



Administrative Conference of the United States

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**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION:  
EVALUATING THE STATUS AND PLACEMENT OF  
ADJUDICATORS IN THE  
FEDERAL SECTOR HEARING PROGRAM**

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This report was prepared by the Office of the Chairman of the Administrative Conference of the United States. The views expressed do not necessarily reflect those of the Council, the members of the Conference, or its committees.

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## TABLE OF CONTENTS

Introduction.....	1
Executive Summary .....	2
I. Background.....	4
A. The APA and Administrative Adjudication .....	4
B. The Federal Sector Hearing Program.....	8
C. Calls for Reform in the Federal Sector Hearing Program.....	10
D. Historical Examples of Conversions to ALJs .....	11
1. The Social Security Administration .....	11
2. The Department of Labor .....	12
II. Assessing the Effects of Transitioning From AJs to ALJs in the Federal Sector Hearing Program.....	13
A. Procedural Considerations.....	13
1. De Novo Judicial Review .....	13
2. Status, Finality, and Review of the AJ’s Decision .....	16
3. Other Procedural Issues .....	17
B. Operational Considerations .....	21
III. Assessing the Commission’s Authority over the Status of Adjudicators in the Federal Sector Hearing Program.....	23
A. The Commission’s Authority over the Status of Adjudicators .....	23
B. How OPM’s Role Affects the Commission’s Authority.....	27
1. Effect on Commission’s Authority to Change Adjudicators’ Status.....	27
2. Effect on New ALJ Appointments .....	30
3. Effect on Conversion of Existing AJs to ALJs.....	31
IV. Determining Where to Situate Adjudicators Within the Commission’s Organizational Structure.....	32
A. Organizational Changes Potentially Required by a Shift to ALJs .....	32
B. Assessing the Organizational Placement of AJs .....	34
1. Legal Considerations Affecting the Organizational Placement of AJs .....	35
2. Alternative Approaches to the Organizational Placement of AJs .....	36
V. Budgetary Considerations .....	42
A. Summary of Cost Model: Methodology & Inputs .....	42
B. Summary of Results .....	46
Conclusion .....	49

Appendix A: The APA’s Formal Adjudication Provisions .....	A-1
Appendix B: Administrative Conference Recommendation 92-7 .....	A-6
Appendix C: Cost Elements: Values & Sources.....	A-19
Appendix D: Federal Pay Rates: Current & Projected Growth Rates .....	A-23
Appendix E: EEOC Adjudicators: Projected Growth Rates.....	A-24
Appendix F: EEOC Adjudicators: Other Costs .....	A-25
Appendix G: Projected Pay Distribution of EEOC Adjudicators: All Scenarios .....	A-26
Appendix H: Sample Annual (Incremental) Cost Equation .....	A-27
Appendix I: Annual Costs: High, Primary, and Low Scenarios at 3% and 7% Discount Rates .....	A-28
Appendix J: Breakdown of Annual Costs: Primary Scenario at 7% Discount Rate.....	A-29
Appendix K: Breakdown of Annual Costs: High Scenario at 7% Discount Rate .....	A-30
Appendix L: Breakdown of Annual Costs: Low Scenario at 7% Discount Rate .....	A-31
Appendix M: MSPB Administrative Judge Position Description .....	A-32
Appendix N: Organizational Charts.....	A-33

## INTRODUCTION

This is an independent study by the Office of the Chair of the Administrative Conference of the United States (Conference) on the status and organizational placement of adjudicators in the Equal Employment Opportunity Commission's (Commission or EEOC) federal sector hearing program. It focuses especially on the considerations the Commission would need to take into account in the event it decided to use Administrative Law Judges (ALJs) instead of Administrative Judges (AJs) in federal sector Equal Employment Opportunity (EEO) hearings.<sup>1</sup>

This report proceeds in five parts. Part I provides background information necessary for understanding the issues analyzed throughout the report. It begins with a discussion of relevant administrative law principles, with a focus on the adjudication provisions of the Administrative Procedure Act (APA). It also provides an overview of the federal sector hearing program and recent calls for reform, as well as some historical examples of other agencies' experiences transitioning from using non-ALJ adjudicators to ALJs in adjudicatory programs. Part II of the report explores potential procedural and operational consequences that may result if the Commission decided to use ALJs instead of AJs in the federal sector hearing program. Part III analyzes the Commission's authority to pursue such reform by appointing ALJs. This includes an examination of how the role of the Office of Personal Management (OPM) in regulating the federal ALJ corps may affect the Commission's ability to: (1) use ALJs instead of AJs in federal sector EEO hearings; (2) define ALJ qualifications and appoint ALJs; and (3) convert existing AJs to ALJs. Part IV addresses how, if the Commission undertook this reform, it might situate ALJs within the agency's overall organizational structure. It also evaluates some issues related to the organizational placement of AJs. Finally, Part V examines the potential budgetary consequences of transitioning from AJs to ALJs in the federal sector hearing program.

Certain issues related to the status and placement of adjudicators in the federal sector hearing program are beyond the scope of this study. Most importantly, normative questions about whether the Commission *should* use ALJs instead of AJs or otherwise formalize federal sector EEO hearing procedures are generally beyond the scope of this study. As we explain, these questions ultimately require the Commission's considered and expert policy judgment regarding the nature and purpose of the federal sector hearing program and that program's proper place within the Commission's broader mission. In addition, a robust analysis of where the Commission should place its adjudicators—whether ALJs or AJs—within the agency's overarching organizational structure is beyond the scope of this study.<sup>2</sup> Our examination of these

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<sup>1</sup> The Commission's Strategic Enforcement Plan noted the importance of an evaluation of the "current structure of the federal sector hearings program, specifically with respect to the placement and status of Administrative Judges in the EEOC's organization, and related issues impacting the effectiveness of the program." EQUAL EMPLOYMENT OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN, FY 2013-2016 17, *available at* <http://www.eeoc.gov/eeoc/plan/sep.cfm>. This study is intended to inform part of that evaluation.

<sup>2</sup> As originally envisioned, this study would have provided a comprehensive evaluation of varying organizational options for the federal sector program, including potential budgetary, reporting, labor relations, and personnel considerations. That evaluation would have included legal research and data analysis, as well as extensive interviews with (or surveys of) EEOC official at all levels, as well as other stakeholders and interested parties. In this way, it would have been akin to the organizational assessment conducted for the Commission in 2003 by the National Academy of Public Administration (NAPA), although the NAPA study largely focused on issues beyond the federal sector program. *See* NAT'L ACAD. OF PUB. ADMIN., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ORGANIZING FOR THE FUTURE (2003) [hereinafter "NAPA EEOC REPORT"]. However, due to budgetary constraints, the scope of

issues is limited to identifying legal considerations that may affect the organizational placement of the EEOC's adjudicators, accompanied by a discussion of how several other federal agencies fit ALJ and non-ALJ adjudicators within their respective organizational structures.

This report is informed by substantial and broad-based research. We conducted extensive legal research, examining the statutes and regulations governing the EEOC's federal sector hearing program, OPM's ALJ program, and the standards governing federal employee pay and benefits, as well as relevant legislative histories and secondary materials, including treatises and scholarly publications. We also considered relevant data and trends from recent years as reflected in publicly available sources, such as OPM's website. Our research was deepened through consideration of certain relevant internal EEOC documents, consultation with several experts in the history and practice of administrative adjudication, and an econometric analysis of data provided by EEOC regarding the number and compensation of EEOC AJs over the past five years.<sup>3</sup> In addition, we interviewed a number of EEOC employees, including four District Directors, four AJs, one Supervisory AJ, and two officials in the EEOC's Office of Federal Operations (OFO). Finally, our analysis incorporates information obtained through telephone discussions and written correspondence with OPM's Office of the General Counsel.<sup>4</sup>

## EXECUTIVE SUMMARY

The EEOC is an independent agency responsible for enforcing civil rights laws that prohibit employers from discriminating against job applicants or employees on the basis of race, color, religion, sex, national origin, age, disability, or genetic information.<sup>5</sup> With regard to private sector employers, the agency investigates charges of discrimination, works to redress unlawful employment practices, and participates in employment discrimination litigation.<sup>6</sup> The Commission also has a significant role in ensuring nondiscrimination in government employment.<sup>7</sup> Although each federal agency bears primary responsibility for investigating its own employees' claims of discrimination, federal sector complainants may request that the

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the instant study was narrowed to a "paper only" review of a sampling of other agencies' organizational approaches for formal and informal adjudication programs.

<sup>3</sup> The data provided by EEOC included grade, step, and awards received by EEOC AJs for each year between 2008 and 2013. This data was used to build the economic model employed in Part V of this report, as well as to inform the underlying economic assumptions for that budgetary analysis.

<sup>4</sup> We conferred with two attorneys representing OPM's Office of the General Counsel. Although knowledgeable about OPM's ALJ program and related matters, they were not speaking officially on behalf of the agency, and their statements do not necessarily reflect OPM's official positions. Their statements were offered as technical assistance (not legal advice) to help us complete our work for the Commission. Subsequent references to OPM's positions throughout this report refer to the information obtained through this technical assistance. Our discussions began with a September 25, 2013 telephone interview. In early January 2014, with EEOC's consent, we shared a draft of this report with OPM and solicited its feedback on the components of the analysis involving OPM's ALJ program. On February 6, 2014, OPM provided us its comments in writing. A second telephone interview followed on February 12, 2014. These communications are hereinafter cited as: Informal Communications, Office of the Gen. Counsel, Office of Pers. Mgmt.

<sup>5</sup> See 29 C.F.R. § 1601.1.

<sup>6</sup> See generally *id.* §§ 1601.6-1601.14 (charges of discrimination), 1601.15-1601.17 (investigation of a charge), 1601.18-1601.22 (procedure following filing of a charge), 1601.23-1601.26 (procedure to rectify unlawful employment practices), 1601.27-1601.29 (procedure concerning the institution of civil actions).

<sup>7</sup> See 42 U.S.C. § 2000e-16; 29 C.F.R. § 1614.101.

Commission conduct a hearing as a part of the investigative process.<sup>8</sup> Federal sector EEO hearings are “informal” adjudications, as no statute requires that they be conducted under the APA.<sup>9</sup> Thus, the presiding officers are AJs who do not have ALJ status. The Commission employs approximately 90 AJs to accommodate federal sector hearing requests.<sup>10</sup>

This report is primarily concerned with identifying the considerations the Commission would need to take into account in the event it decided to use ALJs instead of AJs in federal sector EEO hearings. This decision must ultimately flow from a policy determination reflecting the Commission’s expert judgment regarding the nature of federal sector EEO hearings and their proper place with the Commission’s broader regulatory mission. In addition, the Commission should consider the procedural and operational effects of reform, issues related to the Commission’s authority to appoint and manage ALJs, potential changes that may be required to accommodate ALJs within the Commission’s organizational structure, and budgetary effects of transitioning from AJs to ALJs.

*Procedural Considerations.* Although no statute requires APA procedures in federal sector EEO hearings, the Commission has the authority to impose such a requirement by regulation. Exercising this authority may require the Commission to closely compare its existing procedures with the APA and make modifications as necessary to meet the APA’s minimum, skeletal requirements. The availability to federal employees of subsequent de novo trial of their discrimination claims would not render federal sector hearings ineligible for formalization, but it may present a difficult policy question for the Commission. The current relationship between the AJ’s decision and the employing agencies’ final action, although unique to EEOC, appears to be consistent with the APA. Other, more minor aspects of the Commission’s hearing regulations, however, may require some modification to comply with the APA.

*Operational Considerations.* If the Commission decided to use ALJs instead of AJs, it would have to accept the attendant limitations on its authority over the compensation and tenure of its adjudicators. To preserve ALJ independence, Congress has committed these matters to OPM. OPM regulations establish ALJ compensation levels and require employing agencies to seek OPM’s approval before taking a wide variety of personnel actions with respect to ALJs. The Commission would also be unable to take adverse actions against ALJs to ensure efficiency, subject ALJs to performance standards or appraisals, or pay incentive awards to ALJs.

*The Commission’s Authority to Appoint ALJs.* Transitioning from AJs to ALJs in the federal sector hearing program may require the Commission to, at a minimum, adopt a regulation requiring that all federal sector EEO claims be adjudicated through formal, on-the-record hearings under sections 554, 556, and 557 of the APA. Such action may in turn require the Commission to overhaul its federal sector EEO procedures to ensure compliance with the APA. New ALJs could be appointed only as permitted under federal statutes and OPM regulations governing the examination, certification for selection, and appointment of ALJs. The Commission could convert existing AJs to ALJ positions with OPM’s approval or as required by legislation, executive order, or court order, provided each AJ passed OPM’s examination and

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<sup>8</sup> See *infra* Part I.B.

<sup>9</sup> See *infra* Part I.A-B.

<sup>10</sup> See *infra* Part V.

met OPM’s qualification requirements for ALJs. Waiving these conditions on conversion would require specific legislative action.

*Organizational Placement.* The law provides the Commission with broad discretion regarding the organizational structure and placement of adjudicators within the federal sector hearing program. If the Commission decided to use ALJs instead of AJs in this program, certain organizational modifications may be required to ensure compliance with the APA’s separation of functions requirements and protections of ALJ decisional independence. The Commission would likely want to create a centralized office dedicated to the federal sector hearing program and the administration and management of ALJs. This office could use Chief ALJs, non-ALJ administrators, or a mixture of the two, depending on what structure best suits the agency’s needs. If the Commission continues to use AJs, there are a variety of ways in which it might reorganize the program to address the needs of the agency, the AJs, or complainants.

*Budgetary Considerations.* Based on the economic model developed by the Conference for this study, we estimate that, were the Commission to use ALJs as adjudicators in the federal sector hearing program, the agency’s annual personnel costs—in terms of salaries, benefits, and other related costs—would likely rise between \$1.1 million and \$2.5 million in a given year over a ten-year period. Similarly, on an annualized basis, personnel costs increases from use of ALJs would likely be \$2.1 million per year under the primary (baseline) scenario. Increased costs would stem from higher ALJ salaries and benefits relative to AJs, as well as OPM-assessed fees for the ALJ program. Whether, or to what extent, the benefits to the Commission, litigants, or others of using ALJs as federal sector adjudicators outweighs such costs would require sophisticated economic analyses and is beyond the scope of this study.

## **I. BACKGROUND**

This part provides background information necessary to understand the issues analyzed throughout the remainder of the report. It begins with fundamental administrative law principles that bear on the interpretation and application of the APA’s adjudication provisions. It then briefly explains the current operation of the federal sector hearing program and the recent calls for the EEOC to pursue procedural and organizational reform in the program. It concludes with a few historical examples of how other agencies have converted non-ALJ adjudicators to ALJ status in certain adjudication programs.

### **A. The APA and Administrative Adjudication**

The Administrative Procedure Act was enacted in 1946 to bring greater clarity and consistency to administrative governance by establishing minimum procedural requirements for agency action.<sup>11</sup> The legislation was based on a study of the highly diverse practices of then-existing administrative agencies. This study culminated in a report issued to Congress in 1941 by

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<sup>11</sup> See generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557 (1996) (providing a detailed historical account of the APA’s roots, development, and enactment). As Professor Shepherd explains, the APA “has provided agencies with broad freedom, limited only by relatively weak procedural requirements and judicial review, to create and implement policies in the many areas that agencies touch.” *Id.* at 1559.

the Attorney General's Committee on Administrative Procedure.<sup>12</sup> The APA's provisions were designed to capture best practices identified in the report, and sought to make only "relatively modest reforms in adjudication, rulemaking, and judicial review."<sup>13</sup> Provided that an agency observes the minimum procedural requirements established by the APA, it is afforded substantial discretion to adopt procedures that meet its own unique needs.<sup>14</sup>

In administrative law parlance, "formal" adjudications are those conducted in accordance with the APA's adjudication provisions, codified at 5 U.S.C. §§ 554, 556, and 557.<sup>15</sup> The APA does not specify the circumstances in which formal hearing procedures must be observed.<sup>16</sup> That function is performed by other statutes.<sup>17</sup> That is, an agency is only required to comply with the APA's adjudication provisions when a statute other than the APA requires a hearing "on the record" or "in accordance with" the APA.<sup>18</sup> Adjudicatory hearings not subject to such a statutory requirement are typically referred to as "informal" adjudications.<sup>19</sup> Most adjudicatory hearings conducted by federal agencies are "informal" in this sense.<sup>20</sup> The terminology here can be misleading, however, as so-called "informal" adjudications are often conducted in accordance with procedures consistent with those required by the APA.<sup>21</sup>

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<sup>12</sup> See ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT (1941); SECTION OF ADMIN. LAW AND REGULATORY PRACTICE, AM. BAR ASS'N, A GUIDE TO FEDERAL AGENCY ADJUDICATION 5 (Jeffrey B. Litwak ed., 2d ed. 2012) [hereinafter ABA GUIDE TO FEDERAL AGENCY ADJUDICATION].

<sup>13</sup> *Id.* at 2; see also Shepherd, *supra* note 11, at 1559 (explaining that the APA "has provided agencies with broad freedom, limited only by relatively weak procedural requirements"); see also Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950) ("On purpose [of the APA] was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other.").

<sup>14</sup> See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

<sup>15</sup> These provisions have been included as Appendix A.

<sup>16</sup> See 5 U.S.C. §§ 554, 556, 557; but see *id.* § 555 (setting forth certain minimum procedures related "ancillary matters" that apply in both formal and informal adjudicatory proceedings).

<sup>17</sup> See L. Harold Levinson, *The Status of the Administrative Judge*, 38 AM. J. COMP. L. (SUPP.) 523, 541 (1990).

<sup>18</sup> See 5 U.S.C. § 554(a); see also TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 41 (1947), available at <http://www.law.fsu.edu/library/admin/1947cover.html> [hereinafter ATTORNEY GENERAL'S MANUAL]. The Attorney General was actively involved in the development of the APA and prepared the Attorney General's Manual in 1947, shortly after the APA's passage, to provide guidance to federal agencies on the law's new requirements. See *id.* at 5, 6. The manual does not address all issues relevant to this report. In particular, the manual does not discuss ALJ appointment, "since the Civil Service Commission [was] entrusted with the responsibilities under that section and [was] . . . engaged in working out the necessary requirements, assisted by the Advisory Committee of experts designated by the Commission." *Id.* at 7.

<sup>19</sup> See, e.g., ABA GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 12, at 176 ("The term 'informal adjudication' describes the process for issuing orders when the formal adjudication provisions of the APA are not applicable." (footnotes omitted)). Throughout this report we refer to AJs as "adjudicators." This may strike some as odd, given our view that the question of whether the Commission should transition from AJs to ALJs rests ultimately on the Commission's expert judgment as to whether the federal sector program should serve a primarily investigatory function or a primarily adjudicative function. In administrative law parlance, however, "adjudicator" is the term ordinarily used to refer to non-ALJ officials who preside in non-formal proceedings that result in the issuance of an order. See 5 U.S.C. §§ 551(6), (7) (defining, respectively, "order" and "adjudication").

<sup>20</sup> See, e.g., Levinson, *supra* note 17, at 541. "Perhaps 90 percent of federal agency adjudication is informal rather than formal." ABA GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 12, at 176

<sup>21</sup> Conversely, the "formal" procedures established by the APA actually provide more flexibility to agencies than the terminology might suggest. See Cooley R. Howarth, Jr., *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 ADMIN. L. REV. 1043, 1050 (2004). Immigration hearings are a good example of so-called "informal" adjudications in which formal, judicialized procedures are observed. See Part IV.B.1.

The APA's formal adjudication provisions were designed to ensure fairness, impartiality, and due process in administrative adjudications. Ensuring some separation of the investigating and prosecuting functions of agencies from the adjudication functions of those agencies was fundamental to this overarching congressional purpose.<sup>22</sup> To that end, the presiding official in a formal adjudication under the APA must be an ALJ.<sup>23</sup> ALJs are insulated from their employing agencies by statutes that grant OPM authority over the selection, compensation, and tenure of ALJs.<sup>24</sup> In addition, ALJs may only be removed for "good cause," as defined by the Merit Systems Protection Board (MSPB).<sup>25</sup> These protections, which we examine in greater detail below, provide ALJs with a measure of judicial independence not enjoyed by non-ALJ adjudicators.<sup>26</sup>

In the absence of a statute requiring formal APA adjudication, agencies have broad discretion to fashion their own adjudicatory procedures, subject only to minimum constitutional requirements, such as due process.<sup>27</sup> Although agencies may voluntarily observe APA procedures and appoint ALJs (subject to the potential limitations on ALJ appointment discussed in Part III),<sup>28</sup> it is more common for them to use their discretion to employ informal processes and appoint non-ALJ adjudicators to preside over hearings.<sup>29</sup> For this reason, the disputes that have reached the courts have typically involved challenges to agencies' decisions *not* to observe APA requirements. As a consequence, much of the available judicial precedent is inapposite to the questions the Commission must consider in determining whether to voluntarily transition to using ALJs instead of AJs in the federal sector hearing program.<sup>30</sup>

When Congress has not required an agency to conduct adjudicatory hearings under the APA, the question of whether to use ALJs is ultimately a question of policy.<sup>31</sup> On the one hand,

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<sup>22</sup> See, e.g., *Wong Yang Sung*, 339 U.S. at 41 (noting that a "fundamental" purpose of the APA was "to curtail and change the practice of embodying in one person or agency the duties of prosecutor or judge").

<sup>23</sup> See 5 U.S.C. § 556(b)(3). Until 1978, the APA referred to ALJs as "hearing examiners." See Pub. L. No. 95-251, 92 Stat. 183 (1978). An ALJ need not preside over a formal adjudication if "the agency," see *id.* § 556(b)(1), or "one or more members of the body which comprises the agency," see *id.* § 556(b)(2), preside instead. In informal adjudications, by contrast, "the proceedings may be conducted by anyone the agency head chooses." Levinson, *supra* note 17, at 541.

<sup>24</sup> See Part III.B.

<sup>25</sup> See 5 U.S.C. § 7521; 5 C.F.R. § 930.211; see also Administrative Conference of the U.S., Recommendation 92-7, The Federal Administrative Judiciary 8 (1992) ("Although agencies may seek removal or discipline of ALJs 'for good cause' by initiating a formal proceeding at the MSPB, the Board has applied standards that have strictly limited the contexts in which such actions may successfully be taken against an ALJ.").

<sup>26</sup> See Paul R. Verkuil, *Reflections upon the Administrative Judiciary*, 39 U.C.L.A. L. Rev. 1341, 1345 (1992) [hereinafter Verkuil, *Reflections*].

