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SURVEY OF NON-ALJ HEARING PROGRAMS
IN THE FEDERAL GOVERNMENT

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August 1991

The views expressed herein are those of the author and do not necessarily reflect those of the U.S. Nuclear Regulatory Commission or the Administrative Conference of the United States.



TABLE OF CONTENTS

INTRODUCTION	1
TREATMENT OF PRESIDING OFFICERS DECISIONS	6
Presiding Officers Without Other Duties	15
High Volume Case Types	21
Presiding Officers with Other Duties	23
ENFORCEMENT CASE TYPES	27
Immigration, Passport and Nationality, and Security Clearance Cases	28
Coast Guard and Food and Nutrition Service Cases .	43
Case Types Where the Presiding Officers Have Other Duties	50
Observations and Conclusions - Enforcement Case Types	54
ENTITLEMENTS CASE TYPES	59
H&HS - Medicare Part B Claims	60
Veterans' Benefits	64
Other Case Types Concerned with Entitlements . . .	76
Observations and Conclusions - Entitlements Case Types	78
ECONOMICS CASE TYPES	80
Case Types in which the Government Interest Concerns the Proper Administration of an Economic Program put in place to Achieve a Public Policy	81
Farmers Home Administration Grants and Loans	82
Soil Conservation	87
Small Business	91
Case Types in which the Government Interest is in Providing a Remedy or Licensing System which Primarily Benefits Private Parties	95
Patent and Trademark Cases	96
Complaints for Damages under the Perishable Agricultural Commodities and Packers and Stockyards Acts	100
Case Types in which the Government Interest Concerns the Proper Administration of its Acquisition Program	107
Suspension and Debarment of Contractors and Recipients of Assistance	108
Bid Protests	115
Case Types in which the Government Interest Concerns its Rights and Obligations as a Creditor or Debtor	118
Case Types in which the Government Interest Concerns the Award of a Valuable Privilege .	121
Forest Service	121
Export Licenses	123

Observations and Conclusions - Economics Case Types	124
EMPLOYER-EMPLOYEE RELATIONS CASE TYPES	129
Equal Employment Opportunity Commission Cases	129
Merit System Protection Board Cases	136
Foreign Service Grievance Board	139
Office of Personnel Management Standards	140
Federal Labor Relations Authority	141
National Labor Relations Board	143
Observations and Conclusions - Employer-Employee Relations Case Types	145
HEALTH AND SAFETY CASE TYPES	147
Nuclear Regulatory Commission	148
Environmental Protection Agency	157
Observations and Conclusions - Health and Safety Case Types	162
OVERALL OBSERVATIONS AND CONCLUSIONS	163

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John H Frye, III¹

INTRODUCTION

In June, 1989, the Administrative Conference launched a survey, conducted by the author, designed to identify those adjudications conducted by federal agencies which are presided over by officials who are not administrative law judges (ALJs).

Under the Administrative Procedure Act, (APA) when another statute requires agencies to conduct adjudications "to be determined on the record after opportunity for agency hearing," the APA's hearing requirements apply as does the requirement that the Presiding Officer be an Administrative Law Judge. ALJ'S are a special class of federal employee, given special protection, and guarantees of independence conceding their hiring, terms of employment, tenure, and salary. There are over 1,000 ALJs in the Federal government, employed by about 30 agencies.

However, the APA itself recognizes that many adjudications need not be heard by ALJs. Indeed, the APA explicitly excepts some types of programs from all of the

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APA's adjudication requirements, e.g. cases involving the selection or tenure of Federal employees (except ALJs), certification of worker representatives, or conduct of military or foreign affairs functions.

Other than those exceptions, the key question is whether the relevant statute requires an "on-the-record" hearing (sometimes referred to as an "APA hearing"). If it does then any hearing must be presided over by either the agency head (a rare event) or one or more ALJs -- unless the other statute specifies that another designated board or employee is to preside.

This survey was designed to identify and preliminarily evaluate agency use of non-ALJ presiding officers -- either those that are statutorily designated to hear formal "on-the-record" cases or those hearing less formal cases throughout the government. The conference has built on information gathered by several earlier researchers by directing a questionnaire to the federal agencies.²

The questions asked the agencies to identify all types of adjudications which they conduct which are heard by persons who are not ALJs and to supply certain basic information concerning each type. Specifically, for each case type the agencies were asked to specify the caseload, and to provide basic information concerning the presiding

²The questionnaire and the list of agencies to which it was directed are set out in Appendix A.

officers and the methods by which their work is reviewed. Agencies were also asked to cite the statutory and regulatory authority governing these cases.

A total of 129 types of cases were reported by the agencies.³ A substantial number of the case types reported appeared to be inactive, not constituting a significant part of the reporting agency's work. Forty-six case types which showed a caseload of less than one per year were eliminated from further analysis.⁴ This prevents the inactive cases from influencing the statistics generated by the active cases and hopefully will ensure a more realistic picture. Thus a total of 83 case types were analyzed.

³These cases include administrative proceedings in which a hearing is available before an officer who is not an ALJ. They do not include proceedings conducted pursuant to the Uniform Code of Military Justice or related to the status of military service members, such as boards which review discharges or correct military records. While some of these military boards technically fall into the categories of cases which the questionnaire was designed to identify, the information elicited in regard to them was sketchy. Moreover, they are unique in that they are concerned with the status of military service members as opposed to the public at large.

⁴The decision to draw the line at less than one case per year was based on the fact that it is difficult in a survey of this nature to assess the significance of a small caseload. Five or ten cases a year may well be insignificant at an agency processing a high volume of cases, such as the Veterans Department, but extremely significant at another where the cases tend to be extremely complex and lengthy, such as the Nuclear Regulatory Commission.

The survey revealed that the case types reported constitute a large adjudicatory workload. As is to be expected, the caseload statistics were not reported on identical bases. However, it is reasonable to say that the annual caseload attributable to the case types analyzed is in the neighborhood of 343,200.

By far, the Executive Office of Immigration Review of the Department of Justice processes the largest volume of cases. Its annual caseload of about 152,000, roughly 44% of the total, is divided among three case types. Next comes Health and Human Services where presiding officers employed by insurance carriers process about 68,000 cases per year, roughly 20% of the total. The Department of Veterans Affairs is next with 58,000 cases, about 17% of the total, divided between two case types. The Coast Guard follows with a total of 20,000, about 6% of the total, followed by the Department of Agriculture with about 14,000 cases, roughly 4%, divided among three case types. Thus these five agencies account for roughly 91% of the total caseload. There are 15 high-volume case types with caseloads in excess of 1000 per year. These case types account for an annual caseload of about 336,700, about 98% of the total.

The 83 case types of primary interest divide themselves into six general subject areas. Thirteen case types deal with enforcement matters. These case types account for by far the heaviest caseload, approximately 174,350, or about

51% of the total. About 152,400 of these are immigration cases and 20,000 civil penalty proceedings heard by the Coast Guard.

Thirteen case types dealing with entitlements account for the second largest caseload, approximately 128,500, about 37% of the total. Almost 68,000 of these are heard by presiding officers employed by insurance carriers in a program administered by H&HS, while 58,000 are heard by presiding officers employed by Veterans Affairs.

Forty-three case types deal with economic matters. These account for an annual caseload of about 35,000, about 10% of the total. The Farmers Home Administration accounts for 12,000 of these.

The 11 case types dealing with employer-employee relations account for caseload of about 16,300, about 5% of the total. Together, the Merit System Protection Board and Equal Employment Opportunity Commission account for about 13,350 of this total.

Last in terms of both number of case types and caseload are those cases dealing with health, safety, and environmental matters where three case types account for about 21 cases per year. These cases are heard by the Environmental Protection Agency and Nuclear Regulatory Commission.

TREATMENT OF PRESIDING OFFICERS DECISIONS

In almost all administrative adjudication, the agency has responsibility for not only providing for the hearing process, but for its substantive results as well. Constitutional due process considerations govern the former responsibility, while the agency's responsibilities under its organic legislation govern the later. There is often an inherent tension between these responsibilities. The agency at the same time has the responsibility to provide for a fair adjudicatory procedure which will dispense justice, to serve the ultimate administrative arbiter of the adjudications governed by that procedure (to which its staff is often a party), and to implement policies which are often at issue in those proceedings. The tension between these sometimes conflicting roles can result in a lack of confidence on the part of the public in the process instituted by the agency, which may rise to Constitutional dimensions. On the other hand, due process considerations may often pose a barrier to the efficient conduct of the agency's business, and sometimes a barrier to the discharge of the agency's obligations as it perceives them under its organic legislation.

In formal adjudication, the APA makes provision for this situation. It provides that the agency may direct that a hearing record be certified to it for decision and that the agency may substitute its judgement for that of the

presiding officer. The APA also provides for a measure of fairness by requiring separation of the functions of presiding and deciding from those of prosecuting, by prohibiting ex parte communications with the presiding officer, and by according the presiding officer a certain degree of independence.⁵ These provisions are not applicable to informal adjudication. Nonetheless, agencies should feel a strong incentive to structure their informal adjudication procedures in such a way as to convey the full measure of fairness demanded by the due process. This will inspire public confidence in the results of those proceedings and avoid potential disruption of the agency's programmatic responsibilities which would result from a process that fails to satisfy due process requirements.

Dean Verkuil has identified the criteria of fairness, efficiency, and satisfaction of the parties as relevant to the inquiry of whether informal adjudication meets procedural due process standards,⁶ and Judge Friendly has characterized the right to an impartial tribunal, along with notice and the opportunity to submit written comments, as one of the three fundamental elements of due process.⁷

⁵5 USC §§ 554(d)(2), 1305, 3105, 5372, and 7521.

⁶See Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976).

⁷See Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975).

In Pension Benefit Guaranty Corporation v. LTV Corporation, 496 U.S. ___, 110 L.Ed. 2d 579 (1990), the Supreme Court indicated that § 555 of the APA sets forth the minimum requirements governing informal adjudication.⁸ Thus § 555 may be taken as setting forth the minimum process required, if not by the due process clause, then by Congressional determination. Section 555 provides one with the right to appear, to be represented, to a decision in a reasonable time, to have a copy of the transcript or other record, to subpoenas otherwise authorized by law, and to notice of and a statement of reasons for an adverse decision. These requirements touch on the elements of notice, the opportunity to comment, fairness, and efficiency (at least to the extent that a participant is interested in a speedy resolution of a particular matter) of the Verkuil-Friendly formulations. It is interesting that no statement is made concerning an impartial tribunal, particularly in light of the specific provisions bearing on that subject in § 554(d)(2) of the APA.

It is the intent of this survey to preliminarily assess the extent to which informal adjudication conducted by federal agencies satisfies due process concerns. The fairness of the process and the impartiality of the

⁸In pointing to § 555, the Court noted that, absent due process considerations which were not raised in Pension Benefit, agencies are not required to provide the attributes of formal hearings provided for in §§ 554, 556, and 557.

tribunals surveyed was measured by the questions concerning the quality control methods utilized by the agencies with regard to the presiding officers' work. These focussed on both formal and informal quality control methods. With regard to the former, the survey asked for responses concerning whether formal appeals were entertained and/or whether the agency formally reviewed the presiding officer's work in the absence of appeal. The survey also enquired about informal quality control methods: whether the presiding officers are subject to performance appraisal, whether their decisions are subject to informal review, and whether they have duties other than presiding. These questions were designed to preliminarily assess the independence and impartiality of the presiding officers and are relevant to the inquiry concerning the satisfaction of the parties with the process. A review of the rules of practice cited by the responding agencies revealed whether provisions regarding ex parte communications and separation of functions were in effect. These are also relevant elements in assessing fairness, impartiality, and the satisfaction of the parties.

Efficiency was measured directly by a question which enquired about the existence of some form of quantitative case processing standards. However, efficiency can be viewed in terms of the substantive results reached by the hearing process as well as by the number of cases processed.

If a hearing process results in a high number of decisions which are not acceptable to the agency for policy reasons, that process may well be viewed as inefficient regardless of the rate at which it processes cases. Consequently, the questions designed to gauge the fairness of the process and the impartiality of the tribunals from the point of view of the public also provide some indication of the agency's view of the efficiency of the process in meeting its policy goals.

The survey generated statistics on the use of quality control methods in terms of both case types and caseload. The case type statistics provide an indication of the preferences of the agencies independent of caseload considerations, while the caseload statistics indicate the extent to which considerations of efficiency in processing a large volume of cases dictate that particular control methods be utilized.

The survey only inquired about proceedings in which a hearing may be available, and not about adjudication in which no hearing is available.⁹ Thus it did not consider forms of adjudication in which Judge Friendly's provisos concerning notice and the right to submit written comments would be relevant. The opportunity for a hearing

⁹However, in some of the case types reported, the bulk of the proceedings were decided on the basis of written submissions.

presupposes that one is entitled to notice and the right to be heard.

While the survey provides an insight into the extent to which informal adjudication satisfies the criteria identified by Dean Verkuil and Judge Friendly, as well as those identified in § 555, it was not designed to provide the kind of information necessary to the comparative evaluation of the interests at stake and the procedures employed which was conducted by the Supreme Court in Matthews v. Eldridge and Goldberg v. Kelly.¹⁰ The statutes and regulations governing these proceedings which were cited by the responding agencies, as well as the agencies brief description of the subject matter of the proceedings, provides the principal source of information on the interests at stake in them. In some instances, judicial decisions provide more information. Consequently, while in some instances this information provides an adequate basis to evaluate the interests at stake,¹¹ in others it does not.¹² Similarly, while the information gathered in the survey provides a good basis on which to evaluate existing

¹⁰424 U.S. 319, 47 L.Ed 2d 18 (1976) and 397 U.S. 254, 25 L.Ed. 2d 287 (1970), respectively.

¹¹See, e.g., the immigration and contractor security clearance case types, where the competing interests of the government and the respondent are relatively clear.

¹²See, e.g., the case types heard by the Small Business Administration and the Coast Guard, where one set of procedures covers a wide variety of substantive matters.

procedures, it does not provide a basis to evaluate the costs and benefits of supplemental or different procedures which might be necessary to satisfy due process concerns. Finally, it must be pointed out that neither the agencies nor the parties appearing before them have been contacted to obtain their views on the evaluations contained herein or on the costs and benefits of supplemental or different procedures than those employed when the survey was conducted.

It is self-evident that, to the extent that the agencies use informal means to control the process and its substantive results, they detract from the impartiality of the presiding officer, the fairness of the proceeding, and the satisfaction of the public with the results. At the same time, they increase the control which they exercise over the substantive results of the process. Thus, in their view, they may well enhance the efficiency of the utilization of government resources involved in achieving the policy goals set for them by Congress. Conversely, to the extent that they do not utilize informal means to control the process, agencies enhance the impartiality of the presiding officer, the fairness of the proceeding, and the satisfaction of the public with the results, although

they necessarily relinquish some control over the implementation of policy.¹³

Controls in formal APA proceedings are limited to an on-the-record review of each decision, represented in this survey by the statistics on whether appeals are permitted and whether decisions are formally reviewed in the absence of an appeal. In addition to these controls, in the case types under study, agencies may employ such means as performance appraisal and informal qualitative review of decisions. Neither of the latter control mechanisms is subject to public scrutiny nor subject to challenge by the parties to a proceeding.

In order to learn the extent to which agencies use both formal and informal control mechanisms in these cases, the survey asked whether, for each case type reported, appeals were permitted, formal review in the absence of appeal was undertaken, the presiding officers' performance was appraised, and whether informal qualitative review of decisions was undertaken. The survey also asked whether quantitative case processing standards were in place, an inquiry related to case management controls.

¹³Because, in almost all cases, the agency retains ultimate control in that it may enter its own decision in any proceeding, either by providing for certification of the record with or without a recommended decision or by review of an initial decision, it relinquishes control only to the degree to which it is inhibited from implementing policy by the existence of a formal public record.

The 83 case types of primary interest were divided into two basic groups: case types where the presiding officers have no duties other than presiding and case types where the presiding officers have other duties.¹⁴ This distinction tends to isolate those case types where the caseload is sufficiently low that the agency sees no need to employ full-time presiding officers to handle it, or for other reasons does not wish to employ such presiding officers. Notable examples of the latter are the Health and Human Services Department where hearing officers who are employed by insurance carriers handle an annual caseload of almost 68,000 cases and the Department of Veterans Affairs where employees who are claims adjustors preside over some 16,000 hearings per year.

Use of presiding officers who have no other duties may also reflect a desire on the part of the agency to provide an element of independence for its presiding officers. This can be an important element to consider in assessing the extent to which informal adjudication satisfies the criteria of fairness, efficiency, and satisfaction of the parties. Dean Verkuil points out that there should be every reason for agencies to maximize the independence of its presiding officers.¹⁵

¹⁴Additionally, presiding officers in four case types are not full time government employees.

¹⁵Verkuil, supra, note 6 at 751.

Presiding Officers Without Other Duties

As might be expected, the survey revealed that agencies generally assign high volume case types to presiding officers who have no other duties. While there are 45 case types assigned to presiding officers without other duties and 34 assigned to those with other duties, the caseload of the former is about 251,800 compared to about 23,400 for the latter.¹⁶ Twenty-nine percent of the case types heard by presiding officers without other duties are high volume proceedings,¹⁷ while 88% of those heard by presiding officers with other duties are low volume proceedings.¹⁸ Thus while the caseload of presiding officers with other duties is significant, the tendency to limit their responsibilities to case types with a low caseload is

¹⁶Four case types are assigned to presiding officers who are not government employees. These account for some 68,000 cases, virtually all of which are heard by presiding officers who are employees of insurance carriers under contract with H&HS to process medicare claims. The other three are:

Proceedings to determine whether a person is connected to a Perishable Agricultural Commodities Act licensee administered by the Packers and Stockyards Division, Agriculture Department (about 10 cases per year);

Proceedings concerning the denial of health benefits and provider certifications administered by the Civilian Health and Medical Program of the Uniformed Services, DOD (about 180 cases per year); and

Proceedings concerning personnel grievances and annuity overpayment administered by the State Department (about 40 cases per year).

¹⁷More than 1000 cases per year.

¹⁸Less than 100 cases per year.

pronounced. There is one significant exception to this tendency. Some 16,000 of the 24,000 cases heard by presiding officers with other duties are attributable to one case type administered by the Veteran's Affairs Department.

Moreover, individual groups of presiding officers without other duties handle, on average, more case types than do their counterparts with other duties. Twenty-four separate groups of presiding officers without other duties handle 45 case types, an average of 1.9 case types per group, compared with 31 individual groups with other duties who are assigned 34 case types, an average of 1.1 case types per group.¹⁹ Despite the tendency to assign high volume case types to them, presiding officers without other duties generally are less often subject to quantitative case processing standards than are their counterparts with other duties. The former are subject to such standards in 38% of the case types and 14% of the caseload, while the latter must abide by them in 24% of the case types and 91% of the caseload. These statistics simply bear out the fact that it

¹⁹There are some 601 presiding officers without other duties, resulting in an annual caseload of about 420 per presiding officer. In contrast, there are some 2262 presiding officers with other duties, including those who are not government employees. They have an annual caseload of about 40 per presiding officer. Only a small number of the latter are lawyers, while over two-thirds of the former group are lawyers. As might be expected, 165 of the 176 presiding officers classified above GS-15 have no other duties. Details regarding the assignments, grades, and qualifications of presiding officers are given in Appendix B.

is more efficient to assign the processing of cases to officers who devote their full time to that activity.²⁰

In this case, the more efficient practice from the agency's point of view is probably the fairer practice from the public's point of view. While there is no guarantee that presiding officers without other duties will be accorded sufficient independence to insure their impartiality, it seems reasonable to assume that, on average, limiting an agency employee's duties to presiding is likely to enhance his or her independence. Such a limitation may also serve as a de facto separation of his or her functions as a presiding officer from the prosecutorial functions of the agency. Given the inapplicability of the provisions of the APA which accord independence to and

²⁰Nonetheless, the survey revealed areas in which several case types, each with a low volume of cases, are assigned to separate groups of presiding officers with other duties, despite the fact that administrative law judges or presiding officers without other duties who hear similar cases were presumably available to hear them. A prime example is found at the Family Support and Development Division of H&HS where seven separate procedures, each heard by a separate group of presiding officers, govern 27 different case types, none of which has a caseload in excess of 4 cases per year. This program is discussed at pp. 76-77, infra. One questions why these case types could not be more efficiently processed by the H&HS Departmental Appeals Board, composed of presiding officers without other duties, under its procedures.

In this connection, the rules of the Small Business Administration may well provide a model for avoiding such fragmentation and achieving the efficiency that comes with utilization of presiding officers without other duties. At SBA, one set of rules accommodates both formal and informal adjudication and governs hearings in 17 program areas. This program is discussed at pp. 91-95, infra.

separate the functions of presiding officers, the lack of other duties may be a significant factor in assessing the fairness of the proceedings under study. The extent to which agencies have permitted the lack of other duties to accord their presiding officers independence can be gauged by the quality control methods they use with respect to the presiding officers' work product.

The survey revealed that caseload apparently plays a large role in the agencies' willingness to accord presiding officers without other duties independence. While appeals by parties are utilized in only 40% of the case types, they are utilized in 74% of the caseload. Similarly, performance appraisal is utilized in 47% of the case types but only in 21% of the caseload, and informal review is utilized in 20% of the case types but only 12% of the caseload. These statistics indicate that a heavy caseload is perhaps the strongest incentive for an agency to adopt procedures which provide for an independent, impartial presiding officer.

However, the frequency of use of various combinations of these three quality control mechanisms provides a better indication of the fairness of an agency's process. While the agency may ostensibly provide the presiding officer with a certain degree of independence and afford the parties the right to appeal decisions, it can at the same time utilize performance appraisal and informal review to exercise considerable behind the scenes control over the presiding

officers' work. Thus it is more meaningful to consider whether an agency refrains from the use of these informal control mechanisms in assessing the fairness of its procedures. Statistics on the use of combinations of appeals by parties, performance appraisal, and informal review confirm that caseload is a powerful incentive to an agency to provide an impartial presiding officer.

When caseload considerations are eliminated, the agencies tend to refrain from the use of informal quality control methods in about 45% of the case types. Formal review only by means of appeals is utilized in 27% of the case types, or no review at all in 18%, while performance appraisal and/or informal review of decisions are employed (sometimes together with appeals) in 54% of the case types.

When caseload is considered, it is evident that agencies place principal reliance on formal control mechanisms. They refrain from the use of informal quality control mechanisms in 62% of the caseload, utilizing appeals by parties in 61% and no review at all in 1%, while performance appraisal and/or informal review are utilized in 37% of the caseload. Contrary to what might be expected, the use of quantitative case processing standards also tends

to fall off as caseload increases. Such standards exist in 38% of the case types but only 14% on the caseload.²¹

In addition to the independence which the lack of other duties and a high caseload may afford presiding officers without other duties, it appears that they are in most cases selected with a view to their skills in presiding. The questionnaire asked the agencies to indicate how the presiding officers are selected. Unfortunately, most agencies did not provide any information on the qualifications which they deem important in selecting presiding officers, but rather replied in general terms.

Nonetheless, some generalization is possible with regard to the proceedings heard by presiding officers without other duties. These presiding officers appear to be competitively selected on the basis of particular skills needed in their work in about 59% of the case types and 64% of the caseload assigned to them. Some 44% of these case types, which account for about 2% of the caseload, are heard by administrative judges selected under procedures set out in the Contract Disputes Act. Four immigration case types account for 9% of the case types and about 61% of the

²¹It must be borne in mind that the four case types administered by the Executive Office of Immigration Review greatly influence these results. These case types account for about 152,000 of the total 262,000 caseload. The Agency utilizes only formal appeals by the parties for quality control purposes.

caseload. Presiding officers in this program are selected based on their knowledge of immigration law and judicial practices, their ability to conduct high volume proceedings, and at least six and one-half years experience as a member of the bar. The Office of Workers' Compensation Programs of the Department of Labor employs merit selection with emphasis on disability evaluation and writing skill in administering one case type with a caseload of 2144, and the Nuclear Regulatory Commission emphasizes litigation experience in selecting lawyers for its two case types and selects technically qualified individuals based on recognized achievement in their field of endeavor. These two agencies account for three case types (7%) and less than 1% of the total caseload. Only the Merit System Protection Board indicated that it makes non-competitive appointments. MSPB presiding officers receive non-competitive Schedule A appointments. MSPB administers one case type which accounts for about 3% of the caseload.

High Volume Case Types

The data for high volume case types confirms the shift toward formal quality control mechanisms as caseload rises, but with an important qualification. The 15 high volume case types are those in which the annual caseload exceeds 1000 per year. They account for 98% of the total caseload studied. This category includes case types heard by presiding officers with and without other duties, and those

who are not government employees. Appeals are utilized in 73%, performance appraisal in 67%, and informal review in 67% of these case types. However, appeals rise to 82% of caseload, while performance appraisal and informal review drop to 21% and 47%, respectively. In these case types, agencies refrain from the use of informal quality control methods in only 27% of the case types, but in 46% of the caseload. Quantitative case processing standards are utilized in 67% of the case types, but only 28% of the caseload.

The tendency to shift to formal quality control mechanisms in high volume case types is not as dramatic as it is in the case types heard by presiding officers without other duties. This is because the high volume case types include four case types, constituting a substantial caseload,²² which are heard by presiding officers who are not government employees or who have other duties. All of these case types employ both formal and informal quality control mechanisms. This indicates that, regardless of caseload, agencies tend to continue the use of informal quality control mechanisms when their presiding officers are not full time employees without other duties.

²²The four case types account for a caseload of 87,900. This constitutes 26% of the total caseload and 5% of the total case types.

Presiding Officers with Other Duties

In sharp contrast, there is more concern with quality control and efficiency, and consequently less independence, where presiding officers have other duties. Appeals by parties, performance appraisal, and informal review are all used to a greater extent in terms of both case types and caseload where presiding officers are assigned other duties. The agencies may well place principal reliance on performance appraisal (91% of case types),²³ followed by appeals by parties and informal qualitative review (representing 56% and 50% of case types, respectively). In terms of caseload, these figures become 99% for performance appraisal, 96% for informal review, and 94% for appeals.

This increased concern for quality control is confirmed by the data on the frequency of use of combinations of these three principal control mechanisms. Informal quality control mechanisms are employed in a total of 95% of the case types and 98% of the caseload.²⁴ While appeals

²³This statistic may be somewhat misleading in that an agency's review of an individual's performance might not include his or her discharge of the duties of presiding officer. Nonetheless, an individual's desire to achieve a favorable performance appraisal must inevitably have an influence on the discharge of those duties.

²⁴All three quality control mechanisms are employed together in 29% of the case types and 93% of the caseload. Appeals and performance appraisal are employed together in 24% of the case types, but only 2% of the caseload. Performance appraisal is employed alone, and together with informal review, in 21% of the case types and 2% of the caseload in each instance.

continue to be available to a significant extent (56% of the case types and 94% of the caseload), they are the only quality control mechanism in only 3% of the case types and <1% of the caseload, while the agencies refrain from the use of any quality control mechanisms in the same percentages of case types and caseload. Thus, the agencies' interest in the efficiency of its process in rendering decisions which they view as acceptable appears to far outweigh any perceived need to accord its presiding officers independence.

