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An Alternate Look at the Administrative Conference's Recommendations on the Administrative Judiciary

By Brian C. Griffin and Gary J. Edles

The spring 1993 issue of *The Judges' Journal* contained an article by Administrative Law Judge Charles P. Rippey with the less-than-benign title "Undermining the Administrative Procedure Act: How ACUS Threatens the Independence and Merit Selection of Federal Administrative Law Judges."[1]

Judge Rippey takes issue with certain recommendations [*The Federal Administrative Judiciary* (August 1992)] by the Administrative Conference of the United States (ACUS) concerning the governance of the federal government's administrative judiciary. He concludes that the ACUS recommendations should be rejected. Reasonable people can debate that conclusion, and presumably will. But Judge Rippey goes on to argue that the appropriate sanction for ACUS's position and the proper means for repudiating ACUS's advocacy is to kill off the agency itself—just for good measure. Given Judge Rippey's rules of engagement, we confess to some personal reluctance to take issue with any of his arguments. We trust that advocates in his hearing room are subject to a somewhat less draconian set of decisional consequences.

The Administrative Conference. The Administrative Conference is a unique federal entity. It is the government's nonpartisan expert advisory agency on ways to improve the fairness and efficiency of federal agencies' administrative procedures. It has been in business since 1968.

ACUS is composed of 101 statutory members. A majority of its members are senior government officials, either political appointees or civil servants, who represent the major departments and agencies of the executive branch. The chief administrative law judge of one of the cabinet departments, for example, is a government member. Forty-five percent of ACUS's members are distinguished scholars or members of the private or public interest bar who volunteer their time and expertise and serve without pay. Other ALJs, as well as members of the federal judiciary, participate actively in the conference's deliberations as liaison representatives from various organizations,[2] such as the Judicial Conference of the United States, but do not have voting rights when ACUS meets in semiannual plenary session. All ACUS members serve on at least one of its standing committees.

Acting in a collegial manner, the membership attempts to fashion practical solutions to some of the more difficult or sensitive procedure and process issues affecting the national government. ACUS commissions studies of procedural issues by academic consultants who are experts in administrative law, and uses those studies as springboards for recommendations developed through its committee system. Recommendations are ultimately debated by the full membership at plenary sessions. Consultant reports and committee recommendations are available for public comment throughout the process and committee and plenary sessions are open to public observation. Once recommendations are adopted, ACUS's small permanent career staff works in a variety of ways to encourage their implementation. ACUS has no power to compel any institution to adopt its proposals, which must stand or fall on their intrinsic merits. ACUS's track record is nonetheless quite good. Over the years, about 80 percent of its recommendations have been adopted in whole or in part.[3]

The ACUS Proposals on the Administrative Judiciary. At the express request of the Office of Personnel Management (OPM), ACUS undertook an analysis of the evolving role of administrative law judges and other agency adjudicators from 1946 to the present. A team of academic consultants, headed by Paul Verkuil, former president of the College of William and Mary and former dean of the Tulane Law School, documented that the use of ALJs had leveled off in recent years and had actually declined outside the Social Security Administration. ACUS's central conclusion—which Judge Rippey never addresses—was that agencies were reluctant to hire ALJs and Congress had not added significantly to those agency statutes requiring the use of ALJs. Instead, with Congress's blessing, agencies have created separate groups of *non-ALJ* adjudicators, with duties almost identical to those of ALJs. There are now nearly *twice* as many non-ALJ adjudicators as

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there are ALJs.[4] ACUS believed that "the movement away from the uniformity of qualifications, procedures, and protections of independence that derives from using ALJs in appropriate situations is unfortunate."[5]

Clearly this is (or should be) a concern shared by ALJs. Deciding how to correct this basic problem was difficult. It was ACUS's judgment that the decline in the use of ALJs stemmed in large measure from a perception among agency management of difficulties in selecting and managing ALJs. After thorough study and debate that included a public hearing, receipt, and consideration of public comments; five public committee meetings; and discussion at two public plenary sessions; ACUS proposed a series of changes in the way ALJs are recruited and supervised. These changes were designed to remedy the perceived disadvantages of using ALJs and to encourage Congress and agencies to employ ALJs in the conduct of their adjudicatory processes.

