative and prosecutorial responsibilities).

worked long and hard to prove a proposition (e.g., the defendant is guilty), to make the kind of dramatic change in psychological perspective necessary to assess that proposition objectively (e.g., to decide whether the defendant is guilty). That potentially powerful psychological conflict of interest is internal to an individual, however. The potential for conflicts of interest to infect adjudicatory decisionmaking diminishes greatly if functions are separated at the individual level (i.e., an individual cannot both prosecute a case and decide that case). Separating functions within an agency is likely to cause the individuals in the agency to identify more by function than by agency (e.g., I am an agency prosecutor, or I am an agency adjudicatory decisionmaker). The studies of the attitudes of ALJ and non-ALJ adjudicators described in Chapter IV provide solid empirical support for this phenomenon.

The treatment of separation of functions in the APA is based on acceptance of some combination of the foregoing reasons for rejecting agency-based separation of functions. The APA permits an agency to engage in all four functions, but it requires an agency to establish and maintain internal separation of functions.

The APA provides in §554(d):

The employee who presides at the reception of evidence...shall make the recommended decision or initial decision...unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review...except as witness or counsel in public proceedings. This subsection does not apply--

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

The APA separation of functions provision applies only to "adjudication required by statute to be determined on the record after opportunity for an agency hearing" (i.e., to formal adjudication). The APA contains no statutory restriction on combining functions when an agency engages in "informal adjudication." Informal adjudication is governed by very few statutory restrictions on agency procedural discretion.²⁶ Agencies conduct more informal adjudications than formal adjudications.

In formal adjudications the words of the APA are susceptible to an interpretation that would forbid too much. Section 554(d) states that "An employee...engaged in the performance of investigative...functions...in a case may not, in that or a factually related case, participate or advise in the decision...." That provision operates soundly in an accusatory case in which an investigator is attempting to prove a case against a respondent. But about four-fifths of all adjudications in federal agencies are claims cases, in which an investigator may be as much motivated to develop facts in favor of a claimant as against the claimant; for all such adjudication, the APA provision, if carried out according to its literal language, is harmful. Fortunately, most claims disputes are not governed by the formal adjudication procedures of the APA. The Supreme Court upheld an adjudicatory system in which the adjudicators also perform investigatory functions in *Richardson v. Perales*.²⁷

The APA's excessive language forbidding combinations of investigating and judging in formal adjudications may be cured by legislative history. The word "investigating" in §554(d) might plausibly be interpreted to mean investigating in an accusatory case. This interpretation is supported by a statement in the Senate Judiciary Committee Print of 1945:²⁸ "The first sentence of subsection (c) [now §554(d)] is designed to assure, in so-called 'accusatory' proceedings, that those who hear the case shall not participate in its decision. The remainder of the subsection, in such cases, is designed to

²⁶See *PBGC v. LTV*, 110 S.Ct. 2668 (1990).

²⁷402 U.S. 389, 410 (1971).

²⁸Sen. Doc. No. 248, 79th Cong., 2d Sess. 24 (1946) (emphasis added).

achieve an 'internal' segregation of deciding and prosecuting functions." Even though subsection (c) said nothing about a limitation to accusatory proceedings, the words we have italicized seem to limit the provision to accusatory proceedings.

Shortly after Congress enacted the APA, the Supreme Court decided a case involving the legality of an agency adjudicatory system that did not provide parties the strong protection from potential bias the APA affords in formal adjudications. In particular, the system attacked did not provide for decisionmaking by officers who were independent of the agency and did not prohibit *ex parte* communications between officers responsible for adjudicatory decisionmaking and agency officials involved in policymaking, investigation, or even prosecution. In *Wong Yang Sun v. McGrath*,¹¹⁰⁵ the Court was presented with a challenge to the procedures used to adjudicate disputes over potential deportation of an alien. Congress did not require the agency to use formal adjudication in deportation proceedings. The Court concluded, however that the recently enacted APA provisions governing formal adjudication reflected the minimum procedural safeguards Congress intended to require in adjudicating cases as important as deportation disputes. The language of the statute governing deportation proceedings was ambiguous. The Court interpreted the statute to require use of formal adjudication and suggested that it might adopt the APA's formal adjudication procedures as the constitutional floor for adjudicating important disputes. In the Court's words: "It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."¹¹⁰⁶ The flaw in deportation decisionmaking identified by the Court was inadequate separation of functions. The agency officials responsible for adjudicating deportation disputes reported to officials who had enforcement responsibilities.

Congress disagreed with the Court's decision in *Wong Yang Sun*. It amended the Immigration Act in ways that explicitly authorized an adjudicatory decisionmaking structure in which the hearing officer reports to officials with enforcement responsibility. In *Marcello v. Bonds*,¹¹⁰⁷ the Court retreated from its dicta in *Wong Yang Sun* and held the congressionally authorized decisionmaking structure constitutionally permissible. The Court characterized the due process challenge as "without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the specific

¹¹⁰⁵339 U.S. 33 (1950).

¹¹⁰⁶*Id.* at 50-51.

¹¹⁰⁷349 U.S. 302 (1955).

considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters."¹¹⁰⁸ Two dissenting Justices complained that the Court had acquiesced in a process in which "the hearing officer adjudicated the very case against petitioner which the hearing officer's superiors initiated and prosecuted."¹¹⁰⁹

Taken as a whole, the Court's decisions permit Congress and agencies to conduct administrative adjudications through use of a wide variety of mechanisms. The APA provisions applicable to formal adjudication require relatively strict internal separation of functions and confer on ALJs a high degree of statutory independence from the agencies at which they serve. The Court's decisions make clear that these unusually powerful safeguards of decisional independence are not required by due process. The Court upheld the combination of prosecution and adjudicating in *Marcello* and *Accardi*. The Court has also upheld many state and local systems of adjudicatory decisionmaking that involved less decisionmaker independence and greater merging of roles and functions than exists in virtually any federal adjudicatory system.¹¹¹⁰

2. Greater Public Acceptance

It seems likely that individuals whose rights are adjudicated by agencies feel better about the result and the fairness of the process when they perceive that the decisionmaker is independent of the agency. To the extent that non-ALJ adjudicators are less independent of the agencies at which they serve, and to the extent that perception and reality coincide, this increased public acceptance should be counted as an additional advantage of using ALJ adjudicators.

It is hard to know how much significance to attach to this advantage, however. An individual's feelings concerning the fairness of an adjudicatory process undoubtedly vary with many characteristics of the process (e.g., Is the

¹¹⁰⁸*Id.* at 311.

¹¹⁰⁹*Id.* at 315. The same year, in *Shaughnessy v. U.S. ex rel. Accardi*, 349 U.S. 280 (1955), the Court acquiesced in an even greater departure from the approach to separation of functions and independence of adjudicatory decisionmakers the APA applies to formal adjudications. The members of the Board of Immigration Appeals are appointed by the Attorney General and serve at his pleasure. The Attorney General announced a program to deport all aliens in a class that included *Accardi*. The Board issued an order of deportation to *Accardi* in an adjudicatory proceeding. The Court upheld the deportation order. Two dissenting Justices complained that "the Attorney General's publicized program made it impossible to expect his subordinates to give *Accardi's* application that fair consideration which the law requires." *Id.* at 293.

¹¹¹⁰*See, e.g., Withrow v. Larkin*, 421 U.S. 35 (1975).

adjudicator called a "judge"? Does the adjudicator wear a black robe? Is an adequate opportunity given to present the individual's views, does the adjudicator seem to be a fair-minded person? Is the adjudicator biased against the individual?). The most important factor affecting an individual's perception of fairness probably is the impression that one is, or is not, given an adequate opportunity to present one's views. Thus, the demeanor of the adjudicatory officer plays an important role in shaping an individual's perception of fairness. The relationship between adjudicator independence and perceptions of unfairness is complicated and varies with many factors.

An individual's skepticism about the fairness of an agency adjudication in which one perceives that the adjudicator is, to some extent, dependent on the agency undoubtedly varies depending on the nature of the adjudication. That concern reaches its apogee in cases in which the agency itself is a party with a role adversarial to that of the individual (e.g., a proceeding to impose a penalty or sanction or to determine that a prior practice was unlawful). In benefits cases, the concern is much less. At most, the individual might fear that the agency has a general bias against awarding benefits to conserve the scarce funds available as the source of benefits. Given the limited resources available to fund benefit programs, a general bias of this type is not necessarily inappropriate.

In cases in which an agency adjudicates disputes between or among private entities, individuals perceive unfairness attributable to potential adjudicator bias in favor of the agency only to the extent that they perceive that the agency itself is systematically biased against one or more classes of parties. For instance, there were widespread claims by employers that the NLRB was biased in favor of unions during the 1940s.¹¹¹¹ Fifty years later it is still impossible to verify or refute those claims. Of course, the problem with perceptions of bias is that they need not be based on the reality of bias. Even baseless perceptions of bias can cause citizen discontent and resulting lack of public acceptance of an adjudicatory system. Thus, for instance, Congress might have been justified in amending the National Labor Relations Act in 1947 to increase the degree of separation of functions in the NLRB even if Congress were not convinced that the agency's adjudicatory decisions actually reflected anti-employer bias.

3. Enhanced Status Helps Recruitment and Control of Hearings

To some uncertain extent, a prospective agency adjudicator's expectation that the position will be independent of the agency helps to attract applicants

¹¹¹¹ See discussion in Chapter II.

for agency adjudicator positions. The studies discussed in Chapter IV provide some empirical support for this relationship between independence and recruitment. There are at least four reasons for this beneficial effect on recruiting. First, the prospective adjudicators can have greater confidence that they will not be subjected to pressure to resolve disputes in a manner they consider unjust, inappropriate, or unlawful. Second, they will have greater confidence that their role is important and that they can have a meaningful, beneficial effect on our system of justice. Third, independence from the agency implies a high level of job security. It is extremely difficult, for instance, to terminate an ALJ. Fourth, they value absence of supervision and control for the same reason most people do; they place a high value on personal and professional autonomy.

To some uncertain extent, independent adjudicators also may enjoy a comparative advantage in their ability to control hearings. This advantage is most clear in adjudications in which the agency itself is a party. When the adjudicator is independent of the agency, there is less room for ambiguity about who is in charge of the hearing--the hearing officer or the staff counsel. Independence may also be an advantage when the agency is not a party, but the relationship between independence and ability to control the hearing is less direct and more subtle in this context. Control by the adjudicator is facilitated by the parties' respect for the adjudicator. That respect, in turn, depends to some extent on the parties' perception that the adjudicator is unbiased. The complicated relationship between independence and perceptions of bias was discussed in Chapter VI (A)(1) and (2).

B. Safeguards of Independence

1. Statutory Safeguards Applicable to ALJs

The APA provides significant protection from potential bias by creating and defining the position of ALJ. All formal adjudications must be presided over by (1) the agency, (2) one or more members of the body which comprises the agency, or, (3) one or more ALJs.¹¹¹² As a practical matter, the presiding officer at a formal adjudication almost always is an ALJ, simply because most agencies have far too many cases to designate either the agency (usually a cabinet officer, commissioner or collegial body) or a member of the agency (usually one of several commissioners in a collegial body) to preside over any adjudication. In addition, some agencies voluntarily use ALJs to preside over

¹¹¹² 5 U.S.C. §556(b).

some classes of adjudications that do not fall within the APA definition of formal adjudication. The ALJ presides over the trial stage of an adjudication. The ALJ regulates the course of the proceeding, including scheduling, resolution of procedural and evidentiary disputes, and issuance of an initial decision.

Administrative law judges are almost entirely independent of the agencies at which they preside. Their pay is prescribed by statute and by the Office of Personnel Management, independent of any evaluations or recommendations made by the agency.¹¹¹³ An agency can take no action against an ALJ without convincing a separate agency (the MSPB) that good cause exists for doing so. The MSPB must use a formal adjudicatory proceeding to resolve the good cause issue.¹¹¹⁴ ALJs are assigned to cases by rotation, and an agency can omit the initial decision of the ALJ assigned to a case only if the ALJ becomes unavailable or the agency finds "that due and timely execution of its functions imperatively and unavoidably so requires."¹¹¹⁵ Finally, an ALJ cannot be subject to supervision or direction by any agency employee with investigative or prosecutorial functions and cannot consult any person on any fact at issue in a proceeding without providing all parties notice and opportunity to participate.¹¹¹⁶

In short, ALJs are very nearly as independent of federal agencies as federal trial judges are of the executive branch. This high degree of independence of ALJs from agencies is designed to protect the rights of individuals affected by agency adjudicatory decisions from any potential source of bias.

The APA requires use of an ALJ only in formal adjudications, that is, when adjudication is "required by statute to be determined on the record after opportunity for agency hearing."¹¹¹⁷ Moreover, §554 exempts several important categories of formal adjudication from the statutory requirement to use an ALJ (e.g., selection or tenure of an employee except an ALJ and proceedings involving the conduct of military and foreign affairs functions). In all adjudications that are not required to be "on the record" and in all adjudications made exempt by §554(a), an agency has the discretion to use a non-ALJ adjudicator. The title assigned these adjudicators varies by agency (e.g., administrative judge, presiding officer, hearing examiner).

¹¹¹³ 5 U.S.C. §5372.

¹¹¹⁴ 5 U.S.C. §3105.

¹¹¹⁵ 5 U.S.C. §§557(b)(2), 557(d), 3105.

¹¹¹⁶ 5 U.S.C. §554(d).

¹¹¹⁷ 5 U.S.C. §554(a).

2. Safeguards Applicable to AJs

Judge John Frye's 1991 report to the Conference contains a wealth of information about the important class of agency employees we have referred to as non-ALJ adjudicators or administrative judges (AJs).¹¹¹⁸ Judge Frye determined that non-ALJs preside in 129 different types of adjudications.¹¹¹⁹ Of those, 83 types of adjudications are now active. In total, AJs adjudicate approximately 343,200 disputes per year.¹¹²⁰ The nature of the disputes varies widely.¹¹²¹ They seem to cover a range of case types as broad as the range of case types adjudicated by ALJs.

The statutory provisions that assure ALJ independence do not apply to AJs. It does not necessarily follow, however, that AJs depend on the agencies at which they adjudicate. Nor does it follow that those agencies exercise inappropriate influence over non-ALJ decisionmaking by making use of whatever dependency relationship might exist. Judge Frye discovered that AJs enjoy a high degree of independence from the agencies for which they adjudicate in a large proportion of cases. Our study of the attitudes of AJs, described in Chapter IV, shows that most AJs do not consider lack of independence a significant problem.

Most AJs have a high degree of independence, attributable to two phenomena. First, many agencies voluntarily refrain from imposing on AJs any form of performance appraisal or informal review of decisionmaking. Where non-ALJ adjudicators have no duties other than adjudication, agencies refrain from engaging in performance appraisal of non-ALJ adjudicators in 53% of case types and in 79% of all cases.¹¹²² (Understandably, most agencies engage in performance appraisal of employees who have responsibilities in addition to their role as part-time adjudicators.) Similarly, agencies refrain from using informal review or informal quality control measures in 45% of case types and 62% of all cases.¹¹²³ Second, in other large classes of cases, AJs are employed by an institution that behaves independently from the agency for which the adjudicatory function is being performed (e.g., the Board of Veterans Appeals employs the adjudicatory officers that decide benefits disputes for the Department of Veterans Affairs). This institutional structure accounts for 30% of case types and 23% of all

¹¹¹⁸Frye Report.

¹¹¹⁹*Id.* at 3.

¹¹²⁰*Id.* at 4.

¹¹²¹*Id.* at 4-5.

¹¹²²*Id.* at 18.

¹¹²³*Id.* at 167.

cases.¹¹²⁴ For these case types, the safeguards of independence are statutory, since Congress created the institutional structure by statute.

Between them, these two means of assuring the independence of AJs apply to 65% of case types and 91% of all cases.¹¹²⁵ These statistics suggest that, to the extent independence of federal adjudicatory officers is perceived to be a desirable goal, lack of independence is a *potential* problem in only two circumstances. First, 35% of case types and 9% of total cases are adjudicated by AJs who are subject to some form of informal control by the agency for which they preside. Second, 70% of case types and 73% of all cases are adjudicated by AJs whose independence is assured only by voluntary agency practices and not by statute. These two classes of cases present different concerns.

For the adjudications in the first category, the concern is the potential for bias and/or the potential for perception of bias. It is hard to know the extent to which these related concerns are justified. In at least two situations, an agency's use of informal controls over agency adjudicators should not cause much concern. The first is where there is little reason for concern that the agency itself is biased. Most benefit cases and most adjudications in which the agency itself is not a party would seem to fit in this category. The second is where the agency uses its informal control mechanisms only to advance goals independent of the substantive outcome of a dispute (e.g., to improve adjudicators' efficiency or their proficiency in writing opinions). Without conducting an intensive investigation of an agency's methods of evaluating adjudicators and/or its methods of informal review of adjudicators' decisions, it is impossible to determine whether an agency is using performance appraisal and/or informal review mechanisms only to further such laudable goals, or whether instead its methods of appraisal and review tend to create some bias in favor of the agency's interests. Most AJs do not perceive a problem of this type.¹¹²⁶

In the second class of cases--where the agency does not engage in performance appraisal or informal review but where it is statutorily permitted to do so--the concerns are somewhat different. The only present concern is that affected members of the public may perceive bias attributable to lack of adjudicator independence even though that perception has no factual bias. This concern is easy to allay, however. The agency can issue a rule or policy statement that announces to the public its policy of not subjecting adjudicatory decisionmakers to performance appraisal and not subjecting their decisions to informal review. The second concern is the potential that the agency might

¹¹²⁴*Id.* at 165.

¹¹²⁵*Id.* at 168.

¹¹²⁶See results of survey described in Chapter IV.

create actual adjudicatory bias in the future by beginning to subject adjudicators and adjudicators' decisions to methods of performance appraisal or informal review that interfere with adjudicators' independence.

The only certain and permanent means of avoiding all potential for bias by agency adjudicatory employees is through statutory enactment. If it believes that the problem of bias or perceived bias is sufficiently serious, Congress can eliminate the problem in any of four ways: (1) amend the agency's organic act by requiring it to use APA adjudication; (2) amend the organic act by requiring the agency to use ALJ adjudicators; (3) amend the act by prohibiting the agency from using performance appraisal or informal review; or, (4) amend the act by creating an institution independent of the agency to employ the adjudicatory personnel (e.g., the Board of Veterans Appeals). These mechanisms are functional equivalents in terms of their effects on the independence of adjudicatory officers. They may have significantly different effects in other respects, however, because ALJs' salaries often exceed the salaries of non-ALJ adjudicatory officers.

This statutory solution could create other problems, however. (See the discussion of potential adverse consequences of independence in Chapter VI (C).) Congress might want to adopt such a solution only in situations where the potential for actual or perceived bias is particularly strong (e.g., enforcement or sanction cases). In other contexts, the agency can reduce concerns about potential bias by making public its methods of implementing performance appraisal of adjudicatory employees and/or its methods of implementing any system of informal review of the decisions of such employees. If the published methods or criteria suggest strong potential to introduce bias in adjudicatory decisionmaking, the affected members of the public can complain to the agency and, if necessary, to Congress. If the published methods or criteria do not raise such concerns, but the agency deviates from its published methods or criteria, the agency's adjudicatory employees can complain to the agency or, if necessary, to Congress.

C. Potential Adverse Consequences of Independence

Conferring on adjudicatory officers complete independence from the agency for which they adjudicate has many consequences, including some undesirable ones. We will discuss these in three categories: loss of control over policy; potential for interdecisional inconsistency; and loss of control over quality and productivity. First, however, it is useful to illustrate the potential adverse consequences of adjudicatory independence by reference to the context in which we have traditionally placed the highest social value on adjudicatory independence--adjudication of criminal cases in federal courts.

In 1984 Congress created the United States Sentencing Commission.¹¹²⁷ The seven-member Commission is required to establish sentencing guidelines that are binding on federal judges. Congress created the Commission and assigned it the statutory responsibility to correct a problem that was the result of the high degree of independence of federal judges. Congress concluded that there was an unacceptably wide variation in the length of sentences given by different judges to individuals convicted of federal crimes. Expressed in statistical terms, the Commission's job is to reduce the unexplained variance in the length of sentences imposed by the many independent adjudicatory officers who perform this function. The Supreme Court upheld the validity of this means of responding to the problem of interdecisional inconsistency in criminal sentencing in *Mistretta v. U.S.*¹¹²⁸

The controversy concerning the Sentencing Commission also illustrates the difficulty of characterizing the effect of an agency's attempt to exercise some degree of control over otherwise independent adjudicatory officers. Prior to the Supreme Court's decision in *Mistretta*, numerous lower courts had held that the Sentencing Commission and its binding guidelines violated due process by interfering with the independence of federal judges and by introducing impermissible bias in the performance of their adjudicatory responsibilities. The Supreme Court did not directly address the due process issue in *Mistretta*, but it characterized the Commission's responsibilities in a manner totally inconsistent with the claim that the Commission was interfering improperly in the role of the independent federal judiciary. The Supreme Court characterized the Commission's function as "to exercise judgment on matters of policy" in order to limit the discretion of judges in individual cases.¹¹²⁹ After *Mistretta*, courts relied on this characterization as the basis for opinions holding that the Sentencing Commission's Guidelines do not violate due process even though they obviously limit the degree of decisional independence previously enjoyed by federal judges.¹¹³⁰

1. Scope of Control Over Policy

The historical evolution of administrative law, discussed in detail in Chapter II, was based largely on simultaneous pursuit of two goals--unbiased resolution of factual disputes by independent adjudicatory officers and agency control of policy decisions. The drafters of the APA attempted to further the

¹¹²⁷See 28 U.S.C. §§991-98 (Supp. 1989).

¹¹²⁸109 S.Ct. 647 (1989).

¹¹²⁹*Id.* at 658.

¹¹³⁰E.g., *U.S. v. Seluk*, 873 F.2d 15 (1st Cir. 1989); *U.S. v. Bolding*, 876 F.2d 21 (4th Cir. 1989); *U.S. v. Victoria*, 877 F.2d 338 (5th Cir. 1989).

first goal by creating independent hearing examiners (now ALJs) who are insulated from potential agency control by the statutory safeguards discussed in Chapter VI (B). They attempted to further the second goal by subjecting the initial decisions of these independent factfinders to plenary review by the agency. In the language of APA §557(b), "On appeal from or review of the initial decision, *the agency has all the powers it would have in making the initial decision* except as it may limit the issues on notice or by rule."⁵⁵ The theory was that, by exercising its discretionary power to review, and to change, any decision of an ALJ with which it disagreed, the agency could maintain control over all policy components of adjudicatory decisions notwithstanding the initial role of the independent adjudicatory officer.

The need for agency control over policy decisions has its roots in at least three sources. First, the agency has a comparative advantage in expertise vis-à-vis the adjudicatory officers. This is not to say that agency adjudicatory officers lack expertise. Some have subject matter expertise before they take the position; all develop expertise after several years of adjudicating disputes involving a particular subject matter. Rather, the assertion is relative; the agency has greater subject matter expertise than the adjudicatory officer.

Expertise was the original justification for creating specialized agencies and for assigning them, rather than generalist courts, responsibility for adjudicating disputes within their expertise. An agency's comparative advantage with respect to expertise is a function of the concept of the institutional decision. As a formal matter, agency decisions resolving adjudicatory disputes are made either by the agency head or by some individual or substitution to whom the agency head has delegated this responsibility. In either event, the actual decisionmaking process usually involves input from many individuals, typically including specialists in disciplines relevant to the subject matter of the dispute. The Federal Energy Regulatory Commission can be used to illustrate the point. When FERC's five commissioners consider the issues in a pipeline certificate case, they rely heavily on input from the agency's staff of engineers, environmental scientists, economists, and lawyers. The resulting decision by the agency is not the product of one individual but of many.

By its nature, the institutional decision can reach a level higher in quality than that attainable by the ablest of adjudicatory officers who are cut off from sources of expert advice. The administrative process builds on the principle used by a large medical clinic, which often can provide medical services superior to those any individual physician can provide, by bringing many kinds of specialists into an organization structured to provide a maximum of effectiveness to the aptitudes of each individual. The institutional mind has

⁵⁵Emphasis added.

insights that are as profound as those of any individual and may be much more comprehensive, for the appropriate specialists collaborate, checking the judgment of each other, each drawing upon one's own peculiar knowledge and skills.

The contrast with typical adjudicatory officers is instructive. The officers' decision is almost entirely personal, for they hear the evidence and the argument and make the decision. They may have law clerks, who may sometimes play a significant role, but the decision is almost always entirely theirs. An agency head may often defer to what is deemed to be the superior judgment of a staff specialist, but such deference of an adjudicatory officer to the judgment of a law clerk is relatively rare. Law clerks are typically neophytes, not specialists. But an agency head may often be the intellectual inferior of an agency specialist with respect to a particular subject matter. The agency head exercises judgment in the process of deciding how to incorporate the specialized expertise of a multi-disciplinary staff in the agency's resolution of a case.

The role of an agency's staff is a vital part of the administrative process. It is a source of special strength of the administrative process. The strength springs from the superiority of group work--from internal checks and balances, from cooperation among specialists in various disciplines, from assignment of relatively menial tasks to low paid personnel so as to utilize more economically the energies of high paid personnel, and from the capacity of the system to handle huge volumes of business and at the same time maintain a reasonable degree of uniformity of policy determinations.¹¹³²

Second, agencies must be able to exercise plenary power over policy decisions because of their comparative advantage with respect to political accountability. The Supreme Court established and explained the constitutional and political framework for policymaking in the administrative state in its landmark opinion in *Chevron v. NRDC*.¹¹³³ The Court announced a new approach to judicial review of agency constructions of the statutes Congress has instructed agencies to implement, which instructs reviewing courts to ascertain whether "Congress has directly spoken to the precise question at issue."¹¹³⁴ If so, that is the end of the inquiry; if not the court is to defer to the agency's construction if it is a permissible one. The Court's reasoning in support of this

¹¹³²For an excellent and comprehensive assessment of the many advantages of the institutional decisionmaking process, see J. Mashaw, *BUREAUCRATIC JUSTICE* (1983).

¹¹³³467 U.S. 837 (1984).

broad approval of politically-influenced policymaking demonstrates that *Chevron* is part of an effort to reconcile the administrative state with the principles of democracy:

Judges...are not part of either political branch of the Government....In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices--resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.¹¹³⁵

Behind *Chevron*, then, lies the recognition that where policy is to be made either by the politically insulated members of the judiciary or by the politically accountable members of an agency, it best comports with democratic government that the accountable agency officials form the policy. Governmental policy should have its origin in the politically accountable branches of government. To the extent that Congress is unable to provide an effective link between the people and the policies chosen by agencies by enacting statutes that resolve all policy disputes, the President is responsible for performing this function. In either case, agency policymaking should reflect bias--the bias of Congress or, in the absence of legislative expression of that bias, the bias of the President.

The Court's reference to judges in *Chevron* was to federal district and circuit judges. The *Chevron* analysis applies equally to independent adjudicatory officers in agencies, however. Indeed, independence here correlates with absence of political accountability. Thus, the more "independent" the agency's adjudicatory officers, the greater the comparative advantage of the agency as a source of policy decisions.

Third, agency control of policymaking is essential to the goal of establishing consistent and coherent policies. This reason obviously overlaps with the goal of maintaining interdecisional consistency, which is discussed in the next section. It is somewhat broader, however, encompassing the need for coherence as well.

¹¹³⁴*Id.* at p. 842.

¹¹³⁵*Id.* at 865-66.

The linkage between coherent policies and agency control of policymaking is best understood by first defining coherence in this context. Any agency-administered system of regulation or benefit distribution must be bounded by scores, or perhaps even hundreds, of policy decisions. Almost invariably, there is more than one combination of policies that is consistent with the language of the agency's statute and with pursuit of the agency's legitimate goals. There are not unlimited combinations of such policies, however, and many policy decisions are functionally related. To illustrate this phenomenon in a simplified hypothetical context, consider an agency that must address only two policy issues. On one dimension, it can choose between A and B. On the other dimension, it can choose between X and Y. The functional relationship between the two choices may be such that only A and X or B and Y are likely to further the agency's legitimate goals. Either A and Y or B and X would produce bad results. In this situation, A and X, and B and Y, are coherent policies while A and Y, and B and X are incoherent policies.¹¹³⁶

Agency control of policymaking is far more likely to yield coherent policies for the simple reason that there is only one agency. The agency is highly unlikely to choose A and Y or B and X. If independent agency adjudicatory officers have the power to make policy, incoherence is a probable result, simply because most agencies have multiple adjudicatory officers. Administrative Judge Jones might choose policy A in one case, while Administrative Judge Smith chooses policy Y in another case. Neither judge is wrong, but the result is an incoherent combination of policies.

Of course, it is possible in theory to accept the desirability of agency control over policymaking without concluding that independent adjudicatory officers impair an agency's ability to assert total control over policymaking. In theory, the APA model of formal adjudication allows agencies to fulfill this goal. As discussed in detail in Chapters VI (D) and VII, however, the means available to agencies to control the policy components of adjudicatory decisions are not always adequate to the task.

The APA model of formal adjudication is premised on the existence of a clear dichotomy. Independent ALJs resolve factual disputes, while politically accountable agencies make policy decisions. The line between factual disputes and policy disputes is not so easy to draw in practice, however. The frequent difficulty of the distinction can be illustrated by reference to Professor Davis' famous distinction between adjudicative facts and legislative facts.¹¹³⁷

¹¹³⁶For examples of this ubiquitous phenomenon, see Moglen & Pierce, *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1239-43 (1990).

¹¹³⁷See 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§10:5, 12:6 (2d ed. 1978).

Adjudicative facts answer the questions of who did what, where, when, how, why, and with what motive or intent. Typically, they are specific facts related to the conduct and characteristics of the parties to a dispute. Legislative facts do not usually describe the parties or their conduct; rather, they are the general facts that help any tribunal—legislature, agency, ALJ, or court—decide questions of policy.

Most agency adjudications involve contested issues of legislative fact, as well as contested issues of adjudicative fact. Most decisions of agencies and of agency adjudicatory officers resolve both types of "factual" disputes. A regulatory agency's decision whether to allow a firm to charge a particular price often depends as much or more on the decisionmaker's beliefs concerning the competitive structure of the market as on the decisionmaker's beliefs concerning the particular firm's costs. Similarly, a benefit agency's decision whether an applicant is experiencing disabling pain often depends as much on the decisionmaker's beliefs concerning the etiology, symptomology, and functional effects of pain as on its beliefs concerning the particular applicant's symptoms of pain.

In each of these cases, and most others, the adjudicatory decisionmaker is making decisions based partly on resolution of contested issues of adjudicative fact and partly on resolution of issues of legislative fact. Yet, the latter process is indistinguishable from policymaking. Indeed, it is the essence of policymaking. To the extent that agencies are unable to control this policy component of adjudicatory decisionmaking through use of the mechanisms described in Chapters VI(D) and VII, an agency's use of independent adjudicatory officers limits the agency's ability to control policymaking and places some policymaking power in the hands of its decentralized and politically unaccountable adjudicatory officers.

2. Potential Interdecisional Inconsistency

The relationship between use of independent adjudicatory officers and the potential for interdecisional inconsistency is simple and direct. Even the use of two independent adjudicatory officers to resolve disputes of the same type creates the risk (perhaps the inevitability) that the two officers will reach different results in rationally indistinguishable cases because they see the cases through different prisms. The potential for interdecisional inconsistency increases with increases in the number of independent adjudicatory officers, increases in the difficulty of the disputes they resolve, and increases in the degree of subjective or normative judgment required to resolve the disputes. The potential for significant interdecisional inconsistency is a major concern because it violates a cardinal principle of our system of justice—like cases should be resolved in like manner. It also causes a host of collateral problems

by increasing the uncertainty, unpredictability and cost of any system of dispute resolution.

The potential for interdecisional inconsistency can be illustrated by reference to a well-documented example. An interdisciplinary team of six researchers conducted a comprehensive empirical study of ALJ adjudication of SSA disability cases.¹¹³⁸ Their conclusions were disconcerting. First, "[t]he inconsistency of the disability decision process is patent."¹¹³⁹ Second, "the outcome of cases depends more on who decides the case than on what the facts are."¹¹⁴⁰ Third, the benefit grant rates of individual ALJs correlate strongly with their personal philosophies.¹¹⁴¹ As discussed in Chapter VI (D)(2), SSA has experienced considerable frustration and little success in its attempts to reduce the high level of interdecisional inconsistency produced by more than 850 independent ALJs.

3. Extent of Control Over Productivity and Quality

One of the primary functions of the manager of any enterprise is to enhance the productivity and quality of each employee. To use a familiar but prosaic example, a secretary who types 40 words and 15 errors per minute would not meet anyone's standards of acceptable productivity and quality. Any responsible manager would attempt to obtain improvements in the employee's performance through use of some combination of carrots and sticks (e.g., a contingent promise of a raise, a contingent threat of demotion, a contingent suggestion of transfer to a more or less desirable position). If all else fails, the manager fires him.

Agencies responsible for managing systems of adjudication in which the adjudicatory officers are independent of the agency have effective access to none of the traditional tools managers use to induce improvements in productivity and quality. A paraphrase of a conversation one of the authors had with an agency's Chief ALJ illustrates the problem: "I wish I could do something about ALJs X, Y, and Z. Most of our ALJs are smart, hardworking and productive, but X likes golf a lot more than opinion writing, Y has lost the ability to analyze issues and evidence if he ever had it, and Z is such a compulsive perfectionist I can never get an opinion out of him."

Again, the problem has been documented empirically in at least one context. In response to intense pressure from beneficiaries, Congress, and the

¹¹³⁸J. Mashaw, G. Goetz, F. Goodman, W. Schwartz, P. Verkuil & M. Carrow, *SOCIAL SECURITY HEARINGS AND APPEALS* (1978).

¹¹³⁹*Id.* at xxi.