The agencies' interest in efficiency is also reflected in the fact that the use of quantitative standards for case processing also increases to 24% of the case types and 91% of the caseload where presiding officers have other duties, compared with 38% and 14% where they do not. Similarly, formal review in the absence of appeal is utilized in 26% of the case types and 15% of the caseload, compared with 9% and 3% where presiding officers have no other duties.

The responses with regard to presiding officers with other duties indicate that in at least 33% of the case types (5) and 82% of the caseload (19085) assigned to them, presiding officers are selected based on their qualifications. The Veterans' Department, which processes some 16,000 cases per year, accounts for 68% of this caseload. The responses also indicate that many agencies may have interpreted the question to ask how the individuals

were selected for their primary responsibilities, rather than how they were selected to preside. Because in many if not most case types it appears that the presiding officers are principally occupied by their other duties, it is likely that, had the agencies focussed on the method by which existing employees are selected to preside, the number of presiding officers which the agencies reported as having been selected to preside based on their qualifications for that duty would be higher.

* * *

The foregoing constitutes an overview of the agency responses to the ACUS questionnaire. A more detailed analysis of the due process implications of the individual responses follows. That analysis examines the responses in more detail, focussing on the nature of the rights and obligations being adjudicated and the potential that the procedures employed may result in a less than fair hearing process contrasted with the need of the agencies to control the process and its substantive results.

That analysis of necessity takes as its reference points the provisions of the APA governing informal and formal adjudication. Therefore that provision sets forth the minimum procedures which may be employed. At the other end of the spectrum lie §§ 554, 556, and 557 of the APA. These sections of course state the minimum requirements for

formal adjudication, and thus provide a level of formality not likely to be exceeded by any of the case types under study. The analysis will focus on the extent to which existing procedures approach this latter standard and any significant respects in which it appears that consideration should be given to adopting the more some or all of formal procedures mandated by this standard.

This analysis takes up the case types by the five subject matter areas identified at page 4-5: enforcement; entitlements; economics; employer-employee relations; and health, safety and the environment. The justification for the inclusion of case types in one particular subject matter area rather than another is given with the discussion of that case type.

ENFORCEMENT CASE TYPES

Enforcement cases constitute the largest single annual caseload, 174,240, or about 50% of the total. These cases are divided into 13 separate case types administered by nine agencies.²⁵ Virtually all of these cases (174,200) are heard by presiding officers without other duties.²⁶ Almost all of these (172,400) are heard by the Executive Office of Immigration review and the Coast Guard.

Immigration, passport and nationality case types administered by the State Department, and the industrial security clearance case type administered by the Defense Department are discussed together because of the similarity in the individual interests at stake in them. This is followed by a discussion of the case types administered by the Coast Guard and the Food and Nutrition Service of the

²⁵These agencies are, in order of caseload:

1. Department of Justice, Executive Office of Immigration Review (152,400);
2. Transportation Department, U.S. Coast Guard (20,000);
3. Agriculture Department, Food and Nutrition Service (1,200);
4. Defense Department, Defense Legal Services Agency, Directorate for Industrial Security Clearance Review (650);
5. Labor Department, Mine Safety and Health Administration (20);
6. Treasury Department (18);
7. State Department (10);
8. Federal Deposit Insurance Corporation (3);
and
9. Environmental Protection Agency (unknown).

²⁶Only about 40 are heard by presiding officers who have other duties.

Agriculture Department. Both of these case types use presiding officers who are not lawyers. Finally, attention is given to a group of case types with a small caseload in which the presiding officers have other duties.

Immigration, Passport and Nationality, and Security Clearance Cases

Immigration, passport and nationality, and security clearance all involve fundamental human rights. All incorporate a substantial number of the procedural protections of §§ 556 and 557. Thus it is logical to discuss them together. Given the nature of the rights at issue and the procedures applicable to these proceedings, a question exists of whether there is any substantial reason for excluding them from the formal procedural strictures of the APA.

There are about 152,400 immigration cases each year, virtually all of which involve a hearing.²⁷ Immigration cases are akin to criminal proceedings in that they have to do with the status of aliens who are alleged to have violated the immigration laws. These proceedings decide whether an alien may be deported, prevented from departing, or excluded from entry into the United States.²⁸ If an

²⁷These are assigned to some 71 Immigration Judges who, as a result, each have an annual caseload of almost 2500.

²⁸The Supreme Court has long recognized that the interest of one whose application for entry into the United States is denied is less weighty than that of one resisting deportation and has generally accorded the latter greater

alien is in the custody of the District Director of Immigration, he or she has a right to have bond reviewed by an immigration judge. Clearly, these cases involve basic human rights and must be conducted with proper regard to fundamental concepts of due process.²⁹

A review of the procedures set out in 8 CFR Parts 3 (Executive Office for Immigration Review), 236 (Exclusion of Aliens), and 242 (Deportation Proceedings) reveals that most of the procedural safeguards embodied in §§ 554, 556, and 557 of the APA are also utilized in immigration cases.³⁰ Quality control of the immigration cases is exercised only through formal appeals. Moreover, the immigration judges have no other duties and are selected by a process which is similar to that used to select ALJs. That process requires

procedural rights. Landon v. Plasencia, 459 U.S. 21, 74 L.Ed 2d 21 (1982).

²⁹Landon v. Plasencia, *supra*, note 28; Sewak v. INS, 900 F.2d 667 (3rd Cir. 1990).

³⁰These include the right to the assistance of counsel (8 CFR §§ 236.2(a), 242.1(d), 242.10); notice (8 CFR §§ 236.2(a), 236.6(a), 242.1); a decision rendered by the presiding officer (8 CFR §§ 3.35, 236.5(a), 242.18); separation of the prosecutorial and decisional functions (8 USCA §§ 1226(b), 1252(b)); provision for disqualification of the presiding officer (8 CFR § 242.8(b)); provisions concerning the admission of evidence, and providing for cross-examination and the quantum of evidence necessary to support adverse orders (8 USCA § 1252(b)(4), 8 CFR §§ 236.2(a) and (b), 242.14(a), 242.16(a)); definition of the record (8 CFR §§ 236.2(e), 242.15); the right to a decision stating findings, conclusions, and an order (8 CFR § 242.18(a)); and the right to appeal adverse decisions (8 CFR §§ 3.36, 236.7, 242.21).

that candidates have 6.5 years of experience as a member of the bar, a knowledge of immigration law, an ability to conduct high-volume proceedings, and a knowledge of judicial practices and procedures. Selection is based on the candidate's Form 171, a personal interview, and reference checks. The immigration case types clearly appear to incorporate procedures and practices which emulate those typical of formal adjudication and in that way satisfy basic due process requirements.

Given these circumstances, there does not appear to be any obvious reason why immigration cases should not be made subject to the formal procedures mandated by §§ 556 and 557. Indeed, most of those procedures have already been adopted in the applicable statutes and regulations, and in the selection procedures for immigration judges. Congressional consideration of the adoption of those formal procedures may be appropriate.³¹

Passport denials and revocations, and loss of nationality proceedings, both of which are administered by the State Department, involve individual interests which perhaps cover a broader spectrum of importance than those at issue in immigration cases.³² In general, passports may be

³¹Cf. Marcello v. Bonds, 349 U.S. 302, 99 L.Ed. 1107 (1954).

³²While loss of the right to travel abroad by virtue of the denial of a passport is not so severe as the loss of the right to remain a resident of the United States, it is

denied if the applicant's foreign travel is restricted as a result of legal process, certain indebtedness to the U.S., or the applicant is underage, incompetent, a convicted drug trafficker, or likely to cause serious damage to U.S. security or foreign policy.³³ Loss of nationality can occur under certain circumstances when a naturalized citizen establishes a permanent residence abroad within five years of being naturalized.³⁴ State processes a total of about ten cases in both categories each year. Both of these case types utilize many of the procedural safeguards embodied in §§ 556 and 557 of the APA.³⁵

nonetheless a qualified right protected by the due process clause, at least to the extent that an individual is entitled to a post-revocation hearing. Haig v. Agee, 453 U.S. 280, 69 L.Ed 2d 640, 661-64 (1981). Citizenship is expressly protected by the fourteenth amendment.

³³22 CFR §§ 51.70, 51.71.

³⁴22 CFR § 50.40.

³⁵In passport cases, the respondent is entitled to counsel (22 CFR § 51.84), notice (22 CFR § 51.82), and the opportunity to submit evidence (including cross-examination) and argument (22 CFR § 51.85). Irrelevant and immaterial evidence is to be excluded (22 CFR § 51.86). The Department carries the burden of demonstrating that the passport was properly denied (22 CFR § 51.81).

In loss of nationality cases, the respondent is entitled to notice and to representation by counsel [22 CFR §§ 7.5(k), 7.6(a)]. The hearing, which is to exclude irrelevant, immaterial, and unduly repetitious evidence [22 CFR § 7.5(g)], affords the opportunity to submit evidence and cross-examine adverse witnesses [22 CFR § 7.6(b)]. Further, the Board may order a prehearing conference should it deem one advisable. The Board's decision, which is to be based on the record of the proceeding [22 CFR § 7.5(i)], must state the Board's findings and conclusions in writing [22 CFR § 7.9]. It constitutes the final action of the

Passport denials and revocations are heard initially by a hearing officer, who is either an employee of the passport office or a consular officer. The hearing officer makes findings of fact and submits a recommendation to the Administrator of the Bureau of Security and Consular Affairs.³⁶ The Assistant Secretary for Consular Affairs decides the matter, stating the reasons for an adverse decision, which may be appealed to the Board of Appellate Review.³⁷ In addition to hearing appeals in passport cases, the Board of Appellate Review also hears appeals in loss of nationality cases. In the latter cases, although the procedures contemplate a decision based on briefs, the respondent is entitled to a hearing before the Board, which renders the final agency decision.

The Board of Appellate Review consists of three members. The Chair of the Board is an attorney who is a member of the SES and who devotes full time to those duties. The other two members are attorneys, generally retired from the Legal Advisor's office, who are employed only as needed to consider cases before the Board. The only quality control mechanism in use with respect to the Board's work is

Department, subject to motions for reconsideration [22 CFR § 7.10].

³⁶22 CFR § 51.83.

³⁷22 CFR § 51.89. In passport cases, the Board's review is generally limited to the record on which the Assistant Secretary's decision was based. 22 CFR § 7.7.

performance appraisal, to which the Chair of the Board is subject.

The interests at stake in these proceedings differ from those in the immigration case types. An individual's interest in freedom to travel abroad probably does not rise to the same level as that of an individual who seeks to remain a resident of the U.S., while the government's interest in preventing travel abroad by certain individuals can be very important. The interest in remaining a U.S. citizen is very important, and specifically mentioned in the fourteenth amendment.

Although the procedures in use at State approach those mandated for formal proceedings under §§ 556 and 557 of the APA, State's reliance on performance appraisal for quality control purposes indicates that its procedures afford less protection to the individual rights at stake in them than do the immigration procedures.³⁸ The importance of the individual rights at stake in most of the grounds for denial or revocation of a passport may justify this diminished protection. For example, the existence of a judicial decree which would prevent an individual's foreign travel may well be a more a matter of fact than of opinion or conjecture and

³⁸While the small caseload at State would not fully occupy the time of presiding officers without other duties, State's use of retired attorneys on an as-needed basis could exacerbate this situation if the retired attorneys are substantially interested in retaining their part-time employment and hence overly solicitous of State's views.

its implementation through the denial of a passport more a ministerial act than matter of discretion. The individual's interest in preserving his or her right to travel might well be viewed as being more at stake in the judicial proceeding than in the administrative. Thus the adverse effect on the impartiality of the Board of Appellate Review of any informal quality control mechanisms, as well as any perceived need for them on the part of the State Department, would seem to be minimal.

There is an exception, however, which appears to require subjective judgement and involves important interests. That involves the denial of a passport on the ground that the individual's activities abroad may cause serious damage to national security or foreign policy. Although other activity may be involved, almost certainly activity which would prompt the government to take such action will include an individual's expression of his or her views.³⁹ Similarly, citizenship must be considered to rank very high in importance to the individual, perhaps approaching the importance of personal liberty. In both cases, an individual may well be deserving of a hearing before a truly impartial presiding officer.

As with the immigration cases, one must ask the question what purposes are served by adopting less than the

³⁹See e.g., Haig v. Agee, 69 L.Ed 2d at 661-64 (1981).

full measure of protection offered by §§ 556 and 557, particularly given the extent to which formal procedures already have been adopted. At State, the government's interest in efficiency may outweigh the interest of the individual in a more independent tribunal and greater procedural formality, at least in most of the passport cases. Procedural flexibility would be lost if formal APA procedures were applicable. State uses its three-member Board of Appellate Review as both an appellate tribunal, reviewing hearing records compiled by hearing officers and decisions made at the assistant secretary level based on those records, and as a hearing tribunal, compiling a record and issuing a decision based on it. In both instances the Board renders the agency's final action. Adoption of §§ 556 and 557 would require changes in this process. It may be that the nature of the individual and government interests in these proceedings, together with the fact that the latter interest to some extent may involve national security concerns, dictate that a process less formal than that of §§ 556 and 557 be adopted.

This is not to say that formal procedures have no place in cases where the national security or defense may be involved. Indeed, the executive has recognized that the sort of protection offered by §§ 556 and 557 has its place in the adjudication of the denial of security clearances for

Defense Department contractor personnel.⁴⁰ This case type is administered by the Directorate for Industrial Security Clearance Review (DISCR) of the Defense Legal Services Agency. DISCR holds about 650 hearings per year in which the Defense Industrial Security Office determines that it cannot affirmatively find that it is clearly consistent with the national interest to grant a security clearance to an individual employed by private industry.⁴¹

DISCR operates under the mandate of Executive Order 10865 and its work involves matters related to the conduct of military functions which, by virtue of § 554(a)(4) of the APA, may be exempt from that section and §§ 556 and 557. Nonetheless, those individuals whose security clearances are in jeopardy are provided with certain basic procedural rights. Given the devastating effect that the failure to grant a security clearance can have on an individual's career, it is appropriate that one facing that prospect

⁴⁰Cf. Greene v. McElroy, 360 U.S. 474, 3 L.Ed. 2d 1377 (1959). For a contrary point of view, see Jaksetic, "Security Clearance Determinations and Due Process," 12 Geo Mason L. Rev. 171 (1990).

⁴¹It may be correct that no one has a right to a security clearance. Thus an argument can be made that the refusal to grant such a clearance is not in the nature of civil penalty or an enforcement matter. However, the lack of a clearance is a severe handicap which can result in a substantial curtailment in earnings particularly to anyone pursuing a technical or scientific discipline. In view of this and the fact that security clearances appear to be widely available, the refusal to grant one is more in the nature of a penalty than the refusal to grant a privilege.

should be accorded procedural fairness. Indeed, Executive Order 10865 recognizes that "... it is a fundamental principle of our government to protect the interests of individuals against unreasonable or unwarranted encroachment ..." and that the provisions and procedures contained therein are necessary not only to protect classified defense information, but also to "... provide the maximum possible safeguards to protect ..." the interests of individuals.⁴²

Executive Order 10865 provides individuals protection by providing them with:

1. A written statement of the reasons why their clearance may be revoked (§ 3(1));
2. An opportunity to respond to that statement in writing (§ 3(2));
3. The right to the assistance of counsel (§ 3(5));
4. An opportunity to submit direct and rebuttal evidence (§§ 3(2) and (3)) and to cross-examine adverse witnesses, either orally or through written interrogatories, although this right may

⁴²Preamble, Executive Order 10865, February 20, 1960 (25 Fed. Reg. 1583). Moreover, the Defense Department has recognized the financial cost to one who lacks a security clearance by providing for the reimbursement of lost earnings when a clearance is granted as a result of the DISCR process. Department of Defense Directive 5220.6, Aug. 12, 1985 (Encl. 1, §§ 22-25).

be limited under certain circumstances (§ 3(6));
and

4. A written decision stating the deciding
official's findings on each of the allegations (§
3(7)).⁴³

In addition, Department of Defense Directive 5220.6 (Aug.
12, 1985) states that the presiding officer's functions are
to be exercised impartially, provides more detailed
procedures to implement the provisions of the Executive
Order, and provides for appeals from the presiding officer's
decision to an appeals board. The presiding officers are
grade 15 attorneys in the general merit schedule.

In addition to formal appeals, the quality control
mechanisms employed at DISCR include appraisal of the
performance of the hearing officers, a "point system" which
rewards the completion of cases based on type, the number of
witnesses, and whether travel was required, and supervisory
review of the hearing officer's decisions after issuance.

⁴³The grounds for refusing a security clearance, and
consequently the subject matter of these proceedings,
include financial irresponsibility, criminal or sexual
misconduct, mental or emotional illness, foreign
connections, subversive activity, alcohol or drug abuse, and
security violations. See § F.5. and Encl. 3 to DoD
Directive 5220.6, August 12, 1985.

All of these mechanisms are employed in addition to the right to appeal afforded aggrieved parties.⁴⁴

The critical elements involved in appraisal of hearing officers and the performance which is considered to be fully successful have been described by the Director of DISCR in a letter to the Congress as follows.⁴⁵

The first critical element requires the incumbent to "assure that proceedings are fair and impartial." Performance is fully successful when the Hearing Examiner maintains reasonable control and decorum in conducting proceedings, and makes timely rulings based on pertinent DoD policy and legal principles.

The second critical element requires the incumbent to "assure quality determinations". [Emphasis supplied in letter.] Performance of this critical element is fully successful when the Hearing Examiner's written decisions: utilizes prescribed format; applies pertinent DoD adjudication policies and legal principles; and provides the reader with a succinct statement of relevant and material findings of fact as well as conclusions setting forth the rationale for the determination.

The third critical element requires the incumbent to "assure timeliness and productivity". Performance

⁴⁴Given the plethora of informal, off-the-record control mechanisms, it is perhaps not surprising that in September, 1985, the Assistant General Counsel, Department of Defense, wrote to the Chairman of the DISCR Appeal Board requesting that he instruct Appeal Board members that they are not to substitute their judgement for that of the hearing officers, but rather are to affirm all decisions which are not arbitrary and capricious and which do not present an analysis of the evidence which is plainly erroneous.

⁴⁵May 29, 1990, letter to Hon. Don Edwards, Chair, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, and Hon. Gerry Sikorski, Chair, Subcommittee on Civil Service, Committee on Post Office and Civil Service, U.S. House of Representatives from Leon J. Schachter, Director, DISCR.

under this critical element is fully successful when the Hearing Examiner meets minimal numerical goals for completed decisions; schedules cases for hearing within 30 days of receipt for a date certain within 120 days; issues determinations in non-hearing cases based on a written record within 45 days from receipt; and issues decisions based on a hearing record within 30 days from receipt of the transcript; or obtains waivers when deadlines cannot be met.

The quality of a Hearing Examiner's finished determinations was and continues to be assessed by reviewing a selected number of decisions to determine whether they set forth the pertinent facts, applicable DoD policies, and the rationale for the conclusions reached in a succinct, readable manner. The quality of a Hearing Examiner's conduct of his or her proceedings was and continues to be assessed by reviewing selected transcripts. Other indicia of quality work include the type and number of errors identified on appeal by the DISCR Appeal Board.

The letter also indicates that "...the ratio of cases cleared to denied has no bearing on anyone's rating. The ... rating function must address how the person rated has performed the critical elements of his or her position."

The Director of DISCR indicated in a conversation with the author that, in the absence of contrary legislation, the performance appraisal system is required, but that care is taken to avoid rating hearing examiners on the results reached in their decisions. However, the critical elements emphasize the proper application of DoD policy and legal principles. It is difficult to understand how the results of a hearing examiner's decisions can be completely divorced from his or her performance appraisal so long as proper application of policy is a relevant inquiry. A hearing examiner's record on formal appeal of his or her decisions

is only included under the heading of "other indicia" of performance.

At the same time, Department of Defense Directive 5220.6 and the critical elements state the goal of insuring that DISCR proceedings are impartial. It is a premise of this study that according independence to presiding officers enhances their impartiality and hence the fairness and public acceptability of their proceedings. Consequently, the use of informal quality control mechanisms such as performance appraisal is taken as an indication that an agency has opted to maintain a high degree of control over the results reached in its proceedings at the expense of fairness and public acceptability. The DISCR performance appraisal system appears to fall into that category, a difficulty which might be ameliorated by considering the hearing officers' record on appeal as providing an indication of the efficiency with which a hearing examiner is implementing DoD policy.

The use of the informal quality control mechanisms may be benign in the hands of a wise and benevolent administrator. However, their very existence invites their use in such a way as to severely undercut the procedural protections nominally conferred by E.O. 10865.⁴⁶

⁴⁶The statements of Delbert Terrill, former DISCR Hearing Examiner, and the Honorable Robert Bamford, former DISCR Appeal Board Member, before the Subcommittee on Civil Service of the House Committee on Post Office and Civil

Administrators are of necessity results oriented. To ignore the potential of these tools to assist in achieving results that some higher authority may view desirable is to invite criticism and perhaps adverse personal and/or programmatic consequences. As a result, if the national defense dictates that such informal quality control mechanisms must be available, it would seem fairer to the individuals whose clearances are in question to make less glowing promises of procedural fairness. On the other hand, if sufficient experience has been obtained to permit the true delegation of authority to review security clearance denials to impartial presiding officers as represented in Executive Order 10865, then the informal mechanisms existing at DISCR ought to be eliminated or at least sharply curtailed. Indeed, in that circumstance there would appear to be no reason not to adopt the strictures of §§ 556 and 557 in these proceedings.⁴⁷

Service, October 19, 1989, assert that such has been the case at DISCR.

⁴⁷It is conceivable that circumstances may be presented in which a decision to deny a security clearance is appropriate, but may be difficult to support in the context of a hearing because of the nature of the sources of information or the information itself concerning the applicant. This situation can be accommodated by providing for the omission of a hearing in any case in which the agency head certifies in writing, subject to judicial review, that the holding of a hearing would not be consistent with the national security. In August 1989, the American Bar Association House of Delegates recommended that an APA hearing be afforded subject to such a limitation.

Coast Guard and Food and Nutrition Service Cases

Coast Guard and Food and Nutrition Service case types are discussed together because the officers who preside over them are not required to be legally trained, thus raising the question whether the interests being adjudicated are of such a nature as to demand particular technical, rather than legal skills, on the part of the presiding officer. The presiding officers in these cases have no other duties.

The Coast Guard processes about 20,000 civil penalty cases each year under a variety of statutes. These cases are heard by nine Coast Guard officers and one civilian employee who are headquartered in the various Coast Guard Districts. Like the immigration cases, this caseload demands that each presiding officer dispose of in excess of 2000 cases per year. Unlike the immigration cases, only 5 to 7% of these involve hearings. There are a number of statutes which are administered under this program,⁴⁸ and

⁴⁸These include the following statutes, violations of which frequently come before the presiding officers:

Act of August 18, 1894, 28 Stat. 362 (1894), Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1153 (1899), Bridge Act of 1906, 34 Stat. 85, General Bridge Act of 1946, 60 Stat. 849, and Amendment contained in Pub. L. No. 90-578 (1968), Pub. L. No. 97-322 (1982) and Pub. L. No. 97-449 (1983), 33 U.S.C. 495, 499 and 502

Federal Water Pollution Control Act, specifically the Amendments of 1972, Pub. L. No. 92-500 (1972) and subsequent amendments, 33 U.S.C. 1321

Ports and Waterways Safety Act, Pub. L. No. 92-340 (1972) and Port & Tanker Safety Act of 1978, Pub. L. No. 95-474

the violations of them which give rise to the penalty cases in general seem to be of a technical nature, involving such things as navigation, marine safety, and the discharge of pollutants.

Under the applicable rules,⁴⁹ the Coast Guard District Commanders investigate alleged violations and forward those for which they believe that a prima facie case exists to a Hearing Officer with their recommendations.⁵⁰ The Hearing Officers return those on which they disagree that a prima facie case has been shown with a statement of reasons. If the Hearing Officer concurs that a prima facie case exists, the respondent (referred to as "party" under the

(1978), 33 U.S.C. 1221-1236

Hazardous Materials Transportation Act, Pub. L. No. 93-633
(1975), 49 U.S.C. 1801-1812

International Navigational Rules Act of 1977, Pub. L. No.
95-75 (1977), 33 U.S.C. 1601-1608

Inland Navigation Rules Act of 1980, Pub. L. No. 96-591
(1980), 33 U.S.C. 2001-2073

Partial Revision of Title 46, U.S. Code, Shipping, Pub. L.
No. 98-89 (1983)

Maritime Safety Act of 1984, Pub. L. No. 98-498 (1984),
(amending sections of Title 46, U.S. Code, Shipping)

⁴⁹33 CFR §§ 1.07-1 - 1.07-85.

⁵⁰33 CFR § 1.07-10.

regulations) is notified and advised of the amount of the penalty proposed to be assessed and the procedures by which it may be contested.⁵¹ Essentially, those procedures afford respondents the right to:

1. Have a copy of all written evidence and inspect all physical evidence;
2. Be represented by counsel;
3. Demand a hearing or submit written evidence in lieu of a hearing;
4. Receive a written decision; and
5. Appeal an adverse decision.⁵²

Although a respondent has the right to demand a hearing, that right does not provide an unqualified right to confront the Coast Guard's case. Rather, a respondent has the right to "examine" the material in the case file.⁵³ In response to an inquiry, a Coast Guard representative stated that in most hearings, the Coast Guard personnel who initiated the case are not present, although presiding officers are generally favorably disposed to requests that they be present and available for cross-examination.

The regulations make specific provision for the separation of the hearing officers from any prosecutorial

⁵¹33 CFR § 1.07-20.

⁵²33 CFR §§ 1.07-25, 1.07-30, 1.07-40, 1.07-50, 1.07-55, 1.07-65, and 1.07-70.

⁵³33 CFR §1.07-55(b).

role,⁵⁴ although they do not prohibit ex parte communications. And the separation of functions provision may be weakened somewhat by the fact that the Hearing Officers are subject to performance appraisal by the District in which they work.⁵⁵ According to the response, these officers are usually evaluated by the Chiefs of Staff of their particular District "... who consider the quality and quantity of work production, the accuracy of decisions, and the professionalism of the Hearing Officers." One would assume that most of the cases referred to each Hearing Officer would come from the District in which he or she works. If this is so, appraisal of the Hearing Officer's performance by that District could substantially erode the independence afforded by the regulations. Nonetheless, given the high caseload, the Coast Guard has an undeniable interest in the efficiency of the process. It appears that this interest is vindicated through the performance appraisal process only; the Coast Guard indicates that quantitative case processing goals are not separately implemented.

The technical nature of the subject matter of these cases coupled with the fact that only a small percentage of them go to hearing indicates that they represent an

⁵⁴33 CFR § 1.07-15.

