



## Administrative Conference of the United States

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# NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL

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Final Report, Updated: September 24, 2018

This updated version of the report includes a note at page 18 from the Office of the Chairman identifying a correction recommended by an agency official.

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*This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendation expressed are those of the authors and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.*

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## EXECUTIVE SUMMARY

Federal administrative adjudication dwarfs federal judicial adjudication in volume and variety. Some of these agency adjudications, such as those over which approximately 2,000 administrative law judges (“ALJs”) preside, share a statutory framework under the Administrative Procedure Act (“APA”). The APA also provides uniform provisions for ALJs that seek to protect ALJs from undue agency interference with their decisionmaking. This framework permits relatively easy interagency comparison and discussion.

But these APA hearings are only a fraction of agencies’ adjudicatory hearings. Instead, most administrative hearings are before adjudicators who are not ALJs. These adjudicators—who number more than 10,000—go by numerous titles but are often collectively called “non-ALJ adjudicators,” “non-ALJ-hearing officers,” “administrative judges,” or variations of those terms. In this paper, we use the simpler (and admittedly imprecise) term “non-ALJs.” Likewise, we refer to (and define in more detail below) the hearings over which they preside as “Non-ALJ Hearings.” Neither these Non-ALJ Hearings nor the non-ALJs themselves share a statutory framework, whether under the APA or other statute. As a result, there are many differences among various agencies’ proceedings and in characteristics of their non-ALJs. These differences render it difficult to describe and analyze those characteristics and proceedings comparatively and to offer recommendations for non-ALJs collectively.

Recognizing these problems, ACUS has recently commissioned reports and issued recommendations related to both these diverse non-ALJ proceedings and agency adjudication more generally.<sup>1</sup> ACUS commissioned this report to obtain data and provide recommendations concerning non-ALJs’ appointment, independence, and oversight, especially as contrasted with ALJs’.

Responding to significant concerns over unfair and unprofessional agency hearings, Congress enacted the APA in 1946 to protect ALJs’ independence from their agencies, who are often parties to litigation before ALJs. To that end, the APA includes provisions concerning merit-based hiring, separation of functions, limitations on ex parte communications, and protection from at-will removal. At times agencies have criticized their lack of control over the hiring, job-performance, and removal of ALJs.

Without addressing agencies’ concerns over using ALJs, judicial doctrine over the past few decades has allowed agencies more discretion to use non-ALJs in place of ALJs. In contrast to ALJs, these non-ALJs almost never have statutory protections to promote their independence. Congress and policymakers have concentrated more on agencies’ rulemaking powers and process, providing little oversight or coordination over non-ALJs and their hearings. Non-ALJs, if not confused with ALJs, have largely worked in the shadows as the federal bureaucracy’s “hidden judiciary.”<sup>2</sup> But non-ALJs’ independence is as important for regulated parties and the agencies themselves as it was when Congress enacted the APA with ALJs’ protections. Impartial non-ALJs are central to due process, fair proceedings with

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<sup>1</sup> For a collection of ACUS reports concerning adjudication, see ACUS.GOV, <https://www.acus.gov/past-projects/adjudication> (last visited on Aug. 11, 2017), and ACUS.GOV, <https://www.acus.gov/current-projects> (last visited on Aug. 11, 2017).

<sup>2</sup> Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1345 (1992).

correct decisions, and—perhaps most overlooked—faith in government and administrative programs. (We use the terms impartial and independent interchangeably throughout.<sup>3</sup>)

This report’s two key purposes are (1) to build on prior projects by reporting updated and more comprehensive data concerning non-ALJs, and (2) to identify, based in part on these data, practices for non-ALJ selection, oversight, and independence that promote non-ALJs’ actual and apparent impartiality. We recognize that Conference members and agency officials may have countervailing and disparate views as to our recommendations, and that agencies have different statutory charges and various factors to consider in administering their agencies and their adjudication systems. Accordingly, we offer our recommendations in the spirit of providing agencies and the Conference alternative approaches to establishing or reconsidering their adjudication regimes and these regimes’ effects on adjudicator impartiality.

To meet our two purposes, we circulated a detailed survey to 64 federal agencies and received responses from at least one subcomponent of 53 of those agencies, for a response rate of 83%. We asked the responding agencies to provide information on a certain class of hearings, if any, within their department or agency: those in which a party could request an oral hearing to present evidence for which an agency official other than an ALJ or agency head presided (“Non-ALJ Hearings”). (The full description of Non-ALJ Hearings appears *infra*.)

For agencies that reported offering Non-ALJ Hearings, we asked the respondents two sets of questions. The first concerned the different *types of Non-ALJ Hearings* that their agencies provide (for instance, an agency may have enforcement proceedings under one statute and benefits proceedings under another statute). The second concerned the different *types of non-ALJs* as identified by title and agency. For instance, an agency may have two types of non-ALJs—“Administrative Judges” and “Hearing Officers”—who hear the same or different kinds of matters. An agency received a set of questions for each type of Non-ALJ Hearing and each type of non-ALJs that it identified. Within these sets of questions, we requested information on, among other things, the nature of the hearings, the number of agency non-ALJs, their salaries and bonuses, hiring qualifications, the nature of agency oversight and performance appraisals, the propriety of ex parte contacts, and protection from at-will removal.

Below is a summary of our key findings and alternative practices for agencies to consider in reassessing their non-ALJ programs’ promotion of non-ALJ impartiality:

### Key Findings

**Types of Non-ALJ Hearings and Non-ALJs:** Agencies reported 47 types of Non-ALJ Hearings and 37 types of non-ALJs.

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<sup>3</sup> To be sure, independence and impartiality are different concepts. But they are related. In the adjudicatory context, independence generally refers to structural characteristics that insulate an adjudicator from some authority or other parties. Independence is a means of promoting an adjudicator’s impartiality, i.e., her ability to issue fair, neutral decisions. See James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1200 (2006). The key issue for agency adjudicators is what degree of independence is necessary to promote or ensure their impartiality. See *id.* at 1213–15.

**Nature of Non-ALJ Hearings:** The 47 types of Non-ALJ Hearings concern six subject-matter categories that we identified for the respondents in the survey (such as enforcement, benefits, contracts, etc.) and a number of miscellaneous subject matters. No subject area comprised even 25% of the Non-ALJ Hearings. Agencies reported that the agencies themselves are parties to the Non-ALJ Hearings in 22 (47%) of the 47 types, and it is these hearings that may present the most significant concerns over non-ALJ independence and agency oversight.

**Numbers and Titles of Non-ALJs:** In contrast to the 1,931 ALJs in the federal government, agencies reported at least 10,831 non-ALJs. All but 39 of them are fulltime agency employees (although some fulltime non-ALJs may have only part-time adjudicatory duties). Of the 10,831 non-ALJs, 8,131 are Patent Examiners or Appellate Patent Judges for the Department of Commerce. The agencies with the next largest groups of non-ALJs are Treasury (714), VA (630), NLRB (600<sup>4</sup>), and DOJ's Executive Office for Immigration Review (326). Non-ALJs reported in our survey go by 23 different titles.

**Non-ALJ Salaries:** We were able to calculate approximate base salaries for 9,507 non-ALJs. More than 90% are paid under the General Schedule (GS) pay scale. Excluding the 7,856 Patent Examiners, 57% (941) of the remaining 1,651 non-ALJs are paid in compliance with the GS scale.

**Comparison of ALJ and Non-ALJ Salaries:** In general, non-ALJs have lower salaries than ALJs. Of all 9,507 non-ALJs for whom we had calculable base-salary information, 5,415 or 57% are paid within pay scales or grades that overlap with ALJs' (GS-14, GS-15, and all applicable special pay scales). If we exclude Patent Examiners and consider the remaining 1,651 non-ALJs for whom we have calculable base-salary information, 68% have base-salary ranges that overlap with ALJs.

**Minimum Qualifications for Hiring Non-ALJs:** Whether hiring non-ALJs internally or externally, agencies' most common minimum qualification is a law degree. When hiring externally, agencies applied no other qualification to even half of the 37 non-ALJ types for which agencies responded. When hiring internally, agencies considered only subject-matter expertise and demeanor as minimum qualifications for more than half of the non-ALJ types. Perhaps the most surprising findings were that agencies rely only upon subject-matter expertise when hiring externally about 30% of the time and that agencies rely more on references for *internal* hires than they do for external hires.

**Separation of Functions:** Sixteen (43%) non-ALJ types have no separation of functions (i.e., they are not prohibited from performing agency tasks other than adjudication or reporting to particular agency personnel with nonadjudicatory functions). The remaining non-ALJs have some kind of separation of functions. Some are fully separated from other agency functions because the non-ALJs can only adjudicate. Some have more limited separation. For instance, some can perform functions that are not related to investigation or prosecution (similar to ALJs), while other non-ALJs can perform agency functions subject to various other limitations. Other non-ALJs have no need for separation of functions because

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<sup>4</sup> The NLRB reported that it had "approximately" 600 non-ALJs, and we have used 600 for ease of calculation throughout.

their agencies only adjudicate and thus have only one function. Non-ALJs in 34 of the 37 types do not report directly to supervisors who supervise investigations or prosecutions.

**Ex Parte Communications:** Twenty-one (57%) non-ALJ types are prohibited from having any ex parte communications, 11 (30%) are partially limited, and five (14%) have no limitations. The most common way of limiting ex parte communications is through internal guidance or custom, relatively opaque mechanisms for describing prohibitions and ensuring compliance.

**Physical Separation:** One prominent scholar suggested decades ago that adjudicators' physical separation from other agency personnel was a relatively low-cost way of creating psychological distance between them and ameliorating the adjudicators' sense of separation. Agencies reported that 18 types of non-ALJs are physically separated, 18 are not, and one is sometimes separated.

**Recusal:** Thirty-one (84%) Non-ALJ types must recuse themselves if they cannot serve as unbiased adjudicators; the remaining types are not required to recuse themselves.

**Performance Appraisals:** Twenty-eight (76%) non-ALJ types and 99% of all non-ALJs by number are subject to performance appraisals. These appraisals most commonly consider numerical case-processing goals and various characteristics of the decisions themselves (such as their reasoning or appropriate citations), although many agencies design the review to ignore case outcomes.

**Bonuses:** Twenty-six (71%) non-ALJ types are eligible for bonuses, and 90% of all non-ALJs by number are eligible for bonuses. The range of bonus-eligible non-ALJs who received bonuses in 2016 was from 7% (CFTC) to 100% (for several non-ALJ types). Reported bonuses ranged from a few hundred dollars to \$36,000.

**Protection from At-Will Removal:** Agencies reported that only three non-ALJ types have protection from at-will removal (aside from standard civil-service protections), two of which had protections in collective-bargaining agreements and one of which had statutory protection.

### Key Alternative Practices

**Hiring Process:** Agencies might consider using advisory panels as part of the non-ALJ hiring process (these panels are often called "merit-selection panels" in the state and federal judicial context). These advisory panels could be comprised of different constituencies (including non-ALJs and agency officials) and consider transparent, positive criteria when recommending candidates to hiring authorities.

**Separation of Functions and Space:** To the extent possible, agencies might provide non-ALJs separation of functions and physical separation to provide actual and apparent independence from other arms of the agency, especially when the agency is a party to the proceedings.

**Ex Parte Communications:** Agencies might formally prohibit non-ALJs from engaging in ex parte communications related to the merits of a matter over which they are presiding.

This suggested prohibition, although slightly more stringent than the one for ALJs under the APA, is consistent with the ACUS Model Adjudication Rules and most agencies' reported practice. It is, however, slightly more stringent than a recently adopted ACUS recommendation for informal adjudicators (Recommendation 2016-2) that would permit certain internal agency ex parte discussions with non-ALJs.

**Recusal Requirements:** Most non-ALJ types must recuse when, as stated in our questionnaire, they “cannot serve as . . . unbiased adjudicator[s].”<sup>5</sup> Agencies might memorialize recusal standards for all non-ALJs.

**Performance Appraisals and Bonuses:** Agencies might promulgate clear criteria, unrelated to case outcomes, for performance appraisals and bonus payments.

**Providing Clear Grounds for Adverse Actions:** Agencies might permit adverse actions, including removal, for non-ALJs only on specified grounds that are unrelated to case outcomes.

**Method of Agency Action:** To further transparency, salience, and efficacy, agencies might use notice-and-comment rulemaking when promulgating provisions concerning non-ALJ independence. Agency custom and internal guidance, both of which are often opaque and less concrete than substantive rules, are less optimal.

## I. Non-ALJ Hearings and Prior Research

Adversarial hearings over which ALJs preside (“ALJ Hearings”) are relatively uniform, and the APA protects ALJs as a class from agency influence.<sup>6</sup> The relative ease in describing and evaluating ALJ Hearings may help explain why they receive the overwhelming share of scholarly attention as to agency adjudication. Although ALJ Hearings are central to the federal administrative state, Non-ALJ Hearings exceed ALJ Hearings in number.

Non-ALJ Hearings, unlike ALJ Hearings, vary greatly throughout the administrative state, and this variety renders describing and analyzing them a challenge. Moreover, non-ALJs as a class do not have statutorily protected indicia of independence or even uniform titles. (Indeed, non-ALJs—if not simply confused with ALJs<sup>7</sup>—are informally defined not by who

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<sup>5</sup> See App. A (Q. 42). We did not specify a standard for recusal in our survey. Others have noted the difficulty of “finding the appropriate, specific set of governing [ethical] rules” for agency adjudicators. See, e.g., Moliterno, *supra* note 3, at 1194 (citing various state and federal standards governing recusals and other ethical considerations for administrative adjudicators); see generally Patricia E. Salkin, *Judging Ethics for Administrative Law Judges*, 11 WIDENER J. PUB. L. 7 (2002) (discussing the treatment of ethics for primarily state administrative adjudicators). To limit the length and burden of our survey, we did not ask agencies to identify their recusal standards.

<sup>6</sup> Prominent examples of nonadversarial ALJ Hearings include certain welfare programs (such as social security and Medicare).

<sup>7</sup> In fact, the U.S. Supreme Court, no less, recently mistook non-ALJs for ALJs by incorrectly indicating that an MSPB ALJ, instead of a non-ALJ, had presided over an administrative adjudication at issue. Compare *Perry v. MSPB*, 137 S. Ct. 1975, 1982 (2017) (stating that an Administrative Law Judge presided over the matter), with *Perry v. Dep’t of Commerce*, No. CD–0752–12–0486–B–1, 2014 WL 5358308, at \*1–2 (M.S.P.B. Dec. 23, 2013) (noting that an Administrative Judge presided over the matter). The MSPB uses ALJs for matters concerning ALJs and non-ALJs (often called “Administrative Judges”) for nearly all other federal employees. See Paul R. Verkuil, *supra* note 2, at 1352 n.47; MERIT SYS. PROTECTION BD., ADVERSE ACTIONS:

they are but by whom they are not.) The lack of uniformity in non-ALJ proceedings' and in non-ALJs' characteristics may explain why scholars and policymakers largely ignore them. Although some agency non-ALJs have received considerable attention in recent years (e.g., immigration judges), non-ALJs in the aggregate are difficult to discuss in general terms and, given the variety of non-ALJs and their evidentiary hearings, often difficult even to identify.

As we discuss *infra* in Part I.C., only a few earlier studies have reported cross-agency data on non-ALJs and their hearings. Two of them surveyed numerous agencies to ascertain how many non-ALJs existed within the federal government, how many agencies used non-ALJs, and which federal pay grades applied to them. Those surveys, however, were limited in scope and are more than 15 and 25 years old, respectively. A more recent ACUS-commissioned study reported substantial data on the nature of certain Non-ALJ Hearings and some data related to non-ALJ impartiality. But its focus was not on the number of non-ALJs, the variety of the cases that they decide, their hiring, their oversight, or their protection from at-will removal.

Our focus is on non-ALJs' impartiality. The U.S. Supreme Court has held that impartiality requirements under the Due Process Clause apply to agency adjudication.<sup>8</sup> Because actual bias would be very difficult for litigating parties to prove, courts establish prophylactic measures to promote judges' impartiality—and its appearance—and to help ensure, as the Supreme Court said almost 100 years ago, that adjudicators hold “the balance nice, clear and true.”<sup>9</sup> These measures often concern, among other things, the adjudicator's appointment, relationship with the parties, and financial interest in the proceeding.<sup>10</sup> Even in the absence of constitutional concerns, policymakers have incentives to consider these prophylactic measures to promote adjudicators' impartiality. After all, doing so protects the integrity of the adjudicating body and its process—attributes that benefit the agency, as well as the litigants.<sup>11</sup>

In this study, we:

(1) report our survey data on the number of non-ALJs, the kinds of proceedings over which they preside, qualifications for their appointment, and characteristics concerning agency supervision and oversight; and

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A COMPILATION OF ARTICLES (A RPT. TO THE PRESIDENT AND THE CONGRESS OF THE U.S.) 55 (2016) (“Some types of cases are required, by statute, to use an ALJ. In other cases, a regulation establishes the use of the ALJ because the agency issuing the regulation exercised the discretion given to it by a statute to set forth the rule that an ALJ would be used. Nearly all adverse action cases—whether taken under chapter 43 or 75 of title 5—are heard by an AJ not an ALJ.”), available at [https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1361510&version=1366861&application=A\\_CROBAT](https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1361510&version=1366861&application=A_CROBAT).

<sup>8</sup> See *Schweiker v. McClure*, 456 U.S. 188, 196 (1982).

<sup>9</sup> *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 878–79 (2009) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

<sup>10</sup> See Kent Barnett, *Against Administrative Judges*, 49 UC DAVIS L. REV. 1643, 1671–78 (2016).

<sup>11</sup> See Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 968.

(2) suggest various ways for agencies to promote non-ALJs' appearance of impartiality by focusing on their appointments and oversight.

Before describing our methodology in Part II, reporting our data in Part III, and providing our suggestions in Part IV, we begin in this Part by contrasting the two key kinds of agency evidentiary hearings—ALJ Hearings and Non-ALJ Hearings—and describing the prior studies concerning non-ALJs and their hearings.

### A. Baseline: Administrative Law Judge Hearings

The drafters of the 1946 APA envisioned that the APA's uniform provisions concerning "formal" on-the-record adjudication would apply to a wide variety of adjudicatory hearings required by statute, even in the absence of specific language calling for "on the record" hearings.<sup>12</sup> Under APA §§ 554, 556, and 557, formal adjudication provides numerous procedural protections. One of the most important protections for regulated parties is that an independent ALJ must preside over nearly all formal adjudications.<sup>13</sup> ALJ independence was a purposeful and prominent response to widespread concerns before the APA's enactment over unqualified and biased agency adjudicators.<sup>14</sup>

The APA promotes ALJ independence in numerous ways. First, an independent agency, the Office of Personnel Management (OPM), oversees agency hiring of ALJs under a merit-based system. After administering an ALJ exam and rating candidates, OPM provides a list of the three highest-scored candidates for each ALJ vacancy from which the hiring agency must choose its ALJs.<sup>15</sup> Second, ALJs are required by statute to be impartial.<sup>16</sup> Third, ALJs cannot perform duties inconsistent with their adjudicatory function,<sup>17</sup> such as investigating or prosecuting, or by reporting to an official with these duties.<sup>18</sup> These provisions provide a separation of functions between adjudication and prosecution within the agency. Fourth, ALJs can engage in only limited ex parte communications.<sup>19</sup> Fifth, paid under an ALJ-specific pay scale, ALJs are exempt from performance appraisals and cannot receive bonuses.<sup>20</sup>

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<sup>12</sup> S. REP. NO. 752 at 207 (1946), REPRINTED IN COMM. ON THE JUDICIARY, 79TH CONG., LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 268 (1947); DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 41–43 (1947) (arguing that formal adjudication applied to nearly all hearings required by statute).

<sup>13</sup> 5 U.S.C. § 556(b) (2012).

<sup>14</sup> See Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 ADMIN. L. REV. 1, 3–9, 43–45 (1997).

<sup>15</sup> Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 804–05 (2013).

<sup>16</sup> 5 U.S.C. § 556(b).

<sup>17</sup> *Id.* § 3105 (stating that ALJs "may not perform duties inconsistent with their duties and responsibilities as administrative law judges").

<sup>18</sup> *Id.* § 554(d).

<sup>19</sup> *Id.*; *id.* § 557(d)(1).

<sup>20</sup> See Barnett, *supra* note 10, at 1655–56. This is not to say that reviewing judges' performance necessarily interferes with their independence; the key determinants are how the review is structured and the criteria on which it is based. See Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L. J. AM. U. 589, 603–07 (1993–94) (suggesting that ALJs' performance be subject to peer review led by Chief ALJs). In fact, a majority of state-

Finally, agencies cannot remove their ALJs except for “good cause established and determined by” another independent agency, the Merit Systems Protection Board.<sup>21</sup>

As of March 2017, OPM reported 1,931 ALJs. They are employed by 27 agencies. Of these 1,931 ALJs, SSA employs 1,655. The agencies with the next highest numbers of ALJs are DHS with 106, the Department of Labor with 41, and the NLRB with 34. Twenty of the 27 agencies employ fewer than 10 ALJs.<sup>22</sup>

Until the early 2000s, OPM operated an Office of Administrative Law Judges to assist with the hiring of ALJs and related matters.<sup>23</sup> Along with the uniformity of ALJ characteristics and their proceedings, the presence of that office led numerous scholars and policymakers to collect information on ALJs and analyze formal adjudication in depth. Accordingly, formal adjudication and ALJs are often the only form of agency adjudication and agency adjudicators that receive sustained attention in administrative-law courses. This limited focus on ALJs in the law-school curriculum typically leaves only ALJs with a place in academic and policy-making discourse.

## B. Non-ALJ Hearings

The focus on ALJs and APA formal adjudication obscures agencies’ increased use of non-ALJs for evidentiary hearings that do not qualify as formal adjudication under the APA. After the Supreme Court’s well-known *Chevron* decision,<sup>24</sup> courts granted agencies broad discretion to interpret statutes that did not expressly call for on-the-record hearings (the trigger for ALJ Hearings under the APA) as permitting Non-ALJ Hearings.<sup>25</sup> The APA only minimally governs these Non-ALJ Hearings (often referred to as “informal adjudications”) and provides almost no required procedures.<sup>26</sup> That said, due to statute or agency-created procedures, Non-

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court judges who undergo performance evaluations by law regularly report that such assessments do not impact their independence and can even enhance it. *See, e.g.*, Kevin M. Esterling and Kathleen M. Sampson, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 39 (Chicago: American Judicature Society, 1998); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE BENCH SPEAKS ON JUDICIAL PERFORMANCE EVALUATION: A SURVEY OF COLORADO JUDGES (2008), [http://iaals.du.edu/images/wygwam/documents/publications/Bench\\_Speaks\\_On\\_JPE2008.pdf](http://iaals.du.edu/images/wygwam/documents/publications/Bench_Speaks_On_JPE2008.pdf).

<sup>21</sup> 5 U.S.C. § 7521(a) (2012).

<sup>22</sup> *See Administrative Law Judges: ALJs by Agency*, OPM.GOV, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> [hereinafter *ALJs by Agency*].

<sup>23</sup> *See* John T. Miller, Jr., *Some Reflections on OPM’s Administration of Its APA ALJ Functions*, 30 WTR ADMIN. & REG. L. NEWS 6 (2005).

<sup>24</sup> *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>25</sup> *See, e.g.*, *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989); *Dominion Energy Brayton Point v. Johnson*, 443 F.3d 12 (1st Cir. 2006); *see also* ADMIN. CONFERENCE OF THE U.S., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 23–24 (2014), at <https://www.acus.gov/sites/default/files/documents/FINAL%20EEOC%20Final%20Report%20%5B3-31-14%5D.pdf>.

<sup>26</sup> APA § 555 applies to “Ancillary Matters” and § 558 applies to certain licensing and sanctioning actions.

ALJ Hearings are often similar in formality and procedure to formal adjudication under the APA.<sup>27</sup>

Despite numerous Non-ALJ Hearings' procedural similarity to ALJ Hearings, Non-ALJ Hearings are meaningfully different from ALJ Hearings in one key respect: non-ALJs preside over them. Except for extremely rare exceptions, non-ALJs, who go by different titles at different agencies, do not have ALJs' statutory protections as to their independence.<sup>28</sup> Not only do Non-ALJ Hearings differ across the federal administrative state, but the non-ALJs' characteristics are similarly disparate.

The lack of uniformity can be problematic for scholars and policymakers. The absence of uniform hearing procedures and uniform protections for non-ALJs leads to balkanized agency proceedings for which data collection across agencies proves difficult. Without information, it grows even more difficult to have useful discussions as to the hearings or the adjudicators. Aside from certain exceptions (such as immigration judges), they have become the "hidden judiciary,"<sup>29</sup> largely neglected by policymakers despite their vital function within the federal administrative state.

### C. Prior Studies Concerning Non-ALJs

Three comprehensive empirical projects have attempted to provide some cross-agency insight into non-ALJs, non-ALJ Hearings, or both.<sup>30</sup> Here, we provide a brief overview of each survey. We refer to relevant findings in the discussion of our findings and suggestions.

#### 1. *The Frye Study*

The first study was a 1989 ACUS-sponsored survey that culminated in a law-review article in 1992 by ALJ (and former non-ALJ) John Frye ("the Frye Study").<sup>31</sup> The survey asked twelve questions of agencies that "administer[ed] one or more programs that offer the opportunity for an oral hearing presided over by an official who is not an [ALJ],"<sup>32</sup> even if

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<sup>27</sup> See 2 PAUL R. VERKUIL ET AL., ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION AND REPORT 92-7, THE FEDERAL ADMINISTRATIVE JUDICIARY 1053-54 (1992); MICHAEL ASIMOW, EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 2 (2016).

<sup>28</sup> See Barnett, *supra* note 10, at 1656-62; *id.* at 1649 n.21 ("Congress has also given certain AJs—Board of Contracts Appeals Judges—some or all of the protections that ALJs have. For instance, all of those judges must be appointed like ALJs from a register by the hiring agency. See 41 U.S.C. § 7105(a)(1), (b)(2), (c)(2), (d)(2) (2012). One group also has the same protection from at-will removal that ALJs share. See 41 U.S.C. § 7105(a) (no protection from at-will removal for Armed Services Board Judges); *id.* § 7105(b)(3) (same protection as ALJs from at-will removal for Civil Board of Contract Appeals Judge); *id.* § 7105(c) (no protection for Tennessee Valley Authority Board Judges), (d) (no protection from at-will removal for Postal Service Board Judges).") (some internal citations omitted).

<sup>29</sup> See *id.* at 1645 (quoting Chris Guthrie et al., *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1478 (2009)).

<sup>30</sup> There are a handful of case studies, too. See, e.g., Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976) (considering whether informal adjudications within four federal agencies met due process requirements).

<sup>31</sup> See John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992). ACUS administered the survey in 1989. See VERKUIL ET AL., *supra* note 27, at 950.

<sup>32</sup> *Id.*, app. A, at 348.

most matters were handled through written submissions.<sup>33</sup> Frye, with ACUS's assistance, sent the survey to 48 agencies and received responses from 47. Of those 47 agencies, 34 responded that they held hearings that were described in the questionnaire.

Frye reported 2,692 non-ALJs, who were associated with 83 separate case types. Approximately 2,200—including about 1,700 who worked for the Department of Veterans Affairs—were within paygrades GS-9 through 15. Approximately 175 non-ALJs were “supergrades” (that is, paid on the general service scale above GS-15), senior-executive service (SES) officials, or military officers; only eight of these higher paid non-ALJs had other duties.<sup>34</sup> Frye also reported that approximately 240 non-ALJs were part-time agency officials or did not work for the government. For instance, hearing officers for certain medical-insurance claims were employed by insurance carriers, not the federal government.<sup>35</sup> Of all the non-ALJs, only 601 had no other duties, and 438 were lawyers.<sup>36</sup>

Frye spent most of his lengthy report discussing the different kinds of cases for which agencies used non-ALJs (enforcement, benefits, etc.), the number of cases for each type, and the due process implications of the reported hearings. He also reported some findings concerning the nature of non-ALJs. He primarily divided the non-ALJs into two groups: those who only presided over hearings and those who had additional duties.<sup>37</sup> He argued that the former group were likely to be more efficient managing their dockets (especially with higher caseloads) and appeared more independent from the agency itself.<sup>38</sup> Within both groups, he reported information related to agency oversight or non-ALJ independence, such as the use of performance appraisals and formal and informal review of non-ALJ decisions.<sup>39</sup> Although he asked questions concerning non-ALJ hiring, “most agencies did not provide any information on the qualifications that they deem important.”<sup>40</sup>

## **2. 1992 ACUS Report**

The Frye Study served as a critical source for a comprehensive 1992 ACUS study by Paul Verkuil, Daniel Gifford, Charles Koch, Richard Pierce, and Jeffrey Lubbers. Their report considered both ALJ Hearings and Non-ALJ Hearings. They relied upon the Frye Study and additional research to provide, among other things, information on the ALJ- and non-ALJ-selection processes, their independence, a thorough history of administrative adjudication, and a survey of adjudicators' attitudes. They recommended converting certain non-ALJ Hearings to ALJ Hearings.<sup>41</sup> Their report led to ACUS Recommendation 92-7. Among other things, it called for non-ALJs who oversee certain significant matters (including those with substantial economic effects or limitations on personal liberty) to have “standards for

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<sup>33</sup> *See id.* at 267 n.9.

<sup>34</sup> *Id.*, app. B, at 349.

<sup>35</sup> *See id.*, app. B, at 350.

<sup>36</sup> *Id.*

<sup>37</sup> *See id.* at 269–74.

<sup>38</sup> *Id.* at 270–71.

<sup>39</sup> *See id.* at 269–74.

<sup>40</sup> *Id.* at 272.

<sup>41</sup> *See* VERKUIL ET AL., *supra* note 27, *passim*.

independence, selection, experience, and compensation that approximate those accorded to ALJs.”<sup>42</sup>

### 3. *The Limon Study*

In 2002, Raymond Limon, a former Executive Director of OPM’s now-defunct Office of Administrative Law Judges, recognized that “there is no systematic or centralized method to track non-ALJ workforce information” and sought to update Frye’s data (“the Limon Study”).<sup>43</sup> Similar to the Frye Study, the Limon Study asked whether agencies “provide[d] an opportunity for an ‘oral hearing’ conducted by an agency official who is not an [ALJ].”<sup>44</sup> The 10 questions that Limon posed were similar to those in the Frye Study, although they concentrated more on the non-ALJs and less on the hearings and caseloads. For instance, the Limon Study asked about the number of non-ALJs, their titles, their pay grades and occupation series, their minimum qualifications, and their performance appraisals and protection from agency bias.<sup>45</sup>

Limon sent his survey to more agencies than did Frye—80 to Frye’s 48. He also received more responses (65 to Frye’s 47), although a similar number of agencies (36 for Limon and 35 for Frye) reported having relevant Non-ALJ Hearings.<sup>46</sup>

The Limon Study reported key differences between Frye’s and its data, but the Limon Study mostly presented its data in spreadsheet format for others to analyze.<sup>47</sup> Most germane to this report, the Limon Study found that the number of non-ALJs had increased from approximately 2700 to 3370, with the Department of Commerce replacing Veterans Affairs as having the most non-ALJs (approximately 1100).<sup>48</sup> Approximately 83% of the non-ALJs received performance appraisals.<sup>49</sup>

### 4. *The Asimow Study*

Professor Michael Asimow prepared a 2016 report, *Evidentiary Hearings Outside the Administrative Procedure Act*, for ACUS (“the Asimow Study”). The adjudications at issue were similar, but not identical, to those in the Frye and Limon Studies. Recall that Frye and Limon broadly considered instances in which the agencies provided oral hearings over which non-ALJs presided. Asimow, in contrast, studied what he refers to as “Type B” adjudications. In brief, Asimow contrasts Type B adjudications with Type A adjudications (ALJ Hearings under the APA), and Type C adjudications (those adjudications that occur without any

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<sup>42</sup> ADMIN. CONFERENCE OF THE U.S., REP’T AND RECOMMENDATION 92-7, THE FEDERAL ADMINISTRATIVE JUDICIARY 12 (1992).