¹¹⁴⁰*Id.*

¹¹⁴¹*Id.* at 21-24.

courts, SSA conducted a study of the perceived problem of delay in its disability decisionmaking process. When the SSA examined the causes of delay, variation in the work habits and productivity of its then 700 ALJs emerged as a clear culprit. The average ALJ decided 324 cases per year, but the productivity variance among ALJs was enormous. Individual ALJs decided as many as 1,440 and as few as 120.¹¹⁴² Since cases are assigned to ALJs randomly, differences in the mix of assigned cases cannot explain more than a tiny fraction of this variation in output. As described in Chapter VI(D)(1), SSA's efforts to improve the productivity of its ALJs has produced more frustration than beneficial results.

D. Agency Power to Constrain ALJ and Non-ALJ Discretion

Any agency can constrain the discretion of its adjudicatory officers through use of some combination of three formal devices: (1) issuance of a valid legislative rule that resolves generically one or more recurring issues that otherwise would be subject to case-by-case resolution; (2) implementation of a system of binding precedents; and (3) agency review of the initial decisions of adjudicatory officers. The availability of these methods of control does not depend on whether the officer is an ALJ or a non-ALJ or on the degree of independence from the agency the officer enjoys. We discuss the uses and limits of each of these control mechanisms in Chapter VI(D)(2)(a)(b) and (c). The legal effect of a fourth device—issuance of interpretative rules—is less clear. We discuss that device in Chapter VI(D)(2)(d).

The degree of independence of the adjudicatory officer does bear some relationship to the efficacy of interpretative rules and of less formal methods of attempting to constrain adjudicatory officers' discretion. If an agency uses informal means to communicate to its adjudicatory officers its strong desire to implement a particular policy, to increase interdecisional consistency in some respect, or to have all adjudicatory officers strive for a specified minimum level of productivity or quality, the communication is likely to have greater effect if the officers are to some extent dependent on the agency. The agency's statutory inability to engage in performance appraisal, or to affect an officer's level of compensation, work assignments, etc., or the agency's voluntary decision to refrain from performing these normal managerial functions,

¹¹⁴²*Id.* at 120-21. By fiscal year 1991, the average SSA ALJ was deciding 408 cases per year, Office of Hearings and Appeals, Key Workload Indicator, Second Quarter Fiscal Year 1991, p.1 (covers Quarters 1-2 of FY 1991). There were still approximately 700 ALJs. The number has since increased to 866.

reduces the likely efficacy of any such informal efforts to shape the conduct of adjudicatory officers.

1. Productivity Enhancement Measures

SSA's frustrating attempt to increase the productivity of its few low productivity ALJs illustrates the relationship between the independence of adjudicatory officers and the efficacy of agency attempts to constrain the discretion of adjudicatory officers in this respect. Once SSA detected the large differential in the productivity of its 700 ALJs,⁶⁷ it began looking for differences in work habits that could explain the variance. It identified at least one explanatory factor. Some ALJs write their own opinions, while others delegate this task to staff attorneys; ALJs who delegate opinion writing decide up to twice as many cases as ALJs who refuse to delegate the task.⁶⁸

The SSA addressed this source of delay in two ways: it strongly urged ALJs to delegate opinion writing to staff attorneys, and it informed ALJs that it had established a productivity goal of 338 decisions per ALJ per year.⁶⁹ The SSA expressed particular concern about ALJs who decide fewer than 240 cases per year. It communicated with individual ALJs in this category, urging them to increase their productivity and suggesting methods of doing so. It also mandated special training programs for those who remained in the low productivity category, and, when all else failed, it notified consistently low productivity judges that if productivity did not improve, SSA would initiate "for cause" removal proceedings before the Merit Systems Protection Board.

ALJs challenged the SSA's productivity enhancement initiatives as an infringement on the decisional independence guaranteed them by the APA. The Second Circuit rejected that challenge in its opinion in *Nash v. Bowen*,⁷⁰ issued a decade after the SSA first attempted to control ALJ productivity. The court distinguished between "unreasonable quotas" and "reasonable goals," finding SSA's "goal" of 338 cases per year "reasonable."⁷¹

The court did not explain the notoriously difficult functional distinction between quotas and goals, nor did it suggest a method of distinguishing between "reasonable" and "unreasonable" quotas or goals. It also did not discuss the SSA's admonition to ALJs to delegate opinion writing to staff

⁶⁷See Chapter VI(C)(3).

⁶⁸J. Mashaw, *et al*, *supra*, n. 1135 at 90.

⁶⁹See *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989). But see *SAU v Anyel*, ALJ Docket NO. CB7521910009T1 (January 16, 1992), (SSA may not remove SSA ALJ based on reversal rate of 87.6% despite showing the average reversal rate for all SSA ALJs was 40%).

⁷⁰*Id.*

⁷¹*Id.* at 680-81.

lawyers. Until courts address these issues, the propriety and efficacy of any agency's efforts to enhance the productivity of its ALJs remains in grave doubt, notwithstanding the Second Circuit's holding for the SSA and its acknowledgement that the agency was trying to further "[s]imple fairness to claimants awaiting benefits."⁷²

The MSPB decision in *SSA v. Goodman*,⁷³ illustrates the problems that have arisen from the SSA's attempts to coerce ALJs to be more productive. Goodman was identified as a low productivity ALJ in 1980. The SSA told him to increase his productivity, provided counseling to assist him in doing so, admonished him to delegate opinion writing to staff attorneys, and placed him on notice that the SSA would initiate a proceeding to remove him for cause if he did not improve. For the next 2-1/2 years, Goodman continued to perform as before: he declined to delegate opinion writing, decided about half as many cases as the average ALJ (60 percent of SSA's goal), and remained the least productive ALJ in his regional office.⁷⁴ At that point, SSA made good on its threat—but the threat turned out to be hollow. The MSPB held that Goodman's low productivity was an inadequate basis for removal, noting its unwillingness to infer that the national average was an appropriate measure of "reasonable" ALJ productivity, or that performance at 60 percent of that level was unacceptable productivity.⁷⁵

If the MSPB decision in *Goodman* is a functional application of the Second Circuit's distinction between reasonable goals and unreasonable quotas, no agency has a chance of improving the productivity of its ALJs by establishing goals. If evidence that one is only half as productive as one's peers is insufficient to support an inference of unacceptably low productivity, it is hard to imagine what evidence would suffice. The MSPB speculated that Goodman's case mix might differ from the average ALJ docket.⁷⁶ This statement is dubious, to say the least. With the large number of cases and random assignment to ALJs, the probability that Goodman's docket differs significantly from the average is remote. At a minimum, the SSA's statistical evidence should have been sufficient to shift the burden to Goodman to present evidence that his docket was aberrational.

The MSPB suggested in a footnote alternate means by which the SSA might enhance ALJ productivity.⁷⁷ If the SSA directed ALJs to use staff opinion writers or to take other reasonable steps to improve productivity, the MSPB

⁷²*Id.* at 681.

⁷³19 M.S.P.R. 321 (1984), 58 Ad. L. 20 (Pike and Fischer) 780 (1984).

⁷⁴*Id.* at 782-83.

⁷⁵*Id.* at 789.

⁷⁶*Id.* at 789.

⁷⁷*Id.* at 788 n. 11.

explained, it might be willing to remove for insubordination any ALJ who refused to follow the directive. This, however, would be a crude, second-best method of enhancing productivity. It would be more intrusive and less effective than presumptive productivity goals. Moreover, it is not clear that courts would find such a directive permissible. Judges are likely to fear that legitimating an executive branch order that so directly mandates the work habits of ALJs would strike too close to home. It seems far more sensible for an agency to establish productivity goals and allow ALJs flexibility in deciding how to meet those goals than to become involved in micromanagement of each ALJ's methods of operation.

2. Efforts to Assert Control Over Policy Components of Adjudicatory Decisions and to Enhance Interdecisional Consistency

Agencies can attempt to exercise control over the policy components of adjudicatory decisions made by agency adjudicatory officers through use of at least five vehicles: legislative rules, formal review, a system of precedents, interpretative rules, and informal pressure. The five are listed in order of their relative degree of formality and efficacy, with the most formal and effective control mechanism first. As the degree of formality of the control mechanism decreases, the efficacy of the measure becomes increasingly dependent on the degree of dependence of the agency's adjudicatory officers. To describe the same relationship in a different way, formal control mechanisms have the same powerful constraining effect on independent adjudicatory officers as they have on officers who are to some extent dependent on the agency. Less formal mechanisms are likely to have more persuasive effect on dependent officers than on independent officers. Each of these control mechanisms also is subject to limitations inherent in the nature of the mechanism, the procedures required to use the mechanism, and the characteristics of the adjudicatory environment to which the mechanism is applied.

Policy control and interdecisional consistency are closely related from a functional perspective. That is to say, any agency statement of policy that is applied in all adjudicatory cases that raise the issues resolved by the policy statement enhances interdecisional consistency at the same time it controls the policy component of a decision. Thus, for instance, a binding SSA rule that specifies the circumstances in which a heart murmur is disabling simultaneously allows the agency to control policy in this area and assures that all individuals with heart murmurs are judged by the same criteria. It should

be noted that almost ALJs reject the notion that their role is to make agency policy to any great extent.¹¹⁵⁴

a. By Legislative Rule

Virtually all scholars and judges who have considered the question have concluded that legislative rulemaking is the preferred means by which an agency can exercise control over the policy components of adjudicatory decisions. Most agencies that have the power to adjudicate also have the power to issue rules whose effects are indistinguishable from statutes. APA section 553¹¹⁵⁵ requires an agency to use a three-step process to issue a legislative rule: (1) public notice of the proposed rule; (2) receipt and consideration of comments on the proposal; and, (3) issuance of the rule incorporating a concise general statement of its basis and purpose.

A valid legislative rule is binding on citizens, agency adjudicatory officers, and on the agency itself. A legislative rule can have the effect of eliminating what otherwise would be a party's right to a hearing to resolve contested issues of fact or of reducing the scope of a class of adjudicatory proceedings by eliminating the need for the agency or the adjudicatory officer to resolve one or more factual issues. In other circumstances, a rule can transform a complicated subjective decisionmaking process into a more manageable process of applying one or more objective criteria. Many agencies have adopted rules to serve these purposes.¹¹⁵⁶ As the Supreme Court recognized in *Weinberger v. Hynson, Westcott & Dunning*, an agency frequently "could not fulfill its statutory mandate" without issuing legislative rules that have the effect of eliminating the need to conduct thousands of hearings governed only by broad subjective decisionmaking standards.¹¹⁵⁷

¹¹⁵⁴The ALJ survey (question #9(i), see appendix) reveals that only 1% of respondents indicated that they conceive of their role as making policy to a "great extent" and 8% to "some extent." However, 24% of respondents said they at least occasionally make suggestions to the agency for policy changes (question 10(k)).

¹¹⁵⁵U.S.C. §553.

¹¹⁵⁶See, e.g., *Heckler v. Campbell*, 461 U.S. 458 (1983) (agency rule prescribing "grid" for determining availability of jobs in the U.S. economy eliminates the need to litigate this issue in many social security disability cases); *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609 (1973) (agency rule prescribing minimum acceptable evidence to support finding that drug is effective eliminates the need to conduct hearings on this issue when evidence tendered fails to meet an objective criterion stated in the rule); *U.S. v. Slorer Broadcasting*, 351 U.S. 192 (1956) (agency rule limiting number of broadcasting stations an individual can own eliminates need for hearing to decide whether to issue license to individual who already owned maximum number permitted by rule).

¹¹⁵⁷412 U.S. at 621.

Over the years, scholars, judges, and Justices have shown near unanimity in extolling the virtues of the rulemaking process.¹¹⁵⁸ For a period of several years, Justices Douglas and Harlan attempted to convince a majority of the Court to recognize the enormous advantages of rulemaking by holding that agencies can announce "rules" of general application only through the rulemaking process.¹¹⁵⁹

Commentators have identified at least eight different advantages of rulemaking over adjudication as a source of generally applicable rules. First, rulemaking can be expected to yield higher quality rules than adjudication. When an agency announces a "rule" in the process of adjudicating a specific dispute, it has before it only the parties to the particular dispute and the evidence those parties tender. Traditionally, that evidence focuses on the specific, historical facts related to those parties and their relationship. The factual pattern on which the agency predicates its rule may be widely generalizable or entirely idiosyncratic. The agency has no way of knowing whether the fact pattern before it applies to 100 percent, 50 percent, 10 percent, or 1 percent of superficially analogous relationships or incidents. Other common patterns may suggest entirely different rules. Moreover, the process of making a general rule of conduct should not be based primarily on resolution of specific historical facts. The primary purpose of rules is to affect future conduct or to resolve issues of legislative fact. Thus, rules should be based on evidence relevant to that goal. An agency contemplating announcement of a rule should search for answers to questions like: How can we channel the future conduct of regulatees or beneficiaries in ways that will further our statutory mission? What is the general relationship between exposure to a particular toxic substance and various adverse health effects? An adjudication rarely yields significant, high quality evidence relevant to those questions.¹¹⁶⁰

By contrast, all potentially affected members of the public are given an opportunity to participate in a rulemaking proceeding. The frame of reference established by the agency's notice of proposed rulemaking (e.g., we are

¹¹⁵⁸See, e.g., R. Pierce, S. Shapiro & P. Verkuil, *ADMINISTRATIVE LAW AND PROCESS* §6.4.1 (2d ed. 1992); K. Davis, *ADMINISTRATIVE LAW TREATISE* §6.38 (2d ed. 1978); Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 *YALE L. J.* 571 (1970); Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78 *HARV. L. REV.* 921 (1965).

¹¹⁵⁹See, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777-78 (1969) (Douglas, J., dissenting); *id.* at 781-82 (Harlan, J., dissenting); *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 376-77 (1965) (Harlan, J., dissenting).

¹¹⁶⁰See ACUS Recommendation 91-5, 1 CFR §305.91-5 (1991); Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 *DUKE L.J.* 274 (1991).

considering adoption of the following rules as means of furthering specified statutory goals) invites participants to submit comments relevant to the forward-looking, instrumental purpose of a rule. Parties have a natural incentive to address questions concerning such issues as the generalizability of alternative patterns of fact, alternative means of shaping conduct, and practical problems in implementing alternative rules. Similarly, parties have incentives to include in their comments studies and affidavits of experts addressing issues like: (1) the frequency of occurrence of various factual patterns; (2) the likely efficacy of alternative rules in shaping conduct; (3) the cost of compliance with alternative rules; and (4) the practical problems inherent in implementing or enforcing alternative rules in varying factual contexts. The rule produced by this process almost certainly will be instrumentally superior to any "rule" produced by the process of adjudicating a specific dispute.

The second advantage of rulemaking inheres in the enhanced political accountability of agency policy decisions adopted through the rulemaking process. Before an agency can make a binding policy decision through the rulemaking process, it must issue a public notice of its proposed rule. This Notice of Proposed Rulemaking enables citizens who oppose or support the proposal to alert members of Congress to the existence of the proposal and to express their views of the agency's proposal to those politically accountable officials. This, in turn, allows Congress to express to the agency its views concerning the proposed policy decision and, through the process of congressional oversight, to affect agency resolutions of policy disputes.¹¹⁶¹ By contrast, when an agency announces a policy decision in the context of resolving a particular adjudicatory dispute, Congress usually has no prior notice that the agency is proposing to make such a decision, and Congress has much less ability to influence the agency's policy decision.

Three advantages of rulemaking fit under the broad heading of efficiency. Rulemaking eliminates the need to engage in expensive and time-consuming adjudicatory hearings to address issues of legislative fact; rulemaking eliminates the need to relitigate recurring issues; and, rules created through rulemaking are easier and less expensive to enforce and to implement than are "rules" announced in the course of adjudicating specific disputes.

There is a substantial scholarly literature that documents the extraordinary inefficiency of adopting general rules through use of adjudicatory procedures. The Food and Drug Administration, for instance, once spent over a decade

¹¹⁶¹See McCubbins, Noll & Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987).

conducting an oral evidentiary hearing to try to answer the question: What is peanut butter?¹¹⁶²

The other three major advantages of rulemaking fit under the general heading of fairness. Legislative rules provide affected parties with clearer advance notice of permissible and impermissible conduct; they avoid the widely disparate temporal impact of "rules" announced and applied through adjudicatory decisionmaking; and, they allow all potentially affected members of the public an opportunity to participate in the process of determining the rules that affect them.

Despite the many large advantages of rulemaking, no agency uses rulemaking to resolve all policy issues that can arise in agency adjudications, and some agencies rarely use rulemaking. Indeed, the use of rulemaking at many agencies has declined significantly over the last 10 to 15 years. There are three primary explanations for agency decisions to decline to use rulemaking to make policy decisions. First, rulemaking is inherently unsuited to policymaking in many important contexts. Second, a combination of actions by the courts and Congress has created a situation in which rulemaking often is extremely expensive, requires many years to complete, and requires an enormous commitment of agency resources. Third, OMB review of proposed rules has added still more to the cost and length of the rulemaking process.

FERC's recent policymaking efforts in regulating the natural gas market illustrate both the advantages and the inherent limitations of rulemaking. Beginning in 1984, FERC made a complicated series of changes in its policies governing regulation of the gas market. It relied heavily on rulemaking to make and to implement those policy decisions. The success of its efforts was attributable largely to its use of rulemaking.¹¹⁶³ It was unable to complete the process, however. FERC concluded that the rate design policies it had previously applied to gas pipelines were seriously incompatible with its new policies governing other characteristics of the gas market.¹¹⁶⁴ The agency also concluded, however, that this part of the policymaking process was not amenable to rulemaking. Gas pipelines' characteristics, markets, and functions vary to such an extent that FERC was not sure any uniform policy would work

¹¹⁶²See Merrill & Collier, "Like Mother Used to Make: An Analysis of FDA Food Standards of Identity," 74 COLUM. L. REV. 561 (1974); Hamilton, *Procedures for Adoption of Rules of General Application: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1287-88 (1972). See also Pierce, *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HAST. L. J. 1 (1979).

¹¹⁶³See Pierce, *Reconstituting the Natural Gas Industry from Wellhead to Burnerip*, 9 EN. L. J. 1 (1988).

¹¹⁶⁴See General Policy Statement Providing Guidance with Respect to the Designing of Rates, 47 FERC 61,295 (1989).

well. Moreover, FERC lacked confidence that it had sufficient understanding of the effects of alternative rate designs in differing circumstances to address the issue on a definitive basis. Thus, the agency announced its policy goals in general terms and asked its ALJs to consider ways of implementing those goals as each pipeline's rate design comes before an ALJ in the context of an adjudicatory dispute.

FERC's use of rulemaking as a means of making binding policy decisions is generalizable to many agencies. Both regulatory and benefit agencies often use rulemaking to a point, but then discover that the other recurring policy issues they confront are not amenable to rulemaking, at least until the agency has a better understanding of the issues. At that point, the agency relies on the case-by-case adjudicatory process as its primary means of making policy.

In addition to these inherent limits on the efficacy of rulemaking, many agencies have been deterred from extensive use of rulemaking by the high cost and lengthy delay that now characterizes the rulemaking process. Some agencies that used to rely extensively on rulemaking have very nearly given up on the process.¹¹⁶⁵

There are at least two explanations for this phenomenon. In the case of several important agencies, Congress has added expensive and time-consuming procedures to the normal APA notice-and-comment rulemaking process. The FTC Improvement Act of 1974,¹¹⁶⁶ and the Toxic Substances Control Act of 1976,¹¹⁶⁷ illustrate this selectively implemented congressional innovation. An interested person is entitled to "present his position orally" if "the Commission determines that there are disputed issues of material fact," and "to conduct such cross-examination...as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues."

Congress' intent in FTClA and TSCA was laudable. It wanted to provide an opportunity for *limited* oral testimony and cross-examination with respect to those *few* specific issues of contested fact critical to the outcome of a rulemaking. This congressional innovation has been a failure, however. Agencies subject to statutes that require limited cross-examination on a limited number of issues provide instead a broad right to cross-examination with respect to all issues raised by a proposed rule. That, in turn, virtually

¹¹⁶⁵See Mashaw & Harfa, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443 (1990); J. Mendeloff, *THE DILEMMA OF TOXIC SUBSTANCES REGULATION* 7-16 (1988); Pierce, *Two Problems in Administrative Law: Political Polarity on the D.C. Circuit and Judicial Deterrence of Agency Use of Rulemaking*, 1988 DUKE L. J. 300.

¹¹⁶⁶15 U.S.C. §57a.

¹¹⁶⁷15 U.S.C. §2601.

eliminates rulemaking as a viable regulatory tool; FTC, for instance, returned to near complete reliance on case-by-case adjudication as its primary vehicle for announcing "rules" once it realized that a single rulemaking with oral hearings and cross-examination requires many years to complete.¹¹⁶⁸

The reason for the failure of the congressional innovation is easy to identify in retrospect. When Congress requires an agency to permit limited cross-examination on a limited set of factual issues, the agency cannot predict how a reviewing court will assess the agency's attempt to comply with the statutory command. Suppose that a proposed rule raises a total of 26 issues of fact, issues A through Z. The agency determines that five issues, A-E, are so important and highly controverted as to justify limited oral evidence and cross-examination. Once the agency has completed the lengthy rulemaking process, a reviewing court can easily conclude that issue Q, for instance, also justified this treatment. To avoid this significant risk, the agency must allow an oral hearing on all issues, A-Z. The same problem arises with respect to any agency attempt to limit the amount of oral evidence and cross-examination allowed on any issue. Since a reviewing court always can conclude that the agency limit, be it 10 questions per party or 100 questions per party, is insufficient "for a full and true disclosure with respect to such issues," the agency must allow unlimited oral testimony and cross-examination with respect to each issue to avoid a high risk of reversal.¹¹⁶⁹ Through this understandable agency reaction to an imprecise command, the congressional attempt to permit highly constrained oral testimony and cross-examination in rulemakings has become instead a mandate to permit unlimited oral hearings in rulemakings. That, in turn, so increases the cost of a rulemaking and the time required to complete a rulemaking that the agency rarely uses rulemaking.

The second source of deterrence of agency use of rulemaking is the judiciary. APA section 553(c)¹¹⁷⁰ requires an agency to "incorporate in the rules adopted a concise general statement of their basis and purpose." APA section 706¹¹⁷¹ instructs a court to reverse an agency rule if it is "arbitrary" or "capricious." Reviewing courts routinely apply the arbitrary and capricious test to rulemaking in a manner that replaces the statutory adjectives "concise"

¹¹⁶⁸See ACUS Recommendations 79-1, 80-1. See also Boyer, Report on the Trade Regulation Rulemaking Procedures of the Federal Trade Commission, 1979 ACUS 437 and 1980 ACUS 33.

¹¹⁶⁹This high risk of reversal is illustrated well by *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1211 (5th Cir. 1991) (reversing rule that required 12 years to promulgate on basis, *inter alia*, that agency should have allowed "full cross-examination," rather than selective cross-examination).

¹¹⁷⁰5 U.S.C. §533(c).

¹¹⁷¹5 U.S.C. §706.

and "general" with the judicial adjectives detailed and encyclopedic. To avoid significant risk of judicial reversal of a rule as arbitrary and capricious, an agency knows that it often must incorporate a statement of basis and purpose several hundred pages long. The statement must discuss to the satisfaction of a court all important issues raised in comments, all statutory decisional factors, and all superficially appealing alternatives to the rule adopted.¹¹⁷² This increases significantly the amount of time required to issue a rule and the agency resources that must be devoted to a rulemaking. It is not uncommon for a single rulemaking to require a decade and commitment of 10% of an agency's total staff resources.

When the agency completes the time-consuming and burdensome rulemaking process, it is by no means assured of judicial affirmance. During the period 1984-85, reviewing courts affirmed only 40% of agency rules.¹¹⁷³ Moreover, reviewing courts are less charitable to agencies that rely on rulemaking. Courts reverse or remand rulemakings more frequently than they reverse or remand adjudications, and they reverse adjudications conducted by agencies that rely heavily on rulemaking more frequently than they reverse adjudications conducted by agencies that decline to use rulemaking.¹¹⁷⁴

The final source of agency deterrence of rulemaking is the cost, uncertainty, and delay attendant to OMB review. Executive Order 12,291 instructs all Executive Branch agencies to submit "major rules" to OMB for prepromulgation analysis and review. That process can yield protracted negotiations between the agency, OMB, and other agencies with conflicting views on the rule. The need for centralized review of major rules to allow interagency policy coordination has been well-documented.¹¹⁷⁵ Ways must be found, however, to accomplish this function with less adverse effect on agency incentives to act by rulemaking. OMB seems to have made some progress in this respect. The average time required for OMB review of major rules declined significantly between 1985 and 1988.¹¹⁷⁶

Thus, while rulemaking is a highly desirable mechanism through which agencies can control the policy components of adjudicatory decisions,

¹¹⁷²See J. Mashaw & D. Harf, *THE STRUGGLE FOR AUTO SAFETY* (1990); Pierce, *The Unintended Effects of Judicial Review of Agency Rules*, 43 ADMIN. L. REV. 7 (1991).

¹¹⁷³Schuck & Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984, 1021.

¹¹⁷⁴*Id.* at 1021-23.

¹¹⁷⁵See Strauss & Sunstein, *The Role of the Presidents and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986). We do not address the important questions concerning the extent to which this process should be made open to public scrutiny. See Gilthooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299 (1991).

¹¹⁷⁶See 1988-89 Regulatory Program of the United States, App. IV, Exh. 11, at 555.

rulemaking can not always serve this important function. Many policy issues are not amenable to resolution by rule, and the high costs and lengthy delay attendant to the rulemaking process preclude its use even in many policymaking contexts that are otherwise appropriate for rulemaking.

b. By Formal Review

APA section 557¹¹⁷⁷ authorizes an agency to "review" any initial decision of an employee who presides in an adjudication. It then confers on the reviewing agency "all the powers which it would have in making the initial decision." That language has the effect of allowing the agency to substitute its judgment for that of the adjudicatory officer with respect to most issues resolved in the adjudicatory officer's initial decision. Thus, an agency can maintain some degree of control over the policy components of adjudicatory decisionmaking by exercising its broad power to review each adjudicatory decision.

This potential method of maintaining control over policy is subject to two limitations. First, courts attach some significance to the decision of the adjudicatory officer when they review the agency's decision. Thus, to some extent, the findings and conclusions of the adjudicatory officer limit the agency's power to substitute its judgment for that of the adjudicatory officer. We discuss the complicated relationship between adjudicatory officers' initial decisions and judicial review of agency decisions in Chapter VII(A).

Second, agencies do not have sufficient time or resources to engage in plenary review of each initial decision of an adjudicatory officer. This constraint exists at every agency. Even agencies that routinely review each initial decision cannot possibly engage in a thorough review of each. The problem increases as the agency's caseload increases. An agency whose adjudicatory officers issue tens of thousands of initial decisions each year cannot review with care more than a modest fraction of those decisions. As a result, the mass justice agencies have severely limited ability to use formal agency review as a means of maintaining control over policy or interdecisional consistency. Indeed, the Social Security Administration does not review any of the quarter million decisions its ALJs issue each year. Its Appeals Council reviews a small fraction of those decisions, but the Appeals Council itself is a decentralized institution that consists of a large number of independent decisionmakers.¹¹⁷⁸

¹¹⁷⁷5 U.S.C. §557.

¹¹⁷⁸For a thorough analysis of this problem in the SSA context, see Koch & Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security*

c. By Precedent

To some extent, agencies can maintain control over policy and can maintain interdecisional consistency by establishing a system of precedents analogous to the system long used by federal and state courts. The needed elements of such a system are (1) reasoned opinions, (2) accessibility of prior decisions, both to the tribunal and to parties, and (3) treating precedents as binding unless they are overruled.

A system of precedents can enable an agency to maintain control over the policy components of the decisions of its adjudicatory officers without necessarily reviewing each such decision in detail. The agency can announce and apply a policy in a single case and then assume that its adjudicatory officers will adhere to precedent by applying the same principle in all similar cases that come before them in the future.

Many agencies have established a system of precedents, including published decisions in every case and an index that allows any adjudicatory officer and any member of the public reasonable access to each decision. In such an agency, adjudicatory officers routinely find and apply agency precedents.¹¹⁷⁹ Some agencies are not well-positioned to establish such a system, however. Again, the source of the problem is caseload. An agency whose adjudicatory officers decide tens of thousands or hundreds of thousands of cases per year cannot write a reasoned decision in each case it reviews, make all decisions publicly available, and provide an index that renders all the decisions practically accessible to the public and to the agency's adjudicatory officers.

d. By Interpretative Rule

Some agencies attempt to maintain policy control by issuing interpretative rules. Interpretative rules differ from legislative rules in two important respects. They can be issued without using notice-and-comment procedure, and they have no binding effect on members of the public.

SSA relies heavily on interpretative rules, which it calls Social Security Rulings, to make policy applicable to its enormous and complicated benefit programs. SSA takes the position that its Rulings bind its ALJs.¹¹⁸⁰ Indeed, SSA's practice of issuing binding Social Security Rulings was an integral part of the agency's commitment to Congress to obtain greater consistency in its

Administration's Appeals Council, 1987 ACUS 625, reprinted in, 17 FLA. ST. L. REV. 199 (1990).

¹¹⁷⁹See findings of surveys of adjudicatory officers discussed in Chapter IV.

¹¹⁸⁰See 57 Fed. Reg. 7596-98 (March 3, 1992).

benefit decisionmaking.¹¹⁸¹ SSA's ALJs do not consider themselves bound by SSA Rulings, however.¹¹⁸² This issue has not been definitively resolved.¹¹⁸³

The efficacy of interpretative rules as a means of controlling policy varies with the degree of independence of an agency's adjudicatory officers. Presiding officers who are dependent on an agency are likely to defer to its officially announced policies even if those policies are not contained in an instrument that is formally binding. As SSA's experience illustrates, independent adjudicatory officers believe that they have the discretion to decline to apply any agency policy statement that does not formally bind them.

Of course, an agency can avoid the problem of the questionable efficacy of interpretative rules by relying entirely on legislative rules to announce policy. As mentioned, this option has become unattractive because the procedure for issuing a legislative rule has become extraordinarily long and expensive.¹¹⁸⁴ Of course, section 553 of the APA does contain an exemption from notice-and-comment for rules concerning "benefits" (as well as those pertaining to public property, loans, grants and contracts). The Conference, in 1969, because of the growing importance of such rules to the public, urged elimination of that exception and also urged agencies to voluntarily eschew its invocation.¹¹⁸⁵ Most relevant agencies did, including the Department of Health and Human Services.¹¹⁸⁶ It may be time, given the difficulties with notice-and-comment rulemaking to rethink the need for a more streamlined way to issue rules concerning benefit program administration to permit such policies to become definitely binding on ALJs.¹¹⁸⁷ With such a change in its method of operation, the agency could increase significantly its ability to control the policy components of adjudicatory decisions without any other change in the now high degree of independence enjoyed by its adjudicatory officers. On the other hand, elimination of the notice-and-comment procedure would eliminate some, but not all, of the advantages of making policy by rule. Of course, it would be

¹¹⁸¹See H.R. Rep. No. 618, 98th Cong., 2d Sess. 20-22, reprinted in 1984 U.S. CODE CONG. & ADM. NEWS 3038, 3057-59.

¹¹⁸²See findings of surveys of adjudicatory officers reported in section IV. See also Koch & Kaplow, *supra* note 1178 at 232-33 (1990).

¹¹⁸³See *Bunnell v. Sullivan*, 947 F.2d 341, 346 n. 3 (9th Cir. 1991) (SSA Rulings do not have the force of law but are entitled to judicial deference).

¹¹⁸⁴See Chapter VI (D) (2a)

¹¹⁸⁵ACUS Recommendation 69-8, "Elimination of Certain Exemptions from the APA Rulemaking Requirements," 1 CFR §305.69-8 (1992).

¹¹⁸⁶36 Fed Reg. 2532 (1971). See also 47 Fed. Reg. 26,860 (1982) (notice of HHS proposal to reinstate exemption).

¹¹⁸⁷Most also would be subject to pre-enforcement judicial review, see *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

far better if Congress, the courts, and OMB eliminated some of the unnecessary costs and risks of following the notice-and-comment procedure. Then agencies like SSA would not be required to choose between two unattractive alternatives.

e. Informal Pressure

An agency also can attempt to use less formal means of enhancing consistency and controlling the policy components of adjudicatory decisions. The quality assurance and selective review programs SSA attempted to implement in the 1970s and early 1980s illustrate the many controversial issues raised by such efforts. SSA's programs clearly were intended to enhance interdecisional consistency. Depending on how you view the programs, they also created impermissible bias, enhanced accuracy, and/or allowed SSA to control benefits policy in contexts that were not amenable to control through other means.

Once SSA discovered that its disability benefits adjudication system implemented by 700 independent ALJs was plagued by major interdecisional inconsistencies attributable to the varying personal philosophies of its ALJs,¹¹⁸⁸ it attempted to address that problem by implementing several versions of informal quality controls. In this effort, it initially had the blessing, indeed the prodding, of Congress.¹¹⁸⁹

SSA addressed the problem of ALJ inconsistency by ordering its Appeals Council to review on its own motion large numbers of ALJ decisions. Most of the decisions selected for review had been made by ALJs with aberrationally high benefit grant rates. The Appeals Council initially reviewed 100 percent of the decisions of ALJs with grant rates higher than 74 percent. After ALJs in that category expressed concern that the SSA might attempt to remove them for cause if they continued their historic pattern of decisionmaking, several courts held that this method of controlling ALJ conduct infringed on the decisional independence guaranteed ALJs by the APA.¹¹⁹⁰ One court--the Second Circuit--upheld the validity of the program.¹¹⁹¹ By the time the Second

¹¹⁸⁸See Chapter VI (C) (2).

¹¹⁸⁹For detailed descriptions of the various programs, see J. Mashaw, et al., *supra* n. 1135. See also Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 501-19 (1990).