⁵⁵Appeals and performance appraisal are the only quality control mechanisms employed by the Coast Guard.

appropriate departure from the strictures of §§ 556 and 557. Hearings are relatively rare; thus hearing rights are not of paramount importance. The skills demanded of the presiding officer are more likely to be of a technical rather than a legal nature. The ability to quickly evaluate the substance of an alleged violation and the defense to it on the basis of written submissions seems to be key. In this circumstance, Coast Guard officers who have first hand experience with the subject matter presumably would be more effective than lawyers who do not. Thus, it may well be that it is best to provide for competent technical presiding officers and leave any legal problems to be sorted out in the appeal process. Moreover, the nature of the interests of respondents which are at stake, when compared to the government's interest in the efficient processing of a large number of complaints asserting violations of technical requirements, probably dictates the conclusion that the Coast Guard's existing procedures satisfy due process concerns.

The Food and Nutrition Service (FNS) of the Department of Agriculture processes about 1200 cases per year involving the imposition of sanctions on retail and wholesale grocers for violations of the food stamp program.⁵⁶ These cases

⁵⁶FNS also administer another case type which is heard by the same presiding officers under the same rules. It is discussed briefly under Entitlements Case Types at pp. 77-78 infra.

concern allegations such as the acceptance of food stamps for non-food items. They are heard by review officers who are designated by the Administrator, FNS. These officers are classified at grade 14 on the general merit schedule, series 930, for which legal training is not required. Given the nature of the allegations, it would appear that lawyers would be equally if not more adept at handling the substance of these cases as a technically trained individual.

The process set out in the regulations governing this program appears to meet little more than the minimum requirements set forth in § 555 of the APA.⁵⁷ The "hearing" afforded a respondent appears to be more in the nature of an ex parte meeting with the review officer, since no mention is made of the presence of representatives of the regional office proposing the sanction.⁵⁸ The review officer is to base his or her decision on the information furnished by the regional office, information furnished by the respondent, and any information developed by the review officer independently. The review officer is to seek the advice of the general counsel on difficult legal questions. The review officer's decision is final and an appeal may be

⁵⁷7 CFR Part 279.

⁵⁸See 7 CFR § 279.7(c).

taken from it by filing a complaint in a U.S. District Court or a state court, where a trial de novo will be held.⁵⁹

These procedures do not provide for the independence of the review officers or for the definition and limitation of the record on which their decisions are based. The fact that the review officers hold general merit appointments, and are subject to performance appraisal and quantitative and qualitative standards indicates that the FNS is in a position to maintain tight control over the quality of their work behind the scenes.

Moreover this case type seems to present the opposite situation of that presented by the Coast Guard's case type. In the latter situation, there appears to be good reason to leave the initial decision to presiding officers with technical rather than legal qualifications and to allow any legal problems to be dealt with through the appeal process. Here, in contrast, there does not appear to be sufficient technical content to the subject matter to justify following that approach. While whatever unfairness to respondents which is created by the existing procedural scheme may well be offset by the availability of a judicial trial de novo, absent the need for technically trained presiding officers and a subject matter better suited to informal than formal procedures, the question remains what real advantage is to

⁵⁹7 CFR § 279.10.

be gained by employing an administrative procedure which depends for its fairness on the existence of a follow-on judicial procedure. In light of the current scarcity of judicial resources, it would seem advisable to place more emphasis on employing administrative procedures designed to decide the matter fairly in the first instance without the need for a judicial trial.⁶⁰ This program appears to present a good case for the adoption of the formal hearing requirements of the APA.⁶¹

Case Types Where the Presiding Officers Have Other Duties

In addition to the above, there are five case types which employ presiding officers who have other duties. These account for only about 40 cases per year. These are

⁶⁰The fourth circuit, sitting en banc, has characterized the rights at stake in these proceedings as property rights subject to constitutional protection and noted that the lack of adequate administrative procedures requires that full procedural due process be afforded in the district court. Cross v. United States, 512 F.2d 1212, 1217 (4th Cir. 1975). The seventh circuit has viewed the availability of a trial de novo in the district court as mooted any claim that the administrative process was less than adequate. McGlory v. United States, 763 F.2d 309, 312 (7th Cir. 1985).

⁶¹Indeed, Congress has taken that step with respect to a similar program. The FNS reported that its State Food Stamp Appeals Board had 81 proceedings involving sanctions against State agencies for failure to meet error rate goals to complete. For FY 1986 and subsequent years, this program was transferred to an ALJ by the Hunger Prevention Act of 1988, P.L. 100-435. In view of the fact that the Board's procedures [7 CFR §§ 279.5(b), 279.6(b), 279.7(b), 279.8] involved only an ex parte hearing and relied on a subsequent judicial trial de novo for procedural fairness, the transfer seems appropriate.

conducted by the Environmental Protection Agency, the Federal Deposit Insurance Corporation (FDIC), the Mine Safety and Health Administration of the Labor Department, and the Treasury Department.⁶²

The FDIC proceedings involve two case types, one of which is of interest.⁶³ This case type involves an action brought to remove or prohibit a director or officer from participating in the conduct of the affairs of an insured

⁶²The case type reported by EPA concerning the assessment of civil penalties of less than \$25,000 under § 309(g) of the Clean Water Act may become one of particular interest. Under that program, presiding officers appointed by the EPA's Regional Administrators conduct hearings and issue recommendations to the Regional Administrator who makes the final agency decision. EPA reported that it is in the process of developing regulations for this program.

A second case type concerns the revocation of the approval of a miner safety training instructor under the Federal Mine Safety and Health Act conducted by Mine Safety and Health Administration of the Department of Labor and a third the denial or revocation of a license for a firearms or ammunition manufacturer or importer under the Gun Control Act conducted by the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury. Both types carry an annual caseload of about 20. The procedural regulations governing them appear to meet only the minimum requirements of § 555 of the APA, although Treasury reports that the Gun Control Act proceedings may involve a trial. An aggrieved applicant in those proceedings may appeal an adverse final decision to a U.S. District Court for a trial de novo.

⁶³The other FDIC case type involves the assessment of civil monetary penalties imposed under 12 USC § 1817 against insured State nonmember banks for the submission of delinquent Reports of Condition and Income. About 10 of these proceedings were conducted in the 1983-89 time period. In its response to the ACUS questionnaire, FDIC indicated that rules for this case type are under consideration. FDIC also indicated that these proceedings are generally conducted by the Regional Counsel of a Region. This case type appears to be a relatively unexceptional civil penalty procedure, and is not further discussed.

State nonmember bank on the grounds that that individual has been charged or convicted of a crime involving dishonesty or breach of trust punishable by imprisonment for a period exceeding one year.⁶⁴ This case type involves the potential deprivation of personal freedom in that it could prevent an individual from pursuing a particular occupation. Needless to say, this could have a substantial effect on the individual's earning capacity. About 14 of these proceedings were held in the 1980-89 time period.

This case type clearly involves the kind of subject matter for which the traditional procedural protections embodied in §§ 556 and 557 of the APA may be appropriate. FDIC indicates that the presiding officers in these proceedings are typically retired ALJs or agency attorneys. The procedures employed provide respondents the right to appear by counsel and to submit factual and legal arguments.⁶⁵ The presiding officer has the discretion to permit witnesses to testify on behalf of a party, and, if witnesses are presented, they must be made available for cross-examination.⁶⁶ Following the hearing, the respondent has five days in which to submit additional material for the

⁶⁴12 USC § 1818(g). The FDIC must find that the continued service of such an individual may pose a threat to the bank's depositors or threaten to impair public confidence in the bank.

⁶⁵12 CFR §§ 308.08, 308.107(b)(2).

⁶⁶12 CFR § 308.107(b)(5).

record.⁶⁷ Presumably one could submit proposed findings and conclusions for the presiding officer's consideration. Ten days following any such submission, the presiding officer is to forward recommendations to the Board of Directors of the FDIC, together with the record of the proceeding.⁶⁸

In FDIC v. Mallen, 486 U.S. 230, 100 L. Ed.2d 265 (1988), the Supreme Court recognized that the right to continued employment is protected by the Fifth Amendment and entitled to the protection of due process. It found that the process afforded a bank officer suspended by the FDIC upon indictment was adequate. Specifically, the Court addressed the question whether the post-suspension hearing provided by the regulations provided adequate process. In light of the FDIC's manifest interest in preserving the integrity of the banking system, the Court concluded that it did.⁶⁹ The Court stopped short of holding that due process invalidates the provision that oral testimony may only be presented in the presiding officer's discretion. In this case, Mallen had brought his suspension into the district court before his request to submit such testimony was ruled

⁶⁷12 CFR § 308.107(b)(7).

⁶⁸12 CFR § 308.107(b)(8) and (b)(9).

⁶⁹The FDIC must hold a hearing within 30 days of a request and issue a decision within 60 days following the hearing. 12 USCA § 1818(g)(3).

upon by the ALJ, so that a specific, factual controversy on this point was not presented.

In any event, it is clear that these FDIC cases demand that respondents be afforded as much of the rights accorded by §§ 556 and 557 as practicable, consistent with the FDIC obligation to preserve the integrity of the banking system. That obligation may well dictate that less than all of the formal APA procedures be utilized. However, referral of these cases to a sitting ALJ (in another agency, if necessary) would appear to be a relatively easy and inexpensive way in which to ensure that a respondent's rights are not unduly trampled in an effort to care for the integrity of the banking system.

Observations and Conclusions - Enforcement Case Types

Because immigration cases account for over 87% of the caseload in this category, any statistical generalization of the enforcement caseload will be so strongly influenced that it will be of limited value. Nonetheless, it is interesting that the four immigration case types are the only ones which do not employ informal quality control mechanisms.⁷⁰ All nine other case types employ performance appraisal and five others employ informal review of decisions in addition to

⁷⁰These case types rely solely on formal appeals for quality control purposes. In addition to the immigration case types, appeals are also employed with performance appraisal and informal review of decisions in one case type and with performance appraisal alone in two case types.

performance appraisal. Thus there is a strong tendency to rely on informal quality control methods in enforcement case types. The limited review of the procedures in effect and interests at stake in these case types indicates that this reliance may be questionable at DISCR and the Food and Nutrition Service.

The enforcement category reveals a subgroup of case types (immigration, passport and nationality, and security clearance) which, because of the nature of the individual and government interests involved and the extent to which formal procedures are already in existence, might be considered for inclusion within the formal adjudicatory provisions of the APA. It also contains another subgroup (Coast Guard and Food and Nutrition Service) in which the presiding officers are not legally trained. This subgroup provides an insight into differing ways to satisfy due process requirements pertaining to adjudication.

Within the first subgroup, immigration and security clearance case types appear to be candidates for inclusion within the formal adjudication provisions of the APA. Specifically, there does not appear to be any substantial reason to continue the long-established practice of excluding immigration cases from the provisions of §§ 554, 556, and 557. Because it appears that most of the formal procedures of the APA are already in place, the principal effect of such a change would appear to be the conversion of

the existing immigration judges to administrative law judges. While the survey produced no indications of abuse that would be remedied by adoption of those provisions, this step represents a continuation of the trend toward the implementation of the formal provisions of the APA represented in recent years by the establishment of the Executive Office for Immigration Review. The nature of the individual rights involved in these cases amply justifies this trend.

In contrast to immigration, there are indications that the existence of informal quality control mechanisms at DISCR could substantially erode the procedural rights accorded security clearance applicants by Executive Order 10865. If these informal quality control mechanisms were eliminated, there would appear to be little reason not to apply the formal adjudication provisions of the APA. Bringing these proceedings within the scope of §§ 556 and 557 would guarantee these procedural rights and carry out the purpose of the Executive Order, which states that it is "...a fundamental principle of our government to protect the interests of individuals against unreasonable or unwarranted encroachment...." Of course a decision to adopt the formal provisions of the APA requires a determination that the interests of the government in assuring that defense contractors employ trustworthy individuals would not be unduly compromised. If that interest would be unduly

compromised, then fairness dictates that less glowing promises of an independent and impartial tribunal be made.

Passport and loss of nationality proceedings conducted by the State Department present a less clear picture. The fact that there are only about ten such cases each year is evidence that the programs are administered in such a way as to avoid trampling on individual rights. The individual interests involved present a broader spectrum than those involved in immigration cases, and there may be national security considerations involved. Despite the fact that State has adopted many of the procedures mandated by §§ 556 and 557, bringing these proceedings formally under their mandate would demand fundamental changes in the decision making structure embodied in the Board of Appellate Review. On the basis of this limited review, there does not appear to be a strong argument for the adoption of new or different procedures in order to satisfy due process concerns.

The second subgroup consists of two case types in which the presiding officers are not legally trained. The first of these, administered by the Coast Guard, involves civil penalties for violation of technical requirements under a number of statutes. The procedures followed in these cases seem appropriate to their unique demands. In particular, the use of Coast Guard officers who, in contrast to lawyers, presumably have a better knowledge of the technical substance of the complaints presented to them appears to be

appropriate. Although the Coast Guard does appraise the performance of its presiding officers, the nature of the private interests at stake, the fact that only a small percentage of these cases require a hearing, and the obvious governmental interest in the efficient processing of a large caseload combine to suggest that the Coast Guard's procedures meet due process standards. In these circumstances, it appears best to provide for a technically competent decision maker and leave any legal errors to be sorted out in the appeal process.

The second case type in this subgroup consists of Food and Nutrition Service civil penalty cases involving the food stamp program. This case type appears to satisfy no more than the minimum requirements of § 555 of the APA and presents a strong case for the adoption of the APA's formal adjudication procedures. The Fourth and Seventh Circuit Courts of Appeal have viewed the existence of a trial de novo in U.S. District Court as essential to the protection of the private interests involved. Particularly given the scarcity of judicial resources, there appears to be no substantial reason why due process should not be accorded the respondents in these cases at the administrative agency, thus relieving the burden on the judiciary.

ENTITLEMENTS CASE TYPES

Entitlements cases have the second largest caseload. They account for about 128,500 cases per year, or about 36% of the total. This caseload is divided among 13 case types administered by five agencies.⁷¹ Ninety-eight percent of these cases (about 126,000) are associated with five case types administered by two Departments: Veterans' Affairs (VA) and Health and Human Services (H&HS). The H&HS case types concern health benefits. A similar case type administered by the Office of Civilian Health and Medical Program for the Uniformed Services is also included in the H&HS discussion. The Office of Workers' Compensation Programs of the Department of Labor utilizes procedures which are somewhat similar to those in place at VA and is included with the discussion of the latter's case types. The remaining six case types account for a caseload of about 435 divided among five miscellaneous case types at H&HS and one at the Food and Nutrition Service of Agriculture.

⁷¹These are the Food and Nutrition Service of the Department of Agriculture, the Department of Defense's Civilian Health and Medical Program of the Uniformed Services, the Health and Human Services Department, the Labor Department, and the Veterans' Affairs Department.

H&HS - Medicare Part B Claims⁷²

Medicare Part B provides insurance to the elderly for expenses incurred for physicians' and outpatient medical services. Although the insurance coverage is funded by the government, H&HS employs private carriers to administer it. Thus, these carriers are responsible for processing claims which are paid by the government. The carriers are reimbursed by the government for the cost of administering the program.

Because the Social Security Act provides for an opportunity for a hearing on disputed claims if the amount in controversy is \$500 or more, the carriers employ hearing officers.⁷³ H&HS reported that almost 68,000 of these cases

⁷²These claims comprise virtually all of the caseload concerned with health benefits. However, they constitute only one of three different case types dealing with health benefits. One case type concerns some eight different kinds of hearings under different provisions of the H&HS regulations held by the Health Care Financing Administration. This case type accounts for a caseload of only about 55 per year.

Additionally, H&HS' Provider Reimbursement Review Board, established by Congress to hear appeals from providers of services to Medicare beneficiaries, hears about 152 cases per year. Further, there are separate provisions governing hearings on certain disputes concerning HMOs. The caseload for the latter has been less than one per year.

Given the small caseload for these claims, one must wonder whether some efficiencies could be realized by simplifying and streamlining the hearing process under one agency and one set of rules.

⁷³42 U.S.C. 1395ff(a), 1395u(b)(3)(C).

were handled by 185 hearing officers in fiscal year 1988, and that in excess of 50,000 required a hearing.⁷⁴

H&HS reports that the hearing officers are either independent contractors retained by the carriers to hold hearings as needed or employees of the carriers who may or

⁷⁴The rules governing these hearings are set out in 42 CFR Part 405, Subpart H. They incorporate a number of the procedural safeguards found in §§ 556 and 557. Thus, claimants are entitled to counsel (42 CFR § 405.870), to proper notice (42 CFR § 405.826), to an opportunity to present evidence and to examine witnesses (42 CFR § 405.830), and to seek to disqualify the hearing officer (42 CFR § 405.824). The record on which the hearing officer is to base his decision is discussed but not clearly defined in 42 CFR §§ 405.833 and 405.834. The hearing officer's decision is final and binding on the parties. 42 CFR § 405.835.

A somewhat similar program is administered by the Office of Civilian Health and Medical Program for the Uniformed Services of the Department of Defense. That case type employs 11 presiding officers who are selected through a firm fixed-price negotiated procurement using source selection process. These presiding officers presently are required to be attorneys. They conduct about 180 nonadversary hearings each year concerning the denial of medical benefits and medical provider certifications. These hearings are conducted pursuant to DOD Regulation 6010.8-R which provides many of the safeguards contained in §§ 556 and 557. These include the rights to: counsel; adequate notice; seek recusal of the presiding officer; inspect the OCHAMPUS file and conduct discovery (recognizing that DOD does not have subpoena authority); introduce oral and documentary evidence which is relevant and not unduly repetitious; examine and impeach witnesses; and present oral argument. The burden of proof is on the claimant. The presiding officer renders a recommended decision stating reasons. The final decision is rendered by the Director, OCHAMPUS, or the Assistant Secretary of Defense (Health Affairs). Appeals are not permitted and performance is not appraised, although one would assume that if a contractor's performance is not satisfactory to OCHAMPUS, the contract will not be renewed. The most apparent difference between this case type and the Medicare Part B Claims is that only the hearing function, not the entire claims administration process, has been contracted out.

may not have other duties within the carrier's organization. Apparently, these hearing officers are lawyers or other qualified individuals who have the ability to conduct formal hearings, a general understanding of medical matters, and a thorough knowledge of the Medicare program. Their work product is subject to sampling to check quality.

This system withstood a constitutional challenge in Schweiker v. McClure.⁷⁵ There, claimants' alleged, among other things, that this system deprived them of their right to due process on the grounds that:

First, because the hearing officers are employees of the carriers, they suffer from an institutional bias; and

Second, the system constitutes an unconstitutional delegation of final decisional power to the carriers, thus depriving claimants of their right to a hearing before the Secretary.

Claimants relied on Matthews v. Eldridge⁷⁶ for this last argument, asserting that their interests were important, that the cost of additional procedures to protect those interests was not unreasonable, and that there was a high risk that the existing system for handling claims would

⁷⁵456 U.S. 188 at 199, 72 L Ed 2d 1 at 10 (1982).

⁷⁶424 U.S. 319, 47 L Ed 2d 18 (1976).

erroneously injure those interests. Claimants prevailed in the District Court.⁷⁷

The Supreme Court reversed largely on the basis that the District Court's factual assumptions were in error. The Court reaffirmed that "...due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."⁷⁸ It noted that the hearing officers are presumed to be unbiased unless bias is affirmatively shown.⁷⁹ Further, focussing solely on the question of the risk of erroneous injury to claimants' interests, the Court held that the District Court had misapplied Matthews v. Eldridge.⁸⁰

Subsequent to this decision, Public Law 99-509 provided for an appeal to an ALJ in cases where the amount in

⁷⁷McClure v. Harris, 503 F. Supp. 409 (N.D. CA. 1980).

⁷⁸456 U.S. at 195, 72 L.Ed. 2d at 8.

⁷⁹In this case, the District Court had presumed bias as a result of the hearing officers' relationship with the carrier. However, the Supreme Court noted that no bias had been shown with respect to the carrier which could be imputed to the hearing officers. In fact, the carrier pays all claims from federal funds, so that it has no financial reason to be parsimonious. 456 U.S. at 195-97, 72 L.Ed. 2d at 8-9.

⁸⁰The Court noted that the District Court's assumption that there were no qualifications stated for the role of hearing officer was in error. It pointed to the "Medicare Part B Carriers Manual" as establishing the necessary qualifications. It thus concluded that the risk of erroneous injury to claimants' interests was acceptably low. 456 U.S. at 198-200, 72 L.Ed. 2d at 9-11.

controversy is \$500 or more.⁸¹ In view of the fact that the relief ordered in the District Court was such an appeal, it appears that claimants' arguments have been more effective in the halls of Congress than in the judiciary. Any due process objections to this system which may have somehow remained following Schweiker v. McClure obviously have been substantially answered by this legislation.

Veterans' Benefits

VA cases are perhaps unique in that they are not based on the adversary model of dispute resolution.⁸² There are two case types administered by VA. The first involves

⁸¹It also provides for a judicial appeal where the amount in controversy is \$1000 or more. See Title IX, § 9341(b).

⁸²The third largest caseload in this category, some 2144 cases per year processed by the Office of Workers' Compensation Programs of the Department of Labor, is similar in that the claimant is afforded an ex parte hearing (20 CFR § 10.135). The employing agency has no right to participate beyond commenting on the record after it is compiled, although the claimant may ask for testimony from the agency representative (20 CFR §§ 10.135 and 10.140). The presiding officer is enjoined to admit all relevant evidence as well as any which he or she determines to be "necessary or useful" and to assist the claimant in supporting the claim (20 CFR § 10.133(a)). The claimant has the right to submit oral and documentary evidence (20 CFR § 10.133(a)), to counsel (20 CFR §§ 10.142 and 10.143), and to a written decision (20 CFR § 10.136). A person may appeal an adverse decision (20 CFR Part 501). Additionally, the Department of Labor reports that the immediate supervisor of each presiding officer "reviews and finalizes every decision before it is issued," and that both qualitative and quantitative quality control mechanisms are in place. Thus, despite the apparent bias of the regulations in favor of the claimant, tight control is maintained over the results of the hearing process.

hearings on claims conducted at the regional office level, and the second involves appeals of those decisions to the Board of Veterans' Appeals (BVA). The BVA may conduct a hearing in connection with the appeal and renders the final agency decision. While both case types are based on the same model, there are some interesting differences in the procedures which govern them. The case type involving proceedings at the regional office level is discussed first. The policy governing it is stated in Title 38 CFR as follows:

§ 3.103 Due process -- procedural and appellate rights with regard to disability and death benefits and related relief.

(a) Statement of policy. Proceedings before the Department of Veterans Affairs are ex parte in nature. It is the obligation of the Department of Veterans Affairs to assist a claimant in developing the facts pertinent to his or her claim and to render a decision which grants him or her every benefit that can be supported in law while protecting the interests of the Government. This principle and the other provisions of this section apply to all claims for benefits and relief and decisions thereon within the purview of this part.⁸³

⁸³Part 3 covers pension, compensation, and dependency and indemnity compensation (subpart A) and burial benefits (subpart B).

The policy stated in subsection (a) was at least partially codified by the Veterans Judicial Review Act (Pub. L. 100-687, 102 Stat. 4105), by the enactment of 38 U.S.C. § 3007 which provides that the Administrator is to assist the claimant in developing the facts pertinent to a claim and that any doubt regarding a claimant's entitlement to a benefit is to be resolved in the claimant's favor.

Under 38 CFR § 3.102, a "...claimant [must] submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded." Reasonable doubts are to be resolved in the claimant's favor. Section 3.103(b) provides that any evidence in any form which is offered by a claimant is to be accepted into the record. Section 3.103(c) provides that a claimant is entitled to a hearing at any time on any issue. In addition to a site for the hearing, VA will provide VA "...personnel who have original determinative authority of such issues to be responsible for the preparation of the transcript...." VA's response to the questionnaire indicates that these personnel, who will not have participated in the proposed action or decision which is the subject of the hearing, will conduct the hearing.

The VA employee presiding at the hearing is to assist the claimant in developing facts which may support the claim by "...explain[ing] fully the issues and ... suggest[ing] the submission of evidence which the claimant may have overlooked...." The presiding employee is to frame any questions to the claimant or witnesses in such a way as to "...explore fully the basis for claimed entitlement rather than with an intent to refute evidence and to discredit testimony." Section 3.103(e) provides for a written decision which states the reasons underlying it, and advises of the right to request a hearing or appeal. Moreover, §

3.156 appears to provide an almost unlimited right to seek reconsideration of an adverse decision or reopen a denied claim based on new and material evidence.

The policy stated in 38 CFR § 3.103(a), quoted above, is also applicable to the second case type, proceedings before the Board of Veterans Appeals (BVA). See 38 CFR § 19.101(c). However, the rules governing proceedings before the BVA are somewhat more stringent than those applicable to hearings at the regional office level. Under 38 CFR § 19.137, the BVA apparently may dismiss an appeal if it does not adequately allege an error of fact or law. The claimant is entitled to an ex parte, nonadversary hearing to present evidence and/or argument, and is entitled to question, but not cross-examine, witnesses. However, rather than permitting any evidence which the claimant wishes to put forward, the rule restricts the hearing to "reasonable bounds of relevancy and materiality." The representative of a claimant who does not wish to appear at a hearing in Washington may record oral argument for consideration by the BVA thus avoiding the need to be physically present before the BVA. See 38 CFR § 19.157.

The BVA is divided into three-member hearing panels which conduct the hearing and, in most cases, render the decision following the hearing. These Panels are generally comprised of two lawyers and one medical member. Thus they represent the importation of technical decisionmakers into

the decisional process while, in contrast to the situation presented by the Coast Guard's civil penalty provisions,⁸⁴ maintaining decisional control in the legally trained decisionmakers.

Hearings may be held before a panel of the BVA in Washington, or, to the extent that schedules permit, before a "travelling" panel during a regularly scheduled visit at a VA facility. They may also be held before "appropriate personnel" of the VA office nearest the claimant's residence. In the last case, these personnel act as a "hearing agency" for the BVA which presumably will render the decision. Moreover, claims which are heard by a travelling panel and which concern radiation exposure, agent orange, or asbestosis are decided by BVA members specializing in those issues. See 38 CFR §§ 19.110(b), 19.160; cf. 38 CFR § 19.161. Decisions are to be based on the entire record, are to state findings and conclusions on all material issues, and are to contain an appropriate order. They are to be mailed to the claimant and his or her representative. See 38 USC § 4004(a), (d), and (e). Unanimous decisions of a panel of the BVA constitute the final decision of the VA. Decisions of a majority of a panel of the BVA are also final unless the Chairman of the BVA directs reconsideration by an expanded panel. The

⁸⁴See pp. 43-47, supra.

majority decision of the expanded panel is final. See 38 USC § 4003.⁸⁵

BVA members are required to disqualify themselves in any case in which they may have participated or had supervisory responsibility before joining the BVA and in other instances in which an appearance of bias may exist. See 38 CFR § 19.183. In contrast, 38 USC § 4001(e) authorizes BVA members to receive performance incentives by reason of service on the BVA if the Chairman, after taking into account the quality of the member's performance, determines that an award should be made.