<sup>27</sup> E.g., ABA GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 12, at 178 ("Subject to constraints imposed by due process, or by particular statutes or procedural regulations, an agency is free to provide any procedure (or no procedure) in conducting informal adjudication." (footnotes omitted)).

<sup>28</sup> E.g., Levinson, *supra* note 17, at 541-42 ("[W]hen the APA does not apply, the proceedings may be conducted by anyone the agency head chooses. The agency head could assign an ALJ for this purpose, but is more likely to assign a non-ALJ member of the agency's staff."); Verkuil, *Reflections*, *supra* note 26, at 1351 ("Congress intended the APA to leave to individual agencies the discretion whether to employ ALJs, restricting the requirements for ALJs to those agencies whose organic legislation mandated 'on the record' hearings."). Agency authority to voluntarily employ formal adjudication under the APA is discussed in further detail later in this report. See Part III.A.

<sup>29</sup> See, e.g., Levinson, *supra* note 17, at 541-42; see also Administrative Conference of the U.S., Recommendation 92-7, The Federal Administrative Judiciary 2 (1992) (discussing agency "movement away from ALJs toward AJs").

<sup>30</sup> This reality should be kept in mind because it has a somewhat pervasive effect on this report's analysis.

<sup>31</sup> See Verkuil, *Reflections*, *supra* note 26, at 1354.

ALJs have greater judicial independence and may be perceived as more impartial than non-ALJ adjudicators. If the proceedings at issue implicate individual rights or otherwise require assurances of impartiality and observance of due process, then using ALJs may be the best policy choice.<sup>32</sup> On the other hand, the very protections that ensure ALJ independence also insulate ALJs from management and control by their employing agencies. The result is often to reduce the employing agency's ability to ensure efficiency and consistency in decisionmaking.<sup>33</sup> Moreover, although ALJs are highly qualified, employing agencies generally cannot require them to have specialized knowledge or experience as a precondition of selection and appointment. Finally, there are also typically greater costs associated with employing ALJs. Not only do they have higher salary and benefits levels, but the employing agency must use and pay for OPM's certification and selection process. These additional costs may well be worth the countervailing benefits of using ALJs. But that determination ultimately depends on the nature and purpose of the adjudicatory program at issue and the employing agency's expert judgment regarding the proper role of that program with the agency's larger mission.

In Recommendation 92-7, *The Federal Administrative Judiciary*, the Administrative Conference considered the differences between ALJs and non-ALJ adjudicators and identified several factors that may bear on the decision of what type of adjudicator should be used in a hearing program.<sup>34</sup> Although the recommendation was directed to Congress, the factors it identifies are the ones that the Commission should consider in determining whether to convert federal sector AJs to ALJ status. In relevant part, the recommendation urged that:

[T]he following factors, if present, [should be considered] as indicia to weigh in favor of requiring ALJ status:

1. The cases to be heard and decided are likely to involve:
  - a. Substantial impact on personal liberties or freedom;
  - b. Orders that carry with them a finding of criminal-like culpability;
  - c. Imposition of sanctions with substantial economic effect;or
  - d. Determination of discrimination under civil rights or other analogous laws.<sup>35</sup>
2. The procedures established by statute or regulation for the cases heard and decided are, or would be, the functional equivalent of APA formal hearings.

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<sup>32</sup> See Administrative Conference of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary* 3 (1992).

<sup>33</sup> See *id.* at 8.

<sup>34</sup> See *id.* at 3-4, 11-12.

<sup>35</sup> It bears noting that the preamble to Recommendation 92-7 clarifies that this factor weighs in favor of using ALJs "unless there is an opportunity for a de novo hearing in court." *Id.* at 3.

3. The deciders in such cases are, or ought to be, lawyers—taking into consideration the possibility that some programs might require other types of specialized expertise on the part of adjudicators or on panels of adjudicators.

4. Those incumbent AJs in such cases who are required to be lawyers already meet standards for independence, selection, experience, and compensation that approximate those accorded to ALJs.<sup>36</sup>

Further discussion of the rationale for including each of these considerations in the analysis is provided in the preamble to Recommendation 92-7,<sup>37</sup> which appears as Appendix B.

## **B. The Federal Sector Hearing Program**

An important part of the Commission’s statutory mission is to ensure nondiscrimination in federal sector employment. Federal employees are protected from:

- Race, sex, and other discrimination under Title VII of the Civil Rights Act of 1964;<sup>38</sup>
- Age discrimination under the Age Discrimination in Employment Act (ADEA);<sup>39</sup>
- Disability discrimination under Titles I and V of the Americans with Disabilities Act of 1990 (ADA)<sup>40</sup> and sections 501 and 505 of the Rehabilitation Act of 1973;<sup>41</sup>
- Sex-based compensation discrimination under the Equal Pay Act (EPA);<sup>42</sup>
- Genetic information discrimination under Title II of the Genetic Information Nondiscrimination Act of 2008;<sup>43</sup>

The EEOC is not exclusively responsible for ensuring nondiscrimination in federal employment. Rather, it shares this responsibility with individual federal agencies, each of which is required to

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<sup>36</sup> See *id.* at 11-12 (¶ I(A)).

<sup>37</sup> See *id.* at 3-4.

<sup>38</sup> 42 U.S.C. § 2000e et seq. Title VII was enacted in 1964, see Pub. L. No. 88-352, and was amended by the Civil Rights Act of 1991, see Pub. L. No. 102-166, and the Lilly Ledbetter Fair Pay Act of 2009, see Pub. L. No. 111-2.

<sup>39</sup> See 29 U.S.C. §§ 621 et seq. ADEA was enacted in 1967, see Pub. L. No. 90-202, as amended by the Older Workers Benefit Protection Act, see Pub. L. No. 101-433, section 115 of the Civil Rights Act of 1991, see Pub. L. No. 102-166, and the Lilly Ledbetter Fair Pay Act of 2009, see Pub. L. No. 111-2.

<sup>40</sup> See 42 U.S.C. § 12101 et seq. The ADA was enacted in 1990, see Pub. L. No. 101-336, and amended by the Civil Rights Act of 1991, see Pub. L. No. 102-166, the Americans with Disabilities Act Amendments Act of 2008, see Pub. L. No. 110-325, and the Lilly Ledbetter Fair Pay Act of 2009, see Pub. L. No. 111-2. The ADA does not apply to the federal sector, see 42 U.S.C. § 12111(5)(B)(i), but similar protection is provided for federal employees under the Rehabilitation Act.

<sup>41</sup> See 29 U.S.C. § 791 et seq. The Rehabilitation Act was enacted in 1973, see Pub. L. No. 93-112, and was amended by section 512 of the ADA, see Pub. L. No. 101-336, the Rehabilitation Act Amendments of 1992, see Pub. L. No. 102-569, section 102 of the Civil Rights Act of 1991, see Pub. L. No. 102-166, the Americans with Disabilities Act Amendments Act of 2008, see Pub. L. No. 110-325, and the Lilly Ledbetter Fair Pay Act of 2009, see Pub. L. No. 111-2.

<sup>42</sup> See 29 U.S.C. § 206(d). The EPA was enacted in 1963, see Pub. L. No. 88-38, as an amendment to the Fair Labor Standards Act of 1938.

<sup>43</sup> See 42 U.S.C. § 2000ff et seq.

ensure nondiscrimination in its own employment practices.<sup>44</sup> The Commission has significant oversight responsibility, however, and “provides leadership and guidance to federal agencies on all aspects of the federal government’s equal employment opportunity program.”<sup>45</sup>

Agencies have a significant role in investigating and resolving any discrimination claims raised by their own employees. Within 45 days of an alleged discriminatory act, an aggrieved federal employee must contact an EEO counselor in his or her agency.<sup>46</sup> If the matter is not resolved within 30 days,<sup>47</sup> the aggrieved person has 15 days to file a discrimination complaint with the agency alleged to have discriminated.<sup>48</sup> The agency itself must conduct an investigation into the claim.<sup>49</sup> Within 180 days of filing, the agency generally must provide the complainant with a copy of the investigative file and notify the complainant that he or she has 30 days to request a hearing and decision from an AJ or an immediate final decision from the agency with which the complaint was filed.<sup>50</sup>

A federal sector EEO hearing before one of the Commission’s AJs thus occurs only if the aggrieved federal employee so requests.<sup>51</sup> The Commission’s rules state that “[h]earings are part of the investigative process.”<sup>52</sup> They are “informal” hearings in APA parlance, because they are not required by statute to be conducted “on the record” and in accordance with the procedures set forth in 5 U.S.C. §§ 554, 556, and 557.<sup>53</sup> Over the years, however, the procedures used to conduct federal sector EEO hearings have been increasingly judicialized and today bear much in common with APA procedures. For example, the Commission’s AJs have the power to dismiss complaints,<sup>54</sup> administer oaths,<sup>55</sup> and order the production of documents and attendance of witnesses.<sup>56</sup> On the other hand, the AJs do not have subpoena power—meaning that they cannot compel testimony or the production of documents by third parties (including ex-employees of the defending agency)<sup>57</sup>—and the EEOC’s procedural regulations do not bar *ex parte* communications.<sup>58</sup>

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<sup>44</sup> See 29 C.F.R. §§ 1614.102-1614.110.

<sup>45</sup> EQUAL EMP’T OPPORTUNITY COMM’N, ABOUT EEOC, OVERVIEW, available at <http://www.eeoc.gov/eeoc/>. The regulations governing the federal sector program are codified in 29 C.F.R. pt. 1614, which is further supplemented by an EEO Management Directive, see EQUAL EMP’T OPPORTUNITY COMM’N, MD-110 (Nov. 9, 1999), available at <http://www.eeoc.gov/federal/directives/md110.cfm>, and the AJ Handbook, see EQUAL EMP’T OPPORTUNITY COMM’N, HANDBOOK FOR ADMINISTRATIVE JUDGES (2002), available at <http://www.eeoc.gov/federal/ajhandbook.cfm>.

<sup>46</sup> See *id.* § 1614.105(a)(1).

<sup>47</sup> The aggrieved person may also agree to a longer counseling period or choose to pursue alternative dispute resolution. See *id.* § 1614.105(d).

<sup>48</sup> See *id.* §§ 1614.105(d), 1614.106(a) & (b).

<sup>49</sup> See *id.* § 1614.108(a).

<sup>50</sup> See *id.* §§ 1614.108(f); 1614.110.

<sup>51</sup> See *id.* §§ 1614.108(f), 1614.109(a).

<sup>52</sup> *Id.* § 1614.109(e).

<sup>53</sup> See Part III.A.

<sup>54</sup> See 29 C.F.R. § 1614.109(b).

<sup>55</sup> See *id.* § 1614.109(f)(2).

<sup>56</sup> See *id.* § 1614.109(f)(1).

<sup>57</sup> It bears noting that ALJs do not automatically have subpoena authority (or any of the other powers identified in 5 U.S.C. § 556(c)—the employing agency must itself have the requisite statutory authority. See 5 U.S.C. § 556(c) (stating that “[s]ubject to published rules of the agency and within its powers, employees presiding at hearings may” exercise the enumerated powers); see also ATTORNEY GENERAL’S MANUAL, *supra* note 18, at 74-75 (“[The APA]

Although the AJ issues an initial decision at the conclusion of a federal sector EEO hearing,<sup>59</sup> the final action on the complaint is taken by the defending agency.<sup>60</sup> The agency may issue a final order in accord with the AJ's decision and, if applicable, grant the relief ordered by the AJ.<sup>61</sup> If the agency issues a final order that is not in accord with the AJ's decision, however, the agency must simultaneously file an appeal with the Commission.<sup>62</sup> The complainant may also file an appeal with the Commission if he or she is not satisfied by the agency's final decision.<sup>63</sup> If the complainant is dissatisfied with the ultimate result obtained through the administrative process, he or she may seek a trial de novo of his or her discrimination claims in federal court.<sup>64</sup>

### C. Calls for Reform in the Federal Sector Hearing Program

In recent years, some have urged procedural and organizational reforms in the federal sector hearing program. For example, in 2011, the American Bar Association (ABA) House of Delegates adopted Resolution 124, "urg[ing] the President, Congress, and the [EEOC] to adopt measures to provide that employment discrimination hearings conducted by the EEOC be subject to the formal adjudication requirements of the Administrative Procedure Act."<sup>65</sup> The National Lawyers Guild and the National Association of Women Judges adopted similar resolutions in 2011 and 2012, respectively.<sup>66</sup> The Administrative Judges Association (AJA), a voluntary professional association of the Commission's AJs, has also called for procedural and organizational reform of the federal sector program.<sup>67</sup> The AJA has specifically urged that EEOC adjudicators be given ALJ status<sup>68</sup> and that the EEOC should modify the organizational placement of the program so that the Commission's adjudicators would no longer report to the Commission through District Directors and the Office of Field Programs (OFF). Even putting aside the question of whether AJs should be converted into ALJs, there appears to be significant disagreement over whether AJs should be organizationally placed under OFF, OFO, or some new office especially created to oversee the federal sector hearing program.

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vests in hearing officers only such of the enumerated powers as the agency itself possesses. If an agency lacks the authority to issue subpoenas [sic], subsection 7(b) does not grant the subpoena [sic] power to that agency's hearing officers."). The importance of EEOC carefully evaluating whether it possesses the requisite statutory authority is discussed in greater detail below. *See infra* at notes 130-138 and accompanying text.

<sup>58</sup> An EEOC order, however, does prohibit ex parte communications during federal sector hearings. EQUAL EMP'T OPPORTUNITY COMM'N, ORDER NO. 690.001 (2002); EQUAL EMP'T OPPORTUNITY COMM'N, HANDBOOK FOR ADMINISTRATIVE JUDGES ch. 1 pt. E (2002), available at <http://www.eeoc.gov/federal/ajhandbook.cfm#initial>.

<sup>59</sup> *See* 29 C.F.R. § 1614.109(i).

<sup>60</sup> *See id.* § 1614.110(a).

<sup>61</sup> *See id.*

<sup>62</sup> *See id.* Such appeals are filed with the Office of Federal Operations (OFO), which issues the initial decision on behalf of the Commission. *See id.* §§ 1614.403(a), 1614.404. "The decision on an appeal from an agency's final action shall be based on a de novo review, except that the review of the factual findings in a decision by an administrative judge . . . shall be based on a substantial evidence standard of review." *Id.* § 1614.405(a).

<sup>63</sup> *See id.* § 1614.401(a).

<sup>64</sup> *See* Part II.A.1.

<sup>65</sup> A.B.A. RESOLUTION 124 (adopted Aug. 2011).

<sup>66</sup> *See, e.g.,* Kathleen Mulligan & Albert Sheen, *Faster and Fairer: Federal employees may choose streamlined procedures to resolve complaints of employment discrimination*, L.A. LAW., June 2012, at 19, 20, available at <http://www.lacba.org/Files/LAL/Vol35No4/2933.pdf>.

<sup>67</sup> *See, e.g.,* Admin. Judges Ass'n, Comments on Request for Public Comment on Plan for Retrospective Analysis of Significant Regulations (Mar. 28, 2011), available at <http://www.eeoc.gov/laws/regulations/upload/Link-13-AJA-Comments-re-January-2011-Notice.pdf>.

<sup>68</sup> *See id.* at 4-6.

In response to this ongoing dialogue, the Commission has pursued the present study of the status and placement of federal sector adjudicators.<sup>69</sup>

#### **D. Historical Examples of Conversions to ALJs**

On at least two occasions in the 1970s and 1980s, other federal agencies successfully converted non-ALJ adjudicators to ALJs. Both conversions were sought by agencies that believed the appointment of ALJs was required by a newly-enacted statute. In both instances, the Civil Service Commission (CSC), OPM's predecessor, at first denied the agency's request to appoint ALJs based on its independent judgment that the relevant statutes did not require the adjudications to be conducted under the APA. This delayed the appointment of ALJs until the courts and/or Congress took action to resolve the inter-agency dispute and facilitate the conversion to ALJs. Unfortunately, many of the details of these historical examples were not recorded in publicly available documents and appear to have been lost over time. We have provided here all of the information we have been able to locate.

##### *1. The Social Security Administration*

The first agency to accomplish an ALJ conversion was the Social Security Administration (SSA), with respect to its Disability Insurance (DI) and Supplemental Security Income (SSI) programs. Congress enacted the Social Security Act in 1935 and authorized the DI program in 1956. For many years, it was unclear whether the APA's formal adjudication provisions applied to the DI program. In 1971, the Supreme Court declined an opportunity to decide the question, reasoning that "the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act."<sup>70</sup> The relevant provision of the Social Security Act, however, required only an "opportunity for hearing," not a "hearing on the record."<sup>71</sup> This language would not ordinarily be read to *require* observance of formal APA adjudication procedures.<sup>72</sup> In 1972, Congress supplemented the DI program with the SSI program, requiring that the same procedures be used in both programs. After the law was enacted, SSA asked the CSC for approval to hire additional ALJs to staff the SSI program.<sup>73</sup> The CSC denied the request, taking the position that the SSI program did not require formal APA proceedings and, therefore, did not require the appointment of ALJs.<sup>74</sup>

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<sup>69</sup> See EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN, FY 2013-2016 17, *available at* <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

<sup>70</sup> Richardson v. Perales, 402 U.S. 389, 408-409 (1971).

<sup>71</sup> See 42 U.S.C. § 405(b). Having been enacted in 1935, eleven years before the APA was enacted, the Social Security Act could not have referred to the APA's formal adjudication provisions.

<sup>72</sup> See *Fourth in Hearing Series on Securing the Future of the Social Security Disability Insurance Program*: Subcomm. on Social Security of H. Comm. on Ways and Means, 112<sup>th</sup> Cong. (June 27, 2012) (testimony of Jeffrey S. Lubbers, Professor of Practice in Administrative Law, Washington College of Law, American Univ.); see also *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224 (1973) ("The term 'hearing' in its legal context undoubtedly has a host of meanings.").

<sup>73</sup> Although it appears that the DI program was already using ALJs at the time the SSI program was created, it is not clear when or how that practice began. Because Congress contemplated that the same procedures would be used in both programs, however, SSA interpreted that to mean that formal hearings were required. This is what presumably motivated SSA to seek the appointment of additional ALJs to staff the SSI program. Today, SSI and DI are adjudicated by ALJs, and the resulting orders are subject to substantial evidence review in federal district court. See 42 U.S.C. §§ 405(g), 1383(c)(3). There nonetheless remains some dispute over whether Congress intended to

The impasse between SSA and the CSC went on for years, requiring two acts of Congress before it was finally resolved in 1977.<sup>75</sup> First, in 1976, Congress enacted legislation conferring a two-year “temporary ALJ” status on SSI hearing officers.<sup>76</sup> Finally, in 1977, Congress enacted additional legislation granting the temporary ALJs permanent ALJ status.<sup>77</sup>

## 2. *The Department of Labor*

In the late 1970s or early 1980s, the Department of Labor (Department) similarly converted non-ALJ adjudicators in the Federal Black Lung Benefits Program to ALJ status. In 1972, Congress enacted the Black Lung Benefits Act. To identify the procedures the Department was required to observe in adjudicating claims under the Act, Congress cross-referenced the Federal Coal Mine Health and Safety Act of 1969 (FCMHSA). Several months later, however, Congress amended the relevant provisions of the FCMHSA to require formal adjudication under the APA. The Department accordingly requested an allocation of ALJs to adjudicate Black Lung Benefits claims. The CSC denied the request, taking the position that APA hearings were not required because the cross-references in the Black Lung Benefits Act were properly interpreted as requiring the FCMHSA’s pre-amendment, informal procedures. Because the CSC and the Department were at an impasse, the Department adopted a regulation permitting non-ALJs to adjudicate Black Lung Benefits claims. In 1976, however, the Benefits Review Board found that regulation invalid.<sup>78</sup> Ultimately, several federal circuit courts were called upon to review affected cases. These courts uniformly interpreted the Black Lung Benefits Act to require formal APA adjudications, and upheld the Department’s regulation permitting the use of non-ALJ adjudicators only because Congress, out of necessity, had validated it in several appropriations bills.<sup>79</sup>

The Department eventually succeeded in converting from non-ALJ adjudicators to ALJs in the Black Lung Benefits program. Although it appears that several legislative acts and multiple judicial opinions were required to break the impasse between the Department and the CSC, we have not been able to identify with greater particularity how the conversion was ultimately and permanently accomplished.<sup>80</sup>

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require DI and SSI hearings be conducted under the APA. *See* Jeffrey Scott Wolfe, *Are You Willing to Make the Comment in Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203, 216-22 (2002); *see also* Verkuil, *Reflections*, *supra* note 26, at 1348 (explaining that as of the 1970s, SSA “had long utilized ALJs, even though it was not required by the APA ‘on the record’ hearing requirements to do so.”).

<sup>74</sup> *See generally* Wolfe, *supra* note 73, at 213-16.

<sup>75</sup> *See* Testimony of Jeffrey S. Lubbers before the Social Security Subcommittee, House Ways and Means Committee 5 (June 27, 2012).

<sup>76</sup> *See* Pub. L. No. 94-202 § 3.

<sup>77</sup> *See* Pub. L. No. 95-216, tit. III, § 371, 91 Stat. 1559.

<sup>78</sup> *See, e.g.*, Office of Worker’s Comp. Programs v. Peabody Coal Co., 554 F.2d 310, 313-316 (7th Cir. 1977).

<sup>79</sup> *See* U.S. Pipe & Foundry Co. v. Webb, 595 F.2d 264, 273 (5th Cir. 1979); Office of Workmen’s Comp. Program v. Ala. By-Prod. Corp., 560 F.3d 710, 712, 718 (1977); Office of Workers’ Comp. Programs, E. Coal Corp., 561 F.2d 632, 650-51 (6th Cir. 1977); Krolick Contracting Corp. v. Benefits Review Bd., 558 F.2d 685, 688, 690 (3d Cir. 1977); *Peabody Coal*, 554 F.2d at 340; Office of Workers’ Comp. Programs v. Nat’l Mines Corp., 554 F.2d 1267, 1273, 1275 (4th Cir. 1977); *see also* Eifler v. Office of Workers’ Comp. Programs, 926 F.2d 663, 665 (7th Cir. 1991).

<sup>80</sup> We have consulted with experts familiar with this transition, but have not been able to locate any person or documents with further information regarding the history of the conversion.