¹¹⁹⁰See, e.g., *Barry v. Bowen*, 825 F.2d 1324, 1330-31 (9th Cir. 1987); *Association of Administrative Law Judges v. Heckler*, 594 F.Supp. 1132, 1141-43 (D. D.C. 1984); *Selling v. Bowen*, 641 F.Supp. at 1055-56, 1073; *W.C. v. Heckler*, 807 F.2d 1502, 1504-05 (9th Cir. 1987), opinion amended, 819 F.2d (9th Cir. 1987).

¹¹⁹¹*Naah v. Bowen*, 869 F.2d 675, 678-81.

Circuit upheld the program, however, SSA had abandoned it in response to pressure from ALJs and from other courts.

These different judicial reactions stemmed in part from the philosophies of the judges and in part from their differing findings concerning the effects of the program. Each of the courts that invalidated the ALJ-targeted own-motion review program found that it systematically biased the ALJ decisionmaking process in favor of denial of benefits. The court that upheld the program found that its only effect was to enhance consistency, which it found lay within the Secretary's broad discretionary authority to improve the decisionmaking process.¹¹⁹² That court suggested that it, too, would have held the program invalid if it introduced a systemic bias against applicants.¹¹⁹³

The ALJ-targeted review program clearly enhanced consistency, but it is difficult to determine whether it also changed the mean rate of benefit denials.¹¹⁹⁴ This problem may inhere in any attempt to enhance interdecisional consistency through use of informal quality control programs. It is difficult for any outside observer, or even for the agency itself, to know whether an attempt to increase consistency also affects the mean outcome of disputes.

By contrast, it is easy to demonstrate the beneficial effect of establishing a presumptive range of benefit grant or denial rates in advancing the goal of enhanced interdecisional consistency. Before SSA implemented its informal quality control programs, its then 700 ALJs granted benefits in 50 percent of cases on average. Grant rates varied widely by ALJ, however, with 10 percent of ALJs granting benefits in over 75 percent of cases and 10 percent granting benefits in less than 25 percent of cases.

Reducing the variation in ALJ benefit grant rates inevitably enhances consistency. Given the large number of cases decided by each ALJ and the random assignment of cases to ALJs, the wide variation in benefit grant rates suggests strongly that ALJs were using much different decisional standards. According to elementary statistical analysis, if all ALJs applied the same decisional standard, over 95 percent of ALJs would have a grant rate between 45 and 55 percent; over 99 percent would have a grant rate between 40 and 60 percent. Moreover, the grant rate of an individual ALJ would vary randomly around the mean grant rate from period to period. Thus, the probability that an individual ALJ's grant rate would fall outside the 40 to 60 percent range in two consecutive years is less than one-tenth of one percent. Forcing ALJs to have grant rates within a specified range centered on the median grant rate

¹¹⁹²*Id.* at 681.

¹¹⁹³*Id.*

¹¹⁹⁴For an excellent description of the difficulty of determining whether the quality control program altered the rate of benefit denials, see *Stieberger v. Heckler*, 615 F.Supp. 1315, 1379, 1390-96.

(e.g., 40 to 60 percent) would force them to adopt similar decisional standards. Thus, if SSA had established a presumptively acceptable range of grant rates, instead of selectively reviewing the decisions of ALJs with unusually high grant rates, it would have reduced the problem of interdecisional inconsistency by inducing both its unusually generous ALJs and its unusually stingy ALJs to modify their behavior to conform to group norms. SSA was able to accomplish only modest improvements in interdecisional consistency through its informal quality control programs. The high degree of independence conferred on ALJs by the APA proved to be a major obstacle to SSA's ability to further that goal. SSA abandoned the program in 1984.

SSA's effort to enhance interdecisional consistency also would have increased decisionmaking accuracy. Accuracy is a primary goal of due process.¹¹⁹⁵ To understand why consistency is a good measure, and perhaps the only measure, of accuracy in this context, consider the nature of typical disability cases. The largest proportion of cases that reach the ALJ level involve allegations of chronic pain. The second largest category of cases involve allegations of neuroses--usually anxiety or depression. Neither pain nor neurosis can be measured objectively. In the two most common decisionmaking contexts--chronic pain and neurosis--ALJs are required to make yes-or-no decisions on disability when the applicant's ability to work and the severity of the underlying illness could fall anywhere along a vast spectrum. The ALJ can hope to do little more than draw a line on the disability spectrum and use one's own judgment to determine on which side of the line individual cases fall.

Accuracy in an objective sense obviously is not a realistic goal in this context. Accuracy in a relative sense is attainable only by forcing ALJs to locate the yes-no line at approximately the same point along the disability spectrum. The comparative advantage of using ALJs lies in their ability to place pain cases on a spectrum; for example, from 1 to 10, with "1" meaning slight pain and "10" meaning extreme pain. The disadvantage of using ALJs is that different ALJs draw the line separating tolerable pain from disabling pain at different points on the spectrum; for example, some ALJs will find level-2 pain disabling while others will find level-9 pain tolerable. Consistency, and hence "accuracy," is attainable only by forcing each ALJ to maintain a benefit grant rate that lies within a relatively narrow range; for example, 40 to 60 percent. This constrains ALJs by making them draw the line between tolerable pain and disabling pain at about the same point on the relative pain spectrum.

A carefully implemented quality assurance program of this type also can be characterized as a means through which the agency can control the policy components of adjudicatory decisions in a context that is impervious to other

¹¹⁹⁵See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

potential means of control. Extending the analogy drawn in the prior paragraph, establishing a presumptively correct range of benefit grant rates (e.g., 40 to 60 percent), is functionally equivalent to establishing a binding policy that chronic pain at or above the 4 to 6 level is disabling, while chronic pain below that level is not. Admittedly, this policy is less than precise. It might be argued, however, that this would be an improvement over the present situation in which each of 866 unconstrained, independent ALJs applies idiosyncratic personal policies with respect to the level of chronic pain required to make an individual eligible for disability benefits.

Of course, the independent status of ALJs need not be an inherent obstacle to agency use of quality control programs, including presumptive ranges of rates of granting or denying benefits. As the Second Circuit's decision in *Nash v. Bowen*¹²⁰ illustrates, carefully designed and statistically sound programs of this type can be reconciled with the high degree of independence the APA accords to ALJs. The problem here seems to lie in the statistical naivete of many other courts and of MSPB. Several courts held that SSA's program violated the APA, and MSPB refused to give credence to the agency's solid statistical evidence in the *Goodman* case, discussed in Chapter VI(D)(1).

Statistically based quality control programs have disadvantages, however. As SSA's experience illustrates, ALJs resent them intensely. Applicants for benefits, most of whom are likely to share judges' naivete concerning statistics, may also share that resentment and lose faith in the fairness of the adjudicatory process. Agencies can take other steps that may be almost as effective in reducing interdecisional inconsistency but that are much less controversial. An agency can compile statistics concerning the aggregate and individual decisionmaking patterns of its ALJs and circulate reports of those statistics periodically to its ALJs. This would allow ALJs to self-identify as unusually generous or unusually stingy. This self-identification, combined with peer pressure, would encourage ALJs to adopt decisionmaking standards closer to group norms.

¹²⁰869 F.2d 675 (2d Cir. 1989). But see *SSA v. Anyel*, MSPB ALJ Docket NO. CB7521910009T1 (January 16, 1992) (SSA may not remove SSA ALJ based on reversal rate of 87.6% despite showing that average reversal rate for all SSA ALJs was 40%). See note 1232, *infra*.

E. Establishing an Appropriate System of Performance Evaluation for ALJs

1. The Current Prohibition Against Performance Appraisal of ALJs

Unlike almost all other federal executive branch employees, administrative law judges are excluded from the civil service performance appraisal system.¹¹⁹⁷ Although the 1978 Civil Service Reform Act made it possible for agencies to bring actions against most other federal employees based on unacceptable performance,¹¹⁹⁸ the Act explicitly exempted ALJs from the performance appraisals required under that system.¹¹⁹⁹

At the same time, the Civil Service Reform Act created the Senior Executive Service (SES) for most of the top level "supergrade" employees (other than Presidential appointees and ALJs) in the executive branch.¹²⁰⁰ In addition to providing SES members with certain benefits (increased compensation, opportunity for bonuses and sabbaticals, and some job protections), the Act also required a system of performance evaluations that was keyed to both compensation and possible removal from the SES.¹²⁰¹

¹¹⁹⁷5 U.S.C. §4301(2)(D) (1988) exempts ALJs from the definition of "employee" for the purpose of the performance appraisal subchapters. Other employees not covered include those of the CIA and other national security agencies, foreign service members (who have their own "up-or-out" system), certain employees outside the United States, certain medical personnel in the Department of Veterans Affairs, temporary employees of less than one year, and Presidential appointees.

¹¹⁹⁸Prior to passage of the 1978 Reform Act agencies could only bring actions based on conduct impairing the "efficiency of the service." See Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 G.W.L. REV. 591, 602 (1986) (hereinafter "Note, ALJ Performance Evaluation"). This extremely well-researched note, prepared by L. Hope O'Keefe, was very helpful in preparing this present analysis.

¹¹⁹⁹This was done to maintain "the present system of providing protection for administrative law judges." *Id.*, citing the House report in the legislative history of the Reform Act.

¹²⁰⁰See *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1647-1650 (1984).

¹²⁰¹See 5 U.S.C. §§4311-4315 (1988). Section 4313 specifies the criteria for SES performance appraisals. They are to be "based on both individual and organizational performance, taking into account such factors as—(1) improvements in efficiency, productivity, and quality of work or service, including any significant reduction in paperwork; (2) cost efficiency; (3) timeliness of performance; (4) other indications of the effectiveness, productivity, and performance quality of the employees from whom the senior executive is responsible; and (5)

Thus, under present law, almost all career federal employees in the executive branch, including senior managers, are subject to annual performance appraisals. The major exception is administrative law judges.

Nor is this the only impediment to agency attempts to exert managerial control over ALJ performance. ALJs are also exempt from the normal requirement that appointees in the competitive service serve a probationary period before absolute appointment.¹³⁰² ALJ pay, until recent amendments to the pay laws, was to be "prescribed by [OPM] independently of agency recommendations or ratings,"¹³⁰³ and ALJs were entitled to regular within-grade "step increases" without being subject to the usual rule that the agency head had to certify that the "work of the employee" "is of an acceptable level of competence."¹³⁰⁴ The new ALJ pay system, enacted in 1990,¹³⁰⁵ formalized OPM control over ALJ pay according to a specific statutorily-mandated schedule of pay levels tied exclusively to seniority for all ALJs, except those few placed by OPM in higher pay categories (primarily chief ALJs or others with managerial duties).¹³⁰⁶

Although the Administrative Procedure Act contains significant provisions intended to safeguard the independence of ALJs from agency control, it has never explicitly barred agencies from conducting performance evaluation. Its provisions on ALJ pay, as discussed above, provided that CSC/OPM should prescribe compensation "independently of agency recommendations or ratings." But this provision hardly can be read to prohibit such ratings entirely--indeed it seems to assume them.¹³⁰⁷ Moreover, the disciplinary/removal provisions in section 11 (which survive today as 5 U.S.C. §7521) require agencies wishing to discipline or remove ALJs to bring charges

meeting affirmative action goals and achievement of [EEO] requirements." OPM regulations now provide for a system of periodic recertification of SES members. (Cite)

¹³⁰²See 5 U.S.C. §3321 (1988); 5 CFR §2.4 (probationary period required for employees selected from registers or promoted to managerial positions) and 5 CFR §930.203a(b) (probationary period does not apply to ALJ appointments).

¹³⁰³5 U.S.C. §5372 (1988), *repealed* by Pub. L. No. 101-509, Title I, §104(a)(1), Nov. 5, 1990, 104 Stat. 1445. This provision dated back to section 11 of the APA.

¹³⁰⁴5 U.S.C. §5335 (1988), prior to amendment by Pub. L. No. 101-590.

¹³⁰⁵5 U.S.C. A. §5372 (1991).

¹³⁰⁶As of October 1991 only 18 of the 1,184 ALJs were in the higher pay categories AL-1 or AL-2. All others were in AL-3 (A through F), which is based solely on length of service.

¹³⁰⁷Indeed, Attorney General Clark's one caveat to Administration support of the bill that became the APA was to the inclusion of those quoted words. Clark reported that the Acting Director of the Bureau of the Budget "deems it highly desirable that agency recommendations and ratings be fully considered by the Commission." Letter from Attorney General Thomas Clark to Senator Pat McCarran, Chairman of the Senate Judiciary Committee, October 19, 1945, *reprinted* in ATTORNEY GENERAL'S MANUAL ON THE APA 123-125 (1947).

before the CSC (now MSPB) showing good cause for the action. The MSPB has ruled that such a "good cause" charge *may be* based on agency productivity evaluations.

Nevertheless, the statutory ban on ALJ "performance appraisals" and the even broader, longstanding CSC/OPM rule that states "An agency shall not rate the performance of an administrative law judge,"¹²⁰⁸ when combined with the high threshold of proof demanded by the MSPB in charges brought against ALJs on productivity grounds, have made it very difficult for agencies to exert managerial control over their ALJs.

As one perceptive commentator has written:

Despite these apparently dispositive provisions proscribing agencies' ratings of ALJs' performance, agencies face strong pressures to curb ALJs who deviate from desired norms. Agency managers are thus frustrated by the delicate balance inherent in managing a group of critical employees charged with implementing an agency's policy but nevertheless supposedly independent of the agency. The APA and agencies' enabling statutes authorize agencies to review ALJs' decisions, sometimes even *de novo*, as the primary means of ensuring ALJs' accountability. However, from the perspective of the agency, the right to review ALJs' decisions supplies insufficient control. Review permits only an after-the-fact correction of a single decision, and, although dislike of reversal undoubtedly shapes ALJs' decisions, it does not normally modify behavior as effectively as the choice between conforming to a given norm and suffering direct adverse consequences. Agencies, therefore, gaze lustfully at the forbidden fruit of performance evaluation.¹²⁰⁹

Although ALJs, once appointed, essentially achieve life tenure,¹²¹⁰ it was not always contemplated that they would be so immune from any sort of performance review. In 1941, the Attorney General's Committee on Administrative Procedure recommended an Office of Administrative Procedure to appoint examiners, exercise general supervisory powers, and remove

¹²⁰⁸5 CFR §930.211 (1991). This regulation "has remained essentially the same since [1947]." See Note, *ALJ Performance Evaluation*, *supra* note 1198 at 610, n. 113.

¹²⁰⁹Note, *ALJ Performance Evaluation*, *supra* note 1198 at p. 594-95 (footnotes omitted).

¹²¹⁰Few have been removed under §7521 and, as with other federal employees after 1978, there is no mandatory retirement age. (See Pub. L. No. 95-256, repealing requirement in 5 U.S.C. 8335, of mandatory retirement at age 70.)

examiners after a hearing and for cause. It also recommended a fixed term of 7 years.¹²¹¹

The APA itself, while affording the ALJs various protections and omitting a term appointment, did provide the Civil Service Commission with the authority to "make investigations, require reports by agencies, issue reports,...promulgate rules, appoint advisory committees..., recommend legislation...."¹²¹² The Commission, as described elsewhere in the report, did attempt to evaluate and rate incumbent examiners after the passage of the APA, but that attempt foundered.¹²¹³

2. The 1978 GAO Study

After this episode, the Commission has eschewed any attempt to evaluate sitting ALJs, instead concentrating its attention on the selection and assignment process. And with agencies essentially barred from any sort of formal performance evaluation, management concerns began to escalate. In 1978, the General Accounting Office released a major study of the administrative adjudication process.¹²¹⁴ A primary concern of the Comptroller General was with the ineffectiveness of agency personnel management with respect to ALJs:

Although Administrative Law Judges are agency employees with virtually guaranteed tenure until retirement, the Administrative Procedure Act specifically precludes agencies [from] evaluating the performance of Administrative Law Judges. This personnel management function was not assigned to any other organization or person. Evaluation, to include developing objective standards, is critical to an effective personnel management system. Without it, it is difficult, if not impossible, to meet most other major personnel management needs. GAO found that agencies are unable to

- Identify unsatisfactory Administrative Law Judges and take personnel action,

- Make effective use of Administrative Law Judges to assure maximum productivity,

¹²¹¹See Note, *ALJ Performance Evaluation*, *supra* note 1198, at 597-598, n.30.

¹²¹²APA §11, now 5 U.S.C. §1305 (1988).

¹²¹³See discussion at Chapter II (H), *supra*.

¹²¹⁴Comptroller General, *Administrative Law Process: Better Management is Needed*, General Accounting Office (May 15, 1978).

- Plan adequately for Administrative Law Judge requirements to meet workload,
- Provide the Civil Service Commission with information to determine the adequacy of its Administrative Law Judges certifying practices,
- Develop Administrative Law Judges to their maximum potential through training or diversity of experience,
- Establish appropriate management feedback mechanisms to determine the effectiveness of an Administrative Law Judge personnel management system.¹²¹⁵

In his recommendations, the Comptroller General urged Congress to amend the APA to:

- Assign responsibility for periodic evaluation of Administrative Law Judge performance to a specific organization. The responsible organization could be the Civil Service Commission by itself or as a part of an ad hoc committee composed of attorneys, Federal judges, chief Administrative Law Judges, agency officials, and the Administrative Conference of the United States.
- Clarify the extent to which the Commission can perform its normal personnel management functions in the case of Administrative Law Judges--issuing personnel management guidelines and evaluating periodically agency compliance.
- Establish an initial probationary period of up to 3 years and so eliminate immediate, virtually guaranteed, appointment and tenure.¹²¹⁶

A contemporaneous study by the Senate Governmental Affairs Committee urged that "Chief ALJs should take more responsibility for reviewing the work of their ALJs for both quality and productivity."¹²¹⁷

¹²¹⁵*Id.* at *iv.*

¹²¹⁶*Id.* at v-vi.

¹²¹⁷STUDY ON FEDERAL REGULATION, VOL. IV, "DELAY IN THE REGULATORY PROCESS," 95th Cong., 1st Sess., at 110-112, 130 (Comm. Print July 1977).

These recommendations were fueled by evidence that productivity among ALJs, even at the same agency, varied considerably. The GAO study, for example, found that at the NLRB the 9 most productive ALJs averaged 29 case dispositions per year and the 23 least productive averaged 12 cases. At OSHRC, the GAO found that 6 ALJs averaged 95 case dispositions and 13 averaged 44 cases. The Social Security Administration, as will be discussed below, identified ALJs who were performing way below average in terms of monthly case dispositions.¹²¹⁸ While these are admittedly rough indications, not involving qualitative judgments, at a minimum, they present discrepancies that need to be explained.¹²¹⁹

Perhaps in response to these studies, and in keeping with the spirit of civil service reform, Congress in 1979 and 1980 developed several legislative proposals for limited terms for ALJs, coupled with performance evaluation by outside bodies such as OPM or the Administrative Conference of the U.S., assisted by peer review panels.¹²²⁰ But these proposals were not enacted, partly because of the ALJ organizations' steadfast opposition and partly because election year politics in 1980 dampened Congress' enthusiasm for the various pending "regulatory reform" proposals.¹²²¹

3. Lawsuits By and Against ALJs

In the 1980s, legislative proposals concerning ALJs shifted to discussions of the ALJ Corps bill,¹²²² and debates over personnel evaluation shifted to the social security arena. The debate over the long-running dispute between

¹²¹⁸Comptroller General, *supra* note 1214 at 32. Figures are for FY 1975.

¹²¹⁹A more recent anecdote from the Interior Department shows that in 1987 the productivity of its Indian Probate Judges (then AJs, now ALJs) increased from 200-250 to 300-360 cases annually after a reduction in the number of judges. The remaining judges picked up the slack. See U.S. Department of the Interior, *Final Report on the Organization, Management and Operation of the Office of Hearings and Appeals* (August 1990).

¹²²⁰See Note, *ALJ Performance Evaluation*, *supra* note 1198 at 602-603 and accompanying notes.

¹²²¹Moreover, one proposed overseer of ALJ performance was notably unenthusiastic about this proposed assignment. See "Resolution of an Enhanced Role for the Administrative Conference in Procedural Reform" (Adopted December 13, 1979), 1979 Annual Report, Administrative Conference of the United States 74 (among the "undesirable additions to its primary responsibilities include. . . . Selecting or evaluating individual administrative law judges.)

¹²²²Discussed, in Chapter VII (B)(3), *infra*. Some supporters of the corps bill urged that divorcing ALJs from the employing agencies would finally allow the establishment of a performance evaluation system. See Rich, *The Central Panel System and the Decisionmaking Independence of Administrative Law Judges: Lessons For a Proposed Federal Program*, 6 W.N. ENG. L. REV. 643, 655-56 (1984).

management at the Social Security Administration and SSA ALJs over performance evaluation has been addressed elsewhere in this report.¹²²³ Suffice it to say that it dates to the late 1970s,¹²²⁴ was subject to mixed signals by Congress,¹²²⁵ and resulted in a series of decisions by the courts¹²²⁶ and the Merit Systems Protection Board¹²²⁷ that have not provided very clear signals as to the limits of agency management prerogatives with respect to ALJs.

These cases have resulted either from ALJ organizations suing the Social Security Administration to block management initiatives, or from the SSA bringing charges "for good cause" against individual low-producing ALJs pursuant to 5 U.S.C. §7521. Each effort has met with mixed success.

The ALJ-sponsored suits have arguably established the principle that it is improper for the agency to subject only those ALJs with high allowance rates to review, counseling and possible disciplinary action; but it remains unclear whether the courts would have been so critical if similar review were extended to ALJs with low allowance rates.¹²²⁸ Agencies also appear to be courting judicial opprobrium when they establish any numerical caseload *quotas* (or

¹²²³See Chapters I (C)(E); III (D), VI (D) (I).

¹²²⁴See Subcomm. on Social Security of the House Comm. on Ways and Means, *Social Security Administrative Law Judges: SURVEY AND ISSUE PAPER* (Comm. Print 1979). See also, Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 107, 125 (1981).

¹²²⁵The 1980 Social Security Disability Amendments (known as the "Bellmon Amendment") directed the SSA to increase its own-motion review of ALJ decisions, expressing concern at the high rate of ALJ reversal of state-level denials of claims and of the variance of rates among ALJs. See *Ass'n of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132, 1134 (1984) (explaining the Bellmon Amendment). See generally, D. Cofar, *Judges, Bureaucrats, and the Question of Independence: A Study of the Social Security Administration Hearing Process*, Greenwood Press, (1985).

¹²²⁶See, *Ass'n of Administrative Law Judges v. Heckler*, *id.*, and other cases cited in *Note, ALJ Performance Evaluation*, *supra* note 1198 at 606, note 84. Since that article was published, the Second Circuit rejected an ALJ challenge to SSA productivity initiatives, finding SSA's "goal" of 338 ALJ decisions per year to be reasonable, *Nash v. Bowen*, 869 F. 2d 675, 680 (2d Cir. 1989).

¹²²⁷See discussion of MSPB cases in Rosenblum, *Contexts and Contents of "For Good Cause" as Criterion For Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W.N. ENG. L. REV. 593 (1984).

¹²²⁸See *Nash v. Bowen*, *supra* note 1226 at 681. ("To coerce ALJs into lowering reversal rates—that is, into deciding more cases against claimants—would, if shown, constitute in the district court's words, 'a clear infringement of decisional independence.'") See also *Association of ALJs v. Heckler*, *supra* note 1226 at 1143. (Court is critical of SSA practices in this regard, but declines to grant injunction because "defendants appear to have shifted their focus.") See also the settlement in *Bono v. SSA* (W.D. Mo. 1979) discussed at *Note, ALJ Evaluation*, *supra* note 1198 at 606, n.86.

even goals, if they are unreasonable ones). On the other hand, agency efforts to promote uniformity¹²²⁹ and efficiency in ALJ decisionmaking, including the keeping of individualized case-production statistics as well as the establishment of "reasonable goals," have been upheld by the same courts that have otherwise been critical of agency actions.¹²³⁰

Cases brought by agencies to discipline or remove ALJs under section 7521 since 1946 number less than two dozen¹²³¹ and removals have been even rarer.¹²³² Most of the cases resulting in removals or suspensions have been based on misconduct, occasionally on-the-bench actions, but most often other

¹²²⁹*Nash v. Bowen*, *supra* note 1226 at 680. ("Policies designed to insure a reasonable degree of uniformity among ALJ decisions are not only within the bound of legitimate agency supervision but are to be encouraged.")

¹²³⁰See *Nash v. Bowen*, *supra* note 1226, *Goodman v. Svahn*, 614 F. Supp. 726 (D.D.C. 1985) (ALJ challenge to SSA management efforts dismissed).

¹²³¹The cases involving ALJs were digested by MSPB Administrative Judge Paul J. Streb, "The ALJ Digest," Unpublished memorandum, July 6, 1990, on file at the Administrative Conference. See also cases cited by Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W.N. ENG. L. REV. 807, 807-08 n.1-2. (1984) and in *Note, ALJ Evaluation*, *supra* note 1198 at 606-07 n.86.

¹²³²There have apparently been five forcible removals since 1946: *McEachern v. Macy*, 233 F. Supp. 516 (W.D.S.C. 1964), *aff'd*, 341 F.2d 895 (4th Cir. 1965) (failure to pay debts); *Hasson v. Hampton* 34 Ad. L. Rep. 2d (P&F) 819 (D.D.C. 1973), *aff'd mem.*, D. C. Cir. (April 20, 1976) (acceptance of food, drinks and entertainment from party's representative); *In re Chocallo*, 1 M.S.P.R. 335 (1980) (affirmed by unpublished opinions in D.D.C. and D.C. Cir.) (various acts of disobedience, misconduct and bias); *Social Security Administration v. Davis*, 19 M.S.P.R. 279 (1984), *aff'd*, 758 F.2d 661 (CAFC 1984) (unpublished op.) (lewd and lascivious remarks to employees); and *Social Security Administration v. Burris*, 39 M.S.P.R. 51 (1988), *aff'd*, 878 F.2d 1445 (CAFC 1989) (unpublished op.) (insubordination with travel vouchers, office disruptions, long-term pattern of outrageous conduct). In 1992, the SSA sought to remove an ALJ for (1) improperly applying Social Security law and an overly high reversal rate and (2) improperly treating *pro se* claimants. The MSPB's ALJ rejected SSA's first reason, and accepted the second reason but reduced the penalty to a 90-day suspension. *SSA v. Anyel*, MSPB ALJ Docket No. CB752910009T1 (January 16, 1992). See also *Benton v. United States*, 488 F.2d 1017 (ALJs total disability could constitute good cause, but agency could not use involuntary retirement instead). These cases do not, of course, reflect resignations or settlements after charges were brought.

behavior.¹²³³ Cases involving "insubordination" have also led to disciplinary actions.¹²³⁴ This latter type of charge is strengthened by the generally accepted notion that ALJs are subject to the general administrative direction of the employing agencies. The OPM Program Handbook on ALJs, for example, recites that, "Administrative Law Judges are subject to agency administrative direction in such nonadjudicatory matters as hours of duty, travel, parking space, office space, office procedures, staff assistance and organizational structure."¹²³⁵

Thus it seems clear that the MSPB procedure is a sufficient "weapon" against ALJs engaged in misconduct or insubordination.¹²³⁶ The difficulty with the disciplinary process comes with respect to cases involving low productivity or inefficiency. In these cases, all involving the SSA, the agency has been unsuccessful in its cases before the MSPB.

In the trilogy of SSA-ALJ productivity cases decided by the MSPB in 1984,¹²³⁷ the agency brought to the MSPB what it considered to be evidence of

¹²³³E.g., *id.* See also *SSA v. Burris*, 39 M.S.P.R. 51 (1988) (abusive language toward supervisors would have warranted 30-day suspension; misuse of free mail privilege would have warranted 60-day suspension; removal on other grounds); *SSA v. Friedman*, 41 M.S.P.R. 430 (1989), (canceling hearings without reason; 14-day suspension); *SSA v. Glover*, 23 M.S.P.R. 57 (1984) (vulgarity toward supervisor, throwing files; 120-day suspension); *SSA v. Carter*, 35 M.S.P.R. 485 (1987) (sexual harassment of employees; 70-day suspension); *Department of Commerce v. Dolan*, 39 M.S.P.R. 314 (1988) (kicking employee; 14-day suspension); *In re Glover*, 1 M.S.P.R. 660 (seizing memo, pushing employee, pressing cover of copy machine on employee's hand; 30-day suspension); *In re Spielman*, 1 M.S.P.R. 53 (1979) (falsifying facts on ALJ application to seek higher grade; 60-day suspension). All of these cases were affirmed by unpublished opinions in the courts of appeals. See Streb, *ALJ Digest*, *supra* note 1231.

¹²³⁴E.g., *SSA v. Brennan*, 27 M.S.P.R. 242 (1985), *aff'd sub. nom. Brennan v. DHHS*, 787 F.2d 1559 (CAFC) (refusal to follow case processing procedures, including routing of mail, use of worksheds, etc.; 60-day suspension); *SSA v. Manion*, 19 M.S.P.R. 298 (1984) (refusal to schedule hearings; 30-day suspension); *SSA v. Arterberry*, 15 M.S.P.R. 320 (1983); (refusal to hear cases outside area; 30-day suspension); *SSA v. Boham*, 38 M.S.P.R. 540 (1988) (refusal to hear cases requiring travel; 75-day suspension).

¹²³⁵*Supra* note 985 at 9. The Handbook goes on to caution, "Of course, administrative direction in such matters may not be used as a means of affecting, controlling, or sanctioning [ALJ's] decisions in 'formal' proceedings." *Id.*

¹²³⁶Not that the agency always prevails in these claims. See *SSA v. Glover*, 23 M.S.P.R. 47, 70-78 (1984) (criticizing staff member in decision or in memo to supervisor not good cause for discipline); *SSA v. Brennan*, 27 M.S.P.R. 242, 248-49 (1985) (critical memo to supervisor not good cause); *SSA v. Burris*, 39 M.S.P.R. 51, 60-63 (1988) (failure to stop criticizing agency in decision not good cause). In each of these cases, however, discipline was approved on other grounds. It also is fair to ask whether "insubordination" covers an ALJ's repeated failure to follow agency policy. No charges brought on such a basis have been identified.

¹²³⁷*SSA v. Goodman*, 19 M.S.P.R. 321; *SSA v. Brennan*, 19 M.S.P.R. 335, *opinion clarified*, 20 M.S.P.R. 35; and *SSA v. Balaban*, 20 M.S.P.R. 675.

unacceptably low productivity. In the lead case, SSA produced evidence that the judge's disposition rate for the years in 1980-81 was 15 to 16 cases per month compared to an average of 30 to 32 for all SSA ALJs. In addition, his average monthly "pending" caseload for 1981 was 64, compared with 178 for all SSA ALJs.¹²³⁸ After a hearing, the MSPB ALJ rejected the ALJ's legal defenses and recommended dismissal.

The MSPB heard oral arguments on the case and unanimously ruled that although "there is no generic prohibition to the filing of this charge," the SSA's evidence that the judge's case dispositions were half the national average was not enough to show unacceptably low productivity "[i]n the absence of evidence demonstrating the validity of using its statistics to measure comparative productivity." The Board opined that SSA cases were not fungible and that SSA's comparative statistics did not take into sufficient account the differences among these types of cases. The same reasoning was later applied to two other pending cases against SSA ALJs with similar productivity records.¹²³⁹

The result amounted to a pyrrhic victory for the SSA. The agency won the right to bring low-productivity-based charges against ALJs, but was handed a virtually insurmountable burden of proof. Despite the fact that social security disability cases, because of their high volume and relative fungibility, lend themselves to statistical comparison (at least when compared to other types of agency adjudication), the MSPB found that several years' worth of half-of-average production did not meet its test without greater analysis of the particular cases heard by the cited judge. Moreover, two of the judges involved in these cases later recovered attorney fees of almost \$250,000 against the Government.¹²⁴⁰ It is thus not surprising that SSA has brought no productivity-based charges to the MSPB since 1984.

Nevertheless, the *Goodman* trilogy, by establishing the principle that agencies may, for the purpose of bringing Section 7521 actions, collect case-production statistics, does provide a basis for agency managerial initiatives

¹²³⁸See *Rosenblum supra* note 1227, at 621 (citing the MSPB ALJ's recommended decision).

¹²³⁹*SSA v. Brennan* and *SSA v. Balaban*, see note 1237 *supra*.

¹²⁴⁰Telephone interview with Larry Mason, Executive Assistant to the SSA Associate Commissioner, Office of Hearings and Appeals (referring to *Goodman* and *Balaban* cases), August 1992. See also *SSA v. Goodman*, 33 M.S.P.B. 325 (1987) (finding *Goodman* entitled to attorney fees and urging settlement as to amount.)

notwithstanding the statutory exemption of ALJs from the performance appraisal system.¹²⁴¹

The good cause procedure for disciplining "bad apple" ALJs is rightly seen as a protection of the judges' decisional independence. It requires a full APA hearing before an MSPB ALJ. The "for good cause" test is taken quite seriously by the MSPB and, obviously, an agency will think twice before mounting an expensive, time consuming, and disruptive case against one of its own sitting judges. This is as it should be. Agencies should view the initiation of such proceedings, whether on grounds of misconduct, insubordination, or low productivity, as a last resort.