While §§ 3.103(d) and 19.150 allow a claimant to be represented at every stage of the claims process, historically that right was limited to representation by veterans' service organizations.⁸⁶ Thus VA cases were

⁸⁵This provision was amended by the Veterans Judicial Review Act (see note 83, supra) so as to eliminate the Chairman's apparent power to prevent a majority decision of an expanded panel from becoming final. 38 CFR § 19.181 (September 1, 1989). This section formerly specified that the Chairman must concur in order for the non-unanimous decision of an expanded panel to become final. While this section specified that the Chairman casts the deciding vote in the event that the expanded panel is evenly divided, it was silent as to the course of action to be followed if the Chairman did not agree with the majority of the expanded panel. Presumably the Chairman, by withholding concurrence, could have prevented that decision from becoming final.

⁸⁶Section 3.103(d) provides that the claimant is entitled to a representative in every stage of the prosecution of a claim. However, a Civil War era statute had limited attorneys fees in veterans' cases to \$10. Act of July 14, 1862, §§ 6-7, 12 Stat. 566, 568; Act of July 4, 1864, §§ 12-13, 13 Stat. 387, 389. Section 104(a) (38 USC §

unique in that they effectively discouraged representation of claimants by attorneys. VA cases were also unique in that judicial review of the decisions of the BVA was not permitted.⁸⁷

In summary, the process by which VA affords veterans an opportunity to challenge adverse benefits determinations is characterized by the following attributes.

1. At the regional office, or level at which an initial benefits decision is rendered:

a. An ex parte hearing

3404(c)) of the Veterans Judicial Review Act (VJRA) modified this limitation by permitting reasonable fees to be charged to reopen or reconsider a claim, but left the limitation in place for the initial processing of a claim. A discussion of these fairly complex provisions of VJRA is contained in Stichman, The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings, 41 Admin. L. Rev. 365, 383-391 (1989).

A similar provision which requires representatives of veterans' service organizations and other representatives to certify that they will not charge a claimant a fee in connection with a claim was unchanged by the VJRA. Id. Moreover, the VJRA requires VA, when scheduling hearings before a traveling section of the BVA, to do so in the order in which hearing requests are received. This provision overrides a VA practice of allocating a set number of hearing slots to a veterans' service organization and allowing it to designate which of its clients would receive a hearing. Id. at 395.

⁸⁷38 U.S.C. § 211(a). The seventh circuit, sitting en banc, discussed the scope of this provision in depth and concluded that it did not bar challenges to the constitutionality of VA procedures and remanded a veteran's complaint concerning those procedures to the District Court. Marozsan v. U.S., 872 F.2d 1469 (7th Cir. 1988). Judges Easterbrook, Coffey, and Manion, dissenting, asserted that, in reaching this result, the seventh circuit stands alone. There do not appear to have been any decisions passing on the constitutionality of VA procedures.

i. at any time on any issue
ii. conducted by a presiding officer
who is charged with fully developing facts which may support
the claim and

iii. who has had no prior association
with the claim in question;

b. Essentially no limits on the evidence
which may be introduced by the claimant;

c. An evidentiary standard which requires a
claimant to "justify a belief in a fair and impartial mind
that the claim is well grounded" and requires that any
reasonable doubt be resolved in the claimant's favor;

d. A written decision stating reasons;

e. A virtually unlimited opportunity to
seek reconsideration of or reopen an adverse decision based
on new and material evidence;

f. A limitation on attorneys' fees which
greatly inhibits a claimant's ability to be represented by
counsel; and

g. The right to appeal an adverse decision
to the BVA.

2. At the BVA the claimant is faced with
essentially the same procedures with the following
exceptions:

a. The possibility that the BVA may dismiss an appeal that does not adequately allege an error of fact or law;

b. A standard which limits evidence to that which is reasonably relevant and material;

c. The right to question, but not cross examine, witnesses;

d. A hearing before a panel of three BVA members (or before appropriate personnel of the VA office nearest the claimant's residence) who

i. In many but not all cases will render the final agency decision on the claim,

ii. May not have had prior involvement with the claim before joining the BVA, but

iii. Who are eligible for awards based on their performance as BVA members; and

e. No right to appeal an adverse agency decision to the courts.

Thus VA proceedings are based on an inquisitorial model in which the presiding officer is given specific responsibility to assist in the development of the claim and most of the usual procedural safeguards embodied in §§ 556 and 557 of the APA are omitted. The regulations do not guarantee that the presiding officer will render the decision, do not precisely define the record for decision, and greatly impair the right to counsel. Moreover, in the

interest of making the claimant's task easier, they provide extremely liberal standards governing admissibility of evidence and the standard which must be met to successfully prove a claim. The fact that the proceedings are ex parte and inquisitorial makes cross examination irrelevant. The inhibition on the right to counsel, coupled with the prohibition of appeals from VA determinations, seems to illustrate a conscious attempt to "dejudicialize" VA proceedings which contrasts sharply with the APA and the Supreme Court's holdings which tend to have the opposite effect insofar as the termination of welfare benefits is concerned.⁸⁸ Indeed, the practical and effective limitation on the right to counsel arguably may be inconsistent with § 555 of the APA which sets out the minimum procedures necessary in informal adjudication.

This scheme of things was changed somewhat in 1988 with the enactment of the Veterans' Judicial Review Act (VJRA).⁸⁹ Among other things, VJRA creates the U.S Court of Veterans' Appeals (CVA) under Article I to hear appeals from BVA decisions, permits review of decisions of the CVA in the U.S. Court of Appeals for the Federal Circuit, and allows

⁸⁸See Goldberg v. Kelly, 397 US 254, 25 L. Ed.2d 287 (1970); Verkuil, "A Study of Informal Adjudication Procedures," note 6, supra.

⁸⁹Pub.L. 100-687, 102 Stat. 4105. For an in depth discussion of this Act, see Stichman, op. cit., supra, note

attorneys to charge a reasonable fee to reopen or reconsider a claim before the VA or to argue before the CVA, although the restriction with regard to attorney representation in connection with the original processing of a claim remains unchanged.⁹⁰

VJRA also made important changes in the BVA's organizational status within VA. The BVA is now an independent organization whose Chairman reports directly to the Secretary. Its Chairman is appointed to a six year term by the President and confirmed by the Senate. He or she may be removed by the President, following notice and opportunity for hearing, only for misconduct, inefficiency, neglect of duty, engaging in the practice of law, or physical or mental disability. BVA members are appointed by the Secretary on the recommendation of the Chairman and must be approved by the President. Their removal may be effected only through following the procedures applicable to the removal of administrative law judges.⁹¹ When coupled with the fact that BVA renders final VA decisions, these provisions establish BVA as an independent and presumably impartial organization. Thus the informal quality control mechanisms utilized by BVA probably can not be viewed as a

⁹⁰See note __, supra.

⁹¹See 38 USC § 4001(a) and (b).

means to enhance the VA's control over the outcome of these proceedings.⁹²

The VA procedures clearly place the tension between the policy of liberally dispensing benefits to veterans and the need to protect the public fisc in the presiding officer essentially without the safeguards embodied in APA procedures. VA regional presiding officers are subject to both quantitative and qualitative review and performance appraisal, while BVA members, although not subject to performance appraisal, are subject to quantitative and qualitative standards and are eligible for awards based on their performance, all of which are administered by an independent and presumably impartial organization. Panels of the BVA render final agency decisions unless they are not unanimous. The Chairman may direct the reconsideration of a split decision of a BVA panel by an expanded panel if he or she does not concur with the majority.

In this context, the presiding officers are directed by the regulations and statute to assist the claimant in developing facts which will support his or her claim and to award benefits if the evidence justifies a "belief in a fair and impartial mind that the claim is well grounded." Thus

⁹²It is interesting that, in the context of requiring a bias on the part of the BVA presiding officers in favor of the veteran, Congress provided for a second independent and presumably impartial tribunal, the Court of Veteran's Appeals, to which an aggrieved veteran, but not the VA, may appeal BVA decisions.

VA procedures appear to require that the presiding officer exhibit a procedural bias toward the claimant while retaining decisional impartiality.

The changes made in the VA's procedures by the VJRA may represent a Congressional determination that the policy of protecting the public fisc may have been receiving too much emphasis relative to the policy of providing benefits. In any event, Congress has established VA procedures which substitute inquisitorial for traditional adversary procedures as a means to ensure fairness in awarding benefits and has, in the past, largely excluded these procedures from judicial review on due process grounds. The substitution of inquisitorial for traditional adversary procedures, and, in particular, the apparent requirement that presiding officers exhibit a procedural bias in favor of claimants, places the question of the fairness of VA procedures beyond the scope of this study.

Other Case Types Concerned with Entitlements

H&HS administers another five case types in addition to those discussed above. One case type concerns disputes arising out of the Departmental's grants program which are heard by the Departmental Appeals Board. The Board's members are appointed by the Secretary. It renders a final agency decision in these cases. Unlike the rules governing almost all the case types under study, this Board's procedures prohibit ex parte communications between parties

and Board members.⁹³ In addition, the Board's procedures adopt many of the requirements of §§ 556 and 557.⁹⁴ Board members are, however, subject to performance appraisal by the Board Chairman, but not to other informal quality control mechanisms. These proceedings account for a caseload of about 300 per year. Additionally, the Board hears about 85 cases per year arising from programs administered by the Family Support and Human Development Division.⁹⁵

The Food and Nutrition Service of the Agriculture Department conducts about 30 proceedings a year which provide an opportunity for oral hearing to local agencies aggrieved by USDA actions concerning the Summer Food Service Program for Children and the Child Care Food Program

⁹³45 CFR § 16.17.

⁹⁴The parties are given ample opportunity to submit factual and legal arguments to the Board (45 CFR §§ 16.8 and 16.11), the powers of the Board are enumerated and parallel those contained in § 556 (45 CFR § 16.13), an evidentiary standard which excludes clearly irrelevant, immaterial or unduly repetitious evidence is stated (45 CFR § 16.11(d)), the record for decision is defined (45 CFR § 16.21), discretion is provided to the Board to consider proposed findings (45 CFR § 16.11(e)), and the presiding Board renders the decision (45 CFR § 16.21).

⁹⁵The Family Support and Human Development Division also has its own hearing program which encompasses a total of seven case types, three of which have caseloads of less than one case per year and hence are not included in this study. The four case types with a total caseload of one per year or more have a caseload of only about 19 per year, leading one to question the wisdom of creating so many different ways of dealing with so few cases.

administered under the National School Lunch Act.⁹⁶ These proceedings are conducted by the same GM-14 Administrative Review Officers who conduct the civil penalty proceedings under the Food Stamp Act and are governed by the same rules.⁹⁷ They appear to provide for little more than ex parte meetings; procedural safeguards are provided by the opportunity for a judicial trial de novo. For this reason, the conclusion that the Food Stamp Act civil penalty proceedings might be more efficiently administered under §§ 556 and 557 of the APA also applies to this case type.

Observations and Conclusions - Entitlements Case Types

Both the Medicare Part B and Civilian Medical Program for the Uniformed Services case types utilize presiding officers retained from the private sector, and both employ informal quality control mechanisms. The H&HS system passed constitutional muster in Schweiker v. McClure.⁹⁸ Moreover, given the nature of the private and government interests involved, it seems unlikely that any reasonable informal quality control mechanism would cause a contrary result to be reached.

The VA case types present a most interesting situation, but one in which the model used in this study to evaluate

⁹⁶42 U.S.C. §§ 1761(n)(12) and 1766(e).

⁹⁷These are discussed at pp. 47-50, supra.

⁹⁸See note 75, supra.

the fairness of procedures is not useful. VA procedures follow an inquisitorial model, discarding the notion that the presiding officer must be impartial in favor of the proposition that he or she should be biased in favor of the claimant insofar as procedural matters are concerned. At the same time, the presiding officers who render the final agency decisions are housed in an independent and presumably impartial organization, the BVA, which employs informal quality control mechanisms. Until recently, Congress had placed the question of whether VA procedures satisfied due process concerns off limits to the courts. An in depth comparison of the VA experience with the traditional adjudicatory model as applied in similar entitlements cases could provide useful insights into the relative merits of both models for resolving disputes over such claims.

Finally, H&HS' Family Support and Human Development Division has established some seven different case types to deal with a very small annual caseload. Some efficiency might be realized by consolidating these case types into one and assigning them to a single adjudicatory body, such as the Departmental Appeals Board, which already hears a number of related proceedings under one case type.

ECONOMICS CASE TYPES

Economics case types account for the third largest annual caseload, about 27,000 cases. This caseload is divided among 43 case types, by far the largest number assigned to any of the five categories of case types.⁹⁹ However, this caseload is less than one-quarter of the caseload of the entitlements case types.¹⁰⁰ Fifty-one percent of this caseload is processed by the Agriculture Department, where the Farmers Home Administration (FmHA) alone accounts for some 12,000 cases.

Case types concerned with economics fall into five subcategories based upon the specific government interest which is being furthered. These subcategories are cases in which the government's interest concerns:

⁹⁹Eight of these case types concern contract disputes under the Contract Disputes Act, 41 U.S.C.A. §§ 601 - 613, heard by the Boards of Contract Appeals of the Armed Services, Army Corps of Engineers, General Services Administration, Housing and Urban Development Department, Interior Department, National Aeronautics and Space Administration, Postal Service, and Transportation Department. Although all of these case types are conducted under the Contract Disputes Act, there are some differences among the procedures employed by the various boards.

¹⁰⁰Indian Probate cases heard by Administrative Judges at the Department of the Interior constituted a substantial portion (7%) of the caseload. These cases historically have been conducted under §§ 556 and 557 of the APA. Because of difficulties in recruiting administrative law judges for this program, Congress provided an exception to the APA which permitted Interior to use administrative judges. See 25 U.S.C.A. § 371-1. This exception was repealed by Pub. L. 101-301 (May 25, 1990). Consequently, Indian Probate cases are not included in this discussion.

1. The proper administration of an economic program put in place to achieve a public policy;
2. Providing a remedy or licensing system which primarily benefits private parties;
3. The proper administration of its acquisition program;
4. Its rights and obligations as a creditor or debtor; and
5. The award of a valuable privilege.

Case Types in which the Government Interest Concerns the Proper Administration of an Economic Program put in place to Achieve a Public Policy

Five case types are included here with an annual case load of about 12,940. The 12,000 cases heard by FmHA, which concern financial assistance rendered to farmers through loans, are included here. Two case types administered by the Soil Conservation Service concern soil erosion and wetlands conservation through loan programs. These have an annual case load of about 320. Seventeen Small Business Administration programs, all of which are covered by one set of rules, account for about 400 cases annually. Finally, NASA hears about 222 applications each year for monetary awards for scientific and technical inventions of value to

aeronautical and space activities.¹⁰¹ This case type is not discussed further.

Farmers Home Administration Grants and Loans

The Farmers Home Administration (FmHA) makes grants and loans to farmers for real estate transactions and farm operating expenses.¹⁰² In connection with this program, FmHA maintains a National Appeals Staff¹⁰³ to hear administrative appeals from adverse FmHA decisions on both applications and on the defaults of borrowers. Apparently, these decisions include decisions to "[a]ccelerate and declare entire real estate or chattel indebtedness due and payable, [and] foreclose or request foreclosure of real estate security instruments by exercising power of sale or

¹⁰¹NASA is authorized to make monetary awards for scientific and technical inventions of "...significant value in the conduct of aeronautical and space activities." See 42 U.S.C.A. § 2458(a). It processes about 222 applications per year for such awards. This case type is administered by the NASA Board of Contract Appeals under procedures which appear to meet the minimum requirements for adjudication set out in § 555 of the APA. If it determines that an award is appropriate, the Board makes a recommendation to the Administrator. See 14 CFR §§ 1240.107 and 1240.108. The applicant is entitled to be represented by counsel, to argument, and to present evidence through witnesses, exhibits, and visual aids.

¹⁰²See 7 U.S.C. § 1921 et seq., 42 U.S.C. § 1471 et seq.

¹⁰³There are 77 hearing officers at grades 9, 11, and 12, and 9 review officers at grades 11, 12, and 13, none of whom are attorneys. They have no duties other than hearing appeals.

otherwise."¹⁰⁴ As a result, the interest of individual farmers at stake in these proceedings may be very important. As noted above, FmHA processes about 12,000 cases annually.¹⁰⁵

The regulation governing these appeals provides some of the procedural protection of §§ 556 and 557.¹⁰⁶ In large part, these procedural protections were specifically mandated by Congress in 7 U.S.C. § 1983b, which established the National Appeals Staff in 1985. That provision mandates that:

1. Notice of adverse decisions be given;

¹⁰⁴ 7 CFR § 1900.2(k). See also § 1900.2(m).

¹⁰⁵ FmHA estimated about 5,000 appeals each year and 1,000 review requests based on its experience in FY 1987. As a result of an injunction which halted the processing of adverse actions on existing loans and of legislation which amended FmHA's provisions regarding notice of those adverse actions, a backlog of cases was accumulated. FmHA expects that the annual caseload will remain at about 12,000 through FY 1992-93.

¹⁰⁶ 7 CFR § 1900.53(c)(1) requires notice of adverse decisions. Section 1900.57(a) places the burden of proof on appellants and affords appellants the opportunity to submit oral, documentary, and rebuttal evidence and to question witnesses. It contains no evidentiary standard, providing merely that the rules of evidence do not apply. It requires that the official rendering the decision under review, or a knowledgeable deputy, be present to defend the decision. Section 1900.57(f) defines the record for decision, and § 1900.57(h) provides that the National Appeals Staff member presiding shall render a decision on that record. Sections 1900.57(k) and 1900.58 provide for review by a second National Appeals Staff member. Section 1900.52(j) permits an appellee to be represented by counsel.

2. "...[A]n opportunity for an informal meeting, and an opportunity for a hearing with respect to such decision[s]..."¹⁰⁷ be provided;

3. The appellant be given access to his or her file;

4. The appellant be permitted to retain counsel or another representative;

5. The hearing shall be held in the State of the appellant's residence;

6. The hearing shall be recorded; and

7. The record shall consist of the transcript and "...copies of all documents and other evidence presented to the hearing officer...."¹⁰⁸

In addition, § 1983b(d) provides that the National Appeals Staff "...shall be employees of the Farmers Home Administration who shall have no duties other than hearing and determining formal appeals arising under this section." Similarly, § 1983b(f) provides that

All hearing officers within the national appeals division shall report to the principal officers of the division, and shall not be under the direction or control of, or receive administrative support (except on a reimbursable basis) from, offices other than the national appeals division.¹⁰⁹

¹⁰⁷ U.S.C. § 1983B(a).

¹⁰⁸ U.S.C. § 1983b(e)(2).

¹⁰⁹ FmHA has implemented this provision in part by directing its hearing officers to seek to obtain hearing space outside of FmHA offices and to refrain from fraternizing or sitting near other FmHA personnel, particularly the employee who rendered the decision under

The National Appeals Staff is

...independent from FmHA State and local officials, and from all other agency officials making program administrative decisions. The FmHA official heading the National Appeals Staff ... reports directly to the Administrator of FmHA.¹¹⁰

Interestingly, despite this effort to ensure the independence of these decision makers, there is no prohibition on or other provision concerning ex parte communications. FmHA's response indicates that the National Appeals Staff management exercises all three informal quality control mechanisms over the process. Hearing officers are subject to performance appraisal as well as informal quantitative and qualitative controls.

Appellants are afforded 30 days in which to request review of an adverse decision of a hearing officer. This is conducted by a review officer who is also an employee of the National Appeals Staff. However, appellate rights of the agency are sharply limited. An appeal to the Director, National Appeals Staff, is permitted only where "...the decision of a hearing officer is in conflict with applicable FmHA regulations or law or the decision will result in unauthorized assistance being granted an appellant...." Such appeals are to be taken by an Assistant Administrator within nine working days of receipt of the decision in

appeal.

¹¹⁰7 CFR § 1900.51(a).

question. The Director has three days to determine if the request has merit and, if the determination is affirmative, order a new hearing. The original appellant may rebut the agency's claim at the new hearing, but apparently has no opportunity to comment on the Assistant Administrator's request to the Director.¹¹¹ The decision rendered on conclusion of the hearing and any subsequent proceedings is final.¹¹²

As noted, important individual rights may be at stake in the proceedings conducted by the National Appeals Staff. Should such a proceeding result in approval of the foreclosure of an individual's farm, that individual may well suffer a grievous loss. On the other hand, the cost to the government of providing procedures which are truly fair would not appear to be onerous, and it appears that Congress had such procedures in mind when it provided for the National Appeals Staff.

While the presiding officers who serve on that Staff are subject to informal quality control with respect to their decisions, that quality control is exercised by the National Appeals Staff management which is separated from the management of FmHA. Thus the full impact of that quality control on the fairness of the proceedings is

¹¹¹7 CFR § 1900.61.

¹¹²7 CFR § 1900.59(b).

difficult to assess on the basis of the information at hand. Indeed, the final agency decision is rendered by the National Appeals Staff, not FmHA, so that it may not be correct to assume that the informal quality control mechanisms are in place because of an unwillingness on the part of FmHA to provide for impartial presiding officers. It is indeed possible that this procedural scheme provides for an organizational impartiality which adequately safeguards individual interests and fosters public confidence.

Soil Conservation

The Soil Conservation Service (SCS) of the Agriculture Department has established a procedure to hear appeals of technical determinations¹¹³ made under the highly erodible lands and wetlands conservation provisions of the Food Security Act of 1985.¹¹⁴ In general, these provisions discourage the production of crops on erodible land by making them ineligible for various government programs. SCS

¹¹³These determinations concern the proper classification of a field and the predicted and potential average annual rate of erosion from it. With respect to wetlands, they concern the proper classification as either a wetland or converted wetland and whether the conversion of a wetland to agricultural production will have a minimal effect on the hydrological and biological aspects of the wetland. They also deal with the approval of conservation plans. See 7 CFR § 614.1(b).

¹¹⁴See 16 U.S.C.A. § 3801 et seq. Section 3843(a) requires that these appeal procedures be established by regulation.

hears about 300 cases each year under this procedure. The procedure entitles appellants to notice, the right to submit oral and documentary evidence, and to a decision rendered by the presiding officer setting out findings of fact.¹¹⁵ One may appeal an initial determination to the Area Conservationist, thence to the State Conservationist, and thence to the Chief, SCS. All of these officials have other duties in addition to presiding. They are not subject to any informal quality control mechanisms. There are time limits for the completion of proceedings.

Also, SCS is authorized under the Great Plains Conservation Program to enter into contracts designed to assist in protecting soil in the Great Plains states from erosion. The statute requires that such contracts provide that landowners agree to forfeit all rights to further payments under the contract or to make refunds of payments should the Secretary of Agriculture determine that the landowners violations of the contract warrant it.¹¹⁶ The statute makes no reference to the need for a hearing prior to the Secretary's determination.

The SCS in fact affords landowners who are alleged to have violated their contracts a hearing and processes about 20 such cases per year. Apparently following the literal

¹¹⁵See 7 CFR §§ 614.3, 614.5, 614.8, and 614.9.

¹¹⁶See 16 U.S.C.A. § 590p(b). The penalty provisions are set out in § 590p(b)(1)(ii).

command of the statute that the contract make provision for a termination or refund of payments, the contracts, not the regulations, contain the procedures which are to be followed before taking such action.¹¹⁷ Although rudimentary, the procedural protections of the contract are somewhat more extensive than those provided by the regulation promulgated under the Food Security Act. These are notice, the right to request a hearing before an officer who, although he has other duties, is not involved in the investigation or prosecution of the matter, the right to present oral and documentary evidence, and at the discretion of the presiding officer, to cross examine witnesses. Although it is not specifically stated, the contract provisions appear to assume that a landowner may be represented by counsel.

The presiding officer is to make a record of the testimony adduced at the hearing and report to the state conservationist or conservation district which will render a decision. Interestingly, the decision is to be based on the presiding officer's report and any other information which is available, thus implying that matters outside the record made at the hearing may be considered. If the landowner is

¹¹⁷See 7 CFR § 631.14, which provides that "[c]ontract violations, determinations and appeals will be handled in accordance with the terms of the contract and attachments thereto." The procedures are set out in Subpart I - Exhibits, § 404.88 Attachment A - Violations.

dissatisfied, it may appeal this decision. There are no informal quantitative or qualitative control mechanisms.

Stating these procedural protections in a contract rather than in a regulation would seem to provide the SCS with the power to alter or do away with them for any particular contract.¹¹⁸ While the statute requires that the landowner must agree to abide by the determination of the Secretary, the effort to provide the landowner with some procedural protection in the decisional process is appropriate, particularly given the possibility that the latter may be asked to pay back sums of money advanced. Elevating that protection to the status of a regulation in order to provide for uniformity and predictability is preferable to providing for it in a contract.

With the exception that landowners may be asked to repay sums of money advanced under the Great Plains Conservation Program, the individual interests at stake in SCS proceedings all involve the provision of government benefits. In the case of the Food Security Act proceedings, the question at issue is whether particular lands are ineligible for assistance programs, while under the Great Plains Conservation Program, the question is whether an

¹¹⁸ While in theory a landowner may bargain for procedural protections, because the contracts appear to be a means by which the SCS can provide benefits to landowners and at the same time protect the nation's farm land, it does not appear that it would have much bargaining power.

individual has violated a contract under which assistance has been furnished, thereby forfeiting the right to further assistance and perhaps incurring the liability to repay that previously furnished. With the caveat that it is preferable to set out the procedures under the latter program in a regulation, the procedures in place at SCS seem to provide adequate protection to these interests and at the same time to satisfy the government's need for efficiency.

Small Business

The Small Business Administration (SBA) holds hearings in 17 program areas under the Small Business Act. SBA reported about 400 open cases on its docket. These are presided over by five GS-15 administrative judges who are lawyers. These judges are subject to performance appraisal.

SBA may be unique in that it has established one set of rules to deal with all of these proceedings and formal APA proceedings as well.¹¹⁹ It deals with differences in formality required for these different proceedings by treating the rules as guidelines to be applied by the presiding officer. Thus the rules provide the full panoply

¹¹⁹These are set out in 13 CFR Part 134. The one exception concerns size and industry code appeals which are heard by three-judge panels under procedures set out in 13 CFR §§ 121.1701 - 121.1722. These panels render final agency action with respect to such appeals. See 13 CFR § 121.1720(b). The same standard which governs determinations to hold an oral hearing under Part 134 also governs these cases. Compare 13 CFR §§ 134.1(g) with 121.1714(a). Moreover, Part 121 cases are governed by rules that appear to be of similar formality to the Part 134 rules.

of procedures required by §§ 556 and 557, but, in the exercise of discretion and following the guidance provided, the presiding officers will adapt the procedures available to the demands of the individual proceedings.¹²⁰

The rules instruct the presiding officers that the principal rules where variations in practice should occur are those dealing with hearings and discovery.¹²¹ With respect to hearings, the rule states that: "[n]o oral hearing shall be granted unless there is a genuine dispute as to a material fact of decisional significance that cannot be resolved except by confrontation of witnesses." The rule divides the cases into three categories: those falling under §§ 556 and 557, those not falling under §§ 556 and 557 which involve the imposition of a sanction on a party (external cases), and those not falling under §§ 556 and 557 which concern employee grievances and arbitration arising under labor agreements (internal cases).¹²²

According to the rule, while due process considerations may warrant oral hearings in external cases,

...the fact that Congress has not required such cases to be heard on the record with full APA formality means that the requirements of due process of law may also be met in a decisional process not requiring an oral

¹²⁰See 13 CFR § 134.1(b) - (e).