## II. ASSESSING THE EFFECTS OF TRANSITIONING FROM AJS TO ALJS IN THE FEDERAL SECTOR HEARING PROGRAM

### A. Procedural Considerations

As we explain in great detail later, OPM takes the position that ALJs may only be appointed to preside over hearings required to be conducted in accordance with the APA's formal adjudication requirements.<sup>81</sup> Title VII and the other nondiscrimination statutes implemented through the Commission's federal sector hearing program do not require that federal employees' discrimination claims be adjudicated through such a "hearing on the record."<sup>82</sup> To transition from AJs to ALJs, the Commission may first have to address this deficiency.<sup>83</sup> One way to accomplish this would be for the Commission to seek and secure an appropriate statutory amendment. Alternatively, OPM has suggested that it would be sufficient for the Commission to adopt a regulation subjecting federal sector EEO hearings to the APA's formal adjudication requirements.<sup>84</sup>

This section explores the key procedural issues the Commission would need to consider before adopting a rule requiring observance of APA procedures. It analyzes two potential hurdles to such action identified by OPM: (1) federal employees' right to file suit in federal court for a *de novo* trial of discrimination claims previously adjudicated by the Commission; and (2) the nature and source of the final agency action that emerges from a federal sector EEO hearing. Determining that these hurdles could be overcome, this section concludes by identifying several procedural rules that the Commission would likely need to closely evaluate and, perhaps, modify in order to fully implement a rule requiring APA procedures in federal sector hearings.

#### 1. *De Novo Judicial Review*

The first potential hurdle to requiring APA procedures in federal sector hearings is the availability of a subsequent *de novo* trial of the same claims in federal court. Section 554 of APA provides that matters subject to subsequent *de novo* trial in court are not subject to the Act's formal adjudication requirements:

This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent

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<sup>81</sup> See Part III.B.1.; see generally 5 U.S.C. §§ 554, 556, 557.

<sup>82</sup> If a statute uses the magic words "hearing on the record," formal APA proceedings are required, but otherwise courts generally defer to an agency's interpretation as to the applicability of the APA's formal adjudication provisions. See, e.g., *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006). Courts would likely be similarly deferential to an agency that interpreted its statute to require or permit formal adjudicatory hearings in the absence of the phrase "hearing on the record."

<sup>83</sup> OPM has long taken the position that it has the statutory authority to approve or deny an agency's request for an "allocation" of ALJs. See Part III.B.1. Historically, legislative action, either alone or in conjunction with judicial action, has been required to break the impasse between OPM (or its predecessor, the Civil Service Commission) and an agency seeking to appoint ALJs to adjudicate disputes arguably not subject to the APA. See Part I.D. Although the concept of an "allocation" is no longer relevant, OPM continues to assert the authority to approve new ALJ position descriptions. Informal Communications, Office of the Gen. Counsel, Office of Pers. Mgmt., *supra* note 4.

<sup>84</sup> Informal Communications, Office of the Gen. Counsel, Office of Pers. Mgmt., *supra* note 4.

that there is involved—(1) a matter subject to a subsequent trial of the law and the facts de novo in a court.<sup>85</sup>

This exception was “included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision.”<sup>86</sup> This provision thus reflects Congress’s judgment that it would be inefficient and unnecessary to require agencies to provide formal hearings when the resulting decisions will have little weight in court, and the rights of affected parties will be amply protected through the judicial process. Courts have held that even the possibility of a subsequent de novo trial is sufficient to trigger this exception.<sup>87</sup> Although the statutory language could be read to prohibit formal adjudication when subsequent trial de novo is available, it is couched as an exception to the mandatory application of the APA. This suggests that the language is best read as providing only that an agency is not *required* to conduct formal APA hearings in such circumstances. From this perspective, the exception does not necessarily bar an agency from voluntarily observing APA procedures.<sup>88</sup>

It is well settled “that federal employees are entitled to a trial de novo of their employment discrimination claims,” even after they have availed themselves of an administrative EEO hearing before an AJ.<sup>89</sup> A federal employee who has been afforded a federal sector EEO hearing and has prevailed may simply seek judicial enforcement of the final administrative order.<sup>90</sup> In a judicial action of this kind, review is limited: the only issues are whether the relief ordered was within the Commission’s authority<sup>91</sup> and whether the employing agency has complied with the order.<sup>92</sup> If a federal employee has lost before the agency or is dissatisfied with

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<sup>85</sup> 5 U.S.C. § 554(a)(1).

<sup>86</sup> S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT, S. REP. 752, at 202 (1945), available at [http://www.justice.gov/jmd/ls/legislative\\_histories/pl79-404/senaterept-752-1945.pdf](http://www.justice.gov/jmd/ls/legislative_histories/pl79-404/senaterept-752-1945.pdf); see also ATTORNEY GENERAL’S MANUAL, *supra* note 18, at 43 (examining the legislative history and identifying the specific types of proceedings Congress had in mind when it created the exemption).

<sup>87</sup> See, e.g., *Arwady Hand Trucks Sales, Inc. v. Vander Werf*, 507 F. Supp. 2d 754, 760 (S.D. Tex. 2007) (“Because the Court has the discretion to conduct a trial de novo of the [Bureau of Alcohol, Tobacco, and Firearms (ATF)] denial decision, the underlying ATF hearing is a matter to which the APA adjudication procedures do not apply.”); *D’Angelo v. Dep’t of Navy*, 593 F. Supp. 1307, 1310 (E.D. Pa. 1984).

<sup>88</sup> As we note elsewhere, we have not been able to identify any agency that conducts formal adjudication of matters subject to subsequent de novo trial in federal court.

<sup>89</sup> *Chandler v. Roudebush*, 425 U.S. 840, 846 (1976) (addressing Title VII claims); see also *Carver v. Holder*, 606 F.3d 690, 697-98 (9th Cir. 2010) (explaining that *Chandler* applies to federal sector claims under Age Discrimination in Employment Act (ADEA), which was modeled on Title VII).

<sup>90</sup> See, e.g., *Moore v. Devine*, 780 F.2d 1559, 1564 (11th Cir. 1986) (“The employee may request enforcement by the district court without requesting and trying the merits of the claim.”); *Carver*, 606 F.3d at 696 (explaining that the first of two options available to the employee is to “bring an enforcement action against the agency”); *Ellis v. England*, 432 F.3d 1321, 1324 (11th Cir. 2005) (same). On the other hand, “[u]pon conclusion of the administrative process, the employing agency has no right to seek judicial review of the [Office of Federal Operations]’s resolution of an employee’s claim.” *Carver*, 606 F.3d at 696.

<sup>91</sup> See, e.g., *Moore*, 780 F.2d at 1563 (“Federal district courts have uniformly granted requests for enforcement of favorable final agency and EEOC decisions without requiring *de novo* review of the merits of the discrimination claims, unless the court has found the relief ordered to be outside the EEOC’s authority.”)

<sup>92</sup> See, e.g., *Massingill v. Nicholson*, 496 F.3d 382, 384 (5th Cir. 2007) (“Once a federal-sector employee exhausts her administrative remedies, she can file . . . a suit to enforce the final administrative disposition, in which the court examines only whether the agency has complied with the disposition.”).

the relief ordered, he or she may seek a subsequent de novo judicial trial on one or more claims<sup>93</sup> previously adjudicated through the federal sector hearing program.<sup>94</sup> As the Supreme Court has explained:

Congress was aware of the fact that federal employees would have the benefit of appropriate procedures for an impartial agency adjudication of the complaint, and yet chose to give employees who had been through those procedures the right to file a de novo “civil action” equivalent to that enjoyed by private-sector employees.<sup>95</sup>

In a civil action of this kind, the AJ’s decision and any Commission order issued on administrative appeal are given no deference and treated merely as part of the evidence in the case.<sup>96</sup>

One might argue that the de novo standard of judicial review renders federal sector hearings ineligible to be formal adjudications under the APA. If one reads section 554(a)(1) as a statutory declaration that matters subject to subsequent de novo trial cannot, by definition, be formal adjudications, then a Commission regulation requiring APA procedures may be viewed as insufficient to require the appointment of ALJs in the absence of legislation.<sup>97</sup> Conclusively establishing the Commission’s authority to *voluntarily* subject federal sector EEO hearings to APA requirements, however, is somewhat challenging because of the lack of directly applicable judicial precedent. Available precedent has typically involved private parties trying to *force* an agency to observe APA requirements in exempted proceedings.<sup>98</sup>

To interpret section 554(a)(1) to deny the Commission’s authority to require APA procedures in federal sector EEO hearings would be inconsistent with both the statute’s plain language and fundamental administrative principles. As to the first point, section 554(a)(1) is best read as creating a general exemption from the APA’s statutory requirements. To read it as a

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<sup>93</sup> See 42 U.S.C. § 2000e-16(c); *Chandler*, 425 U.S. at 840; see also, e.g., *Scott v. Johanns*, 409 F.3d 466, 469 (D.C. Cir. 2005) (“In a Title VII suit brought after a final administrative disposition finding no discrimination, the district court considers the discrimination claim de novo.”). Although the circuit courts have long split over the question of whether a federal employee can challenge the ordered remedy without triggering a de novo trial of the underlying liability issue, the weight of authority has recently tipped against allowing such bifurcation. See generally *Massingill*, 496 F.3d at 384-85 (examining the history and trajectory of the circuit split before “agree[ing] with the weight of authority”).

<sup>94</sup> Complainants must exhaust administrative remedies before going to court, see 42 U.S.C. § 2000e-16(c); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976), although a hearing is an optional part of that process, see 29 C.F.R. § 1614.109(a) (“When a complainant requests a hearing, the Commission shall appoint an administrative judge to conduct a hearing in accordance with this section.”).

<sup>95</sup> *Chandler*, 425 U.S. at 863 (internal quotations marks, alterations, and footnote omitted).

<sup>96</sup> E.g., *id.* at 863 n.39 (“Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial de novo.” (citing FED. R. EVID. 803 (8)(c))).

<sup>97</sup> Cf. ATTORNEY GENERAL’S MANUAL, *supra* note 18, at 9 (“[I]nvestigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing the element of final disposition as required by the definition, do not constitute adjudication.”). Of course, Congress could legislatively address this issue by changing the standard of review in subsequently filed employment discrimination actions. It could also statutorily override the APA’s exemption by requiring that federal sector discrimination claims be adjudicated under the APA. See *Starrett v. Special Counsel*, 792 F.2d 1246 (4th Cir. 1986).

<sup>98</sup> See, e.g., *Arwady Hand Trucks Sales*, 507 F. Supp. 2d at 757, 760.

prohibition on the use of APA procedures in exempted proceedings would be at odds with the fundamental administrative principle that the APA establishes only minimum, skeletal procedural requirements, and agencies have broad discretion to design and observe more demanding procedural requirements.<sup>99</sup> As the Supreme Court has explained, even if certain “proceedings need not be conducted pursuant to the Act, 5 U.S.C. § 554, the agency remains ‘free under the Act to accord litigants appearing before it more procedural rights than the Act requires.’”<sup>100</sup> Thus, the Commission presumably has the authority to require APA procedures in federal sector EEO hearings notwithstanding the possibility that the matters adjudicated subsequently may be subject to de novo trial in federal court.

The more fundamental question for the Commission, however, is whether it is necessary, desirable, or appropriate to subject federal sector hearings to the formal procedures of the APA when the issues adjudicated may be subsequently tried de novo in federal court. Although this is an issue over which agencies should have discretion, we have been unable to identify any other agency program in which formal adjudicatory hearings are combined with subsequent de novo judicial review. Ultimately, the decision must be based on the Commission’s interpretation of the nondiscrimination statutes Congress has charged it with enforcing and its expert judgment regarding the proper role of the federal sector program within the Commission’s larger organization and mission. If the Commission views the federal sector hearing program as part of an investigatory process designed to mirror or complement its private sector investigative process, then further formalization of the hearings may not make sense. On the other hand, if it views the predominant purpose of the federal sector hearing program as assuring the impartial adjudication of individual federal employees’ claims of employment discrimination, then formal hearings under the APA may be appropriate. The Commission should carefully consider whether a formal adjudicative vision of the program makes sense without legislative action to eliminate de novo judicial review and give greater finality and weight to the administrative decisions produced through federal sector hearings.

## 2. *Status, Finality, and Review of the AJ’s Decision*

A second potential hurdle to the Commission’s adopting a rule requiring APA procedures in federal sector EEO hearings is the current relationship between the AJ’s decision and the employing agency’s final action. Under current regulations, an AJ’s decision in a federal sector hearing does not immediately become final, but is instead returned to the agency alleged to have discriminated (the “defending agency”). The defending agency is required to “take final action on the complaint by issuing a final order within 40 days of receipt.”<sup>101</sup> Only if the agency fails to take action within the established time period does the AJ’s decision become final agency action.<sup>102</sup> And it becomes the final action of the defending agency, not the Commission.<sup>103</sup> This

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<sup>99</sup> See, e.g., *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 349 (1st Cir. 2004) (“The APA lays out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules.”).

<sup>100</sup> *Int’l Tel. & Tel. Corp. v. Local 134, Int’l Bhd. of Elec. Workers*, 419 U.S. 428, 448 (1975).

<sup>101</sup> See 29 C.F.R. § 1614.110(a).

<sup>102</sup> See *id.* § 1614.109(i).

<sup>103</sup> See *id.* § 1614.109(i) (“If an agency does not issue a final order within 40 days of receipt of the administrative judge’s decision in accordance with 1614.110, then the decision of the administrative judge shall become the final action of the agency.”).

procedural characteristic appears to be unique to the federal sector hearing program. Ordinarily, an AJ or ALJ opinion, if not administratively appealed within a time established by rule, becomes final action of the agency for which the adjudicator is working. Moreover, EEOC regulations permit the defending agency to issue a final order that “does not fully implement” the AJ’s decision.”<sup>104</sup> But in such circumstances, the regulations provide that “the agency shall simultaneously file an appeal” with the Commission and “append a copy of the appeal to the final order.”<sup>105</sup> Appeals from federal sector EEO hearings are processed by the OFO,<sup>106</sup> to which the Commission has delegated the requisite authority.<sup>107</sup>

OPM has expressed concern that this aspect of the process may be inconsistent with the APA’s formal adjudication requirements.<sup>108</sup> We are of the view, however, that this concern is misplaced and this aspect of the Commission’s current process is generally consistent with APA requirements.

The APA specifically contemplates that an ALJ’s decision may be a “recommended” or “initial” decision that may not necessarily become final agency action.<sup>109</sup> More specifically, the APA provides that “[w]hen the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule.”<sup>110</sup> The issue is whether the statute’s reference to “the agency” requires that the agency employing the ALJ and the agency issuing the final decision are one and the same. In our view, the statutory language merely reflects the fact that, in most instances, adjudication occurs within a single agency. Although the Commission’s process is in this sense unique, it nonetheless appears to be consistent with the statutory requirement. The AJ’s decision is an initial decision that becomes final agency action unless the defending agency, within a time prescribed by rule, either: (1) issues a final order fully implementing the AJ’s decision; or (2) issues a final order that does not fully implement the AJ’s decision, while simultaneously filing an appeal of the AJ’s decision with the Commission. That a final order implementing the AJ’s decision comes from an agency other than the EEOC should not make any difference in terms of the appeal process outlined in the APA.<sup>111</sup> Furthermore, the defending agency has no authority to take final action inconsistent with the AJ’s decision in the absence of a successful appeal to the Commission.

### 3. *Other Procedural Issues*

To effectuate a rule requiring APA procedures in the federal sector hearing program, the Commission may be required to make other procedural modifications. We have evaluated the Commission’s current rules and identified several provisions that are potentially inconsistent with the APA. For purposes of our review, we focus only on the procedures codified in the

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<sup>104</sup> *Id.* § 1614.110(a).

<sup>105</sup> *Id.* § 1614.110(a); *see id.* at § 1614.403.

<sup>106</sup> *See id.* § 1614.403.

<sup>107</sup> *See id.* § 1614.403.

<sup>108</sup> Informal Communications, Office of the Gen. Counsel, Office of Pers. Mgmt., *supra* note 4.

<sup>109</sup> *See* 5 U.S.C. §§ 554(d), 557(b) & (c).

<sup>110</sup> 5 U.S.C. § 557(b).

<sup>111</sup> *Cf. Maka v. United States Immigration & Naturalization Serv.*, 904 F.2d 1351, 1356 n.6 (9th Cir. 1990) (finding nothing inconsistent with 5 U.S.C. § 557 where the agency exercising delegated authority to review an ALJ’s decision was “not an officer of the INS”).

Commission's regulations. We recognize that these procedures are supplemented in important ways through EEOC Orders and the guidance contained in the AJ Handbook.<sup>112</sup> OPM's concern, however, is that federal sector hearings be *required* to be conducted under the APA. Thus, the determinative comparison must be between the two sources of binding procedural requirements: the Commission's regulations and the APA.

There are a several inconsistencies between the APA's formal hearing procedures and federal sector EEO hearing procedures that may need to be resolved if the Commission decides to transition to using ALJs. In particular, the Commission would need to consider whether:

- To modify the rules on pre-complaint processing, the filing of complaints, and the scheduling and location of hearings to ensure adequate notice to the parties and consideration of convenience and necessity.<sup>113</sup>
- To extend to complainants the opportunity to submit offers of resolution.<sup>114</sup>
- To address the question of ALJ impartiality and standards for recusal.<sup>115</sup>
- To codify appropriate rules governing *ex parte* contacts.<sup>116</sup>
- To remove the statement that “[h]earings are part of the investigative process,”<sup>117</sup> because it is inconsistent with the APA's separation-of-functions requirements.<sup>118</sup>
- To grant ALJs additional powers. In particular, the rules do not appear to expressly grant AJs the power to issue subpoenas,<sup>119</sup> hold conferences for settlement or simplification of the issues,<sup>120</sup> notify the parties of ADR alternatives or encourage their use,<sup>121</sup> require parties or their representatives to attend conferences,<sup>122</sup> or dispose of procedural requests or similar matters.<sup>123</sup>
- To identify which party bears the burden of proof in federal sector EEO hearings.<sup>124</sup>

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<sup>112</sup> See *supra* note 58.

<sup>113</sup> See 5 U.S.C. § 554(b).

<sup>114</sup> See *id.* § 554(c)(1).

<sup>115</sup> See *id.* § 556(b).

<sup>116</sup> See *id.* § 556(d).

<sup>117</sup> 29 C.F.R. § 1614.109(e).

<sup>118</sup> See 5 U.S.C. § 554(d).

<sup>119</sup> See *id.* § 556(c)(2). As previously noted, this may require the Commission to seek the statutory authority to issue subpoenas, if it does not already possess the requisite authority for ALJs to exercise. See *supra* note 57. This issue is explored in greater detail at the end of the present section. See *infra* at notes 130-138 and accompanying text.

<sup>120</sup> See 5 U.S.C. § 556(c)(6).

<sup>121</sup> See *id.* § 556(c)(7).

<sup>122</sup> See *id.* § 556(c)(8).

<sup>123</sup> See *id.* § 556(c)(9).

<sup>124</sup> See *id.* § 556(d); see also *Steadman v. Sec. & Exch. Comm'n*, 450 U.S. 91 (1981) (holding that the preponderance-of-the-evidence test applies in formal APA adjudications).

- To identify the evidentiary standard for the issuance of a decision or order.<sup>125</sup>
- To define the necessary contents of the administrative record with greater specificity.<sup>126</sup>
- To implement the requirement that “[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.”<sup>127</sup>

The Commission may conclude that its existing rules already fulfill the APA’s “most skeletal” requirements or require only modest changes to achieve that goal.<sup>128</sup> A court would likely give the agency wide latitude to reach such a conclusion, provided it were adequately explained and legally supported.<sup>129</sup>

As a practical matter, the Commission would likely need to satisfy OPM that its procedures fully comply with the APA’s formal adjudication provisions. For this reason, should the Commission pursue an overhaul of its procedures in order to use ALJs in the federal sector hearing process, it may be prudent to consult with OPM to ascertain exactly what modifications to the Commission’s procedural rules it would deem necessary to satisfy its requirements for appointing ALJs.

The Commission would also need to consider whether legislative action would be required to make the procedural modifications that may be necessary to satisfy OPM that federal sector hearing procedures are fully consistent with the APA’s formal adjudication provisions.<sup>130</sup> In addition to the availability of subsequent de novo judicial trial, which we have examined in detail above,<sup>131</sup> another issue arises with respect to ALJ subpoena authority. As previously noted,<sup>132</sup> the APA does not automatically endow ALJs with the powers enumerated in 5 U.S.C. § 556, including the power to issue subpoenas.<sup>133</sup> A statute other than the APA must grant an agency statutory authority to issue subpoenas before that agency can subdelegate the authority to

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<sup>125</sup> See 5 U.S.C. § 556(d).

<sup>126</sup> See *id.* § 556(c).

<sup>127</sup> See *id.* § 556(e).

<sup>128</sup> *Citizens Awareness Network*, 391 F.3d at 349.

<sup>129</sup> See, e.g., *id.* at 352.

<sup>130</sup> It warrants clarifying that, in our view, a hearing may qualify as a “formal” adjudication required to be conducted under the APA even if the presiding ALJ does not have all the powers enumerated in the APA, including the authority to issue subpoenas. See 5 U.S.C. § 556(c) (providing that, “[s]ubject to published rules of the agency and within its powers, employees presiding at hearings *may*” administer oaths, issue subpoenas, etc. (emphasis added)). Were it not so, Administrative Conference Recommendation 70-4, *Discovery in Agency Adjudication* would make little sense. This recommendation urges agencies to “recognize” certain “minimum standards for discovery” in formal hearings subject to the APA’s adjudication provisions. *Id.* at 1. With respect to subpoenas, the recommendation provides that: “The presiding officer should have the power to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding. Agencies affected by this Recommendation that do not have the statutory authority to issue subpoenas should seek to obtain any necessary authority from the Congress.” *Id.* at 6 (¶ 9). If subpoena authority were an indispensable element of formal adjudication, this recommendation would be superfluous.

<sup>131</sup> See *supra* Part II.A.1.

<sup>132</sup> See *supra* note 57.