Consistent with this view, however, agencies should establish other approaches for assessing and dealing with apparent or alleged instances of misbehavior, bias or unacceptably low productivity on the part of their ALJs. The two guiding principles for doing this ought to be safeguarding decisional independence and peer review. It is interesting to note that few ALJs surveyed for this report report frequent problems with overly close supervision of work (4%) or with pressure from agencies for different decisions (8%). On the other hand, 40% complain of pressure from agencies for faster decisions.¹²⁴²

4. The Conference Supports Management Norms for ALJs

The Administrative Conference in 1978 combined these two principles into an approach to develop appropriate managerial norms for ALJs at the Social Security Administration. In Recommendation 78-2 the Conference said:¹²⁴³

The Bureau of Hearings and Appeals (BHA) [now Office of Hearings and Appeals (OHA)] possesses and should exercise the authority, consistent with the administrative law judge's decisional independence, to prescribe procedures and techniques for the accurate and expeditious disposition of Social Security Administration claims. After consultation with its administrative law judge corps, the Civil Service Commission, and other affected interests, [OHA] should

¹²⁴¹In some respects this is not new. As early as 1960, the Civil Service Commission denied a petition from 19 ICC examiners who challenged a new agency monthly work report. The Commission stated "... regardless of this independent status, a hearing examiner is nonetheless an employee and it is both the agency's right and duty to have an account of his work and his hours of duty." Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 *FED. BAR J.* 351, 424 (1967).

¹²⁴²See 1992 ALJ survey, question #14 (Appendix IV A).

¹²⁴³Recommendation 78-2, "Procedures for Determining Social Security Disability Claims," §(A)(2); 1 CFR 305.78-2 (1991)

establish by regulation the agency's expectations concerning the administrative law judges' performance. Maintaining the administrative law judge's decisional independence does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies underlying the Social Security Administration's fulfillment of statutory duties.

In 1986, in its Recommendation 86-7 on case management in agency adjudication, the Conference refined, and generalized, its earlier recommendation:¹²⁴⁴

Personnel management devices. Use of internal agency guidelines for timely case processing and measurements of the quality of work products can maintain high levels of productivity and responsibility. If appropriately fashioned, they can do so without compromising independence of judgment. Agencies possess and should exercise the authority, consistent with the ALJs or other presiding officer's decisional independence, to formulate written criteria for measuring case handling efficiency, prescribe procedures, and develop techniques for the expeditious and accurate disposition of cases. The experiences and opinions of presiding officers should play a large part in shaping these criteria and procedures. The criteria should take into account differences in categories of cases assigned to judges and in types of disposition (e.g., dismissals, dispositions with and without hearing). Where feasible, regular, computerized cases status reports and supervision by higher level personnel should be used in furthering the systematic application of the criteria once they have been formulated.

Under both of these recommendations, the Conference emphasized safeguarding decisional independence, as well as significant ALJ participation in the development of reasonable guidelines.

Application of such criteria would not only improve agency-wide performance (indeed, they should be established and applied at the agency-review stage as well), they would also make it possible for agencies to better

¹²⁴⁴Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1, 1 CFR §305.86-7 (1991). Recently this recommendation was adopted by President Bush's Executive Order 12278, "Civil Justice Reform" Sec. 3, 56 Fed. Reg. 55195, 55199 (October 25, 1991).

address individual managerial problems. In the first place, the chief ALJ or other managing official (e.g., Director, Office of Hearings) could circulate statistics on case dispositions among the agency judges.

This "peer pressure" would likely have a beneficial effect on performance. Indeed, agencies employing large numbers of ALJs or AJs who resolve the same classes of disputes (e.g., SSA disability cases, immigration cases) should circulate periodic statistical analyses of aggregate and individual decisionmaking patterns. Through this mechanism, each judge would be able to compare his or her pattern of decisionmaking with that of his or her peers and with group norms. The ability to self-identify as, for instance, an unusually low-productivity adjudicator or an unusually generous or stingy adjudicator, when combined with peer pressure, should enhance both productivity and inter-ALJ consistency. Indeed, to their credit most ALJs responding to the survey acknowledge that mediocrity of some ALJs is at least a "somewhat" serious problem.¹²⁴⁵

Where peer pressure does not solve a problem of unacceptably low productivity, other measures should be available to an agency. Under existing MSPB caselaw, agencies have to fully document a statistical case to succeed in showing that low productivity is cause for discipline or dismissal under section 7521. If, however, agencies follow Recommendations 78-2 and 86-7 and develop (with ALJ participation) appropriate norms and statistical records, the MSPB route should become more feasible. This is not to say that agency chief ALJs and office managers should rush to bring actions against less-than-average producers. Obviously, some judges produce on average less than others.¹²⁴⁶ Moreover, other techniques such as counseling, training, and opportunities to improve performance should be tried before filing charges before the MSPB. Nevertheless, the possibility of filing charges should be a real one.

5. A Proposed Approach

To eliminate any confusion about agencies' ability to develop, maintain and enforce these properly arrived at standards, the flat statutory exemption of ALJs from the performance appraisal system and the broader OPM regulation

¹²⁴⁵See 1992 ALJ survey question #23 (Appendix IV A). Of those responding, 17% labeled this a "very" serious problem; 56% a "somewhat" serious problem.

¹²⁴⁶See Note, ALJ Evaluation, *supra* note at 1198 at 618, pointing out the danger of allowing production quotas to keep ratcheting upwards: "The purpose of the quota is to encourage underproducers to catch up with the average. Then the average goes up. However, if the quota is based on the average, the quota goes up. Standards simply edge higher and higher."

prohibiting agencies from "rating" the performance of ALJs should be modified.

One might legitimately suggest that both provisions simply be repealed, especially since the new salary statute for ALJs effectively ensures compliance with the APA's injunction that agency ratings or recommendations not influence OPM's setting of ALJ pay. Indeed, given the security of ALJ pay, one possible approach to performance evaluation of ALJs would be to maintain the section 7521 procedure for misconduct or insubordination cases only and simply subject ALJs to either the SES or general employee personnel appraisal system. After all, both systems are replete with provisions that ensure that the evaluations and resulting adverse actions are fair.¹²⁴⁷ Moreover, the rate of removals under either system is extremely low. Of 2.1 million federal employees (not including postal workers) 425 were removed in fiscal year 1989 and 403 in fiscal year 1990 on the basis of performance.¹²⁴⁸ From an SES workforce of about 8,000, four were dismissed in fiscal year 1988, five in fiscal year 1989, three in fiscal year 1990, and zero in fiscal year 1991.¹²⁴⁹ The newly installed recertification process for SES members has led to nine removals or demotions.¹²⁵⁰ This level of annual removal for performance of about 1 in 5,000 general workers and 1 in 2,500 SES members should hardly occasion great concern among ALJs--especially if any application of such a system to ALJs made it clear that evaluation would not infringe upon the judge's decisional independence.¹²⁵¹

¹²⁴⁷See Note, *ALJ Evaluation*, *supra* note 1198 at 623, n. 207, pointing to the following provisions: 5 U.S.C. §4302(b)(6) (1988) (no employee can be disciplined for poor performance without being given an opportunity to improve); *id.* §4303(b)(1)(A) (an employee subject to removal is entitled to 30 days advance notice identifying specific instances of unacceptable performance); *id.* §4303(c)(2)(A) (a demotion or removal may be based only on unacceptable performance during the immediately preceding year); *id.* §4303(c)(2)(D) (an employee whose performance improves is entitled to have his or her record cleared of any reference to the performance based adverse action); *id.* §4301(3) (defining unacceptable performance as the failure to meet established standards). The SES performance appraisal system, 5 U.S.C. §§4311-4315, contains similar safeguards, including review by peers (performance review boards) and guarantee of GS-15 job if removed.

¹²⁴⁸Source: Office of Workforce Information, Personnel Systems and Oversight Group, OPM (March 1992).

¹²⁴⁹Source: Office of Executive Management Policy, Human Resources Development Group, OPM (March 1992).

¹²⁵⁰"*Big Bosses Pass Test*" (by Mike Causey), *Washington Post*, March 20, 1992 at C.2.

¹²⁵¹See, e.g., Attorney General Levi's Opinion that an agency could not reprimand an ALJ for issuing an opinion in a case notwithstanding the agency's commitment to a federal judge that it withhold administrative action. The Opinion characterized the ALJs action as an exercise of "judgment, which in the context, was essentially judicial." 43 Op. Att'y Gen. 1, 6 (1977).

Nor is it difficult to conceive of a structural system to honor separation-of-functions concerns and provide peer review in such evaluations. Most agencies have (or could have) chief ALJs, who could perform this task well. Large-volume agencies have deputy chiefs or regional chiefs. While these chiefs, like other top managers in agencies, are appointed to the position by the agency,¹²⁵³ it has been recognized that their position (and the increased compensation that comes with it) rests in the individual's "substantial administrative and managerial responsibilities," not on policy expertise.¹²⁵³ Thus, it is unlikely that agencies would exert improper pressures on chief ALJs to use improper criteria in effectuating a performance appraisal system. Nevertheless, if chief ALJs were given the lead role in this area, it would likely be wise to increase their insulation from improper pressures from agency policymakers by making their appointment and removal subject to review by OPM. This would permit chief ALJs to engage in the normal supervisory and managerial responsibilities without fear that their actions might be based on impermissible pressure or motives. Chief ALJs should, however, be required to submit their performance appraisal system (including any productivity guidelines) to OPM for its review and certification. This would ensure action by the chief ALJ while also removing the agency (*qua* agency) from this evaluation process. Indeed, if this system were put in place, section 7521 should probably be amended to have the chief ALJ, in the name of OPM, bring the charges against wayward ALJs before the MSPB.¹²⁵⁴ Finally, although performance-based monetary bonuses may be problematic, there is no reason the chief ALJ could not be authorized to recommend nonmonetary awards or commendations to outstanding ALJs.

The success of this approach to performance appraisal depends heavily on participation of ALJs in the development of performance criteria and guidelines. In some situations, peer review of problem performers can be useful as well. Several agencies have already instituted peer review for certain types of complaints or allegations against ALJs. The Department of Labor's Office of Administrative Law Judges has established peer review procedures

¹²⁵²See Rosenblum, *supra* note 1227 at 613-14, citing Attorney General Katzenbach's opinion that agencies may promote ALJs to Chief ALJs without Civil Service Commission participation, 42 Op. At'y Gen. 289 (1964).

¹²⁵³*Id.*

¹²⁵⁴It might be argued that it is unnecessary to institute a somewhat cumbersome and possibly disruptive system of annual performance appraisal of *all* ALJs. Arguably it would be sufficient to amend the exemption from performance appraisal to allow agencies to undertake them on an individual basis as a prelude to bringing a charge under section 7521. Chief ALJs would then await "probable cause" before undertaking a written appraisal of an ALJ's performance--giving the judge a chance to respond to the appraisal and improve his or her performance. This would simply add to the notice, fairness, and documentation of ensuing action at the MSPB.

for handling complaints of misconduct or disability on the part of ALJs.¹⁷⁹ It set up an advisory committee for an informal inquiry made up of three members selected by the Chief ALJ from a panel of six judges elected by the DOL ALJs. Regional advisory committees are also provided for. Although not used often,¹⁸⁰ this sort of procedure is a good model for other large ALJ corps, and the Social Security Administration, which has recently had to defend several class action lawsuits seeking injunctive relief against certain allegedly biased ALJs,¹⁸¹ has instituted a similar procedure modeled on procedures already in effect for peer review of allegations of misconduct by federal Article III judges.¹⁸²

Obviously, agencies with a smaller number of judges will find it more difficult to set up peer review panels (although the SES performance review board system copes with this by rotating peers from among the smaller agencies). On the other hand, agency chief judges in those agencies will have a closer relationship with individual ALJs, thus making many of the managerial tasks easier. Moreover, the promulgation of a model code of

¹⁷⁹See 46 Fed. Reg. 28050 (May 22, 1981), amended at 46 Fed. Reg. 30843 (July 5, 1983) and 52 Fed. Reg. 32973 (September 1, 1987).

¹⁸⁰See Note, *ALJ Evaluation*, *supra* note 1198 at 625, n.219 (reporting it has been invoked twice as of 1985). According to the Deputy Chief ALJ, it has not been invoked in the past 5 years, although it has been "suggested" several times. Conversation with Department of Labor Deputy Chief ALJ John Vitone (February 1992).

¹⁸¹For a description of these cases, see "Judicial Independence of Administrative Law Judges at the Social Security Administration," Hearings before the House Subcomm. on Social Security, Committee on Ways and Means, 101st Cong., 2nd Sess., Serial 101-117 (June 13, 1990) at p. 72 (Statement of Jonathan M. Stein, General Counsel, Community Legal Services, Inc., Philadelphia, Pa.) These allegations have led to a GAO investigation, which concluded that there had been a statistically significant bias against black applicants in ALJ decisions. The GAO study, entitled "Social Security: Racial Difference in Disability Decisions Warrant Further Investigation," discloses that over 10% of SSA ALJs had allowance rates that disfavored black claimants by more than 25%. GAO/HRD-92-56 (April 1992). See also "Benefits Are Refused More Often to Disabled Blacks, Study Finds," *N.Y. Times*, May 11, 1992, A-1. SSA Commissioner King raised concerns about GAO's methodology, but also pledged to vigorously deal with the problems raised by the report. See letter from Commissioner King to Lawrence J. Thompson, GAO, February 4, 1992, reprinted in GAO report at 74-76.

¹⁸²"Social Security Administration Procedures Concerning Allegations of Bias or Misconduct by Administrative Law Judges," 57 Fed. Reg. 49186 (October 30, 1992). See also, "Proposed Amended Rules for the Processing of Certificates That a Judicial Officer Might Have Engaged in Impeachable Conduct," Judicial Conference of the United States, 56 Fed. Reg. 66644 (December 24, 1991).

judicial conduct for ALJs¹⁸³ will provide significant assistance in misconduct or complaint cases.

Finally, there is one aspect of the MSPB process for hearing "for cause" cases that merits reform. The Board at present, and for over a decade, has employed only a single administrative law judge to preside over these cases (and a few other low-volume categories of cases). This places that individual ALJ in the uncomfortable position of repeatedly having to judge his peers. Nor are recusal motions a realistic possibility. It would be far better, given the nature of these cases, for MSPB to expand its pool of available judges to hear such cases.

It has been suggested that MSPB could have these cases heard by a panel of three ALJs, with two of them being employed by agencies other than the MSPB or the prosecuting agency, but assigned in rotation from a list kept by OPM.¹⁸⁴ Multijudge peer review panels are common in both the states and federal system¹⁸⁵ and could easily be incorporated into the MSPB procedure.¹⁸⁶

6. Evaluation of Judicial Performance at the State and Federal Level

Evaluation of judicial performance is hardly a new or radical idea. Evaluation programs exist at both the federal and state court levels, and administrative law judges in a large number of states are also subject to performance evaluation.

The American Bar Association has issued Guidelines concerning the proper role of such evaluations, and that supply specific performance measures to be applied.¹⁸⁷ The Guidelines recognize that such programs should be "structured and implemented so as not to impair the independence of the judiciary,"¹⁸⁸ but they also encourage use of performance evaluation for "self-

¹⁸³Model Code of Judicial Conduct For Federal Administrative Law Judges, endorsed by the National Conference of the Administrative Law Judges, Judicial Administration Division, American Bar Association (February, 1989).

¹⁸⁴See Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W. N. ENG. L. REV. 807, 820 (1984).

¹⁸⁵*Id.* Citing California's commission system in particular.

¹⁸⁶Indeed, this would not require a statutory amendment, since the APA permits agencies to use "one or more" ALJs (5 USC §556 (b)(3)) and OPM administers an ALJ loan program under 5 USC §3344. If the many MSPB AJs were converted to ALJs, the need for loans would be eliminated.

¹⁸⁷AMERICAN BAR ASSOCIATION GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE, Special Committee on Evaluation of Judicial Performance, August 1985.

¹⁸⁸*Id.*, Guideline 1-2 (p. ix).

"improved design and content of continuing judicial evaluation programs," and "retention or continuation of judges in office."¹²⁶⁵

The ABA Guidelines provide the following "performance measures":¹²⁶⁶

- (1) Integrity -- avoidance of impropriety and appearance of impropriety, freedom from bias, impartiality.
- (2) Knowledge and understanding of the law -- legally sound decisions, knowledge of substantive, procedural and evidentiary law of the jurisdiction, proper application of judicial precedent.
- (3) Communication skills -- clarity of bench rulings and other oral communications, quality of written opinions, sensitivity to impact of demeanor and other non-verbal communications.
- (4) Preparation, attentiveness and control over proceedings -- courtesy to all parties, willingness to allow legally interested persons to be heard unless precluded by law.
- (5) Managerial skills -- devoting appropriate time to pending matters, discharging administrative responsibilities diligently.
- (6) Punctuality -- prompt disposition of pending matters and meeting commitments of time according to rules of court.
- (7) Service to the profession -- attendance at and participation in continuing legal education, ensure that the court is serving the public to the best of its ability.
- (8) Effectiveness in working with other judges -- extending ideas and opinions when on multi-judge panel, soundly critiquing work of colleagues.

Whether or not they follow the ABA Guidelines, judicial evaluation programs are increasingly being used at the state level. According to the latest survey of state activity, "six states and the courts of the Navajo Nation operate judicial evaluation programs, and eight states are actively developing a program or are close to implementing one."¹²⁶⁷ Among the stated purposes of

¹²⁶⁵*Id.* Guideline 1-1 (p. ix).

¹²⁶⁶*Id.* Guidelines 3-1 to 3-6 (p. x-xii).

¹²⁶⁷Keilitz and McBride, *Judicial Performance Evaluation Comes of Age*, STATE COURT J., Winter 1992, 4-5. The six states with established programs are AK, CO, CT, IL, NJ and UT. The eight states developing such programs are AZ, DE, HA, MD, MN, NM, ND and WA. See also, Feigenbaum, *Statewide Judicial Performance Evaluation: How New Jersey Judges the Judges*, INNOVATIONS (National Center for State Courts), 1984.

some of these programs is to generate information to be used in judicial retention elections or in reappointment decisions.

The federal judiciary has also shown interest in judicial evaluation. Under the auspices of a Judicial Conference Subcommittee on Judicial Evaluation, the U.S. District Court for the Central District of Illinois recently completed a pilot judicial evaluation project involving the voluntary participation of judges and attorneys.¹²⁶⁸ The report on this pilot project states that "the response of participants was overwhelmingly positive."¹²⁶⁹ In addition, the Seventh, Eighth and Ninth Circuit Courts of Appeals have used performance evaluation in making retention decisions for bankruptcy judges and magistrates.¹²⁷⁰ Finally, it is also worth noting that Congress has expressed its concerns about current arrangements relating to discipline and removal of federal judges by creating the blue-ribbon National Commission on Judicial Discipline and Removal, scheduled to complete its work in 1993.¹²⁷¹

Within the state administrative judiciary, there is considerable use of performance evaluation. All but 4 of the 18 states (plus New York City) that have adopted the "central panel" model of agency adjudication (whereby some or all state ALJs are located in a central organization to be assigned to agency cases on an as-needed basis)¹²⁷² use at least the normal type of civil service evaluation. Eight states (plus New York City) submitted to the Conference specially tailored performance appraisal forms for their judges and one state (Maryland) submitted its proposed plan.¹²⁷³

Perhaps the most sophisticated program is New Jersey's.¹²⁷⁴ The New Jersey Office of Administrative Law has developed an evaluation system designed to reflect performance of ALJs, to indicate the need for improvement,

¹²⁶⁸Federal Judicial Center, *The Judicial Evaluation Pilot Project of the Judicial Conference Committee on the Judicial Branch*, August 1991 (by Darlene R. Davis).

¹²⁶⁹*Id.* at 1.

¹²⁷⁰*Id.* at 2-3.

¹²⁷¹Authorized by Pub. L. No. 101-650 (Title IV, Subtitle II), 104 Stat. 5124.

¹²⁷²The 18 states are CA, CO, FL, HA, IA, MD, MA, MN, MO, NJ, NC, ND, PA, TN, TX, WA, WI and WY. Information supplied by Tracey Brown, Editor, *The Central Panel*, Lutherville, MD (301) 321-3993.

¹²⁷³The eight states submitting appraisal forms were CO, FL, MN, NI, ND, TN, WA and WI.

¹²⁷⁴The following description is derived from a telephone interview with Randy E. Bloom, Assistant Director Judicial Evaluation and Education, New Jersey Office of Administrative Law (July 1992) (Confirming written materials on file at Administrative Conference.)

and also to assist in the Governor's reappointment decisions.¹⁹⁹ The system focuses on three areas of judicial performance: competence, conduct, and productivity, and uses a combination of evaluation techniques for assessing an ALJ's performance.

The evaluation of an ALJ's competence in New Jersey is measured primarily on the judge's written decisions which are reviewed by the Director. Decisions reflective of the judge's major subject matter are randomly selected and are reviewed for factors such as structure, and substance, including: clarity, proper differentiation of significant and insignificant facts, proper consideration of statutory, regulatory, and constitutional principles.

The conduct of an ALJ is assessed primarily through the use of case-specific questionnaires to counsel and parties on a random basis. There are separate questionnaires for attorneys, pro se litigants, other litigants, and state agencies. The attorney questionnaires are quite technical and relate to substantive legal issues as well as settlement skills. The party questionnaires are less technical and relate more to the judge's conduct of the hearing and ability to explain the process to the litigant. The agency's questionnaire is mainly concerned with the judge's written decision but also includes topics such as the judge's compliance with timeframes.

The third area of evaluation is concerned with how the ALJ handles his or her caseload. Computers are used to generate reports which present average time per case, average time from the judge's receipt of the file to the issuance of a decision, and other administrative timing matters. After all of the above data is gathered, each judge is afforded an opportunity to review the information collected. The Office formerly used four performance levels (marginal, acceptable, commendable and distinguished), but eliminated these ratings when it stopped using evaluations for salary review. Now the ALJ is simply provided with the summary results of the evaluation.

In general the evaluation criteria in the state central panels concentrate on three main areas: (1) the ability to preside over hearings both in terms of conducting orderly, speedy hearings and in terms applying principles of law and appropriate procedures, (2) adequacy of decisionmaking and (3)

¹⁹⁹New Jersey ALJs are initially appointed by the Governor and confirmed by the Senate for a 1-year term. After that year the Governor may reappoint (without Senate confirmation) for 4 more years. Subsequent reappointments are for 5-year terms and require Senate confirmation. The practice of the Office of Administrative Law is to conduct evaluations every year of the first 5 years, in only the years 4 and 5 of the second term and year 5 of the third term. When reappointment decisions are looming, the Director sends a confidential letter to the Governor about the incumbent based on the evaluations undertaken up to that point. *Id.*

interpersonal relations with staff and caseload management. In most states, the chief ALJ or panel director does the evaluating (although Idaho, Oregon and Washington have a unique arrangement of evaluating each other's ALJs).¹²⁷⁶ In some states, the purpose of the evaluation (beyond meeting usual civil service requirements) is not explained, although several states explicitly use such evaluations for counseling, training, reassignment, advancement, and even salary adjustments.

Finally, as noted earlier in this report, federal AJs are not exempt from performance appraisal and several important groups of AJs are subject to performance ratings. Among the actual appraisal forms on file at the Conference are those applicable to AJs at MSPB, DISCR, the Trademark Trial and Appeal Board, and the DHHS Departmental Appeal Board.

7. Conclusion

In summary, although the Administrative Procedure Act's procedure for disciplining or removing ALJs for cause after hearing by the MSPB has worked relatively well in misconduct or insubordination cases (except for the overreliance on the single ALJ at MSPB), it has not provided a realistic forum for agency dissatisfaction with low-producing ALJs. In misconduct and insubordination cases, or where a judge may be disabled, agencies with a large corps of ALJs should establish peer review panels for handling complaints and possibly triggering MSPB actions. To assist agencies in holding ALJs accountable for unduly low productivity, the statutory and regulatory impediments to performance appraisals and ratings should be either eliminated or at least modified to clarify that chief ALJs are responsible for management of ALJ performance. Such responsibilities should include developing (with the input of ALJs and advisory groups) appropriate case-processing guidelines; collecting, maintaining and disseminating data on individual ALJ performance in light of those guidelines; conducting performance appraisals of ALJs at appropriate intervals; undertaking counseling, training or other ameliorative activities; and, where good cause exists, bringing charges against individual ALJs before the MSPB. Chief ALJs, when assigned these specific managerial responsibilities, should also be granted additional independence from agency control by making their appointment and removal subject to OPM review. Establishment of such a system would bring the federal administrative judiciary into the mainstream of judicial administration as it is now practiced in many leading jurisdictions throughout the nation.

¹²⁷⁶Telephone interview with David R. LaRose, Chief Administrative Law Judge, State of Washington Office of Administrative Hearings (July 1992).

VII. Effects of ALJ and Non-ALJ Decisions

A. The APA Model

In the absence of judicial or agency review, an adjudicatory officer's initial decision resolves a dispute on a final basis. APA §557¹²⁷⁷ provides for this effect. "When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by rule." In some agencies, very few initial decisions become final in this manner because most decisions are reviewed by the agency. In other agencies, particularly those with large caseloads, a high proportion of initial decisions become final in this manner because no party appeals and the agency lacks the resources to review all initial decisions on its own motion. At many benefit agencies, most initial decisions that grant benefits become final, while most initial decisions that deny benefits are reviewed. This disparity exists because the only party who can appeal is the applicant for benefits, and applicants appeal only when they lose.

If an initial decision is reviewed by the agency but not by a court, the officer's initial decision has no effect at all except to the extent that the agency chooses to adopt it or to agree with some or all of its findings and conclusions. This effect results from another sentence in APA §557.¹²⁷⁸ "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." Thus, absent a rule through which the agency voluntarily limits the scope of its review, the agency can engage in plenary review and substitution of its judgment for that of the ALJ. The same is even more true when the agency reviews the decision of a non-ALJ, since not even the constraints of the APA would normally bind the agency in such a case.

If an initial decision is subject both to agency review and to judicial review, and the agency's resolution of the issues differs from the resolution in the initial decision, the effect of the initial decision is more complicated to describe. Generally, it is the agency's decision that is entitled to deference from a reviewing court, and the initial decision of the adjudicatory officer is merely part of the record on which the court bases its decision on review.

¹²⁷⁷5 USC §557.

¹²⁷⁸5 USC §557.

Underneath that seemingly simple rule lurks a great deal of complicated case law, however.

An initial decision, or an agency decision on review of an initial decision, is based on a series of findings and conclusions that can fall into three categories: statutory interpretation, policy, and fact. Each category is treated in a somewhat different manner by a reviewing court. Moreover, courts sometimes create subcategories that are treated differently (e.g., primary facts versus secondary inferences). The categories and subcategories are often difficult to distinguish, and the thousands of court decisions reflect considerable variation among judges.

1. Statutory Interpretation

The starting point in understanding judicial review of agency interpretations of statutory language is the two-step test the Supreme Court established in *Chevron v. NRDC*:¹²⁷⁹

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

As the Court reconceptualized the process of giving meaning to language in agency-administered statutes in *Chevron*, only step one of the test involves statutory interpretation in the traditional sense of the term. Courts apply step one independent of any reasoning or conclusion in either the initial decision or the agency decision. Increasingly, courts decide whether Congress "has directly addressed the precise question at issue" by reference to the "plain meaning rule" (e.g., Webster defines the statutory term to mean...).¹²⁸⁰ In some cases, however, courts supplement their effort to determine the meaning of language by reference to the dictionary with resort to other interpretive tools

¹²⁷⁹467 U.S. 837, 842-43 (1984).

¹²⁸⁰See Schauer, *Statutory Construction and the Coordination Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

(e.g., legislative history, policy analysis, canons of statutory construction, inferences drawn from the stated purposes of a statute, or inferences drawn from the position of the disputed language in the structure of the statute). Whatever combination of tools a court might use to apply step one of *Chevron*, it does not defer either to the agency or to the initial decision of the adjudicatory officer. If either of these documents plays any role in a court's application of step one, it is a role limited to the inherent persuasive power of the reasoning in one of the two documents.

Once a court has applied step one of *Chevron*, the process of statutory interpretation is over. Step two does not ask the question: What does this language mean? It asks a very different question: Given that the language of the statute is sufficiently malleable to support more than one potential agency provided meaning, is the meaning the agency has given it in this case permissible? That question involves judicial review of agency policymaking, rather than judicial determination of issues of law.

2. Policy Decisions

Courts are highly deferential to agency resolutions of policy issues. The leading case on judicial review of agency policy decisions is *Baltimore Gas & Electric Co. v. NRDC*:¹²¹

Resolution of these fundamental policy issues lies...with Congress and the agencies to which Congress has delegated authority....

A reviewing court must remember that the commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a court must be at its most deferential.

Courts accord little deference to agency adjudicatory officers' resolution of policy issues because agencies have significant comparative advantages both with respect to political accountability and with respect to expertise. See Chapter VI(C)(1). The problem here lies, however, in the frequent difficulty of distinguishing between policy issues and factual issues. The circuit court opinion reversed in *Baltimore Gas & Electric* illustrates the tendency of many courts to mischaracterize a policy issue as an issue of fact. The circuit court

¹²¹462 U.S. 87, 97, 103 (1983). See also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (court cannot interfere with an agency's "forecast of the direction in which the future public interest lies").

had reversed the agency because it thought it was reviewing an issue of fact for which the agency had insufficient evidentiary support. The Supreme Court reversed the circuit court because it concluded that the dispute was over policy rather than facts.

3. Findings of Fact

APA §706(2)(E)¹²⁸² provides that agency findings of fact must be affirmed if they are supported by "substantial evidence." The substantial evidence test had its genesis in appellate court review of jury verdicts. During the 19th century, the practice developed of reviewing jury verdicts less intensively than findings of judges without juries, and early in the 20th century the difference was crystallized and extended to judicial review of agency findings.¹²⁸³

The Supreme Court has often lumped together the review of jury verdicts and of administrative findings. "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' ...and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."¹²⁸⁴

In 1946 Congress incorporated the substantial evidence test in the Administrative Procedure Act and made the test applicable to all agency findings adopted in formal adjudication or formal rulemaking.¹²⁸⁵ The test has not changed in most respects over the course of the century in which it has been applied to findings by juries and by agencies.

The Court announced an important clarification of the meaning of the substantial evidence test shortly after passage of the APA, in *Universal Camera Corp. v. NLRB*:¹²⁸⁶ "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement...[in APA §706] that courts consider the whole record." Thus, the evidence in support of an agency finding must be sufficient to support the conclusion of a reasonable person after considering all the evidence in the record as a whole, not just the evidence that is consistent with the agency's finding. The helpful clarification in *Universal Camera*

¹²⁸²5 USC §706(2)(E).

¹²⁸³See Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944).

¹²⁸⁴*NLRB v. Columbian E. & S. Co.*, 306 U.S. 292, 300 (1939), quoting from *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938).

¹²⁸⁵5 USC §706(2)(E).

¹²⁸⁶340 U.S. 474, 488 (1951).

precludes affirmance of an agency finding in the extreme case where the evidence that detracts from the finding is dramatically disproportionate to the evidence that supports the finding (e.g., a finding based on the testimony of one obviously biased witness that is contradicted by the testimony of multiple unbiased witnesses or powerful documentary and circumstantial evidence).

The substantial evidence test remains extremely deferential to agencies after the *Universal Camera* clarification. The Court explained the nature of the test and its policy underpinnings in *Consolo v. Federal Maritime Commission*.¹²⁸⁷ The Court referred to its 1938 and 1939 opinions in *Consolidated Edison* and *Columbian E & S* and said:

Although these two cases were decided before the enactment of the Administrative Procedure Act, they are considered authoritative in defining the words 'substantial evidence' as used in the Act....This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence....Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute.

Courts sometimes confuse deference to agency findings with deference to findings by agency ALJs. If an agency and an ALJ disagree with respect to a finding of fact, it is the agency's finding that is entitled to deference on judicial review. The ALJ's finding is only a part of the record to be considered by a reviewing court in determining whether the agency's finding is supported by substantial evidence in the record as a whole. A finding by an ALJ is particularly influential with a reviewing court, however, when the finding is a primary or testimonial inference that is based largely on the demeanor of witnesses, since the ALJ was actually present at the time the testimony was given. The Supreme Court explained this relationship between ALJ findings and agency findings in *Universal Camera*,¹²⁸⁸ but many lower court opinions continue to reflect confusion and misunderstanding of the relationship.

Agencies often have comparative advantages over adjudicatory officers with respect to resolution of factual issues. Those advantages have several

¹²⁸⁷383 U.S. 607, 619-21 (1966).

¹²⁸⁸340 U.S. 474, 492-497.

different sources. First, the agency's superior expertise in the field may give it an advantage in some circumstances (e.g., how well does witness X's testimony mesh with the general principles of engineering, economics, or medicine applicable to this dispute?). Second, the agency is always better positioned to ensure interdecisional consistency (e.g., we will give greater weight to one type of evidence versus another type of evidence in this case because we have been doing so in all other cases). Third, sometimes the issue of fact is more appropriately considered an issue of policy (e.g., we reject the opinion evidence of witness X because it is based on one of two competing theories, and we have made a policy decision to base our actions on the other theory).

A 1986 opinion illustrates the manner in which some courts continue to misunderstand the relationship between ALJ findings and agency findings when they apply the substantial evidence test to findings of legislative facts. In *Office of Consumers' Counsel v. FERC*,¹²⁸⁰ the court devoted many pages to a detailed comparison of ALJ findings and agency findings. The court concluded that the ALJ was right and the agency was wrong with respect to each of the findings on which they differed. Each finding involved the issue of whether a gas pipeline "abused" its customers by following particular patterns of contracting to purchase gas. The approach taken in the opinion is erroneous in two respects. First, throughout the opinion the court's discussion places the ALJ's findings and the agency's findings on an equal footing. The court then undertakes the role of determining which set of findings is better. That approach is inappropriate with respect to any finding of fact. If the evidence can support either of two findings, the court must uphold the agency's findings. Second, the disputed findings did not involve adjudicative facts. There was no dispute concerning the firm's contracting practices. The only disputes concerned the most appropriate characterization of those practices (e.g., to what extent should a firm take the risk of having to pay excessive prices in the short term to avoid the risk of experiencing a supply shortage in the long term). That is a policy issue uniquely within the agency's expertise. ALJ findings inconsistent with an agency's findings should have little, if any, weight with respect to a "factual" issue of this type. *Office of Consumers' Counsel* is illustrative of the tendency of many lower courts to misunderstand this important principle.