<sup>43</sup> RAYMOND LIMON, OFFICE OF ADMIN. L. JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY THEN AND NOW—A DECADE OF CHANGE 1992–2002 2 (1992).

<sup>44</sup> *See id.*, app. B (“2002 Survey Questions of Non-ALJ Hearing Programs”).

<sup>45</sup> *See id.*, app. B.

<sup>46</sup> *See Barnett, supra* note 10, at 1657–58 nn. 90–91.

<sup>47</sup> LIMON, *supra* note 43, at 2 (“We wanted to limit our involvement to ‘data collection’ and allow for other interested parties to draw their own conclusions or findings.”).

<sup>48</sup> *See id.* at 3.

<sup>49</sup> *See id.* at 4.

evidentiary hearing required by law). Type B adjudications, in comparison, are oral or written hearings required by law over which non-ALJs preside, to which the formal-adjudication provisions of the APA do not apply, and for which the parties' evidence and argument, along with officially noticed matters, must serve as the exclusive record for decision.<sup>50</sup> Type B hearings do not include public hearings, conferences that do not become part of the exclusive record, "front-line" initial decisions that precede evidentiary hearings, or review that does not permit the submission of new evidence.<sup>51</sup> Thus, Asimow's selected category of hearings is broader than Frye's and Limon's because it includes oral and written hearings. But it is narrower because it includes hearings that require an exclusive record and excludes certain hearings or adjudications that Frye and Limon may have included.

The Asimow Study focused on the procedures in ten selected subject-matter adjudications over which non-ALJs preside and recommended best practices, which ACUS largely adopted.<sup>52</sup> It also provided some limited information on the number of non-ALJs and their caseloads.<sup>53</sup> And it reported data on the integrity of the ten adjudication areas, such as whether they have provisions or guidance on bias, ex parte communications, and separation of functions.<sup>54</sup> In addition to reporting his findings on these particular adjudications, Asimow, working with ACUS and Stanford Law School, established a comprehensive database to collect and confirm, on an ongoing basis, data on all forms of federal administrative adjudication.<sup>55</sup> This data that Asimow has collected for the database overlaps with some of the data that we collect here, including: representation of private parties and agencies, discovery, subpoena authority, ex parte communications, types of hearings and appeals, cross examination, caseload statistics, and information about adjudicators.

## II. Purpose, Scope, and Methodology of Project

Although taking inspiration from these earlier studies, our study has different purposes, a broader scope, and a slightly different survey design.

### A. Purpose

First, we seek to update Frye's and Limon's data on non-ALJs' numbers, status, and case types throughout the federal administrative state. More specifically, we provide updated data on non-ALJ paygrades, titles, and (part-time or fulltime) employment statuses.

Second, we provide more comprehensive data than those studies provided on indicia of non-ALJs' independence. These indicia include qualifications for their selection, whether they are hired from outside or from within the agency, their physical separation from others in the

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<sup>50</sup> See ASIMOW, *supra* note 27, at 2, 10.

<sup>51</sup> *Id.* at 11.

<sup>52</sup> See Recommendation 2016-4, adopted Dec. 12, 2016, <https://www.acus.gov/sites/default/files/documents/informal-agency-adjudication-recommendation-final.pdf>

<sup>53</sup> See *id.* at 16, tbl. 2.

<sup>54</sup> See *id.* at 35, tbl. 3.

<sup>55</sup> ADMIN. CONFERENCE OF THE U.S. AND STANFORD LAW SCHOOL, FEDERAL ADMINISTRATIVE ADJUDICATION DATABASE, <https://acus.law.stanford.edu/> (last visited Feb. 3, 2018).

agency, any limitations on their duties, whether they receive performance appraisals from their agencies, whether they are eligible for bonuses, whether they must recuse themselves if they cannot serve as unbiased adjudicators, and whether they have any protection from at-will removal. (After consultation with ACUS staff, we determined that questions concerning the mechanisms for non-ALJ selection would require narrative answers that would render comparisons difficult.)

Third, we provide suggestions for protecting non-ALJ independence. We comment on non-ALJ selection, protection from undue agency influence during proceedings, and protection from undue agency oversight. Unlike prior projects or academic literature, our purpose is not to recommend when agencies or Congress should use ALJs or non-ALJs,<sup>56</sup> or to suggest particular procedures for evidentiary hearings, save those that concern non-ALJ independence.<sup>57</sup>

## B. Scope

Despite the earlier studies' substantial influence on our project, our project has a unique focus that does not track theirs. We focus on the non-ALJs themselves and only on the aspects of their hearings that most directly implicate non-ALJs' independence. Relatedly, although our study updates much of the data from the Frye and Limon Studies, our survey is substantially broader with more targeted questions concerning matters related to non-ALJs' independence. The use of more particularized questions provides more consistent answers from the responding agencies and permits better comparisons across agencies.

Because of the variety of agency adjudications, it is frequently difficult to identify and define in a survey instrument various terms related to Non-ALJ Hearings. Moreover, the inclusion of too many definitions or complicated, nuanced definitions can dissuade agencies from completing the survey. Thus, we provided as descriptive a definition as we thought prudent to capture the kinds of Non-ALJ Hearings that we sought to consider (referred to as "oral hearings" in the survey itself):

One of the parties to the adjudication can—by statute, regulation, or other law—obtain an oral hearing over which an agency official presides to present evidence, even if most matters are handled through written submissions without an oral hearing,

and

the presiding agency official is **not** a member or commissioner of the agency, and is **not** an "Administrative Law Judge." Instead, the agency official goes by another title, such as Administrative Judge, Administrative Appeals Judge, Administrative Patent

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<sup>56</sup> See, e.g., VERKUIL ET AL., *supra* note 27; Barnett, *supra* note 10.

<sup>57</sup> ACUS has charged a working group with revising the Model Adjudication Rules (MARs). The MARs are intended to serve as model rules for agencies' adversarial, evidentiary hearings.

Judge, Board of Contract Appeals Judge, Veterans Law Judge, Immigration Judge, Presiding Officer, Hearing Officer, etc.

The relevant “oral hearings” do not include “public hearings” in which members of the public are invited to make statements or an initial “front-line” agency decision when that initial decision is followed by an evidentiary hearing before an agency or court.<sup>58</sup>

By considering only instances in which a party can obtain an *oral* hearing (even if parties rarely do so), we largely tracked Frye’s and Limon’s definition. But, like the Asimow Study (and unlike the Frye and Limon Studies), we limited our evidentiary hearings to those to which a party had a right to such a hearing, whether through a statute or regulation. Notably, our definition does not include those hearings for which a party cannot seek an oral (as opposed to a written) hearing, and thus our definition is narrower than Asimow’s definition of “Type B” hearing. Despite our interest in these “written” hearings that Asimow included, we were concerned that responding agencies may confuse those hearings with what Asimow refers to as “Type C” adjudications. Similar to all of these studies, the hearings that we considered did not distinguish hearings concerning facts, law, and agency discretion.<sup>59</sup>

In an effort to capture all Non-ALJ Hearings, we also did not include Asimow’s exclusive-record limitation. The APA requires an exclusive record only for ALJ Hearings.<sup>60</sup> Because our focus was primarily on the adjudicators, as opposed to the process of the hearing, we wanted to ensure that we obtained all of the uses of non-ALJs within federal agencies. That said, except as otherwise indicated, we are not aware of any hearings that the agencies identified that lack an exclusive-record limitation, and thus future surveys may consider including the exclusive-record limitation.<sup>61</sup>

As did Asimow, however, we excluded “public hearings,” those to which the public may provide statements. We also excluded “front-line” determinations, meaning initial decisions that are followed by evidentiary hearings. Finally, we excluded hearings over which the agency heads presided because it is likely that different due process considerations apply to those adjudications.<sup>62</sup> That said, although our definition targets trial-like adjudicators who preside at evidentiary hearings, we did not exclude administrative appellate processes over which non-ALJs preside because they were included in the Frye and Limon Studies and because it is not clear whether evidentiary matters are never permitted in those appellate proceedings. We do, however, segregate appellate proceedings from initial hearings, where indicated. Otherwise, our findings and suggestions apply to trial and appellate non-ALJs alike.

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<sup>58</sup> See App. A (Part A), attached hereto.

<sup>59</sup> See, e.g., ASIMOW, *supra* note 27, at 8.

<sup>60</sup> See 5 U.S.C. § 556(e).

<sup>61</sup> Because our definition is not identical to Asimow’s, we refer to our reported hearings as Non-ALJ Hearings, not “Type B” hearings.

<sup>62</sup> See Barnett, *supra* note 10, at 1679–80.

### C. Survey Design and Methodological Limitations

In this quantitative study, we administered a survey, attached as Appendix A, to numerous federal agencies, identified in Appendix B. With the assistance of ACUS's research attorneys, we compiled a list of agencies that responded to earlier surveys or that we anticipated may have had responsive oral hearings. In February 2017, we then circulated the surveys to ACUS's contacts at 64 agencies or subcomponents within agencies, along with the agencies' responses (if any) to the Limon Study to help ensure that the agency did not overlook responsive non-ALJs and Non-ALJ Hearings. We asked the ACUS contacts to circulate the survey to those within their agencies and offices who had knowledge of adjudication programs. Although we asked them to contact us if they had questions as to which "oral hearings" were responsive or the meaning of certain questions, only a handful of agencies did so.

Our survey sought information on different types of Non-ALJ Hearings and non-ALJs themselves. We asked responding agencies (or their subcomponents) first to identify themselves and then to report whether they had any "oral hearings" as defined in Part II.B. If they answered no, the survey ended. If they responded yes, the survey proceeded with two batteries of questions. One battery concerned types of Non-ALJ Hearings, and the other concerned types of non-ALJs. In contrast to the approximately 12 questions that the Frye and Limon Studies posed to agencies, each agency with responsive "oral hearings" would have received as many as 13 questions for the battery on hearings and 28 questions for the battery on non-ALJs, depending on their answers and any related follow-up questions. Agencies received one battery for each type of Non-ALJ Hearing and one battery for each type of non-ALJ. If agencies had more than one type of Non-ALJ Hearing or one type of non-ALJ, they would have received many more total questions.

The battery of questions concerning the types of Non-ALJ Hearings dealt with, among other things, the title of the presiding non-ALJs, the number who preside over those hearings, whether they are full- or part-time, whether the agency borrows non-ALJs from other agencies, whether the non-ALJs' employing agency is party to the proceeding, whether the non-ALJs can issue final orders, whether the agency offers an internal appellate process, and whether the agency applies any quantitative case-processing goals as to those Non-ALJ Hearings.

The battery of questions for the types of non-ALJs considered, among other things, their titles, their number, their paygrades and occupational series, the agency's hiring criteria for selecting non-ALJs from within and outside the agency, whether the agency prohibits ex parte communications, whether the agency imposes any separation of functions, whether and how the agency conducts performance appraisals, whether the non-ALJs are eligible for bonuses, whether they are required to recuse themselves if they cannot serve as unbiased adjudicators, and whether they are protected from at-will removal.<sup>63</sup>

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<sup>63</sup> Our survey presented the questions with "skip logic," meaning that a responding agency to one question could lead to follow up questions depending on how they answered the predicate question. Because our questions routinely relied upon preceding questions for context, we presented our questions in a fixed order. Accordingly, our survey did not take steps to minimize response-order effects. *See, e.g.,* Jon A. Krosnick & Duane F. Alwin, *An Evaluation of a Cognitive Theory of Response-Order Effects in Survey Measurement*, 51 PUB. OP. Q. 201 (1987).

We received responses on a rolling basis between February and May 2017. Because some agencies have more than one office with adjudicatory programs, one agency or department may have provided more than one response. If we received more than one response for the same adjudicatory program within the agency, we selected the more complete survey or combined answers to different questions to provide a more comprehensive response. After receiving answers from the agencies, we reviewed the answers for any meaningful inconsistencies. We then contacted the agency official who responded to the survey to resolve them.

Our further communications with agency contacts asking them to complete the survey led to a higher, but not close to a 100%, response rate. Our large number of responses from a diverse number of agencies provides some basis for generalizing our findings.<sup>64</sup> But we err conservatively here and present our findings descriptively. Relatedly, we do not claim to have captured all non-ALJs and Non-ALJ Hearings in our study.<sup>65</sup> Instead, we are reporting our significant findings only as to those non-ALJs and Non-ALJ Hearings that agencies have identified in response to our survey.

As with all surveys, one must be careful in assessing the agencies' reported data. Responding officials can engage in social-desirability bias—that is, attempting to demonstrate (either to themselves or to others) more familiarity with the surveyed issues than they possess.<sup>66</sup> Moreover, because we did not permit anonymous responses, this bias may be more meaningful because the officials may seek to present their agency in a more positive light or, alternatively, to highlight what they perceive as flaws within the agency.

Relatedly, we report the data as the agencies responded. We have not independently confirmed the data provided (except as discussed below), and thus the agencies may have reported incorrect data. Many agencies failed to answer every question posed. Their failure to do so limits our response rate for particular questions. That said, when an agency's later answers permitted us to answer an earlier question confidently to which the agency did not respond, we marked a response to that question for the agency so as to obtain more complete responses.<sup>67</sup> We indicate in the description of our findings the number of responses to the particular question.

Finally, at times, an agency's answers were inconsistent or obviously mistaken. Based on more specific answers or easily confirmed facts, we report what we perceived to be the correct answer. Of course, these revisions to the reported data required judgment. Fortunately, these

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<sup>64</sup> See generally FLOYD J. FOWLER, JR., *SURVEY RESEARCH METHODS* 9-11 (5th ed. 2014).

<sup>65</sup> For instance, the Small Business Administration did not respond to our survey, but it has an Office of Hearings and Appeals. See U.S. SMALL BUSINESS ADMINISTRATION WEBSITE, OFFICE OF HEARINGS AND APPEALS, <https://www.sba.gov/oha> (last visited Mar. 18, 2018).

<sup>66</sup> See Harold A. Sackeim & Ruben C. Gur, *Self-Deception, Self-Confrontation, and Consciousness*, in 2 CONSCIOUSNESS AND SELF-REGULATION: ADVANCES IN RESEARCH AND THEORY 139, 142–50 (Gary E. Schwartz & David Shapiro eds., 1978).

<sup>67</sup> For purposes of certain analysis, we added two variables—the nature of the non-ALJs' hearings and whether the hearings might be limited only to administrative appellate proceedings in which no new evidence would be received—after all agencies had responded. We coded these variables based on the agencies similar response to other questions. The variable concerning the nature of the non-ALJs' hearings aided our ability to cross-tabulate our reported data using IBM SPSS statistics software.

revisions were few, and errors in those judgments, if any, would not meaningfully affect our reported results. And as mentioned earlier, for meaningful questions or inconsistencies, we contacted the agencies for clarification, which we used to revise their reported answers.

### III. Data Set

Even with these limitations, we have a robust dataset that yields numerous interesting findings.

We sent a detailed survey to 64 federal departments, agencies, or subcomponents within them.<sup>68</sup> We received 61 responses from 53 federal entities, whether identified as an “agency” or at least one subcomponent within a larger entity.<sup>69</sup> One agency, accordingly, may have had more than one subcomponent respond. Responses from 53 of the 64 federal entities to which we sent surveys means that 83% of the entities provided at least one response. While 31 agencies or their subcomponents reported they do not conduct Non-ALJ Hearings, the analyses that follow are based on responses from 30 agencies or their subcomponents that conduct Non-ALJ Hearings. Notably, we had slightly fewer agencies respond that they had responsive hearings than for either the Limon Study or the Frye Study.<sup>70</sup> For ease of reference, we refer to all responding entities as “agencies.” (A list of the surveyed agencies and the nature of their responses, if any, are attached as Appendix B.)

Agencies reported having 47 types of Non-ALJ Hearings, 15 of which may consist of only appellate Non-ALJ Hearings. They also reported 37 types of non-ALJs. (Appendix C lists the reported types of hearings and types of non-ALJs for each responding agency.)

### IV. Survey Data

We present our findings in the following order: (1) the types, number, titles, and salaries of non-ALJs; (2) the types of Non-ALJ Hearings over which they preside; (3) minimum qualifications for non-ALJs’ selection; and (4) agencies’ oversight of non-ALJs and, relatedly, non-ALJs’ independence. We do not rely on all of the reported findings below in our recommendations to agencies—especially many of those in subsection A—because issues surrounding the number and pay for non-ALJs would require legislative intervention. Other findings, including many of those in subsection B, help inform later analyses and recommendations, even if they play only a secondary role. But we report the data here because they offer a more descriptive picture of non-ALJs and how agencies use them than simply reporting non-ALJs’ indicia of independence from their agencies, and they may aid future research or recommendations.

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<sup>68</sup> For comparison’s sake, Limon surveyed 80 agencies, and Frye surveyed 48 agencies. *Compare* LIMON, *supra* note 43, at 2 (“[W]e eventually contacted over 80 Federal agencies and offices . . .”), *with* Frye, *supra* note 31, app. A (listing 48 agencies to which surveys were sent).

<sup>69</sup> 65 agencies responded to Limon Study and 47 responded to the Frye Study. *Compare* LIMON, *supra* note 43, app. C, *with* Frye, *supra* note 31, app. A.

<sup>70</sup> 36 agencies responded that they had relevant non-ALJ hearings for the Limon Study, and 35 did so for the Frye Study. *Compare* LIMON, *supra* note 43, app. C, *with* Frye, *supra* note 31, app. A.

## A. Types of Non-ALJs

Agencies reported 37 total types of non-ALJs, meaning that one responding agency may have more than one kind of non-ALJ. For instance, the IRS has two types of non-ALJs: Settlement Officers and Appeals Officers. If a different agency also employed non-ALJs titled Settlement Officers or Appeals Officers, we would recognize them as additional types. The characteristics of different non-ALJs within the same agency often vary, and we have attempted to capture their diverse features. In this subsection, we consider non-ALJs' numbers, titles, and salaries.

### 1. Number of Non-ALJs

Agencies reported, as indicated in Figure 1, at least 10,831 non-ALJs.<sup>71</sup> (Of course, these numbers are fluid; an agency may have hired more non-ALJs or declined to fill later vacancies after answering the survey.) All but 39 of these non-ALJs are fulltime agency employees, although some fulltime employees have other duties in addition to presiding over adjudications. Of these 10,831 non-ALJs, 8,131 (75%) work for the Department of Commerce—7,856 as Patent Examiners for the Patent and Trademark Office and 275 as Appellate Patent Judges with the Patent and Trademark Appeal Board (including ten part-time judges and seven judges with administrative responsibilities). Accordingly, the remaining 2,700 non-ALJs work for other agencies.

Agency	Subcomponent	Fulltime non-ALJs	Part-time non-ALJs
Administrative Office of the U.S. Courts	Fair Employment Practices Office		1
CFTC	Office of Proceedings	15 [1]*	
USDA	Agricultural Marketing Service, Specialty Crops Program	3	
	Patent Trial and Appeal Board	265	10

<sup>71</sup> We calculated this number based on the number of non-ALJs for which agencies reported salary grades (9,594) and additional non-ALJs whom agencies reported when responding to other questions. The Peace Corps did not provide any salary information on its 6 non-ALJs, the VA on its 630 reported non-ALJs, the Administrative Office of the Courts on its part-time non-ALJ, and the NLRB on its 600 reported non-ALJs. We added these non-ALJs to our count.

When agencies reported part-time information and salary information on their non-ALJs, we have assumed that these part-time employees were included in the reported salary-related numbers. Other agencies reported hiring non-ALJs on a contract basis (Treasury's Alcohol and Tobacco Tax and Trade Bureau for labor arbitrations and FDIC for miscellaneous proceedings). We have not included these contract non-ALJs in our totals.

When agencies reported different numbers of non-ALJs in response to different questions, we used the response to salary-related information because it was more specific. For instance, PTO reported 8300 Patent Examiners, but PTO provided salary data on only 7,856 of them. Relatedly, EEOC reported 110 Administrative Judges in response to one question but salary data on only 92 of them; CFTC reported one non-ALJ in response to one question but reported 15 non-ALJs when answering salary-related questions; Treasury reported 449 Appeals Officers but provided salary information on 457 of them; DOJ/EOIR reported 300 non-ALJs at one point, but provided salary information on 326 of them; MSPB reported 64 non-ALJs for one question and 70 in salary-related answers.

\* In response to a correction suggested by a CFTC agency official, the number of CFTC fulltime non-ALJs has been changed from 15 to 1 in this table. Further modifications to the report to reflect this change have not been made.

Department of Commerce	U.S. Patent and Trademark Office	7856	
Department of Defense	Armed Services Board of Contract Appeals	22	
Department of Education	Office of Hearings and Appeals	2	
HHS	Office of Secretary, Departmental Appeals Board	5	
DHS	Coast Guard	3	
DOJ	EOIR	326	
DOL	Benefits Review Board	5	
Department of Treasury	Alcohol and Tobacco Tax and Trade Bureau		Contract
	IRS	714	
VA		630	
EEOC		87	5
EPA	Regional Offices	10	
	Office of Administration & Resources	2	
FDIC			Ad hoc
Federal Maritime Commission		272	
FLRA	Office of General Counsel	40	
GAO		43	2
Library of Congress		3	
MSPB		68	2
NASA		1	
NLRB		600	
NRC		11	19
Peace Corps		6	
Pension Benefit Guaranty Corp.		6	
Railroad Retirement Bd.	Bureau of Hearings and Appeals	6	
SSA	Office of Appellate Operations	61	
		<b>10,792</b>	<b>39</b>
		<b>10,831 (total reported non-ALJs)</b>	

*Figure 1 – Number of Reported Non-ALJs*

The number of reported non-ALJs has increased substantially—by approximately 183%—since the 2002 Limon Study. Limon reported 3,370 non-ALJs, an approximate 25% increase over Frye’s reported findings.<sup>73</sup> Most notably, the number of Patent Examiners has increased

<sup>72</sup> One non-ALJ is appointed as necessary.

<sup>73</sup> Frye, *supra* note 43, at 3.

from 1,000 to more than 7,800.<sup>74</sup> Although we were initially skeptical of this substantial increase, PTO had announced its goal of hiring thousands more Patent Examiners shortly after the Limon Study<sup>75</sup> and has reported an increase of more than 50% in its employee numbers over less than a decade in 2014.<sup>76</sup> The reported number in the Limon Study and our survey, if anything, are likely both substantially lower than the numbers that PTO uses for its annual reports. For instance, for FY2002 (the same year as Limon’s Study), PTO reported 3,538 Patent Examiners,<sup>77</sup> compared to the 1,000 reported to Limon in 2002. And by FY2016, PTO reported more than 8,300 Patent Examiners, as compared to the 7,856 reported in our survey in 2017.<sup>78</sup>

Only 39 of the 10,831 non-ALJs, as Figure 1 indicates, are part-time agency employees. The NRC had the largest number of part-time non-ALJs with 19, followed by the PTO with 10, the EEOC with five, and a few other agencies having smaller numbers. A few agencies—such as the FDIC and the Treasury’s Alcohol and Tobacco Tax and Trade Bureau—reported using non-ALJs but so rarely that they merely hired contract non-ALJs as necessary.

A total of 2,700 non-ALJs work for agencies other than the Department of Commerce. Ten agencies each employ more than 25 non-ALJs, as indicated on Figure 2: Treasury (714), VA (630), NLRB (600), DOJ (326), EEOC (92), MSPB (70, including two part-time Chief AJs), SSA (61), GAO (45), FLRA (40), and NRC (30). Together, these ten agencies employ 2,608 of the 2,700 non-ALJs who do not work for Commerce. The remaining 92 of the 2700 non-ALJs work for other agencies.

Of these agencies with more than 25 non-ALJs and Commerce, six were also included in the Limon Study’s top-ten list of non-ALJs by agency. Those on both lists include Commerce, Treasury, Veterans Affairs, DOJ, EEOC, and MSPB.<sup>79</sup> SSA reported only 25 non-ALJs in the Limon Study and more than doubled its numbers in our survey.<sup>80</sup> Notably the FLRA reported for the Limon Study that it used only ALJs, providing an example of the well-known trend of agencies moving towards using non-ALJs.<sup>81</sup> Differences between the reported numbers in the Limon Study and ours largely arise because some agencies or their subcomponents responded to one but not the other.<sup>82</sup>

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<sup>74</sup> See LIMON, *supra* note 43, at app. C at 1.

<sup>75</sup> PTO, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2003, at 2 (stating that it hoped to almost 3000 additional Patent Examiners over the next five years).

<sup>76</sup> See Dennis Couch, *USPTO’s Swelling Examiner Rolls*, PATENTLYO, Nov. 30, 2014, <https://patentlyo.com/patent/2014/11/usptos-swelling-examiner.html>.

<sup>77</sup> See PTO, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2002, at 9.

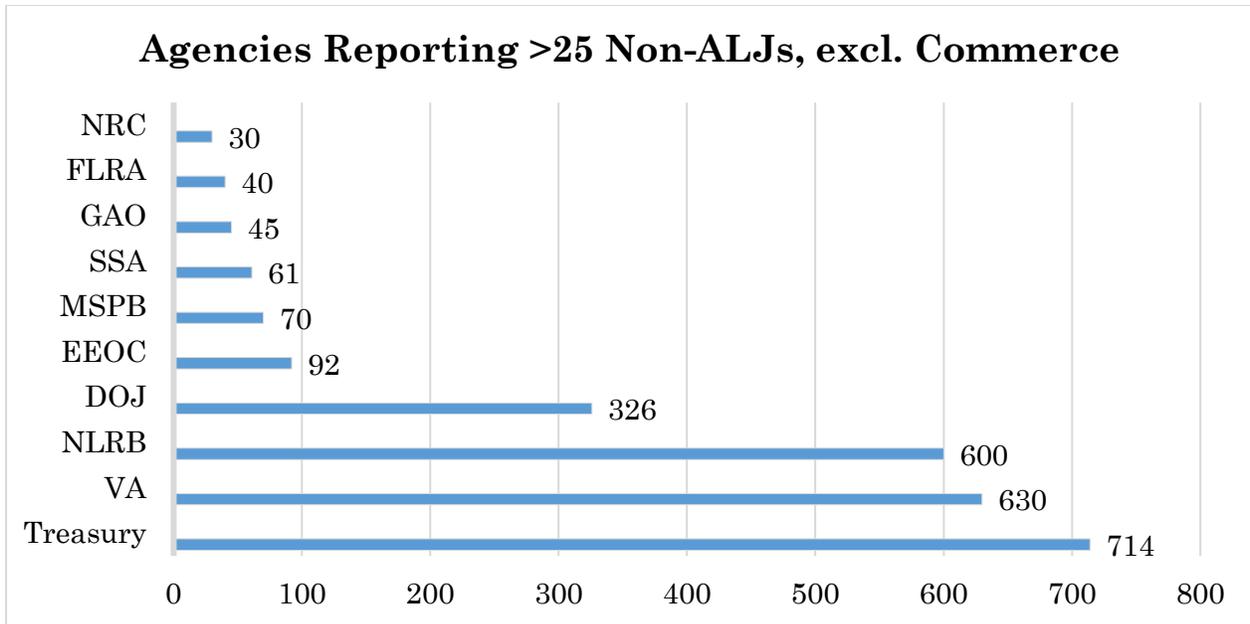
<sup>78</sup> See PTO, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2016, at 16. This number was greater than 9100 the year before. See PTO, PERFORMANCE AND ACCOUNTABILITY REPORT FY 2015, at 14, <https://www.uspto.gov/sites/default/files/documents/USPTOFY15PAR.pdf>

<sup>79</sup> See LIMON, *supra* note 43, at app. C (chart of “2002 Top Ten List of Non-ALJs By Agency”).

<sup>80</sup> See *id.* at app. C, 6.

<sup>81</sup> See *id.* at app. C, 2.

<sup>82</sup> For instance, the Navy was one of the top ten agencies in the Limon Study, but it did not respond to our survey. Similarly, we did not hear from the Army or the Air Force, despite their participating in the Limon



**Figure 2 – Agencies Reporting >25 Non-ALJs, excl. Commerce**

For comparative purposes, OPM reports that 1,931 ALJs work for 27 agencies,<sup>83</sup> while our survey indicates that 10,831 non-ALJs work for 27 agencies. Just as more than 85% of ALJs work for one agency (SSA),<sup>84</sup> more than 79% of non-ALJs work for one agency (Commerce). Similarly, although only four agencies have more than 25 ALJs,<sup>85</sup> ten agencies employ more than 25 non-ALJs.

## 2. Titles

As noted earlier, one of the difficulties in studying non-ALJs is simply describing them because of their variety of titles. Agencies reported having 37 types of non-ALJs, meaning that some agencies or subcomponents have more than one type of non-ALJ (for instance, Administrative Judges and Hearing Officers). Those 37 separately identified types of non-ALJs share 23 titles (meaning, for example, that more than one agency may employ non-ALJs with the title “Hearing Officer”).

Figure 3 illustrates the various titles and the number of officials that hold them. Seven of those titles include “judge” in them and are held by nearly 1,000 (964) of the non-ALJs. And nearly 200 of those non-ALJs are referred to as “Administrative Judges,” a title very similar to “Administrative Law Judge.”

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Study. Although we did receive a response from the Armed Services Board of Contract Appeals for the Department of Defense, its Defense Legal Services Office did not respond to our survey as it did to the Limon Study. The NLRB reported the number of non-ALJs for our survey, but not for the Limon Study.