<sup>133</sup> See 5 U.S.C. § 556(c)(2).

its ALJs.<sup>134</sup> EEOC already has statutory authority to issue subpoenas.<sup>135</sup> Although the text is extremely broad on its face, the Commission would need to consider whether the authority it grants extends to the federal sector program.<sup>136</sup> Careful scrutiny may be required because the statutory provision at issue was enacted in 1972, before responsibility for the federal sector program was transferred from the CSC to EEOC.<sup>137</sup> It is possible that Congress intended the Commission would issue subpoenas only in the context of private sector investigations. Careful regard to the limits of EEOC's current statutory authority may also be warranted because in the federal sector context, EEOC subpoenas would be issued to, and enforced against, other federal agencies.<sup>138</sup>

Finally, the use of ALJs in federal sector hearings may create new issues that do not arise in the current hearing process. For example, if ALJs presided over federal EEO hearings, a conflict of interest might arise in hearings involving claims that OPM has discriminated in its employment practices. OPM's statutory authority over ALJ selection, compensation, and tenure<sup>139</sup> could undermine an EEOC ALJ's real or perceived impartiality in such hearings. Because all ALJs have the same special relationship with OPM, the Commission could not address this issue by "borrowing" an ALJ from another agency.<sup>140</sup> Rather, to address this issue in a manner consistent with the APA, one or more Commissioners or the full Commission would need to preside over any federal sector EEO hearing involving claims against OPM.<sup>141</sup>

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<sup>134</sup> See, e.g., *Peters v. United States*, 853 F.2d 692, 696 (9th Cir. 1988) ("The authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute."); *Johnson v. United States*, 628 F.2d 187, 193 (D.C. Cir. 1980) ("Subpoena power is not an intrinsic feature of the administrative process, and courts cannot engraft subpoena authority onto an agency's charter from Congress."); *Sec. & Exch. Comm'n v. Bourbon Sales Corp.*, 47 F. Supp. 70, 72 (W.D. Kan. 1942) ("When jurisdiction over the subject matter . . . is shown to exist, the authority to issue the subpoena is controlled by the express terms of the particular statute involved.").

<sup>135</sup> See 42 U.S.C. § 2000e-9 ("For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 shall apply."); see also 29 U.S.C. § 161 (granting authority to issue "subpenas [sic] requiring the attendance and testimony of witnesses or the production of any evidence" and providing for federal court aid in enforcement); see generally *Equal Emp't Opportunity Comm'n v. K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982) (discussing how standards governing judicial review and enforcement of administrative subpoenas apply in the context of EEOC private sector investigations).

<sup>136</sup> Our discussion here is at a fairly broad level of generality, and it bears noting that a full evaluation of the availability of subpoena authority for purposes of federal sector hearings would likely require an analysis of each individual statute enforced through federal sector hearings. The adjudicatory tools available to the agency under each statute may vary.

<sup>137</sup> The provision was added by the 1972 amendments to Title VII. See *Equal Employment Opportunity Act of 1972*, Pub. L. No. 92-261, § 7, 86 Stat. 103, 109 (1972). A similar issue, discussed below, arises with respect to the Commission's statutory authority to appoint ALJs. See *infra* at notes 184-194 and accompanying text. The implications, however, are different in each case. Although it is clear that subpoena authority must be specifically granted by Congress, see *supra* note 57 and notes 133-134 and accompanying text, ALJ appointment authority is more in the nature of an inherent authority, see *infra* at Part III.A and note 182.

<sup>138</sup> MSPB, which also adjudicates federal employees' claims against their employing agencies, has statutory authority to issue subpoenas See 5 U.S.C. § 1204(b)(2)(A); *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2138 (2012).

<sup>139</sup> See Part III.B.

<sup>140</sup> In the current process, when a hearing involves a claim of discrimination against EEOC, the agency uses a non-ALJ adjudicator employed by another agency to preside over the hearing. See *Bullock v. Berrien*, 688 F.3d 613, 615 (9th Cir. 2012). Similarly, the MSPB's "policy is to insulate the adjudication of its own employees' appeals from agency involvement as much as possible." 5 C.F.R. § 1201.13.

<sup>141</sup> See 5 U.S.C. § 556(b)(1)-(2).

## B. Operational Considerations

OPM's statutory responsibilities for the federal ALJ program, which are examined in greater detail below,<sup>142</sup> would have significant operational consequences for EEOC in the event the agency decided to transition to using ALJs in the federal sector hearing program. While Part III, below, focuses on how OPM's role would affect the Commission's appointment authority, this section focuses on how it would affect the Commission's authority over the compensation, tenure, and management of ALJs.

To preserve ALJ independence, OPM is vested with statutory authority over the compensation and tenure of ALJs.<sup>143</sup> Employing agencies are required by statute and regulation to pay OPM for the costs associated with administering the ALJ program.<sup>144</sup> In addition, ALJs are compensated according to a special scale established by statute.<sup>145</sup> That statute also vests OPM with the authority to "determine, in accordance with procedures which [OPM] shall by regulation prescribe, the level in which each administrative-law-judge position shall be placed and the qualifications to be required for appointment at each level."<sup>146</sup> Finally, OPM has a role in certain agency personnel actions in relation to the management of ALJs.<sup>147</sup>

The budgetary implications of these requirements are analyzed in detail below,<sup>148</sup> but there are also some non-financial implications that warrant consideration. At the broadest level, employing ALJs in the federal sector hearing process would require the Commission to establish and maintain a good working relationship with OPM.<sup>149</sup> Although the Office of Management and Budget (OMB) has suggested there is no requirement for agencies to annually enter into an Interagency Agreement (IAA) with OPM, it has taken the position that doing so is a "good practice."<sup>150</sup> OPM has taken the position, however, that such agreements are neither necessary nor appropriate and that it will not negotiate IAAs related to the ALJ program.<sup>151</sup> If the Commission reforms its federal sector hearing program to accommodate the use of ALJs, it should consider how it will ensure clear expectations and a forward-looking understanding of program costs.

Using ALJs would also impose some restrictions on the Commission's personnel management authority.<sup>152</sup> OPM regulations provide that OPM has the authority to "[a]pprove

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<sup>142</sup> See Part III.B.

<sup>143</sup> See, e.g., 5 U.S.C. § 5372

<sup>144</sup> See *id.* § 1104(a)(2)

<sup>145</sup> See *id.* § 5372.

<sup>146</sup> See *id.* § 5372(b)(2); see generally 5 C.F.R. §§ 930.201-930.211 (OPM regulations implementing its statutory authority to regulate the selection, compensation, and tenure of ALJs employed by other agencies).

<sup>147</sup> Although OPM does not initiate these actions, it reviews and responds to personnel actions initiated by the employing agency to ensure adherence to the rules designed to protect ALJs.

<sup>148</sup> See Part V.

<sup>149</sup> See generally SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., A-05-12-22144, CONGRESSIONAL RESPONSE REPORT: INTERAGENCY AGREEMENTS WITH THE OFFICE OF PERSONNEL MANAGEMENT FOR ADMINISTRATIVE LAW JUDGE SERVICES (2013) [hereinafter 2013 SSA OIG REPORT], available at <http://oig.ssa.gov/audits-and-investigations/audit-reports/A-05-12-22144>.

<sup>150</sup> See *id.* at 10.

<sup>151</sup> Informal Communications, Office of the Gen. Counsel, Office of Pers. Mgmt., *supra* note 4.

<sup>152</sup> It bears noting that appointing ALJs would not require the Commission to hire additional support staff. Although ALJs in some agencies are supported by administrative personnel or decision writers, see, e.g., HAROLD J. KRENT &

noncompetitive personnel actions for [ALJs], including but not limited to promotions, transfers, reinstatements, restorations, and reassignments,”<sup>153</sup> as well as any “personnel actions related to pay.”<sup>154</sup> The regulations make explicit the obligation of the employing agency to seek OPM approval before taking any of these enumerated actions.<sup>155</sup> By statute, agencies may only take personnel action against an ALJ “for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”<sup>156</sup> Although there are a few limited exceptions,<sup>157</sup> this requirement generally applies to removals, suspensions, reductions in grade or pay, and furloughs of thirty days or less.<sup>158</sup> Actions against ALJs are also subject to procedural and substantive requirements established in OPM’s regulations.<sup>159</sup>

The statutory protections of ALJ independence would affect the Commission’s authority to assign cases and other duties to ALJs. First, the Commission would be required to assign ALJs “to cases in rotation so far as practicable.”<sup>160</sup> Second, if the Commission were to require additional ALJs on a temporary basis, such as to address an unexpected increase in hearing requests, it could meet that need by appointing ALJs on detail from other agencies. The detailed ALJs would be “selected by [OPM] from and with consent of other agencies.”<sup>161</sup> Third, the Commission would also generally have to seek and obtain OPM’s approval before it could detail or assign an ALJ to a non-ALJ position within the agency.<sup>162</sup> Fourth, the law provides that ALJs “may not perform duties inconsistent with their duties and responsibilities as administrative law judges.”<sup>163</sup> This requirement would have a potentially significant effect on the Commission’s ability to rely on ALJs to perform some of the work currently done by AJs.<sup>164</sup> Finally, ALJs,

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SCOTT MORRIS, ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS 6-7 (2013), available at [http://www.acus.gov/sites/default/files/documents/Achieving\\_Greater\\_Consistency\\_Final\\_Report\\_4-3-2013\\_clean.pdf](http://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Final_Report_4-3-2013_clean.pdf) (discussing SSA’s use of “pooled” decision writers in each hearing office), ALJs in other agencies are accorded no such support, Interview with Office Manager, Division of Judges, Nat’l Labor Relations Bd. (Mar. 27, 2014). Agencies may provide support staff to ALJs based on available resources and operational necessities (typically related to caseloads). But this is all discretionary—there is no legal requirement that an agency provide its ALJs with support staff.

<sup>153</sup> 5 C.F.R. § 930.201(e)(4); see also *id.* at § 930.204 (e) (governing promotion); *id.* at § 930.204 (f) (“Prior to OPM’s approval, the agency must provide a bona fide management reason for [a] reassignment.”); *id.* at § 930.204(g) (addressing qualifications for reinstatement); *id.* at § 930.204(h) (imposing limitations on ALJ transfers).

<sup>154</sup> *Id.* § 930.201(e)(5); see also *id.* § 930.205(c), (f)(2), (g), & (j).

<sup>155</sup> See *id.* § 930.201(f)(4).

<sup>156</sup> 5 U.S.C. § 7521. OPM does not need to approve “good cause” actions. Informal Communications, Office of the Gen. Counsel, Office of Pers. Mgmt., *supra* note 4.

<sup>157</sup> See 5 U.S.C. § 7521(b)(A)-(C).

<sup>158</sup> See *id.* § 7521(b)(1)-(5).

<sup>159</sup> See 5 C.F.R. § 930.211.

<sup>160</sup> 5 U.S.C. § 3105. Our understanding is that this is not a burdensome requirement and has rarely, if ever, been enforced.

<sup>161</sup> *Id.* § 3344; see also 5 C.F.R. § 930.201(e)(7) (providing that OPM has the authority to “[a]rrange the temporary detail (loan) of an administrative law judge from one agency to another under the provisions of the administrative law judge loan program”); *id.* at § 9301.208 (prescribing regulations governing the ALJ loan program).

<sup>162</sup> See 5 C.F.R. § 930.201(e)(6).

<sup>163</sup> 5 U.S.C. § 3105.

<sup>164</sup> Our understanding is that AJs often perform duties to help their home offices and OFP achieve goals in areas outside of the federal sector hearing program, particularly by contributing to outreach and education initiatives. Such additional duties do not appear to be inconsistent with the duties of an ALJ.

unlike AJs, are not subject to performance standards and cannot receive any monetary awards or incentives.<sup>165</sup>

Finally, using ALJs in the federal sector hearing program may require modifications to the organizational structure and placement of ALJs within the agency. These considerations, which are related primarily to the separation of functions, are addressed in Part IV.A.

### **III. ASSESSING THE COMMISSION’S AUTHORITY OVER THE STATUS OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM**

#### **A. The Commission’s Authority over the Status of Adjudicators**

As an initial matter, there is no statutory requirement that ALJs preside over hearings in the federal sector program. As previously discussed, it is individual statutes, and not the APA itself, that determine whether a hearing must be conducted under the APA.<sup>166</sup> The statutes that govern in the federal sector hearing program include Title VII of the Civil Rights Act of 1964,<sup>167</sup> the Age Discrimination in Employment Act of 1967,<sup>168</sup> the Rehabilitation Act of 1973,<sup>169</sup> the Equal Pay Act of 1963,<sup>170</sup> and the Genetic Information Nondiscrimination Act of 2008.<sup>171</sup> None of these statutes contains any provision requiring that federal sector EEO hearings be conducted on the record or otherwise in accordance with the APA’s requirements for formal adjudication.<sup>172</sup>

On the other hand, nothing in the relevant statutory provisions would explicitly prevent the Commission from appointing ALJs to preside over hearings in the federal sector program.<sup>173</sup> As previously explained, agencies generally have wide discretion to formulate their own procedures, subject only to the minimal requirements imposed by the APA.<sup>174</sup> In informal adjudicatory settings, such as in the federal sector program, the APA does not specify the procedures that must be observed.<sup>175</sup> Agencies administering statutes that require “hearings” or “public hearings” but not “hearings on the record” have been accorded *Chevron* deference when

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<sup>165</sup> See 5 U.S.C. § 4301(2)(D); 5 C.F.R. § 930.206; see also Administrative Conference of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary* 8-10 (1992) (discussing ALJ evaluation and discipline).

<sup>166</sup> See Part I.A.

<sup>167</sup> 42 U.S.C. § 2000e et seq.

<sup>168</sup> See 29 U.S.C. § 621 et seq.

<sup>169</sup> See *id.* § 791 et seq. The Americans with Disabilities Act of 1990, see 42 U.S.C. § 12101 et seq., does not apply to the federal sector, see 42 U.S.C. § 12111(5)(B)(i), but the Rehabilitation Act provides similar protections for federal employees.

<sup>170</sup> See 29 U.S.C. § 206(d).

<sup>171</sup> See 42 U.S.C. § 2000ff et seq.

<sup>172</sup> See, e.g., 29 U.S.C. §§ 633a, 794a; 42 U.S.C. § 2000e-16, 2000ff-6(b), (e), & (f).

<sup>173</sup> 5 U.S.C. § 3105 provides that “[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with” the APA’s formal adjudication provisions. If Title VII required formal hearings in federal sector cases, this provision would clearly require EEOC to appoint as many ALJs as were required to conduct those hearings. The relevant question here, however, is a different one: does EEOC have the authority to appoint ALJs to preside over hearings if the agency *voluntarily* subjects them to the APA?

<sup>174</sup> See Part I.A.

<sup>175</sup> E.g., *Occidental Petroleum Corp. v. Sec. & Exch. Comm’n*, 873 F.2d 325, 337 (D.C. Cir. 1989) (explaining that “no provision of the APA contains specific procedures to govern an informal agency adjudication”).

interpreting these terms to allow informal adjudication.”<sup>176</sup> Similar deference would likely be afforded to an agency that interpreted such provisions to require formal adjudication. Indeed, agencies generally have broad discretion to fashion their procedural rules, including by observing procedures more formal than the minimum required by the APA in a particular context.<sup>177</sup> An agency may revise its procedural rules whenever it “reasonably determines that existing processes are unsatisfactory and takes steps that are fairly targeted at improving the situation.”<sup>178</sup> The only limitations in this regard are that “[a]n agency may not act precipitously or in an irrational manner.”<sup>179</sup> These principles suggest that, in the absence of some statutory provision to the contrary, the Commission has the authority to formalize its hearing procedures and appoint ALJs to preside over federal sector EEO hearings.<sup>180</sup>

In addition, Title VII appears to give the Commission the specific authority to appoint ALJs, as well as broad discretion over the procedures it uses to prevent and remedy unlawful discrimination against federal government employees. 42 U.S.C. § 2000e-4(a)(2) grants the Chairman of the EEOC the authority to appoint ALJs when, in his or her judgment, doing so is necessary to carry out the EEOC’s functions:

The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and . . . shall appoint, in accordance with the provisions of title 5 governing appointments in the competitive service, such . . . administrative law judges . . . as he deems necessary to assist it in the performance of its functions . . . : Provided, That assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5.<sup>181</sup>

Although this provision appears to be primarily concerned with the division of authority within the EEOC between the Chair and the Commission, it nonetheless suggests that the agency has

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<sup>176</sup> See, e.g., *Dominion Energy*, 443 F.3d at 18 (concluding that Congress’s intent in using the phrase “public hearing” in the Clean Water Act was ambiguous and that EPA’s interpretation was reasonable under *Chevron* step two); *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1480-83 (D.C. Cir. 1989) (same with respect to the Resource Conservation and Recovery Act). In the latter case, the D.C. Circuit made plain that the agency could change its interpretation from one that required a formal hearing to one that required an informal hearing. *Id.* at 1481 (noting that the agency “would remain free to change its interpretation in order to permit the use of informal procedures to implement the 1984 Amendments, provided that its new interpretation is otherwise legally permissible and is adequately explained”). Presumably, it would be even easier for an agency to justify reinterpreting a statute to require formal instead informal hearings, since the change would provide additional procedural rights and protections.

<sup>177</sup> E.g., *New Life Evangelistic Ctr., Inc. v. Sebelius*, 753 F. Supp. 2d 103, 121 (D.D.C. 2010) (“Agencies are, of course, free to adopt additional procedures as they see fit.”); cf. *Vermont Yankee*, 435 U.S. at 543 (noting “the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure”).

<sup>178</sup> *Citizens Awareness Network*, 391 F.3d at 352.

<sup>179</sup> *Id.*

<sup>180</sup> But see Paul R. Verkuil et al., *The Federal Administrative Judiciary*, 1992 A.C.U.S. 771, 1046 n.1310 (1992) (explaining that OPM has historically taken the position that ALJs should be appointed only to formal proceedings required to be conducted under the APA). OPM’s position on this issue is discussed in Part III.B.1.

<sup>181</sup> 42 U.S.C. § 2000e-4(a)(2).

statutory authority to appoint ALJs.<sup>182</sup> In addition, the statutes governing the federal sector hearing program grant the Commission broad remedial discretion, as well as the authority to “issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities.”<sup>183</sup> This language gives specific expression to the more general principle that an agency has broad authority to design procedures that are, in its sound judgment, best suited to accomplishing its statutory mission.

A careful analysis of the legislative evolution of 42 U.S.C. § 2000e-4(a)(2) suggests, however, that its authorization to appoint ALJs was unrelated to the federal sector hearing program or, for that matter, any other then-existing EEOC adjudicatory program. The key is the Equal Employment Opportunity Act of 1972, which contained several relevant provisions amending the Civil Rights Act of 1964. It was the 1972 amendments that granted the Commission the authority now found in 42 U.S.C. § 2000e-4(a)(2) to appoint ALJs.<sup>184</sup> The legislation also created the provision now codified at 42 U.S.C. § 2000e-16, addressing nondiscrimination in federal government employment.<sup>185</sup> There are two primary reasons to question whether the 1972 amendments granted the EEOC authority to appoint ALJs for the purpose of conducting federal sector EEO hearings. First, the provision addressing nondiscrimination in federal government employment did not refer to hearings or contain any indication that Congress contemplated the use of formal adjudication as a means of enforcement.<sup>186</sup> Second, the legislation vested responsibility for enforcing this provision, which is now codified at 42 U.S.C. § 2000e-16, in the Civil Service Commission, not EEOC.<sup>187</sup>

It is not clear why Congress added the ALJ appointment language to the statute in 1972. Neither the final text of the law nor its legislative history reveals the reason. The provision may well have been a vestige of earlier versions of the legislation that would have conferred on the EEOC the authority to adjudicate claims of discrimination against private employers and, upon finding a violation, to issue cease-and-desist orders (subject to judicial review).<sup>188</sup> Those earlier versions provided, not surprisingly, for formal, APA adjudications of such claims,<sup>189</sup> and so

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<sup>182</sup> The statute’s apparent focus on the division of authority between the Chair and the Commission makes sense if ALJ appointment authority is understood as an inherent authority derivative of agency authority to establish procedures appropriate for the particular circumstances of a given program. *See generally* Parts I.A. and III.A.

<sup>183</sup> *See* 42 U.S.C. § 2000e-16(b).

<sup>184</sup> *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 7, 86 Stat. 103, 110 (1972). At the time, ALJs were still referred to as “hearing examiners,” so this is the term used in the legislation. *See id.*

<sup>185</sup> *See id.* § 11, 86 Stat. at 111-12.

<sup>186</sup> *See id.*

<sup>187</sup> *See id.* CSC’s 1977 regulations reveal that the agency did not use ALJs to adjudicate federal sector EEO claims. *See* 5 C.F.R. pt. 772 (1977). The authority to enforce nondiscrimination in federal sector employment was subsequently transferred to the EEOC during the 1978 reorganization.

<sup>188</sup> Whether the EEOC should be given that authority (as opposed to the authority to litigate in federal court) became the central issue in the debates during the ninety-first and ninety-second Congresses leading up to the enactment of the 1972 Act. *See, e.g.,* SEAN FAHRANG, *THE LITIGATION STATE* 131-35 (2010); George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 *GEO. WASH. L. REV.* 824, 830-45 (1972); *see also, e.g.,* H. REP. 92-238, at 58 (1971), *reprinted in* S. COMM. ON LABOR AND PUBLIC WELFARE, *LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972* 118 (Comm. Print 1972) [hereinafter after *LEGISLATIVE HISTORY*] (identifying the EEOC’s adjudicatory authority as “the major issue”).

<sup>189</sup> *See, e.g.,* Equal Employment Opportunities Enforcement Act, S. 2453, 91st Cong. § 2 (1969) (authorizing EEOC to conduct formal, APA adjudications); *id.* § 8 (authorizing appointment of hearing examiners). S. 2453 was the “immediate forerunner to the 1972 amendments.” Sape & Hart, *supra* note 188, at 832. It passed the Senate but not the House. Congress took up the legislation again in the next Congress. Like S. 2453, the original (committee-

conferred upon the Chair of the Commission the authority to appoint ALJs by inserting the above-quoted language that now appears in Title VII.<sup>190</sup> (Title VII originally authorized only the appointment of “officers, agents, attorneys, and employees.”<sup>191</sup>) Late in the process, the legislation was amended to withhold adjudicatory authority from the EEOC, but no corresponding change was made to the provision conferring ALJ appointment authority on the EEOC. The retention of that provision was very likely inadvertent. The voluminous legislative history does not appear to suggest any other explanation.