The case law on the effect of adjudicatory officers' findings of facts when they differ with agency findings is complicated and frequently inconsistent. As a result, an agency cannot be confident that it can maintain control over the policy components of adjudicatory decisions and maintain consistency in its pattern of adjudicatory decisions even if the agency were to review each initial

¹²⁸⁰783 F.2d 206 (D.C. Cir. 1986).

decision. Of course, these problems are much greater in agencies with caseloads so large that the agency can review only a modest proportion of the decisions of its adjudicatory officers.

B. Departures from the APA Model

The APA allocates adjudicatory responsibility among decisionmakers in accordance with three principles: (1) the ALJ presides at the hearing and issues an initial decision; (2) the agency has plenary power to review the initial decision and to substitute its judgment for that of the ALJ; and, (3) reviewing courts defer to the agency rather than to the ALJ. In the most common institutional arrangement, each ALJ works for a single agency, and that agency has responsibility for all aspects of implementation of one or more statutes—policymaking, investigation, enforcement, and adjudication. Within that institutional structure, ALJs are assured a high degree of independence as a result of the statutory limits on the agency's power described in Chapter VI (B). Congress, however, has broad discretion to allocate adjudicatory responsibilities and structure the institutional environment in which adjudicatory officers operate.

1. Allocation of Greater Decisionmaking Power to ALJs

Decisionmaking could be allocated to give adjudicatory officers greater responsibility and authority. Congress has created such a structure in several contexts (e.g., awards of compensation for injuries to longshoremen and harborworkers, awards of compensation to coal miners that contract black lung disease and appeals of agency decisions disqualifying food stores from participating in the Food Stamp program). The only constraint on Congress' discretion in this respect has its source in the Appointments Clause. Conferring on ALJ decisions a high degree of finality makes each ALJ either an "officer" or an "inferior officer."¹²⁹⁰ If an "officer," the ALJ can only be appointed by the President; if an "inferior officer," the ALJ can also be appointed by a "head of department" or by a "court of law."

The Black Lung Benefits Act,¹²⁹¹ provides a good example of an agency adjudication system in which the initial decision of an adjudicatory officer is given unusually powerful effects. The Department of Labor (DOL) has responsibility to adjudicate disputes between coal mine owners and coal mine

¹²⁹⁰See *Freytag v. Commissioner*, 111 S.Ct. 2631 (1991); *Silver v. Postal Service*, 951 F.2d 1033 (9th Cir. 1991).

¹²⁹¹30 USC §§901-945.

employees concerning an employer's obligation to provide statutory compensation for lung diseases attributable to the work environment. The statute allocates decisionmaking responsibility among individuals and institutions within DOL. The Office of Workers' Compensation Programs (OWCP) in DOL has responsibility to issue all rules governing the adjudicatory program. A DOL ALJ makes the initial decision whether an employee is entitled to compensation. If either party is dissatisfied with the ALJ's decision, it can appeal to the Benefits Review Board (BRB), an appellate body that is part of DOL. BRB and OWCP often disagree. DOL ALJs are in an awkward position because they are bound by OWCP policies to the extent those policies are reflected in DOL's elaborate rules, yet their decisions are reviewed by BRB. DOL ALJs sometimes agree with OWCP, sometimes agree with BRB, and sometimes take a third position inconsistent both with OWCP and with BRB.

The statute confers on BRB a review power much more limited than the review power of an agency acting subject to APA §557. BRB can reverse and remand an ALJ's initial decision only if that decision is not "in accordance with the law" or if it is based on a finding of fact that is not supported by substantial evidence. Thus, BRB's relationship to ALJ decisions is analogous to a reviewing court's relationship to agency decisions. BRB must affirm any ALJ finding that is supported by substantial evidence.

If either party is dissatisfied with a BRB decision, it can obtain review in a federal circuit court. The court can reverse and remand any BRB decision that is not "in accordance with law." Thus, on issues of law, the court can ignore BRB, the ALJ, and OWCP. On issues of fact, however, the court is required to uphold any finding *made by an ALJ* if that finding is supported by substantial evidence. On issues of policy and on issues related to interpretation of DOL rules, the court is required to defer to OWCP, the policymaking unit within DOL, rather than to the ALJ or BRB.

This system of agency adjudication is fraught with uncertainties and conflicts concerning the appropriate roles and responsibilities of OWCP, ALJs, BRB, and reviewing courts. As discussed in Chapter VI, the boundaries between questions of law, questions of fact, and questions of policy are often murky. The three types of issues merge and overlap in many contexts. By ignoring the overlaps and allocating decisionmaking responsibility among four independent institutions, the Black Lung Benefit program invites massive confusion and conflict. The circuit court decisions reflect the ambiguity, institutional conflict, and confusion that is inherent in such a complicated allocation of authority. Three recent opinions illustrate the problems courts encounter in reviewing decisionmaking in this system of adjudication.

In *Pancake v. Amax Coal Co.*,¹²⁹² the court concluded that it was reviewing a finding of fact appropriate for resolution by the ALJ, subject to BRB review. In *Greer v. OWCP*,¹²⁹³ the court concluded that it was reviewing a conclusion of law appropriate for resolution by the court. In *Davis v. OWCP*,¹²⁹⁴ the court concluded that it was reviewing a policy dispute appropriate for resolution by OWCP. Each court was, in fact, dealing with the same type of issue. In each case, resolution of the dispute required consideration of the relationship among three variables: (1) the applicable language of the statute; (2) agency policy decisions reflected in regulations that create and define evidentiary presumptions; and (3) various forms of evidence tendered to prove a fact by triggering or rebutting an evidentiary presumption.

Any of the three cases could be characterized plausibly as raising an issue of law, an issue of policy, or an issue of fact. Yet, because the statute allocates decisionmaking authority among four independent institutions depending on the characterization of the issue, the often arbitrary characterization of the issue is outcome determinative in many cases. 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. It may also raise serious questions concerning the constitutionality of any selection process that does not confer a broad power to appoint on the President, a cabinet officer, or a court of law. Whatever its flaws, the APA model of adjudication provides a vastly superior institutional allocation of decisionmaking authority.

2. The Split-Enforcement Model

The adjudicatory function can be placed in an institution that is independent of the agency that makes and enforces rules and policies. This institutional structure can increase the extent to which adjudicatory decisionmaking is insulated from potential sources of agency bias. Congress has chosen this institutional structure in three significant contexts--mine safety and health, occupational safety and health, and transportation safety. In each case, one agency makes all rules and enforcement decisions, while a second independent agency makes all adjudicatory decisions. The Occupational Safety and Health Administration is the rulemaking agency; its enforcement cases are adjudicated at the Occupational Safety and Health Review Commission. Similarly, the Mine Safety and Health Administration's cases are heard at the Federal Mine Safety and Health Review Commission. The National Transportation Safety

¹²⁹²858 F.2d 1250 (7th Cir. 1988).

¹²⁹³940 F.2d 88 (4th Cir. 1991).

¹²⁹⁴936 F.2d 1111 (10th Cir. 1991).

Board hears certain enforcement cases brought by the Federal Aviation Administration, the rulemaking agency.¹²⁹⁵ Various groups have for decades urged general adoption of this institutional structure for all agency adjudication.¹²⁹⁶

The Conference conducted a study of this alternative in 1986. The study was unable to detect any improvement in adjudicatory decisionmaking attributable to the use of the independent adjudicating agency. It was able to document clear and significant costs and inefficiencies, however, attributable to lack of policy coordination, a high level of institutional conflict, frequent litigation between the two agencies, turf battles, and ambiguity with respect to the authority and responsibilities of the two agencies.¹²⁹⁷ The administration of the occupational safety and health program has been the subject of critical commentary by the Conference as well.¹²⁹⁸ Adoption of the split-enforcement model was considered a contributing factor in this poor performance.

3. The Corps Proposal

Some critics of the federal agency adjudicatory system have proposed a major structural change in which all ALJs are employed by a single entity, the ALJ Corps.¹²⁹⁹ Such a restructuring would have the potential advantage of further increasing ALJs' independence. To the extent that even statutorily independent ALJs develop some degree of dependence on the agency at which they preside, or some identification with the interests of that agency, this structural removal of ALJs from the agency could reduce the potential bias or public perception of bias in agency adjudicatory decisionmaking. The Corps

¹²⁹⁵See ACUS Recommendations 90-1 and 91-8, 1 CFR §§305.90-1, 91.8 (1991). Moreover, large executive departments like the Department of Transportation often centralize their ALJ administration so that, for example, DOT ALJs hear civil penalty cases brought by departmental agencies like the FAA. This may be a sensible managerial decision.

¹²⁹⁶See, e.g., Ash Council Report on Selected Independent Regulatory Agencies (1971); President's Committee on Administrative Management (1937).

¹²⁹⁷See ACUS Recommendation 86-4, "The Split Enforcement Model for Agency Adjudication," 1 CFR §305.86-4 (1992). See also Johnson, *The Split Enforcement Model: Conclusions from OSHA and MSHA*, 39 ADMIN. L. REV. 315 (1987). The study found that the model worked somewhat better in the mine safety program due to its discreteness and the clarity of the legislative intent.

¹²⁹⁸See ACUS Recommendations 87-1, "Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration," 1 CFR §305.87-1, and 87-10, "Regulation by the Occupational Safety and Health Administration," 1 CFR §305.87-10; Shapiro & McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1 (1989).

¹²⁹⁹The most recent bills are S. 826 and H.R. 3910. 102d Cong., 1st Sess. (1991). Both were reported to the floor, but neither was enacted.

would assign ALJs to adjudications at different agencies based on its periodic assessments of changing relative workloads. The Corps would be divided into eight divisions in an effort to retain some degree of expertise. The Corps would have the power to establish uniform rules of procedure applicable to all agency adjudications.

Proposals to establish an independent, centralized administrative adjudicatory body in the federal government have been made every year for over half a century. The arguments for and against such a radical restructuring of the administrative process have changed very little over the years. The literature on the subject is voluminous.¹³⁰⁰ The choice presented is between continuation of the original model of administrative law and adoption of a new model that renders administrative adjudication virtually indistinguishable from judicial adjudication.

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 Corps proposal, each of those goals would be abandoned in favor of an administrative adjudication system designed to replicate the Article III courts.

Proponents of the Corps proposal recognize that it represents a rejection of the traditional administrative adjudication model in favor of a judicial adjudication model. Thus, for instance, they refer to the recent tendency of administrative proceedings to "become generally more formal,"¹³⁰¹ as a virtue that would be reinforced and extended by creation of an ALJ Corps.

¹³⁰⁰See, e.g., Hearing Before the Subcommittee on Administrative Law and Governmental relations of the Senate Committee on the Judiciary, 100th Cong., 2d Sess., Serial No. 57 (March 17, 1988); Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary 98th Cong., 1st Sess., Serial No. J-98-45 (June 23 and September 20, 1983); *The Central Panel System for Administrative Law Judges: A Survey of Seven States* (M. Rich & W. Brucar eds. 1983); Nathanson, *The Administrative Court Proposal*, 57 VA. L. REV. 996 (1971); U.S. Commission on organization of the Executive Branch of Government, *Legal Services and Procedure* 84-88 (1955); Caldwell, *A Federal Administrative Court*, 84 U. PA. L. REV. 966 (1936); Reports of Special Committee on Administrative Law, 61 A.B.A. Rep. 218-27, 232-33, 720-94 (1936); Reports of Special Committee on Administrative Law, 59 A.B.A. Rep. 148-53, 539-64 (1934). See generally K. Davis, *Treatise on Administrative Law* §§1:7-1:10 (2d ed. 1978).

¹³⁰¹See Simeone, *The Function, Flexibility, and Future of United States Judges of the Executive Department*, 44 ADMIN. L. REV. 159, 173 (1992).

Establishment of an ALJ Corps undoubtedly would have this effect. The uniform rules of procedure prescribed by the Corps would come to resemble the highly formal rules that govern trials in Article III courts. We do not view that as a virtue, however, because it would abandon the traditional goal of providing a less formal and less expensive means of resolving specialized classes of disputes with the government. Over time, the cost of administrative adjudication would move ever closer to the cost of judicial adjudication. The potential for increased costs attributable to adoption of the formal, judicial model of adjudication is enormous. Use of the judicial model of adjudication to resolve tort disputes creates a situation in which the dispute resolution process costs approximately 50% of the total amount of money awarded as compensation.¹³⁰² By contrast, the Social Security Administration spends only 3.7% of its budget on administrative adjudication.¹³⁰³ Some of this enormous difference in cost is attributable to the somewhat different issues to be resolved in tort cases versus disability cases, but a substantial proportion of the difference is attributable to the greater procedural and evidentiary formality of judicial adjudication.

Proponents of the ALJ Corps are also candid in their rejection of the value of specialized expertise that is among the principal justifications for assigning adjudicatory functions to agencies rather than to Article III judges. In the words of one proponent: "It is true that judges...in a particular agency acquire an experience and expertise in a particular field and are better able to understand the issues involved and make an intelligent and just decision. But being a judge who is a generalist...far outweighs the advantages of being an "expert" in a particular narrow field of law. A judge is a 'judge.'"¹³⁰⁴

Rejection of specialized expertise as a justification for administrative adjudication would have major implications. Converting all ALJs (and potentially non-ALJ adjudicators) into generalist judges would impose major costs on the agency adjudicatory system in the form of lost expertise. ALJs preside in more than 100 different types of adjudicatory disputes at scores of different agencies. Non-ALJ adjudicators preside in another almost 100 different types of adjudicatory disputes at scores of other agencies. Each of the hundreds of regulatory and benefit programs in which ALJs participate is different and many are extremely complicated. A typical regulatory or benefit system can be understood only by mastering hundreds of pages of statutes and regulations, thousands of pages of judicial opinions, tens of thousands of pages

¹³⁰²J. Kabalik & N. Pace, *COSTS AND COMPENSATION PAID IN TORT LITIGATION IX-X* (Institute for Civil Justice, 1986).

¹³⁰³SSA 1989 Annual Report at 30.

¹³⁰⁴Simeone, *supra* n.1301, at 175.

of agency guidelines and decisions, and the principles of one or more disciplines other than law.

Many ALJs arrive on the job with preexisting expertise in the area in which they are assigned to adjudicate cases (e.g., prior familiarity with statutes, regulations, case law, and major recurring issues). Others arrive with preexisting expertise in one or more of the disciplines that must be applied in a given class of adjudications (e.g., medicine, economics, or engineering). Even those ALJs who lack relevant pre-existing expertise develop it during their first few years presiding at a particular agency. After a few years' experience, they are well-positioned to understand and to apply the complicated maze of statutes, regulations, and agency policies that govern the disputes they adjudicate.

To illustrate the point, consider just three of the agencies whose adjudicatory systems are described in this report: NRC, FERC, and SSA. (Two of the three--FERC and NRC--are within the same division of the proposed Corps.) NRC's primary mission is to regulate civilian applications of nuclear power to protect public health and safety. The recurring issues require application of the principles of engineering, large scale construction, physics, and meteorology. FERC's primary mission is to regulate the natural gas and electricity industries to ensure consumers face prices and price structures that are just, reasonable, and not unduly discriminatory. The recurring issues require applying the principles of microeconomics to two of the most structurally complicated industries in the nation. SSA's primary adjudicatory mission is to determine which of hundreds of thousands of applicants for disability benefits each year are eligible. The recurring issues require applying the principles of medicine to an infinitely variable set of physical and mental conditions, and then to compare the results of that process with the full range of vocations available in the U.S. economy.

Each agency is governed by a different body of substantive law. In each case, the applicable law is accessible in a variety of sources that total well over 100,000 pages. Moreover, presiding officers confront systematically different procedural problems at each agency. At NRC, the typical challenge is to referee a form of guerilla warfare between representatives of two opposing interest groups, each of which sincerely believes that the other threatens the nation's ability to survive. At FERC, the typical challenge is to create an orderly procedure that will accommodate the conflicting interests of 100 or more separately represented parties and still complete the hearing in a reasonable period of time. At SSA, the typical challenge is to help the frequently unrepresented or underrepresented applicant obtain the data required to support the claim and yet still be able to adjudicate fairly several hundred cases per year. Adjudicatory officers cannot make the transition from one of these regimes to another without significant sacrifice of expertise. Moreover,

it is impossible to devise a set of procedural and evidentiary rules that is appropriate to these widely varying types of disputes.

Replacing the specialized ALJ model with the "generalist judge" model would have numerous secondary effects. To avoid an intolerable degree of interdecisional inconsistency and to retain agency control over the policy components of adjudicatory decisions, agencies would have to increase considerably the extent to which they engage in plenary review of the decisions of adjudicatory officers and/or the extent to which they confine the discretion of adjudicatory officers by issuing binding rules that govern the resolution of all disputes. As discussed in Chapter VI(D), however, agencies encounter great difficulties in their efforts to perform those critical functions today. Those difficulties would increase significantly if special purpose agency ALJs are replaced by generalist ALJs controlled and assigned by a Corps. The agency would need to act on the assumption that each ALJ assigned to adjudicate a dispute has little or no prior knowledge of the agency's policies.

Although the ALJ survey indicates that about half the ALJs support the independent corps concept,¹³⁰⁵ in recent months it appears that even many ALJs have concerns about the Corps bill's negative impact on ALJ expertise in particular agency programs. A leading ALJ organization that has been strongly supportive of Corps legislation in the past, the Federal ALJ Conference (FALJC), testified recently "that many of [its] members have raised concerns about the specifics of the bills to implement [the corps]," and that FALJC is seeking to "develop a consensus" on a "balanced structure which will promote the essential goal of assuring ALJ neutrality both in appearance and in fact, without diminishing ALJ expertise or the ability of agencies to obtain prompt handling of their cases."¹³⁰⁶

In seeking this consensus, a drafting committee sponsored by FALJC has developed a revised draft Corps bill (so far not endorsed or introduced) that would establish each existing agency ALJ grouping as a separate division of the Corps.¹³⁰⁷ Thus, instead of 8 divisions, there would be approximately 30. Future ALJ appointments would be made by the Director of the Corps and appointees would be assigned to those divisions.

¹³⁰⁵See 1992 ALJ survey, question 23 (Appendix). Of those responding, 54% said the absence of a corps was a "very serious" problem, 22% said it was a "somewhat serious" problem and 24% said it was "not" a problem.

¹³⁰⁶Hearings on H.R. 3910 before the House Subcommittee on Administrative Law and Government Relations, 102d Cong., 2d Sess. April 29, (1992) (Statement on The Administrative Law Judge Corps Act, on behalf of the FALJC by Judge Victor W. Palmer).

¹³⁰⁷April 7, 1992 draft provided by FALJC. On file at the Administrative Conference. A general jurisdiction division would also be created for judges whose agencies did not elect to have a separate division.

In this iteration, the Corps becomes largely an administering agency, analogous to the Administrative Office of the U.S. Courts, and the questions raised by the original proposal (and of course, its proclaimed benefits) are correspondingly reduced. Although a detailed analysis of the current draft of the FALJC bill is not offered here, it is sufficient to note that it represents a departure from earlier Corps proposals.¹³⁰⁸ Nevertheless, the fundamental question concerning whether a clear case can be made for establishing an independent Corps remains. To date, such a case has not been made.¹³⁰⁹

VIII. Developing Standards for When to Use ALJs as Presiding Officers

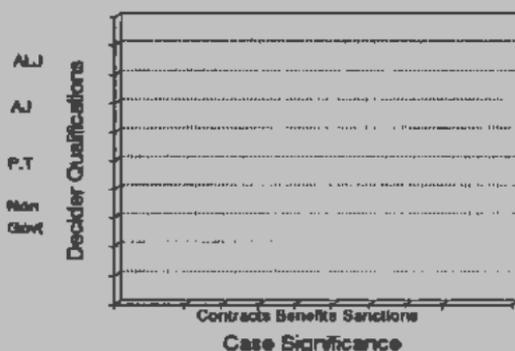
As this study has shown, there is no consistent standard for when to use ALJs as opposed to non-ALJs to hear significant cases. The APA, of course, designates ALJs in situations where an on-the-record hearing is required by statute. But that provision is only triggered when other statutes so dictate. Many statutes do not invoke the explicit triggering language and therefore ALJs have not been used, even in situations where the seriousness of the issues at stake should call for a formal ALJ hearing.¹³¹⁰ In recent years this failure of Congress to extend APA hearings to comparable new cases has led to the development of an alternative corps of administrative judges who share some, but not all, of the characteristics of ALJs. In general, ALJs are more independent than their AJ counterparts because of the legally required difference in treatment for selection, promotion and disciplinary purposes. The question is how can the use of ALJs be regularized? This question is the subject of this chapter.

¹³⁰⁸For example, this report urges that Chief ALJs (answerable to OPM) be given a greater role in management of ALJ performance. The FALJC draft would provide for a Council (made up of Chief ALJs) and a Director of the Corps to perform similar functions.

¹³⁰⁹This study does not address possible Constitutional arguments relating to the various provisions in the the Corps proposals that provide for appointment or "grandfathering" ALJs into the Corps. See *Freytag v. Commissioner*, 111 S.Ct. 2631 (1991). While *Freytag* is a split decision, it raises the issue concerning whether "grandfathering" is permissible under the Appointments Clause because a Presidential appointee empowered to appoint a member of the proposed ALJ Corps must be permitted to exercise that power.

¹³¹⁰Interestingly, while there is no barrier to their use in nonformal hearing contexts, OPM has taken the position that it will only assign ALJs to agencies where there is APA work to be done. OPM's decision in this regard is the result of a pragmatic judgment that this is the best way to counter agency demands for new allocations of ALJs. It also makes sense on the conceptual grounds that it should be Congress' decision to create formal procedures and decisionmakers.

A. The Random Nature Of ALJ Use



In a perfectly planned system of administrative justice, the highest quality and highest cost deciders would be reserved for those adjudications where their expertise and independence were most needed. To make that determination one

would have to rank significance of cases against qualifications of deciders. This could be done by graphing qualifications of deciders in ascending order on the vertical axis and significance of the case to individuals in increasing order on the horizontal axis. This would result in ALJ formal hearing cases being located in the upper right hand quarter of the graph. If one starts with the assumption that ALJs are at the top of the decider qualification pole,¹³¹¹ this leaves the horizontal axis to be clarified.

The hierarchical model introduced in Chapter I and applied to various agency functions in Chapter III employs a balancing of interest analysis approach used in administrative due process cases.¹³¹² The cases in which the individual's interest in fair treatment is highest should yield the most elaborate procedural protections, including the need for ALJs. These cases involve penalties, sanctions or restrictions on personal freedom. They would be placed on the farthest right hand point on the horizontal scale.

The next class of cases include benefits or licensing determinations that involve monetary interests of individuals or corporations. The third class

¹³¹¹Below ALJs would rank many of the AJs discussed in this study in descending order based on agency created protections of independence, including salary levels, and length of appointment and so forth. These would be followed by nonlawyer part-time deciders.

¹³¹²See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (Due process determinations require a balance between the importance of the procedures to the claimant, the cost of providing them and the needs of the government).

might include suits against the government for monetary damages. Each of these classes of cases has already been discussed in some detail in Chapter III. We now strive to incorporate them into an overall approach for ALJ use.

1. Comparing Deciders in Sanction and Penalty Cases

ALJs are desirable in cases in which it is most important to ensure that deciders will be least affected by agency enforcement policy. Those cases include those that involve significant interests in freedom of action of particular individuals or of particular business firms or those that involve the imposition of sanctions. What one wants most to emulate in the administrative context in these cases is the level of independence achieved by the federal courts. The risk of bias can be best overcome by using the APA protections accorded ALJs. Thus, there are many situations, such as NLRB unfair labor practice hearings, for which APA hearings with ALJs presiding are required. But there are also many other comparable situations outside the APA umbrella. Those discussed in Chapter III include the Equal Employment Opportunity Commission, the Executive Office of Immigration Review, DOD's Directorate for Industrial Security Clearance Review and the Merit System Protections Board. Each of these agencies operates with non-APA administrative judges in settings that involve the resolution of substantial individual interests not unlike those arising at the NLRB or other agencies such as FTC.

Even though Congress has not spoken directly in each of the non-APA programs, agencies have made some efforts to make their administrative judges as independent as possible outside the APA requirements. But questions remain. Can these agencies ensure decider independence when they still control salaries, promotions and hiring? Moreover, even if they could, would it be easier for Congress simply to incorporate these programs within the APA so that there was no need to mimic that statute's requirements?

The EEOC has probably compensated best for any lack of independence associated with its use of AJs. Because the agency conciliates before it charges private employers with discrimination and then goes to federal court if a complaint is issued, the problem of decider independence is minimized. So long as cases are tried *de novo* before a federal district judge, maximum decider independence is ultimately achieved. If the employee's complaint is against a federal agency employer, the EEOC then uses either its own AJs or ones drawn from an agency other than the respondent agency to decide the

case.⁴ By virtue of the fact that none of the AJs can be from the agency that is alleged to have discriminated, the potential for bias is again limited.⁵

With regard to AJs in EOIR and DISCR, there is a greater potential for bias simply because the AJs are employed and controlled by the agencies before whom individuals must present their cases. Under the Department of Justice's aegis, immigration judges are placed within the Executive Office of Immigration to isolate them from direct policy interference by the agency. The Department also employs four ALJs to hear employee sanction cases and about 120 asylum officers who are employed by INS to hear asylum cases.⁶ In effect, the Department of Justice runs the gamut in decider formality in those three classes of cases, each of which involves significant private interests. The ALJs are reserved ironically for those matters where personal freedom is not really at stake—fines and sanctions against employers for hiring illegal aliens or for discriminating against job applicants because of alien status. Asylum officers are often nonlawyers and they are required to resolve claims for asylum in a nonadversary (and often nonhearing) setting. Since these cases may be reheard in deportation or exclusion proceedings by IJs, the problem of asylum officers independence can usually be overcome at that stage.

This of course leaves the issue of IJ independence itself. In recent years efforts have been made to make IJs as independent as possible within the non-APA setting. They are managed, controlled and disciplined by a Chief Administrative Judge, within the Department. In addition, a bill pending in Congress would grant IJs salary benefits commensurate with ALJs.⁷ But no proposal has been made to convert these judges to ALJs. The Department's objections to ALJ status for IJs continue to center on the issue of agency control of the selection and discipline process.⁸ But there is no way for the Department of Justice to make IJs as independent as ALJs so long as they are within the agency for salary determination and promotion purposes. The appearance, if not the reality, of decider control still clouds the process.

⁴See discussion at Chapter III (A).

⁵This is also essentially the case with MSPB AJs who rule on cases brought by outside agencies against their employees. See Chapter III (C) (3). But there are other reasons that may make the 66 MSPB AJs candidates for ALJ status. Their independence has been questioned and legislation has been introduced to make them more independent. See *id.* At some point this kind of legislation suggests that ALJ status might be more sensible. See discussion *infra* at Chapter VIII (B).

⁶See Chapter III (C) (1).

⁷S. 2099. See note 1026, *supra*.

⁸Testifying in opposition to a bill to convert immigration judges into ALJs, Attorney General William French Smith stated the common wisdom that "an absence of accountability.... would only compound existing management problems." See Verkuil, *A Study of Immigration Procedures*, 31 U.C.L.A. L. REV 1141, 1195 (1984).

appearance, if not the reality, of decider control still clouds the process. Moreover, the argument that management control is necessary because of problems with OPM's selection and disciplinary process for ALJs would fail if the reforms proposed in Chapter VII of this study were implemented.

2. The Use of ALJs and AJs in the Benefits and Licensing Areas

The need for the maximum independence of ALJs in cases involving personal freedom can be contrasted with the use of ALJs in benefits and licensing cases where only monetary interests are at stake. In this category are individual disability decisions by SSA and DVA and large scale licensing decisions by FERC and NRC. These situations were described in Chapter III.¹³¹⁸

Benefit decisions are characterized by large volume caseloads and the application of a complicated legal standard to a variety of medical conditions. This is an area where consistency of outcomes has become a partial surrogate for accuracy of result. What is sought is a decision system that concentrates on consistency of outcomes as much as on production of individualized decisions that reach fair results. A limited set of medical conditions recurs in substantial numbers. The central goal is to ensure that those similarly disabled will be treated equally no matter where or before whom they appear. Obviously this is a massive management task. Assuring fairness to the overall class of millions of claimants might lead to different procedural tradeoffs than simply assuring fairness to those persons who can persist in appeals all the way through the system.

The two systems studied have proceeded in different directions regarding the use of ALJs. The SSA is committed to their use and these judges (now more than 850 strong) decide more than 250,000 cases per year. The DVA, on the other hand, uses rating boards, hearing officers, and the Board of Veterans Appeals (each of which consists of lawyers, nonlawyers and medical personnel) to reach results in hundreds of thousands of cases per year. The question of decider independence in both systems seems secondary to other concerns. Until there is a way to measure the quality of output under either system, there can be no sure way to measure the value of ALJs as deciders in this setting. In other words, the case for expanding the use of ALJs in the mass justice arena of disability benefits cannot be made on the value of decider independence alone.¹³¹⁹ At the same time, it is equally difficult to argue

¹³¹⁸See Chapter III (B) and (D).

¹³¹⁹Ironically, the independence of SSA ALJs themselves has been challenged by claimants in the hearing process who contend that reversal rates of individual ALJs may be indicators of bias.

against the use of ALJs in the social security disability context since they are an experienced cadre of disability experts who should hardly be converted into AJs without a clear reason to do so. Thus, there is neither a case to expand nor contract ALJ use in the benefits area at this time. Further experimentation with existing systems may demonstrate better ideas. The use of panels of deciders is one that has already been mentioned. Moreover, experience with the use of an Article I disability court in the veterans benefits setting may yield more generalizable results in the future.

When it comes to big cases, FERC is an expert. Its 23 ALJs routinely produce initial decisions in cases with stakes of over \$100 million. There is much to recommend the use of ALJs at FERC, especially those with expertise in economics and statistical analysis. The NRC on the other hand decides cases with as much at stake financially (nuclear power plant licensing and enforcement cases) through the use of non-ALJs. These expert deciders can be lawyers, economists or engineers and they usually sit in three-person panels.¹³²⁰ In both the FERC and NRC examples the critical issue for expanded ALJ participation—that of the need for enhanced decider independence—does not seem to be involved.

Since these cases tend to be carefully reviewed and often set aside by the agency itself, independence from the agency is a less meaningful concept. Thus there is not much of a basis to proclaim an expanded use of ALJs in these types of cases. Moreover in the DVA and NRC situations nonlawyers sit on the panels that make the ALJ level decisions. Because ALJs must be legally trained there would be no way to convert these seemingly well-qualified deciders into ALJs without limiting experimentation with decider qualifications. This would be an unfortunate result.

3. The Use of ALJs and AJs in Cases For Monetary Damages Against the Government

This class of cases is unusual in that ALJs do not appear at all. Even if one includes the Tax Court and its Article I function of resolving tax claims for and against the government, no ALJs are used.¹³²¹ The two situations explored in this study involve contract claims against the government that can be heard

See discussion in Chapter VI(D)(3). No comparable challenges have so far been leveled against DVA deciders.

¹³²⁰See Chapter III (B).

¹³²¹Nor are claims under the Federal Tort Claims Act heard by ALJs. They are first determined by agency officials, and then taken to federal district court. See Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 CASE W. RES. 509 (1984-85).

by Boards of Contract Appeal or the U. S. Claims Court.¹³²² The BCA judges are not ALJs, but they enjoy substantial independence from the agencies that employ them by virtue of the control granted the Chief BCA judge in most agency settings.¹³²³

The Claims Court judges, of course, enjoy independence (and status) that rivals if not exceeds that of ALJs. They are selected for 15-year terms pursuant to presidential nomination and Senate confirmation. Their decisions are reviewed by the U. S. Court of Appeals for the Federal Circuit. Claims Court judges rival federal district judges in their independence. But in terms of expertise they suffer in comparison with BCA administrative judges. Litigants and their attorneys even seem to prefer BCA judges to Claims Court judges in situations where either one can hear the cases.¹³²⁴

This expression of preference arguably overcomes recent evaluations by the GAO that urge protections against control by the Armed Services over BCA judges that would create protections similar to those provided by OPM for ALJs.¹³²⁵ These protections would certainly be reassuring, but since litigants have a choice of forums, the alleged lack of independence of BCA judges is not as much of a concern in this setting.¹³²⁶ Indeed, BCA judges have a higher salary than ALJs. Certainly on an interest analysis scale, the issues at stake do not seem to require ALJs to protect individual rights. The best argument for ALJs rather than BCA judges stems from the fact that if Congress extends most of the APA's protections of ALJs to BCA administrative judges, then it might as well go all the way to place them and their processes within the APA as a way of avoiding balkanization of the administrative process.

B. The Qualified Case for Conversion of AJs to ALJs

The distinctions between ALJs and all the non-APA administrative hearing officers we have lumped together under the term administrative judges have narrowed in recent years for a variety of reasons. First, the focus by the courts on administrative due process, a rather vague concept until the

¹³²²See Chapter III (E).

¹³²³In the smaller agencies this may not be as true as it is in the Armed Services Board of Contract Appeals.

¹³²⁴See Chapter III (E) (3).

¹³²⁵*Id.*

¹³²⁶In some of the smaller Boards of Contract Appeals, such as at the Department of Agriculture, the independence problem may be more severe. See note 1323, *supra*.

1970s,¹³²⁷ has emphasized the need for procedural integrity in the informal setting.¹³²⁸ This judicial movement applied, of course, to both federal and state administrative decisionmaking, but the emphasis on the federal level has always been moderated by the very presence of the APA itself. Unlike the situation in most states, where the development of administrative procedures for agency hearings has been halting, the federal APA has defined standards for administrative due process for many years.¹³²⁹

The 1970s due process revolution did, however, bring to light gaps in the APA's coverage that required attention.¹³³⁰ To fill these interstices, the agencies themselves began to improve the quality of non-APA decisionmaking and decisionmakers. In terms of our concerns here, the efforts made by agencies to professionalize the deciders they employed certainly offset many objections about fairness and independence of the informal process. Indeed, the term administrative judge has come into the regulatory lexicon later than administrative law judge to signify the increased status to be accorded non-APA deciders.