First, ACUS called for the creation of a larger pool of eligible candidates. The consultant report had found that, as of March 1990, only 5.4 percent of ALJs were women, 2.93 percent were black, and 2.75 percent were Hispanic. ACUS urged a series of measures designed to afford agencies a greater opportunity to select ALJs who would be more representative of the public whose rights and benefits they are charged with administering.

Specifically, ACUS proposed changes to the current application of veterans' preference when selecting ALJs. Judge Rippey agrees with this proposal, which has also been endorsed by the National Association of Women Judges and the American Bar Association. ACUS also urged that agencies assign a high priority to the recruitment of women and minority applicants to ALJ positions—a proposal not seriously challenged in any quarter. Despite the passionate rhetoric, the only element of ACUS's various proposals on ALJ selection that drew Judge Rippey's criticism was the provision that would allow agencies to select new ALJs from among those who scored in the top 50 percent on the Office of Personnel Management register of qualified applicants. "By permitting agency selection from anyone in the top half of the register," Judge Rippey argued, "ACUS proposes a serious departure from the standards of merit selection. The ACUS proposal also undercuts the need for a system that carefully ranks and evaluates each candidate."[6] Judge Rippey seriously overstates the case.

Under the current system, several hundred applicants have been rated as "qualified" and their names are included on the register of acceptable candidates. That number will increase now that the register has been reopened. Yet an agency seeking to fill a vacancy may only select from the *top three individuals* on the register. Thus, despite their "qualified" ratings, all but three individuals are, in effect, ineligible for selection for any particular vacancy.

This is so even though the distinctions between the top three candidates and those immediately below them are recognized as meaningless. The top three applicants may have ratings between 96.57 and 96.55, while applicant number 4 may have a rating of 96.54. The current evaluation system, as good as it may be, is arbitrary at this level of refinement. Even Judge Rippey is forced to concede that "the small differences in scores between those ranking near each other may not be significant." Surely the pool of eligible applicants can be expanded somewhat without sacrificing the quality of potential candidates or threatening the merit selection of ALJs.

The issue, therefore, is how much to expand an agency's ability to choose from among qualified candidates. ACUS favored allowing agencies to select from among applicants in the top half. Judge Rippey argues that "there is little doubt that there is a significant difference between those at the top of the register and those at the middle."[7] His opinion is intuitive, not empirical. In fact, ALJs have historically been selected from the top half of the register.

To be placed on the register, an applicant must receive a score of 70 or above on a 100-point scale. The top half, at least historically, encompassed those applicants with scores of 85 or better. ACUS chose that number because, over the years, individuals with scores in the 85–100 range were actually included among the top three candidates for particular ALJ positions. Yet there has been no suggestion that ALJ candidates available for selection in recent years from the current register have been in any sense "unqualified." Moreover, an agency under current rules can be authorized to dip well below those who would otherwise be the top three candidates if it requires some special credential.[8] So, a formal shift from the current "rule of 3" to a "50 percent rule" would not represent a marked departure from historic practice.

What seems clear is that, if one believes that enhancing the *diversity* of the applicant pool is a valuable objective, the current limitation to the top three candidates can be modified to a considerable degree without genuinely sacrificing the quality of ALJ applicants. Plainly, all line drawing is somewhat arbitrary, and reasonable people can disagree on precisely where a different line might be drawn. But, to use an APA frame of reference, ACUS's selection of the 50 percent figure is neither arbitrary nor capricious. As noted above, it roughly follows the actual historical dividing line between "reachable" and "nonreachable" candidates on the register.

Second, ACUS recommended that the current statutory ban on any form of performance appraisal for ALJs be replaced by a system that would

permit an appropriate form of periodic review of individual ALJ performance. ALJs are the only group of civil servants who do not serve any probationary period and are not subject to any form of periodic performance review, and addressing performance or conduct problems under the current structure has proven ineffective. ACUS noted that most states with a central corps of ALJs already provide for some form of periodic performance review and that performance evaluation systems are in effect in several federal circuits for making retention decisions for federal bankruptcy judges and magistrate judges. Many state judges serve a term of years. Judge Rippey acknowledges that the ABA is on record in favor of periodic performance evaluation for ALJs by an outside reviewing entity.[9] Congress has even begun to examine the current system for discipline and removal of Article III judges. So the notion of periodic review of judicial conduct or performance is hardly startling. ACUS saw no reason for the continued exemption for ALJs from any form of meaningful evaluation. The need for greater individual accountability is consistent with concerns raised by the General Accounting Office in its 1992 report entitled *Social Security: Racial Differences in Disability Decisions Warrants Further Investigation*, and a report by the Ninth Circuit Gender Bias Task Force, about possible race and gender bias by some Social Security Administration ALJs.