¹²¹See 13 CFR § 134.1(f).

¹²²See 13 CFR § 134.1(g). Subsection 134.1(g)(1) notes that in APA cases, a presumption exists in favor of holding an oral hearing when one is requested.

hearing but preserving the opportunity to be heard through written submissions.¹²³

For internal cases, the rule recognizes "...that, as a matter of law, there is not a right to the same full array of due process elements as may be appropriate in external cases." While the rule provides that the genuine dispute of material fact standard is to be applied, it also provides that,

[i]n making this determination, the judge may also assess the importance of the disputed fact of decisional significance in terms of the Agency's proper interest in resolving internal matters in ways consistent with sound budgetary and management practices.¹²⁴

While requests for admissions, interrogatories, depositions, and requests to produce documents are provided for by the rules,¹²⁵ pre-hearing conferences conducted in order to identify the issues and exchange information are also provided for.¹²⁶ The rule recognizes that formal discovery beyond that available through a prehearing conference may be necessary in external cases.¹²⁷ In

¹²³See 13 CFR § 134.1(g)(2).

¹²⁴See 13 CFR § 134.1(g)(3).

¹²⁵See 13 CFR § 134.24.

¹²⁶See 13 CFR § 134.20.

¹²⁷See 13 CFR § 134.1(h)(2).

internal cases the parties need for discovery is to be satisfied through the use of pre-hearing conferences.¹²⁸

SBA's approach of providing one set of rules to cover a variety of case types contrasts with the practice of some agencies of providing a separate set of rules for each case type. The informal case types conducted by SBA probably benefit from the infusion of formality which undoubtedly results from the incorporation of the rules applicable to them within those applicable to APA proceedings. This practice results in the automatic applicability of rules dealing with separation of functions and ex parte communications,¹²⁹ as well as more mundane but essential provisions related to such matters as filing and service of documents and computation of time. Moreover, the existence of one set of rules simplifies matters considerably for parties and their counsel and should be encouraged.

SBA's approach is also interesting because it appears to employ a unique method of balancing of the nature of the individual interests at stake against the agency's interest in efficiency. While SBA follows the approach used by other agencies to the extent of providing the broad outlines of the procedure applicable to a class of cases, it places the final responsibility for this balancing in the presiding

¹²⁸See 13 CFR § 134.1(h)(1).

¹²⁹These subjects are largely neglected in agency rules governing informal cases.

officer to be exercised on a case-by-case basis. By following this procedure, it appears that SBA should be able to fashion its procedures so as to protect individual interests on a much more effective basis than are other agencies. The information developed in this survey reveals nothing which indicates that SBA's practice somehow unduly compromises the impartiality of its presiding officers and public confidence in its proceedings.

Case Types in which the Government Interest is in Providing a Remedy or Licensing System which Primarily Benefits Private Parties

Here the government's interest is in providing a means for protecting valuable private property and settling disputes between private parties. The agencies administering these case types have an obvious interest in efficient case processing and in a procedure in which the public has confidence. However, theoretically there is no governmental interest in the substantive results reached in these case types and hence no incentive for an agency to seek to control the outcome of its process through informal means. Consequently, the model applied to gauge the impartiality of presiding officers in this study may not be fully applicable to these case types.

Five case types dealing with patents and trademarks are in this subcategory. Three are administered by the Commerce

Department¹³⁰ and two by the National Aeronautics and Space Administration; they account for an annual case load of about 4,000. One case type administered by the Agriculture Department provides a private remedy for persons injured by the improper conduct of persons licensed under the Perishable Agricultural Commodities Act and Packers and Stockyards Act.¹³¹ It accounts for about 255 cases per year.

Patent and Trademark Cases

Patent and trademark cases are heard by two statutorily created bodies housed in the Department of Commerce, the Board of Patent Appeals and Interferences (BPAI) and the Trademark Trial and Appeal Board (TTAB).¹³² The BPAI hears interference proceedings in which two or more claimants

¹³⁰Commerce also reported a separate case type dealing with appeals of initial denials of applications for patents. Essentially, these cases are appeals from a ruling of a patent examiner. Although an opportunity for oral argument is presented, additional evidence is not admissible absent a showing of good cause. See 37 CFR §§ 1.194(c) and 1.195. Consequently, these appeals are not considered in this discussion. This case type accounts for a caseload of about 5,400 per year, while the two patent case types considered account for a caseload of only about 380.

¹³¹Although they do not meet the definition of this subcategory, for convenience two other case types which function under similar rules are also included here. One involves determinations of whether party is "responsibly connected" to a licensee under one of these Acts and the other the licensing of grain inspectors. These account for only about 11 cases per year.

¹³²The BPAI was created by 35 U.S.C. § 7 and the TTAB by 15 U.S.C. § 1067.

contest which one was first to invent the subject matter for which a patent is sought (BPAI reported about 380 pending cases), and proceedings to determine whether the U.S. Government or a contractor holds the patent rights to inventions relating to nuclear energy or relating to a contract with the NASA.¹³³ BPAI renders the final agency decision. Its members are subject to performance appraisal, one element of which considers success in meeting informal quantitative case processing goals. There are no informal qualitative controls in place.

The TTAB hears oppositions to the registration of trademarks (2418 cases, 140 of which require trial), petitions to cancel trademark registrations (644 cases, 39 of which require trial), applications to register lawful concurrent users of trademarks (57 cases, of which 3 required trial), interferences between applicants (none

¹³³In addition to the BPAI procedures to determine whether the inventor or NASA holds the patent rights to an invention, pursuant to 42 U.S.C. § 2457(f) NASA has established an Inventions Contribution Board which provides persons petitioning for a waiver of NASA's rights to an invention with an opportunity for a transcribed, ex parte hearing at which they may be represented by counsel and may present evidence and argument. See 14 CFR § 1245.113(b) and (c). The Board makes findings and recommends a decision to the Administrator based on the transcript of the hearing as well as the relevant NASA contract, public policy, and the effect of a waiver on related NASA programs. See 14 CFR § 1245.114(a). The Board processes about 100 patent waiver cases per year, some 15% of which involve hearings, and in addition, hears one or two patent licensing cases. This accounts for essentially all the NASA patent waiver cases; BPAI reported that it had only two pending.

reported), and appeals from final refusals of an examiner to register a mark (484 cases).¹³⁴ TTAB renders the final agency decision. Its members are subject to performance appraisal, one element of which considers success in meeting informal quantitative case processing goals, and another element of which is based on a review of each member's decisions after they are issued.

Although proceedings of the BPAI and TTAB are formal,¹³⁵ they are unique in that neither Board presides at the reception of evidence. Rather, evidence, including cross examination, is presented in affidavits and depositions.¹³⁶ Thus it would appear that these proceedings do not present questions of credibility of witnesses and that the few objections to the presentation of evidence are lodged by the parties. This practice appears to reflect the fact that the evidence is of a technical nature and parallels § 556(d) of the APA which provides that, in claims for money or benefits and applications for initial licenses, an agency may provide for the submission of evidence in

¹³⁴Caseload statistics are for FY-88. The last category of cases, appeals of an examiner's ruling on an application, are ex parte and do not involve the presentation of evidence. See 37 CFR § 2.142(d).

¹³⁵The Federal Rules of Evidence apply to BPAI. See 37 CFR § 1.671(b). Both the Federal Rules of Civil Procedure and the Federal Rules of Evidence apply to TTAB. See 37 CFR §§ 2.116(a) and 2.122(a).

¹³⁶See 37 CFR §§ 1.671 et seq.; §§ 2.123 et seq.

writing if no party will be prejudiced as a result. The Attorney General's Manual on the Administrative Procedure Act makes clear that this exception is intended to permit extensive technical or statistical data to be submitted in exhibit form.¹³⁷

The practice at TTAB and BPAI appears to elaborate on the proposition that statistical and technical data need not necessarily be presented orally by providing that even when cross examination is necessary, it need not necessarily be conducted in the presence of the presiding officer. Indeed, where the testimony is technical and the inquiry sharply focussed, it would appear that both the direct testimony and the cross examination of it might well be presented to the presiding officer in written form. This practice could, and, at the Patent and Trademark Office, obviously does result in more efficient use of the presiding officer's time without prejudicing the interests of the parties.¹³⁸

¹³⁷In this situation, the Manual notes that the veracity and demeanor of witnesses are not important and that as a result it is difficult to see how a party might be prejudiced by the absence of live testimony. The Manual makes clear that, where prejudice can be shown, cross examination is to be permitted. See Attorney General's Manual on the Administrative Procedure Act, U.S. Department of Justice (1947), p.78.

¹³⁸However, in other situations where the issues concern the appropriate application of public policy in controversial proceedings, it would appear that the presence of the presiding officer may well be necessary to oversee and, to the extent necessary, direct the inquiry.

Complaints for Damages under the Perishable
Agricultural Commodities and Packers and Stockyards
Acts

In addition to a judicial remedy, the Perishable Agricultural Commodities Act (PACA) and Packers and Stockyards Act (P&SA) provide an administrative remedy to one who is damaged as a result of a violation of either Act by a person regulated under it.¹³⁹ These proceedings, known as reparations proceedings, involve contract disputes over transactions involving produce (PACA) and livestock (P&SA). They are administered by the Packers and Stockyards Division of the Office of the General Counsel, Agriculture Department. In both cases, the proceedings are commenced by the filing of an informal complaint which may be followed by an investigation by the agency, and, if the agency believes following investigation that a violation may have occurred, an effort to settle the matter.¹⁴⁰

If settlement is not possible, the hearing procedure is begun.¹⁴¹ This procedure affords the parties many of the procedural tools that are available under the Federal

¹³⁹See PACA, 7 U.S.C.A. §§ 499e and 499f; PSA, 7 U.S.C.A. §§ 209 and 210.

¹⁴⁰See 7 CFR § 47.3(a) and (b) (PACA); 9 CFR §§ 202.103 and 202.104(a) (PSA).

¹⁴¹Under PACA, the complainant must file a formal complaint in order to bring the matter to hearing. 7 CFR 47.6. Under PSA, a failure to settle automatically results in the service of the complaint on the respondent and the triggering of the hearing procedures. 9 CFR § 202.140(b).

Rules of Civil Procedure and many of the procedural protections of §§ 556 and 557 of the APA.¹⁴² The nature of the hearing afforded depends on the amount in controversy. Under PACA, if that amount exceeds \$15,000 and in other instances where the presiding officer finds it necessary, an oral hearing is held.¹⁴³ Otherwise, evidence is taken in written form. In that event, there is no opportunity to cross examine or otherwise confront witnesses except to the extent that depositions form a part of the evidentiary

¹⁴²In comparison to the Federal Rules of Civil Procedure, in addition to providing for the service of the complaint, the rules lay down requirements for an answer (7 CFR § 47.8 [PACA], 9 CFR § 202.106 [PSA]), reply to an answer in the event it raises a counterclaim or setoff (7 CFR § 47.9 [PACA], 9 CFR § 202.107 [PSA]), motions (7 CFR § 47.13 [PACA]), prehearing conferences (7 CFR § 47.14 [PACA], 9 CFR § 202.110 [PSA]), depositions (7 CFR § 47.16 [PACA], 9 CFR § 202.109 [PSA]), and subpoenas (7 CFR § 47.17 [PACA]).

With regard to the APA, the rules provide for notice (7 CFR §§ 47.6(c), 47.7, 47.15(c) [PACA], 9 CFR §§ 202.104(b) and (c), 202.112(a) and (b) [PSA]), representation by counsel (7 CFR § 47.15(d) [PACA], 9 CFR § 202.111(e) [PSA]), the powers of the presiding officer (7 CFR § 47.11(c) [PACA], 9 CFR § 202.118(a) [PSA]), the disqualification of the presiding officer (7 CFR § 47.11(a) and (b) [PACA], 9 CFR § 202.118(d) and (e) [PSA]), standards governing the introduction of oral and documentary evidence and the cross examination of witnesses (7 CFR § 47.15(f) [PACA], 9 CFR § 202.112(e) [PSA]), oral argument (7 CFR § 47.15(g) [PACA], 9 CFR § 202.112(g) [PSA]), proposed findings or briefs (7 CFR § 47.19(b) and (c) [PACA], 9 CFR § 202.114(a) [PSA]), definition of the decisional record (9 CFR § 202.115(b) [PSA]), and a recommended decision by the presiding officer (7 CFR § 47.19(e) [PACA], 9 CFR § 202.115(a) [PSA]).

¹⁴³See 7 CFR § 47.15(a).

submissions.¹⁴⁴ Similar rules exist for P&SA proceedings, although the dividing line between oral and written presentations is set at \$10,000.¹⁴⁵ About 235 PACA and 30 P&SA proceedings are commenced each year. Of these 35 and 10, respectively, involve oral hearings.

Following either an oral or written hearing in PACA proceedings, the presiding officer, "...with the assistance and collaboration of such employees of the Department as may be assigned for the purpose,..." prepares an order based on the hearing record and the parties' submissions for the signature of the Secretary. This recommendation is not served on the parties prior to signature by the Secretary.¹⁴⁶ If he deems it advisable, the Secretary may issue the order drafted by the presiding officer as a tentative order and permit the parties to comment on it.¹⁴⁷ Further, a party may petition the Secretary to rehear or reargue a proceeding, or to reconsider an order.¹⁴⁸ A party aggrieved by the Secretary's order may appeal to a U.S. District Court where he is entitled to a trial de novo,

¹⁴⁴See 7 CFR § 47.20. With this exception, the procedural tools available to the parties and the protections afforded them by this procedure are essentially equivalent to those present when an oral hearing is held.

¹⁴⁵See 9 CFR §§ 202.111 and 202.113.

¹⁴⁶See 7 CFR § 47.19(e).

¹⁴⁷See 7 CFR § 47.23.

¹⁴⁸See 7 CFR § 47.24(a) and (c).

although the Secretary's order is prima facie evidence of the facts recited therein.¹⁴⁹ The rules governing PACA proceedings do not contain provisions governing ex parte communications.

The rules governing P&SA hearings are similar,¹⁵⁰ although the P&SA rules do prohibit ex parte communications and provide that, should any occur, they are to be memorialized in the record.¹⁵¹ Moreover, while they provide for petitions to reconsider an order of the Judicial Officer entered in the proceeding, that petition initially is referred to a presiding officer for a recommendation.¹⁵² A party aggrieved by a final order may appeal to the Court of Appeals.

In both PACA and P&SA proceedings, the presiding officers are all of the GS-11 to GS-15 attorneys in the Packers and Stockyards Division of the Office of General Counsel. They handle all the legal work of the PACA Branch and the Packers and Stockyards Administration. They are subject to performance appraisal and their recommended decisions and orders are subject to a qualitative control

¹⁴⁹See 7 U.S.C.A. § 499g(c).

¹⁵⁰See 9 CFR §§ 202.115(a) and 202.116. In PSA proceedings, the presiding officer prepares an order for the Department's Judicial Officer, rather than the Secretary.

¹⁵¹See 9 CFR § 202.122.

¹⁵²See 9 CFR § 202.117.

mechanism in the form of a review by the Deputy Assistant General Counsel, apparently prior to transmittal to the Secretary or Judicial Officer and ensuing service on the parties.¹⁵³ There are no quantitative controls.

In addition to the above proceedings which are devoted to resolving disputes between two private parties, the Administrator, Agricultural Marketing Service (AMS) has entered into a contract with a retired division director of the Packers and Stockyards Administration to hear certain PACA cases which are more in the nature of enforcement proceedings. PACA forbids a licensee from hiring an individual who is "responsibly connected" with any person who has committed certain violations of PACA.¹⁵⁴ If the appropriate AMS branch makes such a determination, the respondent is entitled to a hearing.¹⁵⁵ The rules governing the hearing establish procedures which are similar to those discussed above.¹⁵⁶ Notable exceptions are the facts that the presiding officer issues a decision which is final unless appealed to the Administrator and is not subject to qualitative control mechanisms.

¹⁵³These recommended decisions and orders are not circulated to the parties prior to issuance by the Secretary or the Judicial Officer. See 7 CFR § 47.19(e) (PACA) and 9 CFR § 202.115(a) (PSA).

¹⁵⁴See 7 U.S.C.A. 499h(b).

¹⁵⁵There are about ten such hearings per year.

¹⁵⁶See 7 CFR §§ 47.47 - 47.68.

The Administrator, AMS, also has responsibility under the Grain Standards Act¹⁵⁷ for conducting hearings on refusals to renew, to suspend or to revoke a license to perform official inspection and weighing functions unless the grain inspector requests, pursuant to the Act, that the proceeding be conducted under §§ 556 and 557 of the APA.¹⁵⁸ The procedures for these cases closely parallel those for the PACA and P&SA proceedings discussed above.¹⁵⁹ The principle differences are that an oral hearing is held unless waived¹⁶⁰ and the presiding officer prepares recommended findings and conclusions (to which exceptions may be taken), but no order, for the signature of the administrator.¹⁶¹ There is no provision governing ex parte communications. Given the fact that the informal procedures incorporate many of the procedural protections of §§ 556 and 557, and the fact that only about one case per year is heard under them, it is difficult to envision any significant advantage to maintaining the informal procedures in addition to the APA procedures.

¹⁵⁷7 U.S.C.A. § 71 et seq.

¹⁵⁸See 7 U.S.C.A. §§ 85 and 87e(a). The Administrator conducts about one such proceeding per year.

¹⁵⁹See 7 CFR Part 26.

¹⁶⁰See 7 CFR §§ 26.2009 and 26.2010.

¹⁶¹See 7 CFR § 26.2011(j), (k), and (l).

The PACA and P&SA reparations proceedings represent a rare instance in which Congress has provided an administrative remedy through which one private party may obtain an award of money damages against another private party whose violation of the law administered by the agency has caused monetary loss. Traditionally, such remedies have been solely within the province of the judiciary, and it is interesting that, in providing the administrative remedy, Congress specifically provided that the injured party might seek judicial relief, as well as for the continuation of all existing remedies.¹⁶² Despite the essentially private nature of these proceedings, the Agriculture Department maintains considerable control over the results reached by its presiding officers through informal qualitative review in the General Counsel's office and by requiring that their orders actually be issued by high level Department officials. This contrasts with the "responsibly connected" proceedings in which the presiding officer's decision is final unless appealed. Given that Agriculture probably has no interest in the outcome of the former cases, but may well have such an interest in the outcome of the latter, this distinction is sensible. In the former case, the agency itself may be said to be impartial, so that its control of the presiding officer's work product is unlikely to lead to

¹⁶²See 7 U.S.C.A. §§ 209(b) (P&SA) and 499e(b) (PACA).

an unfair or biased proceeding. In the latter, the agency is probably not impartial, hence the need for it to refrain from the imposition of quality control mechanisms in order to ensure an unbiased proceeding.

Because they are designed to provide a remedy for private parties and already incorporate procedures which have most of the attributes of a formal APA proceeding, there does not appear to be any substantial reason why the PACA, P&SA, and related case types should not be conducted under formal procedures such as the provisions of §§ 556 and 557. Adopting those provisions could eliminate the need to provide aggrieved parties a right to a trial de novo in U.S. District Court in PACA proceedings. Moreover, it could eliminate the need to involve high level officials in the decisional process on a routine basis. Rather, their involvement could be limited to reviewing those administrative appeals which present issues having implications for their administration of the PACA and P&SA programs. Indeed, the patent and trademark proceedings follow this model and eliminate both the need for judicial trials de novo and the routine involvement of high-level policy making officials.

Case Types in which the Government Interest Concerns the Proper Administration of its Acquisition Program

These case types are designed to afford individuals and firms an opportunity for a fair hearing before action is

taken against them which would end or impair their ability to do business with the government. They include bid protests, in which a bidder on a government contract may challenge the award of that contract, and suspension and debarment proceedings, in which the government proposes to stop doing business with a contractor. There are two case types concerning bid protests. One concerns protests in general (about 3000 per year) and is administered by the General Accounting Office. The other concerns protests of the acquisition of ADP equipment (about 100 per year) and is administered by the General Services Board of Contract Appeals. There are ten suspension and debarment case types administered by seven agencies accounting for a caseload of about 900. These are not limited to contractors but also include recipients of government assistance and others.

Suspension and Debarment of Contractors and Recipients of Assistance

The Federal Acquisition Regulations System (FAR) directs executive agencies to "...solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only."¹⁶³ A similar policy exists with respect

¹⁶³See 48 CFR § 9.402(a) and (b), which sets forth the policy with respect to procurement. Its purpose is to establish "...uniform policies and procedures for acquisition by all executive agencies." See 48 CFR § 1.101. The Federal Acquisition Regulations System is promulgated by two councils, the Defense Acquisition Regulatory Council and the Civilian Agency Acquisition Council. See 48 CFR § 1.201-1(a).

to financial and nonfinancial assistance.¹⁶⁴ Thus, these case types arise from the need to afford respondents a fair hearing in connection with the government's policy to protect itself from irresponsible contractors and recipients of assistance, rather than from a need to impose punishment on wrongdoers.

In order to carry out this policy, procedures to suspend or debar contractors and recipients have been adopted. The Department of Housing and Urban Development (HUD), Postal Service, General Services Administration (GSA), Air Force Department, Army Department, Environmental Protection Agency (EPA), and Forest Service¹⁶⁵ together reported that they conduct about 900 such proceedings each year.¹⁶⁶ At HUD, these proceedings are conducted by the

¹⁶⁴See Executive Order 12,459, February 18, 1986, (51 Fed. Reg. 6370) which sets forth the policy with respect to financial and nonfinancial assistance and benefits.

¹⁶⁵The Forest Service of the Department of Agriculture has adopted regulations which fairly closely parallel the Federal Acquisition Regulations and presumably were motivated by the same considerations. These regulations concern the suspension and debarment of timber purchasers, rather than suppliers of goods and services. See 36 CFR § 223.130 et seq. The Forest Service's program is included here.

¹⁶⁶Only the Army indicated how many cases required an evidentiary hearing. The Army reported that it held 50 hearings out of a total of 450 cases.

EPA and HUD reported that they also conduct proceedings concerning the debarment and suspension of recipients of assistance. EPA reported about 10 cases per year. HUD did not report a separate figure for debarment of recipients of assistance. HUD's proceedings with regard to recipients of assistance are governed by 24 CFR Part 24.

members of the Board of Contract Appeals and the Administrative Law Judges assigned in rotation. At the Postal Service, they are conducted by the Judicial Officer, who serves as the Chair of the Board of Contract Appeals and as the agency for purposes of the APA. At the five other agencies, these proceedings are conducted by officials with other primary duties.¹⁶⁷

Suspension is an immediate action taken to protect the government during the course of an investigation and subsequent legal proceeding.¹⁶⁸ It may not run for more than the period necessary to complete the investigation and

Additionally, HUD reported that it conducts proceedings which may result in debarment, suspension, or some other action being taken with regard to a mortgagee participating in HUD/FHA programs. See 24 CFR Part 25. HUD also administers a similar program under which a principal may be disapproved as a participant in a project which receives assistance under Titles I and II of the National Housing Act, 12 U.S.C.A. §§1701 - 1715z-18. See 24 CFR Part 200, Subpart H.

¹⁶⁷At Army, the Commanding General, U.S. Army Legal Services Agency, conducts the proceedings. Air Force employs a Debarment and Suspension Review Board made up of senior civilian and military officials. At GSA, the Associate Administrator for Acquisition Policy has responsibility, although, as noted in note 178, *infra*, disputed facts are found by the Board of Contract Appeals. At EPA, the Director, Grants Administration, has responsibility, although EPA reports that it also has a full-time GS-14 hearing officer who presumably hears disputed factual matters. The Chief of the Forest Service or one of his deputies hears cases concerning the suspension and debarment of timber purchasers.

¹⁶⁸See 48 CFR § 9.407-1(b) (FAR); 36 CFR § 223.141(b) (Forest Service); 40 CFR §§ 32.400, 32.415(a) (EPA); 24 CFR § 24.415(a) (HUD).

proceeding, and, in no event, for longer than 18 months without the institution of legal proceedings.¹⁶⁹ A contractor or recipient may be suspended on adequate evidence of the commission of fraud, certain crimes, or other offenses indicating a lack of integrity, violation of the antitrust laws, and violation of the Drug-Free Workplace Act.¹⁷⁰

A contractor or recipient may be debarred on completion of legal proceedings.¹⁷¹ The grounds for debarment are generally the same as for suspension, with the addition of serious violation of the terms of a government contract.¹⁷² Generally, a debarment may run for no more than three years.¹⁷³

In both suspension and debarment proceedings, contractors and recipients are entitled to counsel, notice,

¹⁶⁹See 48 CFR § 9.407-4 (FAR); 36 CFR § 223.144 (Forest Service); 40 CFR § 32.415(b) (EPA); 24 CFR § 24.415(b) (HUD).

¹⁷⁰See 48 CFR § 9.407-2 (FAR); 36 CFR § 223.142 (does not include violations of Drug-Free Workplace Act) (Forest Service); 42 CFR § 32.405 (EPA); 24 CFR §§ 24.405 and 24.305 (HUD).

¹⁷¹See 48 CFR § 9.406-1(a) (FAR); 36 CFR § 223.136(a) (Forest Service); 40 CFR § 32.300 (EPA); 24 CFR § 24.300 (HUD).

¹⁷²See 48 CFR § 9.406-2 (FAR); 36 CFR § 223.137 (Forest Service); 40 CFR § 32.305 (EPA); 24 CFR § 24.305 (HUD).

¹⁷³However, debarment for violation of the Drug-Free Workplace Act may run for five years. See 48 CFR § 9.406-4 (FAR); 40 CFR § 32.320 (EPA); 24 CFR § 24.320(a) (HUD). See also 36 CFR § 223.139(a) (Forest Service).

and an opportunity to submit information and argument in opposition to the proposed action.¹⁷⁴ To this extent, the procedures are similar to the minimum procedures for adjudication set out in § 555 of the APA. However, unless the action is based on a conviction or civil judgment, if the information submitted by the contractor indicates a genuine dispute with regard to material facts the contractor is entitled to a hearing in which it may submit evidence, present witnesses, and confront the government's witnesses. It is also entitled to a transcript of the hearing.¹⁷⁵ If a hearing is held, the presiding officer must make findings of fact and base his or her decision on them.¹⁷⁶ Except for

¹⁷⁴See 48 CFR §§ 9.406-3(b)(1) and (c), 9.407-3(b)(1) and (c) (FAR); 36 CFR §§ 223.138(b)(1), (2), and (3), 223.143(b)(1), (2), and (3) (Forest Service); 40 CFR §§ 32.312, 32.313(a), 32.411, 32.412(a) (EPA).