But this development of a substitute administrative judge corps has its counterproductive effects. To the extent that the APA was meant to be a unifying force in administrative procedure, it is frustrated by these carefully drawn alternative processes. As a practical matter, there is now more than one kind of informal process. There is the formal-informal process that is presided over by AJs, which is "informal" only because it is outside sections 556 and 557--the APA formal process. As noted at the outset of this study, there is also what we might label the informal-informal process. That process is one in which the deciders are often neither full time nor legally trained and the procedural structure of any hearing is minimal or nonexistent.¹³³¹ The non-APA process that is presided over by AJs is, in fact, far from informal in that sense. The deciders are called judges and the hearings contain most of the

¹³²⁷It is from the landmark case of *Goldberg v. Kelly*, 397 U.S. 254 (1990), that most of the developments in administrative due process are dated. There was, of course, interest in that subject before then but it hardly constituted a judicial focus.

¹³²⁸Admittedly, *Goldberg* asked very little by way of decider independence when it constitutionalized administrative procedures. See notes - *supra*. Nevertheless, the procedural focus has over time heightened concerns about deciders as well.

¹³²⁹Indeed, it was the very purpose of the APA when it was enacted to bring due process to administrative law. See remarks of Sen. McCarran.

¹³³⁰See e.g. Verkuil, *Study of Informal Adjudication Procedures*, 43 U. CHI L. REV 739 (1976).

¹³³¹See discussion in Verkuil, *id.* at 792 which discusses an informal adjudication process that approximates the basic ingredients of notice-and-comment rulemaking.

ingredients of an APA formal hearing. Virtually all the non-APA cases discussed in Chapter III exhibit these qualities, for example.

Another apprehension that may cause agencies to resist using ALJs might be a feeling that the APA on-the-record hearing procedures are too formal and that using ALJs brings costly and unnecessary formality. But it is too often forgotten that the APA is a procedurally flexible statute. It, in fact, places limits on the right of cross examination and permits written hearings in numerous types of cases.¹³³² There is no reason why ALJs could not be asked, or even required by regulation, to use these informal procedures and/or even to engage in alternative dispute resolution techniques.¹³³³

Thus we have come to a crossroads: Should we encourage more formal non-APA AJ hearings or should we argue for expanding of the APA when an agency or Congress provides functionally equivalent processes?

In making this decision, it must be accepted that the reasons are not related to constitutional level problems of fairness or independence. One of the critical conclusions of this study is that the informal process as we define it and the deciders who preside over it are not constitutionally deficient. Moreover, our empirical survey shows that AJs consider themselves just as independent as ALJs.¹³³⁴ That is an important confirmation of their decisional integrity. They have little complaint about agency interference even though they are subjected to more agency supervision over salary and employment conditions than ALJs.¹³³⁵

Overall, AJs are as respected by the lawyers who practice before them as are ALJs. In terms of educational and experience levels, our surveys showed that AJs are much like ALJs. Thus, in the last 10 years or so AJs have quietly emerged as a professional group of deciders who look, act and are treated much like ALJs.

If they are so close to ALJs as a functional matter, why not designate them as such? Certainly doing so would honor the historical function of the APA and it would ensure that no objections based on independence could be

¹³³²See 5 U.S.C. §556(d). See also, Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 313-15 (1978).

¹³³³Such duties would clearly not be "inconsistent with their duties and responsibilities as administrative law judges." 5 U.S.C. §3105. The Conference has often recognized the potential role of ALJs in ADR activities. See ACUS Recommendations 88-5, *Agency Use of Settlement Judges*, 1 CFR §305.88-5 (1992); 86-8, *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution*, 1 CFR §305.86-8 (1992); and 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR §305.86-3 (1992).

¹³³⁴See Chapter IV(F).

¹³³⁵Ironically, ALJs still seem to complain more about agency interference than do AJs. See notes 849-54 *supra*.

emerged in the future. The arguments against doing so are basically three: The first is the "if it ain't broke, don't fix it" proposition. The second is the recognition by agencies that ALJs are more difficult to select, assign and manage or discipline than are AJs within the agency; and the third deals with the cost of deciders (some are lower in grade than ALJs.)¹³³⁶

The first argument, for the status quo, can be readily met by the counter proposition that the APA is meant to be a unifying force in defining the formal process. If AJs are by rule or statute presiding over what are functionally formal processes, why not bring them within the APA, assuming the second objection is met. The second argument has considerable force at present--agencies resist ALJs because of the cumbersome and unproductive way they are selected, assigned and managed. This was clearly shown in Chapters V and VI. Unless the reforms proposed there are implemented, it is hard to rebut an agency's reluctance to convert AJs to ALJs. But the contrary proposition also has merit. If those reforms are achieved, these objections are removed as valid issues. Agency reluctance to employ ALJs thereafter might be read as simply a concern about control--a concern that would be inappropriate in agencies that decide cases involving serious curtailment of individual interests.

The third objection--that of cost--is not to be ignored in these fiscally stringent times. It is not easy to quantify the compensation differences between the two groups of deciders but obviously if there is a three or four grade difference, the dollars can be significant. Moreover, preservation of some salary gradations in the administrative judge community makes it possible to restore a kind of multi-grade structure that was originally intended for ALJs but lost over the years.¹³³⁷ But at the same time some administrative judges are having their salaries raised to ALJ levels by separate legislation.

For example, BCA judges are already paid more than ALJs and there are currently pending in Congress several bills designed to give some non-ALJs ALJ-like protection and benefits without calling them ALJs. One bill gives such protections to administrative judges at the Merit Systems Protection

¹³³⁶For example, EEOC judges are GS-13s and 14s versus the super grades of ALJs.

¹³³⁷See Scalia, *The ALJ Fiasco--A Reprise*, 47 U. CHI. L. REV. 57 at 62-75 (describing--and arguing for--the original APA plan which used promotions of ALJs to higher grades as a quality control technique). The use of multigrade "examiner" positions was specifically approved by the Court in *Ramaeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953).

Board,¹³³⁶ another offers comparable salary benefits to immigration judges,¹³³⁹ and a third does so for the Board of Veterans Appeals.¹³⁴⁰

Here the question earlier asked needs to be reemphasized: If Congress is going to equate MSPB judges, Immigration Judges and BVA judges with ALJs in terms of salary and independence from agency control, why not simply take the next step and convert them directly to ALJs?¹³⁴¹ This argument gains special force if the reforms to the selection, appointment and disciplinary process are accepted. But it should apply in any event to those administrative judges who decide cases with great significance to individuals--such as those that come before immigration judges (deportations or exclusions) or DISCR judges (security clearance cases). The touchstone seems to be whether a serious curtailment of individual interests is at stake. If so, the step from formal-informal to truly formal processes should be taken.

The qualified case for conversion of AJs to ALJs comes down to this basic proposition: the APA formal hearing requirements, and hence ALJ status, should extend to cases where serious individual interests are implicated. Congress should see to it where new "me too" AJ legislation is being proposed that the APA's mandate is met instead.¹³⁴² To ignore this opportunity will only further balkanize the administrative process when uniformity and consistency are much to be valued.

IX. Conclusions and Recommendations

In enacting the Administrative Procedure Act in 1946, Congress determined that in the interest of efficiency, accountability, and the development of expertise, there should be a concentration of legislative,

¹³³⁶See the Merit Systems Protection Board Administrative Judges Protection Act of 1991, H.R. 3879, 102d Cong. 1st Sess. 137 Cong. Rec. H10930 (daily ed. Nov. 22, 1991).

¹³³⁹See S.2099, 102d Cong. 1st Sess. (Sept. 26, 1991) (establishing a special pay scale for immigration judges just below that of ALJs). In submitting the bill, Senator Kennedy commented: "clearly, the responsibilities and duties of immigration judges are on an equal standing with that of administrative law judges, in terms of both their level of authority and complexity of issues adjudicated." 137 Cong. Rec. S18417 (Daily ed. Nov. 26, 1991). One might fairly ask why not just convert immigration judges to ALJs if this is correct?

¹³⁴⁰See H.R. 3950, 102d Cong. 1st Sess. 137 Cong. Rec. H11885 (daily ed. Nov. 26, 1991). (making BVA pay comparable to ALJs).

¹³⁴¹Indeed the Department of Interior recently converted its "Indian Probate Judges" to ALJs, after OPM determined that the individual judges met the minimum qualifications for ALJ status.

¹³⁴²Conversely, if no serious curtailment of individual interests is involved, agencies should be encouraged to experiment with informal procedures and decider qualifications. This may be the situation, for example, in agencies dealing with benefits and contracts cases. In particular, those cases may allow experimentation with specialized, nonlawyer decisionmakers.

enforcement and adjudicatory authority within each agency. This concentration of functions does not violate recognized principles of due process. At the same time, the APA provided that adjudicatory factfinders be insulated from investigative and prosecutorial functions within the agency through a system of internal separation of functions. Since 1946, the administrative judiciary has evolved as an essential component of the federal administrative decisional system. Indeed, government could not function as it is currently structured without these decisional officials.

As this study has demonstrated, the administrative judiciary requires sufficient protection from agency influence to encourage and facilitate the exercise of independent judgment with regard to evidentiary factfinding in the record of an adjudication. But, at the same time, the presiding officer, whether an administrative law judge or some other administrative adjudicator, functions within a framework of administrative, not judicial, decisionmaking. Thus, the concept of a completely independent corps of presiding officers has been eschewed because the APA contemplates that the administrative adjudicator would have only partial independence from agency control.

This study has reemphasized this essential compromise struck in the APA because the authors believe it is valid for logical as well as historical purposes. It is to the Executive agency that Congress and the Constitution have delegated authority; the duty of the administrative adjudicators is to implement agency policy under an adjudicatory system that relies upon the integrity of the factfinder.

Being a successful administrative adjudicator is a complicated task involving deference to agency policy choices and obedience to agency rules, but also rigorous independence within delegated decisional authority. Those who perform this role well are extremely valuable public servants. Despite such difficult assignments, the vast majority of these judges perform admirably and prove that Congress correctly determined that this complicated role could be effectively performed primarily by a special category of officers--administrative law judges--under the APA.

To ensure the continued value of this approach, the study has emphasized that there is much that can be done to dampen the legitimate criticisms of the system concerning selection, discipline and performance as well as to assuage the concerns of the judges concerning the protection of decisional independence. A number of modest changes can be made that will improve perceptions and quiet concerns about selection, independence, and accountability. If such challenges are not answered, agencies will likely continue to seek alternatives to the use of ALJs to avoid a counterproductive set of problems that can be readily corrected, and presiding officers will continue to seek fuller independence from agency direction. This study's conclusion is that ALJs employed by agencies should be used in proceedings

that are functionally formal. Non-ALJ adjudicators should be used where special circumstances, such as the need for nonlawyer expertise, militate against the use of ALJs. But administrative judges should not be employed in lieu of ALJs simply to avoid bureaucratic impediments to ALJ selection.

Although this study has discovered a professional and diverse group of non-ALJ deciders, it has not uncovered a significant or persuasive reason associated with the APA for using such deciders as opposed to ALJs. The study included an empirical survey of ALJs and AJs to describe, for the first time, the professional qualities and concerns of this large universe of federal administrative deciders. Somewhat surprisingly, but reassuringly, there seems to be little difference in the degree of independence both groups feel they have from improper agency controls on their decision process. Both groups emerge as relatively productive and secure.

The recommendations that follow are intended to suggest some modest changes that will ensure that these officials continue to perform at even more effective levels, and that they will be able to do so within the framework of what after 45 years remains the best organizing structure, the Administrative Procedure Act.

Recommendations

The Administrative Procedure Act provides for a uniform class of employees, known as administrative law judges, to conduct formal agency adjudications and to initially decide the factual issues in controversy. This system provides procedural fairness and uniformity in agency decision-making processes and should be preserved. Over the years, however, certain perceived difficulties with the ALJ system have led Congress and the agencies to avoid using ALJs in many such formal adjudication programs. This results in losing many of the benefits the APA system seeks to realize. The Conference recommends the following steps to restore the benefits intended by the APA system while alleviating the perceived disadvantages. The Office of Personnel Management (OPM) or Congress should take the following steps:

I. Agency Use of ALJs and AJs

A. Congress should consider expanding the category of cases where ALJs are required (i.e., on-the-record hearings subject to APA formal procedures) to preserve the uniformity of process and decider qualifications contemplated by the APA. To achieve this goal, Congress should consider converting certain administrative judges (AJs) to ALJs.

B. In making its determination of when to convert AJs to ALJ status, Congress should focus on the following factors:

1. Whether the cases heard and decided by the AJs involve potentially serious curtailment of individual interests ("Serious curtailment of individual interests" should be defined to include those cases that involve penalties, sanctions, or other significant restrictions on personal freedom.)

2. Whether the procedures established by regulation or statute for the cases heard and decided by the AJs are the functional equivalent of APA formal hearings

3. Whether the AJs involved already meet standards of independence, selection, experience, and compensation that approximate those accorded to ALJs

4. Whether the AJs are lawyers.

C. When considering how and when to preserve uniformity of process under the APA, Congress should also continue to be alert for opportunities to experiment with procedures and decider qualifications in the nonformal process. Generally speaking, cases involving government benefits, grants or contracts should be candidates for procedural experimentation, as should cases where there is a need for specialized, nonlawyer decisionmakers.

D. When converting existing AJs to ALJ status, Congress should require that OPM automatically appoint those existing AJs designated by the agency involved, subject to an OPM determination that the individual AJs meet the minimum qualifications for ALJ status.¹

E. OPM should no longer be responsible for second guessing agency requests for additional ALJ positions—those decisions should be the purview of agency management.

II. Preserving the Unified Agency Model

Generally speaking, the traditional unified structure that places agency policymakers and semi-independent adjudicators under one roof should be preserved. Accordingly, the split-enforcement mode of separating policymakers and adjudicators into separate agencies should be disfavored and Congress should resist efforts to separate ALJs from the agencies and lodge them in an independent corps.

¹Whether the newly consolidated pay scale for ALJs [5 U.S.C.A. §5372 (1991)] needs to be modified to accommodate converted AJs deserves consideration, but this report does not take a position on the issue.

III. Modifications in the ALJ Program

A. Reforming the ALJ Selection Process

1. OPM should continue to determine the minimum qualifications for ALJ positions and rate the experience of individual applicants. Candidates who rate sufficiently high should be listed alphabetically (without numerical rankings) as "eligible." OPM would no longer administer the personal reference inquiry, panel interview or written demonstration, but would leave those activities to the hiring agency. The hiring agency should be permitted to hire any eligible candidate off the list of eligibles, subject to approval of an agency executive review board, similar to that used for hiring members of the Senior Executive Service.

2. To facilitate this change in the ALJ selection process, OPM should exercise its discretion to designate ALJs as "excepted service" employees (i.e., not part of the competitive service), or Congress should so direct by statute.

3. The mechanical application of veterans preference in the hiring of ALJs, which has had a significant impact on the hiring process, should be modified.

a. Congress should consider eliminating veterans preference entirely in hiring ALJs, as has been done in hiring SES members.

b. If the ALJ selection process is revamped as suggested in paragraphs 1 and 2 (above), but without elimination of veterans preference, veteran status should be noted on the list of eligibles and preference should be given, in appropriate ways, by the hiring agency (as is now done in the hiring of other excepted service attorneys).

4. If the ALJ selection process is not revamped as suggested in paragraphs 1 through 3 (above), then Congress and OPM should, as separate matters, take the following actions:

a. Congress should either eliminate or significantly reduce veterans preference in that process, either by lowering the number of points added or by amending the "rule of three" to permit agencies to select anyone from the top 10 available persons on the register.¹³⁴⁴ OPM should also, in that event, make it easier for agencies to use "selective certification" to hire specially qualified applicants.

¹³⁴⁴The Conference has already formally recommended this in ACUS Recommendation 69-9, "Recruitment and Selection of Hearing Examiners: . . .," 1 CFR §305.69-9 (1989) ¶4.

b. OPM should establish separate qualifications and maintain a separate list of eligibles for ALJ positions at the Social Security Administration (and perhaps other benefit claims agencies) and tighten the requirements for transfer from SSA to other agencies.

5. OPM should, once it revamps the selection process, reopen the application process for ALJ positions and keep it open on a continuing basis.

B. A New System of Performance Appraisal and Discipline of ALJs

The current exclusion of ALJs from the system of performance appraisals applicable to SES members and other federal employees [in 5 U.S.C. §4301(2)(D)] and the current OPM regulation barring agency performance ratings of ALJs [in 5 CFR §930.211] results in poor communication with ALJs about their expected performance in regard to case processing, interaction with parties and the public, and application of agency policies and priorities. This allows problems to go uncorrected until they require formal disciplinary actions before the Merit Systems Protection Board. The current rules should be modified to permit the following type of system:

1. A Chief Administrative Law Judge should be appointed by each agency employing more than one ALJ. Chief ALJs should be given the responsibility to:

a. Develop appropriate case processing guidelines with the participation of ALJs, agency officials, and advisory groups, and subject to the oversight and approval of OPM¹³⁴⁵

b. Collect and maintain data on individual ALJ performance based upon those guidelines and on adherence to agency rules and substantive policies

c. Conduct performance appraisals on ALJs based on those case processing guidelines and adherence to agency rules and substantive policies, at appropriate intervals

d. Recommend commendations and awards for superior performance

e. Undertake counseling, training or other ameliorative activities with respect to an ALJ's performance

¹³⁴⁵See ACUS Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR §305.86-7 (1992) ¶1: "Agencies possess and should exercise the authority, consistent with the ALJ's . . . decisional independence, to formulate written criteria for measuring case handling efficiency, prescribe procedures, and develop techniques for the expeditious and accurate disposition of cases."

f. Receive complaints from ALJs about undue agency pressure or infringement on decisional independence, determine whether such complaints are meritorious and take appropriate steps to resolve meritorious complaints and

g. Issue reprimands, or recommend that the agency bring formal charges for good cause, against individual ALJs before the MSPB. In agencies with numerous ALJs, the Chief ALJ may wish to establish peer review groups to provide advice on whether to bring such charges.

2. Chief ALJs, when assigned the above responsibilities, should be insulated from improper agency pressures. OPM should set up an office or expand its current Office of ALJs to review agency hiring of, and all personnel decisions involving, Chief ALJs. This office should also be responsible for reviewing the performance of Chief ALJs and overseeing and approving the case processing guidelines established by the Chief ALJs.

3. The MSPB, when assigning cases involving charges against ALJs, should consider using a pool of ALJs or using a multi-judge panel of ALJs to hear and recommend decisions in such cases.

IV. Effectuation of Policy Control by Rulemaking

The system of agency adjudication that relies heavily on independent ALJs to find facts and make initial decisions should also ensure that agency policymakers can establish policies in an efficient manner for application by ALJs in individual cases. Thus, agencies should articulate such policies, through rules of general applicability or a system of precedential decisions,¹³⁴⁶ and Congress, the President and the courts should strive to encourage such policy articulation and, in particular, reduce procedural impediments to rulemaking. When agencies make their policies known in an appropriate fashion, ALJs should be bound to apply them in individual cases subject, of course, to parties' right to show that the policy may be inapposite in the particular case.

¹³⁴⁶See generally ACUS Recommendation 71-2, "Articulation of Agency Policies," 1 CFR §305.71-2 (1992); ACUS Recommendation 87-7, "A New Role for the Social Security Appeals Council" 1 CFR §305.87-7 (1992), and ACUS Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR §305.89-8 (1992).

Appendix I

TOTAL ALJs BY GRADE & AGENCY (MAY 1, 1992)

	AL-3 K	AL-3 -B	AL-3 C	AL-3 D	AL-3 E	AL-3 F	AL-2	AL-1	TOTAL
Agriculture				5	2	1	1		5
Commerce						1			1
Commodity Futures Trading Commission						3			3
Education				2	1				3
Environmental Protection Agency					4	2	1		7
Federal Communications Commission				5	4	3	1		9
Federal Energy Regulatory Commission	1			5	1	18		1	22
Federal Labor Relations Authority				1	2	5	1		9
Federal Maritime Commission						3			3
Federal Mine Safety & Health Review Commission			1	3	1	5	1		11
Federal Trade Commission						2			2
HHS/Departmental Appeals Board			1	2					3
HHS/Food and Drug Administration						1			1
HHS/Social Security Administration	92	150	70	415	80	8	11		866
Housing & Urban Development		1		3			1		5
Interior				6	2	2			12
Interstate Commerce Commission						2			2
Justice/Drug Enforcement Administration					1	1			2
Justice/Executive Office of Immigration Review					3	1			4
Labor			4	20	43	7	9	1	64
Merit Systems Protection Board						1			1
National Labor Relations Board					36	39	5	1	81
National Transportation Safety Board				2	1	3			6
Nuclear Regulatory Commission						1			1
Occupational Safety & Health Review Commission				3	4	8	1		16
Office of Thrift Supervision						2			2
Small Business Administration					1				1
Securities and Exchange Commission						3	1		4
Transportation/Coast Guard				8		2			10
Transportation/Office of the Secretary					2	1	1		4
International Trade Commission				1	1		1		3
Postal Service					1	1			2
TOTAL	93	191	78	471	150	126	35	3	1,185

[No Appendix II]

[No Appendix III]

Appendix IV A

Survey of
ADMINISTRATIVE LAW JUDGES FOR ALL AGENCIES

This questionnaire is a part of a study of the practices and attitudes of Administrative Judges ("AJs") and Administrative Law Judges ("ALJs").¹

Please answer each question in the space provided and RETURN THE COMPLETED FORM WITHIN ONE WEEK. If you have additional comments, please include them. The anonymity of respondents will be preserved.

1. Type of Function:

- 7 Civil Rights Enforcement
 - 39 Health & Safety
 - 4 Environment
 - 5 Commodities & Securities
 - 9 Trade Regulations
 - 49 Labor Relations & Personnel
 - 28 Licensing & Rate-making
 - 19 Program Grants & Resource Management
 - 378 Individual Economic Support - SSA
 - 40 Individual Economic Support - All other
- (610 Total)

2. Number of years you have been an ALJ.

0-3	28%	16-18	13%
4-6	10%	19-21	11%
7-9	4%	22-24	3%
10-12	16%	25-27	0%
13-15	12%	27+	2%

¹Most of the questions in this survey duplicate or parallel those of a survey of ALJs by Paula P. Burger, *JUDGES IN SEARCH OF A COURT: CHARACTERISTICS, FUNCTIONS, AND PERCEPTIONS OF FEDERAL ADMINISTRATIVE LAW JUDGES* (1984 & photo. reprint 1985, University Microfilms International). Other sources include United States General Accounting Office, *SURVEY OF ADMINISTRATIVE LAW OPERATIONS*; and Donna Price Cofer, *JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE* (1985).

3. Number of years you have been an ALJ at your present agency.

0-3	31%	16-18	12%
4-6	12%	19-21	8%
7-9	4%	22-24	1%
10-12	19%	25-27	0%
13-15	10%	28+	1%

4. Number of agencies at which you have served as an ALJ.

1 - 77%	3 - 4%	More than 4 - 1%
2 - 17%	4 - 1%	

5. Your age.

0%	Under 30	20%	45-49
.2%	30-34	16%	50-54
1%	34-39	19%	55-59
5%	40-44	21%	60-64
		18%	65 & Over

6. How would you describe your role in the administrative process? (separate sheet)

7a. Do the cases you decide come to you as appeals from another determination level?

Yes - 77% No - 23%

7b. If so, do you make your decision on the record or file made at this other level?

Yes - 5% No - 95%

7c. Or, do you make your decision based in whole or in part on a record made in an oral fact finding hearing over which you preside?

Yes - 99% No - 1%

8. How much of the **TOTAL TIME** spent doing your job is devoted to each of the following activities? Estimate the overall proportion of time, even if from week to week the exact proportions may vary. Ignore those activities that are not relevant to your work.

(BYG.)

- | | |
|----|--|
| 20 | a. Pretrial preparation, reading, study |
| 6 | b. Conducting prehearing conferences and negotiations |
| 31 | c. Presiding at formal hearings, rulings on motions |
| 32 | d. Making decisions and writing decisions |
| 7 | e. Travel |
| 9 | f. General administrative duties, correspondence, professional meetings |
| 3 | g. Conduct rule-making or other proceedings having generalized applicability |
| 12 | h. Other |

9. To what extent do you conceive of your job as involving the following?

	Great Extent	Some Extent	Not Signif. Extent
a. Determining and marshaling facts	95%	4%	1%
b. Guaranteeing due process of law	84%	15%	1%
c. Making credibility determinations	87%	12%	1%
d. Applying agency policies and regulations	71%	26%	3%
e. Applying substantive expertise to problems	64%	30%	6%
f. Interpreting statutes	38%	50%	12%
g. Effecting the settlement of controversies	18%	33%	49%
h. Clarifying agency policies and regulations	11%	37%	52%
i. Making agency policy	1%	8%	91%
j. Educating the public	5%	29%	66%
k. Balancing interests	20%	39%	41%
l. Protecting the public interest over special interests	19%	27%	54%
m. Bringing efficiency to agency proceedings	39%	46%	15%
n. Helping to keep matters out of the federal courts	25%	32%	43%

Rank the three most important of the above.

1. A = 85%
2. C = 71%
3. B = 68%

10. Rate your frequency of engaging in the following reading practices and patterns of communications.

[Note: "N.A." in Questions 10-15 means "Not Applicable."]

	Freq.	Occ.	Rare/Neve	N.A.
a. Read decisions of other presiding officials	26%	48%	23%	3%
b. Read final agency decisions	54%	33%	11%	2%
c. Read decisions of federal courts	54%	41%	4%	1%
d. Read commercial services, industry publications	16%	38%	33%	13%
e. Confer with superior about difficult cases	2%	19%	45%	34%
f. Consult with other ALJs prior to hearing	4%	36%	52%	8%
g. Consult with other ALJs while case pending ...	3%	30%	55%	12%
h. Receive requests for confidential information ..	4%	9%	56%	31%
i. Communications about your case with agency staff	22%	23%	39%	16%
j. Communications about your case with those outside of the agency	3%	12%	57%	28%
k. Make suggestions to agency for policy changes	2%	22%	60%	16%
l. Make suggestions to agency for procedural changes	4%	33%	52%	11%
m. Talk with individual members of private bar about agency procedures	3%	35%	51%	11%
n. Disqualify yourself from hearing a case	--%	11%	85%	4%
o. Attend professional meetings or seminars	8%	65%	26%	1%

11. With respect to the record or file you receive from another determination level, the record—

	Freq.	Occ.	Rare/Neve	N.A.
a. Is not adequate to support the decision at the other level.....	39%	35%	6%	20%
b. Does not adequately prepare me for my hearing	44%	29%	10%	17%
c. Would be improved by staff review before transmission	23%	30%	17%	30%
d. Would be improved if updated before transmission	42%	23%	11%	24%
e. Should have clearer and more thorough expert opinions	41%	27%	11%	21%
f. Is better when a party is represented	51%	19%	9%	21%

	Freq.	Occ.	Rare/Neu	N.A.
g. Would be improved if the other level had been more thorough in obtaining information from the party.....	45%	27%	9%	19%
h. Other suggestion	24%	16%	16%	44%

12. In hearing cases, how often do you engage in any of following practices?

	Freq.	Occ.	Rare/Neu	N.A.
a. Prehearing conferences	25%	36%	37%	2%
b. Order depositions	6%	17%	64%	13%
c. Require experts	60%	19%	17%	4%
d. Request additional evidence	63%	24%	12%	1%
e. Request issue briefs.....	28%	47%	24%	1%
f. Authorize reply briefs	17%	24%	36%	23%
g. Go "off record"	10%	40%	47%	3%
h. IN CAMERA proceeding	6%	18%	52%	24%
i. Question witness directly.....	84%	14%	1%	1%
j. Call own witnesses	43%	18%	32%	7%
k. Certify interlocutory appeals	1%	7%	42%	50%
l. Certify record to agency head for decision (without making initial decision)	1%	3%	42%	54%
m. Admit evidence for "whatever it may be worth"	22%	37%	37%	4%
n. Receiving "testimony" in writing.....	38%	38%	22%	2%
o. Deliver decisions orally.....	4%	15%	62%	19%
p. Grant summary judgment	3%	26%	30%	41%

13. After your initial or recommended decision has been written, how often do you do any of the following things?

	Freq.	Occ.	Rare/Neu	N.A.
a. Participate in oral argument before review board or agency head.....	--%	--%	32%	68%
b. Talk with news media about your decision.....	--%	1%	58%	41%
c. Supply written clarification of decision for agency staff.....	4%	4%	52%	40%

	Freq.	Occ.	Rare/Nev	N.A.
d. Talk or meet with agency staff to explain your decision	1%	8%	51%	40%
e. Study appeal briefs submitted to review board or agency head	3%	15%	47%	35%
f. Help prepare documents or questions to aid agency head or review board in hearing cases on appeal	1%	1%	44%	54%
g. Observe oral argument before review board or agency head	—%	1%	47%	52%
h. Assist in writing of final agency decision, order, report	14%	3%	34%	49%

14. Do any of the following problems arise in your work, and, if so, to what extent?

	Freq.	Occ.	Rare/Nev	N.A.
a. Delay in proceedings	41%	54%	5%	—%
b. Ambiguity in the law you must apply	19%	61%	19%	1%
c. Too great a caseload	34%	45%	20%	1%
d. Cases overly complex in technical sense	9%	35%	53%	3%
e. Lack of direction from agency about policies	9%	35%	46%	10%
f. Lack of agency standards for review of AL decisions	20%	25%	43%	12%
g. Pressure from agency for faster decisions	40%	28%	28%	4%
h. Pressure from agency for different decisions	8%	13%	63%	16%
i. Review of your decisions by persons you think unqualified	33%	29%	30%	8%
j. Lack of procedural uniformity among agencies	10%	13%	33%	43%
k. Lack of procedural uniformity within agency for different cases	11%	23%	48%	18%
l. Too close supervision of work	4%	7%	60%	29%
m. Threats to independence of judgment	20%	14%	48%	18%
n. Other	28%	19%	23%	30%

15. Everyone occasionally feels bothered by certain kinds of things in their work. Below is a list of things that might sometimes bother ALJs. Please indicate how frequently you feel bothered by each of them.

	Freq.	Occ.	Rare/Neve	N.A.
a. Feeling that your caseload burden may interfere with the quality of your work.....	29%	40%	30%	1%
b. Feeling that you have too little authority to carry out the responsibilities assigned to you.	22%	27%	47%	4%
c. Feeling that you can't get your work out.	12%	31%	53%	4%
d. Thinking that there are too many reviews of your work by agency officials.	12%	22%	55%	11%
e. Feeling that you have to do things in your work that are against your better judgment.	11%	23%	57%	9%
f. Feeling that your job tends to interfere with your family life.	2%	16%	73%	9%
g. Feeling that you're not qualified to handle your work.....	—%	2%	78%	9%
h. Feeling that you have too heavy a work load.	17%	38%	41%	4%
i. Thinking that agency officials who review your work aren't nearly as qualified as you are.	29%	33%	31%	7%
j. Thinking that others who perform your type of work (e.g., District Court Judges) are accorded more deference than you are.	38%	32%	26%	4%
k. Feeling that non-ALJ adjudicators are asked to perform ALJ work at your agency or other agencies.	19%	20%	43%	18%

16. In reaching your decisions, how important do you consider the following factors?

[Note: "N.A." in this question means "Not Appropriate to Consider."]]

	Very	Somewhat	Not	N.A.
a. Applicable statutes	94%	6%	0.3%	—
b. Published agency regulations	95%	4%	1%	—
c. Federal court precedents	85%	14%	1%	0.2%
d. Published agency opinions or decisions	68%	27%	3%	2%
e. Executive Orders	22%	22%	28%	28%
f. Staff position as outlined in brief	7%	36%	31%	26%
g. Decisions of other presiding officials	6%	33%	38%	23%
h. Public statements or speeches by agency officials	0.3%	5%	42%	53%
i. Private statements by agency officials	1%	3%	36%	61%
j. Statements by members of Congress	2%	5%	38%	55%
k. Your perception of agency policy goals	11%	38%	28%	23%
l. Your idea of what serves the public interest	23%	35%	23%	19%
m. Your own standards of fairness	49%	33%	9%	9%
n. Public opinion	2%	9%	37%	52%
o. Your evaluation of the facts of a case	99%	0.5%	0.3%	0.2%
p. Your evaluation of documentary evidence	99%	1%	0.2%	0.2%
q. Your evaluation of written "testimony"	76%	17%	4%	3%

Rank the three most important of the above.

1. O = 78%
2. A = 58%
3. B = 53%

17. How important are the following as qualities which should be sought in candidates for positions as ALJs? [Note: "N.A." in this question means "Not Appropriate to Consider."]]