<sup>83</sup> See *ALJs by Agency*, *supra* note 22.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<b>Non-ALJ Titles</b>		<b>No. of Non-ALJs</b>	<b>“Judge” in title</b>
1.	Administrative Appeals Judges	66	66
2.	Administrative Judge	193	193
3.	Administrative Patent Judge	275	275
4.	Appeals Board Members	11	
5.	Appeals Officers	457	
6.	Attorney-Examiner / Senior Attorney	42	
7.	Board of Immigration Appeals Members	16	
8.	Board of Contract Appeals Judge (or AJ)	22	22
9.	Copyright Royalty Judge	3	3
10.	Decision Review Officer	535	
11.	Hearing Officer	651	
12.	Hearing Panelist	6	
13.	Immigration Judge	310	310
14.	Judgment Officer	15	
15.	Labor Arbitrators	Contract	
16.	Ombudsman	1	
17.	Patent Examiner	7,856	
18.	Presiding Officer	3 (plus ad hoc)	
19.	Regional Directors	6	
20.	Regional Judicial Officer	10	
21.	Settlement Officers	257	
22.	Small Claims Officer	1	
23.	Veterans Law Judge	95	95
<b>(total)</b>		<b>10,831</b>	<b>964</b>

**Figure 3 – Non-ALJ Titles**

### **3. Salaries**

Agencies provided salary data on 30 of the 37 types of non-ALJs and 9,594 non-ALJs of the 10,831 reported non-ALJs.<sup>86</sup> Of these 9,594 non-ALJs, we were able to calculate high or low base salaries for 9,507 of them.<sup>87</sup> (The difference between the high and low base salaries vary based on steps or other distinctions within a pay grade.) We present the highest and lowest

<sup>86</sup> We received no salary information from the Administrative Office of the Courts, VA (for either of its two kinds of non-ALJs), FDIC (whose non-ALJ is hired on an ad-hoc basis), the NLRB, the Peace Corps, and Treasury for its Labor Arbitrators (who are hired on a contract basis).

<sup>87</sup> Agencies reported specified paygrades that we provided on the survey for 9,239 non-ALJs. Agencies reported paying 355 non-ALJs under “other” pay scales, some for which we did not have specific salary data. We were able, however, to calculate the salary ranges for PTO’s reported 268 Appellate Patent Judges. The PTO listed their salaries under the generic “AD” pay scale (“Agency Determined”), but we were able to calculate their salaries because the PTO posts these salaries on its website. *See USPTO 2014 AD Pay Plan*, COMMERCE.GOV, [http://hr.commerce.gov/Employees/Compensation/PROD01\\_010302](http://hr.commerce.gov/Employees/Compensation/PROD01_010302) (last visited July 27, 2017). We were unable to calculate the remaining 87 non-ALJs’ salaries for whom their agencies reported were paid under “other” pay plans. Accordingly, we were able to calculate salaries for 9507 non-ALJs (9,239 + 268 = 9,507).

base salaries for each category in the figures below (without accounting for any locality-pay or other adjustments). Agencies reported the remaining 87 non-ALJs' salaries as using various "other" pay scales for which we were unable to make specific calculations.

Frye and Limon asked agencies to report pay scales or grades that they used, but they did not ask agencies to report how many of their non-ALJs were paid under each grade.<sup>88</sup> To have a better idea of how much non-ALJs cost their agencies in salaries, we asked agencies to identify how many non-ALJs were paid under each grade.

For comparative purposes, ALJs' base salaries begin at \$108,100 and, with the sixth and highest step, top out at \$149,600 (the pay scale known as AL-3).<sup>89</sup> Almost all ALJs are paid under AL-3 (1,888 of 1,931).<sup>90</sup> The remaining (43) ALJs with substantial administrative duties earn base salaries of either \$157,900 or \$161,900.<sup>91</sup>

#### ***a. Non-ALJs on General-Service Pay Scales***

Figure 4 demonstrates that more than 90% (8,797) of the 9,507 non-ALJs (for whom we could calculate base salaries) are paid under the General Schedule (GS) pay scale, which generally governs federal executive white-collar employees,<sup>92</sup> while the remaining are paid under special pay scales. Nearly 90% (7,856) of these non-ALJs under the GS pay scale are patent examiners for the PTO.

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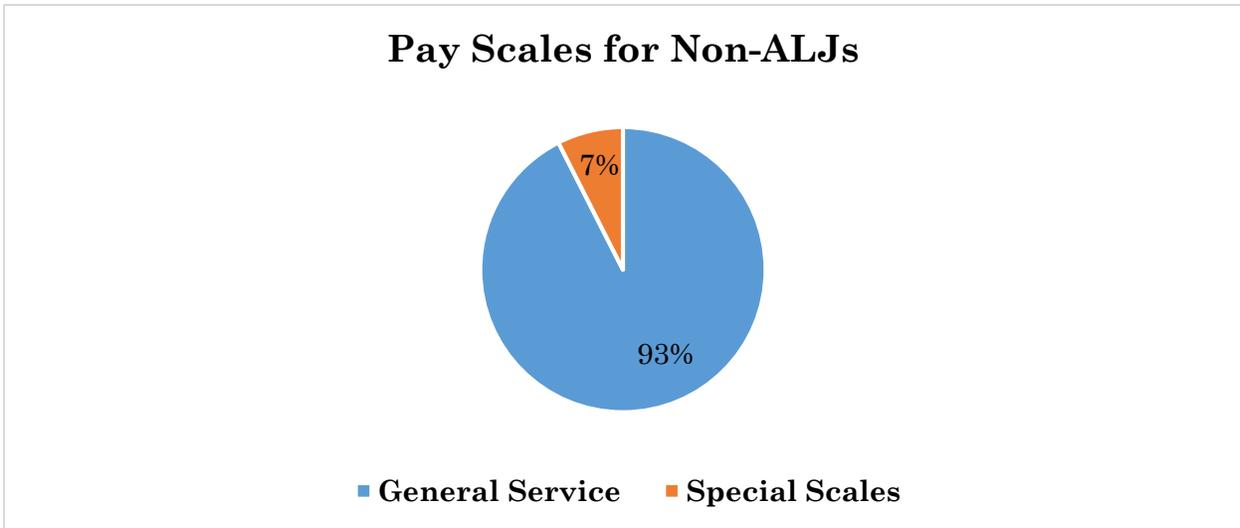
<sup>88</sup> See Frye, *supra* note 31, at app. B, 349–53; LIMON, *supra* note 43, at app. C.

<sup>89</sup> See *Pay & Leave: Salaries & Wages, Salary Table No. 2017-ALJ*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/ALJ.pdf> [hereinafter *2017-ALJ Table*]. Even with locality pay, no ALJ may earn more than \$172,100. See *Pay & Leave, Salaries & Wages, 2017 Locality Rates of Pay*, OPM.GOV, [https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/ALJ\\_LOC.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/ALJ_LOC.pdf). Because many ALJs may have prior federal service or "superior qualifications," many ALJs' base pay will exceed the entry-level ALJ pay. See *Pay & Leave, Pay Administration, Fact Sheet: Administrative Law Judge Pay System*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/administrative-law-judge-pay-system/> [hereinafter *ALJ Pay Fact Sheet*]. Moreover, it takes only seven years of creditable service to reach the highest pay base rate even if one starts at the entry-level base salary. See *id.*

<sup>90</sup> See *ALJs by Agency*, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>.

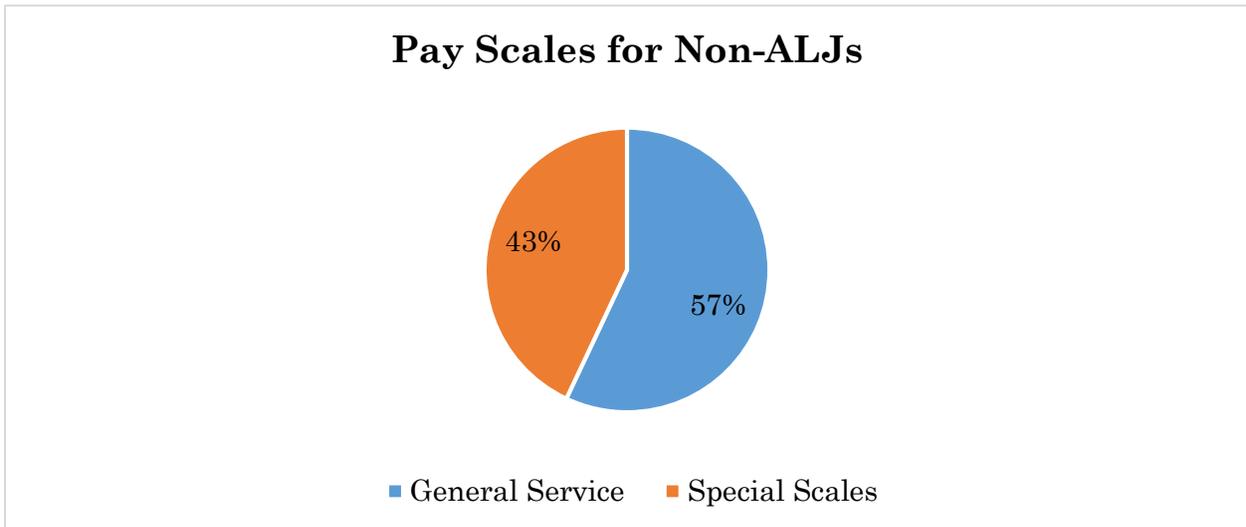
<sup>91</sup> See *ALJ Pay Fact Sheet*; see also *2017-ALJ Table*, *supra* note 89 (AL-2 and AL-1 entries); see also *ALJs by Agency*, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (reporting that 37 ALJs are paid at AL-2 and 5 are paid at AL-1, the highest-paying level).

<sup>92</sup> See *Pay & Leave: Pay Systems*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule>.



**Figure 4 – Pay Scales for Non-ALJs (GS vs. Special Scales), incl. Patent Examiners (n=9507)**

Because the patent examiners’ disproportionate numbers may obscure non-ALJs’ salaries throughout the federal government, we exclude patent examiners where indicated. If they are excluded, Figure 5 indicates that 57% (941) of the remaining 1,651 non-ALJs are paid under the GS pay scale.



**Figure 5 – Pay Scales for Non-ALJs (GS vs. Special Scales), excl. Patent Examiners (n=1651)**

The GS pay scale has 15 grades (starting with the lowest salaries at GS-1 and the highest at GS-15). Each grade has 10 “steps,” beginning with Step 1, where elevation provides a higher

salary within a grade.<sup>93</sup> Agencies reported non-ALJs' salaries at GS-9, 11, 12, 13, 14, and 15.<sup>94</sup>

Figure 6 details the number of non-ALJs (including patent examiners), the highest and lowest base annual salaries for the reported steps, and the range of total base salaries paid (based on the highest and lowest steps) for the number of non-ALJs reported. Figure 7 does the same but excludes patent examiners.

GS Grade	No. of Non-ALJs (n=8797)	2017 Lowest Step Salary	2017 Highest Step Salary	Base Salary Range (in millions)
9	354	\$43,251	\$56,229	\$15.3 – \$19.9
11	507	\$52,329	\$68,025	\$26.5 – \$34.5
12	1,192	\$62,722	\$81,541	\$74.8 – \$97.2
13	2,039	\$74,584	\$96,958	\$152.1 – \$197.7
14	4,516	\$88,136	\$114,578	\$398.0 – \$517.4
15	189	\$103,672	\$134,776	\$19.5 – \$25.4
<b>(total)</b>				\$686.2 – \$892.1

**Figure 6 – Non-ALJs on GS Pay Scale, incl. Patent Examiners**

Figure 6 indicates the following number of non-ALJs paid under the GS grades: 354 for GS-9, 507 for GS-11, 1,192 for GS-12, 2,039 for GS-13, 4,516 for GS-14, and 189 for GS-15.

Aside from the much larger number of reported patent examiners since the 2002 Limon Study (our 7,856 to Limon's 1,000),<sup>95</sup> a notable difference arises in their salaries. The Limon Survey reported that all patent examiners were paid at GS-15, the highest GS grade.<sup>96</sup> But the PTO reports in our survey that only 75 of the patent examiners are paid at GS-15. More than half of the patent examiners (4,225 of 7,856) are now paid at GS-14, and a large portion are paid at GS-13 (1,731) and GS-12 (1,085), suggesting that the PTO may be providing lower salaries to conserve resources as it hires substantially more patent examiners. But even with the

<sup>93</sup> See *Pay & Leave: Salaries & Wages, Salary Table 2017-GS*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/GS.pdf> [hereinafter *Salary Table 2017-GS*]. Base salaries at higher steps within a grade can exceed the next higher-paying grade's base salary at its first step. For example, a GS-1 federal employee at Step 5 earns \$20,991, while a GS-2 federal employee at Step 1 earns only \$20,829.

<sup>94</sup> We did not request information about the steps under which non-ALJs were paid for each pay grade (i.e., GS-15, step 1 or step 2).

<sup>95</sup> See LIMON, *supra* note 43, at app. C, 1.

<sup>96</sup> See *id.*

PTO’s conservation, non-ALJs under the GS pay scale still cost the federal government a range of approximately \$686.2 to \$892.1 million in base salaries.

Because the substantial number of patent examiners may obscure how agencies throughout the administrative state pay non-ALJs, Figure 7 excludes patent examiners. None of the remaining agencies reported any non-ALJs at GS-9. They reported 121 non-ALJs at GS-11, 107 at GS-12, 308 at GS-13, 291 at GS-14, and 114 at GS-15. Agencies pay a range of base salaries to the reported non-ALJs from \$73.3 to \$95.4 million.

GS Grade	No. of Non-ALJs (n=941)	2017 Lowest Step Salary	2017 Highest Step Salary	Base Salary Range (in millions)
9	0	\$43,251	\$56,229	\$0
11	121	\$52,329	\$68,025	\$6.3 – \$8.2
12	107	\$62,722	\$81,541	\$6.7 – \$8.7
13	308	\$74,584	\$96,958	\$23.0 – \$30.0
14	291	\$88,136	\$114,578	\$25.6 – \$33.3
15	114	\$103,672	\$134,776	\$11.8 – \$15.3
<b>(total)</b>				\$73.4 – \$95.5

**Figure 7 – Non-ALJs on GS Pay Scale, excl. Patent Examiners**

Figure 8 disaggregates the GS grades by agency (excluding patent examiners), rendering it easier to see how agencies pay their non-ALJs. It becomes clear that the Treasury Department primarily uses the lower grades (GS-11, GS-12, and GS-13) for its more than 700 non-ALJs. Indeed, only Treasury and the FLRA use these lower grades. All other agencies that pay non-ALJs under the GS grades use GS-14 and GS-15, whose pay can overlap with ALJ base salaries.<sup>97</sup>

GS Grade	Agency	Agency Office or Subcomponent	Non-ALJ Title	No. of Non-ALJs (n=941)
11	Treasury	IRS	Settlement Officers	72
	Treasury	IRS	Appeals Officers	44
	FLRA	Office of Gen. Counsel	Hearing Officer	5
12	Treasury	IRS	Settlement Officers	45
	Treasury	IRS	Appeals Officers	57
	FLRA	Office of Gen. Counsel	Hearing Officer	5
13	Treasury	IRS	Settlement Officers	132

<sup>97</sup> At Step 8 of GS-14 and Step 3 of GS-15, the base salaries (\$108,702 and \$100,584, respectively) exceed the entry-level ALJ base salary of \$108,100. *Compare Salary Table 2017–GS, supra* note 93, *with 2017-ALJ Table, supra* note 89.

	Treasury	IRS	Appeals Officers	166
	FLRA	Office of Gen. Counsel	Hearing Officer	10
14	USDA	Agric. Mktg. Serv.	Presiding Officer	2
	Treasury	IRS	Settlement Officers	8
	Treasury	IRS	Appeals Officers	156
	EEOC		Administrative Judges	92
	FMC		Small Claims Officer	1
	FLRA	Office of Gen. Counsel	Hearing Officer	20
	MSPB	Reg. & Field Offices	Administrative Judges	6
	RRB	Bureau of Hearings	Hearing Officers	6
	15	USDA	Agric. Mktg. Serv.	Presiding Officer
DOE			Administrative Judges	1
DHS		Coast Guard	Hearing Officer	1
Treasury		IRS	Appeals Officers	34
EPA		Region Offices	Regional Judicial Officer	10
EPA		Off. of Admin. & Res.	Attorney-Examiner	2
FMC			Hearing Officer	1
MSPB		Reg. & Field Offices	Administrative Judges	56
MSPB		Reg. & Field Offices	Chief Administrative Judges	2
PBGC			Appeals Board Member	6

**Figure 8 – Non-ALJs on GS Pay Scale, by Agency, excl. Patent Examiners**

When excluding patent examiners, 25% of non-ALJs whose salaries are calculable receive pay at GS-14 or GS-15 grades (405 out of 1,651). When including patent examiners, 50% of all non-ALJs whose pay is calculable receive pay at these two grades (4,705 out of 9,507).

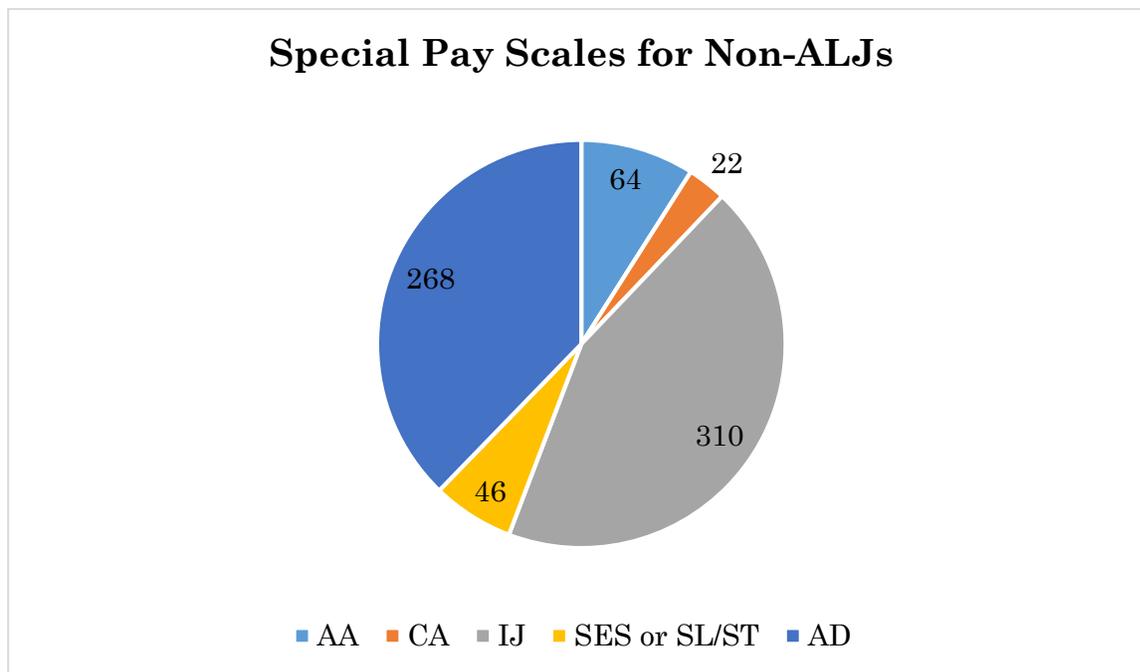
#### ***b. Non-ALJs on Special Pay Scales***

The remaining 710 non-ALJs are paid under special pay scales. They account for 7% of all 9,507 non-ALJs for whom agencies provided specific salary information or 43% of non-ALJs who provided specific salary information and are not patent examiners (1,651).

These percentages for all non-ALJs (including patent examiners) are similar to findings in the 1992 Frye Study. It indicated that approximately 7% (165 out of 2,455) of all reported non-ALJs were paid on special scales or “supergrades.”<sup>98</sup> But if, like our exclusion of patent examiners from our findings, one excludes the largest reported group of non-ALJs from the Frye Study (1,692 VA non-ALJs), 22% (165 of 763) of non-ALJs were paid on special pay scales. (The Limon Study did not provide similar data.) Notably, when excluding the largest group of non-ALJs, a comparison of our data to the Frye Study suggests that special pay scales are becoming more common for non-ALJs.

<sup>98</sup> See Frye, *supra* note 31, app. B. Of the 2,692 non-ALJs for whom agencies reported some salary information, 237 of them were not government employees. 165 of the remaining 2,455 non-ALJs were paid under supergrades or other special pay scales. See *id.*

The 710 non-ALJs not on the GS scale are paid under one of five other scales (*see* Figure 9), which are further defined and discussed below. All of these scales have salary ranges that overlap with (or are the same as) ALJs' salary ranges.



**Figure 9 – Special pay Scales for Non-ALJs (n=710)**

Some non-ALJs are paid under analogues to the ALJ pay scales. For instance, Administrative Appeals Judges (AAJs) have their own pay scale (AA-1 through AA-6), and it tracks the six steps of ALJ pay grades AL-3.<sup>99</sup> Only the SSA's Office of Appellate Operations reported paying its AAJs on the AA scale. Save three AAJs who were paid under the ALJ pay scales (AL-2 and AL-1) because of their administrative duties, all of the SSA's AAJs were paid on the AA pay scale. Figure 10 provides data on their base salaries:

<sup>99</sup> See *Pay & Leave: Salaries & Wages, Salary Table 2017-AAJ*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/AAJ.pdf>.

Pay Scale	No. of SSA AAJs (n=64)	2017 Base Salaries	Total Salary (in millions)
AA-1	11	\$108,100	\$1.9
AA-2	0	\$116,300	\$0
AA-3	0	\$124,700	\$0
AA-4	9	\$133,000	\$1.2
AA-5	20	\$141,500	\$2.8
AA-6	21	\$149,600	\$3.1
AL-2	2	\$157,900	\$0.3
AL-1	1	\$161,900	\$0.2
<b>(total)</b>			<b>\$9.5</b>

*Figure 10 – AAJ Pay Scale (n=64)*

Likewise, as indicated in Figure 11 the Armed Services Board of Contract Appeals uses a special pay scale for its Board of Contracts Appeals Judges. As required and determined by statute,<sup>100</sup> the BCA Judges receive pay according to a special pay scale (the CA-1 through CA-3 pay scale).<sup>101</sup> Their base salaries share some similarities with ALJs’ base salaries. Although the two highest grades are the same or nearly identical to ALJs’ pay grades, the entry base salary is substantially higher (approximately \$152,000 for BCA Judges and \$108,100 for ALJs).

Pay Scale	No. of DoD BCA Judges (n=22)	2017 Base Salaries or Range	Total Salary (in millions)
CA-3	19	\$152,186	\$2.9
CA-2	2	\$157,043	\$0.3
CA-1	1	\$161,900	\$0.2
<b>(total)</b>			<b>\$3.4</b>

*Figure 11 – BCA Judges’ Pay Scale (n=22)*

The 310 Immigration Judges (IJs) in the DOJ’s Executive Office for Immigration Review are paid under a special pay scale (IJ-1 through IJ-4) that is similar to the ALJ pay scale.<sup>102</sup> Figure 12 indicates that the IJ pay scale has four grades, some of which are higher and some of which are lower than similar AL-3 steps:

<sup>100</sup> See 41 U.S.C. § 7105(2), 5 U.S.C. § 5372a(b).

<sup>101</sup> For the CA pay scale, see <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/BCA.pdf>

<sup>102</sup> See *EOIR 2014 Immigration Judge Pay Rates (eff. Jan. 12, 2014)*, JUSTICE.GOV, <https://www.justice.gov/sites/default/files/eoir/legacy/2014/05/28/2014IJPayTable.pdf>.

Pay Scale	No. of IJs (n=310)	2017 Base Salaries	Total Salary (in millions)
IJ-1	46	\$109,970	\$5.1
IJ-2	39	\$125,680	\$4.9
IJ-3	13	\$141,390	\$1.8
IJ-4	212	\$144,532	\$30.6
<b>(total)</b>			\$42.4

**Figure 12 – IJs' Pay Scale (n=310)**

The remaining 314 non-ALJs (for whom we have calculable salary information) are paid on special pay scales for which only salary ranges are readily available.<sup>103</sup> Forty-six non-ALJs are paid under the Senior Executive Service (SES) or the Senior-Level and Scientific or Professional Positions (SL/ST) pay scales. Notably, under these scales, non-ALJs can obtain pay that exceeds ALJs'. The ranges for both pay scales are the same.<sup>104</sup> Two hundred sixty-eight Appellate Patent Judges for the Patent Trial and Appeal Board receive pay under an agency-determined pay scale (AD).<sup>105</sup>

Figure 13 provides additional detail, including agencies using the SES pay scale, the number of non-ALJs paid under these scales, and the salary ranges:

<sup>103</sup> Although we received data on special salary grades for 15 CFTC Hearing Officers, two Coast Guard Hearing Officers, 40 GAO Senior Attorneys, and 30 NRC AJs, we were not readily able to determine the base salaries or salary ranges for these non-ALJs.

<sup>104</sup> See *Pay & Leave: Salaries & Wages, Salary Table 2017-SL/ST*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/SLST.pdf>; *Pay & Leave: Salaries & Wages, Salary Table 2017-ES (SES)*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/ES.pdf>.

<sup>105</sup> See *USPTO 2014 AD Pay Plan: Salary Table Administrative Patent Judges & Administrative Trademark Judges*, COMMERCE.GOV, [http://hr.commerce.gov/Employees/Compensation/PROD01\\_010302](http://hr.commerce.gov/Employees/Compensation/PROD01_010302).

Pay Scale	Agency	Agency Office or Subcomponent	No. of Non-ALJs (n=314)	2017 Base Salary Ranges	Total Salary (in millions)
SES or SL/ST	Commerce	PTAB	7	\$124,406 to \$187,000	\$5.7 to \$8.6
	DOE		1		
	HHS	Office of Secretary, DAB	5		
	DOJ	EOIR, BIA	16		
	DOL	BRB	5		
	GOA		5		
	MSPB	Reg. & Field Off.	6		
	NASA	Ombudsman	1		
AD (APJs)	Commerce	PTAB	268	\$135,845 to \$167,000	\$36.4 to \$44.8
<b>(total)</b>					\$42.1 to \$53.4

**Figure 13 – SES, SL/ST, AD Pay Scales for Non-ALJs (n=313)**

Of all 9,507 non-ALJs for whom we had calculable base-salary information, 5,415 or 57% of those non-ALJs are paid within pay scales or grades that overlap with ALJs’ paygrades (GS-14, GS-15, and all special pay scales). But if one excludes GS-14 because of its very limited overlap with ALJ salary ranges, then only 8% of the non-ALJs (829) have pay ranges that overlap with ALJs’. For the same figures based on the 1,651 non-ALJs for whom we have calculable base-salary information (when excluding patent examiners), 68% have overlapping base-salary ranges with ALJs (when including GS-14) or 50% (when excluding GS-14).<sup>106</sup>

## **B. Types of Non-ALJ Oral Hearings**

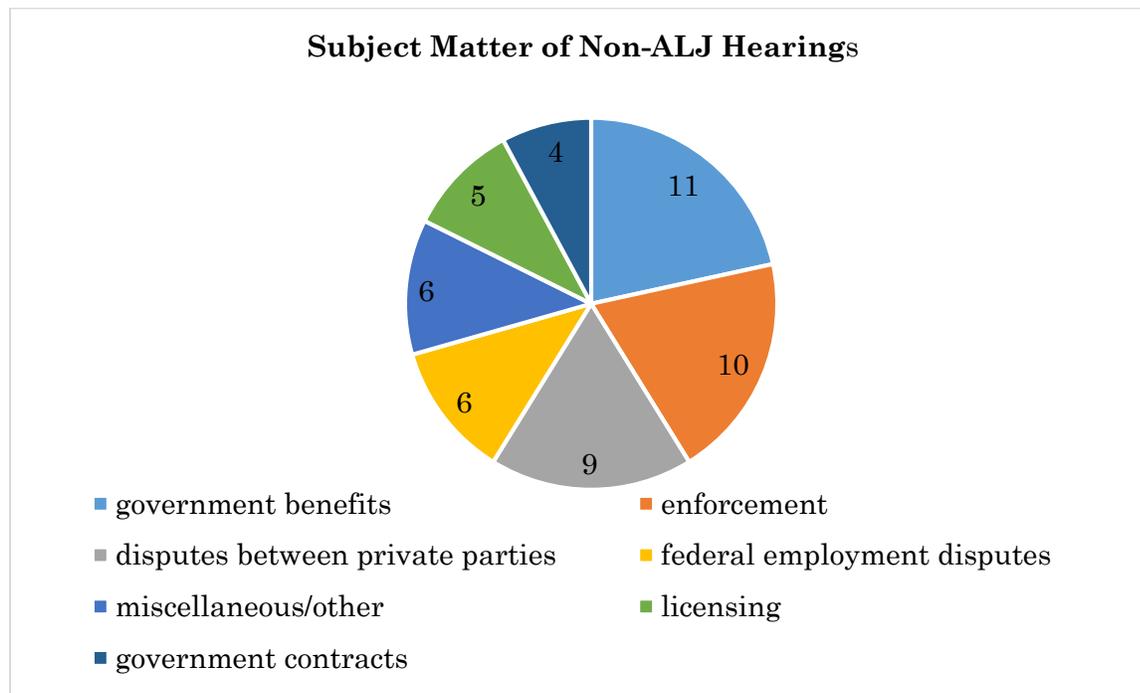
Agencies reported 47 types of Non-ALJ Hearings because some agencies have more than one type of Non-ALJ Hearing. For instance, the CFTC has wage-garnishment, statutory-disqualification, and reparation-award proceedings. We report here our findings as to the nature of the 47 reported Non-ALJ Hearing types, whether the non-ALJs’ agency is a party to the hearing, whether the non-ALJs’ decision is final and the nature of any administrative appeal, and whether the agency imposes case-processing goals on the non-ALJ for the particular type of Non-ALJ Hearing.

### **1. Nature of Hearings**

Our questionnaire asked respondents to assign the hearings over which their non-ALJs preside to one or more of six general subject matter categories and an “other” category. Figure 14 indicates the distribution of the 47 types of Non-ALJ Hearings reported by the responding officials, (with some kinds of hearings fitting into more than one category): government benefits (11), enforcement (ten), disputes between private parties (nine), federal employment disputes (six), miscellaneous/other (six), licensing (five), and government contracts (four). (No

<sup>106</sup> 710 non-ALJs have special pay scales, 291 are paid at GS-14, and 114 are paid at GS-15.

agencies included disputes for one of our listed subject-matter categories: disputes between different governmental agencies.) The numbers in Figure 14’s chart total 51, not 47, because a few agencies identified more than one subject matter for a hearing. For example, the EPA’s Office of Administration and Resources reported that it conducted hearings that involved both government benefits and government contracts.



**Figure 14 – Subject Matter of Non-ALJ Hearings (n=47)**

No category commanded even 25% of the reported hearing types, revealing the variety of Non-ALJ Hearings across the federal government.<sup>107</sup>

Below is a short description of each category:

- *Government-Benefits Hearings.* The reported government-benefits hearings concerned HHS grants, PBGC benefits, and disability benefits for veterans, railroad employees, and social-security beneficiaries.
- *Enforcement Hearings.* The enforcement hearings concerned wage garnishments and disqualifications by the CFTC for commodities brokers; penalties, fines, or other enforcement remedies by the Coast Guard, DHS, DOE, EPA, HHS, or NRC; immigration-removal proceedings in DOJ; and license-revocation proceedings by the Federal Maritime Commission.