¹⁷⁵See 48 CFR §§ 9.406-3(b)(2), 9.407-3(b)(2) (FAR); 36 CFR §§ 223.138(b)(4), 223.143(b)(4) (Forest Service); 40 CFR §§ 32.313(b), 32.412(b) (EPA). At HUD, a respondent is entitled to an evidentiary hearing in all instances. Where the proposed debarment is based on an indictment or conviction, the respondent is limited to documentary evidence. Where it is based on a finding of civil rights noncompliance after a hearing, the presiding officer is bound by that finding. See 24 CFR § 24.313(b). At the Postal Service, a respondent is also entitled to an evidentiary hearing in all instances. 39 CFR §§ 957.5 and 957.6. However, where debarment is based on respondent's debarment by another agency, the Postal Service proceeding may be based entirely on the record made before the other agency. 39 CFR § 957.10(a).

¹⁷⁶See 48 CFR §§ 9.406-3(d)(2)(i), 9.407-3(d)(2)(i) (FAR); 36 CFR §§ 223.138(b)(5)(ii), 223.143(b)(5)(ii) (Forest Service); 40 CFR §§ 32.314(b)(1), 32.413(b)(1) (EPA); 39 CFR § 957.21 (Postal Service). HUD requires a written determination based on the hearing record, but does

HUD and the Postal Service, no provisions relating to ex parte communications or separation of functions are included,¹⁷⁷ although provisions permitting the presiding officer to refer disputed factual matters to another official for findings may have been prompted by such considerations. If the presiding officer takes this course, he or she may reject the findings made only after determining that they are either arbitrary and capricious or clearly erroneous.¹⁷⁸

not mention findings of fact. See 24 CFR §§ 24.134(a) and 26.24(c). HUD's rules also provide an enumeration of the powers of the presiding officer similar to that contained in the APA (24 CFR § 26.2(c)), provide for disqualification of the presiding officer (24 CFR § 26.5), provide for pleadings, motions, and discovery (24 CFR Part 26, Subparts D and E), adopt the APA provision with regard to the presentation of evidence and conduct of cross examination, and provide that the Federal Rules of Evidence shall be used as guidance (24 CFR § 26.23(a)). The Postal Service rules enumerate the powers of the presiding officer (39 CFR § 957.15), provide for depositions (39 CFR § 957.18), and adopt the Federal Rules of Evidence (39 CFR § 957.16).

¹⁷⁷HUD and the Postal Service prohibit unauthorized ex parte communications. See 24 CFR § 26.4, 39 CFR § 957.28. While the regulations do not provide for separation of hearing and line functions, the provision that hearings are to be conducted by ALJ's or BCA judges would seem to have the same effect. See 24 CFR § 26.2(a), 39 CFR § 957.6.

¹⁷⁸See 48 CFR §§ 9.406-3(d)(2)(ii), 9.407-3(d)(2)(ii) (FAR); 36 CFR §§ 223.138(b)(5)(ii)(B), 223.143(b)(5)(ii)(B) (Forest Service); 40 CFR §§ 32.314(b)(2), 32.413(b)(2) (EPA). GSA reports that it refers all disputed factual matters to its Board of Contract Appeals for resolution.

None of the agencies, except HUD and the Forest Service, have internal appeal procedures.¹⁷⁹ Army, Air Force, HUD, and the Postal Service do not employ either quantitative or qualitative control mechanisms. EPA uses qualitative but not quantitative controls, while GSA employs deadlines for completing each stage of the proceedings and subjects all final decisions to review by the General Counsel. The Forest Service regulation contains deadlines for the completion of each step in a proceeding, and the Service reports that "qualitative controls are exercised through line officer consultation where review is occurring," implying some ex parte contacts between decision makers and those officers who initiated the proceeding.

It is interesting that HUD and the Postal Service employ procedures which reflect virtually all of the procedural formalities required by §§ 556 and 557. This contrasts with the rules in place at the other agencies where, with the possible exception of the need for some restriction on ex parte contacts, relatively simple, straightforward procedures appear adequately to meet the need to protect government procurement and assistance programs from unscrupulous contractors and, at the same time, protect the legitimate interests of the latter. The

¹⁷⁹The Forest Service reports that one may appeal to the Board of Contract Appeals. At HUD, one may petition the Secretary for review. See 24 CFR Part 26, Subpart G.

survey does not reveal any obvious reason to question these less formal procedures. Perhaps most interesting from the point of view of this study is their departure from the assumption of §§ 556 and 557 that a hearing is necessary. Rather, these procedures place the burden on the respondent to show that factual disputes exist which should be the subject of a hearing. The nature of the transgressions which support an adverse action suggests that in most instances a hearing is not necessary. This is supported by the statistics reported by Army showing that hearings are held in only about 10% of the cases. In such circumstances, it may be best to accord the government's allegations some presumptive validity and assume that a hearing is not necessary unless the respondent demonstrates the contrary.

Bid Protests

Bid protests heard by the General Accounting Office (GAO) with regard to procurement in general, and General Services Administration (GSA) with regard to procurement of automatic data processing equipment, constitute somewhat related case types. They provide a means by which an entity with a direct economic interest in the award of a contract for the procurement of property or services by a Federal agency may obtain review of allegedly improper practices on

the part of the procuring agency.¹⁸⁰ If successful, the protester may obtain a determination from GAO that the solicitation, proposed award, or award does not comply with a statute or regulation.¹⁸¹ GSA has authority to suspend an ADP procurement if a protest is filed not later than ten days following the award of a contract, or to suspend, revoke, or revise the applicable procurement authority in other cases.¹⁸²

Bid protests filed with GSA are heard by the Board of Contract Appeals under its rules. These procedures are discussed in the section on contract disputes. An appeal from the decision of the Board may be taken as authorized by the Contracts Disputes Act. The statute requires a decision on a protest within 45 days following its filing. No other informal quantitative or qualitative controls are in place.¹⁸³

¹⁸⁰GAO has responsibility for bid protests in general. See 31 U.S.C. § 3551 et seq., 4 CFR §§ 21.0(a) and (b), 21.1(a). GSA has responsibility for bid protests with regard to procurement of automatic data processing equipment provided that a similar protest has not been filed with GAO. See 40 U.S.C.A. § 759(h).

¹⁸¹31 U.S.C. § 3554(b)(1); 4 CFR § 21.6(a). In the event GAO makes such a determination, it shall recommend that the agency undertake certain remedies and may award the protester its costs incurred in filing the protest, including attorney's fees, and the cost of preparing a bid or proposal. 31 U.S.C. § 3554(c), 4 CFR § 21.6(d).

¹⁸²See 40 U.S.C.A. § 759(h)(2), (3), and (5).

¹⁸³See 40 U.S.C.A. § 759(h)(1), (4), and (6)(A); 48 CFR § 6101.1(a).

On receipt of a protest, GAO notifies the contracting agency which must respond by furnishing a complete report to the GAO and the protester. If a conference is not held, the protester is afforded an opportunity to comment on this report.¹⁸⁴ In its discretion, GAO may elect to hold one of two types of conferences of the parties to the protest. A so-called informal conference apparently affords the parties the opportunity to present argument only and to comment on the report of the conference.¹⁸⁵ In the event that GAO determines that it is necessary "...in order to resolve a specific factual dispute essential to the resolution of the protest which cannot be otherwise resolved on the written record," it may hold a so-called formal fact finding conference. Such conferences are transcribed, witnesses testify under oath and are subject to questioning by the parties, and the parties are entitled to comment in writing within three days following receipt of the transcript. The presiding GAO official makes findings of fact.¹⁸⁶

¹⁸⁴31 U.S.C. § 3553(b)(2); 4 CFR § 21.3(i) and (k). The protester may request specific documents which it believes to be relevant to the protest, which are to be furnished to it. If the agency withholds a document on the ground that it would accord the protester a competitive advantage or that for some other reason the protester is not entitled to it, it must be identified and furnished to GAO. See generally 4 CFR § 21.3(c) through (h).

¹⁸⁵See 4 CFR § 21.5(a).

¹⁸⁶See 4 CFR § 21.5(b).

GAO reports that it receives about 3,000 bid protests per year, some 850 of which require decision. These have required about 100 informal and 6 or 7 formal conferences. The General Counsel assigns senior attorneys (GS-15) or assistant general counsels to bid protests based on their experience in these matters. Their decisions are subject to qualitative control through supervisory review prior to issuance. The authorizing legislation contains quantitative controls in the form of deadlines for the issuance of decisions. These attorneys have other primary duties and are subject to performance appraisal. The fact that GAO has no interest in the award of the contracts which are the subject of these protests indicates that the use of informal qualitative controls and presiding officers with other duties probably does not impair the presiding officers' impartiality or the fairness of the proceedings.

Cases in which the Government Interest Concerns its Rights and Obligations as a Creditor or Debtor

These fifteen case types are primarily contract disputes heard by the Armed Services (ASBCA), Army (ABCA), General Accounting (GABCA), General Services (GSBCA), Housing and Urban Development (HUDBCA), Interior (IBCA), NASA (NASABCA), Postal Service (PSBCA), and Transportation (TBCA) Boards of Contract Appeals. They also include Equal Access to Justice Act and certain debt collection cases.

Together, these disputes account for about 4,600 cases per year.¹⁸⁷ ASBCA accounts for about one-half of this total.

Contract appeals are all decided under formal rules of procedure which contain many, but not all, of the safeguards incorporated in §§ 556 and 557 of the APA. The Contract Disputes Act provides for guidance to be issued to the executive agencies regarding the establishment, functions, and procedures of the boards.¹⁸⁸ Thus it is not surprising that these rules are relatively uniform from agency to agency.¹⁸⁹ Given this uniformity and the close attention

¹⁸⁷In addition to traditional contract disputes, these cases include the following:

1. About 1,400 tax refund offset cases which authorize HUD, after affording an opportunity for hearing, to collect money owed it by levying on a refund owed a taxpayer (31 U.S.C.A. 3720A);

2. About 268 contract disputes arising under the Indian Self-Determination and Educational Assistance Act (25 U.S.C.A. §§ 450, 450f, 450g, 450h, and 450m) and appeals of Department decisions to contract for services, both of which are heard by the IBCA;

3. A few cases in which the Postal Service seeks to collect debts from employees; and

4. A few Equal Access to Justice Act cases heard by IBCA and NASABCA.

¹⁸⁸See 41 U.S.C.A. § 607(h).

¹⁸⁹The rules governing contract disputes of the agencies reporting are set out as follows:

ASBCA	48 CFR Chap. 2, App. A
ABCA	33 CFR Part 210
GSBCA	48 CFR Part 6101
HUDBCA	24 CFR Part 20
IBCA	43 CFR §§ 4.100 et seq.
NASABCA	14 CFR Part 1241
PSBCA	39 CFR Part 955
TBCA	48 CFR Chap. 63

Because the GABCA is not part of an executive agency, it is not subject to the Contract Disputes Act. It did not report

given this case type by Congress, there does not appear to be any reason to question the appropriateness of these procedures for deciding contract disputes.

There appears to be a degree of independence afforded BCA members which is similar to that afforded ALJs. Indeed, ASBCA reports that GAO concluded following a review that DOD has not exercised control over the Board's activities¹⁹⁰ and that the private bar concurred. GAO nonetheless recommended

a citation for its rules.

The rules governing EAJA cases at Interior and NASA (43 CFR §§ 4.601 et seq. and 14 CFR Part 1262, respectively) are much less formal and merely provide for a hearing in the event the presiding officer finds that the facts are not sufficiently developed in the record of the proceeding for which attorneys fees are sought and the submissions of the parties.

The rules governing appeals of decisions to contract for services at Interior are also informal, as are the debt collection procedures employed by the Postal Service. These are set out at 43 CFR § 4.1600 et seq. and 39 CFR Part 961, respectively.

The rules governing tax refund offset cases at HUD are governed by the same rules that govern the suspension and debarment of HUD contractors which are discussed supra.

¹⁹⁰See The Armed Services Board of Contract Appeals Has Operated Independently, GAO/NSIAD-85-102, B-198620 (Sept. 23, 1985).

While it is not an informal qualitative control, the ASBCA employs an interesting procedure. At ASBCA, the presiding administrative judge prepares a draft decision which is submitted to a vice chairman for concurrence. If the vice chairman concurs, the draft is reviewed by the Chairman. All three must concur in order to issue the decision. In the event of a dissent, two more members are appointed and the majority decides the outcome. Because the Chairman and three vice chairmen of the ASBCA are appointed for two year terms, this procedure may provide the 33 rank and file administrative judges with the means to override decisions which are motivated by considerations outside the bounds of the record of the case.

that legislation be enacted affording ASBCA administrative judges the same protections as those afforded ALJs. ASBCA reports that, although such legislation has been introduced, it has not been enacted. With the exception of the IBCA and PSBCA, BCA members are not subject to performance appraisal. IBCA utilizes informal quantitative controls and ASBCA reviews individual judge's docket management on a daily basis. None utilize informal qualitative controls on the administrative judges work product. In any event, the Boards of Contract Appeals render decisions which bind their agencies, so that a not insubstantial degree of institutional, if not individual, independence exists.

Cases in which the Government Interest Concerns the Award of a Valuable Privilege

There are two case types in this category. One concerns permits for the use and occupancy of National Forest System lands administered by the Forest Service. It accounts for about 1,300 cases per year. The other concerns the award of export licenses by the Commerce Department. It accounts for less than 25 cases per year.

Forest Service

The Forest Service of the Agriculture Department has provided an appeal procedure for those who are adversely affected by decisions concerning the occupancy and use National Forest System Lands. This procedure is available with regard to such matters as permits for ingress and

egress, grazing, and mining.¹⁹¹ It provides one level of review of initial determinations as a matter of right and one additional level as a matter of discretion, except that initial determinations by District Rangers are subject to two levels of review as a matter of right.¹⁹² This procedure is not required by statute but was voluntarily established. About 1280 cases are processed each year.

The procedure provides little more than the minimum adjudicatory safeguards mandated by § 555. An appellant is entitled to notice of an initial determination and an opportunity to present viewpoints to the reviewing officer on appeal.¹⁹³ The regulations seem to view the factual content of the appeal as having been defined by the notice of appeal, which must include "...sufficient narrative evidence ... to show why a decision of a lower level officer should be reversed or changed," and the lower level

¹⁹¹See 36 CFR § 251.82.

¹⁹²See 36 CFR § 251.87. The appeal chain is as follows. An initial determination of the District Ranger may be appealed to the Forest Supervisor whose decision in turn may be appealed to the Regional Forester. The latter's decision is final. An initial determination of the Forest Supervisor may be appealed to the Regional Forester, and an initial determination of the Regional Forester may be appealed to the Chief of the Forest Service. In both the latter instances, the next higher level has discretion to review an appellate decision rendered by the officer immediately below him, but apparently an aggrieved party may not seek such review. There is a certiorari type review exercised by the Secretary with respect to initial determinations of the Chief of the Forest Service.

¹⁹³See 36 CFR §§ 251.84 and 251.97.

officer's response.¹⁹⁴ The reviewing officer is to base the decision on the appeal record.¹⁹⁵ The regulations establish a schedule for decisions. The Forest Service reports that "qualitative controls are exercised through line officer consultation within the level at which review is occurring." This consultation may or may not be a form of peer review. The Forest Service's regulations appear to have provided some structure to a policy of meeting with the users or potential users of federal lands who may be adversely affected by its decisions. It is difficult to gauge the importance of the private interests which may be at stake in these proceedings on the basis of the information available. Nonetheless, the Forest Service's effort to regularize the process by which it considers those interests is a laudable one.

Export Licenses

The Export Administration Act of 1979 authorizes controls on certain exports from the United States.¹⁹⁶ The Act requires the Secretary of Commerce to establish procedures by which actions under the Act, other than enforcement actions, may be informally appealed.¹⁹⁷ The

¹⁹⁴See 36 CFR §§ 251.90 and 251.94.

¹⁹⁵See 36 CFR §§ 251.99(a) and 251.98.

¹⁹⁶See 50 U.S.C.A. App. §§ 2401-2420.

¹⁹⁷See 50 U.S.C.A. App § 2409(j).

Secretary has promulgated 15 CFR Part 789 in response. It provides that an aggrieved party may informally appeal to the Assistant Secretary for Export Administration and request an informal hearing. If granted, that hearing permits the appellant or its representative to make a presentation based on the materials previously submitted and, apparently, to introduce evidence.¹⁹⁸ The Assistant Secretary makes the Department's final decision based on the record of the appeal and any other information which the Assistant Secretary deems relevant. No provisions concerning ex parte communications are present, and the regulation appears to contemplate that the Assistant Secretary may consult with other groups on an ex parte basis.¹⁹⁹ No informal quantitative or qualitative controls are in place. Commerce processes less than 25 such cases each year. These procedures appear to meet the minimum standards of § 555.

Observations and Conclusions - Economics Case Types

Case types dealing with economics cover a broad range of interests. In addition to the five types of government interests identified at the beginning of this discussion, the private interests at stake vary from the individual interest of a farmer seeking to save the family farm from

¹⁹⁸See 15 CFR § 789.2(b)(4)(ii).

¹⁹⁹See 15 CFR § 789.2(c)(1).

foreclosure to that of large defense contractor seeking to obtain additional payments under a multimillion dollar contract.

The first subcategorization of governmental interest, that in which the government's interest is in the administration of an economic program designed to achieve a public purpose, appears to encompass most of the individual interests at stake in these proceedings. It includes not only the family farmer, but other agricultural programs which may impact individuals and small business programs where the private business interests involved may be the highly personal ones of individual entrepreneurs. The case types administered by FmHA and SBA afford these interests a substantial degree of procedural protection. In the case of FmHA, this protection has been specifically mandated by Congress. While the other subcategorizations of governmental interests may also include individual interests, those interests are less likely to be personal than they are to be corporate.

While the image of the farmer trying to save the family farm conjures up considerable sympathy as opposed to the defense contractor trying to dun the government for yet more millions, the survey reveals that the interests of government contractors before the boards of contract appeals and litigants before BPAI and TTAB probably receive greater procedural protection than any other private interest at

stake in the economics case types. In terms of sheer economic size, these interests undoubtedly exceed the other private interests at stake. Moreover, they present examples in which the government's interest is more that of a litigant than that of one with the responsibility to implement public policy. The economic size of these interests and the reduced impact on public policy of the results of these cases probably combine to promote the use of formal procedures as opposed to informal ones.

Perhaps not surprisingly, these same case types also reveal some examples in which the presiding officers are subject to informal quality controls administered by an organization which enjoys some independence from those responsible for administering the program which gives rise to the cases in adjudication. It may be that, in this context, informal quality controls do not reasonably give rise to the inference that the impartiality of the presiding officers has been compromised. If the organization administering the controls is itself impartial, then the effect of the controls should be neutral.

These examples include the National Appeals Staff of the FmHA, where the Congress has directed that separation between the hearing and line functions be maintained, and BPAI, TTAB, and the boards of contract appeals. Final decisional authority is vested in all these bodies. Many of them exercise informal quality controls. This model might

be usefully applied in other case types, such as reparations proceeding under the Packers and Stockyards Act, where the government does not have an important interest in the implementation of policy through adjudication.

SBA's approach to balancing private and governmental interests needs to be highlighted because it probably could be employed beneficially in other agencies with responsibility to administer a variety of programs which require adjudication. SBA follows the traditional approach of balancing these interests to the extent that it provides the broad outlines of the procedure applicable to a category of cases in its rules. However, SBA takes the balancing process a step further in that it vests the presiding officer with authority to adapt the procedures to the demands of a particular case. The survey revealed no other agency which employs this approach.

Because of the broad range of private interests at stake and the nature of some of the organizations and procedures involved, generalization with regard to these case types may not be meaningful. Nonetheless, a statistical analysis of the responses to the survey reveals that there is a strong tendency to utilize informal quality control mechanisms. Where the presiding officers have no other duties, performance appraisal and informal review of decisions are employed in 44% and 15% of the case types and 78% and 75% of the caseload, respectively. These

percentages grow to 99% and 56% of the case types and 98% and 83% of the caseload where the presiding officers have other duties. Formal appeals are employed in 26% of the case types and 60% of the caseload where presiding officers have no other duties, and in 63% of the case types and 34% of the caseload where the presiding officers have other duties. The tendency of agencies to utilize informal quality control mechanisms is confirmed by the fact that the agencies refrain from using them in only 35% of the case types and 16% of the caseload.

It was noted above that the National Appeals Staff of the FmHA, BPAI, TTAB, and the Boards of Contract Appeals are independent organizations, some of which employ informal quality control mechanisms. If the statistics are modified to reflect the presumption that these organizations are impartial so that their use of informal quality control mechanisms does not impair the fairness or public acceptability of their proceedings, rather than showing a strong tendency to use informal quality control mechanisms, the statistics indicate the opposite. Under this assumption, where the presiding officers have no other duties, the use of performance appraisal and informal review of decisions by the agencies drops to 22% and 5% of the case types and 3% and 13% of the caseload, respectively. Similarly, the case types in which agencies do not use

informal quality control mechanisms jumps to 51% from 31% and the caseload to 77% from 15%.

EMPLOYER-EMPLOYEE RELATIONS CASE TYPES

There are 11 case types administered by 11 agencies in this category.²⁰⁰ They account for an annual caseload of about 15,100. With two exceptions,²⁰¹ these are all concerned with the Federal government's relations with its employees. Two case types, administered by the Equal Employment Opportunity Commission (EEOC) and the Merit Systems Protection Board (MSPB), account for about 13,400 cases per year, or 89% of the total caseload. These are discussed first.

Equal Employment Opportunity Commission Cases

EEOC is responsible for conducting all equal employment opportunity discrimination complaint hearings arising in

²⁰⁰One of these case types concerns statutorily mandated hearings designed to supplement the record in exemption requests under the Employee Retirement Income Security Program (see 29 U.S.C.A. § 1108(a)) and the Federal Employees Retirement System (see 5 U.S.C.A. § 8477(c)(3)(D)(iii)). Although both statutes require an opportunity for hearing and a "determination on the record," there are no procedural rules governing these proceedings. They are conducted by agency employees (GS-15 or above) with other primary duties. There are only about one to three such proceedings a year.

²⁰¹These are a case type administered by the National Labor Relations Board (NLRB), p. 143-44, infra, and one administered by the Department of Labor, note 200, supra.

U.S. government agencies.²⁰² These hearings result from complaints charging an agency with unlawful discrimination based on race, color, sex, religion, national origin, age, or physical or mental disability. EEOC closed about 6,227 such cases in FY-88, or about 38% of the total caseload in this category.²⁰³ The discussion which follows focusses on individual complaints. However, similar procedures exist for class complaints.²⁰⁴

An employee who believes that he or she is the victim of unlawful discrimination must first take the matter up with an Equal Employment Opportunity Counselor appointed by

²⁰²EEOC acts under three statutes:

- (1) Title VII of the Civil Rights Act of 1964 as amended, which prohibits employment discrimination based on race, color, sex, religion, or national origin. 42 U.S.C.A. § 2000e et seq.
- (2) Age Discrimination in Employment Act (ADEA) of 1967 as amended, which prohibits employment discrimination against persons 40 years and over. 29 U.S.C.A. § 633(a) (1982).
- (3) Section 501 of the Rehabilitation Act of 1973 as amended, which concerns employment discrimination against persons with physical or mental disabilities in the federal sector. 29 U.S.C.A. § 791.

²⁰³These involved a total of 6,791 allegations, 74% of which involved discrimination on the basis of race, color, sex, religion, or national origin, 15% of which involved age discrimination, and 11% of which involved discrimination on the basis of disability.

²⁰⁴29 CFR Part 1613, Subpart F.

his or her agency.²⁰⁵ The counselor is authorized to conduct an inquiry into the matter, counsel the employee, and attempt to resolve the matter informally. If after the expiration of 21 days the employee is still dissatisfied, the counselor is to advise him or her of the right to file a discrimination complaint. After review to determine if the complaint is legally sufficient,²⁰⁶ the agency's Director of Equal Employment Opportunity appoints an investigator who may not be connected with the office from which the complaint arose.²⁰⁷ The investigator's report is made available to the employee and an effort is made to settle the complaint informally. If that effort fails, the employee may demand a hearing.²⁰⁸

The hearing is conducted by a single administrative judge from the EEOC.²⁰⁹ The hearing is said to be a part of

²⁰⁵29 CFR §§ 1613.213, 1613.204(c). Sections 1613.213 - 1613.222 provide procedures for dealing with discrimination prohibited by the Civil Rights Act. 29 CFR §§ 1613.511 and 1613.708 make these procedures applicable to age and disability discrimination.

²⁰⁶29 CFR § 1613.215.

²⁰⁷29 CFR § 1613.216.

²⁰⁸29 CFR § 1613.217.

²⁰⁹29 CFR § 1613.218(a). There are 79 such administrative judges at EEOC, all of whom are lawyers, in grades 11 through 14, the last being a supervisory administrative judge. According to EEOC, they are selected through "normal merit selection procedures." In addition, EEOC may designate an administrative judge, whom it certifies to be qualified, from another agency.

the investigatory process and thus is closed to the public.²¹⁰ Indeed, the regulations contemplate that the starting point of the hearing is the investigator's report. This is furnished to the administrative judge who reviews it to determine whether it should be remanded to the Director for further investigation. If satisfied with the report, the judge arranges for the appearance of the necessary witnesses and schedules the hearing. There is no indication in the regulations that the complaining employee has an opportunity to participate in this process through comments or argument. Moreover, the judge is directed to conduct the hearing so as to bring out pertinent facts.²¹¹

Nonetheless, the rules contain some of the features mandated by §§ 556 and 557. The complainant is entitled to a representative of his or her choice beginning with the initial contact with the EEO Counselor.²¹² He or she may cross examine witnesses, although the regulation is silent with regard to the right to introduce evidence.²¹³ If satisfied that the testimony is necessary, the

²¹⁰29 CFR § 1613.218(c)(1).

²¹¹29 CFR § 1613.218(b) and (c)(2).

²¹²29 CFR § 1613.214(b)(1).

²¹³29 CFR § 1613.218(c)(2). If the administrative judge determines that there are no issues of material fact, he may dispense with the hearing and, after giving the parties an opportunity to comment, issue a recommended decision. 29 CFR § 1613.218(g).

administrative judge may require the appearance of witnesses from government agencies on the request of the complainant. The judge may also require such testimony in the absence of a request.²¹⁴

The judge is empowered to administer oaths, regulate the hearing, rule on evidence, order the production of documents, limit repetitious testimony, and exclude contumacious individuals.²¹⁵ Further, he or she is authorized to impose sanctions on a party who fails to comply with requests for information.²¹⁶ The record consists of the testimony received and all documents admitted by the judge.²¹⁷ The judge is required to submit the complaint file along with the judge's findings and analysis and a recommended decision to the agency head.²¹⁸ The agency head is required to adopt, reject, or modify the recommended decision. In the event the agency head rejects or modifies the recommended decision, the agency head must state specific reasons in detail. The agency head's decision must be based on the preponderance of the

²¹⁴29 CFR § 1613.219(f).

²¹⁵29 CFR § 1613.218(d).

²¹⁶29 CFR § 1613.218(e).

²¹⁷29 CFR § 1613.218(h).