	Very	Somewhat	Not	N.A.
a. Integrity	99.5%	0.3%	0.2%	—
b. Quality of legal education	53%	42%	4%	1%
c. Experience practicing administrative law	28%	52%	20%	0.7%
d. Judicial temperament	93%	7%	0.5%	—
e. Experience in substantive area of law	28%	48%	24%	—
f. Neat personal appearance	23%	60%	15%	2%
g. Sense of humor	18%	55%	20%	7%
h. Trial experience	72%	23%	5%	—
i. Technical expertise	24%	53%	21%	2%
j. Writing ability	72%	27%	1%	0.5%

	Very	Somewhat	Not	N.A.
k. Public speaking ability	20%	57%	20%	3%
l. Analytical skill and reasoning ability	98%	1.5%	0.2%	0.2%
18. When you underwent your qualification and selection process for your appointment as an ALJ, how burdensome did you find the following aspects of the process? [<i>Note: "N.A." in this question means "Not Applicable."</i>]				
	Very	Somewhat	Not	N.A.
a. Completing the OPM/CSC supplemental qualifications statement	43%	37%	18%	2%
b. Providing references for the personal reference inquiry by OPM/CSC	12%	40%	48%	0.2%
c. Completing the written decision test for OPM/CSC	10%	39%	50%	1%
d. Completing the panel interview for OPM/CSC	6%	23%	70%	1%
e. Undergoing interviews, etc. by selecting agency	3%	19%	72%	6%
19. Do you think the selection criteria used for ALJs is relevant to duties actually performed?				
	Very	Somewhat	Not	
	52%	43%	5%	
20. How important were the following factors in your decision to become an ALJ?				
	Very	Somewhat	Not	
a. Independence of job	89%	9%	2%	
b. Challenge of job	78%	30%	2%	
c. Salary	39%	50%	10%	
d. Prestige of position	34%	53%	14%	
e. Enjoyment of government service	27%	48%	25%	
f. Perquisites of office	7%	34%	60%	
g. Commitment to policy goals	9%	37%	55%	
h. Desire to have influence	8%	29%	63%	
i. Unhappiness with previous position	8%	27%	65%	
j. Desire to travel	3%	23%	74%	
k. Experience helpful for further advancement in agency	4%	9%	87%	
l. Other	48%	34%	48%	

21. How would you rate the following descriptions in terms of them being appropriate characterizations of the role of an ALJ?

	Very	Somewhat	Not
a. Judge/Adjudicator.....	96%	3%	1%
b. Important.....	62%	27%	12%
c. Independent.....	90%	9%	1%
d. Decision-maker.....	94%	5%	1%
e. Fact-finder.....	91%	8%	1%
f. Wearer of "Three Hats".....	39%	27%	34%
g. Cog.....	3%	19%	78%
h. Referee.....	4%	25%	71%

22. How satisfied are you with the following aspects of your present position?

	Very	Somewhat	Not
a. Nature of duties.....	81%	17%	1%
b. Conditions of employment.....	47%	37%	16%
c. Substantive area of law in which you work.....	63%	34%	4%
d. Overall satisfaction.....	65%	32%	3%

23. How serious are the following problems for ALJs?

	Very	Somewhat	Not
a. Agency interference.....	26%	35%	39%
b. Need for independence.....	59%	19%	22%
c. Lack of status; poor image.....	25%	45%	30%
d. Inadequacy of hearing facilities & staff support.....	43%	41%	17%
e. Poor salary; lack of prerequisites.....	11%	36%	53%
f. Compromise of formal procedures.....	13%	40%	48%
g. Mediocrity of some ALJs.....	17%	56%	27%
h. Need for increase in judicial powers.....	41%	35%	24%
i. Need for separation from the agency.....	57%	22%	21%
j. Veterans being given preference in the selection process.....	20%	25%	55%
k. Absence of independent corps of ALJs.....	54%	22%	24%

24. To what extent are the following practices appropriate for administrative law judges?

	Very	Somewhat	Not
a. Taking active role in developing the record in a case	69%	24%	6%
b. Talking with news media about the case while hearing is in progress	0.2%	1%	99%
c. Talking with news media about the case after your decision has been made	1%	7%	93%
d. Talking with news media about the case after agency decision is final	1%	8%	91%
e. Having lunch or other social contacts with agency staff attorneys.....	7%	39%	53%
f. Having lunch or other social contacts with private attorneys who practice before your agency	2%	30%	69%
g. Suggesting procedural changes to agency	38%	51%	11%
h. Suggesting changes in substantive policy to agency	22%	50%	28%
i. Urging changes in legislation affecting ALJs...	54%	37%	9%
j. Suggesting other proceedings, investigations, or studies you think your agency should conduct.....	27%	48%	24%

25. How would you classify the nature of your primary professional experience before you became an ALJ?

- (a) 36% Private
48% Federal Government
16% State or Local Government

- (b) 79% Litigation
8% Advisory
0.4% Transactional
12% Examiner or Other Adjudicator

26. 94% Male 6% Female

27. Racial/Ethnic Category: (choose one)
1% Asian or Pacific Islander 1% Black, not of Hispanic origin
3% Hispanic 1% American Indian or Alaskan Native
94% White, not of Hispanic origin
28. Did you receive veteran's preference for your appointment as an ALJ?
65 Yes 36 No
29. Government Service Classification
AL-3 10% A 18% B 8% C 36% D 14% E 10% F
AL-2 4%
AL-1 1%
30. In comparison to Federal Judges, do you think you have?
- | | Greater/More | The Same | Lesser |
|---|--------------|----------|--------|
| a. Authority | 1% | 2% | 97% |
| b. Prestige..... | 0.2% | 1% | 99% |
| c. Freedom in reaching a decision..... | 2% | 60% | 39% |
| d. Complex cases | 7% | 45% | 48% |
| e. Caseload burden..... | 31% | 44% | 25% |
| f. Duty to be bound by agency policy..... | 71% | 25% | 4% |
| g. Duty to follow rules of evidence..... | 1% | 45% | 54% |
| h. Impact on public policy..... | 4% | 23% | 73% |
| i. Independence | 1% | 39% | 60% |
31. In comparison to non-ALJ adjudicators, do you think you have?
- | | Greater/More | The Same | Lesser |
|---|--------------|----------|--------|
| a. Authority | 87% | 10% | 2% |
| b. Prestige..... | 87% | 11% | 2% |
| c. Freedom in reaching a decision..... | 87% | 12% | 2% |
| d. Complex cases | 78% | 21% | 1% |
| e. Caseload burden | 56% | 38% | 6% |
| f. Duty to be bound by agency policy..... | 13% | 55% | 32% |
| g. Duty to follow rules of evidence..... | 57% | 40% | 3% |
| h. Impact on public policy..... | 53% | 42% | 6% |
| i. Independence | 88% | 9% | 3% |
32. What undergraduate institution did you attend? 246 different schools
33. Degree Received; 68% B.A. 32% B.S.

34. Major: 81 different majors

35. Did you attend law school? ____ If no, skip to question 39.

99.5% yes 0.2% no

What law school did you attend? Many different schools

36. What was your approximate rank in your law school class?

23% a. Top 10%

35% b. Top 25%

35% c. Upper half

7% d. Lower half

37. Were you a member of law review? 17% yes 83% no

38. Have you had any graduate training other than law school?

28% yes 72% no

39. If you have had additional graduate work, what was your field of study?

67 different fields

40. Please give us the benefit of any observations that will help in understanding your work. (Comments may be written on the back of this page, or an additional sheet may be attached.)

Appendix IV B

**Survey of
SOCIAL SECURITY ADMINISTRATION ADMINISTRATIVE LAW JUDGES**

This questionnaire is a part of a study of the practices and attitudes of Administrative Judges ("AJs") and Administrative Law Judges ("ALJs").¹

Please answer each question in the space provided and RETURN THE COMPLETED FORM WITHIN ONE WEEK. If you have additional comments, please include them. The anonymity of respondents will be preserved.

1. Type of Function:

- Civil Rights Enforcement
- Health & Safety
- Environment
- Commodities & Securities
- Trade Regulations
- Labor Relations & Personnel
- Licensing & Rate-making
- Program Grants & Resource Management
- 100% Individual Economic Support - SSA
- Individual Economic Support - All other

2. Number of years you have been an ALJ.

0-3	39%	16-18	10%
4-6	13%	19-21	9%
7-9	3%	22-24	1%
10-12	16%	25-27	1%
13-15	7%	27+	1%

¹Most of the questions in this survey duplicate or parallel those of a survey of ALJs by Paula P. Burger, *JUDGES IN SEARCH OF A COURT: CHARACTERISTICS, FUNCTIONS, AND PERCEPTIONS OF FEDERAL ADMINISTRATIVE LAW JUDGES* (1984 & photo. reprint 1985, University Microfilms International). Other sources include United States General Accounting Office, *SURVEY OF ADMINISTRATIVE LAW OPERATIONS*; and Donna Price Cofer, *JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE* (1985).

3. Number of years you have been an ALJ at your present agency.

0-3	40%	16-18	9%
4-6	14%	19-21	9%
7-9	3%	22-24	1%
10-12	17%	25-27	0.3%
13-15	7%	28+	1%

4. Number of agencies at which you have served as an ALJ.

1 - 92%	3 - 1%	More than 4 - 0.3%
2 - 6%	4 - 1%	

5. Your age.

—	Under 30
—	30-34
2%	34-39
6%	40-44
25%	45-49
14%	50-54
18%	55-59
18%	60-64
17%	65 & Over

6. How would you describe your role in the administrative process? (See Appendix IV A, Survey of ALJs for All Agencies.)

7a. Do the cases you decide come to you as appeals from another determination level?

Yes - 95% No - 5%

7b. If so, do you make your decision on the record or file made at this other level?

Yes - 4% No - 96%

7c. Or, do you make your decision based in whole or in part on a record made in an oral fact finding hearing over which you preside?

Yes - 99% No - 1%

8. How much of the TOTAL TIME spent doing your job is devoted to each of the following activities? Estimate the overall proportion of time, even if from week to week the exact proportions may vary. Ignore those activities that are not relevant to your work.

(avg.)

22%	a. Pretrial preparation, reading, study
5%	b. Conducting prehearing conferences and negotiations
34%	c. Presiding at formal hearings, rulings on motions
27%	d. Making decisions and writing decisions
6%	e. Travel
8%	f. General administrative duties, correspondence, professional meetings
3%	g. Conduct rule-making or other proceedings having generalized applicability
10%	h. Other

9. To what extent do you conceive of your job as involving the following?

	Great Extent	Some Extent	Not Signif. Extent
a. Determining and marshaling facts	95%	5%	0.3%
b. Guaranteeing due process of law	84%	15%	1%
c. Making credibility determinations	93%	7%	1%
d. Applying agency policies and regulations	75%	24%	1%
e. Applying substantive expertise to problems	65%	30%	4%
f. Interpreting statutes	29%	57%	14%
g. Effecting the settlement of controversies	14%	27%	60%
h. Clarifying agency policies and regulations	8%	36%	56%
i. Making agency policy	1%	5%	95%
j. Educating the public	4%	33%	63%
k. Balancing interests	20%	37%	43%
l. Protecting the public interest over special interests	15%	28%	57%
m. Bringing efficiency to agency proceedings	39%	47%	14%
n. Helping to keep matters out of the federal courts	29%	35%	37%

Rank the three most important of the above.

1. A = 85%
2. C = 79%
3. B = 71%

10. Rate your frequency of engaging in the following reading practices and patterns of communications.

[Note: "N.A." in Questions 10-15 means "Not Applicable."]

	Freq.	Occ.	Rare/Nev	N.A.
a. Read decisions of other presiding officials	15%	53%	29%	3%
b. Read final agency decisions	41%	42%	16%	2%
c. Read decisions of federal courts	47%	47%	5%	0.3%
d. Read commercial services, industry publications	10%	37%	39%	13%
e. Confer with superior about difficult cases	3%	26%	45%	29%
f. Consult with other ALJs prior to hearing	4%	35%	55%	6%
g. Consult with other ALJs while case pending	3%	27%	60%	10%
h. Receive requests for confidential information	5%	8%	59%	28%
i. Communications about your case with agency staff	30%	29%	33%	7%
j. Communications about your case with those outside of the agency	4%	13%	60%	23%
k. Make suggestions to agency for policy changes	1%	23%	62%	13%
l. Make suggestions to agency for procedural change	3%	32%	55%	10%
m. Talk with individual members of private bar about agency procedures	3%	36%	50%	8%
n. Disqualify yourself from hearing a case	0%	14%	83%	3%
o. Attend professional meetings or seminars	6%	65%	28%	1%

11. With respect to the record or file you receive from another determination level, the record—

	Freq.	Occ.	Rare/Nev	N.A.
a. Is not adequate to support the decision at the other level	51%	42%	6%	1%
b. Does not adequately prepare me for my hearing	56%	36%	9%	0.3%
c. Would be improved by staff review before transmission	30%	37%	20%	13%
d. Would be improved if updated before transmission	56%	29%	9%	6%
e. Should have clearer and more thorough expert opinions	55%	33%	11%	2%
f. Is better when a party is represented	61%	25%	11%	3%

	Freq.	Occ.	Rare/Nev	N.A.
g. Would be improved if the other level had been more thorough in obtaining information from the party	59%	31%	9%	—
h. Other suggestion	12%	1%	1%	14%
12. In hearing cases, how often do you engage in any of following practices?				
	Freq.	Occ.	Rare/Nev	N.A.
a. Prehearing conferences	7%	41%	50%	2%
b. Order depositions	1%	14%	71%	14%
c. Require experts	80%	19%	1%	—
d. Request additional evidence	85%	14%	—	—
e. Request issue briefs	12%	56%	31%	1%
f. Authorize reply briefs	5%	21%	44%	31%
g. Go "off record"	6%	31%	60%	3%
h. IN CAMERA proceeding	6%	9%	53%	30%
i. Question witness directly	96%	3%	1%	0.3%
j. Call own witnesses	61%	21%	13%	5%
k. Certify interlocutory appeals	1%	36%	62%	—
l. Certify record to agency head for decision (without making initial decision)	2%	40%	58%	—
m. Admit evidence for "whatever it may be worth"	29%	41%	26%	4%
n. Receiving "testimony" in writing	40%	43%	16%	1%
o. Deliver decisions orally	3%	16%	62%	19%
p. Grant summary judgment	2%	19%	27%	52%

13. After your initial or recommended decision has been written, how often do you do any of the following things?

	Freq.	Occ.	Rare/Nev	N.A.
a. Participate in oral argument before review board or agency head	—	—	28%	71%
b. Talk with news media about your decision	—	—	49%	50%
c. Supply written clarification of decision for agency staff	6%	6%	48%	40%
d. Talk or meet with agency staff to explain your decision	2%	12%	48%	37%
e. Study appeal briefs submitted to review board or agency head	3%	10%	47%	38%
f. Help prepare documents or questions to aid agency head or review board in hearing cases on appeal	1%	0.3%	42%	57%
g. Observe oral argument before review board or agency head	—	—	40%	59%
h. Assist in writing of final agency decision, order, report	20%	4%	27%	47%

14. Do any of the following problems arise in your work, and, if so, to what extent?

	Freq.	Occ.	Rare/Nev	N.A.
a. Delay in proceedings	45%	51%	4%	—
b. Ambiguity in the law you must apply	12%	65%	22%	—
c. Too great a caseload	41%	42%	15%	1%
d. Cases overly complex in technical sense	8%	37%	52%	2%
e. Lack of direction from agency about policies	9%	38%	47%	4%
f. Lack of agency standards for review of ALJ decisions	27%	28%	36%	6%
g. Pressure from agency for faster decisions	54%	28%	16%	1%
h. Pressure from agency for different decisions	10%	16%	61%	10%
i. Review of your decisions by persons you think unqualified	43%	31%	22%	2%
j. Lack of procedural uniformity among agencies	12%	14%	27%	44%
k. Lack of procedural uniformity within agency for different cases	13%	25%	44%	15%
l. Too close supervision of work	3%	8%	65%	22%
m. Threats to independence of judgment	21%	12%	40%	10%
n. Other	12%	2%	3%	10%

15. Everyone occasionally feels bothered by certain kinds of things in their work. Below is a list of things that might sometimes bother ALJs. Please indicate how frequently you feel bothered by each of them.

	Freq.	Occ.	Rare/Neve	N.A.
a. Feeling that your caseload burden may interfere with the quality of your work.	36%	42%	21%	1%
b. Feeling that you have too little authority to carry out the responsibilities assigned to you.	27%	32%	39%	1%
c. Feeling that you can't get out your work.	15%	34%	47%	2%
d. Thinking that there are too many reviews of your work by agency officials.	14%	29%	50%	6%
e. Feeling that you have to do things in your work that are against your better judgment.	13%	29%	52%	5%
f. Feeling that your job tends to interfere with your family life.	3%	18%	71%	7%
g. Feeling that you're not qualified to handle your work.	1%	79%	18%	—
h. Feeling that you have too heavy a work load.	19%	41%	35%	4%
i. Thinking that agency officials who review your work aren't nearly as qualified as you are.	34%	35%	26%	4%
j. Thinking that others who perform your type of work (e.g., District Court Judges) are accorded more deference than you are.	43%	30%	22%	4%
k. Feeling that non-ALJ adjudicators are asked to perform ALJ work at your agency or other agencies.	23%	21%	39%	14%

16. In reaching your decisions, how important do you consider the following factors?

[*Note: "N.A." in this question means "Not Appropriate to Consider."*]

	Very	Somewhat	Not	N.A.
a. Applicable statutes.	92%	8%	1%	—
b. Published agency regulations	96%	4%	---	---
c. Federal court precedents	85%	14%	1%	0.3%
d. Published agency opinions or decisions	58%	35%	5%	2%
e. Executive Orders	20%	21%	29%	30%
f. Staff position as outlined in brief	4%	32%	32%	32%
g. Decisions of other presiding officials	2%	27%	42%	29%
h. Public statements or speeches by agency officials	0.3%	5%	45%	50%
i. Private statements by agency officials	1%	4%	39%	57%
j. Statements by members of Congress	1%	6%	41%	52%
k. Your perception of agency policy goals	11%	40%	30%	20%
l. Your idea of what serves the public interest	21%	35%	25%	19%
m. Your own standards of fairness	48%	37%	8%	8%
n. Public opinion	2%	11%	40%	47%
o. Your evaluation of the facts of a case	99%	0.3%	0.3%	0.3%
p. Your evaluation of documentary evidence	99%	1%	0.3%	0.3%
q. Your evaluation of written "testimony"	76%	20%	3%	2%

Rank the three most important of the above.

1. O = 82%

2. B = 58%

3. A = 55%

17. How important are the following as qualities which should be sought in candidates for positions as ALJs? [*Note: "N.A." in this question means "Not Appropriate to Consider."*]

	Very	Somewhat	Not	N.A.
a. Integrity	100%	—	—	0.3%
b. Quality of legal education	52%	43%	4%	1%
c. Experience practicing administrative law	26%	51%	22%	1%
d. Judicial temperament	94%	6%	—	0.3%
e. Experience in substantive area of law	28%	44%	28%	0.3%
f. Neat personal appearance	25%	59%	14%	2%
g. Sense of humor	17%	56%	21%	5%
h. Trial experience	73%	22%	5%	—
i. Technical expertise	28%	53%	18%	1%
j. Writing ability	64%	35%	1%	1%
k. Public speaking ability	21%	58%	18%	2%
l. Analytical skill and reasoning ability	98%	1%	—	0.3%

18. When you underwent your qualification and selection process for your appointment as an ALJ, how burdensome did you find the following aspects of the process? [*Note: "N.A." in this question means "Not Applicable."*]

	Very	Somewhat	Not	N.A.
a. Completing the OPM/CSC supplemental qualifications statement	41%	37%	20%	1%
b. Providing references for the personal reference inquiry by OPM/CSC	12%	39%	50%	—
c. Completing the written decision test for OPM/CSC	11%	39%	50%	0.3%
d. Completing the panel interview for OPM/CSC	7%	23%	70%	1%
e. Undergoing interviews, etc. by selecting agency	4%	18%	73%	6%

19. Do you think the selection criteria used for ALJs is relevant to duties actually performed?

Very	Somewhat	Not
54%	43%	4%

20. How important were the following factors in your decision to become an ALJ?

	Very	Somewhat	Not
a. Independence of job	87%	12%	2%
b. Challenge of job	75%	23%	2%
c. Salary	42%	48%	10%
d. Prestige of position	33%	53%	14%
e. Enjoyment of government service	26%	48%	27%
f. Perquisites of office	8%	35%	58%
g. Commitment to policy goals	9%	40%	51%
h. Desire to have influence	7%	29%	64%
i. Unhappiness with previous position	8%	30%	62%
j. Desire to travel	3%	21%	77%
k. Experience helpful for further advancement in agency	4%	10%	86%
l. Other	50%	5%	45%

21. How would you rate the following descriptions in terms of them being appropriate characterizations of the role of an ALJ?

	Very	Somewhat	Not
a. Judge/Adjudicator	97%	3%	1%
b. Important	62%	28%	10%
c. Independent	87%	12%	1%
d. Decision-maker	94%	5%	0.3%
e. Fact-finder	92%	8%	1%
f. Wearer of "Three Hats"	53%	33%	14%
g. Cog	4%	20%	76%
h. Referee	3%	21%	76%

22. How satisfied are you with the following aspects of your present position?

	Very	Somewhat	Not
a. Nature of duties	79%	19%	1%
b. Conditions of employment	42%	40%	19%
c. Substantive area of law in which you work	57%	39%	4%
d. Overall satisfaction	61%	36%	4%

23. How serious are the following problems for ALJs?

	Very	Somewhat	Not
a. Agency interference	32%	41%	27%
b. Need for independence	66%	20%	15%
c. Lack of status; poor image	27%	46%	27%
d. Inadequacy of hearing facilities & staff support	50%	38%	13%
e. Poor salary; lack of prerequisites	10%	35%	55%
f. Compromise of formal procedures	16%	44%	40%
g. Mediocrity of some ALJs	19%	57%	23%
h. Need for increase in judicial powers	50%	32%	18%
i. Need for separation from the agency	68%	23%	9%
j. Veterans being given preference in the selection process	19%	26%	55%
k. Absence of independent corps of ALJs	67%	22%	12%

24. To what extent are the following practices appropriate for administrative law judges?

	Very	Somewhat	Not
a. Taking active role in developing the record in a case	77%	17%	6%
b. Talking with news media about the case while hearing is in progress	—	0.3%	100%
c. Talking with news media about the case after your decision has been made	0.3%	3%	97%
d. Talking with news media about the case after agency decision is final	1%	4%	95%
e. Having lunch or other social contacts with agency staff attorneys	11%	49%	41%
f. Having lunch or other social contacts with private attorneys who practice before your agency	3%	32%	65%
g. Suggesting procedural changes to agency	42%	49%	7%
h. Suggesting changes in substantive policy to agency	25%	56%	19%
i. Urging changes in legislation affecting ALJs	57%	36%	7%
j. Suggesting other proceedings, investigations, or studies you think your agency should conduct.	34%	51%	15%

25. How would you classify the nature of your primary professional experience before you became an ALJ?
- (a) 43% Private
38% Federal Government
20% State or Local Government
- (b) 79% Litigation
8% Advisory
1% Transactional
12% Examiner or Other Adjudicator
26. 94% Male 6% Female
27. Racial/Ethnic Category: (choose one)
1% Asian or Pacific Islander 1% Black, not of Hispanic origin
4% Hispanic 1% American Indian or Alaskan Native
94% White, not of Hispanic origin
28. Did you receive veteran's preference for your appointment as an ALJ?
66 Yes 34 No
29. Government Service Classification
AL-3 14% A 27% B 10% C 40% D 5% E 1% F
AL-2 1%
AL-1 1%
30. In comparison to Federal Judges, do you think you have?

	Greater/More	The Same	Lesser
a. Authority	1%	2%	97%
b. Prestige	-	1%	99%
c. Freedom in reaching a decision	1%	53%	46%
d. Complex cases	3%	40%	57%
e. Caseload burden	43%	44%	13%
f. Duty to be bound by agency policy	76%	22%	3%
g. Duty to follow rules of evidence	1%	39%	60%
h. Impact on public policy	4%	17%	79%
i. Independence	1%	30%	69%

31. In comparison to non-ALJ adjudicators, do you think you have?

	Greater/More	The Same	Lesser
a. Authority	86%	11%	3%
b. Prestige	86%	11%	3%
c. Freedom in reaching a decision	85%	13%	2%
d. Complex cases	75%	24%	1%
e. Caseload burden	59%	35%	6%
f. Duty to be bound by agency policy	12%	52%	36%
g. Duty to follow rules of evidence	52%	44%	4%
h. Impact on public policy	48%	45%	7%
i. Independence	85%	11%	4%

32. What undergraduate institution did you attend? (See Appendix IV A, Survey of ALJs for All Agencies.)

33. Degree Received: 66% B.A. 34% B.S.

34. Major: (See Appendix IV A, Survey of ALJs for All Agencies.)

35. Did you attend law school? ____ If no, skip to question 39.

99.5% yes 0.3% no

What law school did you attend? (See Appendix IV A, Survey of ALJs for All Agencies.)

36. What was your approximate rank in your law school class? (See Appendix IV A, Survey of ALJs for All Agencies.)

37. Were you a member of law review? 16% yes 84% no

38. Have you had any graduate training other than law school? 28% yes 72% no

39. If you have had additional graduate work, what was your field of study? (See Appendix IV A, Survey of ALJs for All Agencies.)

40. Please give us the benefit of any observations that will help in understanding your work. (Comments may be written on the back of this page, or an additional sheet may be attached.) (See Appendix IV A, Survey of ALJs for All Agencies.)

Appendix IV C

**Survey of
NON-SOCIAL SECURITY ADMINISTRATION ADMINISTRATIVE LAW
JUDGES**

This questionnaire is a part of a study of the practices and attitudes of Administrative Judges ("AJs") and Administrative Law Judges ("ALJs").¹

Please answer each question in the space provided and RETURN THE COMPLETED FORM WITHIN ONE WEEK. If you have additional comments, please include them. The anonymity of respondents will be preserved.

1. Type of Function:

- 4% Civil Rights Enforcement
- 20% Health & Safety
- 2% Environment
- 3% Commodities & Securities
- 5% Trade Regulations
- 25% Labor Relations & Personnel
- 14% Licensing & Rate-making
- 10% Program Grants & Resource Management
- Individual Economic Support - SSA
- 20% Individual Economic Support - All other

2. Number of years you have been an ALJ.

0-3	8%	16-18	20%
4-6	5%	19-21	14%
7-9	5%	22-24	4%
10-12	16%	25-27	3%
13-15	20%	27+	4%

¹Most of the questions in this survey duplicate or parallel those of a survey of ALJs by Paula P. Burger, *JUDGES IN SEARCH OF A COURT: CHARACTERISTICS, FUNCTIONS, AND PERCEPTIONS OF FEDERAL ADMINISTRATIVE LAW JUDGES* (1984 & photo. reprint 1985, University Microfilms International). Other sources include United States General Accounting Office, *SURVEY OF ADMINISTRATIVE LAW OPERATIONS*; and Donna Price Cofer, *JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE* (1985).

3. Number of years you have been an ALJ at your present agency.

0-3	16%	16-18	17%
4-6	9%	19-21	8%
7-9	3%	22-24	2%
10-12	22%	25-27	1%
13-15	16%	28+	2%

4. Number of agencies at which you have served as an ALJ.

1 - 52%	3 - 8%	More than 4 - 3%
2 - 34%	4 - 2%	

5. Your age.

—	Under 30
0.4%	30-34
—	34-39
2%	40-44
12%	45-49
20%	50-54
20%	55-59
26%	60-64
20%	65 & Over

6. How would you describe your role in the administrative process? (See Appendix IV A, Survey of ALJs for All Agencies.)

7a. Do the cases you decide come to you as appeals from another determination level?

Yes - 47% No - 53%

7b. If so, do you make your decision on the record or file made at this other level?

Yes - 7% No - 93%

7c. Or, do you make your decision based in whole or in part on a record made in an oral fact finding hearing over which you preside?

Yea - 98% No - 2%

8. How much of the TOTAL TIME spent doing your job is devoted to each of the following activities? Estimate the overall proportion of time, even if from week to week the exact proportions may vary. Ignore those activities that are not relevant to your work.

(avg.)

- 7% a. Pretrial preparation, reading, study
- 14% b. Conducting prehearing conferences and negotiations
- 7% c. Presiding at formal hearings, rulings on motions
- 25% d. Making decisions and writing decisions
- 39% e. Travel
- 6% f. General administrative duties, correspondence, professional meetings
- 8% g. Conduct rule-making or other proceedings having generalized applicability
- 3% h. Other

9. To what extent do you conceive of your job as involving the following?

	Great Extent	Some Extent	Not Signif. Extent
a. Determining and marshaling facts	97%	3%	0.4%
b. Guaranteeing due process of law	84%	14%	2%
c. Making credibility determinations	78%	20%	2%
d. Applying agency policies and regulations	65%	29%	6%
e. Applying substantive expertise to problems	61%	29%	11%
f. Interpreting statutes	53%	37%	10%
g. Effecting the settlement of controversies	27%	43%	31%
h. Clarifying agency policies and regulations	16%	37%	46%
i. Making agency policy	2%	13%	84%
j. Educating the public	5%	24%	71%
k. Balancing interests	21%	41%	38%
l. Protecting the public interest over special interests	25%	24%	51%
m. Bringing efficiency to agency proceedings	40%	42%	18%
n. Helping to keep matters out of the federal courts	21%	26%	54%

Rank the three most important of the above.

- 1. A = 84%
- 2. B = 63%
- 3. C = 58%

10. Rate your frequency of engaging in the following reading practices and patterns of communications.

[Note: "N.A." in Questions 10-15 means "Not Applicable."]

	Freq.	Occ.	Rare/Neve	N.A.
a. Read decisions of other presiding officials	45%	40%	13%	3%
b. Read final agency decisions	77%	18%	3%	2%
c. Read decisions of federal courts	66%	30%	2%	1%
d. Read commercial services, industry publications	25%	39%	24%	9%
e. Confer with superior about difficult cases	1%	15%	43%	41%
f. Consult with other ALJs prior to hearing	4%	38%	47%	11%
g. Consult with other ALJs while case pending	5%	33%	46%	15%
h. Receive requests for confidential information	2%	12%	51%	34%
i. Communications about your case with agency staff	8%	13%	48%	30%
j. Communications about your case with those outside of the agency	3%	10%	50%	37%
k. Make suggestions to agency for policy changes	2%	19%	56%	22%
l. Make suggestions to agency for procedural changes	5%	36%	45%	13%
m. Talk with individual members of private bar about agency procedures	3%	28%	53%	16%
n. Disqualify yourself from hearing a case	--	7%	88%	4%
o. Attend professional meetings or seminars	11%	64%	23%	1%

11. With respect to the record or file you receive from another determination level, the record:

	Freq.	Occ.	Rare/Neve	N.A.
a. Is not adequate to support the decision at the other level	16%	20%	5%	50%
b. Does not adequately prepare me for my hearing	22%	15%	9%	44%
c. Would be improved by staff review before transmission	9%	16%	10%	55%
d. Would be improved if updated before transmission	15%	11%	10%	55%
e. Should have clearer and more thorough expert opinions	15%	14%	8%	53%
f. Is better when a party is represented	30%	6%	3%	50%

	Freq.	Occ.	Rare/Nev	N.A.
g. Would be improved if the other level had been more thorough in obtaining information from the party	18%	16%	7%	49%
h. Other suggestion	4%	--	--	52%

12. In hearing cases, how often do you engage in any of following practices?

	Freq.	Occ.	Rare/Nev	N.A.
a. Prehearing conferences	57%	28%	15%	1%
b. Order depositions	15%	23%	51%	12%
c. Require experts	26%	21%	42%	11%
d. Request additional evidence	26%	41%	31%	3%
e. Request issue briefs	54%	32%	13%	1%
f. Authorize reply briefs	37%	30%	23%	9%
g. Go "off record"	18%	57%	23%	1%
h. IN CAMERA proceeding	6%	34%	49%	12%
i. Question witness directly	64%	33%	2%	0.4%
j. Call own witnesses	13%	13%	62%	11%
k. Certify interlocutory appeals	1%	19%	52%	29%
l. Certify record to agency head for decision (without making initial decision)	1%	5%	43%	48%
m. Admit evidence for "whatever it may be worth"	11%	30%	54%	4%
n. Receiving "testimony" in writing	35%	29%	30%	5%
o. Deliver decisions orally	4%	15%	62%	18%
p. Grant summary judgment	4%	38%	36%	--

13. After your initial or recommended decision has been written, how often do you do any of the following things?

	Freq.	Occ.	Rare/Nev	N.A.
a. Participate in oral argument before review board or agency head	--	--	37%	63%
b. Talk with news media about your decision	--	2%	71%	27%
c. Supply written clarification of decision for agency staff	0.4%	1%	57%	41%
d. Talk or meet with agency staff to explain your decision	0.4%	2%	54%	43%
e. Study appeal briefs submitted to review board or agency head	3%	22%	45%	29%
f. Help prepare documents or questions to aid agency head or review board in hearing cases on appeal	--	--	48%	52%
g. Observe oral argument before review board or agency head	--	3%	56%	41%
h. Assist in writing of final agency decision, order, report	3%	0.4%	45%	51%

14. Do any of the following problems arise in your work, and, if so, to what extent?

	Freq.	Occ.	Rare/Nev	N.A.
a. Delay in proceedings	34%	58%	7%	--
b. Ambiguity in the law you must apply	29%	55%	13%	0.4%
c. Too great a caseload	21%	49%	28%	1%
d. Cases overly complex in technical sense	9%	31%	54%	4%
e. Lack of direction from agency about policies	7%	28%	43%	21%
f. Lack of agency standards for review of ALJ decisions	9%	18%	51%	22%
g. Pressure from agency for faster decisions	15%	28%	46%	9%
h. Pressure from agency for different decisions	4%	5%	64%	24%
i. Review of your decisions by persons you think unqualified	15%	25%	42%	15%
j. Lack of procedural uniformity among agencies	7%	9%	40%	40%
k. Lack of procedural uniformity within agency for different cases	7%	18%	50%	21%
l. Too close supervision of work	4%	4%	51%	40%
m. Threats to independence of judgment	8%	7%	51%	21%
n. Other	6%	1%	8%	17%

15. Everyone occasionally feels bothered by certain kinds of things in their work. Below is a list of things that might sometimes bother ALJs. Please indicate how frequently you feel bothered by each of them.