<sup>107</sup> Unlike earlier studies, we did not collect responses concerning the caseloads for different Non-ALJ Hearings because our study focuses more on the non-ALJs themselves and because of what we perceived as the difficulty in obtaining reliable data from agencies. See Frye, *supra* note 31, at 264 (reporting estimated caseloads and noting lack of consistent agency reporting).

- *Hearings for Private Parties.* Non-ALJs resolve disputes between private parties in the context of commodities trading, specialty agricultural products, intellectual property, benefits, labor relations, maritime, and sexual-harassment claims.
- *Federal Employment and Government-Contract Hearings.* Some categories are self-explanatory and share similar contexts, but it may be helpful to know of the agencies with these kinds of hearings. Non-ALJ Hearings concerning federal employment disputes occur within the Administrative Office of the U.S. Courts, Treasury, EEOC, FLRA, GAO, and MSPB. The DOD, EPA, and the GAO have Non-ALJ Hearings concerning governmental contracts.
- *Licensing Hearings.* Licensing hearings concern patents and nuclear power for the Department of Commerce and the NRC, respectively.
- *Miscellaneous Hearings.* As for the “other” proceedings that do not fit within our established categories, Treasury has hearings for tax-assessment disputes, the FDIC and the NRC have hearings on “miscellaneous” subject matter (without further description), and NASA has hearings on public-private partnerships.

We are limited in our ability to compare these results with prior studies. The 2002 Limon Study did not report Non-ALJ Hearing types. The earlier 1992 Frye Study did report case types, but it reported them in different categories than ours.<sup>108</sup>

## 2. Agency as Party

Concerns over non-ALJ independence are at their apex when the non-ALJ’s employing agency is a party at the Non-ALJ Hearing. To be sure, agencies may have reasons to influence non-ALJs as to the agency’s policy preferences in hearings in which the agency does not appear as a party. But the agency as a party is more problematic because it implicates the due process principle of *nemo iudex in sua causa*, i.e., no one should judge his or her own case.<sup>109</sup> The Supreme Court has held that notions of impartiality under the Due Process Clause apply to agency adjudication,<sup>110</sup> but it has given agencies a wide berth in the context of informal adjudication.<sup>111</sup> A party’s “significant and disproportionate influence” on a judge’s selection, the party’s ability to remove the judge, and the party’s (or the litigation’s) ability

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<sup>108</sup> Frye organized the types of hearings in five key categories (enforcement, entitlements, economic, employer-employee, and health and safety) and then, with his key focus on the kinds of non-ALJ proceedings, described the cases heard under each category in detail. *See id.* at 261–62.

<sup>109</sup> *See* Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384 (2012).

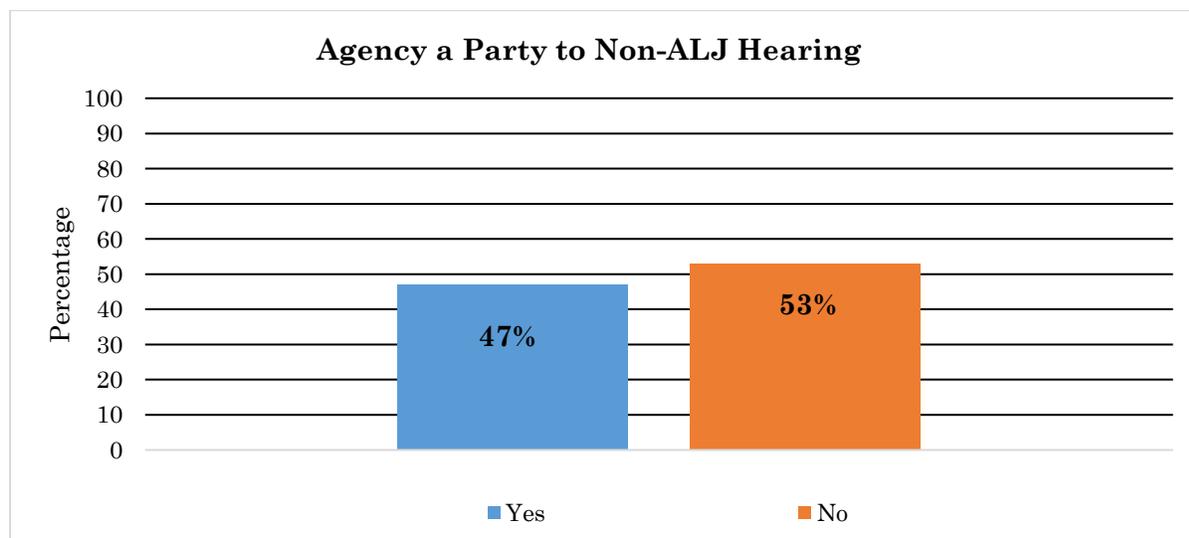
<sup>110</sup> *See* Schweiker v. McClure, 456 U.S. 188, 196 (1982); *Withrow v. Larkin*, 421 U.S. 35, 54 (1975) (holding that combination of functions for agency or its members will usually not violate due process); *see id.* at 48 (noting “presumption of honesty and integrity in those serving as adjudicators”); *see id.* at 51 n.16 (noting lower-court decisions finding due process violations for lesser officials within agencies that had combined functions).

<sup>111</sup> *See, e.g., id.*; *Marcello v. Bonds*, 349 U.S. 302, 311 (1955) (rejecting due process challenge to non-ALJs based on their reporting relationship with investigative and prosecutorial functions because of “the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters”). The Department of Justice is no longer a party to immigrant removal proceedings before DOJ’s immigration judges.

to benefit the judge financially are relevant as to whether the adjudicator has sufficient impartiality under the Due Process Clause.<sup>112</sup>

Notably, ALJs have a largely OPM-led appointment process, prohibitions on their at-will removal, a pay scale set by OPM regulations, and prohibitions on agencies paying them bonuses. These conditions contribute to ALJ impartiality.<sup>113</sup> The statutes that promote ALJ impartiality do not apply to non-ALJs. One of the goals of this project was to determine to what extent non-ALJs have similar protections from statutes or other sources.

We thus began by asking whether agencies were parties in the identified Non-ALJ Hearings. As indicated below in Figure 15, agencies reported that they were parties to 47% of the Non-ALJ Hearing types (22 of 47). Of these hearings, nine concern administrative enforcement, four concern governmental benefits, four concern licensing, two concern government contracts, one concerns federal employment matters, and six concern “other” kinds of hearings (such as tax-assessment disputes or public/private partnerships).<sup>114</sup> (Our results for the other independence criteria follow in Parts IV.C and IV.D. In later subsections, we cross-tabulate other findings with the agency’s status as a party.)



**Figure 15 – Whether Agency is a Party in Non-ALJ Hearing Types (n=47)**

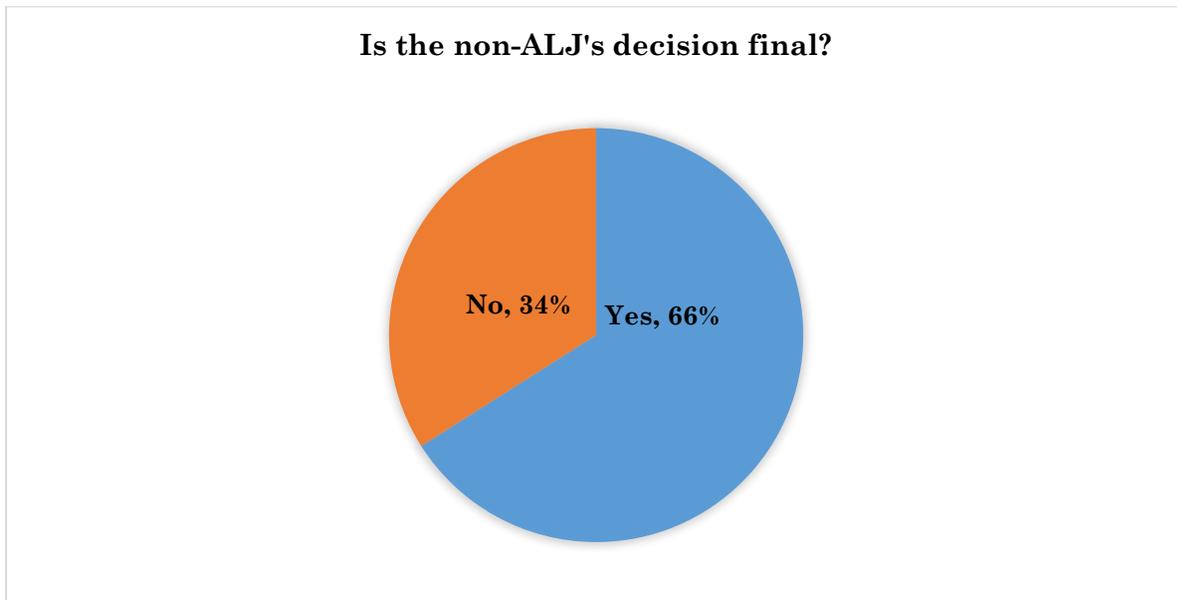
<sup>112</sup> See Barnett, *supra* note 10, at 1674–78.

<sup>113</sup> Cf. Butz v. Economou, 438 U.S. 478, 513 (1978) (providing ALJs absolute immunity based on their quasi-judicial function and “more importantly” the statutory structures that “assure that the [ALJ] exercises his independent judgment on the evidence before him”).

<sup>114</sup> Agencies identified some Non-ALJ Hearings as fitting into more than one category (say, governmental benefits and government contracts), meaning that more than 22 responses apply to 22 types of Non-ALJ Hearings in which the non-ALJ’s agency is a party.

### 3. Appeals and Finality

The non-ALJs' decisions often serve as the agency's final decision in the adjudication, both with and without further agency review. First, as indicated in Figure 16, in two-thirds of the Non-ALJ Hearing types (66%, or 31 of 47), the non-ALJs' decisions either are final agency actions without any administrative appeal or can be final agency actions if no party takes a permissive administrative appeal. Accordingly, in the majority of Non-ALJ Hearing types, non-ALJs do not issue tentative or recommended decisions for the agency to render binding with a separate order. In the remaining 34% of Non-ALJ Hearing types, agencies indicated that a final agency action could not occur until after mandatory administrative appeal occurs (at the Administrative Office of the U.S. Courts, and the PTO), a higher ranking official issues an order (at the USDA, FDIC, FLRA, Library of Congress, NLRB, and Peace Corps), or another kind of required action occurs.



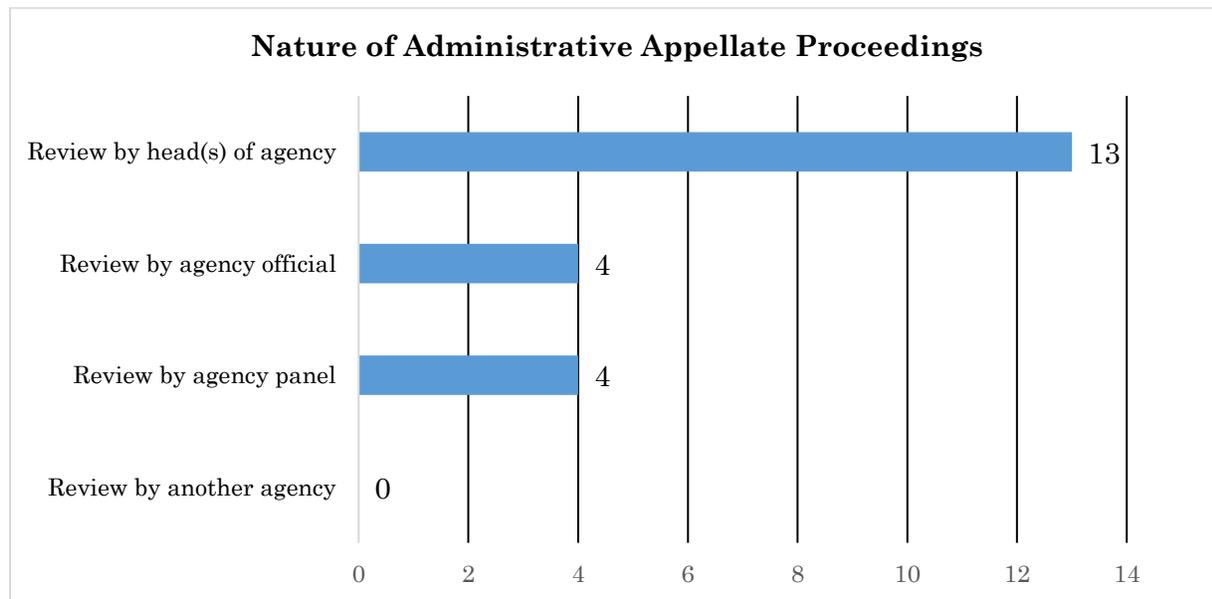
*Figure 16 – Finality of Non-ALJ Decision by Non-ALJ Hearing Type (n=47)*

Relatedly, further administrative appeals are available in over slightly half (53%, or 25 of 47) of Non-ALJ Hearing types. If we exclude from consideration what we perceive to be the 15 Non-ALJ Hearing types that are entirely or mostly appellate proceedings (because those proceedings serve as appellate proceedings for the particular adjudicatory regime), 41% (13 of 32 Non-ALJ Hearing types) permit no administrative appeal at all.

The matters in which the non-ALJ could issue a final decision without the possibility of any appellate review were limited to what appear to be extremely low-volume adjudications: CFTC wage-garnishment proceedings, labor arbitrations within the Alcohol and Tobacco Tax and Trade Bureau of Treasury, public/private partnerships with NASA, and certain license-transfer agreements before the NRC.

When agencies permit administrative appellate review, we asked the agencies to describe the nature of the review. We asked them to choose all of the following that apply: automatic administrative appellate review, discretionary review, review by an appellate panel (whose members do not comprise the head(s) of the agency), review by the head(s) of the agency,

review by another agency official, or review by another agency or a component of another agency. Some of the results from responding agencies are provided in Figure 17.



**Figure 17 – Nature of Administrative Appellate Proceedings (n=25)<sup>115</sup>**

For either mandatory or discretionary administrative appeals, four Non-ALJ Hearing types have review by an appellate panel, four by another agency official, and a substantial 13 by the head of the agency itself. (No agency reported Non-ALJ Hearings whose appeals went to a different agency.)<sup>116</sup> We were initially surprised at the relatively large number of proceedings that the heads of agencies reviewed. But when we reviewed those kinds of hearings, they either appeared to be relatively rare proceedings or appeals to agencies that mainly or solely use adjudication. For instance, appeals from the Administrative Office of the U.S. Courts’ fair-employment-practices hearings, the DOE’s proceedings concerning improper actions surrounding student financial aid, and the NRC’s various nuclear-power hearings are likely not substantial in number. And several of the agencies—such as the Federal Maritime Commission, the MSPB, the NLRB, and the Railroad Benefits Board—that permit or mandate appeals to the head(s) of the agency act largely or solely through adjudication, rather than rulemaking.

Agencies reported only three Non-ALJ Hearing types as having mandatory appellate proceedings: patent applications, certain veterans-benefits decisions, and certain decisions

<sup>115</sup> Despite having the 25 agencies report having appellate proceedings, not all of their responses are indicated on the graph. Some, such as the EEOC, simply reported discretionary appeals, while others, such as DOL/BRB only reported “other” (parties could choose to appeal).

<sup>116</sup> We did not ask agencies about the availability or nature of judicial review from the non-ALJ or agency’s decision.

concerning nuclear energy. (The responses as to the number of discretionary proceedings were very likely incomplete.<sup>117</sup>)

#### **4. Case-Processing Goals**

Quantitative case-processing goals and qualitative evaluations have a lengthy and contentious history. The Frye Study indicated that quantitative case-processing goals were widespread by 1992 (although Frye’s presentation of the data renders them difficult to compare with ours).<sup>118</sup> As the Conference has previously recognized, case-processing goals can improve productivity and accountability.<sup>119</sup> These values appear most salient when the agency seeks efficient disposal of high-volume caseloads. Nevertheless, some adjudicators (most famously, ALJs at SSA) have criticized them for interfering with their decisional independence.<sup>120</sup> The federal courts of appeals have not been receptive to ALJs’ criticism.<sup>121</sup>

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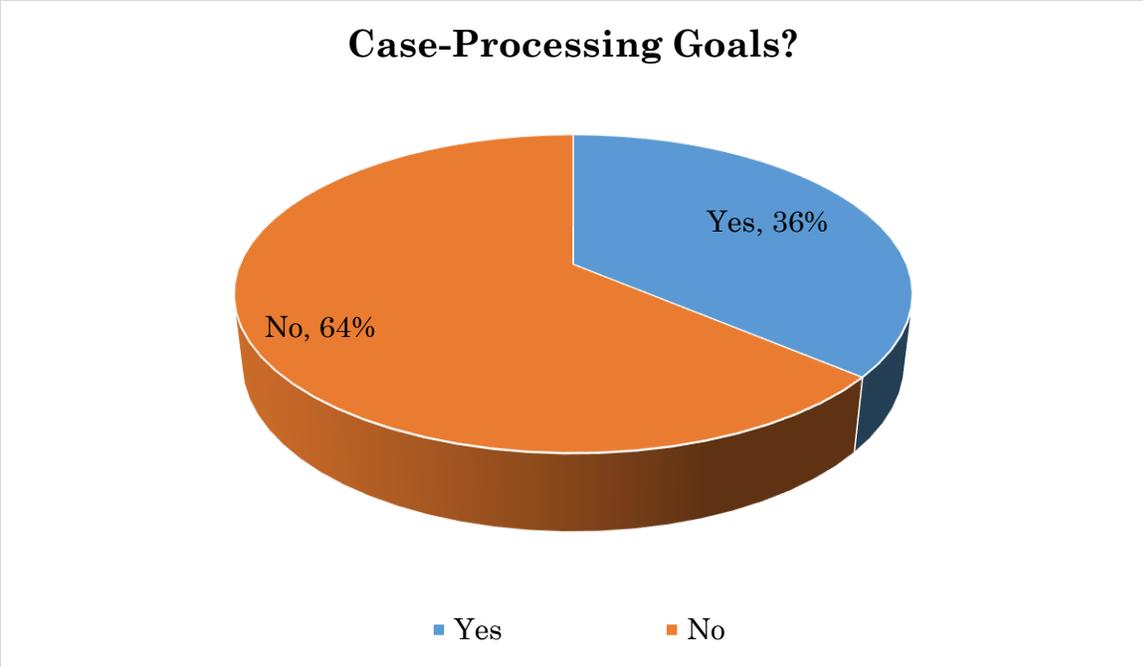
<sup>117</sup> Although all 25 types of Non-ALJ Hearings with appellate proceedings must either be mandatory or discretionary, we received only 17 responses to these binary variables (three for mandatory and 14 for discretionary). We suspect that the reported mandatory appellate processes are accurate because of their rarity.

<sup>118</sup> See Frye, *supra* note 31, at 270.

<sup>119</sup> See Admin. Conference of the U.S., Recommendation 86–7, “Case Management as a Tool for Improving Agency Adjudication,” at 1 (1986).

<sup>120</sup> See Ass’n of Admin. Law Judges v. Colvin, 777 F.3d 402, 405–06 (7th Cir. 2015) (holding that ALJs had to seek relief under Civil Service Reform Act, not the APA, to challenge the SSA’s current 500-decision “goal” and rejecting the ALJ union’s argument that the quota had improper effects on ALJs’ decisional independence); Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989) (upholding SSA’s implementation of “reasonable production goals”). For criticism of the ALJs’ position, see Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481 (1990).

<sup>121</sup> See *id.*



**Figure 18 – Case-Processing Goals (n=47)**

As Figure 18 indicates, agencies impose quantitative case processing goals for 17 of 47 Non-ALJ Hearing types (36%). Agencies use those goals mostly in what are likely high-volume proceedings. Although we did not survey agencies about their specific caseloads, we can obtain a proxy by considering the number of reported adjudicators. The following proceedings have case-processing goals (with the number of non-ALJs presiding over the types of proceeding at issue in parentheses): patent applications (8,300 non-ALJs), labor-representative disputes (600), immigrant-removal proceedings (310), tax-assessment disputes (at least more than 250 for each kind of tax-assessment proceeding), veterans-benefits hearings (535) and appeals (95), employment or labor hearings for employees in agencies throughout the government (62 full-time non-ALJs for MSPB and 40 for FLSA), and social-security matters (60). The only large groups of non-ALJs *without* case-processing goals were Appellate Patent Judges (268) in appellate patent matters and EEOC AJs (92) in certain employment matters. In other words, the vast majority of non-ALJs are subject to case-processing goals, even if the majority of Non-ALJ Hearing types are not.

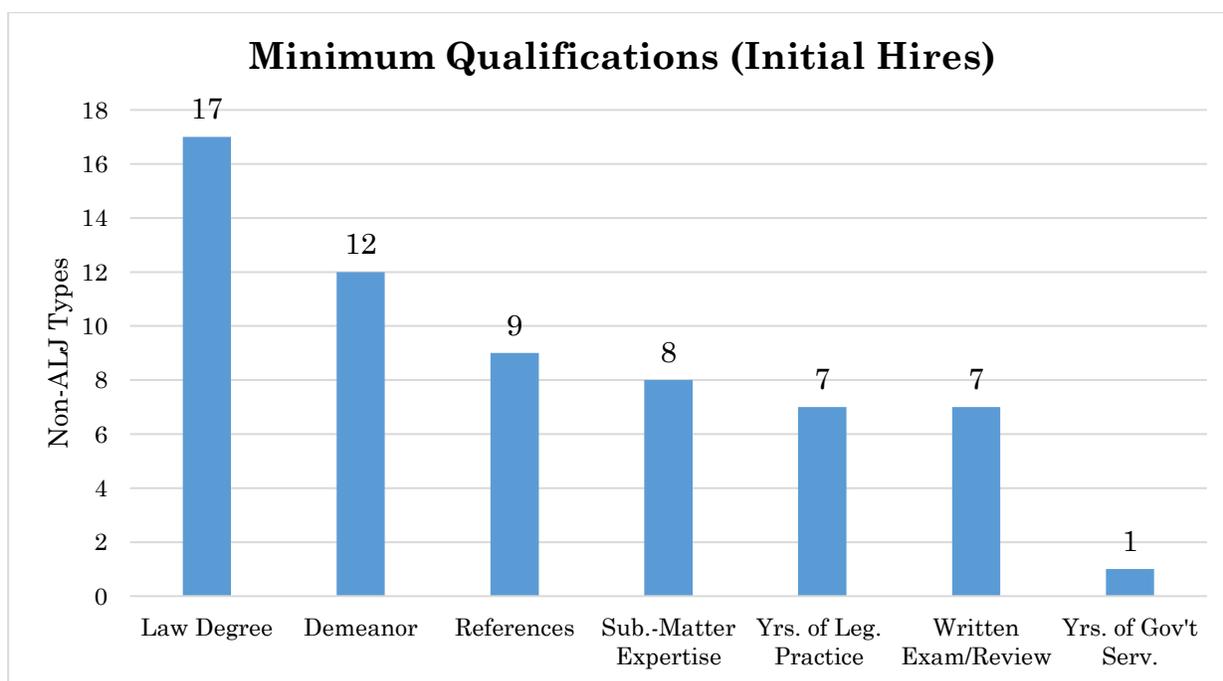
**C. Non-ALJ Selection**

Agencies reported that applicants for 31 of the 37 identified types of non-ALJs must meet minimum qualifications. We asked about qualifications for (1) outside candidates whom agencies consider hiring initially as non-ALJs and (2) agency employees whom agencies move from another position within the agency to serve as non-ALJs (whether or not through a formalized application or selection process). Of the 31 non-ALJ types for which agencies responded with qualifications information, 23 of those types are hired both initially from outside the agency and from within, while four are hired only from within and four are hired only from outside.

Agencies did not report any minimum qualifications for six of the non-ALJ types. Most of those agencies—such as the Administrative Office of the Courts or the Treasury (for Labor

Arbitrators), the FDIC, or the Peace Corps—likely did not report any information because of the short-term contractual (or temporary and rare) nature of the individual’s adjudication duties. These agencies likely do not have formalized requirements. The responding official for the FMC’s two types of non-ALJs did not know what the qualifications were, if any.

Agencies reported hiring persons outside the agency as non-ALJs for 27 of the reported 37 non-ALJ types. We specifically asked agencies about certain potential qualifications and asked them to mark all qualifications that applied: a law degree; years of government service, legal practice, litigation experience, and legal practice concerning regulatory issues relevant to the Non-ALJ Hearings; military service; adequate written work product; subject-matter expertise; demeanor; and references. We also provided space for them to identify other qualifications. As indicated in Figure 19, they reported the following minimum qualifications for initial hires:



**Figure 19 – Minimum Qualifications (Initial Hires) (n=27)**

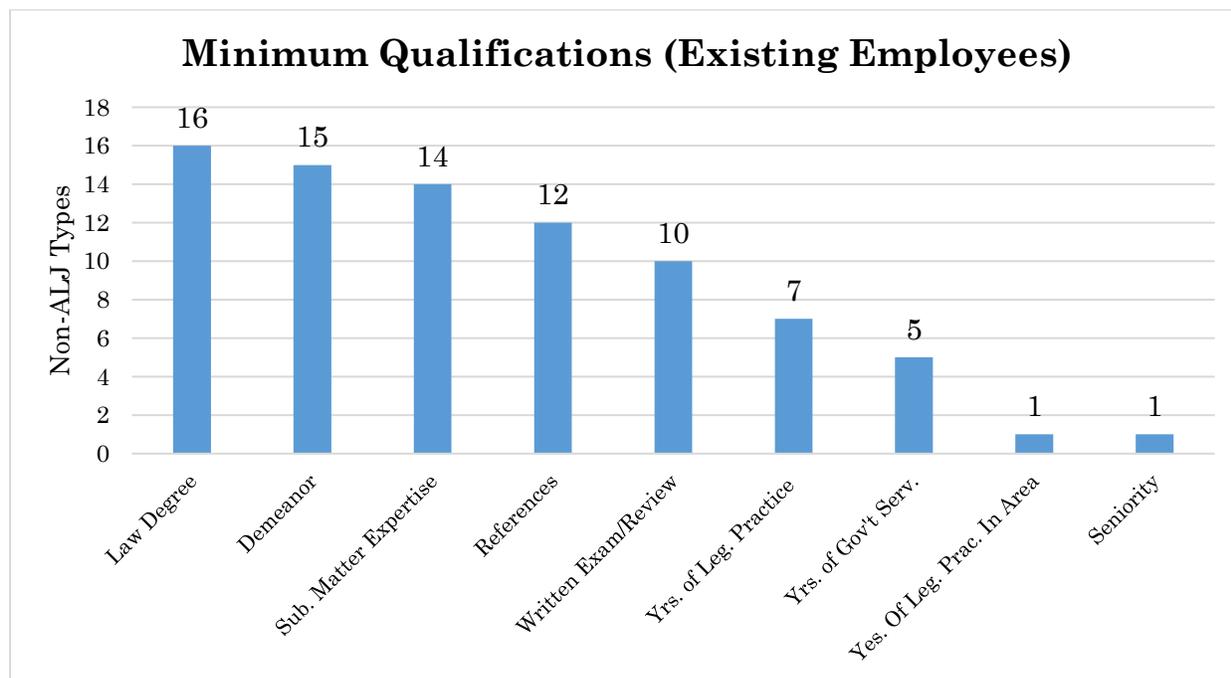
Agencies require that nearly two-thirds of the 27 initially-hired non-ALJ types (63%) have a law degree,<sup>122</sup> and some impose related requirements, such as expertise in general administrative law (CFTC), bar membership (EEOC), a mix of litigation and/or subject-matter expertise (EPA and Library of Congress), or dispute-resolution experience (NASA). Applicants could meet agencies’ years-of-legal-practice requirements with between five and ten years’ experience. Only two other qualifications were common to more than one-third of the types: consideration of demeanor and references. Agencies reported “other” qualifications, such as scientific degrees (PTO) and certain military rank (Coast Guard).

Perhaps the most interesting takeaway is that agencies reported only considering subject-matter expertise when initially hiring non-ALJs for eight non-ALJ types (or 12 types, if

<sup>122</sup> The NLRB noted that it hires some Hearing Officers with a law degree and others without.

including an expansive understanding of the qualifications with the “other” answers)—not even half of the 27 types initially hired. Agencies often criticize OPM for the difficulty in hiring ALJs and for OPM’s refusal to consider subject-matter expertise.<sup>123</sup> But our findings suggest that agencies themselves do not always, or even usually, consider such expertise. That said, agencies consider, without exception, expertise when hiring non-ALJs who will work in scientific areas.<sup>124</sup>

Agencies reported moving existing employees into non-ALJ roles for, coincidentally, 27 non-ALJ types (and thus indicating that some agencies select non-ALJs from inside and outside of the agency). Similar to initial hires, agencies require a law degree for 59% of the non-ALJ types hired from within the agency. And agencies that require years of legal practice impose from seven to ten years’ experience. Interestingly, as indicated in Figure 20, they reported more types of minimum qualifications for internal hires. With these internal hires, agencies were more likely than with outside hires to consider subject-matter expertise, writing ability, demeanor, and—perhaps most surprising—references. Indeed, agencies considered law degrees, expertise, and demeanor for slightly more than half of the non-ALJ types. (Agencies reported similar qualifications under “other” as they did for initial hires.)



**Figure 20 – Minimum Qualifications (Existing Employees) (n=27)**

Agencies place 17 (46%) of the 37 identified types of newly hired non-ALJs on probation. Agencies relied upon probationary periods for 81% of non-ALJ types that hear benefits claims, 67% for those that hear enforcement matters, 50% for those that hear licensing or private-party disputes, 39% for those who hear federal employment disputes, and none for

<sup>123</sup> See Barnett, *supra* note 10, at 1704.

<sup>124</sup> PTO and NRC require expertise or scientific degrees.

those who hear government-contract disputes. Only four (11%) are hired for a term of years, and none of those four are subject to performance appraisals.

#### **D. Non-ALJ Oversight and Independence**

For each of the 37 reported types of non-ALJs, we asked agencies numerous questions that concern non-ALJs' independence and impartiality. Specifically, we asked about (1) any limitations on the non-ALJs' duties and their reporting relationships within the agency, (2) any limitations on non-ALJs having ex parte communications, (3) any physical separation from others in the agency, (4) any requirements for recusal, (5) any performance appraisals and eligibility for pay bonuses, and (6) any protections from at-will removal. Throughout, we provide comparisons to ALJs' protections and prohibitions.

##### **1. Separation of Functions**

ALJs are prohibited by statute from performing investigative or prosecutorial functions or reporting to an employee with those functions.<sup>125</sup> This separation of functions—prosecution from adjudication—provides ALJs independence from the agencies who are often parties in ALJ Hearings. We asked agencies about non-ALJs' functions and limitations on their functions, as well as their reporting relationships.