The only provision of the 1972 amendments that requires the use of ALJs addresses the procedure for denial, termination, or suspension of government contracts for an employer-contractor’s failure to comply with the executive order (11246) requiring affirmative action.<sup>192</sup> The provision added section 718 to Title VII and is now codified at 42 U.S.C. § 2000e-17. Requiring the use of formal adjudicatory hearings, section 2000e-17 provides, in relevant part:

No Government contract or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer *full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections.*<sup>193</sup>

But these procedural requirements apply, as the statutory language makes clear, to adverse actions against a contractor undertaken by “any agency” of the federal government, not to the EEOC.<sup>194</sup> They were directed, in particular, to the only federal agency then responsible for approving the affirmative action plans of private federal contractors and otherwise administering Executive Order 11246: the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP). (A proviso to the above-quoted section of the 1972 Act specifically mentions the OFCCP as the responsible agency.) The legislative history of the Senate amendment by which the above-quoted language was added confirms this reading.<sup>195</sup>

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reported) House version of the legislation that would become the 1972 Act (H.R. 1746) conferred adjudicatory authority on the EEOC, *see* H. REP. 92-238, at 27, *reprinted in* LEGISLATIVE HISTORY, *supra* note 188, at 87, authorized the appointment of hearing examiners, *see id.* at 30, *reprinted in* LEGISLATIVE HISTORY, *supra* note 188, at 90, and made explicit that the adjudications would be “on the record,” *id.* at 28, *reprinted in* LEGISLATIVE HISTORY, *supra* note 188, at 88. (The committee report expressly noted that the hearings would be governed by the formal adjudication provisions of the APA. *See id.* at 10, *reprinted in* LEGISLATIVE HISTORY, *supra* note 188, at 70.) The original (committee-reported) Senate bill was in accord on all these matters. *See* S. Rep. 92-415 (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 188, at 410-97.

<sup>190</sup> *See* S. 2453 § 8.

<sup>191</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 705(a), 78 Stat. 241, 258 (1964).

<sup>192</sup> *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 13, 86 Stat. 103, 113 (1972).

<sup>193</sup> *Id.* (emphasis added).

<sup>194</sup> No other provision of the 1972 Act required EEOC to conduct formal hearings.

<sup>195</sup> *See* LEGISLATIVE HISTORY, *supra* note 188, at 949-50 (floor statement of sponsor that it “would merely give some semblance of fair play in cases where employers had filed and had approved by the Office of Federal Contract Compliance an affirmative action plan, and provide that after it had approved it the Office of Federal Contract

That said, the absence of any adjudication-related provisions to which the 1972 amendment to 42 U.S.C. § 2000e-4(a)(2) might relate does not necessarily deprive that provision of legal effect. The canon of interpretation that a statute should not be read to render one of its provisions surplusage—among other textual canons—may dictate that the statute be read to confer ALJ-appointment authority, even if at the time of enactment there were no adjudicatory programs in which it could be exercised. We only caution that the matter is not free from doubt.

Regardless of the purposes for which the Commission might appoint ALJs, however, any such appointments would be subject to OPM’s statutory authority over the federal ALJ corps. This is evident on the face of Title VII, which expressly conditions the Chairman’s authority to appoint ALJs on compliance with other federal statutes, including those that vest in OPM authority over the examination, certification for selection, and compensation of ALJs.<sup>196</sup> This is best read to mean simply that any ALJs appointed by the Commission must conform to the requirements governing OPM’s overall ALJ program. The next section evaluates the ways in which OPM’s role would affect the Commission’s authority to appoint and manage ALJs.

## **B. How OPM’s Role Affects the Commission’s Authority**

To preserve the independence of ALJs from their employing agency, Congress has given OPM a significant role in the examination, certification for appointment, and compensation of all ALJs used throughout the federal system.<sup>197</sup> OPM’s role affects the Commission’s authority by: (1) effectively requiring the Commission to get OPM’s authorization to use ALJs instead of AJs in the federal sector hearing program; (2) limiting the Commission’s ability to establish ALJ qualifications and independently select ALJs for appointment; and (3) preventing the Commission from performing a direct conversion of existing AJs to ALJs. This section provides an overview of OPM’s role and then analyzes each of the three ways in which that role affects the Commission’s authority.

### *1. Effect on Commission’s Authority to Change Adjudicators’ Status*

First, OPM interprets the relevant statutes as granting it authority to approve or deny an agency’s request to create new ALJ positions based on OPM’s independent determination of whether the appointment of ALJs is appropriate in the circumstances of a particular agency adjudicatory program. As OPM has explained it, the agency’s evaluation and approval of new

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Complaint Programs could not reject that plan without giving the employer an opportunity to be heard under the Administrative Procedure Act”); *id.* at 951 (sponsor’s statement during floor colloquy) (“Well, here is the difficulty: The Office of Contract Compliance Programs has been approving plans, time after time they approve a plan and then, they refuse to give a man a contract based on the plan that has been approved.”); *accord id.* at 955 (statement of amendment’s sponsor during floor colloquy). *See also* Clarence Mitchell, *An Advocate’s View of the 1972 Amendments to Title VII*, 5 COLUM. HUM. RTS. LAW REVIEW, 311, 330 (1973). The provision that became 42 U.S.C. § 2000e-17 never appeared in the House legislation. The Senate negotiated for its inclusion at conference committee. *See* H. REP. NO. 92-899, at 21, *reprinted in* LEGISLATIVE HISTORY, *supra* note 188, at 1841.

<sup>196</sup> *See* 42 U.S.C. § 2000e-4(a)(2).

<sup>197</sup> *See* 5 U.S.C. §§ 1104(a), 1302(a), 1305, 3105, 3304, 3323(b), 3344, 4301(2)(D), 5372, and 7521; *see generally* VANESSA K. BURROWS, CONG. RESEARCH SERV., RL 34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW (2010); Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 111 (1981) [hereinafter Lubbers, *Invisible Judiciary*]. This part of the study focuses exclusively on how OPM’s authority affects the Commission’s authority to appoint ALJs or convert existing AJs to ALJs. Parts II and III will analyze the procedural, budgetary, and organizational consequences of OPM’s role.

ALJ position descriptions for conformity with its regulations governing positions requirements is expressly authorized by three statutory provisions.<sup>198</sup> The first such provision is 5 U.S.C. § 1303, which provides that OPM “may investigate and report on matters concerning . . . the enforcement and effect of the rules prescribed by the President under this title for the administration of the competitive service.”<sup>199</sup> The second 5 U.S.C. § 1305, which provides that “[f]or the purpose of sections . . . of this title that relate to administrative law judges, the Office of Personnel Management may . . . investigate [and] prescribe regulations.”<sup>200</sup> The third and final provision is 5 U.S.C. § 1304, which vests in OPM the functions of “executing, administering, and enforcing . . . the civil service rules and regulations of the President and the Office and the laws governing the civil service.”<sup>201</sup> OPM further notes that the civil service rules state that OPM “shall promulgate and enforce regulations necessary to carry out the provisions of the Civil Service Act and the Veterans’ Preference Act, . . . the Civil Service Rules, and all other statutes and Executive orders imposing responsibilities on the Office.”<sup>202</sup> The rules also task OPM with the responsibility of “[e]valuating the effectiveness of . . . agency compliance with and enforcement of applicable laws, rules, regulations and office directives.”<sup>203</sup>

Our research also suggests another, more practical explanation for why OPM and its predecessor, the CSC, have asserted authority to approve or deny agency requests to appoint ALJs. At one time, a statutory ceiling on the number of “supergrade” positions available in the federal government effectively capped the number of ALJ positions that could be created government-wide.<sup>204</sup> This may have justified OPM’s reserving ALJ positions for those proceedings required by statute to be conducted under the APA’s formal adjudication provisions.<sup>205</sup> The strict statutory ceiling that created this necessity, however, has since been eliminated.<sup>206</sup> Thus, “it is no longer necessary for OPM to participate in th[e] process” of reviewing and approving agency requests for additional ALJ positions.<sup>207</sup>

In our view, OPM’s continued assertion of authority to grant or deny agency requests to create new ALJ positions is misplaced. It does not appear to be compelled by statute.<sup>208</sup> It is also in tension with provisions that appear to vest ALJ appointment authority in employing agencies and not OPM.<sup>209</sup> Moreover, it seems inconsistent with fundamental principles of administrative

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<sup>198</sup> Informal Communications, Office of the Gen. Counsel, Office of Pers. Mgmt., *supra* note 4.

<sup>199</sup> 5 U.S.C. § 1303(1)

<sup>200</sup> *Id.* § 1305.

<sup>201</sup> *Id.* § 1103(a)(5)(A); *see also* 5 C.F.R. § 5.1 (authorizing OPM to enforce the civil service rules).

<sup>202</sup> *See* 5 C.F.R. § 5.1.

<sup>203</sup> *See id.* § 5.2(b).

<sup>204</sup> *See* Lubbers, *Invisible Judiciary*, *supra* note 197, at 112-13 n.18.

<sup>205</sup> As Recommendation 92-7 explained it: “Historically, OPM has had responsibility to review and rule on agency requests for additional ALJ positions. In the past, when there were government-wide limits on “supergrade positions, which included ALJs, this oversight role served a purpose.” Administrative Conference of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary* 4 (1992).

<sup>206</sup> *See* 5 U.S.C. § 5108.

<sup>207</sup> Administrative Conference of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary* 4 (1992).

<sup>208</sup> *See* 5 U.S.C. §§ 3105, 5372. No statute prohibits the use of ALJs in informal proceedings, grants OPM the authority to determine when formal proceedings are “required” or ALJ appointments are “necessary,” or suggests that formal proceedings are “required” only when required by statute.

<sup>209</sup> *See, e.g., id.* § 3105 (mandating that “[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557” of the APA (emphasis

law recognizing that agencies have broad authority to design adjudicative procedures and provide affected citizens with procedural protections beyond those required by the APA or other statutes.<sup>210</sup> In short, “[a]gencies should be free, within their normal resource allocation constraints, to determine for themselves whether they need more or fewer ALJs.”<sup>211</sup>

As a practical matter, however, disagreements between an employing agency and OPM are difficult to resolve because there is no clear avenue for compulsory dispute resolution by a third party (e.g., judicial review). Such disagreements have historically been resolved through legislation or a combination of legislation and court order.<sup>212</sup> Another option might be for an agency denied an allocation of ALJs by OPM to seek an opinion from the Department of Justice’s Office of Legal Counsel.<sup>213</sup>

To change the status of its federal sector adjudicators, then, the Commission may first have to obtain OPM’s agreement that it would be appropriate for ALJs to preside over federal sector EEO hearings.<sup>214</sup> OPM might deny the Commission’s request to appoint ALJs for this purpose unless EEOC first adopted a regulation requiring that federal sector EEO hearings be conducted under the APA and reformed the program’s procedures as necessary to comply with APA requirements.<sup>215</sup> As previously noted, the APA clearly requires that ALJs preside in formal adjudications,<sup>216</sup> and Congress has not statutorily required that federal sector EEO hearings be conducted “on the record” or in accordance with the APA. Although there appears to be no formal legal barrier to an agency’s appointing ALJs to preside over informal hearings,<sup>217</sup> OPM’s position is that it will approve an agency’s request to appoint ALJs only if the positions include

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added)); 5 C.F.R. § 930.201(f)(1) (specifying that employing agencies have “the authority to appoint as many administrative law judges as necessary for proceedings conducted under 5 U.S.C. 556 and 557”).

<sup>210</sup> See *supra* at notes 174-180 and accompanying text.

<sup>211</sup> Administrative Conference of the U.S., *Recommendation 92-7, The Federal Administrative Judiciary* 4 (1992).

<sup>212</sup> See Part I.D.

<sup>213</sup> Exec. Order No. 12,146, 44 Fed. Reg. 42,657 (1979) provides that “[w]henver two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.” The Attorney General has delegated this authority to the head of OLC. See 28 C.F.R. § 0.25; see also DEP’T OF JUSTICE, OFFICE OF LEGAL COUNSEL, ABOUT THE OFFICE, <http://www.justice.gov/olc> (“By delegation from the Attorney General, the Assistant Attorney General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all the Executive Branch agencies. The Office . . . provides . . . written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department. Such requests typically deal with legal issues of particular complexity and importance or about which two or more agencies are in disagreement.” (emphasis added)).

<sup>214</sup> Legally, OPM’s authority over the selection, certification, and tenure of ALJs is distinct from an employing agency’s authority to interpret its own statutes and design its own procedures. As a practical matter, however, OPM occupies a position as gatekeeper and an impasse between an employing agency and OPM may be difficult to resolve without legislative action.

<sup>215</sup> See Part II.A.

<sup>216</sup> But see *supra* note 23.

<sup>217</sup> See Levinson, *supra* note 17, at 541-42. As a practical matter, however, agencies usually elect to use non-ALJ adjudicators for informal hearings. See *id.* It bears noting that SSA’s “expanded use of ALJs [accomplished by legislation in the 1970s] emerged without APA compulsion” and “raised the prospect that ALJs could be used in other non-formal hearing settings.” Verkuil, *Reflections, supra* note 26, at 1349. “The use of ALJs to preside over non APA informal rulemaking,” however, “has long been advocated but not readily embraced.” *Id.* at 1349 n.34.

duties presiding over adjudications *required* to be conducted under the APA.<sup>218</sup> Current OPM regulations reflect this position.<sup>219</sup> OPM has explained, however, that an agency regulation requiring hearings to be conducted under the APA may be sufficient, provided the agency’s hearing procedures in fact comply with APA requirements.<sup>220</sup> OPM further takes the view that its examination and qualification requirements are necessary to ensure ALJs have the degree of judicial competence required to preside over adjudicative proceedings conducted under the APA.<sup>221</sup> As members of the government-wide federal ALJ corps, all ALJs are expected to be competent to preside over APA hearings in any adjudicatory program in the federal government.<sup>222</sup>

## 2. Effect on New ALJ Appointments

Second, OPM has exclusive authority over the initial examination of ALJs, as well as the certification of individuals eligible for selection by employing agencies.<sup>223</sup> OPM recruits ALJ candidates,<sup>224</sup> establishes qualification requirements for ALJ positions,<sup>225</sup> and periodically administers an ALJ examination of its own design.<sup>226</sup> ALJ candidates who pass the examination and have the necessary qualifications are certified for selection as ALJs and placed in a register of eligible candidates.<sup>227</sup> To appoint a new ALJ from the register,<sup>228</sup> agencies may select a candidate from the top three available candidates, considering candidate geographical preferences, position location, and veterans’ preference rules.<sup>229</sup> Each employing agency must pay OPM an annual pro rata share, based on the actual number of ALJs it employs, of OPM’s

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<sup>218</sup> E.g., Verkuil et al., *supra* note 180, at 1046 n.1310 (“Interestingly, while there is no barrier to their use in nonformal hearing contexts, OPM has taken the position that it will only assign ALJs to agencies where there is APA work to be done.”).

<sup>219</sup> See 5 C.F.R. § 930.201(a) (“This subpart applies to individuals appointed under 5 U.S.C. 3105 for proceedings required to be conducted in accordance with 5 U.S.C. 556 and 557 and to administrative law judge positions” (emphasis added)); *id.* § 930.202 (defining “[a]dministrative law judge position” as “a position in which any portion of the duties *requires* the appointment of an administrative law judge under 5 U.S.C. § 3105 (emphasis added)).

<sup>220</sup> Informal Communications, Office of the Gen. Counsel, Office of Pers. Mgmt., *supra* note 4.

<sup>221</sup> *Id.*

<sup>222</sup> This ensures that any ALJ has the qualifications necessary to be detailed or transferred to another agency as necessary to meet shifting needs for ALJs. See 5 C.F.R. §§ 930.207, 930.208.

<sup>223</sup> See 5 U.S.C. §§ 1104(a), 1302, 3301, 3304; see also, e.g., Lubbers, *Invisible Judiciary*, *supra* note 197, at 111. OPM’s statutory authority over ALJ examinations is expressly non-delegable. See 5 U.S.C. § 1104(a)(2).

<sup>224</sup> See 5 C.F.R. § 930.201(e)(1).

<sup>225</sup> See 5 U.S.C. § 5372(b)(2); 5 C.F.R. § 930.201(e)(3); see also OFFICE OF PERS. MGMT., QUALIFICATION STANDARD FOR ADMINISTRATIVE LAW JUDGE POSITIONS, <http://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/> [hereinafter ALJ QUALIFICATION STANDARD].

<sup>226</sup> See 5 C.F.R. § 930.201(d), (e)(1).

<sup>227</sup> See 5 U.S.C. § 3313; 5 C.F.R. § 332.401.

<sup>228</sup> Agencies sometimes hire ALJs “laterally” from other agencies, thus circumventing the need to hire from the OPM register, although OPM’s regulations appear to require OPM approval for such appointments. See 5 C.F.R. § 930.204(a); see also *id.* § 930.204(h). The large number of Social Security ALJs around the country provides a fertile source of lateral transfers. See ABA GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 12, at 203 n.20.

<sup>229</sup> See 5 U.S.C. §§ 3317, 3318; 5 C.F.R. §§ 332.402, 332.404; Burrows, *supra* note 197, at 2-3. An agency may appoint an ALJ not in the available register selection only with OPM’s prior approval. See 5 C.F.R. § 930.204(a).

total cost of developing and administering the ALJ examination and operating the ALJ program.<sup>230</sup>

OPM's role in relation to the federal ALJ corps would thus limit the Commission's authority to establish qualifications for its ALJs and independently select particular ALJs for appointment. OPM requires that ALJs be licensed attorneys at the time of application and appointment.<sup>231</sup> Applicants must also have seven years of qualifying litigation or administrative experience as a licensed attorney.<sup>232</sup> Finally, applicants must pass the ALJ examination.<sup>233</sup> When appointing ALJs, the Commission would generally be restricted to selecting from the top three candidates in the ALJ certificate<sup>234</sup> and would not be able to select other individuals without OPM's prior approval.<sup>235</sup> One consequence of this process is that the Commission would be unable to require as a condition of employment that its ALJs possess specialized experience with civil rights and antidiscrimination law.

### 3. *Effect on Conversion of Existing AJs to ALJs*

Finally, OPM exercises significant control over the conversion of existing adjudicators to newly-created ALJ positions. Such conversions may be accomplished with OPM's prior approval, provided that the affected adjudicators pass the ALJ examination and meet OPM's ALJ qualification requirements.<sup>236</sup> OPM regulations acknowledge that ALJ conversions may sometimes proceed "on the basis of legislation, Executive order, or a decision of a court."<sup>237</sup> Even in such circumstances, however, OPM regulations condition the conversion on the affected adjudicators' passing the ALJ examination and meeting ALJ qualification requirements.<sup>238</sup>

OPM regulations would thus prevent the Commission from simply converting its existing AJs to ALJs. As previously explained, OPM regulations provide that non-ALJ personnel may be converted to positions newly classified as ALJ positions either with OPM's approval<sup>239</sup> or as required by statute, executive order, or judicial decision.<sup>240</sup> OPM would not exercise its discretion to approve the appointment of existing AJs to newly-created ALJ positions if those AJs did not meet OPM's qualification requirements.<sup>241</sup> Similarly, OPM regulations provide that

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<sup>230</sup> See 5 U.S.C. § 1104(a)(2), 1304(e); 5 C.F.R. § 930.203; see generally 2013 SSA OIG REPORT, *supra* note 149. In FY 2011, the Social Security Administration was assessed \$1,526.00 per ALJ. See *id.* at 4. In FY 2012, the fee was \$1,633.00 per ALJ. See *id.* at 6 tbl. 1.

<sup>231</sup> See 5 C.F.R. § 930.204(b). In 2008, OPM issued an interim rule suspending the requirement that ALJs maintain licensure once appointed as ALJs, see Programs for Specific Positions and Examinations (Miscellaneous), 73 Fed. Reg. 41,235 (July 18, 2008), and it has recently finalized that rule, see 78 Fed. Reg. 71,987 (Dec. 2, 2013). This rule does not affect the requirement that ALJ candidates be licensed attorneys at the time of application and appointment.

<sup>232</sup> See ALJ QUALIFICATION STANDARD, *supra* note 225.

<sup>233</sup> See *id.*

<sup>234</sup> See 5 U.S.C. §§ 3317, 3318(a). The EEOC could reach other applicants on the basis of a sustained objection or pass over request. See *id.* § 3318; 5 C.F.R. § 332.406. In addition, the three-consideration rule, see 5 C.F.R. § 332.405, could be used to discontinue consideration of candidates on the register who have received three bona fide considerations. See generally *Lackhouse v. Merit Sys. Prot. Bd.*, 773 F.2d 313 (1984).

<sup>235</sup> See 5 C.F.R. § 930.204(a).

<sup>236</sup> See *id.* § 930.204.

<sup>237</sup> *Id.* § 930.204(c).

<sup>238</sup> See *id.*

<sup>239</sup> See *id.* § 930.204(a).

<sup>240</sup> See *id.* § 930.204(c).

<sup>241</sup> Informal Communications, Office of the Gen. Counsel, Office of Pers. Mgmt., *supra* note 4.

ALJ conversions based on legislation, executive order, or judicial decision can be accomplished only if certain conditions are met and the affected incumbents meet OPM's qualifications and have passed the ALJ examination.<sup>242</sup> Of course, Congress has the authority to override these requirements with respect to specific incumbents, but precise legislative language would be required for the Commission to convert existing AJs to ALJ positions without meeting OPM's conditions.<sup>243</sup>

#### **IV. DETERMINING WHERE TO SITUATE ADJUDICATORS WITHIN THE COMMISSION'S ORGANIZATIONAL STRUCTURE**

##### **A. Organizational Changes Potentially Required by a Shift to ALJs**

If the Commission decided to use ALJs instead of AJs in the federal sector hearing program, it would retain substantial discretion over the placement of those ALJs within the agency's broader organizational structure.<sup>244</sup> No provision of the APA directly addresses this issue or requires agencies to employ a particular organizational structure for formal adjudicative programs.<sup>245</sup> On the other hand, the provisions of the law aimed at preserving the separation of functions and protecting ALJs' decisional independence may have indirect implications for the organizational placement of ALJs.<sup>246</sup> Of particular relevance are the provisions, previously discussed, that insulate ALJs from their employing agencies by providing them with certain protections against agency personnel actions and performance reviews.<sup>247</sup> In addition, the APA requires separation between adjudicators and investigating or prosecuting employees in individual or factually-related cases.<sup>248</sup>

Although the law has little to say about the organizational placement of formal administrative adjudication programs, most agencies that employ ALJs place those ALJs within a dedicated office that reports directly or near-directly to the top level of agency. For example:

- The Social Security Administration has an Office of the Chief Administrative Law Judge, which reports to the Deputy Commissioner of Disability Adjudication and Review.<sup>249</sup>

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<sup>242</sup> See 5 C.F.R. § 930.204(c).

<sup>243</sup> Informal Communications, Office of the Gen. Counsel, Office of Pers. Mgmt., *supra* note 4.