²¹⁸29 CFR § 1613.218(i). The regulation requires that the employee be given notice that this has been done, but is silent with regard to his or her right to a copy of the judge's findings and recommended decision.

evidence.²¹⁹ The entire process from the filing of the complaint to agency decision is to take no more than 180 days; the recommended decision becomes the agency's decision in 60 days unless the agency acts.²²⁰ The agency's decision may be appealed to the EEOC.²²¹

This scheme for resolving discrimination complaints presents an interesting blend of investigative and adjudicative techniques. On balance, it would appear to lean more toward the investigative model than the adjudicative. The EEOC exercises informal quantitative and qualitative controls over the work of the administrative judges and appraises their performance. EEOC reports that the quantitative controls require each District Director to process an average of 71 cases per judge in order to receive a fully successful evaluation.²²² Further, each recommended decision is subject to qualitative review in both the district Office and Headquarters. There is no prohibition on ex parte communications, although the regulations do reflect a concern with separation of functions in the

²¹⁹29 CFR § 1613.221(a) and (b). The agency's decision is to be served on the complainant along with the hearing record and recommended decision.

²²⁰29 CFR § 1613.220(a) and (d).

²²¹29 CFR § 1613.231.

²²²The statistics reported by EEOC indicate that in FY-88, the administrative judges closed an average of 79 cases each.

requirement that investigators must not be connected with the office in which a complaint arose.

The role of EEOC appears to be one of policing the agencies' investigative processes. The initial counselling and investigating function is under the control of the agency. While that function is subject to review by an administrative judge from EEOC who hears both sides and recommends a decision, the agency retains decisional authority. Final word comes from EEOC to whom the agency's decision may be appealed. In addition to retaining the ultimate authority, EEOC is in a position to substantially influence the result reached by the agency through informal controls exercised over the administrative judges. However, EEOC is an independent organization charged with resolving controversies between an employee and his or her employing agency. As such, presumably it is impartial. Therefore, the use of informal quality control mechanisms would not necessarily result in a proceeding which is biased toward either the employee or the employing agency.

If a pure adjudicatory model were followed, one would expect the agency and the complainant to present their cases to the EEOC which would make the final decision without the benefit of an intermediate decision by the agency, or for the agency staff and complainant to present their cases to an independent judge who would make a decision subject to review by the agency. The structure of the process provides

a means for EEOC to monitor and control the agencies' investigatory processes for dealing with discrimination complaints and to ensure that the agencies' employment practices are acceptable. For these reasons, the EEOC program is more akin to investigation than adjudication.

Merit System Protection Board Cases

In contrast to EEOC, these cases follow the adjudicative rather than the investigative model. The MSPB affords federal employees against whom appealable personnel actions have been taken an opportunity for a hearing.²²³ By virtue of § 554(a)(2) of the APA, these proceedings are excepted from the requirements of §§ 554, 556, and 557. The Attorney General's Manual notes that, traditionally, decisions involving the selection and tenure of public

²²³5 U.S.C.A. §§ 7701(a)(1) and (b)(1), 1221(a). In addition, 5 U.S.C.A. §§ 7511 - 7514 (removal or suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less) and 4303 (action based on unacceptable performance) provide an employee with the right to a proceeding before the employing agency before a right of appeal to MSPB accrues. The latter proceedings meet the minimum standards of § 555 of the APA. Postal Service employees not covered by a collective bargaining agreement are entitled under 39 U.S.C.A. § 1001(b) to a fair hearing with a representative of their choosing in adverse actions, but only if they do not appeal to MSPB. The Postal Service reports that it processes about 20-25 such hearings each year.

During FY-88, MSPB's 66 administrative judges issued 7,124 initial decisions. This accounts for about 44% of the caseload in this category. A hearing was required in 1,278 of these cases.

employees, other than administrative law judges, have been regarded as a discretionary function.²²⁴

In Arnett v. Kennedy,²²⁵ the Supreme Court recognized that federal employees are entitled to due process prior to being subjected to adverse personnel actions. Although divided, the Court held that a federal employee was entitled to only a post-termination hearing and that the official preferring the charges against the employee might also discharge him. In the Civil Service Reform Act of 1978, Congress created the MSPB and made changes in the procedures governing review of adverse actions in order to protect the rights of federal employees recognized in Arnett.²²⁶ Congress provided that appeals to the MSPB may be heard by the Board itself, an ALJ, or an administrative judge. The regulations promulgated by the MSPB indicate that appeals filed by MSPB employees, ALJs, and proceedings initiated by the Special Counsel are referred to an ALJ.²²⁷

²²⁴Attorney General's Manual on the Administrative Procedure Act, p.44.

²²⁵416 U.S. 134, 40 L.Ed.2d 15 (1974)

²²⁶P.L. 95-454, 91 Stat. 1111. See Senate Report No. 95-969, July 10, 1978, p.51.

²²⁷See 5 CFR §§ 1201.13 (pertaining to appeals by MSPB employees), 1201.124(a)(3) (pertaining to proceedings brought by the Special Counsel), and 1201.135(a) (pertaining to appeals by ALJs). The Special Counsel is appointed by the President with the advice and consent of the Senate. In general, the Special Counsel brings proceedings to correct prohibited personnel practices on the part of agencies and to discipline employees. 5 U.S.C.A. §§ 1211, 1212; 5 CFR §

The procedures followed by both the ALJs and the administrative judges are the same.²²⁸ These procedures satisfy essentially all of the requirements of §§ 556 and 557. However, the administrative judges are subjected to informal quality control mechanisms which presumably are not applicable to the ALJ. Their decisions are reviewed by the Regional Director for their region prior to issuance and they are subject to performance appraisal. They are also required to meet quantitative performance requirements. MSPB has set quantitative standards for minimally satisfactory performance, fully satisfactory performance, and performance which exceeds the standard. Thus the MSPB maintains considerably more control over the decisions of the administrative judges than it does over the work of the ALJ.

Unlike the usual situation in which an agency is called upon to review decisions to which its own staff is a party, the MSPB renders decisions on disputes between an agency and the latter's employees. Because of this separation between the agency rendering the decision from the parties to the decision, there may be less need to separate the function of the administrative judge from that of the agency staff, or

1201.123(a).

²²⁸Subpart B of Part 1201 is generally applicable to MSPB proceedings. See 5 CFR §§ 1201.13, 1201.121(b), 1201.131, and 1209.4.

to provide them with the same degree of independence accorded ALJs. Here again, the possible existence of institutional impartiality may operate to ensure that procedures are fair and acceptable to those who are subject to them despite the fact that informal quality control mechanisms are in use.

These developments in the law applicable to the procedural rights of federal employees seem contrary to the proposition that their employment is discretionary and that actions against them are not subject to the formal adjudication provisions of the APA. The very existence of a separate agency to decide disputes concerning federal employees, the fact that it has been given statutory authority to refer such disputes to ALJs, and the fact that it has adopted procedures which are identical for both ALJ and administrative judge proceedings indicates that the traditional view reflected in § 554(a)(2) of the APA may no longer hold true.

Foreign Service Grievance Board

In addition to the MSPB procedures, Congress has provided for a Foreign Service Grievance Board.²²⁹ This Board is made up of 15 members who are "independent,

²²⁹22 U.S.C.A. §§ 4131 - 4140; 22 CFR Part 16. The Board also hears appeals under 22 CFR Part 17 relating to overpayments to annuitants.

distinguished citizens"²³⁰ appointed by the Secretary of State from nominees approved by the affected agencies and the exclusive representative of the employees. The Board's procedures approach those mandated by §§ 556 and 557 of the APA.²³¹ State reports that it does not use informal quality control mechanisms, and that it processes about 40 cases per year.

Office of Personnel Management Standards

The Office of Personnel Management (OPM) has promulgated minimal procedural standards to be followed by executive agencies in processing employee grievances. Under 5 CFR Part 771, each covered agency is required to establish an agency administrative grievance system.²³² Part 771 sets forth criteria which more than meet the minimum

²³⁰22 U.S.C.A. § 4135(a).

²³¹These include: 1) representation; 2) a qualified right to a hearing; 3) the right to examine and cross-examine witness and propound interrogatories; 4) the right to compel the testimony of agency employees; 5) the right to make written submissions and comment on the record if a hearing is not held; and 6) a record which excludes irrelevant, immaterial, or unduly repetitious evidence and is recorded verbatim. 22 U.S.C.A. § 4136. The Board issues final decisions in some instances and makes recommendations to the Secretary of State in others. These decisions must be in writing and must include findings of fact. Ex parte communication with the Secretary are forbidden while a Board recommendation is under consideration. 22 U.S.C.A. § 4137.

²³²5 CFR § 771.301(a).

standards for adjudication of § 555 of the APA.²³³ The Army (Civilian Appellate Review Agency), Interior, and Treasury reported that they process about 500, 20, and 20 cases, respectively, under this procedure each year.

Federal Labor Relations Authority

The Federal Labor Relations Authority (FLRA) has responsibility for resolving disputes concerning the relations between federal agencies and unions. In connection with this responsibility, it is required to provide an opportunity for hearing in certain circumstances concerning petitions of unions for exclusive representation and determinations of appropriate bargaining units.²³⁴

FLRA's rules characterize these hearings as investigatory

²³³Under 5 CFR § 771.302, an employee filing a grievance is entitled to: 1) prompt consideration; 2) if fact finding is appropriate a hearing conducted by an employee who is not a part of the organization involved in the grievance; 3) representation; 4) a reasonable amount of official time to present the grievance; 5) freedom from restraint or coercion; 6) an opportunity to comment on any facts found; and 7) a written decision if the grievance is presented in writing.

Part 771 is applicable to all agencies except the Central Intelligence Agency, the Federal Bureau of Investigation, the Defense Intelligence Agency, the National Security Agency, the Nuclear Regulatory Commission, the Tennessee Valley Authority, the Postal Rate Commission, and the U.S. Postal Service. 5 CFR § 771.206(a). Of these, the Nuclear Regulatory Commission reports that it has established similar procedures and processes one or two cases a year.

²³⁴5 U.S.C.A. §§ 7111 and 7112. FLRA reports that it conducted 46 such hearings in FY-87 and 43 in FY-88.

and not adjudicatory.²³⁵ The rules do not require separation of the functions of presiding from the function of investigating. They specifically fail to provide for the allocation of the burden of proof or incorporate technical rules of evidence, relying instead on relevancy and materiality.²³⁶ They do not require that the hearing officer render a recommended decision, but rather place the decisional authority solely in the hands of the Regional Director,²³⁷ and establish no standard of proof which must support the decision. Nonetheless, these rules provide many of the procedures mandated by §§ 556 and 557, including the right to submit evidence and conduct cross-examination.²³⁸

The hearing officers are some 60 non-supervisory labor-relations specialists, GS-233-13. Cases are assigned on the

²³⁵ 5 CFR § 2422.9(b).

²³⁶ 5 CFR § 2422.9(b).

²³⁷ FLRA reports that a member of the Regional Director's staff normally drafts the decision and that that individual may or may not be the hearing officer.

²³⁸ In addition to providing for the right to counsel (5 CFR § 2422.11(a)), subpoenas (5 CFR § 2422.12(a)), and for a prompt decision (5 CFR § 2422.16(a)) as required by § 555, the rules specifically require: adequate notice (5 CFR § 2422.8); enumerate powers of the hearing officer which closely parallel those in § 556 (5 CFR § 2422.12); permit parties to submit evidence, conduct cross-examination, argue the case at the end of the hearing (5 CFR § 2422.11); and file a brief with the Regional Director who will issue the decision (5 CFR § 2422.14). The rules also specify the content of the decisional record (5 CFR § 2422.15), prohibit ex parte communications (5 CFR Part 2414), and permit appeals of the Regional Director's decision (5 CFR § 2422.17).

basis of availability. Conducting hearings is a relatively small part of these individuals' duties. They are subject to performance appraisal. Retention of decisional authority in the Regional Director eliminates them from any formal decisional role.

National Labor Relations Board

The National Labor Relations Board (NLRB) conducts similar hearings concerning the relations among private employers, their employees, and labor organizations. These are presided over by employees who function principally as field attorneys and field examiners.²³⁹ These hearings concern petitions seeking an election to determine whether a particular group of employees wishes to be represented by a union (pre-election hearings), allegations of election-related misconduct (post-election hearings), and work disputes between labor organizations arising under § 10(k) of the National Labor Relations Act (10(k) hearings).²⁴⁰

The procedures governing these hearings permit parties to appear in person and to be represented, to introduce oral and documentary evidence, to cross-examine witnesses, to request subpoenas, and to argue the case at the close of the hearing. Judicial rules of evidence are specifically made

²³⁹NLRB has approximately 480 field attorneys (GS-11 to 14) and 500 field examiners (GS-5 to 13) who conduct these hearings.

²⁴⁰In FY-88, NLRB conducted 860 pre-election hearings, 200 post-election hearings, and 27 10(k) hearings.

inapplicable.²⁴¹ The hearing officer is charged with "...the duty ... to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties...",²⁴² implying that an investigative, rather than adjudicatory, model governs is applicable. In pre-election hearings, the hearing officer may submit an analysis of the record to the regional director, but is prohibited from making recommendations,²⁴³ thus adding to the implication that the investigative model governs these hearings. In post-election hearings, the regional director may direct the hearing officer to prepare and serve a report resolving questions of credibility and containing findings of fact and a recommended disposition of the matter.²⁴⁴ NLRB indicates that this procedure is the rule rather than the exception, and that the hearing officer's report must be issued within 95 days of the date of the election. NLRB also indicates that all regional office decisions are reviewed by headquarters management personnel. Hearing officers are subject to performance appraisal.

²⁴¹29 CFR § 102.66(a), (c), and (e).

²⁴²29 CFR § 102.64(a) (emphasis in original).

²⁴³29 CFR § 102.66(f).

²⁴⁴29 CFR § 102.69(e).

Observations and Conclusions - Employer-Employee Relations
Case Types

These case types divide themselves between those with government-wide or nationwide scope, and those which are largely limited to the personnel of the agency in question. The programs administered by NLRB, EEOC, FLRA, and MSPB, the principal case types in the former category, are concerned with resolving adverse actions taken against employees, complaints of discrimination by employees, and questions of union representation of employees. They account for 96% of the total caseload assigned to this category. All are programs in which the deciding agency is independent from the parties to the controversies it decides. All utilize both informal quality control mechanisms, performance appraisal and informal review, as well as formal appeals. Because the organizations may be presumed to be impartial, their use of informal quality control mechanisms may be presumed to have no effect on the fairness and public acceptability of their proceedings.

The programs administered by agencies which affect only that agency's personnel are largely concerned with resolving employee grievances. They also tend to use informal quality control mechanisms, but not appeals. The statistics reveal that performance appraisal is used in 71% of the case types and 91% of the caseload, informal review in 29% of the case types and 91% of the caseload, and appeals in 43% of the

case types and 19% of the caseload. Combining both categories of case types confirms that heavy emphasis is placed on informal quality control. Appeals are not utilized in the absence of an informal method for controlling quality. Only two case types employ none of the quality control methods. These are those administered by the Foreign Service Grievance Board and the Pension and Welfare Benefits Administration of the Labor Department. Their combined caseload is about 40.

The employer-employee relations case types reveal a tendency to combine investigatory and adjudicative functions. The principal example is EEOC, where the conduct of the hearing by an EEOC judge leading to a recommended decision is a continuation of the investigative process begun by the agency. It seems designed to provide an agency with an independent view of the credibility of allegations of discrimination and to correct the agency's resolution of the matter if that resolution does not pass muster. It is thus as much a means to police discrimination in the federal establishment as it is to resolve particular allegations.

Similarly, the procedures of the FLRA are characterized in its rules as investigatory, not adjudicatory. They nonetheless incorporate a number of similarities to the formal procedures of the APA. While not so characterized in the rules governing them, the proceedings of the NLRB concerning pre- and post-election disputes incorporate

features which lead to the conclusion that they are largely investigations rather than adjudications.

One thing seems clear. While it may be that when the APA was enacted, federal employment was a discretionary matter in which the applicant or employee had few procedural rights, that no longer appears to be the case. The provisions of the Civil Service Reform Act of 1978 incorporated many procedural rights and created an impartial body to resolve adverse actions taken against employees. Moreover, when the Congress stopped short of placing responsibility for the adjudication of these cases in ALJs, it opened the door to the deciding agencies to utilize informal quality control mechanisms. This opportunity has been fully exploited. Not only have federal employees been vested with considerable procedural rights, the agencies administering those procedures have availed themselves of both formal and informal mechanisms to ensure that these programs are properly administered.

HEALTH AND SAFETY CASE TYPES

There are two case types administered by the Nuclear Regulatory Commission (NRC) and one administered by the Environmental Protection Agency (EPA) in this category. These account for an annual caseload of only about 21 cases, thus constituting by far the smallest category both in number of case types and caseload.

Nuclear Regulatory Commission

Of the NRC case types, one involves formal adjudication under §§ 556 and 557 and one informal adjudication under § 555. The former concerns applications for nuclear power reactor construction permits and operating licenses as well as enforcement actions. Although the former proceedings are governed by §§ 556 and 557 of the APA, the Atomic Energy Act specifically authorizes the Commission to,

[n]otwithstanding the provisions of sections 7(a) and 8(a) of the Administrative Procedure Act, ... establish one or more atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have such technical or other qualifications as the Commission deems appropriate to the issues to be decided, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act....²⁴⁵

The NRC has established an Atomic Safety and Licensing Board Panel made up of lawyers, scientists, and engineers from which the atomic safety and licensing boards (ASLBs) are drawn.²⁴⁶ These individuals are selected on the basis of recognized achievement in their respective fields of

²⁴⁵42 U.S.C.A. 2241(a).

²⁴⁶The Panel includes two ALJs who are available to hear civil penalty cases and other cases sitting as a individual presiding officer. However, these cases constitute a very small portion of their workload, which consists principally of chairing ASLBs. Most of the other lawyer members of the Panel have qualified as ALJs, but do not occupy an ALJ position.

endeavor. Lawyers are required to demonstrate that they have seven to ten years of litigation experience before federal or state courts or administrative bodies.

Qualifications are reviewed by a selection committee and the names of three individuals deemed to be qualified for each vacancy are forwarded to the Commission, which makes all appointments to the Panel. Although they are not entitled to the statutory protection afforded ALJs,²⁴⁷ in practice they are accorded all the independence accorded the ALJs.

These same judges, sitting as single presiding officers, also conduct the Commission's informal proceedings.²⁴⁸ Although governed by the same statutory provision, the Commission has determined that these proceedings do not require formal adjudication. They concern applications for materials and reactor operators' licenses. Materials license applications usually come from operators of small businesses such as radiographers, well loggers, and the like, as well as medical applicants. Occasionally a larger business or institution, such as a university, may be an applicant, but the amount of money at stake is generally far less than that involved in a power

²⁴⁷5 U.S.C.A. § 7521.

²⁴⁸Pursuant to 10 CFR § 2.1207(a), ASLB's are not convened in informal proceedings. In practice, a second judge is appointed as an advisor to the presiding officer pursuant to 10 CFR §§ 2.1209(j) and 2.722. If the presiding judge is a lawyer, the advisor is a scientist or engineer, and vice versa.

reactor licensing proceeding. Applicants for reactor operator's licenses are individuals. Both materials and reactor operator license application proceedings can and often do involve interests which center on an individual's ability to earn an income and are, as a result, very important. Given the low caseload volume (generally less than 15 per year), there does not appear to be a strong governmental interest in avoiding the expense of lengthy proceedings.²⁴⁹

In general, even the most complicated of these cases are much less complex than power reactor licensing cases where opposition from state and local governments has been known to result in extremely controversial, hotly contested proceedings which are fought simultaneously before multiple ASLBs, state, and federal courts and to last for years. Here the interests asserted center on public health and safety as well as environmental values. These interests may be asserted by local individuals or groups on one extreme, or a governor and/or attorney general of a state on the other. Often, national organizations will become sufficiently interested to intervene. The interests asserted are indeed weighty ones, potentially affecting large segments of the public. Given the high cost of these

²⁴⁹ However, the government has a strong interest in assuring that unqualified individuals are not allowed to assume positions where their actions could pose a threat to the public.

proceedings, there is a governmental interest in efficiency. That interest is shared by the utility companies who are applicants in that delay costs often are substantial and may run well into six figures on a daily basis in some cases. Thus these proceedings bear out the cliché that one man's delay is another's due process.

The NRC's interpretation of the statute which governs its hearings not to require formal proceedings on materials license applications while at the same time utilizing such proceedings on reactor license applications was affirmed in City of West Chicago v. NRC.²⁵⁰ That case involved an industrial site located within West Chicago, Illinois, where the milling of thorium ore had taken place pursuant to a materials license issued by the NRC. As a result, some buildings where this activity had taken place were contaminated with radioactivity and some slightly radioactive mill tailings had been taken offsite for use as fill. The NRC issued license amendments to the licensee, Kerr-McGee Corporation, permitting the demolition of some buildings under carefully controlled conditions and return to the site of the contaminated fill. The City of West Chicago requested an adjudicatory hearing conducted pursuant to §§ 556 and 557. NRC denied this request noting that neither the statute governing its hearings nor its

²⁵⁰701 F.2d 632 (7th Cir. 1983).

regulations required a formal hearing. Furthermore, NRC analyzed Matthews v. Eldridge²⁵¹ and concluded that West Chicago was not entitled to a formal hearing on due process grounds.²⁵² The NRC decided the issues raised by West Chicago on the basis of papers which set forth the parties positions on the facts in issue and their arguments. The seventh circuit affirmed this procedure, noting that NRC correctly applied the Matthews v. Eldridge analysis. The court briefly noted that West Chicago's interest was generalized rather than specific; that it had not valued that interest highly enough in the past to seek formal procedures with regard to similar actions approved by NRC; that the factual issues were technical and scientific, not involving questions of credibility; and that the convening of an ASLB to conduct a formal hearing involved a good deal of expense to both the agency and the parties.²⁵³

The Court's conclusions concerning the technical nature of the issues and expense apply with equal force to the NRC's formal proceedings. However, the importance of the interests in terms of potential impact on the public at

²⁵¹Supra, note 76.

²⁵²For the NRC decision, see Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982).

²⁵³City of West Chicago v. NRC, supra, 701 F.2d at 645-46. The court also affirmed NRC's conclusion that neither its regulations nor the governing statute require a formal hearing.

large is far greater in the reactor licensing case than in a materials licensing case. This is so when viewed in terms of the public health and safety, where the consequences of a reactor accident must be considered, or when viewed in terms of economics, where sometimes huge costs of delay incurred during the pendency of an application may well be passed on to the ratepayers. These interests often compete. The interest in public health and safety, represented by public interest groups and/or state and local governments, argues for more procedure and less efficiency, while the economic interest, represented by the utility-applicant, argues for more efficiency and less procedure. The Congress and the NRC, by opting for formal proceedings in these cases, have struck the balance in favor of the former.

NRC's rules governing informal proceedings reflect the court's conclusions concerning the nature of the factual issues in the West Chicago case. They satisfy the three basic requirements of § 555 in that they provide for notice, the right to be represented, and to appear before the agency.²⁵⁴ The rules contemplate that the issues will be decided on written submissions, rather than after a hearing, unless the presiding officer determines that oral presentations are necessary in order to create an adequate

²⁵⁴See 10 CFR §§ 2.1205, 2.1215, and 2.1233.

record.²⁵⁵ The presiding officer is given most of the powers enumerated in § 556(c), including the power to issue subpoenas and to issue initial decisions. Initial decisions must be based on the record and include findings and an order. They become final agency action unless appealed.²⁵⁶ Although the NRC Staff must pass on any application which may be the subject matter of such a hearing, it is a party to the proceeding only if it proposes to deny the application or it chooses to be a party.²⁵⁷ The three chief

²⁵⁵If an oral hearing is ordered, individual presentations are taken under oath, stenographically recorded, and may be subject to time limitations. Cross examination is not permitted, although the presiding officer may permit the parties to suggest questions for the presiding officer to put to a witness. See 10 CFR § 2.1235(a) and (b). Strict rules of evidence do not apply to either written or oral presentations, although the presiding officer may strike cumulative, irrelevant, immaterial, or unreliable evidence. See 10 CFR §§ 2.1233(e) 2.1235(c).

²⁵⁶See 10 CFR §§ 2.1209 and 2.1251(a) and (c). The power to issue subpoenas contrasts with the fact that discovery is not permitted in these proceedings. Presumably, the subpoena power was deemed to be required by § 555(d).

²⁵⁷See 10 CFR § 1213. The Staff's review and proposed disposition of the application are the events which trigger a request for hearing. It is unlikely that a request for a hearing in opposition to the application will be filed unless the Staff proposes to grant the application. Similarly, there is no incentive for the applicant to request a hearing unless the Staff proposes to deny the application. Yet the cited rule requires the Staff to participate as a party only in the latter event. In any event, the Staff prepares a so-called "hearing file" consisting of the application, the relevant Staff documents generated as a result of Staff's review, and any other relevant documents. 10 CFR § 2.1231. This file provides the basis for the hearing and the initial decision, and the parties' positions and arguments usually center on

differences between NRC's formal and informal proceedings are that the latter:

1. Do not require a hearing and do not permit cross-examination;
2. Do not permit discovery; and
3. Do not require the NRC staff to be a party.

NRC does not use any informal quality control mechanisms in either its formal or informal proceedings, relying instead exclusively on formal review for quality control purposes.²⁵⁸ The highly public nature of the interests at stake in them makes the acceptability of NRC's decisions to the public more important than in almost any other administrative proceedings. Without a high degree of public acceptability, it is unlikely that NRC's licensing decisions could be given effect.²⁵⁹ The use of informal quality control mechanisms would operate to substantially

information contained in it.

²⁵⁸In the past, formal review has included review of initial decisions in the absence of an appeal. That review was carried out by an independent appeal board without the views of any party to the proceeding or the NRC staff. The appeal board's conclusions were issued in writing and served on the parties. In turn, the appeal board's conclusions might be subject to review by the Commission.

²⁵⁹It may be argued that the lack of the public's willingness to accept the NRC's decisions to license the Shoreham reactor in Suffolk County on Long Island was responsible for the successful conclusion of an agreement to scrap that plant entered into between the plant's owner, Long Island Lighting Company, and the State of New York, which had opposed licensing of the plant in litigation before several ASLBs.

weaken the public's confidence in the NRC's processes. Thus it is unlikely that the NRC could successfully employ informal quality control mechanisms.