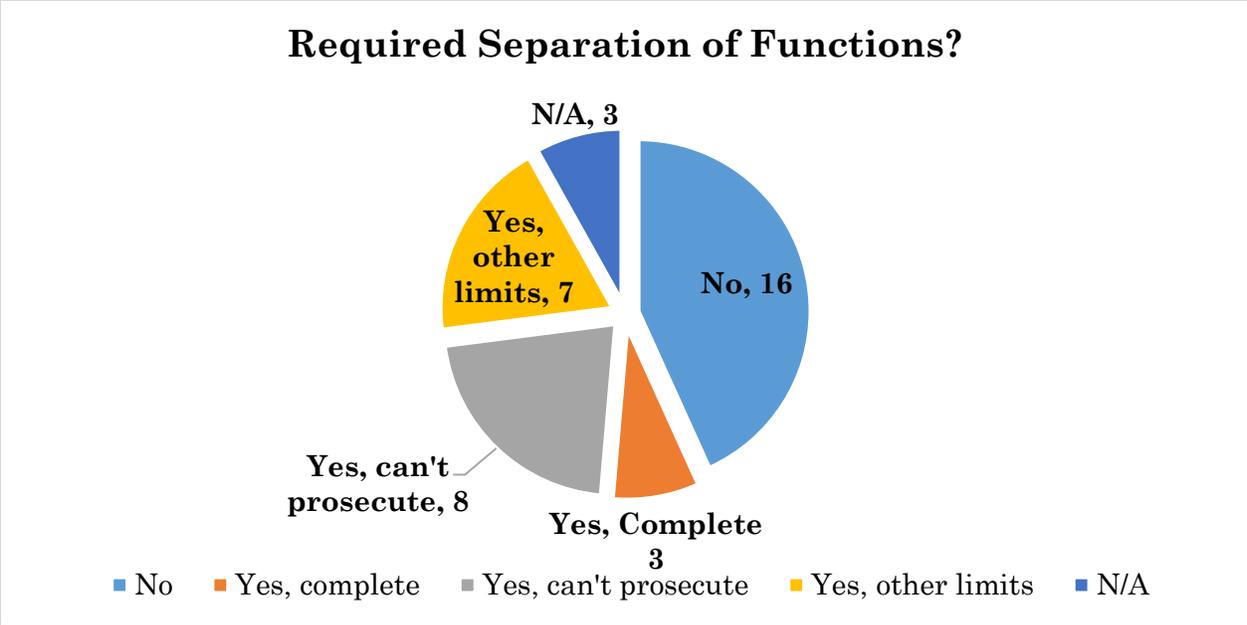
##### **a. Non-ALJ Functions**

We asked whether any authority prohibited non-ALJs from performing duties aside from adjudication and, if so, the nature of that authority. Figure 21 reports our results. Agencies indicated that 16 (or 43%) of the 37 non-ALJ types had no required separation of functions. This comprised the largest group. In addition, three types worked for agencies that only adjudicate and thus have no competing functions to separate. And three other types could perform only adjudicative duties and thus had complete separation of functions.

For the remaining 15 non-ALJ types, eight were prohibited from engaging in investigative or prosecutorial functions (like ALJs). The seven other types reported “other” limits. For instance, Treasury's Settlement Officers cannot prosecute or investigate the cases that they decide, Copyright Royalty Judges are limited by general ethics and conflicts rules, and Presiding Officers for the CFTC cannot report to an employee who prosecutes or investigates.

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<sup>125</sup> See 5 U.S.C. §§ 554(d)(2), 3105.



*Figure 21 – Required Separation of Functions (n=37)*

Many observers might regard the lack of separation of functions especially troubling for certain hearings, such as enforcement proceedings and those in which the agency is a party. Because of the agency’s competing roles and interests, it is in these hearings where internal separation within the agency is particularly useful in providing the proceeding and the non-ALJ an appearance of impartiality. As Figure 22 indicates, more than one-third (6) of the 17 non-ALJ types that preside over hearings in which their agencies are parties have no separation of functions. The same number (6) of those non-ALJ types that preside over hearings in which the agency is a party are prohibited from performing investigative or prosecutorial functions. The remaining non-ALJ types either are prohibited from performing any function other than adjudication (3), or have some other limitation (2). Agencies appear more sensitive to the need for separation of functions in enforcement proceedings specifically. For non-ALJ types that hear enforcement matters, only 22% of them have no separation of functions, while all other types (except one) have similar separation as ALJs.<sup>126</sup>

<sup>126</sup> For enforcement matters, 22% of non-ALJ types have no separation-of-functions requirements, 67% have the same separation as ALJs, and 1 had some “other” kind of separation.

### Separation of Functions for Enforcement Proceedings and Proceedings With Agency-Party

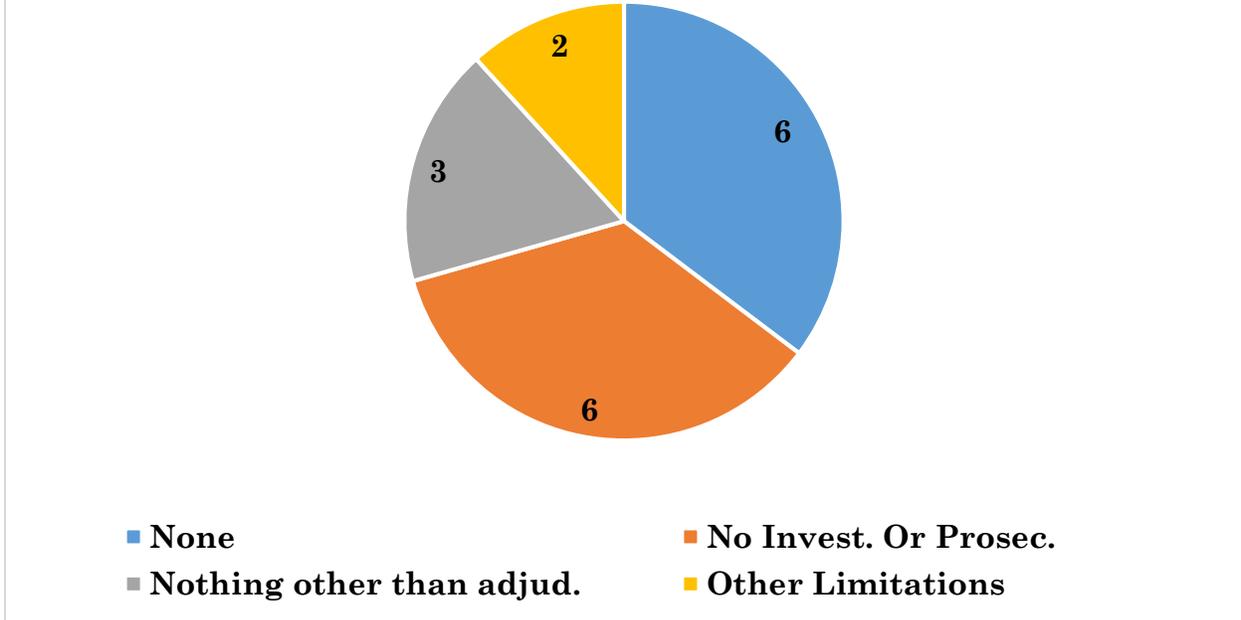
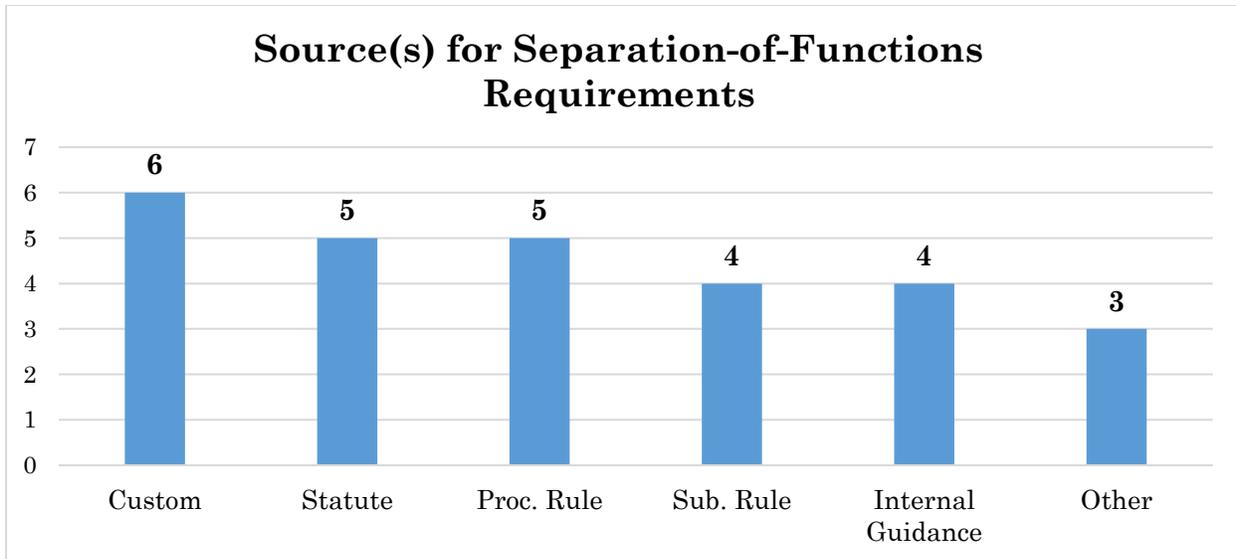


Figure 22 – Separation of Functions for Certain Hearings (n=17)

We asked agencies to identify the source for separation of functions for each non-ALJ type, and agencies did so for 10 types (regardless of the nature of the hearings). Selecting as many sources as applicable, agencies reported, as indicated in Figure 23,<sup>127</sup> that the requirement arose from statute (for five non-ALJ types), substantive rule (four), procedural rule (five), internal guidance (four), custom (six), or other norm or limitation (such as conflict-of-interest principles, etc.) (three).

<sup>127</sup> We did not include responses for non-ALJ types that responded “none” in calculating the number of responses or that did not answer at all.



**Figure 23 – Source(s) for Separation-of-Functions Requirements (n=10)**

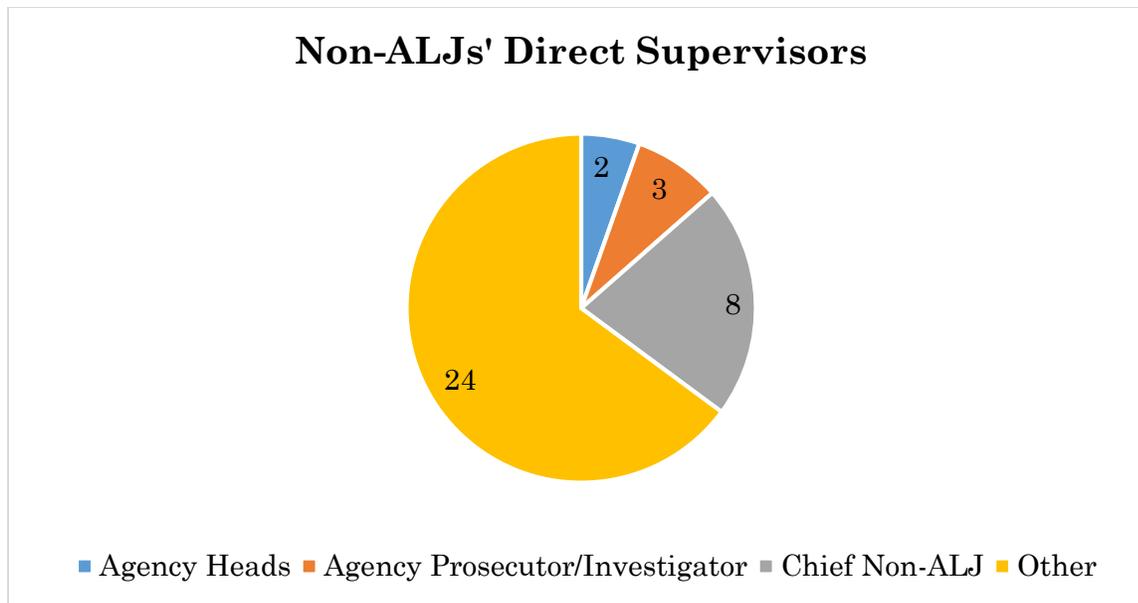
Most of the responding agencies identified more than one source for separation-of-functions requirements. For instance, DOD indicated that its non-ALJs had separated functions via statute and substantive rule. Treasury identified four sources (statute, procedural rule, guidance, and custom), and DOJ/EOIR—despite having DHS, not DOJ or EIOR, as a party in its adjudications<sup>128</sup>—also identified four (statute, substantive rule, guidance, and custom).

**b. Reporting Relationships**

Under the APA, ALJs may not report to those who investigate or prosecute. We were interested in non-ALJs’ reporting relationships and asked agencies to identify to whom the non-ALJs directly report. As Figure 24 reveals, they indicated as follows (with the number of types who report to the indicated official in parentheses): agency head(s) (two), agency officials who supervise investigation/prosecution (three), chief non-ALJs (eight), and other officials (24).

<sup>128</sup> See *supra* note 111.

## Non-ALJs' Direct Supervisors



*Figure 24 – Non-ALJs' Direct Supervisors (n=37)*

Three types of non-ALJs who report to agency prosecutors or investigators and lack the ALJs' separation of functions are the NLRB's Hearing Officers, the FLRA's Hearing Officers, and EPA's Regional Judicial Officers (and the EPA is a party to the Regional Judicial Officers' hearings). As for the non-ALJs who report directly to the head of their agency, the Copyright Royalty Judges report to the Librarian of Congress and the NASA ombudsman reports to the NASA Administrator.

We also asked to whom the chief non-ALJ reports in order to ascertain whether the separation of functions ends one level up from the "line" non-ALJs. For the eight non-ALJ types (22%) that report to chief non-ALJs,<sup>129</sup> agencies for four maintain separation for the chief non-ALJs. For instance, the DOD's Board of Contracts Appeals Judge Chairman does not directly report to anyone, the DOE's Chief Administrative Judge reports to the Director of the Office of Hearings and Appeals, and the SSA's Chief AAJ reports to the Director of the Office of Appellate Affairs.<sup>130</sup> Other non-ALJ types do not maintain similar separation. For instance, the Coast Guard's Chief Hearing Officer reports to the Deputy Chief Counsel/Judge Advocate General, the Peace Corps Chief Hearing Panelist reports to an agency prosecutor or investigator, and the NRC's Chief Administrative Judge reports to the Commissioners.

Notably, 65% of non-ALJ types (24 out of 37) reported having direct supervisors other than the categories that we provided in the survey. Respondents told us that these other supervisors ran the gamut from, among other things, the "Director of Proceedings" at the CFTC, Manager of the Appeals Division at the PBGC; chairpersons of appellate boards at

<sup>129</sup> Our tally of non-ALJs who report to chief non-ALJs does not include the MSPB's AJs, who can report to other Chief AJs or Regional Directors.

<sup>130</sup> The HHS's Chief Departmental Appeals Board Member reports to the Deputy Secretary of the DHS. The GAO did not respond to this question for its Chief AJ.

DOJ/EOIR;<sup>131</sup> supervisory non-ALJs (but not “chief non-ALJs”) or Chief ALJs (not chief non-ALJs) at EEOC, PTAB, PTO, and FMC; and various attorneys and directors. These reporting relationships provide at least some segregation from any agency-enforcement functions.

We also asked agencies whether there were specific limitations on who could supervise non-ALJs, similar to how the APA addresses supervision for ALJs. Slightly fewer than half of the non-ALJ types have no limitations (18 out of 37).<sup>132</sup> The others’ limitations varied. The CFTC prohibits its non-ALJs from reporting to an agency prosecutor or investigator (as the APA does for ALJs). The USDA’s Agriculture Marketing Service requires that its non-ALJs report to an independent entity within the USDA, the Office of General Counsel. But most others reported lesser limitations, such as that the supervisor for certain non-ALJs (for example, PTO’s patent examiners, Treasury’s Settlement Officers, MSPB’s non-ALJs, and SSA’s AAJs) had to have certain qualifications or had to be a specific individual per statute or regulation (for example, Armed Forces Board of Contract Appeals, Peace Corps’ Hearing Panelists, and EPA’s Regional Judicial Officers).

## 2. *Ex Parte Communications*

One indicium of a fair proceeding and an independent adjudicator is freedom from pressure from the agency or a party. One way to limit such pressure or interference is to prohibit or limit the adjudicator’s *ex parte* contacts with parties. Likewise, *ex parte* third-party communications can be unfair to parties who cannot participate in those communications. Thus, limiting third-party communications can increase the fairness and accuracy of the hearing.

Several APA provisions prohibit certain *ex parte* communications during ALJ Hearings. For instance, unless otherwise permitted by law or excluded by the APA, ALJs may not have *ex parte* communications with anyone concerning facts at issue. ALJs may, however, discuss legal issues with others inside the agency, unless they are employees who investigate or prosecute the case at issue or one factually related.<sup>133</sup> The APA permits official notice of material facts under certain conditions<sup>134</sup> and other *ex parte* contacts as permitted by law.<sup>135</sup>

We surveyed agencies to ascertain whether non-ALJs had similar prohibitions on their *ex parte* communications. We asked them whether *ex parte* communications were permitted, and, if so, which communications were permitted. And we asked what source of law, if any, prohibited or limited *ex parte* communications.

Figure 25 indicates that agencies have no *ex parte* communications prohibitions for five (or 14%) non-ALJ types, and prohibit some *ex parte* communications for 11 types (30%). Agencies

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<sup>131</sup> Contrary to the questionnaire response, we think Immigration Judges’ direct supervisors are Assistant Chief Immigration Judges, not the Board of Immigration Appeals chairperson. See <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios>

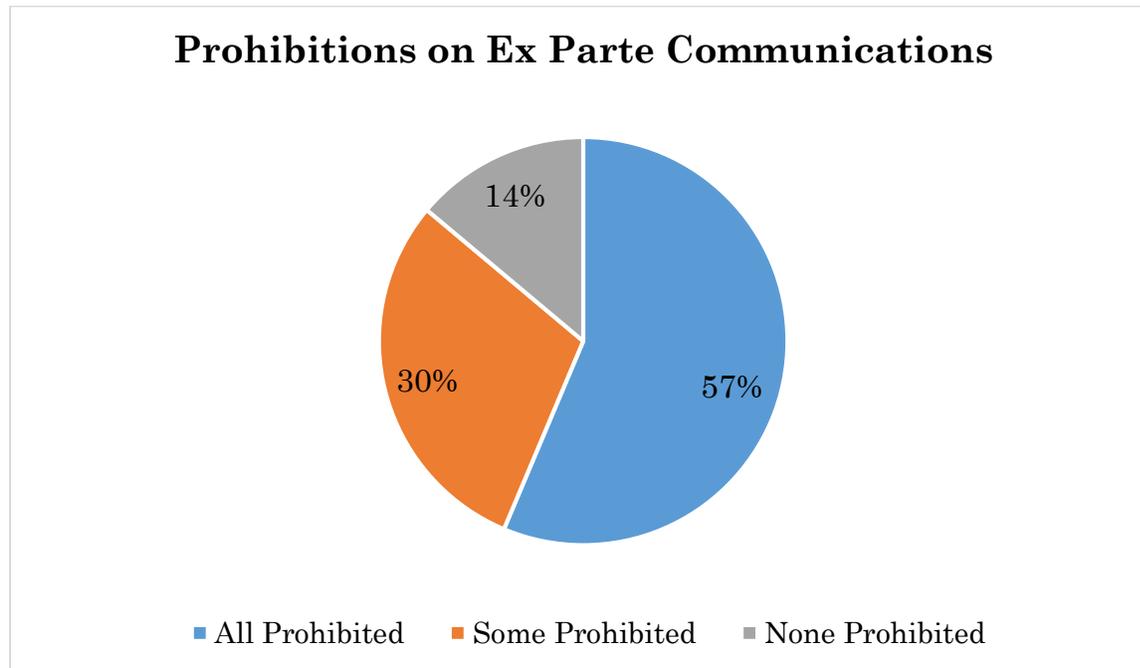
<sup>132</sup> We included in the calculation answers that indicated the only limitation was that the supervisor must have supervisory rank (for the EEOC) or no “conflict of interest” (for the DOE).

<sup>133</sup> 5 U.S.C. § 554(d).

<sup>134</sup> *Id.* § 556(e).

<sup>135</sup> *Id.* § 554(d).

prohibit all ex parte communications for 21 of the 37 non-ALJ types (or 57%). Notably, the prohibition on all ex parte communications (as to both matters of fact and law) is stricter than even the APA standard for ALJs, which permits ALJs to discuss legal matters with certain agency officials.<sup>136</sup> This stricter prohibition is consistent with ACUS' 1993 Model Adjudication Rule on prohibiting ex parte communications.<sup>137</sup>



**Figure 25 – Prohibitions on Ex Parte Communications (n=37)**

This strong prohibition against any ex parte communications applies to eight of the nine types of non-ALJs hearing enforcement matters, three of the four in licensing matters, and five of the eight in matters between private parties.<sup>138</sup> The widespread prohibition of ex parte contacts in enforcement proceedings is encouraging because the non-ALJ's agency is usually a party to these proceedings.<sup>139</sup> The widespread prohibitions of ex parte contacts in licensing matters (at least with our small number of observations) is also encouraging because the agency may well have interests in licensing matters even if not formally a party. But the prohibition's common use is surprising because licensing matters are excepted from some of the APA's ex parte prohibitions.<sup>140</sup>

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<sup>136</sup> See *id.* § 554(d)(2).

<sup>137</sup> See ACUS MAR 120(A) (“Except to the extent required or the disposition of ex parte matters as authorized by law, the Adjudicator may not consult a person or party on any matter relevant to the merits of the adjudication . . .”).

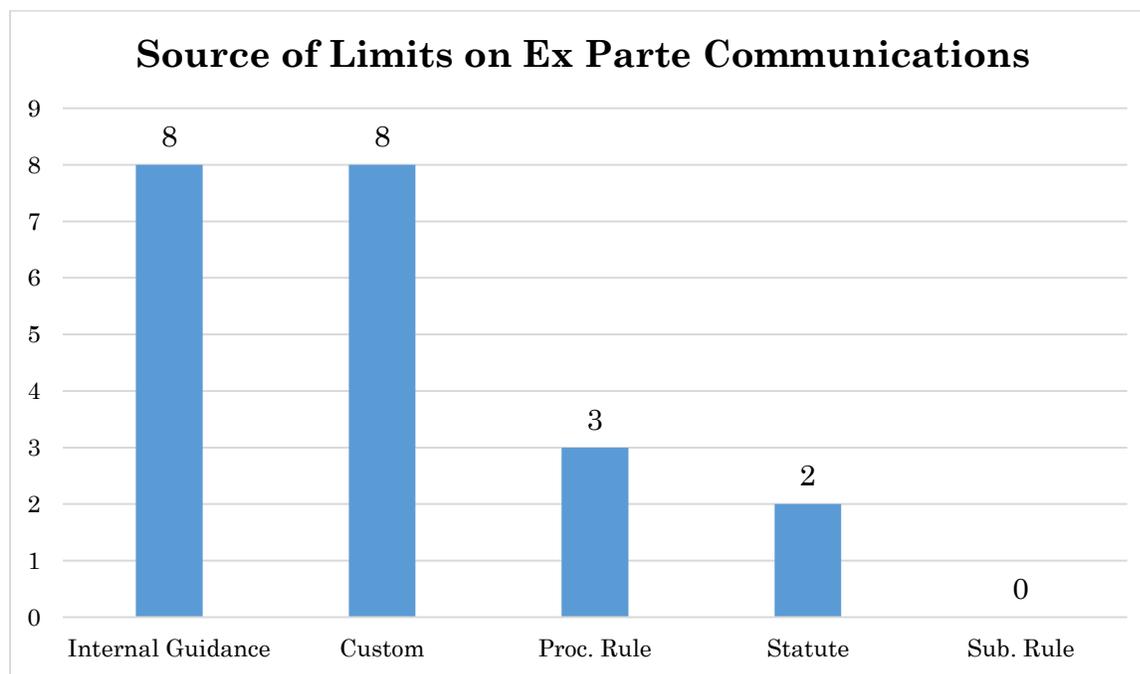
<sup>138</sup> All ex parte communications are prohibited for 67% of the non-ALJ types deciding government-contract disputes, 46% of those deciding federal employment disputes, and only 18% if those deciding benefits matters.

<sup>139</sup> For immigration-removal hearings, DHS is the prosecuting agency in the DOJ/EOIR's hearing.

<sup>140</sup> See 5 U.S.C. § 554(d)(2)(A).

We also considered how agencies did or did not insulate non-ALJs when the agency was a party to Non-ALJ Hearings. The agency’s status as a party likely places the most strain on the non-ALJs’ independence because of concerns that the non-ALJ will communicate with those in the agency who seek to advance the agency’s litigating position. As discussed earlier, the APA limits certain, but not all, ex parte communications with certain adjudicators; we sought to understand whether agencies with ex parte prohibitions have similar prohibitions for non-ALJs. Agencies reported that no ex parte communications are permitted for 10 (59%) of the 17 proceedings in which the agency is a party (a standard that is stronger than the APA’s). Some ex parte communications are permitted for four (24%) of those proceedings (a standard that would be similar to the APA’s). And all ex parte communications are permitted for three (18%) of them. Overall, these findings are reassuring because 82% of Non-ALJ Hearings with the agency as a party have ex parte prohibitions that are at least similar to the APA’s prohibitions for ALJ Hearings.

As indicated in Figure 26, agencies identified the sources of these prohibitions on ex parte communications—whether in statute, substantive rule (such as a notice-and-comment rule), procedural rule, internal agency guidance, or custom—for 12 non-ALJ types (with some having more than one source).



**Figure 26 – Sources of Limitations on Ex Parte Communications (n=12)**

Notably, 67% of the agencies that responded to this question indicated that the prohibition comes only in the least accessible and transparent forms: internal guidance or custom or both. Agencies’ substantial reliance on custom is problematic because it is likely to be unwritten, opaque, and open to varied construction by different non-ALJs.

For those non-ALJ types for which agencies limit ex parte contacts, we asked agencies about the nature of those limitations. None of the agencies that limit (as opposed to prohibit all) ex parte communications prohibited either all communications related to fact or all

communications related to law. Instead, agencies prohibit six non-ALJ types from discussing facts only with certain agency officials (as opposed to prohibiting discussion with anyone), and agencies prohibit seven types from discussing legal issues with certain agency officials. (The six types in the former group—two non-ALJ types for Treasury, three kinds for MSPB, and PBGC—are also six of the types for the latter group.) Agencies prohibit five types of non-ALJs from discussing both facts and legal issues with persons outside the agency (Peace Corps, NASA, RRB, and Treasury for two types).

### 3. *Physical Separation*

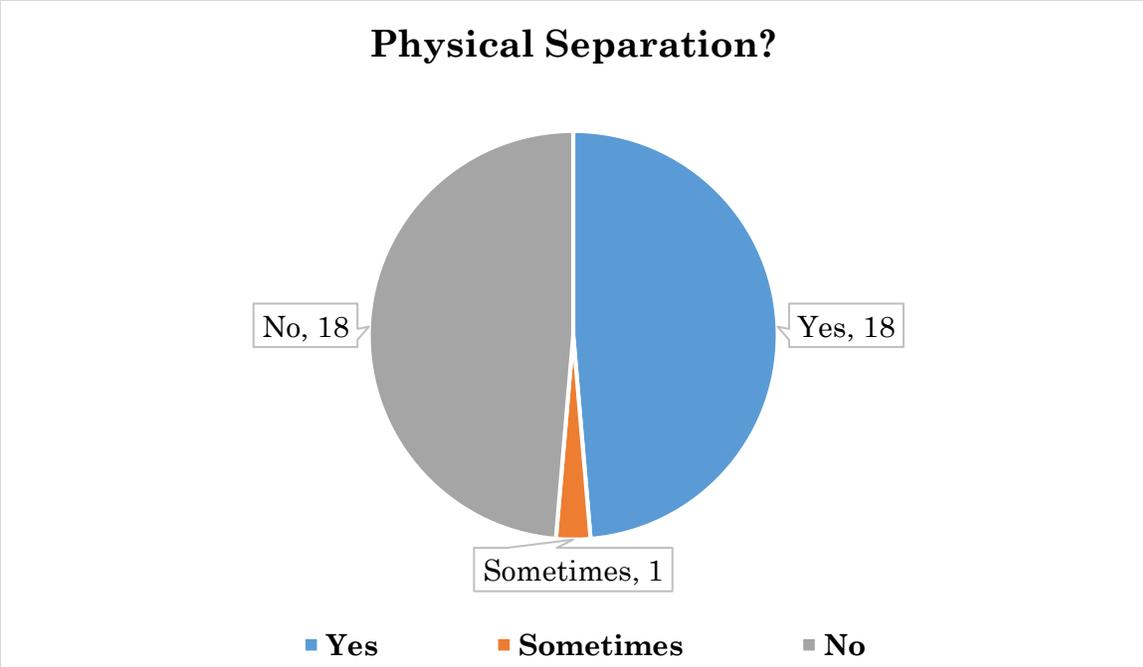
A related question asked agencies whether their non-ALJs were physically separated from other agency employees. Paul Verkuil reported in 1976 that the Department of Interior's physical separation and new titles for its non-ALJs led some to assert that the "resulting decisions on informal appeals are less institutionally oriented, more objective and ultimately more fair."<sup>141</sup> He lauded the agency for its "internal agency reform that . . . substantially increased the impartiality of the informal decision making at a low cost to the system."<sup>142</sup> Indeed, physical separation would likely encourage an agency culture that views the non-ALJs as being separate from the rest of the agency in function. Moreover, fewer casual "water-cooler interactions" between non-ALJs and agency employees should also create some psychological separation from agency employees who shape agency litigation or policy positions. That said, Verkuil did not detail the specific or optimal nature of the physical separation, whether as to space or personnel.

Figure 27 reports our results. Of the 37 types of non-ALJs, almost half (18) are physically separated from other agency employees. One type (Hearing Officers for the FMC) are sometimes physically separated, while the remaining 18 are not. Agencies were most likely to provide physical separation for non-ALJ types that heard federal employment disputes (for 69% of the types that heard these claims), government benefits (64%), and enforcement (56%). Agencies were less likely to do so for non-ALJ types that preside over licensing matters (25%), government contracts (33%), and private disputes (13%).

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<sup>141</sup> Verkuil, *supra* note 30, at 787.