<sup>244</sup> See Russell L. Weaver, *Management of ALJ Offices in Executive Departments and Agencies*, 47 ADMIN. L. REV. 303, 315 (1995) (explaining that "[t]he APA offers little guidance" on issues related to administration of ALJ offices).

<sup>245</sup> See 5 U.S.C. §§ 554, 556, 557.

<sup>246</sup> See Weaver, *supra* note 244, at 315; see also Benjamin W. Mintz, *Administrative Separation of Functions: OSHA and the NLRB*, 47 CATH. U. L. REV. 877, 881 (1998) (explaining how "[t]he APA implements the separation of functions in two basic ways" with respect to ALJs); cf. CHARLES KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE*, VOL. 2, at 61 (3d ed. 2010) ("Generally administrative law judges are part of the agency bureaucracy but with some special status and protection.").

<sup>247</sup> See Part II.B.

<sup>248</sup> See 5 U.S.C. § 554(d).

<sup>249</sup> SOC. SEC'Y ADMIN., ORGANIZATIONAL CHART, <http://www.ssa.gov/org/ssachart.pdf>. The administrative structure also includes Regional Chief ALJs who oversee ALJs in each of the agency's ten regions, as well as Hearing Office Chief ALJs who oversee ALJs in particular hearing offices. See *id.*

- The Department of Justice’s Executive Office of Immigration Review (EOIR) has an Office of the Chief Administrative Hearing Officer (OCAHO), which oversees EOIR’s ALJs and reports to the Deputy Director of EOIR.<sup>250</sup>
- The Department of Transportation has an Office of Hearings, which is headed by a Chief ALJ and reports to the Assistant Secretary for Administration.<sup>251</sup>
- The Department of the Interior has an Office of Hearings and Appeals, which is headed by a Director who reports to the Assistant Secretary of Policy, Management, and Budget through the Deputy Assistant Secretary of Technology, Information, and Business Services.<sup>252</sup>
- The Department of Labor has an Office of Administrative Law Judges, which is headed by a Chief ALJ and reports to the Secretary of Labor.<sup>253</sup>

These agencies’ organizational charts are provided in Appendix N. As these brief descriptions above suggest, some ALJ offices are administered by Chief ALJs, while others are administered by non-ALJ officials.<sup>254</sup> Indeed, some agencies take a hybrid approach, using both non-ALJ and ALJ administrators to run the ALJ office.<sup>255</sup> The APA permits all of these approaches.<sup>256</sup>

A variety of considerations may make a particular organizational structure more desirable for an individual agency.<sup>257</sup> Creating a dedicated office for ALJs, for example, may help maintain the separation of functions, improve the public’s perception of the impartiality of an agency’s ALJs, facilitate better communication with agency leadership, and provide a foundation for improved consistency in adjudication programs that operate nationwide. The choice between ALJ and non-ALJ administrators is ultimately a matter of which system the agency concludes is

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<sup>250</sup> See DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, ORGANIZATION CHART, <http://www.justice.gov/eoir/sibpages/Organization.html>. OCAHO ALJs preside over hearings arising under the Immigration and Nationality Act related to employer sanctions, unfair employment practices, and document fraud. See DEPT. OF JUSTICE, FACT SHEET (Oct. 1, 2013), <http://www.justice.gov/eoir/press/2012/OCAHOFactSheet05292012.pdf>. Other types of proceedings relating to immigration status, such as cases involving removal (deportation) actions and asylum petitions, are heard by non-ALJ adjudicators. See Part IV.B.1.

<sup>251</sup> See DEP’T OF TRANSP., OFFICE OF HEARINGS, <http://www.dot.gov/mission/administrations/administration/hearings>.

<sup>252</sup> See DEP’T OF INTERIOR, ABOUT THE OFFICE OF HEARINGS AND APPEALS, <http://www.doi.gov/oha/index.cfm>.

<sup>253</sup> See DEP’T OF LABOR, OFFICE OF ADMIN. LAW JUDGES, <http://www.oalj.dol.gov/>; Dep’t of Labor, Organizational Chart, <http://www.dol.gov/dol/aboutdol/orgchart.htm>. Beyond this office, the administrative structure extends to nationwide district offices, each of which is staffed with its own District Chief ALJ. See DEP’T OF LABOR, OFFICE OF ADMIN. LAW JUDGES, ORGANIZATIONAL CHART, [http://www.oalj.dol.gov/ORGANIZATIONAL\\_CHARTA.HTM](http://www.oalj.dol.gov/ORGANIZATIONAL_CHARTA.HTM).

<sup>254</sup> See generally Weaver, *supra* note 244.

<sup>255</sup> See *id.* at 306.

<sup>256</sup> *E.g., id.* at 315 (“The APA does not require that ALJs administer ALJ offices. On the contrary, under the Act, Congress allowed ALJs to be assigned to specific agencies and to report to non-ALJs within those agencies.”).

<sup>257</sup> The Association of Administrative Law Judges provides helpful information about federal agencies that employ ALJs. See ASS’N OF ADMIN. LAW JUDGES, AGENCIES EMPLOYING ADMINISTRATIVE LAW JUDGES, <http://www.aalj.org/agencies-employing-administrative-law-judges>.

most desirable for its own purposes. Both systems have advantages and disadvantages. An agency choosing between them might consider a variety of factors, including:

- The preferences of the agency’s ALJs and whether or to what extent they would be comfortable with non-ALJ administrators;<sup>258</sup>
- The effect on the public perception of agency adjudications<sup>259</sup> and the needs of complainants;<sup>260</sup>
- The consequences for the decisional independence of the ALJs;<sup>261</sup>
- How best to meet the agency’s needs with respect to case assignment,<sup>262</sup> decisional leadership,<sup>263</sup> productivity,<sup>264</sup> and efficiency.<sup>265</sup>

If the Commission were to use ALJs in the federal sector hearing program, it may find that certain organizational changes are necessary or desirable, or both. Some modifications to the existing organizational structure may be required to respect the decisional independence of ALJs or ensure a proper separation of functions.<sup>266</sup> For example, it would perhaps be necessary or, at a minimum, prudent, to remove ALJs from the direct supervision of District Directors. In addition, the Commission may wish to follow the example of other agencies by creating an office in its D.C. headquarters that is exclusively dedicated to the administration of the federal sector hearing program and the management of the agency’s ALJs. If the Commission were to pursue such reorganization, it should consider the views of relevant agency personnel, including both adjudicators and non-adjudicators, using that feedback to design a system of administration and management best suited to the purposes of the federal sector hearing program and that program’s contribution to the Commission’s larger mission.

## **B. Assessing the Organizational Placement of AJs**

Even if the Commission does not reform the federal sector hearing program to accommodate the use of ALJs, it may consider making certain modifications to the current organizational placement of its AJs. As previously explained, a comprehensive normative evaluation of whether such reform is necessary or desirable is beyond the scope of this project.<sup>267</sup> To provide the Commission with some sense of the options available to it, however, this section: (1) identifies legal considerations that may affect the Commission’s options for reforming the organizational placement of its AJs; and (2) provides a few illustrative examples of how other

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<sup>258</sup> See Weaver, *supra* note 244, at 315-17.

<sup>259</sup> See *id.* at 317-18.

<sup>260</sup> See *id.* at 324-25.

<sup>261</sup> See *id.* at 318-21.

<sup>262</sup> See *id.* at 321-23.

<sup>263</sup> See *id.* at 323-24, 325-28.

<sup>264</sup> See *id.* at 324, 330-31.

<sup>265</sup> See *id.* at 328-30.

<sup>266</sup> Cf. KOCH, *supra* note 246, at 64 (“The key is to develop a structure for . . . management that does not compromise independence.”).

<sup>267</sup> See *supra* note 2.

agencies have structured informal adjudication programs. We briefly explore the organizational structure and placement of the Department of Justice’s EOIR, the Merit Systems Protection Board (MSPB), the United States Department of Agriculture’s (USDA) National Appeals Division (NAD), and the Railroad Retirement Board (RRB).<sup>268</sup> Where possible, we go beyond merely identifying the organizational placement of these agencies’ non-ALJ adjudicators, in order to give some sense of the procedural and managerial aspects of the organizational structures.

### 1. *Legal Considerations Affecting the Organizational Placement of AJs*

Although the vast majority of agency adjudications are conducted informally,<sup>269</sup> the law has very little to say about the procedures and organizational structures that agencies may employ in informal adjudicatory programs. The few potential legal constraints on agency discretion in this area directly relate to procedural issues, as opposed to questions of organizational placement.<sup>270</sup> They are grounded in three possible sources. First, the due process clause of the U.S. Constitution may require an agency to observe certain minimum procedural requirements when constitutionally protected interests are at stake.<sup>271</sup> Second, although the APA generally does not concern itself with informal adjudications,<sup>272</sup> 5 U.S.C. § 555, which addresses “ancillary matters,” such as the right to counsel for persons compelled to appear before an agency, may have some relevance in this context.<sup>273</sup> Third, individual statutes may require agencies to follow specified procedures in certain informal adjudications.<sup>274</sup> Although an agency may find that a particular organizational structure works better or is perceived to provide a fairer or more neutral forum for adjudication, such judgments are rarely compelled by administrative law or legal ethics.

The few legal requirements that may constrain agency discretion in informal adjudication appear to have little or no application to the federal sector hearing program. Federal sector EEO hearings do not result in the deprivation of constitutionally protected interests. Section 555 of the APA truly involves “ancillary matters” and is unlikely to have any meaningful effect on the

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<sup>268</sup> These agencies’ organizational charts are provided in Appendix N.

<sup>269</sup> See *supra* at Part I.A.; see also ATTORNEY GENERAL’S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 35 (1941) (“[E]ven where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process.”).

<sup>270</sup> Procedural requirements may, of course, have organizational consequences. See *supra* at Part IV.A.

<sup>271</sup> See U.S. CONST. amend. V; see, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976) (involving Social Security disability benefits); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (involving Aid to Families with Dependent Children benefits); see generally ABA GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 12, at 11-40 (examining hearings required by procedural due process).

<sup>272</sup> See Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 744 (1976) [hereinafter Verkuil, *Informal Adjudication*].

<sup>273</sup> See 5 U.S.C. § 555; ABA GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 12, at 183-87; see also *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990) (“The determination in this case . . . was lawfully made by informal adjudication, the minimal requirements for which are set forth in § 555 of the APA.”). Another provision of the APA that may apply to informal adjudication involves licensing issues. See 5 U.S.C. § 558(c); see also *Everett v. United States*, 158 F.3d 1364, 1368 (D.C. Cir. 1998), *cert. denied* 526 U.S. 1132 (1999) (rejecting as “obviously wrong” an argument that a helicopter permit could not be issued through informal adjudication). This provision is irrelevant for our purposes because the federal sector hearing program does not involve licensing.

<sup>274</sup> See ABA GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 12, at 178-79.

higher level issues relevant to the question of where the Commission should place its AJs. Finally, none of the statutes applicable to federal sector EEO hearings appear to contain any provision that would constrain the Commission's discretion to design and structure the program as it sees fit.

It therefore appears that the Commission has broad discretion over the organizational structure of the federal sector program. This discretion extends to two conceptually separate aspects of the program's organizational structure: (1) personnel management structure, which primarily relates to the placement of the program within the EEOC's overarching organizational structure;<sup>275</sup> and (2) procedural structure, which involves potential interaction between organizational structure and the procedures through which administrative appeals from AJ decisions are processed.<sup>276</sup> The Commission could make modifications to either or both of these organizational aspects of the program, depending on its determination regarding what is most appropriate and will work best for the federal sector hearing program.<sup>277</sup> We have not been able to identify any legal principles or requirements that would limit the options available to the Commission in this area.

## 2. *Alternative Approaches to the Organizational Placement of AJs*

In order to provide the Commission with some guidance as to how it might exercise its substantial discretion over the organizational placement of its AJs, we provide below a few examples of how other agencies have structured informal adjudication programs. Perhaps because agencies are generally "free to provide any procedure (or no procedure) in conducting informal adjudication,"<sup>278</sup> there is great variety in the procedural and organizational structures that agencies use in informal adjudicatory programs.<sup>279</sup> Our selection of the examples explored below was guided by a few principles. First, we have sought to provide organizational examples of agencies that operate adjudication programs that serve similar purposes or functions as the federal sector program.<sup>280</sup> In this respect, we were limited to administrative adjudication programs for which sufficient information is publicly available regarding the organizational placement of non-AJ adjudications.<sup>281</sup> Additionally, we have endeavored to examine a variety

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<sup>275</sup> Options available to the Commission along this dimension would include retaining the organizational placement of AJs under OFP, moving the AJs to another existing office such as OFO, or reorganizing the AJs under the auspices of a new organizational unit (e.g., an Office of Administrative Judges).

<sup>276</sup> Currently, AJs are organized under OFP, while appeals from AJ decisions are processed through OFO. One could envision a revised structure in which the staff who conduct hearings are organizationally placed within the same unit as the staff who review appeals.

<sup>277</sup> The NAPA study previously mentioned includes some analysis and recommendations regarding the organizational placement of the federal sector hearing program. *See* NAPA EEOC REPORT, *supra* note 2, at 60-62.

<sup>278</sup> ABA GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 12, at 178.

<sup>279</sup> *See generally* Verkuil, *Informal Adjudication*, *supra* note 272. One reason for this diversity is that informal adjudications are conducted for many different purposes, including to award grants, disburse benefits or subsidies, issue licenses, conduct inspections or audits, assess penalties for regulatory noncompliance, develop labor relations orders or orders requiring regulated parties to cure violations, and even to craft internal agency statutory interpretations. *See* ABA GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 12, at 176-77.

<sup>280</sup> MSPB is the closest analog to EEOC in this regard. *See infra* at Part. IV.2.b.

<sup>281</sup> It is often difficult to determine, from an external perspective, how a program is organized and managed. DOJ is a good example of an agency that provides a great deal of information to the public about such matters through its published regulations. *See infra* Part IV.2.a.

of adjudication programs that, taken together, might convey some sense of the great diversity of possible procedural and organization structures used in informal adjudicatory programs.

a. The Executive Office of Immigration Review (EOIR)

The Department of Justice's EOIR not only houses the Chief Administrative Hearing Officer and the program's ALJs, it also houses the Chief Immigration Judge and the far more numerous "immigration judges" who adjudicate immigration removal cases.<sup>282</sup> Although DOJ describes immigration proceedings as "formal court proceedings,"<sup>283</sup> immigration judges are non-ALJ adjudicators.<sup>284</sup> EOIR is headed by a Director, assisted by a Deputy Director, with the work of the office further divided among seven subsidiary offices.<sup>285</sup> The Director of EOIR is authorized to manage, supervise, and evaluate the performance of these subsidiary offices.<sup>286</sup> One of these is the Office of the Chief Immigration Judge (OCIJ), within which immigration judges are placed.<sup>287</sup>

The Attorney General has delegated to the Director of EOIR significant authority over immigration judges and the conduct of immigration hearings. Perhaps most notably, the Director is authorized to:

Direct the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred; to regulate the assignment of adjudicators to cases; and otherwise to manage the docket of matters to be decided by . . . the immigration judges.<sup>288</sup>

The Director also has the power to "[p]rovide for performance appraisals for immigration judges . . . while fully respecting their roles as adjudicators, including [by providing] a process for reporting adjudications that reflect temperament problems or poor decisional quality."<sup>289</sup> Similarly, the Director is responsible for "[a]dminister[ing] an examination for newly-appointed

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<sup>282</sup> See DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, EOIR AT A GLANCE (Sept. 9, 2010), <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm>. It perhaps bears noting that EOIR is separate and independent from the non-adjudicatory immigration functions and programs within DOJ, including the Office of Special Counsel for Immigration-Related Unfair Employment Practices (part of the Civil Rights Division), which brings anti-discrimination enforcement actions on behalf of the U.S., and the Office of Immigration Litigation (part of the Civil Division), which handles all civil immigration matters. See DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, ABOUT THE OFFICE, <http://www.justice.gov/eoir/orginfo.htm>.

<sup>283</sup> E.g., DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE CHIEF IMMIGRATION JUDGE, <http://www.justice.gov/eoir/ocijinfo.htm> ("Immigration judges are responsible for conducting formal court proceedings and act independently in deciding the matters before them.")

<sup>284</sup> See 8 C.F.R. § 1003.10. Although immigration hearings are informal proceedings in APA parlance, the regulations governing the procedures followed in such hearings are quite detailed and comprehensive. See generally *id.* §§ 1003.12-1003.47.

<sup>285</sup> See DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, ORGANIZATION CHART, <http://www.justice.gov/eoir/sibpages/Organization.html>; see also 8 C.F.R. § 1003.0(a).

<sup>286</sup> See 8 C.F.R. § 1003.0(b)(1).

<sup>287</sup> See *id.* § 1003.9(a).

<sup>288</sup> *Id.* § 1003.0(b)(1)(ii).

<sup>289</sup> *Id.* § 1003.0(b)(1)(v).

immigration judges” to ensure “their familiarity with key principles of immigration law before they begin to adjudicate matters” and “evaluat[ing] the temperament and skills of each new immigration judge.”<sup>290</sup> Finally, the Director is authorized to “[p]rovide for comprehensive, continuing training and support for . . . immigration judges . . . in order to promote the quality and consistency of adjudications”<sup>291</sup> and “[i]mplement a process for receiving, evaluating, and responding to complaints of inappropriate conduct by EOIR adjudicators.”<sup>292</sup>

It is the OCIJ, however, that “provides overall program direction, articulates policies and procedures, and establishes priorities for over 260 immigration judges in 59 immigration courts” nationwide.<sup>293</sup> OCIJ is headed by the Chief Immigration Judge, with assistance from two Deputy Chief Immigration Judges, twelve Assistant Chief Immigration Judges, and one Chief Counsel.<sup>294</sup> The Chief Immigration Judge is appointed by the Attorney General<sup>295</sup> and, “[s]ubject to the supervision of the Director,” is “responsible for the supervision, direction, and scheduling of the immigration judges in the conduct of the hearings and duties assigned to them.”<sup>296</sup> DOJ regulations expressly deny the Chief Immigration Judge the power “to direct the result of an adjudication assigned to another immigration judge,”<sup>297</sup> but otherwise grant him or her broad authority to manage, supervise, and evaluate immigration judges.<sup>298</sup>

Appeals from immigration judges’ decisions are taken to the Board of Immigration Appeals.<sup>299</sup> Both the Board of Immigration Appeals and the Office of the Chief Immigration Judge are housed within EOIR and report directly to its Director (through the Deputy Director).<sup>300</sup>

#### b. The Merit Systems Protection Board (MSPB)

Established in 1978,<sup>301</sup> the MSPB “is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems.”<sup>302</sup> It is responsible for, among other things, adjudicating federal employees’ appeals of agency personnel actions.<sup>303</sup> In a few instances, MSPB adjudications are conducted under the APA, and the presiding official is an

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<sup>290</sup> *Id.* § 1003.0(b)(1)(vi).

<sup>291</sup> *Id.* § 1003.0(b)(1)(vii).

<sup>292</sup> *Id.* § 1003.0(b)(1)(viii).

<sup>293</sup> See DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE CHIEF IMMIGRATION JUDGE, <http://www.justice.gov/eoir/ocijinfo.htm>.

<sup>294</sup> See DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE CHIEF IMMIGRATION JUDGE, BIOGRAPHICAL INFO., <http://www.justice.gov/eoir/fs/ocijbio.htm>.

<sup>295</sup> See 8 C.F.R. § 1003.9(a).

<sup>296</sup> *Id.* § 1003.9(b).

<sup>297</sup> *Id.* § 1003.9(c).

<sup>298</sup> See *id.* § 1003.9(b). The Chief Immigration Judge may also “[a]djudicate cases as an immigration judge.” See *id.* at § 1003.9(b)(5).

<sup>299</sup> See *id.* § 1003.38(a).

<sup>300</sup> See Appendix N.

<sup>301</sup> See Reorganization Plan No. 2 of 1978, codified by the Civil Service Reform Act of 1978, Pub. L. No. 95-454.

<sup>302</sup> MERIT SYS. PROT. BD., ABOUT MSPB, <http://www.mspb.gov/About/about.htm>; see also 5 C.F.R. § 1200.1 (“The Merit Systems Protection Board (the Board) is an independent Government agency that operates like a court. The Board was created to ensure that all Federal government agencies follow Federal merit systems practices.”).

<sup>303</sup> 5 C.F.R. § 1200.1. In recent years, MSPB has not employed its own ALJs, but has relied on loaned ALJs procured under 5 U.S.C. § 3344.

ALJ.<sup>304</sup> In the mine run of cases, however, which involve (non-ALJ) federal employee appeals from agency personnel action,<sup>305</sup> the claims are adjudicated informally by non-ALJ adjudicators. As in federal sector EEO hearings, these MSPB adjudicators are non-ALJ “Administrative Judges.”<sup>306</sup>

Like the EEOC, the MSPB divides its jurisdiction into regional and field offices,<sup>307</sup> and it is the AJs located in these offices that “hear and decide initial appeals and other assigned cases.”<sup>308</sup> As the agency’s organizational chart shows, the regional and field offices are situated under the authority of the MSPB’s Office of Regional Operations.<sup>309</sup> The Office of Regional Operations and each regional or field office is staffed with a Chief Administrative Judge (CAJ) tasked with overseeing the work of the MSPB’s AJs.<sup>310</sup> At the headquarters level, the current Director of Regional Operations also serves as the Chief Administrative Law Judge.<sup>311</sup> In regional offices, it appears that the CAJ also typically serves as the regional director.<sup>312</sup> This likely reflects the fact that MSPB’s work is predominately adjudicatory. It has no second program analogous to the EEOC’s private sector investigations and therefore perhaps does not require a more complex or duplicative management structure.

Procedurally, MSPB AJs issue initial decisions that are administratively appealable directly to the Board, which appears to give some deference to the AJ’s factual findings. In this context, the initial complaint that a federal employee files against his or her employing agency is referred to as an “appeal.”<sup>313</sup> When an appeal is filed, the CAJ in the appropriate field office assigns it to an AJ,<sup>314</sup> which issues an “initial decision” on the appeal.<sup>315</sup> The initial decision may then be challenged through a “petition for review” filed with the MSPB itself.<sup>316</sup> The agency’s

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<sup>304</sup> For example, ALJs preside over hearings involving merit systems claims brought by ALJs employed by other agencies of the federal government. *See* 5 C.F.R. § 1200.10(b)(2). The ALJs that preside over such hearings are placed within the MSPB’s Office of the Administrative Law Judge. *See id.*

<sup>305</sup> *See* 5 C.F.R. § 1201.3(a) (describing the MSPB’s appellate jurisdiction).