The issues presented in both formal and informal NRC proceedings are usually highly technical, and the evidence presented is generally in the form of expert opinion. In these circumstances, the conventional wisdom teaches that credibility of witnesses is not an issue, so that there is a reduced need for the confrontation afforded by formal procedures. There is merit to this view in that expert witnesses are unlikely to respond to cross examination in a manner which will expose the weaknesses of their position, even when cross is guided by an opposing expert. Experts are hired by a party to put forward the best possible technical and/or scientific case for that party. As a result, their conclusions are sometimes inadequately supported. However, an expert who sticks to his or her strongly expressed albeit unsupported conclusion in the face of vigorous cross may appear convincing to a nonexpert trier of fact.²⁶⁰

While there are techniques of confrontation which, when used in conjunction with direct and/or cross examination,

²⁶⁰For a discussion of this problem from the scientist's point of view, see "DNA Typing on the Witness Stand," 24 Science 1033, June 2, 1989.

tend to expose poorly supported conclusions,²⁶¹ the use of technical decision makers presents a distinct advantage as a means to arrive at the truth. They can grasp the technical issues more quickly than lawyers and are less likely to be misled by an inadequately supported technical position. What makes NRC proceedings unusual is the combination of legal and technical skills in the same presiding officer, a practice which has been successful enough to dictate that a technical or legal advisor be automatically appointed to each individual presiding officer in informal proceedings. NRC's experience clearly indicates that it is possible to preserve all of the procedural rights accorded by §§ 556 and 557 and, at the same time, endow the decision maker with the technical knowledge necessary to quickly and accurately resolve the scientific and engineering disputes presented for decision. This addition may, more than any other procedural tool, contribute significantly to the ability of the administrative process to arrive at acceptable results in technical controversies.

Environmental Protection Agency

EPA's cases concern corrective action orders issued to operators of interim facilities subject to the Resource Conservation and Recovery Act (RCRA) in response to releases

²⁶¹An effective technique is to conduct the examination of opposing experts together, thereby giving each the opportunity to comment directly and immediately on the other's conclusions.

of hazardous waste from those facilities.²⁶² These orders may require that the interim facility cease operations, may levy a fine, or may seek other corrective action.²⁶³ In the last case, informal adjudicative procedures are used if a hearing is requested, whereas in the first two, any hearing is conducted pursuant to §§ 556 and 557 under procedures established for RCRA § 3008(a) orders.²⁶⁴ In this regard, EPA has followed a similar path as NRC in interpreting the statute to require a formal hearing in one set of circumstances, but not another. This approach was affirmed in Chemical Waste Management, Inc. v. U.S. Environmental Protection Agency.²⁶⁵

EPA looked to Matthews v. Eldridge to determine the degree of formality necessary to resolve the issues presented and focussed on the nature of the issues to be resolved.

The issues posed in proceedings on disputed corrective action orders will typically relate to legal, policy,

²⁶²"Interim" facilities under RCRA are those which were in existence in 1980, when the requirement that hazardous waste treatment, storage, or disposal facilities must obtain a permit went into effect. Interim facilities are allowed to continue operations while their permit applications are under review. 42 U.S.C.A. § 6925.

²⁶³42 U.S.C.A. § 6928(h).

²⁶⁴40 CFR § 24.01. RCRA § 3008(a) (42 U.S.C.A. § 6928(a)) authorizes civil penalties, including the suspension or revocation of permits for violations of RCRA regulations.

²⁶⁵873 F.2d 1477 (D.C. Cir. 1989).

or technical matters, which are most appropriately addressed in informal hearings. The primary issue in a hearing on a corrective action order is not likely to be whether a violation occurred (as is generally true in the case of a RCRA § 3008(a) order) but how a respondent should study and remediate a release. This kind of issue is apt to be wide-ranging and complex and is more susceptible to resolution through analysis of a full documentary record than through examination and cross examination of witnesses. The goal should then be to complete a full and fair documentary record upon which EPA can base its decision. These procedures allow the respondent and the Agency every opportunity to develop just such a record.²⁶⁶

EPA elaborated on the nature of the factual issues to be resolved in the Statement of Considerations accompanying the final rule. There, EPA noted its belief that the facts likely to be at issue in proceedings on corrective action orders were likely to be of a technical nature and involve such questions as: has a release occurred; are the corrective measures proposed by EPA warranted; where has the contamination migrated; has EPA accurately characterized hydrological conditions at the site. These sorts of questions, in EPA's view, do not often raise questions of witness credibility which make formal procedures desirable. Rather, they can be more effectively resolved through informal procedures.²⁶⁷ The court in Chemical Waste Management agreed, noting that the regulations give the

²⁶⁶52 Fed. Reg. 29222 at _____ (August 6, 1987).

²⁶⁷See 53 Fed. Reg. 12256 at _____ (April 13, 1988). EPA also pointed out that there were substantial monetary costs to the agency if formal proceedings were used as well as costs to the public interest resulting from delay in corrective action.

presiding officers substantial discretion to tailor the procedures employed to the nature of the issues involved. The court noted in particular the presiding officer's power to pose questions to the parties, permit interchanges between the parties, and permit a respondent to pose questions to the agency in advance of the hearing.²⁶⁸

EPA adopted a two track approach to its informal adjudications.²⁶⁹ The first track is the least formal and is applicable to corrective action orders which require a respondent to undertake investigative studies, either alone or in conjunction with limited interim corrective measures.²⁷⁰ The second track provides more formality and

²⁶⁸873 F.2d at 1482-83, 1484.

²⁶⁹These tracks more than meet the minimum requirements of § 555. They both provide for notice (40 CFR §§ 24.02, 24.04(b)), representation by counsel (40 CFR § 24.04(c)), and the opportunity to submit information and argument (40 CFR Part 24, Subparts B and C). The presiding officer is to be the Regional Judicial Officer or another attorney. 40 CFR §§ 24.09, 24.13. The presiding officer is directed to conduct a fair and impartial hearing. 40 CFR §§ 24.11, 24.15(a).

²⁷⁰See 40 CFR Part 24, Subpart B. These procedures provide the respondent with an opportunity to submit information and argument for inclusion in the record in advance of the hearing. 40 CFR § 24.10(b). At the hearing, EPA is to introduce the administrative record underlying its order. The respondent is given an opportunity to "address relevant issues and present its views through legal counsel or technical advisors." Direct and cross examination of witnesses is not permitted, although the presiding officer may permit "technical and legal discussions and interchanges between the parties, including responses to questions to the extent deemed appropriate," and may question the parties. 40 CFR § 24.11. Following the hearing, the presiding officer must approve a written summary of the hearing and

is applicable to corrective action orders incorporating more permanent corrective measures.²⁷¹ EPA's rationale for the differing treatment of these corrective action orders is that the former "...are expected to present fewer issues of material fact and, accordingly, fewer opportunities for the Agency to commit prejudicial error in reaching its decision."²⁷²

The presiding officers who conduct these proceedings are attorneys who have other duties and as a result are subject to performance appraisal. They are not subject to other informal quality control mechanisms. They are subject

prepare a recommended decision for the Regional Administrator, who issues the final agency decision. The parties may comment on the recommended decision. 40 CFR §§ 24.12, 24.18, 24.20.

²⁷¹See 40 CFR Part 24, Subpart C. These procedures require respondent to submit a brief "stating and supporting respondent's position on the facts, law and relief," followed by a response from EPA. 40 CFR § 24.14(a) and (c). In addition, the respondent may seek permission to pose 25 questions to EPA. The presiding officer is to allow those which are necessary "for full disclosure and adequate resolution of the facts" and are not "irrelevant, redundant, unnecessary, or an undue burden." The presiding officer may pose questions to the parties and issue subpoenas. 40 CFR § 24.14(d) and (e). The hearing begins with the introduction by EPA of the order and supporting record, followed by respondent's response, EPA's rebuttal, and a possible last word from respondent. 40 CFR § 24.15(b). The hearing is to be either transcribed or tape recorded. 40 CFR § 24.16(a). Following the hearing, the presiding officer is to submit a recommended decision to the Regional Administrator on which the parties may comment. 40 CFR § 24.17. The Regional Administrator issues the final agency decision. 40 CFR §§ 24.18, 24.20.

²⁷²52 Fed. Reg. 29222 at _____.

to separation of functions requirements and prohibitions on ex parte communications.²⁷³ Like NRC, it appears that public acceptability is important in these proceedings. Hence EPA probably would find itself under the same sort of constraints as NRC concerning the use of informal quality control mechanisms.

Observations and Conclusions - Health and Safety Case Types

The public nature of the interests at stake in these case types sets them apart from the others included in this survey. Indeed, these case types provide support for the proposition that the greater the interest at stake in a proceeding, the less acceptable informal methods of quality control become. NRC and EPA appear to have balanced the conflicting interests in their proceedings in such a way as to avoid any serious concern that they do not satisfy due process requirements.

NRC's use of technically trained judges on its ASLBs represents a relatively novel means of providing for greater public acceptability. While this procedure does not go to the impartiality of the presiding officer, it does go to its competence and thus to the fairness of the proceeding in the sense that it will make it more difficult for a well financed party to convince the presiding officer that a poorly supported technical opinion is correct. In this

²⁷³40 CFR §§ 24.09, 24.13, 22.04(b).

sense, the presence of technically trained judges probably goes more to the substantive, rather than procedural fairness of the proceeding. It increases the probability that a just result will be reached. However, in the final analysis, this would appear to be an essential element of public acceptability. The right to submit technical evidence and views to an impartial presiding officer under rigorous procedural safeguards is not worth much if that presiding officer does not understand the evidence and views submitted.

OVERALL OBSERVATIONS AND CONCLUSIONS

In addition to the observations and conclusions already stated, some overall observations and conclusions based on the survey are appropriate. Perhaps the most striking of these is the extent to which independent organizations are utilized to house the presiding officers. For this purpose, an independent organization is one which is disinterested in the controversies it decides and which renders the final administrative decision, thus relieving it from pressure to please an interested administrative reviewing authority. This sort of organization was reviewed by the Supreme Court in Schweiker v. McClure.²⁷⁴ There, the argument was made that the connection between the presiding officers rendering final decisions on Medicare claims and the insurance

²⁷⁴456 US at 195-97, 72 L.Ed 2d at 8-9.

carriers paying those claims was sufficiently close to justify the conclusion that the presiding officers were biased against the claimants. This bias was said to deprive the claimants of due process.

The Court began by recognizing that the presiding officers serve in a quasi-judicial capacity not unlike ALJs and as a result are required by due process considerations to be impartial. However, it found that the claimants had not demonstrated that the presiding officers were in fact biased. Their connection with the carriers who pay the claims was insufficient for this purpose because the carriers did not have any financial stake in those payments, but rather paid from government funds. The Court noted that, "[i]n the absence of proof of financial interest on the part of the carriers, there is no basis for assuming a derivative bias among their [presiding] officers."²⁷⁵

Similarly, where a government agency established to hear and decide controversies renders the final administrative decision and has no policy stake in the outcome of those controversies, it would seem that there is no bias which might be attributed to the presiding officers who carry out its functions. The existence of informal quality control mechanisms may indeed tend to lessen the independence of the presiding officers from their employing

²⁷⁵456 US at 197, 72 L.Ed. 2d at 9.

agency. But that lessening of independence may not necessarily result in diminished impartiality on the part of the presiding officers if the employing agency is itself impartial.

The Survey reveals that 30% of the 83 case types accounting for about 23% of the 343,200 annual caseload are administered by such organizations. These organizations are:

1. The Board of Veterans Appeals (BVA) of the Veterans' Affairs Department (VA) which administers one case type accounting for an annual caseload of 42,000. It renders final decisions on veterans' claims for entitlements and is by statute an independent element of the VA. BVA employs informal quality control mechanisms.

2. The National Appeals Staff of the Farmers Home Administration (FmHA), which is required by statute to be independent from FmHA and which renders final agency decisions. Its director reports to the Administrator of FmHA. It administers one case type which accounts for a caseload of about 12,000. It employs informal quality control mechanisms.

3. The Board of Patent Appeals and Interferences (BPAI) and the Trademark Trial and Appeal Board (TTAB), which administer three case types accounting for an annual caseload of about 3900. They render the final agency decisions, and their directors report to the Commissioner of

Patents and Trademarks, who in turn reports to the Secretary of Commerce. Generally, the government does not have an interest in the subject matter of their proceedings. They employ informal quality control mechanisms.

4. The nine Boards of Contract Appeals (BCA) and the General Accounting Office (GAO) (case type concerning bid protests), which administer 16 case types accounting for an annual caseload of about 7600. They render decisions which are binding on both the contractor and the government. Two of them employ performance appraisal; otherwise they do not use informal quality control mechanisms.

5. The National Labor Relations Board (NLRB) and the Federal Labor Relations Board (FLRA), which rule on disputes between labor unions and private, in the case of NLRB, and government, in the case of FLRB, employers. They administer two case types with an annual caseload of about 1150. They have no interest in the disputes which they hear and render final administrative decisions. Their proceedings are largely investigatory in nature.

6. The Merit System Protection Board (MSPB), which administers one case type concerning appeals by federal employees from adverse actions. MSPB has an annual caseload of about 7100. It has no interest in the proceedings before it and employs informal quality control mechanisms.

7. The Equal Employment Opportunity Commission which administers one case type concerning complaints of discrimination by federal employees. EEOC's procedures are investigatory in nature and it has an annual caseload of about 6200. It has no interest in the proceedings before it and employs informal quality control mechanisms.

These examples, all of which exist by virtue of legislation, indicate a concern on the part of Congress that independence and impartiality be maintained in informal adjudication. Indeed, in the case of the VA, Congress has gone so far as to create two independent organizations to which an aggrieved veteran may appeal: the BVA, which renders the final VA decision, and the Court of Veterans' Appeals, which hears appeals by veterans, but not the VA, from the decisions of the former. In light of the fact that in processing claims, VA is to illustrate a procedural bias in favor of the veteran, the existence of two independent organizations to review its work is remarkable.

At the outset of this paper, it was noted that where the presiding officers have no other duties, the agencies refrain from the use of informal quality control mechanisms in about 45% of the case types and 62% of the caseload. This indicates that the agencies appear to be willing to accord these presiding officers a fair degree of independence. If these statistics are modified to include these independent organizations among those who refrain from

the use of informal quality control mechanisms, these figures rise to 65% of the case types and 91% of the caseload.²⁷⁶ This indicates a high degree of independence and impartiality is accorded presiding officers without other duties.

Another interesting observation concerns the kinds of interests which appear to receive the greatest protection in the cases surveyed. Certainly the interests at stake in the case types administered by independent organizations should be included in this group. In addition, those administered by the Executive Office for Immigration Review and that administered by the NRC concerning the licensing and regulation of nuclear facilities are notable for their formality. The former case types utilize essentially all of the procedural safeguards applicable to formal APA proceedings, and the later are governed by §§ 556 and 557. Thus they too accord their presiding officers a high degree of independence and impartiality. Thus, the interests which appear to receive the greatest protection in terms of being presented before impartial presiding officers are the following.

²⁷⁶ Similarly, where presiding officers have other duties, the percentage of case types and caseload in which agencies refrain from informal quality control measures rises to 15% and 18%, respectively, from 6% and less than 1%.

- The interest of aliens resisting deportation or exclusion.

- The interest of farmers resisting foreclosure of an agricultural loans.

- Commercial interests in intellectual property and in rights under contracts with the government.

- The interest of the public affected by the siting or operation of nuclear power plants, and the interest of the owners of such plants faced with enforcement actions.

- The interest of federal employees faced with adverse personnel actions or discrimination, and the interests of labor organizations representing employees in both the federal and private sectors.

These interests fall into the following general categories:

- Concerns of individuals regarding their domicile, jobs, and livelihood;

- Concerns of individuals and corporations over large amounts of money; and

- Concerns of individuals and organizations over potential adverse effects on the health and safety of large segments of the public and on the environment.

In light of the strong tendency to accord presiding officers a high degree of independence and impartiality, at least where they have no other duties, it is perhaps

surprising that the survey revealed that only a very few case types are governed by rules incorporating provisions governing ex parte communications. However, this observation may not reflect the true state of affairs. First, it may well be that many agencies view the traditional legal approach to ex parte communications as being so fundamental as to dispense with the need to address it in a regulation. Second, many may have addressed it in decisions.²⁷⁷ Third, a number of proceedings are in fact ex parte or investigatory, so that a rule governing such contacts would be inappropriate. Nonetheless, the APA contains specific provisions governing ex parte communications in formal cases. Consequently, there may be some value in considering the adoption of similar provisions to govern informal proceedings which are truly adversarial.

The same observation may be made with regard to the lack of provisions governing separation of the functions of prosecuting and deciding, although at the same time it must be noted that the traditional separation of functions concept probably is unworkable in most case types where presiding officers have other duties. Further, as noted initially, where presiding officers have no other duties, a de facto separation may exist. And the housing of presiding

²⁷⁷See e.g. DISCR OSD Case No. 89-0525, June 15, 1990, in which the DISCR Appeal Board dealt with the problem of improper ex parte contacts.

officers in independent organizational units with no interest in the controversies heard by them clearly effects a separation. Nonetheless, as in the case of ex parte communications, the addition of provisions to the APA governing separation of functions in those informal case types where it is feasible and appropriate may be beneficial.

Finally, it is appropriate to observe that the case types surveyed revealed that some presiding officers have technical competence in addition to or in place of legal training and expertise. In the formal proceedings heard by the Nuclear Regulatory Commission's Atomic Safety and Licensing Boards, two of the three board members are from engineering and/or scientific disciplines, and the third, who serves as chair, is a lawyer. This practice is specifically authorized by § 191 of the Atomic Energy Act,²⁷⁸ which authorizes the Commission to utilize boards rather than ALJs in its formal proceedings. Section 191 requires that two of the board members are to have "...such technical or other qualifications as the Commission deems appropriate to the issues to be decided...."²⁷⁹

²⁷⁸42 USC § 2241.

²⁷⁹Section 191 requires the third member to be "...qualified in the conduct of administrative proceedings...." Since enactment of § 191 in 1962, The Commission has consistently interpreted this language to require that lawyers with litigation experience serve as chairs of the boards.

Section 191 provides a means whereby technical competence can be brought to bear on the issues by the presiding officer itself, rather than only by the parties through the use of expert witnesses. While it is a procedure which goes to the competence of the presiding officer rather than to its impartiality, nonetheless it can be an effective way to ensure fairness and public acceptability. As noted in the discussion of NRC cases, the right to present evidence and argument on technical subjects to an impartial presiding officer is not so valuable if the presiding officer does not understand the subject matter.²⁸⁰

The Board of Veterans' Appeals also uses technically trained individuals. There, each three-member board is generally composed of two lawyers and one medical doctor. Thus the competence of these boards emphasizes the legal and procedural rather than technical aspects of the cases presented to them. Given the procedural bias in favor of the claimant which these boards are to exhibit, this emphasis is somewhat surprising. In that situation, one would expect that greater emphasis would be placed on the

²⁸⁰It is interesting that EPA has not seen fit to utilize a similar procedure in its informal proceedings on corrective action orders issued under RCRA, particularly in light of the fact that EPA justifies the use of informal procedures in part on the ground that the issues are likely to be both technical on the one hand, and complex and wide-ranging on the other.

substantive merits of the claims rather than the procedures under which it is considered.

The case type administered by the Coast Guard perhaps represents the opposite extreme. There, individual Coast Guard officers who presumably are not legally trained but are knowledgeable concerning the technicalities of the alleged violations in the civil penalty cases they hear process a large caseload. This program places the emphasis on correct substantive resolution of its cases and leaves any legal errors to be sorted out in the appeals process. technically trained presiding officer.





ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W., SUITE 500

WASHINGTON, D.C. 20037

(202) 254-7020

June 23, 1989

OFFICE OF
THE CHAIRMAN

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Dear Mr. Alpern:

The Administrative Conference is conducting a study of certain types of adjudication by federal agencies. Specifically, the Conference is interested in adjudications that are conducted by individuals who are not administrative law judges. Such presiding officials may be known as hearing officers, administrative judges, examiners or some other title. The study is designed to provide the Conference with a better understanding of the extent of the use of "non-ALJ" adjudicators and the procedures used in such cases.

I have enclosed several questions that we would appreciate your answering. We have tried to design the questions so that they may be answered easily by someone with knowledge of the relevant programs without necessitating much research.

We would appreciate your answers by July 28, 1989. If any questions arise, please call Administrative Judge John H. Frye, who is conducting the study for us. Judge Frye may be reached at 492-7861. If you have questions for me, please call 254-7065.

We greatly appreciate your cooperation. -

Sincerely yours,

Jeffrey S. Lubbers
Research Director

Enclosure

STUDY OF NON-ALJ HEARING PROGRAMS

If your agency administers one or more programs that offer the opportunity for an oral hearing presided over by an official who is not an administrative law judge appointed pursuant to 5 U.S.C. § 3105, please provide the following information for each such program:

(A) Case type categories

Please list all the types of cases that meet the above description at your agency. Please supply basic information about the case category (name of Act, U.S. Code citation, and brief description of the proceeding).

(B) Caseload

For each of the categories listed above, please indicate (estimate if necessary) the aggregate number of hearings before the relevant officer or corps of officers.

(C) Rules of Practice

For each of the categories, please give the CFR citation for the governing rules of practice and procedure.

(D) Presiding Officers

For each of the categories, please give the following information about the presiding officer(s) used in the program:

- (1) How many officers are involved?
- (2) What is their title, GS rank and occupational series?
- (3) Do they have other agency functions? If so, describe.
- (4) How are they selected for the position/role?

(E) Review

- (1) Describe the process, if any, by which the agency entertains appeals of decisions by these officials.
- (2) Does the agency reivew the decision, on its own, without an appeal?
- (3) Is the officer subject to performance appraisal? If so, by whom?
- (4) Has the agency established quantitative case-processing goals for the program? If so, describe.
- (5) Does the agency exercise qualitative controls, such as by subjecting opinions to informal supervisory review or peer review?

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**GRADE STRUCTURE, ASSIGNMENTS, AND
QUALIFICATIONS OF PRESIDING OFFICERS**

The table sets out the grade structure of the presiding officers. It shows a total of 2692 presiding officers associated with the 83 case types included in the Survey. Of these, 2228 are in grades 9 through 15; 427 of them have no other duties and 1801 have other duties. It should be noted that 1692 of the latter are employed by one agency, the Department of Veterans Affairs.

There are 151 presiding officers who are supergrades, all of whom have no other duties. There are 14 SES members who have no duties other than presiding and 4 who preside as an additional duty. Finally, there are 11 military officers, nine of whom have no duty other than presiding.

Presiding Officers Without other Duties

The presiding officers who have no other duties total 601. Approximately 438 of them are lawyers, who are assigned as follows:

<u>Agency</u>	<u>No.</u>	<u>Caseload</u>	<u>Grade</u>
Boards of Contract Appeals:	80	5,000	GS-14-18
EEOC:	79	6,227	GS-11-14
Immigration:	76	152,372	GS-15, SES
MSPB:	66	7,124	GS-13-15
Board of Patent Appeals:	58	5,782	GS-17, SES
Veterans Affairs:	44	42,000	GS-15, SES
Trademark Board:	9	3,503	GS-16, SES
Defense Legal Services:	8	650	GS-15
Nuclear Regulatory Com:	8	43	GS-16, SES
Small Business Admin:	5	400	GS-15
H&HS Departmental Appeals Bd:	<u>5</u>	<u>300</u>	GS-15
Eleven agencies:	438	223,401	

The 164 presiding officers who are not lawyers are assigned as follows:

<u>Agency</u>	<u>No.</u>	<u>Caseload</u>	<u>Grade</u>
Farmers Home Administration:	86	12,000	GS-9-13
Veterans Affairs:	21	42,000	GS-15
Labor Department:	20	2,144	GS-13
Coast Guard:	10	20,000	O-4-6, GS-11
Food & Nutrition Service:	10	1,230	GS-14
Health & Human Services:	8	307	GS-14-15, SES
Nuclear Regulatory Com:	7	43	GS-16-17
State Department:	<u>1</u>	<u>10</u>	SES
Eight agencies:	163	77,734	

Presiding Officers With Other Duties

In contrast, it appears that of the 2130 presiding officers who have other duties, only a small proportion are lawyers. They are assigned as follows:

<u>Agency</u>	<u>No.</u>	<u>Caseload</u>	<u>Grade</u>
Agriculture (Packers & Stockyards Div.)	23	255	GS-11-15
EPA (RCRA orders)	NG	10	GS-9-15
DOD (Civilian Health)	9	180	Private Attorneys
(Army)	1	450	O-7
GAO (Bid protests)	7	3000	Senior Atty or Ass't GC
(BCA)	3	4	GS-15
Pension Benefit Guaranty (\$ 8(g) action)	NG	2	Agency Atty

(\$ 7 civil penalty)	NG	1	GS-15 or SES
Nuclear Regulatory Com.	NG	1	Agency Atty or AJ
NLRB	NG	1087	GS-11-14 (May also use examiners)
Interior	<u>NG</u>	<u>20</u>	GS-14-15
Seven Agencies	43	5010	

The non-lawyer presiding officers are indicated below. Those line entries marked by an asterisk represent more than one case type, so that the entries for number of presiding officers, caseload, and grade combine the information given for each case type.

<u>Agency</u>	<u>No.</u>	<u>Caseload</u>	<u>Grade</u>
Agriculture			
(Forest Service)*	NG	1315	Varies
(Soil Conservation)*	NG	320	GS-12-15
(Food & Nutrition)	6	81	GS-15
(Agricultural Marketing)	1	1	SES
Commerce	1	24	Ass't Secretary
Defense			
(Air Force)*	4	132	SES, 0-6, GS-15
(Army - Civ App Rev)*	37	1625	GS-13
EPA*	2	20	GS-12-15
Federal Labor Relations Authority	NG	46	GS-13
GAO	2	125	SES
H&HS*	NG	19	NG
Labor			
(Pension & Welfare)	3-5	1	GS-15
(Mine Safety)	18	20	GS-15, SES
Postal Service	32	23	NG

State Department	2	5	SES
Treasury Department*	21	38	GS-12
VA	<u>1692</u>	<u>16,000</u>	GS-9-13
Twelve Agencies	1821	19,795	

The assignments of the presiding officers who are not agency employees are given below. Any presiding officer who is not employed on a full time basis by the Federal government is considered not to be an agency employee for purposes of this breakout, regardless what his or her legal relationship with the agency may be. It should be noted that the § 8(g) actions at the Pension Benefit Guaranty Corporation are heard either by an agency attorney or a retired ALJ. Similarly, the non-government employees at the NRC are assigned to cases when workload prevents the full time government employees (who have no other duties) from handling them. At State, the two experts who hear passport denials work with a member of the SES whose only assignment is hearing these cases. Thus these programs appear more than once in these tables.

<u>Agency</u>	<u>No.</u>	<u>Caseload</u>	<u>Grade</u>
Agriculture (Packers & Stockyards)	1	10	Retired Division Director
DOD (Civilian Health)	10	180	9 Attys 1 Non- Atty
H&HS			

(Carrier Hearing Off)	185	67,632	Employed by carrier
NRC (Licensing & Enforcement Proceedings)	23	50	Legal & technical experts paid GS- 18 rate
Pension Benefit Guaranty (Section 8(g) action)	1	2	Retired ALJ
State (Grievances)	15	40	Persons paid GS- 18 rate
(Passport Denial)	2	10	Experts paid GS- 15 rate
Six Agencies	237	67,924	

Finally, the table notes that there are four presiding officers who are identified only by title, not grade. They are:

1. The Chief, National Forest Service, Deputy Chief or Associate Deputy Chief, National Forest Systems, who hear about 15 cases a year concerning the suspension or debarment of timber purchasers; and

2. The Assistant Secretary of State for Political-Military Affairs who, with a member of the SES, hears about 5 cases a year concerning violations of munitions control regulations.