<sup>142</sup> *Id.*



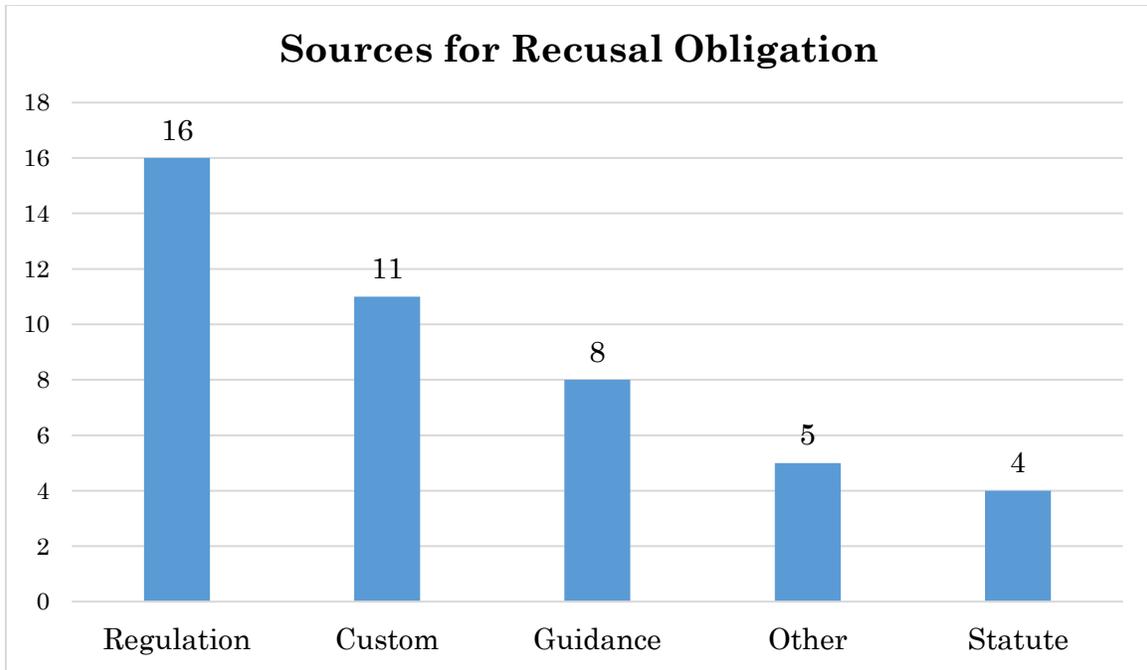
**Figure 27 – Physical Separation (n=37)**

We also considered the relationship between non-ALJs’ separation of functions and their physical separation within the agency. Agencies physically separate all non-ALJ types who are permitted only to adjudicate. And agencies do so for 75% of the non-ALJ types who are prohibited from investigating or prosecuting. Agencies always physically separate only 19% of non-ALJs types who may perform other duties (and they sometimes physically separate 6% of those non-ALJ types).

Although our data provide some insight into how agencies do or do not physically separate non-ALJs from other agency officials, the utility, optimal form, and costs of effecting physical separation is an area ripe for future research and consideration.

**4. Recusal Requirements**

Agencies require 31 (84%) of the 37 non-ALJ types to recuse themselves if they cannot serve as an unbiased adjudicator in a case. For those with recusal requirements, as indicated in Figure 28, agencies identified the sources that require recusal (selecting all that apply). More than half of the 31 agencies with limitations rely on regulations to do so, providing meaningful transparency and clarity to those requirements. In contrast, more than a third (11 of 31) of the non-ALJ types’ limitations arise, at least in part, from custom. Seven of those 11 non-ALJ types had limitations that arose only from custom.



**Figure 28 – Sources of Recusal Obligation (n=31)**

As for the responses that marked “other,” the limitations arose from contractual provisions (non-ALJs hired on an ad-hoc basis, such as for the Administrative Office of the Courts), “general government ethics requirements” or “ethical considerations” (for DOE, Commerce, EPA, and DHS), or “certification” (required for certain EPA actions). Agency reliance generally on seemingly vague “ethical considerations” likely leave substantial discretion to non-ALJs.

No recusal requirement exists for the following six non-ALJ types: CFTC’s Presiding Officers, the Treasury’s Alcohol and Tobacco Tax and Trade Bureau, both non-ALJ types within the VA, the FLRA’s Hearing Officers, and NASA’s Ombudsman.

**5. Performance Appraisals and Bonuses**

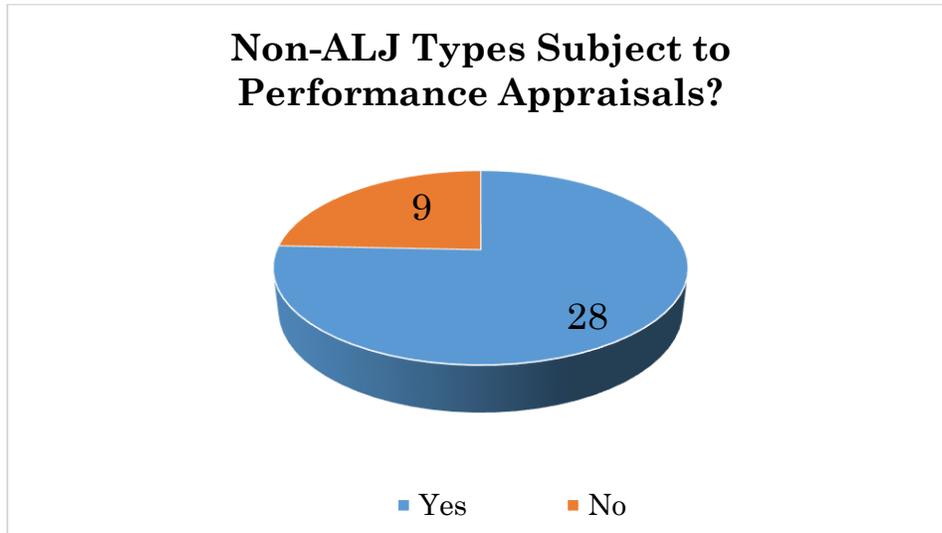
To promote ALJ independence from their agencies, ALJs are exempt from civil-service performance appraisals and cannot receive bonuses from their agencies.<sup>143</sup> We sought to ascertain whether non-ALJs had similar protections from agency oversight.

First, we asked agencies whether their non-ALJ types were subject to performance appraisals. If so, we asked about the nature of the appraisals. Second, we asked whether the agency awarded bonuses to non-ALJs (based on performance appraisals). If so, we asked for the amounts or ranges of bonuses awarded in 2016. Finally, we asked whether the agency had set up any means of preventing the appraisals from affecting the non-ALJs’ impartiality.

<sup>143</sup> See Barnett, *supra* note 10, at 1655–56.

**a. Subject to Performance Appraisals**

A large proportion of non-ALJs by type and by number are subject to performance appraisals. 28 of the 37 types of non-ALJs (76%) are subject to performance appraisals (Figure 29),<sup>144</sup> and all but 68 of the 10,831 total non-ALJs are subject to performance appraisals.<sup>145</sup> In other words, an overwhelming 99% of all non-ALJs are subject to performance appraisals (Figure 30). Of the ten agencies (excluding the Department of Commerce) with more than 25 non-ALJs (see Figure 2, *supra*), nine administer performance appraisals for their non-ALJs. Of the 2,608 non-ALJs that these ten agencies employ, almost all (2,573) have performance appraisals.<sup>146</sup>

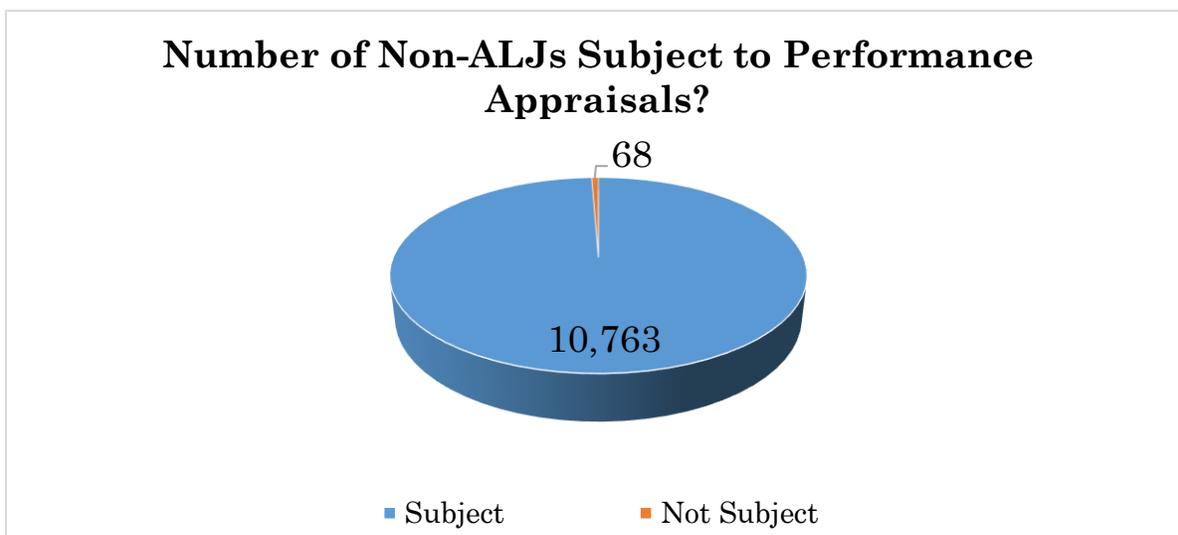


**Figure 29 – Types Subject to Performance Appraisals (n=37)**

<sup>144</sup> The nine non-ALJ types *without* performance appraisals are the Administrative Office of the Courts, DOD, Treasury (Labor Arbitrators), FDIC, GAO (five Personnel Appeals Board Members), the Library of Congress, NASA, NRC, and the Peace Corps.

<sup>145</sup> The agencies and the number of non-ALJs *not* subject to performance appraisals are as follows: Administrative Office of the Courts (1), DOD (22), GAO (five Personnel Appeals Board Members), the Library of Congress (three), NASA (one), NRC (30), and the Peace Corps (six). The FDIC and Treasury Labor Arbitrators are hired only on an ad hoc basis.

<sup>146</sup> Of the ten listed agencies with more than 25 non-ALJs (excluding Commerce), only the NRC did not use performance appraisals for any of its (30) non-ALJs. The GAO reported that it used performance appraisals for its 40 Senior Attorneys, but not its five Administrative Judges.



*Figure 30 – Number of Non-ALJs & Performance Appraisals (n=10,831)*

The percentage of non-ALJs subject to performance appraisals has increased based on figures reported in the 2002 Limon Study. Limon reported that 83% of non-ALJs were subject to performance appraisals.<sup>147</sup> The increase to more than 99% likely arises primarily from the substantial increase in the number of patent examiners, the largest group of non-ALJs.

As with several other factors that concern non-ALJ independence, we considered how many agencies conducted annual performance appraisals for the different types of non-ALJs who preside over hearings in which the agency is a party. The appraisals could serve as a subtle (or not so subtle) method of influencing non-ALJ decision making. Given the significant percentage of non-ALJ types and total number of non-ALJs who are subject to performance appraisals, we were not surprised to find that agencies conduct appraisals on 71% of non-ALJ types that hear proceedings in which agencies are a party (and for 89% of non-ALJ types that hear enforcement matters).<sup>148</sup> This percentage, slightly smaller than the overall percentage of non-ALJ types subject to appraisals (76%), suggests some agency sensitivity to Non-ALJ Hearings in which the agency is a party. But the percentage is still substantial and indicates that agencies are using what the APA regards as a suspect tool on judges who conduct proceedings for which concerns over impartiality are most sensitive.

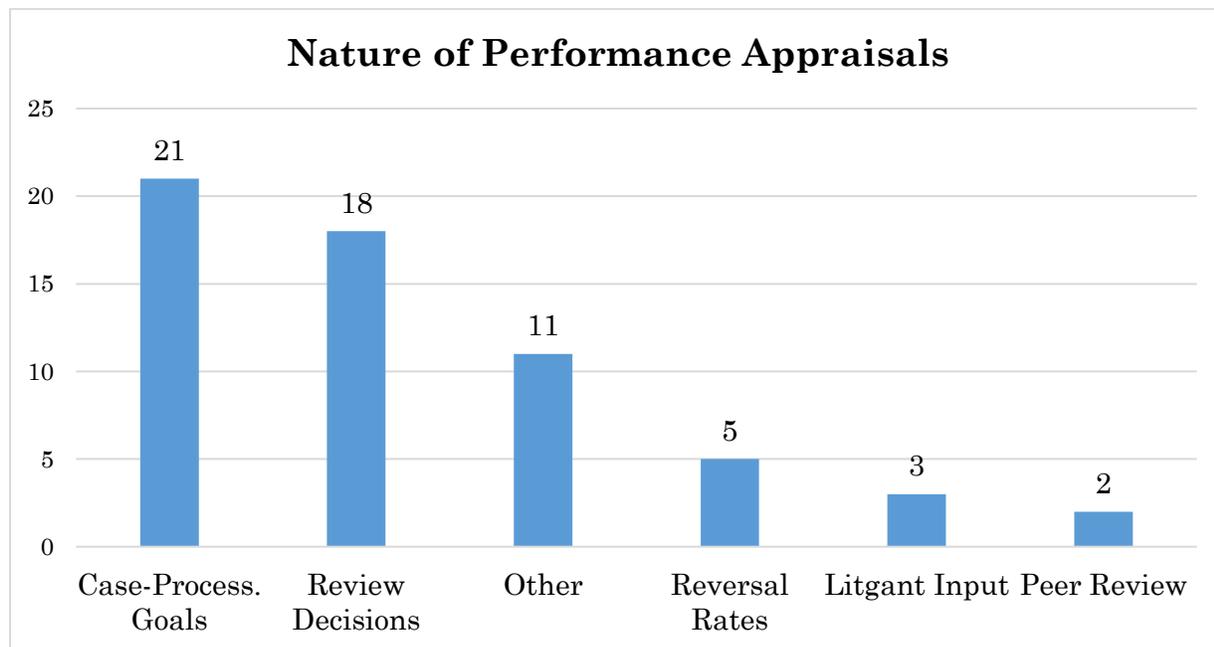
#### ***b. Nature of Performance Appraisals***

To understand the nature of the non-ALJs' performance appraisals, we asked agencies that subject non-ALJs to performance appraisals to identify whether the appraisals included consideration of (1) quantitative case-processing goals, (2) input from litigants, (3) peer review, (4) qualitative review of the non-ALJs' decisions themselves, (5) reversal rates of the

<sup>147</sup> See LIMON, *supra* note 43, at 4. Limon also reported that 30 of 55 agencies (approximately 55%) that reported using non-ALJs also subjected their non-ALJs to performance appraisals. *See id.*

<sup>148</sup> Agencies conduct appraisals for 100% of non-ALJ types that hear benefits matters, 77% for federal employment disputes, 75% for licensing and for disputes between private parties, 71% for enforcement, and 67% for government contracts.

non-ALJs’ decisions, or (6) other factors. We asked them to identify all that apply, and agencies reported information on the performance appraisals for 26 of the 28 non-ALJ types that are subject to performance appraisals.<sup>149</sup>



**Figure 31 – Nature of Performance Appraisals (n=26)**

As Figure 31 indicates, the two most used factors in non-ALJs’ performance appraisals are case-processing goals (for 81% of non-ALJ types for which we received responses) and review of non-ALJs’ decisions (69%). Litgant input, peer review, and reversal rates are relatively rare.<sup>150</sup>

The 11 “other” responses provided more detail. For example, agencies for certain non-ALJ types—such as the DOE’s AJs and HHS’s Departmental Appeals Board Members—also consider non-ALJs’ administrative responsibilities. The MSPB considered government-wide performance standards for the Senior Executive Service when reviewing its Regional Directors.

Some of these “other” responses suggested that certain appraisal criteria, if not properly cabined, could implicate decisional outcomes. The Coast Guard, for instance, considers its non-ALJs’ adherence to agency guidance on impartiality, fairness, and achieving remedial goals of the civil-penalty process. Other agencies, such as the VA, echoed the Coast Guard by indicating that they consider compliance with statutes and regulations or “job knowledge.” SSA and Treasury reported considering vague (and potentially troubling) “business results.”

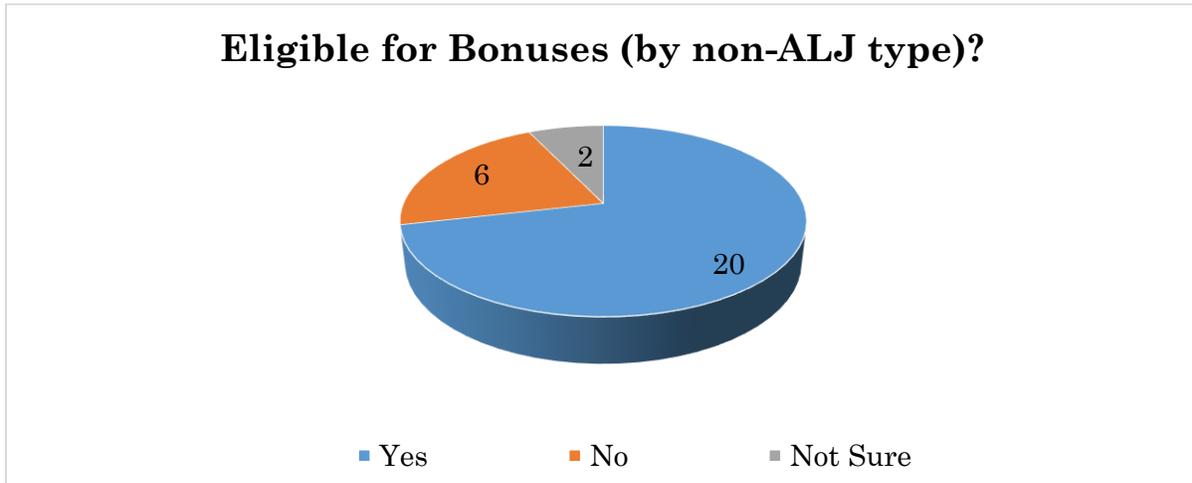
<sup>149</sup> The FMC did not report information for its two non-ALJ types.

<sup>150</sup> Only two responses—for GAO’s Senior Attorneys and DOL’s Benefits Review Board—identified a single factor for their performance reviews. The others provided more than one factor.

**c. Bonus Eligibility**

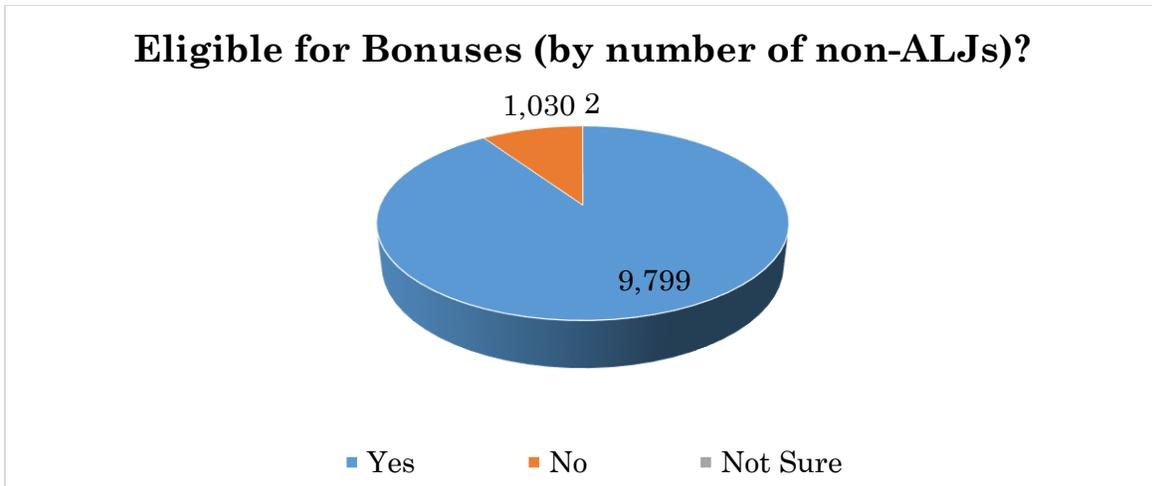
In contrast to the uniform prohibition against agencies’ paying bonuses to their ALJs, agencies can generally pay them to non-ALJs. We sought to determine how widespread the paying of bonuses was to non-ALJs, and the size of these bonuses.

Figure 32 indicates that of the 28 non-ALJ types that are subject to performance appraisals, 20 (71%) of them are eligible for bonuses, six types are not, and the responding official for two non-ALJ types for the FMC was unsure. Of the 10,831 reported non-ALJs, 9,799 (90%) are eligible for bonuses (*see* Figure 33).<sup>151</sup> At least some non-ALJs in all non-ALJ types whose incumbents are eligible for bonuses received bonuses in 2016 (even if not every non-ALJ within a type received a bonus).



**Figure 32 – Bonus Eligibility, by Types of Non-ALJs Subject to Performance Appraisals (n=28)**

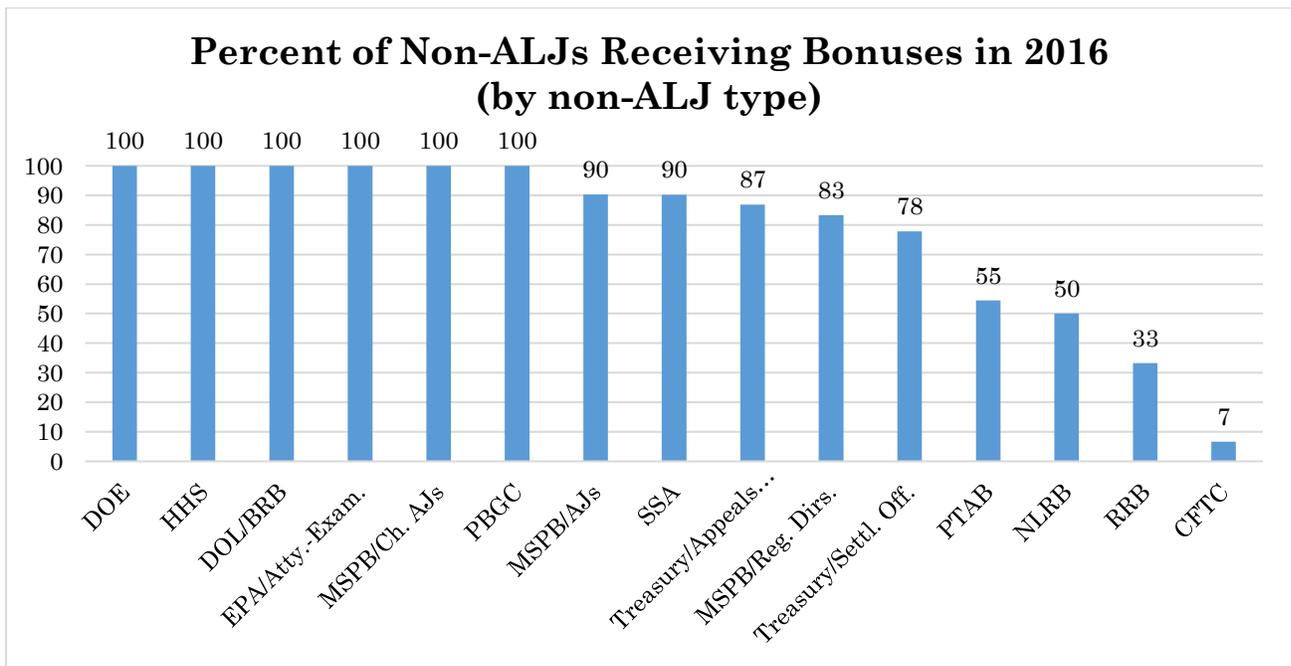
<sup>151</sup> The following non-ALJs are eligible for bonuses (totaling 9,799): CFTC (15), PTAB (275), PTO (7,856), DOE (two), HHS (five), DOL/BRB (five), Treasury (714), EEOC (92), EPA (12), FLRA (40), FAO (40 Senior Attorneys), MSPB (70), NLRB (600), PBGC (six), RRB (six), and SSA (61). The largest groups of non-ALJs who are not eligible for bonuses are those who work for the VA (630) and DOJ/EOIR (326).



**Figure 33 – Bonus Eligibility, by No. of Non-ALJs (n=10,831)**

Of the 17 non-ALJ types that preside over matters in which their agencies are parties, 12 of those types are subject to performance appraisals, and 10 of the 12 are eligible for bonuses. Although not all of these non-ALJ types are eligible to receive bonuses, more than a majority of the non-ALJ types who preside over matters in which their agencies are parties have annual performance appraisals that can affect their income.

In response to our question asking how many non-ALJs received bonuses, some of the agencies reported how many of their non-ALJs within each type received bonuses in 2016. Figure 34 below indicates the percentage of non-ALJs who received bonuses for each of the 15 types that reported the information:



**Figure 34 – Percentage of Non-ALJs Who Received Bonuses in 2017, by non-ALJ type (n=15)**

Despite the relatively large percentage of non-ALJs who are subject to performance appraisals, the reported amounts of the bonuses are usually within a relatively narrow range. Of the 20 non-ALJ types that are eligible for bonuses, agencies reported information on the range of the bonuses for 10 of them. Figure 35 reports the bonuses ranges, which defy easy categorization:

Agency	Subcomponent	Title	Type of Hearing	% Receiving Bonuses	Bonus Range
Commerce	PTAB	APJs	Licensing disputes between private parties	55%	\$2K to \$36K
HHS	Departmental Appeals Bd.	Departmental Appeals Bd. Members	Enforcement	100%	\$10K max.
DOL	BRB	AAJs	Benefits, dispute between private parties	100%	\$6,775 to \$14,476
Treasury	IRS	Settlement Officers	Tax-assessment disputes	78%	\$898 to \$1,669
		Appeals Officers		87%	\$1,010 to \$2,245
EPA	Office of Grants and Disbarments	Attorney-Examiners	Gov't Contracts	100%	\$1,000 to \$2,000
MSPB	Regional and Field Officers	AJs	Federal Employment Disputes	90%	\$600
		Chief AJs		100%	4%
		Regional Directors		83%	0% to 6%
NLRB		Hearing Officers	Labor-Representation Disputes	approx. 50%	\$713 to \$2,325
PBGC		Appeals Bd. Members	Gov't Benefits	100%	1% to 2% of base pay (\$1036 to \$2694 under GS-15)
RRB	Bureau of Hearings and Appeals	Hearings Officers	Gov't Benefits	33%	2.5% to 3% of annual salary
SSA	Office of Appellate Operations	AAJs	Gov't Benefits	90%	\$500 to \$2500

Figure 35 – Bonus Ranges (n=10)

Some of the reported bonus ranges seem substantial. For instance, the BRB’s bonuses of \$6,775 to \$14,476 are 5% to 8% of the AAJs’ base salaries of \$124,406 to \$187,000, respectively. Likewise, the high end of bonuses for PTAB APJs (\$36,000) are more than 20% of their highest permissible base salary of \$167,000. Others are relatively modest, such as the \$600 bonuses for MSPB AJs (less than 1% for even the lowest paid MSPB AJ with a base salary of \$88,136).

***d. Precautions with Performance Appraisals and Bonuses***

We concluded our inquiry on performance appraisals and bonuses by asking whether agencies that used performance appraisals took any precautions to ensure that the appraisals did not interfere with non-ALJs’ impartiality. Agencies reported, as indicated in Figure 36, precautions for 17 non-ALJ types:<sup>152</sup>

Agency	Subcomponent	Title	Precaution	Category
Commerce	PTAB	APJs	No relationship with any particular hearing	Not related to outcomes
Education	Office of Hearings and Appeals	AJs	No relationship with any outcome and some level of separation of functions	Not related to outcomes
HHS	Departmental Appeals Board	Departmental Appeals Board Members	Chair of Board solely responsible for assessments and appeals to Deputy Secretary are available	Separation of Functions
DHS	Coast Guard	Hearing Officers	Agency directive prohibits tracking amount of assessed penalties, the number of penalties, or the number of agency positions upheld	Not related to outcomes
DOJ	EOIR	Immigration Judges Board of Immigration Appeals Members	Pass/Fail Appraisal	Nature of Standards or Scoring
DOL	BRB	AAJs	Assessments do not consider how AAJs decide cases	Not related to outcomes
Treasury	IRS	Settlement Officers	Assessments cannot consider amount of tax	Not related to outcomes

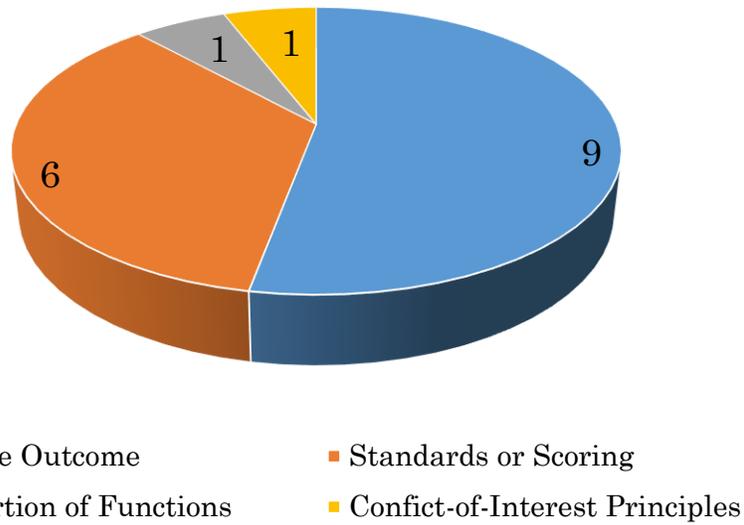
<sup>152</sup> Some others responded that they had no precautions or other information that did not indicate general or specific limitations. For instance, FLRA indicated that its non-ALJs do not issue decisions; they simply take evidence. The PTO reported that Patent Examiners’ appraisals have “quality reviews.”

		Appeals Officers	collection, and supervisors must certify that amounts don't affect evaluation	
GAO		Senior Attorneys	Required disclosure of conflicts of interest	Conflict-of Interests Limitations
MSPB	Regional and Field Offices	AJs	Qualitative and quantifiable standards; internal agency grievance procedure or review by other officials	Nature of Standards or Scoring
		Chief AJs		
		Regional Directors		
NLRB		Hearing Officers	Appraisals consider only the thoroughness of the Hearing Officer's development of the evidentiary record	Not related to outcomes
PBGC		Appeals Bd. Members	Rated on quality and quantity of decisions, as well as being impartial; expected to follow law, regulations, and policies	Nature of Standards or Scoring
RRB		Hearings Officers	Not based on outcomes, but instead timeliness, hearings held, number of decisions issued, and accuracy of citations and regulations used in decisions	Not related to outcomes
SSA		AAJs	Not related to decisional outcomes	Not related to outcomes

**Figure 36 – Precautions to Protect Impartiality (n=17)**

Contrary to the bonus ranges, we were able to categorize agency efforts to mitigate performance appraisals' effects on non-ALJ impartiality. We categorized the reported precautions in Figure 37 as (1) ignoring case outcomes, (2) crafting review standards or scoring to protect impartiality (likely very similar to "ignoring case outcomes"), (3) using some form of separation of functions and reporting relationships to insulate non-ALJs, and (4) relying upon conflict-of-interest principles.