<sup>306</sup> The position description for an AJ employed by MSPB is provided in Appendix M.

<sup>307</sup> *See* MERIT SYS. PROT. BD., MSPB JURISDICTION, <http://www.mspb.gov/contact/contact.htm>.

<sup>308</sup> 5 C.F.R. § 1200.10(c).

<sup>309</sup> *See* MERIT SYS. PROT. BD., ORGANIZATION, <http://www.mspb.gov/About/organization.htm>; *see also* 5 C.F.R. § 1200.10(b)(1) (“The Director, Office of Regional Operations, manages the adjudicatory and administrative functions of the MSPB regional and field offices.”).

<sup>310</sup> *See* MERIT SYS. PROT. BD., MSPB JURISDICTION, <http://www.mspb.gov/contact/contact.htm>.

<sup>311</sup> *See id.* We were unable to find publicly available information explaining the relationship between the CAJ in headquarters and the CAJs located in individual regional and field offices.

<sup>312</sup> *See id.*; *see also* U.S. MERIT SYS. PROT. BD., JUDGES’ HANDBOOK 1 (Oct. 2007), <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT> (“As used in this handbook, the term “CAJ” refers to the regional director or the CAJ designee of a field office.”). The same appears to hold for field offices, in which the CAJ is also the managing official. *See* MERIT SYS. PROT. BD., MSPB JURISDICTION, <http://www.mspb.gov/contact/contact.htm>.

<sup>313</sup> *See, e.g.*, 5 C.F.R. § 1201.11(f) (defining “[a]ppeal” as “[a] request for review of an agency action.”).

<sup>314</sup> U.S. MERIT SYS. PROT. BD., JUDGES’ HANDBOOK 10 (Oct. 2007), <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT>. CAJs also perform pre-issuance quality review of initial decisions. *See id.* at 54.

<sup>315</sup> *See, e.g.*, 5 C.F.R. § 1201.11 (governing the initial decision by the judge); *id.* § 1201.113 (identifying the circumstances in which the initial decision will become final).

<sup>316</sup> *See, e.g., id.* § 1201.11(g) (defining “[p]etition for review as “[a] request for review of an initial decision of a judge.”); § 1201.114(1) (“A petition for review is a pleading in which a party contends that an initial decision was incorrectly decided in whole or in part.”). Organizationally and procedurally, MSPB has no analog to the

regulations identify circumstances in which the MSPB may grant a petition for review.<sup>317</sup> Although the MSPB may grant a petition for review if “[t]he initial decision contains erroneous findings of material fact,”<sup>318</sup> such a result is limited in three ways. First, the regulations require that “[a]ny alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision.”<sup>319</sup> In addition, the party alleging an error of fact “must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates that error.”<sup>320</sup> Finally, the regulations provide that the MSPB will generally be deferential to an AJ’s credibility determinations.<sup>321</sup> These limitations suggest that, as a practical matter, MSPB AJs operate as fact finders for the agency in matters subject to a petition for review.

### c. The National Appeals Division (NAD)

The USDA’s NAD is an example of an informal adjudication program that nonetheless bears many of the procedural and organizational hallmarks of formal adjudication. NAD was created in 1994 as part of a congressionally-mandated reorganization of the USDA.<sup>322</sup> In NAD, Congress consolidated the adjudicatory functions of seven USDA component agencies into a single administrative forum.<sup>323</sup> NAD conducts “impartial administrative appeals hearings and reviews of adverse program decisions” made by USDA officials in those component agencies.<sup>324</sup> NAD adjudicators therefore hear cases involving a variety of subjects, including agricultural assistance, commodities and conservation programs, and rural housing and development.<sup>325</sup> As of 2008, NAD docketed about 13,000 cases annually.<sup>326</sup>

In terms of its organizational structure, NAD is independent of any USDA program office and reports directly to the Secretary (through the Deputy Secretary).<sup>327</sup> NAD is headed by a Director, who is appointed by the Secretary for a six-year term.<sup>328</sup> NAD houses both hearing-

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Commission’s OFO—administrative appeals from the AJs’ initial decision go directly to and are decided by the MSPB.

<sup>317</sup> See *id.* § 1201.115.

<sup>318</sup> *Id.* § 1201.115(a).

<sup>319</sup> *Id.* § 1201.115(a)(1).

<sup>320</sup> *Id.* § 1201.115(a)(2).

<sup>321</sup> See *id.* § 1201.115(a)(2) (“In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge’s credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.”).

<sup>322</sup> See Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. 103-354, tit. II, subtit. H, 108 Stat. 3228 (1994) (codified at 7 U.S.C. §§ 6991-6999). Although the Act characterizes NAD as handling “appeals,” the Division actually conducts both hearing-level and appellate adjudications.

<sup>323</sup> 7 U.S.C. §§ 6991-6992.

<sup>324</sup> See U.S. DEP’T OF AGRIC., NAT’L APPEALS DIV., ABOUT NAD, MISSION STATEMENT, [http://www.nad.usda.gov/about\\_mission.html](http://www.nad.usda.gov/about_mission.html).

<sup>325</sup> U.S. DEP’T OF AGRIC., NAT’L APPEALS DIV., ABOUT NAD, [http://www.nad.usda.gov/about\\_nad.html](http://www.nad.usda.gov/about_nad.html); see also 7 C.F.R. § 11.1 (2013).

<sup>326</sup> See *Five Points Road Joint Venture v. Johanns*, 542 F.3d 1121, 1128-29 (7th Cir. 2008).

<sup>327</sup> See U.S. DEP’T OF AGRIC., ORGANIZATIONAL CHART, [http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA\\_ORG\\_CHART](http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA_ORG_CHART), reprinted in Appendix N.

<sup>328</sup> See 7 U.S.C. § 6992(b); U.S. DEP’T OF AGRIC., NAT’L APPEALS DIV., ABOUT NAD, ORGANIZATIONAL ROLES, [http://www.nad.usda.gov/about\\_roles.html](http://www.nad.usda.gov/about_roles.html).

level and appellate offices.<sup>329</sup> Hearings are conducted by non-ALJ adjudicators, who are referred to as “hearing officers” and are dispersed among three regions.<sup>330</sup> Three Regional Assistant Directors are responsible for overseeing the adjudication process within their respective regions, by, among other things, supervising and providing operational support for hearing officers (including by assigning cases), as well as performing other administrative functions.<sup>331</sup> The Regional Assistant Directors, in turn, report to the NAD Director.<sup>332</sup>

An applicant or participant who receives an adverse program decision related to a covered USDA program may seek review by NAD. Once an appeal is filed, cases are assigned to a hearing officer. Private parties are entitled to hearings (either in-person or telephonic) upon request.<sup>333</sup> Hearing officers are responsible for managing pre-trial proceedings, conducting trial-type evidentiary hearings, and issuing written determinations.<sup>334</sup> NAD hearings are informal in APA terminology, but have many of the characteristics associated with formal adjudication. Ex parte contacts are prohibited, and hearing officers are authorized to administer oaths and to issue subpoenas to compel the production of documents or the attendance of witnesses.<sup>335</sup> Official records of hearings are maintained by audiotape or, at the discretion (and expense) of the private party, by transcript.<sup>336</sup> A hearing officer’s post-hearing notice of determination becomes the agency’s final administrative decision absent a timely request for review by either party.<sup>337</sup>

Should a party seek review of a hearing officer’s determination, the appeal is heard by the NAD Director (or his or her delegee).<sup>338</sup> In his or her role as appellate adjudicator, the Director is assisted by a staff of appeals officers who research and draft the Director’s review determinations. A Supervisory Appeals Officer manages the appellate staff.<sup>339</sup> The Director’s final determination on review represents the agency’s final administrative action, and parties may seek judicial review thereafter.<sup>340</sup>

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<sup>329</sup> See, e.g., 7 C.F.R. §§11.8-11.15; U.S. DEP’T OF AGRIC., NAT’L APPEALS DIV., ORGANIZATIONAL CHART, [http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA\\_ORG\\_CHART](http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA_ORG_CHART), reprinted in Appendix N.

<sup>330</sup> See 7 C.F.R. §§ 11.1, 11.21; see also U.S. DEP’T OF AGRIC., NAT’L APPEALS DIV., [http://www.nad.usda.gov/contact\\_us.html](http://www.nad.usda.gov/contact_us.html). NAD regional offices are located as follows: Eastern Region (Indianapolis, IN); Southern Region (Memphis, Tennessee); and Western Region (Lakewood, CO). NAD headquarters is located in Alexandria, VA. 7 C.F.R. § 11.21.

<sup>331</sup> See 7 C.F.R. § 11.22(d); U.S. DEP’T OF AGRIC., NAT’L APPEALS DIV., ABOUT NAD, ORGANIZATIONAL ROLES, [http://www.nad.usda.gov/about\\_roles.html](http://www.nad.usda.gov/about_roles.html).

<sup>332</sup> See 7 C.F.R. § 11.22(d).

<sup>333</sup> *Id.* § 11.6(b).

<sup>334</sup> *Id.* § 11.8.

<sup>335</sup> *Id.* § 11.8(a).

<sup>336</sup> *Id.* § 11.8(b)(5)(iii).

<sup>337</sup> *Id.* § 11.8(f)

<sup>338</sup> *Id.* § 11.9.

<sup>339</sup> See U.S. DEP’T OF AGRIC., NAT’L APPEALS DIV., ABOUT NAD, ORGANIZATIONAL ROLES, [http://www.nad.usda.gov/about\\_roles.html](http://www.nad.usda.gov/about_roles.html). The Director and appellate staff are located in headquarters.

<sup>340</sup> 7 C.F.R. §§ 11.9(d), 11.13.

#### d. The Railroad Retirement Board (RRB)

The Chicago-based RRB primarily adjudicates benefits claims by railroad workers and their families under the Railroad Retirement and Railroad Unemployment Insurance Acts.<sup>341</sup> A claimant dissatisfied with the initial decision on his or her application for benefits has the right to file an appeal with the Bureau of Hearings and Appeals and to request an oral hearing on factual issues.<sup>342</sup> These informal proceedings are not conducted under the APA, and the presiding official is a non-ALJ “hearings officer.”<sup>343</sup> Appeals from the decision of a hearing officer are taken to the Board.<sup>344</sup> Organizationally, the Bureau of Hearings and Appeals is situated within the Office of the General Counsel,<sup>345</sup> and the General Counsel is “responsible for . . . planning, directing, and coordinating the work of . . . the Bureau of Hearings and Appeals.”<sup>346</sup>

### V. BUDGETARY CONSIDERATIONS

While numerous factors would necessarily underlie any decision to change the status of adjudicators in the federal sector program, this section explores the potential effect of such reform only from the perspective of the personnel costs of using ALJs instead of AJs. More specifically, our assessment models, monetizes, and evaluates the likely fiscal impact—in terms of salary, benefits, and other personnel-related costs—of using ALJs (instead of AJs) in the federal sector hearing program over a 10-year period. Two important points bear emphasis. First, this model assesses the likely additional incremental—rather than absolute—costs to the Commission of using ALJs as adjudicators in the federal sector hearing program; that is, we assess the likely cost differential between ALJs and AJs, since it is only these costs that can properly be attributed to switching to ALJs. Second, this assessment solely evaluates the direct personnel costs to the Commission of using ALJs in the federal sector program.<sup>347</sup> We were not tasked by the agency to monetize the potential benefits of ALJ adjudicators, and we do not attempt to do so here. Whether—or to what extent—monetized benefits to the Commission, litigants, or other federal sector stakeholders might offset cost increases associated with use of ALJs would require a more complex economic analysis that is beyond the scope of this study.

#### A. Summary of Cost Model: Methodology & Inputs

The essential framework of the model used to estimate the incremental costs of using ALJs as federal sector adjudicators involves three key aspects: analytical timeframe, cost elements (inputs), and incorporation of uncertainty. With respect to timeframe, a 10-year period is used because this is a standard time horizon for analyzing future costs (or benefits) of federal

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<sup>341</sup> See, e.g., 20 C.F.R. § 258.1(a); see also *id.* § 200.1(a)(3) (“The Board administers the Railroad Retirement Act and the Railroad Unemployment Insurance Act. . . . The Board also participates in the administration of the Federal Medicare health insurance program.”).

<sup>342</sup> See *id.* §§ 200.2(a)(2), 200.2(b)(8), 320.12.

<sup>343</sup> See 20 C.F.R. §§ 200.2(a)(2), 200.2(b)(8); see also *id.* § 320.18 (governing appointment of hearings officers); *id.* § 320.20 (identifying the powers of the hearings officer).

<sup>344</sup> See *id.* § 320.39. The Board’s decisions are subject to judicial review. See *id.* § 320.45.

<sup>345</sup> See R.R. RET. BD., RRB ORGANIZATIONAL CHART, [http://www.rrb.gov/org/org\\_chart.asp](http://www.rrb.gov/org/org_chart.asp).

<sup>346</sup> 20 C.F.R. § 200.1(b)(2).

<sup>347</sup> Thus, the extent to which—if any—that switching to ALJ adjudicators might lead to higher (or lower) indirect operational or personnel costs (by, for example, prompting other Commission employees subsequently seeking to have their positions upgraded) are not captured in this economic analysis.

agency action, as well as a period for which assumptions about future events can be made with a sufficient degree of reliability.<sup>348</sup> It is assumed for modeling purposes that “Year 1” is 2015 and “Year 10” is 2024.<sup>349</sup> In terms of cost elements, the model uses four basic inputs: number of adjudicators; salaries; benefits; and other costs (namely, AJ performance awards and fees assessed by OPM for each agency’s pro rata share of ALJ program costs). Each of these four cost elements, in turn, was derived from EEOC data or publicly available sources. While Appendices C – L provide detailed descriptions of these cost elements and their underlying sources and assumptions, salient aspects of these inputs are summarized below:

- *Number of Adjudicators.* EEOC-provided data show that the agency currently employs 89 full-time AJs in the federal sector program plus 6 full-time equivalents (FTEs) based on the average number of hours worked annually by part-time EEOC AJs.<sup>350</sup> It is thus assumed that 95 full-time adjudicators is the “base” number of adjudicators that, depending on the applicable set of cost assumptions, is projected to grow, contract, or remain the same over the 10-year period.
- *Salaries—General.* Federal salaries consist of basic and locality pay. The model uses one (or both) types of pay as relevant to the particular cost calculation. Because EEOC-provided data did not identify AJs’ duty stations, locality pay for each grade/step pair used in the model is based on the median locality pay of all federal pay jurisdictions that currently house an EEOC district or field office.
- *Salaries (Grade)—AJs.* AJs are classified, pursuant to the Commission’s personnel standards, as Grades 11 to 14 on the federal General Schedule (GS) pay system. Summary personnel data provided by the Commission to the Conference for this study show that, over the past five years, the vast majority of AJs (about 93%) have been GS-14s, with the rest of the AJ corps at the GS-13 level save for a single GS-15 (in 2013 only); the Commission has not employed any GS-11/12s in the past four years. It is thus assumed that the “base” number of AJs follow this same general distribution (i.e., 93% GS-14s, 6% GS-13s, and 1% GS-15).
- *Salaries (Within-Grade Steps)—AJs.* Data initially provided by EEOC indicated only the grade levels (and not within-grade steps) of AJs. Subsequently, EEOC provided supplementary data identifying the number of AJs at each grade/step

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<sup>348</sup> See, e.g., OFFICE OF MGMT. AND BUDGET, REGULATORY IMPACT ANALYSIS: FREQUENTLY ASKED QUESTIONS 4 (Feb. 2011) [hereinafter OMB RIA FAQs] (characterizing 10 years as one of the “standard timeframe[s]” for economic analyses of actions by federal agencies); OFFICE OF MGMT. AND BUDGET, REGULATORY IMPACT ANALYSIS: A PRIMER 11 (Aug. 2011) [hereinafter OMB RIA PRIMER] (discussing selection of time horizon for economic analysis); see also OFFICE OF MGMT. AND BUDGET, CIRCULAR A-4 15 (Sept. 2003) [hereinafter OMB CIRCULAR A-4]. While assessment of the fiscal implications of using ALJs in the Commission’s federal sector program is not governed by OMB standards, such guidance nonetheless distills well-established methodologies that warrant application to the extent feasible in the instant cost analysis.

<sup>349</sup> Of course, whether the Commission ultimately will employ ALJs in the federal sector hearing program, and if so, when, remains an open question at this juncture. However, modeling costs requires a defined timeframe for analysis. For cost modeling purposes only, it is thus assumed that the Commission would begin using ALJs in 2015.

<sup>350</sup> See OFFICE OF MGMT. AND BUDGET, CIRCULAR A-76 (2003) (providing FTE conversion factor of 1,776 annual hours).

pair in recent years (i.e., fiscal years 2008 through 2013). A chart depicting this grade/step data is set forth in Appendix C.)<sup>351</sup> However, the complexity of modelling over twenty grade/step pairs for a ten-year period, coupled with other data constraints (such as lack of historical data on which to base detailed accession, attrition and retirement assumptions for AJs in future years), precluded detailed economic forecasting for specific grade/step pairs across the entire corps of AJs. Nonetheless, the EEOC-provided supplementary grade/step data were used to build the model's simplified methodology regarding within-grade steps held by AJs. Drawing from this data, it is assumed that, within each respective grade, all AJs occupy Step 4, Step 7, or Step 10 depending on the relevant cost scenario.

- *Salaries (Level/Rate)—ALJs.* ALJ pay is established by OPM based on a government-wide pay scale.<sup>352</sup> This pay scale has three levels (AL-3, AL-2, and AL-1); however, it is assumed that nearly all EEOC ALJs would occupy the lowest level (AL-3) since the other two levels represent managerial positions. Grade AL-3, in turn, encompasses five within-level rates (A thru F). To simplify modeling, it is assumed that non-managerial EEOC ALJs would be assigned to one of three rates—namely, AL-3/A, AL-3/C, or AL-3/F—and then progress to higher rates based on a modeled approximation of time-in-rate requirements. With respect to ALJ management, it is assumed that, should the Commission transition to using ALJs, the Commission would need one Chief ALJ (at the AL-2 level) and, depending on the particular cost scenario, another one or two Regional Chief ALJs (also at the AL-2 level).
- *Benefits.* Modeled benefits inputs are limited to those agency-provided benefits that are proportional to salary (e.g., retirement benefits), since it is only such benefits that show incremental variance between ALJs and AJs. Benefits calculations use basic (rather than locality) pay rates according to applicable statutory or administrative formulae. Benefits included in the model are: Federal Employees Retirement System (FERS) (11.9% basic pay); Federal Employees' Group Life Insurance (FEGLI) (0.75¢ per \$1,000 basic pay); Thrift Savings Plan (TSP) - Basic (automatic agency contribution of 1% basic pay); and TSP - Matching (agency matching of employee TSP contribution up to 5% basic pay).
- *Other Costs.* This cost element addresses two separate inputs – one unique to AJs (performance awards) and one applicable only to ALJs (OPM fees). AJs—as General Schedule employees—can receive discretionary annual performance

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<sup>351</sup> Notably, between FY 2008 and FY 2013, there was a marked shift in the predominant grade/step pairs across all AJs. In FY 2008, GS-14/8 represented the grade/step pair with the highest number of AJs, followed by GS-14/9 and GS-14/10. See Appendix C. By the end of FY 2013, however, AJs at the GS-14/10 pay level far outnumbered both GS-14/9s and GS-14/8s. *Id.* The exact causes of this significant change in AJ pay distribution are not known, though it is likely that federal budget limitations and hiring freezes (which constrain job movement), as well as the general economic downturn, played some role.

<sup>352</sup> See 5 U.S.C. § 5372 (providing that OPM “shall determine . . . the [pay] level in which each administrative-law-judge position shall be placed”); 5 C.F.R. § 930.205 (“OPM assigns each administrative law judge position to one of the three levels of basic pay, AL-3, AL-2 or AL-1 of the administrative law judge pay system[.]”).

awards. (ALJs are prohibited from receiving performance or incentive awards.)<sup>353</sup> EEOC provided ACUS with summary AJ performance (cash) award data for FYs 2008 through 2013. Due to budget constraints, the Commission granted no cash awards to AJs in 2012 and 2013. It is assumed that, for any given model year, the AJ corps receives cash awards based on the four-year annual weighted average of cash awards collectively granted to AJs in FY 2008 through FY 2011, with award frequency (e.g., annually, biennially) dependent on the particular cost scenario. Second, OPM annually bills each agency employing ALJs its pro rata share of OPM's cost of administering the ALJ program.<sup>354</sup> In 2012, the OPM-assessed fee was \$1,633 per ALJ.<sup>355</sup> In recent years, this fee has increased annually by 6% to 22%, with a median increase of 7%.<sup>356</sup>

In addition, the model incorporates “low” (L), “medium” (M), and “high” (H) assumptions for certain cost elements to account for uncertainties inherent in forecasting future costs, as well as to permit growth (or contraction) over time. Cost elements with L/M/H ranges are thus integral to the cost model because they permit a more refined analysis than single-point estimates. For example, it cannot be known at this time the extent to which federal salaries will increase in coming years, or whether the rolls of the Commission's adjudicators will expand, contract, or remain the same in the coming decade. Modeling key cost elements (or uncertainties) using ranges permit development of a primary (medium) cost scenario that is bounded by plausible upper and lower bound cost estimates. A sample, simplified annual cost equation from the model is set forth in Appendix H.

In our model, each cost element with an L/M/H range is based on, or derived from, an objective data source such as EEOC-provided summary personnel data, current and past OPM federal salary tables, or reports on recent TSP participation and contribution rates by federal employees. Cost inputs with L/M/H ranges include: annual number of federal sector adjudicators; pay rates under the federal GS and AL pay systems; distribution of AJs and ALJs under their respective pay systems; TSP participation and deferral rates; and OPM-assessed ALJ program fees. (For a complete list of cost elements with L/M/H ranges and their underlying assumptions, see Appendix C.)

In sum, the foregoing represents the fundamentals of the cost model. Based on this model, annual costs are calculated for each of the 10 years and, within each of these years, separately for each of the three (i.e., L/M/H) scenarios. Annual cost estimates for each of these cost scenarios are generated by respectively indulging all applicable “low” assumptions, all “medium” assumptions, and all “high” assumptions. It bears noting that, because these three scenarios assess incremental (rather than absolute costs), it does not necessarily follow that

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<sup>353</sup> See 5 C.F.R. § 930.203 (“An agency may not grant any monetary or honorary award or incentive . . . to an administrative law judge.”); see also 5 U.S.C. §§ 4502-4504.