	Freq.	Occ.	Rare/Neve	N.A.
a. Feeling that your caseload burden may interfere with the quality of your work.	16%	36%	44%	1%
b. Feeling that you have too little authority to carry out the responsibilities assigned to you.	12%	18%	59%	8%
c. Feeling that you can't get out your work.	7%	23%	61%	5%
d. Thinking that there are too many reviews of your work by agency officials.	8%	10%	61%	18%
e. Feeling that you have to do things in your work that are against your better judgment.	6%	13%	65%	13%
f. Feeling that your job tends to interfere with your family life.	1%	11%	75%	11%
g. Feeling that you're not qualified to handle your work.	—	3%	73%	20%
h. Feeling that you have too heavy a work load.	11%	31%	50%	5%
i. Thinking that agency officials who review your work aren't nearly as qualified as you are.	20%	29%	37%	11%
j. Thinking that others who perform your type of work (e.g., District Court Judges) are accorded more deference than you are.	30%	34%	31%	4%
k. Feeling that non-ALJ adjudicators are asked to perform ALJ work at your agency or other agencies.	11%	18%	47%	22%

16. In reaching your decisions, how important do you consider the following factors?
 [Note: "N.A." in this question means "Not Appropriate to Consider."]]

	Very	Somewhat	Not	N.A.
a. Applicable statutes	97%	3%	—	—
b. Published agency regulations	92%	5%	3%	—
c. Federal court precedents	84%	14%	2%	—
d. Published agency opinions or decisions	84%	14%	1%	1%
e. Executive Orders	25%	24%	26%	25%
f. Staff position as outlined in brief	11%	42%	29%	18%
g. Decisions of other presiding officials	13%	44%	30%	13%
h. Public statements or speeches by agency officials	0.4%	4%	37%	58%
i. Private statements by agency officials	1%	2%	30%	67%
j. Statements by members of Congress	4%	3%	34%	59%
k. Your perception of agency policy goals	12%	34%	26%	28%
l. Your idea of what serves the public interest	25%	34%	20%	21%
m. Your own standards of fairness	51%	28%	11%	11%
n. Public opinion	3%	5%	33%	59%
o. Your evaluation of the facts of a case	99%	1%	—	—
p. Your evaluation of documentary evidence	99%	1%	—	—
q. Your evaluation of written "testimony"	77%	12%	6%	5%

Rank the three most important of the above.

1. O = 72%
2. B = 64%
3. A = 45%

17. How important are the following as qualities which should be sought in candidates for positions as ALJs? [Note: "N.A." in this question means "Not Appropriate to Consider."]

	Very	Somewhat	Not	N.A.
a. Integrity	99%	1%	—	—
b. Quality of legal education	56%	40%	4%	1%
c. Experience practicing administrative law	31%	54%	15%	0.4%
d. Judicial temperament	91%	8%	—	1%
e. Experience in substantive area of law	29%	54%	16%	1%
f. Neat personal appearance	19%	62%	16%	3%
g. Sense of humor	19%	54%	19%	8%
h. Trial experience	69%	25%	6%	—
i. Technical expertise	20%	52%	25%	3%
j. Writing ability	85%	14%	1%	0.4%
k. Public speaking ability	18%	55%	23%	3%
l. Analytical skill and reasoning ability	98%	1%	0.4%	—

18. When you underwent your qualification and selection process for your appointment as an ALJ, how burdensome did you find the following aspects of the process? [Note: "N.A." in this question means "Not Applicable."]

	Very	Somewhat	Not	N.A.
a. Completing the OPM/CSC supplemental qualifications statement	45%	35%	15%	5%
b. Providing references for the personal reference inquiry by OPM/CSC	12%	43%	44%	0.4%
c. Completing the written decision test for OPM/CSC	9%	39%	52%	1%
d. Completing the panel interview for OPM/CSC	4%	24%	71%	1%
e. Undergoing interviews, etc. by selecting agency	2%	20%	72%	6%

19. Do you think the selection criteria used for ALJs is relevant to duties actually performed?

Very	Somewhat	Not
51%	44%	6%

20. How important were the following factors in your decision to become an ALJ?

	Very	Somewhat	Not
a. Independence of job	93%	5%	2%
b. Challenge of job	83%	16%	1%
c. Salary	35%	54%	11%
d. Prestige of position	35%	51%	14%
e. Enjoyment of government service	30%	49%	21%
f. Perquisites of office	5%	33%	62%
g. Commitment to policy goals	9%	31%	60%
h. Desire to have influence	9%	30%	61%
i. Unhappiness with previous position	8%	22%	70%
j. Desire to travel	4%	26%	70%
k. Experience helpful for further advancement in agency	3%	7%	90%
l. Other	43%	—	55%

21. How would you rate the following descriptions in terms of them being appropriate characterizations of the role of an ALJ?

	Very	Somewhat	Not
a. Judge/Adjudicator	96%	3%	1%
b. Important	61%	24%	14%
c. Independent	95%	4%	1%
d. Decision-maker	94%	4%	2%
e. Fact-finder	91%	7%	2%
f. Wearer of "Three Hats"	15%	17%	69%
g. Cog	2%	16%	82%
h. Referee	5%	31%	64%

22. How satisfied are you with the following aspects of your present position?

	Very	Somewhat	Not
a. Nature of duties	85%	14%	1%
b. Conditions of employment	55%	34%	11%
c. Substantive area of law in which you work	72%	25%	3%
d. Overall satisfaction	72%	25%	3%

23. How serious are the following problems for ALJs?

	Very	Somewhat	Not
a. Agency interference	17%	26%	57%
b. Need for independence	48%	17%	35%
c. Lack of status; poor image	22%	42%	36%
d. Inadequacy of hearing facilities & staff support	32%	46%	23%
e. Poor salary; lack of prerequisites	13%	37%	50%
f. Compromise of formal procedures	8%	32%	60%
g. Mediocrity of some ALJs	14%	54%	32%
h. Need for increase in judicial powers	26%	41%	33%
i. Need for separation from the agency	40%	21%	40%
j. Veterans being given preference in the selection process	23%	23%	55%
k. Absence of independent corps of ALJs	32%	24%	45%

24. To what extent are the following practices appropriate for administrative law judges?

	Very	Somewhat	Not
a. Taking active role in developing the record in a case	57%	37%	6%
b. Talking with news media about the case while hearing is in progress	0.4%	3%	97%
c. Talking with news media about the case after your decision has been made	1%	13%	86%
d. Talking with news media about the case after agency decision is final	1%	15%	84%
e. Having lunch or other social contacts with agency staff attorneys	2%	24%	74%
f. Having lunch or other social contacts with private attorneys who practice before your agency	0.4%	25%	75%

	Very	Somewhat	Not
g. Suggesting procedural changes to agency	33%	54%	14%
h. Suggesting changes in substantive policy to agency	16%	42%	43%
i. Urging changes in legislation affecting ALJs	49%	39%	12%
j. Suggesting other proceedings, investigations, or studies you think your agency should conduct.	16%	45%	40%
—			
25. How would you classify the nature of your primary professional experience before you became an ALJ?			
(a) <u>25%</u> Private			
<u>65%</u> Federal Government			
<u>10%</u> State or Local Government			
(b) <u>79%</u> Litigation			
<u>9%</u> Advisory			
_____ Transactional			
<u>12%</u> Examiner or Other Adjudicator			
26. <u>94%</u> Male <u>6%</u> Female			
27. Racial/Ethnic Category: (choose one)			
<u>1%</u> Asian or Pacific Islander <u>2%</u> Black, not of Hispanic origin			
<u>2%</u> Hispanic <u>1%</u> American Indian or Alaskan Native			
<u>94%</u> White, not of Hispanic origin			
28. Did you receive veteran's preference for your appointment as an ALJ?			
<u>63</u> Yes <u>37</u> No			
29. Government Service Classification			
AL-3 <u>3%</u> A <u>4%</u> B <u>4%</u> C <u>28%</u> D <u>29%</u> E <u>24%</u> F			
AL-2 <u>8%</u>			
AL-1 <u>2%</u>			
30. In comparison to Federal Judges, do you think you have?			
	Greater/More	The Same	Lesser
a. Authority	1%	1%	98%
b. Prestige	0.4%	1%	99%
c. Freedom in reaching a decision	3%	71%	27%
d. Complex cases	15%	53%	32%

- | | Greater/More | The Same | Lesser |
|--------------------------------------|--------------|----------|--------|
| e. Caseload burden | 11% | 44% | 44% |
| f. Duty to be bound by agency policy | 64% | 31% | 5% |
| g. Duty to follow rules of evidence | 1% | 55% | 44% |
| h. Impact on public policy | 4% | 34% | 61% |
| i. Independence | 1% | 54% | 45% |
31. In comparison to non-ALJ adjudicators, do you think you have?
- | | Greater/More | The Same | Lesser |
|--------------------------------------|--------------|----------|--------|
| a. Authority | 89% | 9% | 2% |
| b. Prestige | 89% | 10% | 1% |
| c. Freedom in reaching a decision | 90% | 9% | 1% |
| d. Complex cases | 84% | 16% | 1% |
| e. Caseload burden | 51% | 44% | 6% |
| f. Duty to be bound by agency policy | 14% | 60% | 26% |
| g. Duty to follow rules of evidence | 67% | 32% | 1% |
| h. Impact on public policy | 61% | 36% | 3% |
| i. Independence | 93% | 5% | 2% |
32. What undergraduate institution did you attend? (See Appendix IV A, Survey of ALJs for All Agencies.)
33. Degree Received 71% B.A. 28% B.S. (See Appendix IV A, Survey of ALJs for All Agencies.)
34. Major (See Appendix IV A, Survey of ALJs for All Agencies.)
35. Did you attend law school? ____ If no, skip to question 39.
100% yes 0.4% no
- What law school did you attend? (See Appendix IV A, Survey of ALJs for All Agencies.)
36. What was your approximate rank in your law school class?
24% a. Top 10%
35% b. Top 25%
36% c. Upper half
5% d. Lower half
37. Were you a member of law review? 19% yes 81% no

38. Have you had any graduate training other than law school?

29% yes 72% no

39. If you have had additional graduate work, what was your field of study? (See Appendix IV A, Survey of ALJs for All Agencies.)

40. Please give us the benefit of any observations that will help in understanding your work. (Comments may be written on the back of this page, or an additional sheet may be attached.) (See Appendix IV A, Survey of ALJs for All Agencies.)

Appendix IV D

Survey of
ADMINISTRATIVE JUDGES

This questionnaire is a part of a study of the practices and attitudes of Administrative Judges ("AJs") and Administrative Law Judges ("ALJs").¹

Please answer each question in the space provided and RETURN THE COMPLETED FORM WITHIN ONE WEEK. If you have additional comments, please include them. The anonymity of respondents will be preserved.

1. What undergraduate institution did you attend? 157 Schools
Degree Received: 56 different majors B.A. 70% B.S. 30%
2. Did you attend law school? (If no skip to question 6) Yes 95% No 5%
What law school did you attend? 105 law schools; prestige law schools 13%
3. What was your approximate rank in your law school class?
a. Top 10% 18% c. Upper half 39%
b. Top 25% 32% d. Lower half 11%
4. Were you a member of Law Review? Yes 12% No 88%
5. Have you had any graduate training other than law school? Yes 34% No 66%
6. If you have had additional graduate work, what was your field of study? 56 fields of study (Some were duplicates - just characterized slightly differently.)
7. What is your age? average age - 49 minimum age - 30 maximum age - 74
- 8a. Are you male or female? 80% male 20% female

¹Most of the questions in this survey duplicate or parallel those of a survey of ALJs by Paula P. Burger, JUDGES IN SEARCH OF A COURT: CHARACTERISTICS, FUNCTIONS, AND PERCEPTIONS OF FEDERAL ADMINISTRATIVE LAW JUDGES (1984 & photo. reprint 1985, University Microfilms International). Other sources include United States General Accounting Office, SURVEY OF ADMINISTRATIVE LAW OPERATIONS; and Donna Price Cofer, JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE (1985).

8b. Racial/Ethnic Category (Choose one)

- A Asian or Pacific Islander - 3%
- B Black, not of Hispanic origin - 9%
- H Hispanic - 3%
- W White, not of Hispanic origin - 84%
- I American Indian or Alaskan Native - 1%

9. What was the nature of the primary professional experience you had before becoming an AJ? Mostly attorneys
10. Government Service (GS) Classification: 53% at GS-15
Did you receive veteran's preference for your appointment as an AJ?
Yes 19% No 81%
11. How long have you been an AJ at your present agency? 0-31 years (Average of 8 years)
12. How long have you been an AJ? 0-30 years (Average of 8 years)
13. Rate your frequency of engaging in the following reading practices and patterns of communications.

	Frequent.	Occas.	Rarely/ Never
a. Read decisions of other presiding officials	59%	32%	9%
b. Read final agency decisions	92%	7%	1%
c. Read decisions of federal courts	75%	23%	2%
d. Read commercial services, industry publications	36%	47%	17%
e. Confer with superior about difficult cases	17%	36%	47%
f. Consult with other AJs prior to hearing	29%	45%	26%
g. Consult with other AJs while case pending	32%	41%	27%
h. Receive requests for confidential information	1%	20%	79%
i. Communicate about your case with agency staff	14%	29%	57%
j. Communicate about your case with those outside of the agency	3%	5%	92%
k. Make suggestions to agency officials for policy changes	2%	44%	54%
l. Make suggestions to agency officials for procedural changes	2%	58%	39%

	Frequent.	Occas.	Rarely/ Never
m. Talk with individual members of private bar about agency procedures	7%	41%	52%
n. Disqualify yourself from hearing a case	1%	14%	85%
o. Attend professional meetings or seminars	20%	71%	9%
p. Approached through <i>ex parte</i> communication which would be prohibited by the APA	1%	12%	87%

14. In hearing cases, how often do you engage in any of following practices? (Note: only 99 responses to this question.)

	Frequent.	Occas.	Rarely/ Never
a. Prehearing conferences	61	23	16
b. Order depositions	7	29	64
c. Require experts	10	36	54
d. Request additional evidence	29	53	18
e. Request issue briefs	24	49	27
f. Authorize reply briefs	27	43	30
g. Go "off record"	17	54	29
h. Hold IN CAMERA proceeding	6	27	67
i. Question witness directly	71	18	11
j. Call own witnesses	5	16	79
k. Certify interlocutory appeals	0.4	12	88
l. Certify record to agency head for decision (without making initial decisions)	0	4	96
m. Admit evidence for "whatever it may be worth"	23	34	43
n. Deliver decisions orally	32	11	57
o. Grant summary judgment	5	27	68

15. To what extent do you conceive of your job as involving the following?

	Frequent.	Occas.	Rarely/ Never
a. Determining and marshaling facts	98	2	0.4
b. Guaranteeing due process of law	95	4	1
c. Making credibility determinations	86	12	2
d. Applying agency policies and regulations	78	17	5
e. Applying substantive expertise to problems	71	18	11
f. Interpreting statutes	70	29	1
g. Effecting the settlement of controversies	55	28	17
h. Clarifying agency policies and regulations	29	39	32

i. Making agency policy	1	13	86
j. Educating the public	10	39	51
k. Balancing interests	30	39	31
l. Protecting the public interest over special interests	21	28	51
m. Bringing efficiency to agency proceedings	47	40	13
n. Helping to keep matters out of the federal courts	25	29	46

Rank the three most important of the above.

1. A = 86%
2. B = 76%
3. C = 42%

16. In reaching your decisions how influential do you consider the following factors?
 [Note: "N.A." in this question means "Not Appropriate to Consider."]]

	Very	Somewhat	Not	N.A.
a. Applicable statutes	98	2	—	—
b. Published agency regulations	87	13	0.4	—
c. Federal court precedents	90	8	1	1
d. Published agency opinions or decisions	86	10	4	0.4
e. Executive Orders	39	32	17	11
f. Staff position as outlined in brief	8	38	27	27
g. Decisions of other presiding officials	15	38	32	15
h. Public statements or speeches by agency officials	1	6	32	61
i. Private statements by agency officials	2	5	19	74
j. Statements by members of Congress	1	8	24	67
k. Your perception of agency policy goals	7	25	29	39
l. Your idea of what serves the public interest	13	33	28	27
m. Your own standards of fairness	37	35	15	12
n. Public Opinion	0.4	7	22	71
o. Your evaluation of the facts of a case	98	2	—	—

Rank the three most important of the above.

1. A = 84%
2. C = 69%
3. O = 54%

17. After your initial or recommended decision has been written, how frequently do you do any of the following things?

	Frequent.	Occas.	Rarely/ Never
a. Participate in oral argument before review board or agency head	1	1	98
b. Talk with news media about your decision	0.4	3	97
c. Supply written clarification of decision for agency staff	— 0.4	7	93
d. Talk or meet with agency staff to explain your decision	1	10	89
e. Study appeal briefs submitted to review board or agency head	8	24	68
f. Help prepare documents or questions to aid agency head or review board in hearing cases on appeal	3	7	90
g. Observe oral argument before review board head	1	8	91
h. Assist in writing of final agency decision, order, report	22	5	73

18. To what extent do you think the following practices are appropriate for administrative judges?

1 - Completely Appropriate

2 - Sometimes Appropriate/Sometimes Not Appropriate

3 - Inappropriate

	1	2	3
a. Taking active role in developing the record in a case	63	32	5
b. Talking with news media about the case while hearing is in progress	0.4	6	94
c. Talking with news media about the case after your decision has been made	2	21	77
d. Talking with news media about the case after agency decision is final	4	25	71
e. Having lunch or other social contacts with agency staff attorneys	11	49	40
f. Having lunch or other social contacts with private attorneys who practice before your agency	3	51	46
g. Suggesting procedural changes to agency	42	44	14

	1	2	3
h. Suggesting changes in substantive policy to agency	30	41	29
i. Lobbying Congress for changes in legislation affecting AJs	31	39	30
j. Suggesting other proceedings, investigations, or studies you think your agency should conduct	31	46	23

19. How much of the total time spent doing your job is devoted to each of the following activities? Estimate the overall proportion of time, even if from week to week the exact proportions may vary. Use percentage figures and ignore those activities that are not relevant to your work.

Avg. Time	Percent of AJs	
75%	13%	a. Pretrial preparation, reading, study
55%	10%	b. Conducting prehearing conferences and negotiations
86%	25%	c. Presiding at formal hearings, rulings on motions
91%	37%	d. Making decisions and writing decisions
20%	5%	e. Travel
90%	9%	f. General administrative duties, correspondence, professional meetings
80%	2%	g. Other _____

20. How would you rate the following as qualities which should be sought in candidates for positions as AJs? [Note: Ratings used below are "Indispensable", "Important", and "Little or no Importance".]

	Indispens.	Import.	Little/No Import.
a. Integrity	98	3	—
b. Law school degree	83	14	3
c. Experience practicing administrative law	21	60	19
d. Judicial temperament	82	18	0.4
e. Experience in substantive area of law	33	56	11
f. Neat personal appearance	16	65	18
g. Sense of humor	16	56	28
h. Trial experience	19	55	26
i. Technical expertise	24	55	21
j. Writing ability	73	27	—
k. Public speaking ability	16	57	27
l. Analytical skill and reasoning ability	95	5	—

21. How would you rate the following factors in terms of their importance in your decision to become an AJ?

	Very	Moderately	Not
a. Independence of job	82	15	3
b. Challenge of job	80	20	
c. Salary	33	56	12
d. Prestige of position	26	59	15
e. Enjoyment of government service	22	55	23
f. Perquisites of office	3	26	71
g. Commitment to policy goals	7	40	53
h. Desire to have influence	6	39	56
i. Unhappiness with previous position	8	13	80
j. Desire to travel			
k. Experience helpful for further advancement in agency	1	15	85
l. Other (specify) _____	5	16	80

Rank the three most important of the above.

1. B = 91%
2. A = 90%
3. C = 44%

22. How would you describe your role in the administrative process? (Separate sheet.)
23. The following descriptions are appropriate characterizations of the role of an AJ. [Note: "Not" in this question means "Not at all Appropriate."]

	Very	Somewhat	Not
a. Judge/Adjudicator	99	1	---
b. Important	58	31	11
c. Independent	91	9	0.4
d. Decision-maker	99	1	---
e. Fact-finder	97	3	0.4
f. Wearer of "Three Hats"	15	21	64
g. Cog	3	23	74
h. Referee	16	40	44

24. How significant are any of the following problems in your work? [Note: Column headings mean "Frequently a Problem"; "Sometimes a Problem"; and "Not a Problem".]

	Freq.	Sometimes	Not
a. Delay in proceedings	22	63	15
b. Ambiguity in the law you must apply	13	70	17
c. Too great a caseload	48	37	15
d. Cases overly complex in technical sense	5	50	45
e. Lack of direction from agency officials about policies	4	30	66
f. Lack of agency standards for review of AJ decisions	7	21	72
g. Pressure from agency officials for faster decisions	29	30	41
h. Pressure from agency officials for different decisions	2	16	82
i. Review of your decisions by persons you think unqualified	7	28	65
j. Lack of procedural uniformity among agencies	4	17	79
k. Lack of procedural uniformity within agency for different cases	3	30	67
l. Too close supervision of work	4	17	79
m. Threats to independence of judgment (Describe) _____*	10	18	72
n. Other _____	---	—	—

25. How would you rate your level of satisfaction with your present position? [Note: Column headings means "Very Satisfied"; "Moderately Satisfied"; and "Satisfied".]

	Very	Mod. Sat.	Satisfied
a. Nature of duties	77	22	1
b. Conditions of employment	34	44	22
c. Substantive area of law in which you work	75	24	1
d. Overall satisfaction	51	46	3

26. The following are serious problems affecting AJs.

	Strongly Agree	Agree	Disagree
a. Agency interference	11	23	66
b. Need for more independence from agency supervision	23	22	55
c. Lack of status; poor image	23	34	43
d. Inadequacy of hearing facilities and staff support	33	38	29
e. Poor salary; lack of perquisites	34	42	24
f. Formal procedures too frequently compromised	5	18	78
g. Mediocrity of some AJs	7	36	57
h. Need for increase in judicial powers	35	32	33
i. Inadequate policy guidance	5	20	75

27. Everyone occasionally feels bothered by certain kinds of things in their work. Below is a list of things that might sometimes bother AJs. Please indicate how frequently you feel bothered by each of them. [1 - Almost Never; 2 - Rarely; 3 - Sometimes; 4 - Rather Often; 5 - Nearly All the Time]

	1	2	3	4	5
a. Thinking that the amount of work you have to do may interfere with how well it gets done.	13	13	37	23	14
b. Feeling that you have too little authority to carry out the responsibilities assigned to you.	31	28	25	11	5
c. Feeling that you can't get out your work.	24	28	32	11	5
d. Thinking that there are too many reviews of your work by agency officials.	50	23	17	7	3
e. Feeling that you have to do things in your work that are against your better judgment.	47	28	21	3	1
f. Feeling that your job tends to interfere with your family life.	35	28	28	7	2
g. Feeling that you're not qualified to handle your work.	83	12	4	0	1
h. Feeling that you have too heavy a work load.	14	18	33	18	17
i. Thinking that agency officials who review your work aren't nearly as qualified as you are.	43	18	25	9	5

	1	2	3	4	5
j. Thinking that others who perform your type of work (e.g., District Court Judges) are accorded more deference than you are.	15	14	24	16	31
28. In comparison to ALJs, do you think you have?					
	Greater	The Same	Lesser		
a. Independence from agency supervision	32	26	42		—
b. Authority	29	32	39		
c. Status	14	14	72		
d. Staff report	4	31	65		
e. Caseload burden	57	36	7		
f. Duty to be bound agency policy	17	54	28		
g. Relevance of selection criteria to duties	28	63	9		

Thank you for completing this questionnaire.

Appendix V A

104 de p'cent

STATISTICS FOR A.D. AFFIDAVITS, WARRANTS, & RECEIPTS

RACE	1972		ALL APPELLATES						
	NO.	%	SOB	NO	P1	P2	CS	FS	
White	876	96.22	86.87%	16.58	85.16	15.16	12.27	86.81	87.57
Black	48	5.21	3.86%	19.18	29.18	15.80	11.67	63.32	66.81
Hispanic	26	2.82	3.55%	12.16	21.18	13.37	11.84	43.38	45.21
Asian	8	0.87	0.83%	10.00	23.50	12.43	13.28	85.00	81.00
S. Indian	6	0.65	0.50%	17.25	39.82	12.25	12.68	83.25	81.25
Unknown	217	23.55	26.83%	28.11	64.33	19.81	12.26	83.72	85.15
TOTAL	907	100.00%	100.00%	18.43	64.56	15.12	12.25	86.47	86.77
SEX	NO.	%	SOB	NO	P1	P2	CS	FS	
Men	1083	87.57%	16.55	64.43	15.81	12.18	86.27	87.28	
Women	229	12.43%	19.32	21.33	19.84	12.36	84.43	84.12	
TOTAL	1312	100.00%	18.43	64.56	15.12	12.25	86.47	86.77	
VEI	NO.	%	SOB	NO	P1	P2	CS	FS	
10 Point	89	2.44%	18.89	64.18	15.35	12.06	83.60	83.60	
5 Point	428	21.93%	18.64	62.61	14.91	12.01	84.27	84.27	
Non-Vet	1796	88.59%	18.64	65.16	15.22	12.34	86.61	86.61	
TOTAL	1313	100.00%	18.43	64.56	15.12	12.21	86.47	86.77	

RACE	1973		ALL APPELLATES						
	NO.	%	SOB	NO	P1	P2	CS	FS	
White	957	96.27	86.87%	19.08	67.83	15.96	12.21	86.27	86.43
Black	46	4.51	3.86%	19.00	65.83	16.43	11.86	83.87	85.11
Hispanic	31	3.02	3.37%	19.50	65.28	15.84	11.56	86.78	85.43
Asian	7	0.68	0.24%	19.00	20.50	19.00	15.57	88.87	83.00
S. Indian	1	0.10	0.24%	18.00	52.00	16.00	12.87	87.86	87.86
Unknown	26	2.53	3.27%	18.50	67.42	16.12	11.86	84.89	86.87
TOTAL	996	100.00%	100.00%	19.05	66.85	16.82	12.36	86.34	86.35
SEX	NO.	%	SOB	NO	P1	P2	CS	FS	
Men	368	36.92%	19.84	60.48	15.85	12.09	86.43	86.72	
Women	628	63.08%	19.11	70.41	17.41	12.74	87.26	87.36	
TOTAL	996	100.00%	19.05	66.88	16.82	12.36	86.34	86.35	
VEI	NO.	%	SOB	NO	P1	P2	CS	FS	
10 Point	60	6.03%	18.12	65.83	15.87	10.96	83.71	83.71	
5 Point	211	21.19%	18.99	65.86	15.49	12.83	83.71	83.71	
Non-Vet	1375	137.53%	19.04	69.43	17.33	12.67	86.67	86.67	
TOTAL	996	100.00%	19.05	66.88	16.82	12.36	86.34	86.35	

RACE	1974		ALL APPELLATES						
	NO.	%	SOB	NO	P1	P2	CS	FS	
White	482	49.27	86.11%	18.14	63.77	14.50	12.20	83.45	85.08
Black	22	2.25	3.12%	17.55	54.17	14.00	11.60	81.45	81.64
Hispanic	20	2.03	2.84%	17.15	48.21	14.35	10.67	80.67	81.60
Asian	7	0.71	0.99%	17.86	47.54	11.71	11.25	81.89	81.60
S. Indian	1	0.10	0.14%	16.00	64.00	20.00	13.18	80.81	80.81
Unknown	785	79.53%	17.79	63.85	14.80	12.21	82.90	83.41	
TOTAL	987	100.00%	17.99	63.24	14.61	12.20	83.21	84.48	
SEX	NO.	%	SOB	NO	P1	P2	CS	FS	
Men	356	36.07%	17.90	63.23	14.51	12.22	83.25	84.25	
Women	109	11.03%	17.97	63.30	15.00	12.12	83.21	83.64	
TOTAL	785	100.00%	17.99	63.24	14.61	12.20	83.21	84.48	
VEI	NO.	%	SOB	NO	P1	P2	CS	FS	
10 Point	13	1.33%	12.61	50.51	16.15	12.24	83.20	83.20	
5 Point	103	10.33%	17.66	41.66	13.94	11.87	82.79	83.17	
Non-Vet	547	55.32%	18.07	63.92	14.74	12.26	83.55	83.55	
TOTAL	785	100.00%	17.99	63.24	14.61	12.20	83.21	84.48	

OFFICE OF ADMINISTRATIVE LAW JUDGES

Operations conducted under Section 3150, Title 5, U.S.C.

Fiscal Year 1990 (as of 9-6-90)

	1990	1989	1988	1987	1986	1985	1984	1983	1982	1981
Applications received-----	3	8	8	741	5	16	809	214	289	363
Applications processed (to completion)-----	98	198	172	175	189	300	83	341	321	435
Assigned ratings and added to register-----	143	487	289	265	329	154	70	107	185	182
(Number of eligibilities, GS-15 & GS-16)										
Certificates issued (GS-14)-----	0	0	0	2	0	0	0	0	0	0
Certificates issued (GS-15)-----	2	5	1	7	0	2	2	2	13	9
Certificates issued (GS-16)-----	8	10	4	11	8	2	3	0	0	6
Selections from GS-14 certificates-----	0	0	0	0	0	0	0	0	0	0
Selections from GS-15 certificates-----	128	28	119	8	37	0	7	7	142	3
Selections from GS-16 certificates-----	1	5	2	5	2	1	2	0	0	7
Loans of Judges to agencies insufficiently staffed-----	890	808	356	221	219	326	205	146	178	214
Noncompetitive Actions-----	77	62	80	62	88	25	35	37	102	132
Promotions to Chief Administrative Law Judge-----	2	0	1	3	1	1	0	0	3	2
Promotions (without Transfer)-----	0	0	0	0	19	0	0	0	0	0
Reassignments-----	42	39	46	34	28	20	21	53	70	50
Reinstatements-----	2	1	1	2	1	1	0	1	0	4
Reemployments-----	21	17	22	3	4	0	0	0	0	0
Transfer-----	7	9	9	19	24	7	4	3	29	76
Transfer (with promotion)-----	4	5	3	13	11	2	1	0	1	43
Transfer (without promotions)-----	2	4	4	5	11	3	2	1	8	19
Transfer (change to lower grade -- voluntary)-----	1	0	2	1	2	2	1	2	19	14
Details-----	3	3	1	0	0	0	0	0	0	0
Positions subject to classification review-----	3	7	10	0	35	0	0	0	0	51
Actions involving allocations of positions-----	5	4	5	0	5	0	4	2	4	72
Adverse Actions-----	0	0	0	0	0	0	1	1	61	0
Eligibles on GS-15 register-----	692	736	501	404	270	294	237	244	182	212
Eligibles on GS-16 register-----	808	669	484	402	273	363	348	360	345	255
	2740	3108	2134	2271	1577	1521	1921	1541	1984	2149

Appendix V B

ACUS -- OFFICE OF ALJ'S

1117

Appendix V D

REQUEST AND JUSTIFICATION FOR
SELECTIVE FACTORS AND QUALITY RANKING FACTORS
(Attach to SF 39)

	Certificate No.
	Date Issued
Requesting Agency	Request No.
	Date

Title, Series, and Grade of Vacancy:

Definitions: You may request that special qualifications of two types be considered by the CSC in its evaluation of eligibles for certification: (1) *Selective Factors* must be skills, knowledges, abilities or other worker characteristics basic to and essential for satisfactory performance of the job; i.e., a prerequisite to appointment. These represent minimum requirements in addition to or more specific than X-11B standards. (2) *Quality Ranking Factors* must be skills, knowledges, abilities, or other worker characteristics which could be expected to result in superior performance on the job. Selective factors may be used for screening (in or out) purposes; quality ranking factors will not be used for screening, but may be used as ranking criteria.

Instructions: This form must be accompanied by a description of the position to be filled. The request and justification for selective and/or quality ranking factors should follow this format: (1) Each selective or quality ranking factor must be stated in terms of a knowledge, a skill, an ability, or other worker characteristic. (2) List the duties or tasks the incumbent will perform that require the possession of the requested knowledge, skill, or ability, or that could better be performed if he or she possessed the knowledge, skill, or ability. (3) Optional: Indicate what experience, education, or other qualifications provide evidence of possession of the knowledge, skill, or ability.

SELECTIVE FACTORS

These special or additional knowledges, skills, or abilities are needed for this position.	Because the incumbent is expected to perform this work (Provide a clear description or a specific reference to an item in the position description.)	These may be appropriate evidences of necessary qualifications (optional)

Standard Form 33A

QUALITY RANKING FACTORS

These special or additional knowledges, skills, or abilities are desirable for this position

Because the incumbent is expected to perform this work (Provide a clear description or a specific reference to an item in the position description).

These may be appropriate evidences of superior qualifications (optional)

Additional Agency Remarks:

Signature and Title of Appointing Officer

For CSC Use:

Signature of CSC Examiner

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- * Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review By the Agency*
- * Recommendation 69-6, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*
- * Recommendation 69-9, *Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government*
- * Recommendation 72-6, *Civil Money Penalties as a Sanction*
- * Recommendation 74-1, *Subpena Power in Formal Rulemaking and Formal Adjudication*
- * Recommendation 78-2, *Procedures for Determining Social Security Claims*
- * Recommendation 78-3, *Time Limits on Agency Actions*
- * Recommendation 79-3, *Agency Assessment and Mitigation of Civil Money Penalties*

- * Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*
 - * Recommendation 86-2, *Use of Federal Rules of Evidence in Federal Agency Adjudications*
 - * Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*
 - * Recommendation 86-4, *The Split-Enforcement Model for Agency Adjudication*
 - * Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*
 - * Recommendation 87-12, *Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*
 - * Recommendation 88-5, *Agency Use of Settlement Judges*
 - * Recommendation 90-1, *Civil Money Penalties for Federal Aviation Violations*
 - * Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendations*
 - * Recommendation 91-8, *Adjudication of Civil Penalties Under the Federal Aviation Act*
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