## Nature of Precautions, Categorized



**Figure 37 – Nature of Precautions, Categorized (n=17)**

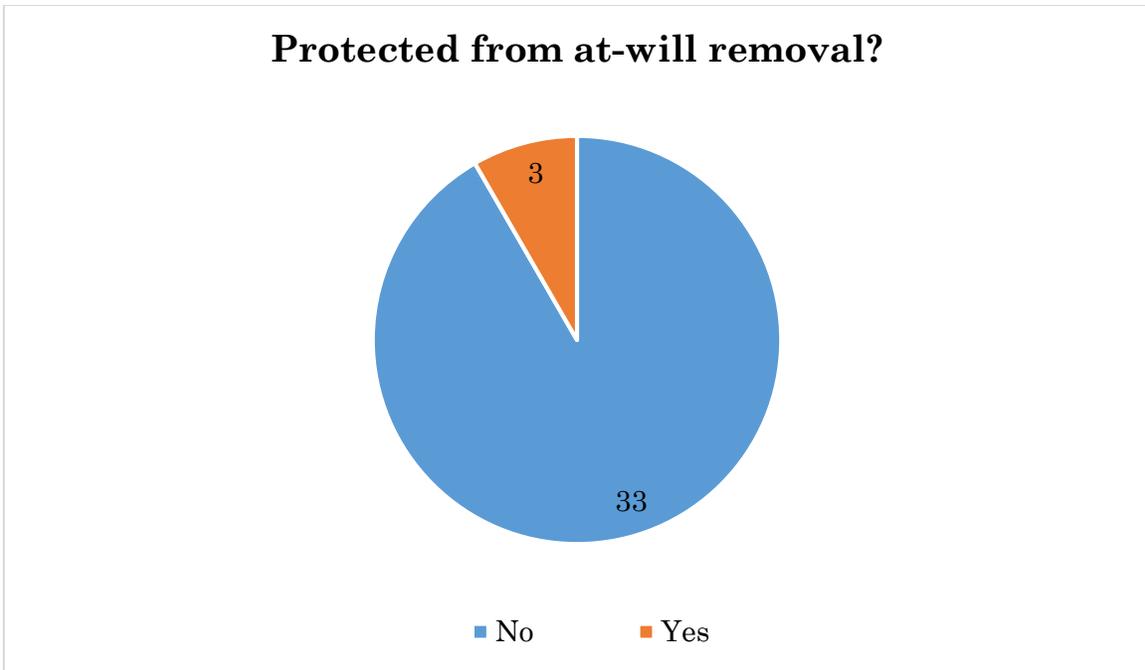
As indicated, approximately half (9 of 17) of the reported precautions are in the form of a policy or custom that appraisers should ignore case outcomes as part of the performance appraisal, while approximately 35% (6 of 17) consider the standards or scoring to limit discretion. Only one non-ALJ type has separation-of-functions-based protections, and only one has conflicts-of-interest principles to mitigate concerns.

### **6. Non-ALJ Removal**

ALJs can be removed under the APA only for “good cause established and determined by the [MSPB]” after a formal administrative hearing.<sup>153</sup> Although we were aware of a handful of non-ALJs with similar statutory protection from at-will removal,<sup>154</sup> we surveyed agencies to see if other non-ALJs had similar protections, whether pursuant to statute, regulation, or other source of law. Agencies responded for 36 of the 37 non-ALJ types.

<sup>153</sup> 5 U.S.C. § 7521(a) (2012).

<sup>154</sup> See Barnett, *supra* note 10, at 1648 n.21 (discussing protections for certain Board of Contracts Appeals Judges).



**Figure 38 – Protection from At-Will Removal (n=36)**

Of the 36 non-ALJ types for which we received responses, only three have reported protections from at-will removal (Figure 38). EEOC Administrative Judges and NLRB Hearing Officers have protection from removal under their collective-bargaining agreement. (The EEOC also indicated that these protections come from statute, regulation, guidance, and custom.) By statute, the GAO’s AJs, as members of the GAO’s Personnel Appeals Board, can be removed only for good cause by a majority of the board (not including the member subject to removal).<sup>155</sup> Despite the lack of specific protection from at-will removal, non-ALJs typically have civil-service protections that provide insulation from possible improper agency retaliation in the performance-appraisal process.<sup>156</sup>

### V. Suggested Alternative Practices

Here we describe alternative practices that agencies might consider for protecting non-ALJs’ impartiality. As we asserted in Part I, agencies benefit from ensuring that non-ALJs not only are impartial but also appear impartial. This appearance comes in part from structural protections regarding non-ALJs’ selection, oversight, and removal. What follows is general commentary on how agencies might promote and protect non-ALJ independence. Many of these suggestions derive from related APA provisions or, as our data indicate, existing agency practice for non-ALJs. We recognize, however, that agencies must account for numerous variables—such as budget limitations, personnel issues, statutory mandates, and various forms of adjudication—that render absolute rules or detailed suggestions impractical and unhelpful. And to be clear, we do not contend here that any or all of these suggestions are required by the Due Process Clause, even if they touch on matters that the Supreme Court

<sup>155</sup> See 31 U.S.C. § 751(d).

<sup>156</sup> See Kellie Lunney, *Wielding the Ax*, GOVEXEC.GOV, <http://www.govexec.com/magazine/briefing/2012/07/wielding-ax/56558/>.

has identified as relevant to adjudicator bias. But implementation of these suggestions, or other alternatives that promote impartiality, may have the beneficial side effect of insulating non-ALJ Hearings from any constitutional concern.

Likewise, we suspect that many of the alternatives offered here will be subject to debate either because of their actual or perceived costs or their specific application to particular adjudicatory programs. Because of this anticipated debate, we offer these alternatives as a suggested guide for agencies to recognize key indicia of impartiality and discuss these indicia within their agencies and with other agencies. We suspect that, because non-ALJs are not subject to uniform statutory provisions, their protections have likely grown organically—perhaps without systemic contemplation—as each agency has established its non-ALJ program or particular Non-ALJ Hearings. Our goal with these observations is to help agencies think more systemically about their Non-ALJ Hearings and their non-ALJs’ appearance of impartiality.

### A. Non-ALJ Selection

#### **Agencies should consider using a panel-based process to select their non-ALJs.**

While our survey did not explore the mechanisms that each agency uses to hire non-ALJ adjudicators,<sup>157</sup> we know that non-ALJ hiring processes—whether external or internal—vary significantly across agencies and that some are more transparent than others.<sup>158</sup> Agencies might consider a process, where permissible and feasible,<sup>159</sup> for selecting non-ALJ adjudicators similar to those in place for selecting federal magistrate and bankruptcy judges,<sup>160</sup> as well as for at least some judges in 29 states and the District of Columbia.<sup>161</sup> Sometimes called “merit selection,” this process, despite variations, is generally one in which

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<sup>157</sup> See *supra* Part II.A. With this report’s more comprehensive and updated data on non-ALJs across the administrative state, ACUS may wish to consider a future project that seeks interviews with agencies to report their appointment mechanisms. Regardless of current appointment mechanisms, our recommendations are instructive.

<sup>158</sup> See Memorandum from Amber Williams and Megan Gibson to Matt Weiner et al., *Selection, Performance Appraisal, and Removal Processes of non-Administrative Law Judge Adjudicators* (undated) (on file with authors).

<sup>159</sup> Because of various OPM regulatory requirements concerning hiring for different kinds of federal employees, agencies should coordinate with OPM when setting up panel-based hiring process to ensure that the panel complies with any relevant law. For instance, OPM permits agencies to identify “selective factors” in hiring GS employees and to request, in rare instances, additional qualification standards. See *Classification & Qualifications: General Schedule Qualification Policies*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-policies/#url=estb>. OPM already has a Qualifications Review Board for SES hires. See *Senior Executive Service: Selection Process*, OPM.GOV, <https://www.opm.gov/policy-data-oversight/senior-executive-service/selection-process/#url=Qualifications-Review-Board>.

<sup>160</sup> See generally MAGISTRATE JUDGES DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES (2002); MALIA REDDICK & NATALIE KNOWLTON, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A CREDIT TO THE COURTS: THE SELECTION, APPOINTMENT, AND REAPPOINTMENT PROCESS FOR BANKRUPTCY JUDGES (2013), [http://iaals.du.edu/sites/default/files/documents/publications/a\\_credit\\_to\\_the\\_courts.pdf](http://iaals.du.edu/sites/default/files/documents/publications/a_credit_to_the_courts.pdf).

<sup>161</sup> JUDICIAL NOMINATING COMMISSIONS IN THE STATES, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/quality-judges/judicial-nominating-commissions-states>.

a panel screens and interviews applicants and recommends one or more to the appointing authority. Panel composition varies among the different processes, but usually includes various types of attorneys and some laypersons, and may include judges. The appointing authority usually must select a candidate from the panel's list, though in some systems the appointing authority may request a second list.

We emphasize that agencies must account for the nature of their adjudications to determine whether this alternative hiring mechanism is appropriate for their adjudicator types. We present this as but one way for agencies to promote adjudicator independence and impartiality as part of the hiring process. Moreover, one single kind of panel-based system will not apply to all non-ALJs. Instead, we present a description of prototypical process to help agencies consider whether and how to set up a panel-based system that is optimal for their non-ALJs.

Selection panels for non-ALJs could include sitting non-ALJs (from within or outside the agency) with varying degrees of seniority, agency officials, and representatives of regulated parties, with a high-level agency official making the ultimate appointment. Agency regulations could clarify how such panels will be assembled, identify any categories of persons who must and must not be panel members, and who will select the members. Set, staggered terms for panel members promote continuity and stability, and they provide the benefits of more senior members' experience.

Panel-based selection systems embrace clear qualifications for hiring, such as education and practice requirements, age, independence from appointers, and personal attributes such as moral character, judicial temperament and commitment to equal justice.<sup>162</sup>

Our survey provided little evidence of comprehensive criteria for non-ALJs. At least where non-ALJs will be performing similar functions, we recommend that they possess, and be hired based upon, the same baseline qualifications across agencies for similarly situated non-ALJs, a goal that ACUS and OPM might wish to cultivate. For fewer than half of the non-ALJ types in our study do agencies look to merit-based characteristics beyond simply having a law degree. In other words, agencies do not formally consider criteria that are virtually boilerplate in other judicial hiring contexts, such as personal and professional references, demeanor, and quality of writing. In some agencies and for some non-ALJ roles, subject-matter expertise may also be desirable, or even essential, to performing the non-ALJ's duties.<sup>163</sup>

To ascertain whether applicants meet the prescribed qualifications, a panel-based process typically calls for completion of an application form, evidence of legal scholarship, names and contact information for personal and professional references, and at least one round of interviews. Announcements of vacant positions and instructions for applying are usually widely circulated in local newspapers, bar journals and/or newsletters, and websites of bar associations and the hiring entity. Similar practices for agencies that use non-ALJs would ensure at least some consistency in the levels of competence and experience that applicants must meet and would undoubtedly expand the professional and demographic diversity of

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<sup>162</sup> See, e.g., requirements for federal magistrate judges in 28 U.S.C. § 631(b).

<sup>163</sup> REDDICK & KNOWLTON, *supra* note 154, at 15.

applicants. (Common hiring qualifications and applications will also better facilitate the sharing of non-ALJs, as discussed in a subsequent recommendation.)

A panel-based process may offer benefits, but it also likely has significant costs. First, supporters believe it promotes a fair, thorough, and transparent hiring process that encourages highly qualified applicants to apply. Second, supporters believe it helps ensure the selection of highly qualified adjudicators. And finally, it may inspire confidence in the quality and impartiality of administrative adjudicators, especially among those who will interact with the adjudicators. This final point is especially relevant for agencies that hire both from within and outside the agency because panel-based hiring can help ensure that a pro-agency culture does not form within the agency's non-ALJs corps. But, of course, it also has costs, especially start-up costs. Agencies must expend time and money to establish relevant hiring criteria and decide on how to compose the panels, how the panels will process the applicants, and how quickly the panels can interview and hire applicants. Once an agency makes those decisions, it faces the time and expense of administering the system. The use of panels may slow hiring, which may delay agency adjudications.

As a final matter, a panel process is not alien to agency adjudication and probably gives agencies more control over hiring than in other contexts. A non-ALJ panel-selection process is extremely similar to the ALJ-selection process through OPM (and already used for hiring one kind of non-ALJ, Civilian Board of Contract Appeals Members<sup>164</sup>). For ALJs, OPM, per statute, controls the hiring criteria and timing for administering the ALJ written examination. Because OPM would not oversee the non-ALJ selection process, agencies would have more authority over the initiation and timing of the process, as well as the ability to determine the characteristics for non-ALJs, such as subject-matter expertise, which is not currently a permissible factor in ALJ hiring. In short, a panel-based process for non-ALJs would share many of the benefits of ALJ hiring without suffering from what agencies have frequently argued are the demerits of the ALJ-hiring process.

## **B. Non-ALJ Oversight and Independence**

**Agencies should consider implementing separation of functions for non-ALJs and providing them physical separation from others in the agency.**

By limiting non-ALJs' functions and their interactions with certain agency officials, agencies may enhance non-ALJs' appearance of impartiality and perhaps limit subconscious sympathy to agency missions and positions. The presence of purportedly unprofessional hearing examiners who were overly integrated within the agency was one of the most significant criticisms of administrative adjudication before the APA.<sup>165</sup> In response, the drafters of the APA recognized the benefits of internally separating adjudicators from those who handle other phases of the adjudication process.<sup>166</sup> Physical separation can enhance the separation of functions by providing the non-ALJ with psychological separation from the agency's mission and enforcement or other priorities.

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<sup>164</sup> See, e.g., 41 U.S.C. § 7105(b).

<sup>165</sup> See *supra* note 14 and accompanying text.

<sup>166</sup> ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY 24–25 (1947). The drafters noted that a minority of the Attorney General's Committee advocated for an entity separate from the agency (or a court) to preside.

Separation is most salient when the agency is a party to “accusatory” proceedings, as the drafters of the APA noted when protecting ALJs.<sup>167</sup> Agencies have, in fact, provided separation of functions when they are parties to Non-ALJ Hearings for most non-ALJ types. For 53% of the non-ALJ types who preside over matters in which the agency is a party, agencies provide complete separation of functions, or provide at least separation from prosecutorial or investigative functions, or find it unnecessary because the agency engages in only adjudication. But even with these efforts, agencies have provided lesser protections for approximately 12% of non-ALJs types or failed to provide separation at all for nearly 36% of them. There is longstanding and widespread acceptance of separation of functions.<sup>168</sup> And its use for more than a majority of non-ALJ types that preside over hearings in which the agency is a party indicates that separation is feasible for most if not all agencies.

But even when the agency is not a party to proceedings and does more than adjudicate, the agency may still have objectives that non-ALJs may internalize as shared goals. Non-ALJs may come to internalize these goals either by participating in other agency activities or being a part of the “water-cooler” culture within the agency. Separation of functions, although not as pressing as in the agency-party context, still appears likely to promote a non-ALJ culture that is shielded from excessive identification with the agency’s mission.

Aside from prohibiting non-ALJs from engaging in certain agency activities, agencies may want to ensure that, as with ALJs, non-ALJs do not report directly to agency officials who prosecute, investigate, or oversee those who do and consider other potentially problematic reporting relationships that may be particular to their agency and Non-ALJ Hearings. The substantial number of non-ALJ types who respond to various agency officials renders it difficult for us to evaluate particular responses based on the diversity of forms of agency adjudication and agency organization. But the guiding principle for agencies should be to ensure that their non-ALJs are insulated from agency officials who are responsible for formulating and executing agency policy preferences, especially those related to enforcement or other matters in which the agency is a party.

Separation of functions, similar to other protections concerning non-ALJ independence, may prove trickier for agencies that rarely hold Non-ALJ Hearings or that have a longstanding culture of having agency officials adjudicate and handle numerous other agency tasks. Agencies that rarely have Non-ALJ Hearings might consider funneling existing hearings from several regional offices into one office (such as the one that routinely has the most hearings) and sharing a non-ALJ with other agencies who rarely hold Non-ALJ Hearings (similar to agencies that rarely hold ALJ Hearings and borrow ALJs from other agencies). For agencies that have a longstanding culture of having non-ALJs with adjudication and other duties, they might consolidate the hearing responsibilities to a group of fulltime non-ALJs. Agencies will certainly incur upfront costs in reorganizing their offices to accommodate non-ALJ independence. But given the growing formality of Non-ALJ Hearings and the recognized relationship between separated functions and independence, these largely upfront

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<sup>167</sup> *Id.* at 24.

<sup>168</sup> See ASIMOW, *supra* note 27, at 19–20 (recommending separation of functions similar to those provided in the APA).

costs are likely not unreasonable, especially considering that increased fairness of Non-ALJ Hearings inures to agencies' benefit by giving these hearings more legitimacy.

**Agencies should consider limiting non-ALJs' ex parte communications concerning the merits of any agency adjudication over which they are presiding.**

Limiting non-ALJs' ex parte communications is perhaps the easiest change that agencies can make. Indeed, agencies have prohibited all ex parte communications for more than half (57%) of the non-ALJ types and limited some ex parte communications for nearly 30% more. Only about 14% of the non-ALJ types have no limitations on ex parte communications. Agencies, however, often rely only upon internal guidance or custom (or both) for implementing prohibitions. Agencies should consider making these prohibitions more transparent and binding by reducing them to writing, preferably in a rule.

Although the APA prohibits ALJs from ex parte communications with those within the agency only as to factual matters,<sup>169</sup> prohibiting ex parte communications as to both fact and law for non-ALJs, except as required for the disposition of ex parte matters as permitted by law,<sup>170</sup> is consistent with ACUS's Model Adjudication Rules (for ALJ and Non-ALJ Hearings).<sup>171</sup> Agencies have widely implemented this total prohibition in Non-ALJ Hearings (for 57% of non-ALJ types). Despite a broad ex parte prohibition, non-ALJs can seek legal input from agency officials via amicus briefs or testimony—to which the parties can respond.

Limiting non-ALJs' ex parte communications does not interfere with the agency's prerogative. Even if non-ALJs are prohibited from communicating ex parte on factual and legal matters, agency heads (or their delegates) may still decide legal matters de novo on administrative appeal (to the extent permitted by law). The APA permits the agency to do so in ALJ Hearings.<sup>172</sup> Moreover, the agency may still respond to non-ALJ decisions by issuing clarifying rules or other guidance.<sup>173</sup> To be sure, drafting amicus briefs and issuing guidance are usually more costly in time and money than oral communications between agency officials and adjudicators. But the efficiency of ex parte oral or written communications has its own costs. That efficiency limits the transparency and participatory values that adjudication seeks to further. Our recommended ex parte prohibition furthers the appearance of non-ALJs' impartiality by prohibiting backroom conversations and eliminating the suggestion of hearings with preordained outcomes. In short, fair proceedings (in fact and in appearance) are not free, and the cost that our recommendation imposes is one that numerous agencies have already accepted.

We recognize, however, that our suggestion, the noted agency practice, and the current MAR are inconsistent with a 2016 ACUS recommendation concerning ex parte communications in informal adjudications. That recommendation, in brief, would permit some factual and legal discussions between adjudicators and certain agency officials, although not those directly

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<sup>169</sup> See 5 U.S.C. § 554(d)(1).

<sup>170</sup> See ASIMOW, *supra* note 27, at 18–19 (recommending similar limitation on ex parte contacts).

<sup>171</sup> See ACUS Model Adjudication Rule 120(A).

<sup>172</sup> See 5 U.S.C. § 557(b).

<sup>173</sup> See, e.g., *Warder v. Shalala*, 149 F.3d 73 (1st Cir. 1998).

involved in investigative or prosecutorial roles in the pending or related adjudication.<sup>174</sup> For the reasons stated, we recommend a stronger standard, which our data demonstrate is feasible for many agencies.

### **Agencies should consider memorializing recusal requirements for non-ALJs.**

As with prohibitions on ex parte communications, agencies generally require non-ALJs to recuse themselves if they are unable to serve as unbiased adjudicators (for approximately 84% of non-ALJ types). It seems sensible for agencies to do the same for all non-ALJ types. Non-ALJs need clear statements of the grounds for recusal (e.g., actual bias or that the non-ALJ's impartiality can be reasonably questioned, aside from the fact that she works for the agency). Agencies should also consider how parties may go about seeking a non-ALJ's recusal, including the procedure for the decision itself and any appeal from it.<sup>175</sup> As with prohibitions on ex parte communications, agencies often rely on custom. But custom lacks clarity, transparency, salience, and binding effect. The widespread use of recusal requirements indicates that this change should be easy to implement.<sup>176</sup>

### **Agencies should consider promulgating clear criteria that are unrelated to case outcomes for non-ALJs' performance appraisals and bonus eligibility.**

The APA drafters were keenly aware of the relationship among performance appraisals, bonuses, and raises and their real or perceived effect on adjudicator independence. To mitigate these concerns, the drafters precluded agencies from affecting ALJs' pay with performance appraisals.<sup>177</sup> We recognize the nearly universal practice of subjecting non-ALJs to performance appraisals and the significant benefits such appraisals can provide in furthering efficiency and accountability,<sup>178</sup> and offer comments on how agencies might better ensure that performance appraisals for non-ALJs do not impinge upon their independence and create as little due-process concern as possible.

Providing clear factors for non-ALJs' appraisals (and each factor's individual weight in the overall assessment) seems likely to encourage transparency and impartial appraisals. Many factors that agencies already consider are not problematic. For instance, obtaining litigant input is helpful in assessing non-ALJs' demeanor and case-management abilities. One effective and efficient way of garnering that input is the administration of surveys to nonagency parties to the hearings. Non-ALJ peer review can also be an effective tool in helping assess non-ALJs' fulfilment of administrative duties and identifying issues related to docket management. For sample surveys of litigants (including attorneys) and peer judges, agencies could look to those used in evaluating magistrate and bankruptcy judges in the pilot

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<sup>174</sup> See Admin. Conference of the U.S., Recommendation 2016-4 at 2–3 (2016).

<sup>175</sup> See ASIMOW, *supra* note 27, at 18 (recommending that agencies require recusal for bias, clarify the grounds for recusal, and consider procedural matters surrounding recusal).

<sup>176</sup> See, e.g., RUSSELL WHEELER & MALIA REDDICK, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., JUDICIAL RECUSAL PROCEDURES: A REPORT ON THE IAALS CONVENING (2017) <http://iaals.du.edu/quality-judges/publications/judicial-recusal-procedures>. Many of the suggestions regarding recusal procedures and templates provided for both litigants and judges in this report are relevant in the administrative context.

<sup>177</sup> See, e.g., *supra* note 166, at 280–81 (House Judiciary Cmte. Rpt.); VERKUIL, *supra* note 27, at 2.

<sup>178</sup> See Part IV.5.a.

and voluntary programs that the Federal Judicial Center has developed,<sup>179</sup> as well as the surveys used in the 18 states with official programs for evaluating the performance of state-court judges.<sup>180</sup> As another example, case-processing goals can help agencies assess non-ALJs' efficiency, a key value for agencies with large dockets.

But it is obviously important that the peer and litigant feedback and goals do not influence case outcomes. For instance, disappointed litigants may unfairly complain about non-ALJs and their work product. The survey response rate from litigants can inform how to take those responses into account as part of a non-ALJ's appraisal. Permitting the non-ALJ an opportunity to respond to the review can help ensure that the performance appraisal is fair and based on correct underlying facts. Likewise, poorly designed quantitative case-processing goals may unwittingly incentivize the adjudicator to favor one party over another if the ease in ruling for that party allows the adjudicator to decide more cases. (For instance, approving a claimant's request for benefits may require more or less work from the adjudicator, depending on the nature of the agency's internal review and decision-making requirements.)

Other factors may directly or indirectly require the appraiser to consider the substance of non-ALJs' decisions. For instance, agencies reported often reviewing non-ALJs' decisions and, to a lesser extent, reversal rates. Relatedly, some agencies reported that they consider factors that encourage the reviewer, directly or indirectly, to consider the outcome and the non-ALJs' reasoning—such as “achieving remedial goals of civil-penalty process,” compliance with statutes and regulations, and “business results.” Although agencies have an interest in having non-ALJs rule impartially, correctly, and consistently, agency review of these qualities may result in non-ALJs favoring agency positions, despite governing law. Indeed, many agencies reported that they do not consider outcomes and some even have policies or customs to prevent such consideration (*see* Figure 36). Agencies that use clear assessment criteria help ensure that outcomes are not part of the assessment.

Some agencies, indeed, already seek to protect non-ALJ impartiality from the appraisal processes. For instance, the Coast Guard reported that it prohibits data collection on, among other things, the number of agency positions upheld or number of penalties assessed in enforcement proceedings. The IRS requires supervisors to certify that outcomes did not affect the appraisal. Other agencies have assigned non-ALJ assessment to other agency adjudicators, and they permit review of those assessments (although review has proved unnecessary to date).

If agencies have concerns over non-ALJs' decision-making, agencies can implement programs, in lieu of appraisals, to mitigate partiality concerns. State agencies have reported success in collaborative, peer-review assessment of decisions in which agency officials discuss

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<sup>179</sup> *See* DARLENE R. DAVIS, JUDICIAL EVALUATION PILOT PROJECT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE JUDICIAL BRANCH 2 (1991); FED. JUDICIAL CTR. 2003 ANNUAL REPORT 11, 2005 ANNUAL REPORT 9.

<sup>180</sup> JUDICIAL PERFORMANCE EVALUATION IN THE STATES, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://iaals.du.edu/quality-judges/judicial-performance-evaluation-states>.

how others may have decided similar matters.<sup>181</sup> The key is that the non-ALJs can receive feedback in a less adversarial posture than a performance appraisal.

Non-ALJ performance appraisals that do not consider outcomes and the decisionmaking process also mitigate concerns over paying non-ALJs bonuses.

Agencies responded to our question on the existence of precautions in the performance-appraisal process for fewer than half of non-ALJ types. Examining the de facto and de jure nature of the performance appraisals can help ensure that appraisers do not consider decisional outcomes and are clear and transparent for non-ALJs and the public alike.

Agencies will want to ensure that the appraising official has no interest in the non-ALJs' decisional outcomes. For instance, an agency official who administers the appraisals and also supervises the agency's investigative or prosecutorial functions would likely have a potential conflict of interest.

### C. Non-ALJ Removal

**Agencies should consider promulgating clear grounds for non-ALJs' removal from their adjudicatory roles or other adverse action against them.**

The threat of at-will removal (or other adverse action) is a potent stick for ensuring that a subordinate does the bidding of the removing official. As the Supreme Court stated in the context of the president's and principal officers' power to remove other officials, "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."<sup>182</sup> Whether or not the agency will actually threaten to remove non-ALJs who rule against agency positions is not the only concern. Instead, agencies must not create the impression (for non-ALJs or outsiders) that a non-ALJ's employment or position as a judge is dependent on the caprice of the agency. When the agency is also a party, the impression is magnified because the agency-party appears to have "[chosen] the judge in [its] own case."<sup>183</sup> Providing that non-ALJs may not be removed or disciplined except for specified causes is likely to ensure both the appearance and reality of impartiality. Yet, our findings indicate that agencies provide for-cause removal for only three types of non-ALJs.<sup>184</sup>

Providing for-cause discipline or removal via regulation is not unprecedented. The Department of Justice has done so in the context of protecting special counsel from the

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<sup>181</sup> See Daniel E. Ho, *Does Peer Review Work? An Experiment of Experimentalism*, 69 STAN. L. REV. 1 (2017), available at <https://www.stanfordlawreview.org/print/article/does-peer-review-work-an-experiment-of-experimentalism/> (discussing positive effects on efficiency and consistency that peer-review had in food-safety inspections in King County, Washington).

<sup>182</sup> *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493 (2010) (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935)).

<sup>183</sup> *Id.* at 886.

<sup>184</sup> See Part IV.D.6. Some non-ALJs who were not reported as part of our survey have statutory protection from removal. See *supra* note 28 (discussing boards of contract appeals).

attorney general's at-will removal.<sup>185</sup> Protecting adjudicators from at-will removal or discipline can “help create legitimacy” for executive decision making.<sup>186</sup>

To be meaningful, the protection for non-ALJs should provide clear guidance on the suitable grounds for good-cause removal. An agency can remove ALJs only for “good cause” as the MSPB determines.<sup>187</sup> For ALJs, the MSPB decides for itself whether good cause exists for an ALJ's removal. But for most of the civil service,<sup>188</sup> an agency makes the initial determination of whether removal or discipline is appropriate either to “promote the efficiency of the service”<sup>189</sup> or respond to “unacceptable performance,”<sup>190</sup> subject to deferential administrative appellate review by the MSPB.<sup>191</sup> Merely establishing a “good cause” standard would have no effect on MSPB's role in the review, and it would provide little to no clarity as to the appropriate grounds for adverse actions.

Instead, agencies' efforts may be better spent providing guidance on how to understand these statutory terms (i.e., “efficiency of the service” and “unacceptable performance”) in the context of agency adjudicators. Moreover, agencies might also consider providing guidance on when non-ALJs may be legitimately reassigned (an action which is generally not covered under the other statutory regimes)<sup>192</sup> to mitigate concerns that reassignment is a guise for moving a non-ALJ to another role if the agency is unhappy with his or her decisions.

Providing clear grounds for adverse action need not serve as a straightjacket for agencies. For instance, some agencies take account of quantitative case-processing goals.<sup>193</sup> They could also account for other criteria on non-ALJs' performance appraisals, as long as they clarify how scoring on those appraisals affects the standard for removal or discipline. The criteria for good-cause removal and for performance appraisals can together provide clear guidance to non-ALJs and their supervisors. We do not attempt here to instruct agencies on the appropriate grounds for their non-ALJs' removal or discipline. The key is to provide sufficient guidance in the regulation to mitigate any concerns that the substance of the non-ALJs' decisions influences disciplinary decisions.

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<sup>185</sup> See 28 C.F.R. § 600.7(d) (“The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.”).

<sup>186</sup> *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 522 (2010) (Breyer, J., dissenting).

<sup>187</sup> 5 U.S.C. § 7521(a).

<sup>188</sup> Slightly different procedures apply to the SES. See 5 U.S.C. § 3592 (requiring a hearing before an official whom the MSPB designates but not permitting appeal to the MSPB itself).

<sup>189</sup> See 5 U.S.C. § 7513(a).

<sup>190</sup> See 5 U.S.C. § 7521(a).

<sup>191</sup> See 5 U.S.C. § 7701(c)(1) (reviewing under substantial evidence standard for “unacceptable performance” adverse actions and for “preponderance of the evidence” for efficiency-based actions).

<sup>192</sup> See OPM.GOV., WORKFORCE RESTRUCTURING, SUMMARY OF REASSIGNMENT, at <https://www.opm.gov/policy-data-oversight/workforce-restructuring/Summary-of-Reassignment/> (last visited Feb. 9, 2018) (noting agency's broad discretion to reassign employees).