In ACUS's judgment, appropriate oversight of ALJs is not incompatible with the need to protect decisional independence. Although alternate approaches may also be acceptable, the ACUS proposal is plainly reasonable. To ensure that the special role of ALJs in the federal adjudicatory process is protected, ACUS recommended that performance review be conducted by agency chief ALJs, not the agency's political hierarchy, and be based on standards established with the participation of the ALJs themselves. It also proposed the creation of a special unit within the Office of Personnel Management to oversee all personnel, hiring, and performance matters that involve chief ALJs. This is intended to insulate chief ALJs from agency pressures. As a further protection, ACUS recommended a system for investigating improper agency infringement of, or interference with, ALJ decisional independence.

Conclusion. The ACUS study found that, despite the growth in agency programs over the last 15 years, there has been no growth in the total number of ALJs across government because agencies are not hiring ALJs in large numbers and Congress has not added significantly to those agency statutes requiring the use of ALJs. Instead, an alternative administrative judiciary has been established. Although that finding is seemingly of no concern to Judge Rippey, it should be some cause for alarm to the National Conference of ALJs as well as students of the administrative process who believe that the movement away from the uniformity that derives from using ALJs in appropriate situations is undesirable. ACUS believed that changes in the selection and management of ALJs are critical if the current trend is to be reversed. The fundamental flaw in Judge Rippey's analysis is the total failure to address this critical concern that motivated the ACUS recommendations.

This is not to say that the ACUS proposals are necessarily the only way to increase diversity, enhance ALJ accountability, and encourage increased use of ALJs. In fact, a host of proposals were floated, and ultimately rejected, during the nearly 18 months of consensus-building deliberations by ACUS's consultants and the members who reviewed the consultants' report. It is significant, however, that apart from a small contingent of administrative law judges, the recommendations that ultimately emerged were not particularly controversial among ACUS's members from the government, the private or public interest bar, or the academic community. They represent positive, thoughtful approaches that merit consideration of the message rather than execution of the messenger.

1. 32 The Judges' Journal 12 (No. 2, Spring 1993) (hereafter Rippey Article).

2. Chief Judge Stephen Breyer of the United States Court of Appeals for the First Circuit and Judge Stephen Williams of the United States Court of Appeals for the District of Columbia Circuit serve as liaison representatives from the Judicial Conference.

3. Judge Rippey's article observes that "[a]lmost no ACUS recommendations in 30 years have been adopted." (Rippey Article at 46.) The article provides no documentation for this assertion, and it is, flatly, untrue. Since 1968, ACUS's first year of operation, it has issued 177 recommendations. Six of them are now moot due to changed circumstances and 14 provide general guidance to agencies and/or Congress, and are thus not readily susceptible to implementation. Of the remaining 157 "implementable" recommendations, 113 have been implemented in whole or in part. ACUS's implementation data are entirely a matter of public record.

4. Not all non-ALJ adjudicators are full-time and some have other duties. See generally, John H. Frye's seminal study for the Administrative Conference, *Survey of Non-ALJ Hearing Programs in the Federal Government*, reprinted in 44 Admin. L. Rev. 261 (1992), and cited in *Darby v. Cisneros*, 113 S. Ct. 2539, 112 L.Ed 2d 113 (June 21, 1993).

5. Recommendation 92-7, *The Federal Administrative Judiciary*, 1 CFR § 302.92-5 (1993). ACUS has remained true to this principle. In recent environmental statutes, Congress authorized the Environmental Protection Agency to impose civil money penalties without a formal APA hearing before an administrative law judge. In June 1993, ACUS proposed that Congress provide that the APA's formal hearing requirements apply whenever money penalties may be imposed by administrative agencies. Recommendation 93-1, *Use of APA Formal Procedures in Civil Money Penalty Proceedings*, to be codified at 1 CFR § 305.93-1.

6. Rippey Article at 13.

7. Rippey Article at 13.

8. OPM allows the Social Security Administration to bypass the top three individuals on the register in order to obtain applicants for its Puerto Rico office who are fluent in Spanish.

9. Rippey Article at 15.