<sup>193</sup> See *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) (upholding SSA's implementation of “reasonable production goals” for its ALJs).

Aside from defining the standard for removal, the regulation can clarify, to the extent permitted by law,<sup>194</sup> how the agency will decide whether to remove non-ALJs. Questions to consider include who should make the removal decision, such as other non-ALJs within the agency, non-ALJ supervisors, the head of the agency, a panel of individuals outside of the agency (such as judges from other agencies, regulated parties, and agency officials), or some combination of these possibilities. A panel format requires agreement from a majority of participants who have different interests in administrative adjudication, such as a mix of non-ALJs, regulated parties, and supervisors.<sup>195</sup> But different agencies have different resources, needs, and forms of adjudication that may make other options more suitable. Even a panel of the agencies' non-ALJs alone can provide internal monitoring and is common in other adjudicatory contexts.<sup>196</sup> Agencies will also want to consider how the non-ALJ can respond to the threatened removal and the benefits of requiring specific findings and reasons for removal to guard against impermissible factors affecting the removal decision.<sup>197</sup>

Agencies will want to consider how to protect non-ALJs who perform duties other than adjudication. The types of other duties vary and thus present different concerns, but it may behoove agencies to consider consolidating adjudication functions into as few agency officials as possible to limit the reach of for-cause protections and, as discussed earlier, to limit the duties that non-ALJs may perform. Agencies should also consider how to account for the non-ALJs' other duties when defining which actions provide grounds for removal or other adverse action.

Because of the OPM's regulations and the MSPB's significant role in disciplinary actions, we encourage agencies to work with OPM and MSPB officials for advice and to consult their guidance materials to ensure that any action that agencies take to promote their non-ALJs' impartiality does not inadvertently conflict with other statutory or regulatory law.

#### **D. Agency Transparency and Assessment**

**To further transparency, salience, and efficacy, agencies should consider using notice-and-comment rulemaking when promulgating provisions that concern non-ALJ independence.**

Promulgating notice-and-comment rules that concern non-ALJ hiring, oversight, and discipline and removal can encourage transparency and binding effect for non-ALJs' protections. Of course, agency rules concerning personnel policies are not subject to notice-

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<sup>194</sup> See, e.g., 5 U.S.C. §§ 7513(b) & (c), 4303(b)–(d), 7701(a). For guidance on the removal and discipline process, see *Adverse Actions*, *supra* note 7, which describes the full process in detail with references to legal authority.

<sup>195</sup> To further separation of functions, we do not recommend including agency officials that prosecute or investigate on behalf of the agency.

<sup>196</sup> As ACUS has recognized, multi-judge peer-review panels, despite inherent concerns over self-interest or peer-protection, are common for judicial discipline or removal in state judicial settings. See VERKUIL ET AL., *supra* note 27, at 1027. In state settings, disciplinary panels typically include both attorneys and nonattorneys as well.

<sup>197</sup> See, e.g., 28 C.F.R. § 600.7(d) (“The Attorney General shall inform the Special Counsel in writing of the specific reason for his or her removal.”).

and-comment requirements under the APA,<sup>198</sup> and thus agency personnel matters, like the DOJ regulation concerning special counsel, are usually addressed in interpretative rules or other less formal formats. In many instances, notice-and-comment would be of little value because the public would have little information or expertise to provide thorough comments and the personnel policies are not especially useful or important to those outside the agency. But because non-ALJs' independence may affect the public, voluntarily using notice-and-comment rulemaking—as agencies do in other contexts<sup>199</sup>—makes sense for personnel matters related to non-ALJs' independence. To be sure, the use of notice-and-comment rulemaking has costs (both as to time and money), but it provides numerous benefits. Rulemaking provides more awareness of non-ALJs' status than less formal action. Relatedly, because an agency must use notice-and-comment procedures to amend or repeal a rule, notice-and-comment rulemaking facilitates public awareness of any amendment or repeal. The public, including regulated parties who are directly affected by Non-ALJ Hearings, may also be able to provide useful comments as part of the rulemaking process and thereby improve the agency's internal governance in the sensitive area of agency adjudication, where agencies must balance fairness concerns with the agency's ability to achieve its statutory mission. The comment period may also give other agencies the opportunity to share insights as to how it promotes non-ALJ impartiality, providing the agency the chance to learn from other agencies. Finally, the rulemaking process requires agencies to produce a concise explanation of the agency's rules, providing transparency as to the agency's reasoning.

All this said, ACUS has previously recommended that agencies use procedural regulations that are published in the Federal Register and the Code of Federal Regulations but exempt from notice and comment.<sup>200</sup> Procedural regulations may be most appropriate when agencies grant non-ALJs strong forms of independence, as we discuss here. The public is likely to agree with the agency's action, thereby diminishing the value of soliciting comments.

As a final matter, transparency and certainty over non-ALJs' independence matters not only to those outside the agency. The agency and the non-ALJs, too, can benefit from having concrete protections, prohibitions, and guidance in place

Agencies' posting their rules with their other adjudication materials on their websites can provide additional and continuous transparency and awareness.<sup>201</sup> Agencies, too, might clearly title their rules or the website links to help the public review provisions designed to protect non-ALJs' independence. Moreover, providing a concise, easy-to-read summary of the relevant provisions to parties early in the litigation can promote nonagency parties' confidence in the Non-ALJ Hearings.

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<sup>198</sup> See, e.g., 5 U.S.C. § 553(a)(2), (b)(3)(A) (exempting “a matter relating to agency management or personnel” from § 553).

<sup>199</sup> See 1 RICHARD PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.10, p. 669 (5th ed. 2010) (noting that agencies have often accepted ACUS recommendations to waive APA § 553(a)(2)'s exemption from notice-and-comment rulemaking).

<sup>200</sup> Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30102 (July 8, 1992).

<sup>201</sup> See ADMIN. CONFERENCE OF THE U.S., ADJUDICATION MATERIALS ON AGENCY WEBSITES, RECOMMENDATION 2017-1 (2017).



## APPENDIX A

### Survey



### Non-ALJ Adjudicators

The Administrative Conference of the United States commissioned the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver and Professor Kent Barnett at the University of Georgia School of Law to (1) collect data on agency adjudicators who are **not** "Administrative Law Judges" and (2) provide recommendations to agencies for best practices concerning hiring, overseeing, and removing these adjudicators.

Data on these adjudicators throughout the federal government are extremely limited. We are asking for your help in answering the following questions about your agency's practices concerning the relevant administrative adjudications and administrative officials, as defined in Question 1. We are not seeking the respondent's personal experiences.

We ask that you complete the survey by **March 3, 2017**. Please direct any questions to Professor Kent Barnett (706.542.5169 or [khbarn@uga.edu](mailto:khbarn@uga.edu)).

Thank you for contributing your valuable time to this project.

## Part A: Introduction

**Q1** Please list the name of your agency in the first block. If your responses pertain to only one subcomponent (e.g., an office, bureau, or division) of that agency, please list that subcomponent in the second box.

(For instance, if you are responding for the Drug Enforcement Agency only, please list the "Department of Justice" as your agency in the first box below and the DEA as its subcomponent in the second box. Or, for example, if you are responding for the U.S. Postal Service as a whole, please list "U.S. Postal Service" in the agency box and leave the subcomponent box blank.

Agency: \_\_\_\_\_

Subcomponent (if applicable): \_\_\_\_\_

**Q2** This survey concerns agency officials who preside over a certain subset of agency adjudications that permit oral hearings. The relevant "oral hearings," as the term is used in this survey, have the following characteristics:

- One of the parties to the adjudication can—by statute, regulation, or other law—obtain an oral hearing over which an agency official presides to present evidence, even if most matters are handled through written submissions without an oral hearing,
- and**
- the presiding agency official is **not** a member or commissioner of the agency, and is **not** an "Administrative Law Judge." Instead, the agency official goes by another title, such as Administrative Judge, Administrative Appeals Judge, Administrative Patent Judge, Board of Contract Appeals Judge, Veterans Law Judge, Immigration Judge, Presiding Officer, Hearing Officer, etc. For ease of reference, this survey will often refer to these presiding agency officials as "non-ALJs."

The relevant "oral hearings" do not include "public hearings" in which members of the public are invited to make statements or an initial "front-line" agency decision when that initial decision is followed by an evidentiary hearing before an agency or court.

Does your agency provide oral hearings as defined here?

- Yes
- No

*If No, skip to end of survey.*

### **Part B: Types of Oral Hearings**

**Q3** An agency may have different kinds of "oral hearings," for instance, to hear matters related to different regulatory programs, different kinds of proceedings under an agency program (e.g., enforcement vs. awarding benefits), different parties (e.g., claims between private parties vs. claims between a private party and an agency), or different phases of litigation (e.g., an initial oral hearing before non-ALJs and later appellate proceedings before non-ALJs). A series of questions follows concerning each type of oral hearing identified.

If your agency provides more than one type of oral hearings, please identify the first type on the next screen. Subsequent questions will ask you to identify additional types of oral hearings, once you answer a series of questions related to the first type.

Please identify **one type of oral hearings** that your agency provides.

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**Q4** For [type of oral hearings] hearings, what is the title of the non-ALJs who preside? (Select all that apply.)

- Administrative Judge
- Administrative Appeals Judge
- Administrative Patent Judge
- Board of Contract Appeals Judge
- Veterans Law Judge
- Immigration Judge
- Presiding Officer

- Hearing Officer
- Hearing Examiner
- Other (Please identify.) \_\_\_\_\_

**Q5** For [type of oral hearings] hearings, how many non-ALJs does your agency **employ full-time** (whether or not duties include matters other than adjudication)?

\_\_\_\_\_

**Q6** For [type of oral hearings] hearings, if your agency borrows non-ALJs from another agency (who are employed full-time by their agencies, whether or not their duties include matters other than adjudication), how many non-ALJs does it borrow? From which agency or agencies does it borrow?

\_\_\_\_\_

**Q7** For [type of oral hearings] hearings, are any of the non-ALJs **not** full-time agency employees? (For instance, do any of the non-ALJs work part-time as contractors or work directly for outside entities (such as hearing officers for insurance carriers under certain benefit programs)?)

- Yes
- No

**Q8** For [type of oral hearings] hearings, please indicate how many non-ALJs are **not** full-time agency employees.

\_\_\_\_\_

**Q9** For [type of oral hearings] hearings, is the agency for which the non-ALJ works one of the parties to the oral hearing?

- Yes
- No

**Q10** For [type of oral hearings] hearings, is the non-ALJ's decision final within the agency without any further action by agency officials (if no appellate proceedings within the agency follow in a particular case)?

- Yes

- No

*If Yes, skip to Q12.*

**Q11** For [type of oral hearings] hearings, please indicate what further action by agency officials is required to produce a final agency decision. (Select all that apply.)

- Mandatory administrative appeal
- Execution of order by higher-ranking official or agency head(s)
- Other (Please identify.) \_\_\_\_\_

**Q12** For [type of oral hearings] hearings, is there any appellate process within the agency (whether a proceeding before a non-ALJ, an ALJ, or the head of the agency)?

- Yes
- No

*If No, skip to Q14.*

**Q13** Please identify the appellate process available within the agency for [type of oral hearings] hearings. (Select all that apply.)

- Automatic administrative appellate review
- Discretionary administrative appellate review
- Administrative appellate review is heard by an appellate panel (not the head(s) of the agency)
- Administrative appellate review is heard by the head(s) of the agency
- Administrative appellate review is heard by another agency official
- Administrative appellate review is heard by an appellate panel within another agency or by head(s) of another agency
- Other (Please identify.) \_\_\_\_\_

**Q14** Does the agency apply any quantitative case-processing goals for [type of oral hearings] hearings?

- Yes
- No

*If No, skip to Q16.*

**Q15** Please describe case-processing goals for [type of oral hearings] hearings and how the agency enforces those goals.

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**Q16** Does your agency provide a type of oral hearings in addition to [type of oral hearings] hearings?

- Yes
- No

*If Yes, skip to Q3.*

### **Part C: Types of Non-ALJs**

**Q17** An agency may use different types of non-ALJs who go by different titles (e.g., Administrative Judge, Administrative Appeals Judge, Administrative Patent Judge, Board of Contract Appeals Judge, Veterans Law Judge, Immigration Judge, Presiding Officer, Hearing Officer, Hearing Examiner). A series of questions follows concerning each type of non-ALJs.

If your agency uses more than one type of non-ALJs, please enter the first type on the next screen. Subsequent questions will ask you to identify additional types of non-ALJs, once you answer a series of questions related to the first type.

If two types of non-ALJs are treated differently by the agency but share the same title, please list them separately and distinguish between them in your identification of the types of non-ALJs.

Please identify **one type of non-ALJs** that your agency uses.

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**Q18** Please identify the nature of the hearings over which [type of non-ALJ](s) preside. (Select all that apply.)

- Governmental benefits
- Licensing
- Enforcement (imposing a fine, injunction, or other penalty)
- Government contracts
- Disputes between different governmental agencies
- Disputes between private parties
- Other (Please Identify.) \_\_\_\_\_

**Q18** Which federal occupational series applies to your [type of non-ALJ](s)? (If more than one series applies, please list it in a separate field below.)

Federal occupational series: \_\_\_\_\_

Federal occupational series: \_\_\_\_\_

Federal occupational series: \_\_\_\_\_

**Q19** Please indicate the number of [type of non-ALJ](s) under each pay plan listed below.

AA-1: \_\_\_\_\_

AA-2: \_\_\_\_\_

AA-3: \_\_\_\_\_

AA-4: \_\_\_\_\_

AA-5: \_\_\_\_\_

AA-6: \_\_\_\_\_

AL-1: \_\_\_\_\_

AL-2: \_\_\_\_\_

AL-3: \_\_\_\_\_

APJ: \_\_\_\_\_

BCA: \_\_\_\_\_

CA-1: \_\_\_\_\_

CA-2: \_\_\_\_\_

CA-3: \_\_\_\_\_

EX-I: \_\_\_\_\_

EX-II: \_\_\_\_\_

EX-III: \_\_\_\_\_

EX-IV: \_\_\_\_\_

EX-V: \_\_\_\_\_

IJ-1: \_\_\_\_\_

IJ-2: \_\_\_\_\_

IJ-3: \_\_\_\_\_

IJ-4: \_\_\_\_\_

GS-9: \_\_\_\_\_

GS-10: \_\_\_\_\_

GS-11: \_\_\_\_\_

GS-12: \_\_\_\_\_

GS-13: \_\_\_\_\_

GS-14: \_\_\_\_\_

GS-15: \_\_\_\_\_

PCES: \_\_\_\_\_

SES-1: \_\_\_\_\_

SES-2: \_\_\_\_\_

SES-3: \_\_\_\_\_

SES-4: \_\_\_\_\_

SL/ST: \_\_\_\_\_

SR: \_\_\_\_\_

Other (Please identify the pay plan and number.) \_\_\_\_\_

Other (Please identify the pay plan and number.) \_\_\_\_\_

Other (Please identify the pay plan and number.) \_\_\_\_\_

**Q20** Please identify any minimum qualifications for *hiring an employee initially and directly* as [type of non-ALJ](s). (Select all that apply.)

- Law degree
- Years of government service (If so, enter number of years.) \_\_\_\_\_
- Years of legal practice (If so, enter number of years.) \_\_\_\_\_
- Years of litigation experience (If so, enter number of years.) \_\_\_\_\_

- Years of legal practice in regulatory issue in agency hearings (If so, enter number of years.) \_\_\_\_\_
- Prior military service
- Examination or review of written work product
- Expertise in regulatory area at issue in agency hearings
- Professional demeanor
- References
- Other (Please identify.) \_\_\_\_\_
- Not applicable. The agency hires no employees initially and directly as [type of non-ALJ](s).

**Q21** Please identify any minimum qualifications for *moving an existing agency employee into a new position* as [type of non-ALJ](s).

- Law degree
- Years of government service (If so, enter number of years.) \_\_\_\_\_
- Years of legal practice (If so, enter number of years.) \_\_\_\_\_
- Years of litigation experience (If so, enter number of years.) \_\_\_\_\_
- Years of legal practice in regulatory issue in agency hearings (If so, enter number of years.) \_\_\_\_\_
- Prior military service
- Examination or review of written work product
- Expertise in regulatory area of issue in agency hearings
- Professional demeanor
- References
- Seniority
- Other (Please identify.) \_\_\_\_\_
- Not applicable. The agency does not move existing employees into new positions as [type of non-ALJ](s).

**Q22** Are [type of non-ALJ](s) subject to a probationary period when they begin their adjudicatory duties?

- Yes
- No

**Q23** Are [type of non-ALJ](s) appointed for a term of years?

- Yes
- No

**Q24** Are [type of non-ALJ](s) permitted to engage in ex parte communications as to factual or legal matters with employees (aside from those who work directly for the non-ALJ) or members of the agency?

- Yes, ex parte communications are permitted and are not limited
- Yes, ex parte communications are permitted, but are limited in certain ways
- No, ex parte communications are not permitted

*If Yes, skip to Q27.*

**Q25** Please identify the source of any limitations on ex parte communications by [type of non-ALJ](s). (Select all that apply.)

- Statute
- Substantive (notice and comment) rule
- Procedural rule
- Internal guidance
- Custom
- Other (Please identify.) \_\_\_\_\_

**Q26** Please identify the nature of any limitations on ex parte communications by [type of non-ALJ](s). (Select all that apply.)

- Prohibited from communicating with all agency officials (other than those who work directly for the non-ALJ) as to disputed facts
- Prohibited from communicating with all agency officials (other than those who work directly for the non-ALJ) as to disputed legal issues. Please identify the agency officials with whom [type of non-ALJ](s) may not communicate. \_\_\_\_\_
- Prohibited from communicating with certain agency officials (other than those who work directly for the non-ALJ) as to disputed facts. Please identify the agency officials with whom [type of non-ALJ](s) may not communicate. \_\_\_\_\_
- Prohibited from communicating with certain agency officials (other than those who work directly for the non-ALJ) as to disputed legal issues
- Prohibited from communicating with individuals outside the agency as to disputed facts
- Prohibited from communicating with individuals outside the agency as to disputed legal issues
- Other (Please describe.) \_\_\_\_\_

**Q27** Please identify any authority that precludes [type of non-ALJ](s) from performing duties for the agency other than adjudicating disputes (or administering the adjudicatory process). (Select all that apply.)

- Statute
- Substantive (notice and comment) rule
- Procedural rule
- Internal guidance
- Custom
- None
- Other (Please identify.) \_\_\_\_\_

**Q28** Please identify the nature of any limitations on the ability of [type of non-ALJ](s) to perform other duties. (Select all that apply.)

- Prohibited from performing any duties aside from adjudication
- Prohibited from performing investigative or prosecutorial duties
- Not prohibited from performing other duties
- N/A (because the non-ALJ works for an agency that only adjudicates disputes and lacks rule making, investigative, or enforcement authority)
- Other (Please identify.) \_\_\_\_\_

**Q29** Are the offices of [type of non-ALJ](s) physically separated from others within the agency?

- Yes
- No

**Q30** To whom do [type of non-ALJ](s) directly report?

- Chief [type of non-ALJ]
- Agency official who also supervises investigation or enforcement proceedings
- Agency head(s)
- Other (Please identify.) \_\_\_\_\_

*If Chief [type of non-ALJ], go to Q31; if not, skip to Q32.*

**Q31** To whom does the Chief [type of non-ALJ](s) directly report?

- Agency official who also supervises investigation or enforcement proceedings
- Agency head(s)
- Other (Please identify.) \_\_\_\_\_

**Q32** What limitations, if any, exist as to who may supervise [type of non-ALJ](s)?

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**Q33** Are [type of non-ALJ](s) subject to performance appraisals?

- Yes
- No

*If No, skip to Q39.*

**Q34** Please identify germane considerations for performance appraisals of [type of non-ALJ](s). (Select all that apply.)

- Case-processing goals
- Input from parties/litigants
- Peer review
- Review of decisions
- Reversal rates
- Other (Please identify.) \_\_\_\_\_

**Q35** Are [type of non-ALJ](s) eligible for pay bonuses?

- Yes
- No

*If No, skip to Q39.*

**Q36** Did any [type of non-ALJ](s) receive a pay bonus in the last year in which bonuses were awarded to employees within the agency?

- Yes
- No

**Q37** Please indicate the number of [type of non-ALJ](s) who received bonuses and the amount (or ranges) of those bonuses.

Number of [type of non-ALJ](s): \_\_\_\_\_

Amount (or range): \_\_\_\_\_

**Q38** Please describe any specific precautions the agency takes to mitigate concerns over how receiving performance appraisals and/or bonuses may impact the impartiality of [type of non-ALJ](s).

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**Q39** Do [type of non-ALJ](s) have any protection from at-will removal from their positions, aside from standard protections for federal employees? (For example, does any regulation or statute provide that the agency can remove [type of non-ALJ](s) for only "good cause" or similar grounds?)

- Yes
- No

*If No, skip to Q42.*

**Q40** What is the source of the protection for [type of non-ALJ](s) from at-will removal? (Select all that apply.)

- Statute
- Regulation
- Internal guidance document
- Custom
- Other (Please identify.) \_\_\_\_\_

**Q41** Please describe the nature of the protection for [type of non-ALJ](s) from at-will removal.

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**Q42** Does any requirement exist for [type of non-ALJ](s) to disqualify themselves if they cannot serve as an unbiased adjudicator?

- Yes
- No

*If No, skip to Q44.*

**Q43** Please identify the source of the disqualification requirement for [type of non-ALJ](s) who cannot serve as an unbiased adjudicator. (Select all that apply.)

- Statute
- Regulation
- Internal guidance document
- Custom
- Other (Please identify.) \_\_\_\_\_

**Q44** Does your agency use a type of non-ALJs in addition to [type of non-ALJ](s)?

- Yes
- No

*If Yes, skip to Q17.*

Please provide the information requested below.

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Phone: \_\_\_\_\_

Thank you for taking the time to complete this survey. Please click the SUBMIT button at the bottom of this screen to record your responses.

**APPENDIX B**

**Surveyed Agencies – Subcomponents and Responses**

<b>Agency</b>	<b>Subcomponent</b>	<b>Response as to Oral Hearings</b>
Administrative Office of the United States Courts	Fair Employment Practices Office	Yes
Agency for International Development		No
Air Force	Board for Correction for Military Records	N/A
Architectural and Transportation Barriers Compliance Board (Access Board)		No
Army	Board of Correction of Military Records	N/A
	Legal Services	No
	Judge Advocate General	No
Central Intelligence Agency	Office of Public Affairs	N/A
Chemical Safety and Hazard Investigation Board		No
Civilian Board of Contract Appeals (GSA)		N/A
Commission on Civil Rights		No
Commodity Futures Trading Commission	Office of Proceedings	Yes
Consumer Financial Protection Bureau		No
Consumer Product Safety Commission		No
Department of Agriculture	Agricultural Marketing Service, Specialty Crops	Yes
	Grain Inspection/Packers & Stockyard Administration	No

<b>Agency</b>	<b>Subcomponent</b>	<b>Response as to Oral Hearings</b>
Department of Commerce	Patent Trial and Appeal Board	Yes
	U.S. Patent and Trademark Office	Yes
Department of Defense	Armed Services Board of Contract Appeals	Yes
	Legal Services Office, Civilian Health	N/A
	Office of Hearings and Appeals	N/A
Department of Education	Office of Hearings and Appeals	Yes
Department of Energy	Office of Hearings and Appeals	No
Department of Health and Human Services	Office of Secretary, Departmental Appeals	Yes
	Food and Drug Administration	N/A
Department of Homeland Security	Coast Guard	Yes
	Citizenship-Immigration Services, U.S. Customs-Border Protection, FEMA, ICE, TSA, National Protection-Programs Directorate, U.S. Secret Service	N/A
Department of Housing and Urban Development	Federal Housing Administration	N/A
Department of the Interior	Office of Hearings and Appeals	N/A
Department of Justice	Executive Office for Immigration Review	Yes
	Board of Immigration Appeals, Drug Enforcement Administration, Immigration and Naturalization Service	N/A
Department of Labor	Benefits Review Board	Yes
	Employee Compensation Appeals Board	No
Department of the Navy		N/A

<b>Agency</b>	<b>Subcomponent</b>	<b>Response as to Oral Hearings</b>
Department of State		No
Department of Transportation		N/A
Department of the Treasury	Alcohol and Tobacco Tax and Trade Bureau	Yes
	Internal Revenue Service	Yes
	Office of the Comptroller of the Currency	No
Department of Veterans Affairs		Yes
Equal Employment Opportunity Commission		Yes
Environmental Protection Agency	Region 9	Yes
	Office of Administration and Resources	Yes
Farm Credit Administration		No
Federal Communications Commission		No
Federal Deposit Insurance Corporation		Yes
Federal Election Commission		No
Federal Energy Regulatory Commission		No
Federal Housing Finance Agency		N/A
Federal Labor Relations Authority	Office of the General Counsel	Yes
Federal Maritime Commission		Yes
Federal Mediation and Conciliation Service		No
Federal Mine Safety and Health Review Commission		No

Agency	Subcomponent	Response as to Oral Hearings
Federal Reserve Board of Governors		No
Federal Trade Commission		No
Government Accountability Office		Yes
Inter-American Foundation		No
International Trade Commission		No
Library of Congress		Yes
Merit Systems Protection Board	Regional and Field Offices	Yes
National Aeronautics and Space Administration		Yes
National Foundation on the Arts and Humanities	National Endowment for the Arts	N/A
	National Endowment for the Humanities	No
National Labor Relations Board		Yes
National Science Foundation		N/A
National Transportation Safety Board		No
Nuclear Regulatory Commission		Yes
Occupational Safety and Health Review Commission		No
Overseas Private Investment Corporation		No
Peace Corps		Yes
Pension Benefit Guaranty Corporation		Yes

<b>Agency</b>	<b>Subcomponent</b>	<b>Response as to Oral Hearings</b>
Postal Regulatory Commission		No
Railroad Retirement Board	Bureau of Hearings and Appeals	Yes
Securities and Exchange Commission		N/A
Selective Service System		No
Small Business Administration		N/A
Social Security Administration	Office of Appellate Operations	Yes
Surface Transportation Board		No

NOTE: N/A denotes that the agency or its subcomponent(s) did not respond.

**APPENDIX C**

**Types of Hearings and Types of Non-ALJs  
by Agency – Subcomponent**

<b>Agency – Subcomponent</b>	<b>Types of Hearings</b>	<b>Types of Non-ALJs</b>
Administrative Office of the United States Courts – Fair Employment Practices Office	Fair Employment Practices hearings	Hearing Officer
Commodity Futures Trading Commission – Office of Proceedings	Wage garnishment	Judgment Officer
	Statutory disqualification	
	Reparations awards	
Department of Agriculture – Agricultural Marketing Service, Specialty Crops	Private party disputes involving produce transactions	Presiding Officer
Department of Commerce – Patent Trial and Appeal Board	Claims between private parties	Administrative Patent Judge
	Claims between a private party and agency	
Department of Commerce – U.S. Patent and Trademark Office	Patent Examiner interviews with patent applicants	Patent Examiner
Department of Defense – Armed Services Board of Contract Appeals	Oral hearings involving private parties and the DoD, DoD components, NASA, or CIA	Board of Contract Appeals Judge, or Administrative Judge
Department of Education – Office of Hearings and Appeals	Appeals of actions ordering the return of funds, imposition of fines, or the termination, limitation, suspension, or reduction of eligibility for federal funds by Federal Student Aid and other Department of Education Program Offices, and show cause hearings for related emergency actions	Administrative Judge
Department of Health and Human Services – Office of	Agency enforcement actions against individuals or corporations	Board Member

<b>Agency – Subcomponent</b>	<b>Types of Hearings</b>	<b>Types of Non-ALJs</b>
Secretary, Departmental Appeals	Grant disallowances and terminations	
Department of Homeland Security – Coast Guard	Class I civil penalty assessments	Hearing Officer
Department of Justice – Executive Office for Immigration Review	Removal proceedings	Board Member
		Immigration Judge
Department of Labor – Benefits Review Board	Oral arguments for parties, which may include employees, employers, carriers, and/or the Director	Administrative Appeals Judge
Department of the Treasury – Alcohol and Tobacco Tax and Trade Bureau	Labor arbitrations	Labor Arbitrator
Department of the Treasury – Internal Revenue Service	Collection due process	Settlement Officer
	Settlement conferences for examination cases	
	Settlement conferences for non-CDP collection cases	Appeals Officer
Department of Veterans Affairs	Board of Veterans’ Appeals hearings	Veterans Law Judge
	Decision review officer hearings	Decision Review Officer
Equal Employment Opportunity Commission	Federal employment disputes re: unlawful discrimination	Administrative Judge
Environmental Protection Agency – Region 9	Enforcement hearings	Regional Judicial Officer
Environmental Protection Agency – Office of Administration and Resources	Presentation of matters in opposition (PMIO) meetings	Attorney-Examiner (Suspension and Disbarment Hearing Officer who has a collateral duty of Suspension and Disbarment Fact-Finding Official)
	Fact-finding hearings	
Federal Deposit Insurance Corporation	Miscellaneous	Presiding Officer
Federal Maritime Commission	Informal claims	Small Claims Officer

Agency – Subcomponent	Types of Hearings	Types of Non-ALJs
	License revocation proceedings	Hearing Officer
Federal Labor Relations Authority – Office of the General Counsel	Agency program	Hearing Officer
Government Accountability Office	Bid protest	Senior Attorney or Assistant General Counsel
	Personnel appeals board	Administrative Judge
Library of Congress	Determination of royalty rates and terms for statutory licenses to use copyrighted works	Copyright Royalty Judge
	Distribution of royalties to copyright owners of broadcast television programs	
Merit Systems Protection Board – Regional and Field Offices	Employment disputes	Administrative Judge
		Chief Administrative Judge
		Regional Director
National Aeronautics and Space Administration	Ombudsman to address matters between agency and private parties on public/private partnerships	Ombudsman
National Labor Relations Board	Fact-finding proceedings regarding questions concerning employee representation	Hearing Officer
Nuclear Regulatory Commission	Informal “Subpart L” hearings, that govern all NRC adjudicatory proceedings, with certain identified exceptions	Administrative Judge
	Formal “Subpart G” hearings associated with particular proceedings	
	“Subpart M” hearings on license transfer applications	
	“Subpart N” – simplified procedures for legislative hearings (when all parties agree to use these procedures)	

Agency – Subcomponent	Types of Hearings	Types of Non-ALJs
Peace Corps	Sexual misconduct hearing panel	Hearing Panelist
Pension Benefit Guaranty Corporation	PBGC permits	Appeals Board Member
Railroad Retirement Board – Bureau of Hearings and Appeals	Appeals from denial of a disability benefit	Hearing Officer
	Appeal of a finding of an overpayment	
Social Security Administration – Office of Appellate Operations	Appearances related to request for review of administrative law judge decision	Administrative Appeals Judge
	Requests for review of administrative law judge decisions on representative disqualifications	
	Requests for representative reinstatement after disqualification	