<sup>354</sup> See 5 U.S.C. § 1104(a)(2); 5 C.F.R. § 930.203 (providing, in pertinent part: “Each agency employing administrative law judges must reimburse OPM for the cost of developing and administering the administrative law judge examination. Each agency is charged a pro rata share of the examination cost. . . . OPM computes the cost of the examination program on an annual basis and notifies the employing agencies of their respective shares after the calculations are made.”); see also 2013 SSA OIG REPORT, *supra* note 149, at 6 tbl. 1 (discussing OPM-assessed ALJ fees).

<sup>355</sup> See 2013 SSA OIG REPORT, *supra* note 149, at 6 tbl. 1.

<sup>356</sup> *Id.*

results from the “low” or “high” scenarios will respectively show the lowest and highest annual (incremental) costs. The “baseline” against which ALJ-related costs are assessed is the status quo—namely, continued use of AJs as federal sector adjudicators. Annual cost totals for each year (and each L/M/H scenario) are presented as “rolled-up” costs at both 3% and 7% discount rates in order to account for differences in the timing of such costs.<sup>357</sup> In addition, costs are also presented on an annualized basis for the federal sector program generally, as well as per ALJ.<sup>358</sup>

## **B. Summary of Results**

We estimate the likely incremental costs to the Commission of using ALJs as federal sector adjudicators over the studied 10-year period from three perspectives: total annual costs, total annualized costs, and annualized per-ALJ costs. All annual and annualized cost results represent incremental costs (i.e., cost differential between using ALJs and AJs in the federal sector program) unless stated otherwise. Additionally, the scenario assessing the “medium” cost inputs at a 7% discount rate is termed the “primary scenario” because it presents the central, most likely cost scenario. The “high” and “low” scenarios form the upper and lower bounds of the expected range of annual costs to the Commission of using ALJs as federal sector adjudicators. Complete results from our cost assessment are presented in Appendices I – L. Key findings from these analyses are summarized below.

First, use of ALJs as adjudicators in the federal sector hearing program will increase annual costs for the Commission under all of the modeled scenarios. For example, under the primary scenario, annual costs are expected to rise between \$1.1 million and \$2.5 million for any given year. Annual costs for each of the three scenarios over the studied 10-year term are depicted in Figure 1, which appears on the next page.

It may be noted that, in this figure (and in other annual cost results presented herein) there is the seeming incongruity of the “low” scenario showing the highest annual costs, while the “high” scenario presents the lowest annual costs. This is not a typographical error. Rather, this apparent anomaly stems from two inter-related considerations. First, as noted previously, modeled costs are incremental (i.e., the cost differential between using ALJs and AJs as federal sector adjudicators), not absolute. Consequently, the “higher” cost curve for the “low” scenario demonstrates that collectively indulging all “low” modeling assumptions yields the greatest incremental costs relative to the “medium” and “high” cost scenarios. Second, as befits a cost scenario modeling lower-range estimates, the “low” scenario assumes that a greater proportion of federal sector adjudicators (whether AJs and ALJs) hold relatively lower-ranking positions on their respective pay scales. Since the lower end of the pay scale is precisely where the greatest ALJ–AJ salary disparities occur, this low cost assumption results in higher incremental salary

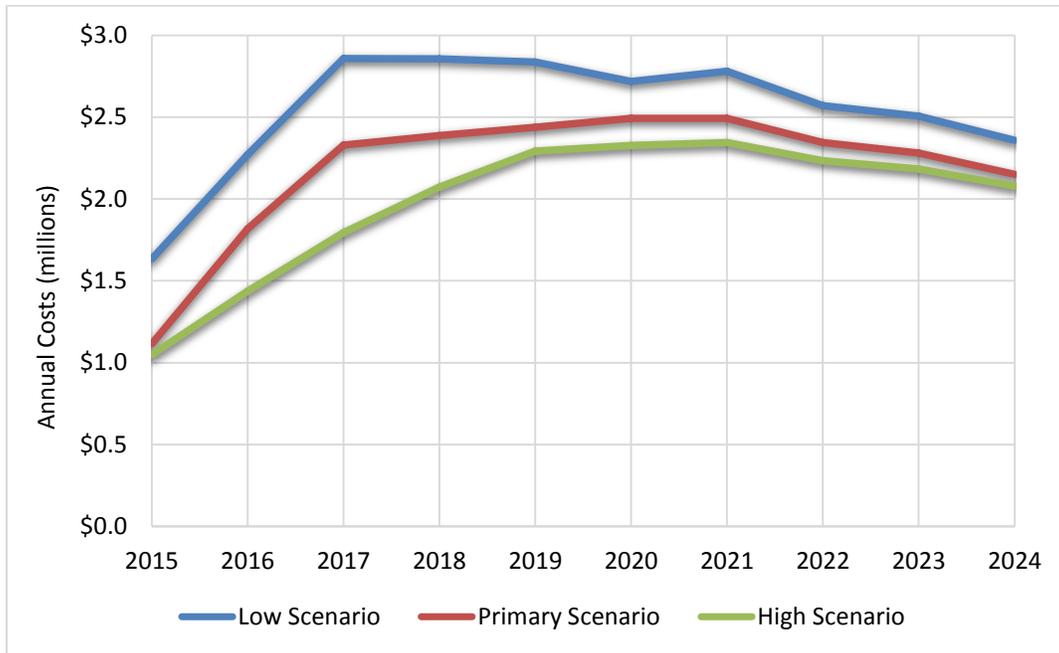
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<sup>357</sup> Since costs from use of ALJs in the federal sector program would not be incurred all at one time, it would be incorrect to simply add up all expected costs without taking into account when such costs would be incurred by the agency. See OMB CIRCULAR A-4, *supra* note 348, at 33-34 (discussing the importance of discounting costs or benefits accrued over time and specifying use of both 3% and 7% discount rates); *see also* OMB RIA PRIMER, *supra* note 348, at 11 (same). Or, put in more colloquial terms, discounting costs incurred over time is important because “a dollar today is worth more than a dollar tomorrow.”

<sup>358</sup> Annualization involves taking the sum of a future stream of costs (or benefits) and estimating approximate yearly costs. See OMB CIRCULAR A-4, *supra* note 348, at 45; *see also* OMB RIA FAQs, *supra* note 348, at 6-8. This process is akin to mathematical averaging except that, as with discounting, it takes into account the timing of the accrual of costs/benefits.

costs.<sup>359</sup> Consequently, the “low” scenario forms the likely upper-bound estimate of likely annual (incremental) costs of using ALJs as adjudicators in the federal sector program.

**Figure 1: Annual Costs - Low, Primary, and High Scenarios (7% Discount Rate)**

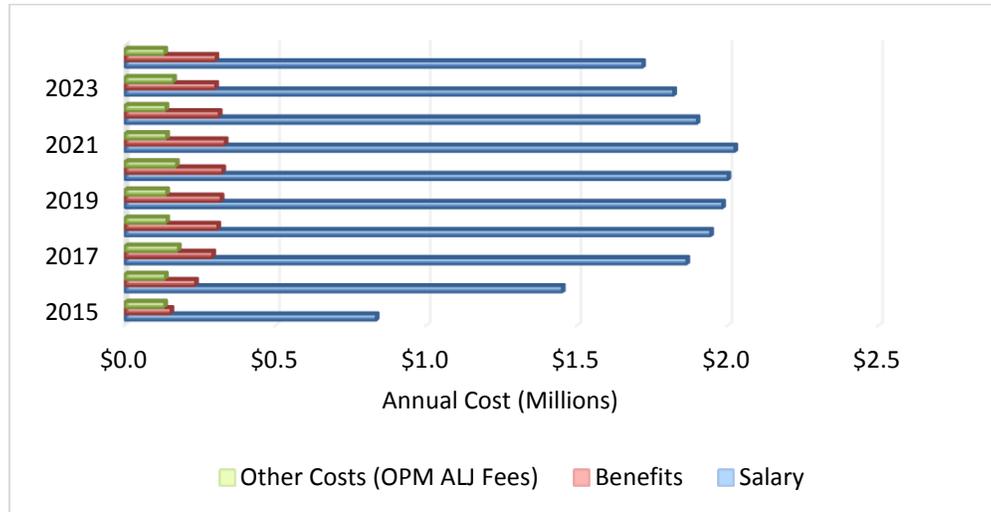


Moreover, the key driver of annual costs under all scenarios is the relatively higher salaries for ALJs under government-wide pay rates. For example, under current (2013) federal pay rates, the locality pay for an entry-level ALJ (AL-3/A) is about \$13,000 higher than a mid-level AJ (GS-14/4). (See Appendix D.) This ALJ:AJ pay gap is reflected in the cost curves in Figure 1 above. Costs under each scenario exhibit the highest increases in Years 1 through 4 (i.e., 2015 - 2018) as EEOC ALJs are appointed and progress through the ALJ pay scale. In Years 5 through 10, the cost curves for the three scenarios flatten—and come close to converging—due to several inter-related factors, including: longer time-in-grade requirements for promotions between higher steps in the ALJ pay scale; a “maturing” distribution of ALJs on the ALJ pay scale as it settles into a consistent pattern; and a projection that federal pay will continue to lag relative to inflation.

<sup>359</sup> For example, the “low” scenario assumes that nearly all ALJs will hold entry-level positions (AL-3A), and most AJs will be paid at the GS-14/4 level. See Appendices C - G. Based on 2013 pay rates, the difference in annual basic pay between these two pay rates is \$13,078. By comparison, the “high” scenario assumes that most ALJs will hold mid-level positions (AL-3/C), and most AJs will hold senior positions (GS-14/10). *Id.* The pay differential between these more senior adjudicators is about 10% lower (\$11,965). See Appendix D.

Overall, ALJ salaries represent, on average, about 80% of annual costs over the 10-year period. Depicted in the figure below (Figure 2) are the annual cost breakdowns for the studied 10-year term under the primary scenario:

**Figure 2: Breakdown of Annual Costs Under Primary Scenario (7% Discount Rate)**



While ALJ salaries are the largest component of annual costs, benefits and, to a lesser extent, OPM ALJ fees, also play a role. Since FERS, FEGLI, and TSP benefits are proportional to basic pay, higher ALJ pay also leads to incrementally higher benefit costs. Under the primary scenario, these benefits are expected to collectively average about \$287,000 in present dollars, which represents 13% of total annual costs. (See Figure 2 above and Appendix J.) Likewise, OPM’s ALJ fees are projected to rise annually anywhere from 5% - 9% based on fee assessments in recent years. OPM ALJ fees are estimated to average about \$170,000 in present dollars under the primary scenario, which represents 7% of total annual costs. (See Figure 2 above and Appendix J.)

Turning to annualized costs, another key result from our analysis shows that, on an annualized basis, cost increases from use of ALJ adjudicators are expected to be \$2.1 million under the primary scenario. Presented below are annualized costs for each of the three (L/M/H) scenarios at both 3% and 7% discount rates:

<b>Discount Rate</b>	<b>High Scenario (\$millions)</b>	<b>Primary Scenario (\$millions)</b>	<b>Low Scenario (\$millions)</b>
<b>3%</b>	<b>\$2.4</b>	<b>\$2.6</b>	<b>\$3.5</b>
<b>7%</b>	<b>\$1.9</b>	<b>\$2.1</b>	<b>\$3.0</b>

Lastly, our analysis shows that annual per capita ALJ costs under the primary scenario are expected to range from a low of \$11,737 (Year 1) to a high of about \$26,000 (Years 6 - 7), and average about \$23,000 annually in present dollars over the 10-year period. (*See* Appendix G.)

### CONCLUSION

The decision of whether to use ALJs instead of AJs in the federal sector hearing program requires the Commission to consider a variety of factors. Transitioning from AJs to ALJs may require the Commission to revise its hearing procedures. It would also likely have significant operational and budgetary consequences and may potentially require the Commission to modify its organizational structure to accommodate the use of ALJs. Ultimately, however, the determination of adjudicator status is a question of policy that will require the Commission's expert judgment regarding the nature of federal sector EEO hearings and their proper place with the Commission's broader regulatory mission.

# APPENDICES

## APPENDIX A: THE APA'S FORMAL ADJUDICATION PROVISIONS

### 5 U.S.C. § 554 – Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

- (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
- (2) the selection or tenure of an employee, except a [sic] administrative law judge appointed under section 3105 of this title;
- (3) proceedings in which decisions rest solely on inspections, tests, or elections;
- (4) the conduct of military or foreign affairs functions;
- (5) cases in which an agency is acting as an agent for a court; or
- (6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
- (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
- (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the

decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

- (A) in determining applications for initial licenses;
- (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
- (C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

**5 U.S.C. § 556 – Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

- (1) the agency;
- (2) one or more members of the body which comprises the agency; or
- (3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on offers of proof and receive relevant evidence;
- (4) take depositions or have depositions taken when the ends of justice would be served;
- (5) regulate the course of the hearing;
- (6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;
- (7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557 (d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

**5 U.S.C. § 557 – Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)

(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

## APPENDIX B: ADMINISTRATIVE CONFERENCE RECOMMENDATION 92-7

### The Federal Administrative Judiciary

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(Adopted December 10, 1992)

#### PREAMBLE

At the request of the Office of Personnel Management, the Administrative Conference undertook a study of a series of issues relating to the roles of Federal administrative law judges (ALJs) and non-ALJ adjudicators, or administrative judges (AJs),<sup>360</sup> as they have evolved over the last several decades. The study addressed a number of different issues, including those relating to selection and evaluation of ALJs and AJs, the relationship of ALJs and AJs to their employing agencies, including the appropriate level of “independence” of such decision makers, and under what circumstances each type of decision maker should be used. Many of these issues are controversial, and the Conference has heard strong arguments from those with differing views.

The Administrative Conference takes as its starting point in considering the role of the Federal administrative judiciary the role created for “hearing examiners,” now redesignated as “administrative law judges,” in the Administrative Procedure Act in 1946.<sup>361</sup> That Act contemplated the existence of impartial factfinders, with substantive expertise in the subjects relevant to the adjudications over which they preside, who would be insulated from the investigatory and prosecutorial efforts of employing agencies through protections concerning hiring, salary, and tenure, as well as separation-of-functions requirements. The decisions of such impartial factfinders were made subject to broad review by agency heads to ensure that the accountable appointee at the top of each agency has control over the policymaking for which the agency has responsibility.

The need for impartial factfinders in administrative adjudications is evident. To ensure the acceptability of the process, some degree of adjudicator independence is necessary in those adjudications involving some kind of hearing.<sup>362</sup> The legitimacy of an adjudicatory process also depends on the consistency of its results and its efficiency.

ALJs possess a degree of independence that dates back to the enactment of the APA and is governed by the APA and related statutes. The APA provides that certain separations of functions must be observed to protect the ALJ from improper pressures from agency investigators and prosecutors. ALJs are selected through a special process overseen by OPM. Their pay is set by statute and OPM regulations. Any attempt by an agency to discipline or remove an ALJ requires a formal hearing at the Merit Systems Protection Board. ALJs are also

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<sup>360</sup> The term “administrative judge,” as used here, includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.

<sup>361</sup> In 1969, the Conference addressed some of these issues in the context of hearing examiners. See Conference Recommendation 69-9, 1 CFR 305.69-9 (part A) (1988). Many of the recommendations set forth here pertaining to selection and training of ALJs are broadly consistent with the earlier recommendation, but to the extent that they differ, this recommendation is intended to supersede part A of Recommendation 69-9.

<sup>362</sup> The study underlying this recommendation limited its consideration to adjudicators who preside over some kind of hearing. More informal adjudication processes are outside the scope of the study.

exempt from the performance appraisal requirements applicable to almost all other Federal employees under the Civil Service Reform Act.

While the number of ALJs in the Federal government has leveled off in the last decade, and has actually decreased outside of the Social Security Administration, some agencies have been making increased use of AJs. The amount of functional independence accorded to AJs varies with the particular agency and type of adjudication; however, AJs generally lack the statutory protections guaranteed to ALJs. AJs are not statutorily exempt from performance appraisals, and several major groups of AJs regularly undergo such appraisals by the agencies for which they work. In general, however, AJs presiding in agency adjudications in which a hearing is provided are accorded de facto protection from pressure from agency investigators and prosecutors, and, according to the Conference's survey, do not perceive themselves as significantly more subject to agency pressure than do ALJs.

The Conference's general view is that the movement away from the uniformity of qualifications, procedures, and protections of independence that derives from using ALJs in appropriate adjudications is unfortunate. The Conference believes that, to some extent, this movement away from ALJs toward AJs has been fueled by perceptions among agency management of difficulties in selecting and managing ALJs. These recommendations attempt to address these perceived problems. It should be noted these recommendations are interdependent. For example, recommendations concerning the conversion of AJ positions to ALJ positions, and creation of new ALJ positions in new programs, are premised on the implementation of improvements in the selection and evaluation processes.

### **Use of ALJs and AJs**

There is no apparent rationale undergirding current congressional or agency decisions on the use of ALJs or non-ALJs in particular types of cases. Congress seems to make such choices on an ad hoc basis. Moreover, it is quite clear that similar types of determinations made in different agencies are being made by different types of decision makers. For example, disability benefits adjudications at the Social Security Administration are handled by ALJs; at the Department of Veterans Affairs, AJs adjudicate similar types of cases. Moreover, in some contexts, non-ALJ adjudicators preside over cases in which extremely important issues of personal liberty are potentially at stake, such as deportation proceedings and security clearance cases.

The uniform structure established by the APA for on-the-record hearings and for qualifications of presiding officers serves to provide a consistency that helps furnish legitimacy and acceptance of agency adjudication. A rationalized system of determining when ALJs should be used would encourage uniformity not only in procedure, and in the qualifications of the initial decider, but in adjudication of similar interests. The Conference, therefore, recommends that Congress consider the conversion of AJ positions to ALJ positions in certain contexts. While the Conference does not identify specific types of cases for which such conversion should be made, it proposes a series of factors for Congress to consider in making such determinations; these same factors should also apply when Congress creates new programs involving evidentiary hearings.

One critical factor is the nature of the interest being adjudicated. The separation of functions mandated by the APA as well as the selection criteria designed to ensure the highest quality

adjudicators, are of particular value in situations where the most important interests are at stake. Generally speaking, a hearing that is likely to involve a substantial impact on personal liberties or freedom, for example, is one where use of an ALJ likely would be appropriate. Similarly, cases that could result in an order carrying with it a criminal-like finding of culpability, imposition of sanctions with a substantial economic effect (such as large monetary penalties or some license revocations),<sup>363</sup> or a determination of discrimination under civil rights laws (unless there is an opportunity for a de novo hearing in court) represent categories of proceedings that may call for ALJ use. This characterization should be done for types of cases rather than for particular cases.

Another factor to consider is whether the procedures established by statute or by rule for cases heard and decided are, or would be, substantially equivalent to APA formal hearings. In such cases, the additional uniformity that would derive from making the cases formally subject to 5 U.S.C. §§554, 556, and 557 would argue in favor of ALJs.

ALJs are required to be lawyers. Some AJs who decide cases are not lawyers, but have other needed specialized expertise. For example, certain adjudicators at the Nuclear Regulatory Commission are physicists or engineers who participate on multi-member boards. In determining whether it is appropriate to use ALJs in particular types of cases, Congress should consider whether the benefits of using ALJs are outweighed by the benefits of having other expertise brought to bear. It should also consider whether lawyers serving with nonlawyers on decision panels should be ALJs.

A final consideration, particularly in the context of considering conversion of existing AJ positions to ALJ positions, is the extent to which the current adjudicators closely approximate ALJs in their decisional independence, the criteria for their selection, or their compensation and experience levels. If existing AJs are functioning well and do not approach parity with ALJs on these criteria, there may be no need to make the conversion. On the other hand, if they closely match ALJs on these factors, uniformity interests may weigh in favor of conversion.

Although none of these factors is necessarily intended to be determinative, the more that these factors weigh in favor of ALJ status for the decision maker, the more appropriate it is for Congress to mandate such status. It should be noted, however, that these recommendations are not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

In situations where Congress does convert AJ positions to ALJ positions, those AJs who can satisfy OPM eligibility qualifications should be eligible for immediate appointment as ALJs. Thus, only those existing AJs meeting the standards for ALJ appointment would become ALJs, but they would not be required to go through the competitive selection process.

Historically, OPM has had responsibility to review and rule on agency requests for additional ALJ positions. In the past, when there were government-wide limits on “supergrade” positions, which included ALJs, this oversight role served a purpose. Those limits no longer exist, and it is no longer necessary for OPM to participate in this process. Agencies should be free, within their

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<sup>363</sup> Grant or contract disputes would not fall within this category, unless a monetary penalty was involved.

normal resource allocation constraints, to determine for themselves whether they need more or fewer ALJs.

## **ALJ Selection**

The selection process for ALJs has been administered by OPM (and its predecessor agency) since 1946. OPM develops the criteria for selection, accepts applications for the register of eligibles, and rates the applicants on the basis of their experience as described in a lengthy statement prepared by the applicant, a personal reference inquiry, a written demonstration of decision-writing ability, and a panel interview. The scores from this process determine an applicant's rank on the register of eligibles. Because OPM has historically considered ALJs as being in the competitive service, OPM follows the statutory requirements for filling vacancies. Thus, OPM rates and ranks eligibles on a scale from 70 to 100, and when an agency seek to fill a vacancy, OPM certifies the top three names on the register to that agency. In practice, only applicants with scores from 85 to 100 have been certified.

The Veterans' Preference Act, which has historically applied to most civil service hiring, is applicable to selection of administrative law judges. As applied, veterans deemed qualified for the preference are awarded an extra 5 points, and disabled veterans are awarded an extra 10 points in their scores. These extra points have had an extremely large impact, given the small range in unadjusted scores. In addition, under current law, agencies may not pass over a veteran to hire a nonveteran with the same or lower score on the certificate. As a consequence, application of the veterans' preference has almost always been determinative in the ALJ selection system.

There has been concern about the ALJ selection process, arising from the determinative impact of veterans' preference and the very limited selection options available to agencies. In fact, most agencies in recent years have found ways to circumvent this process somewhat, primarily by hiring laterally from other agency ALJ offices, or (in those few agencies that hire substantial numbers of ALJs) by waiting until there are numerous slots to fill at one time, thus entitling them to a larger certificate of eligibles from OPM.

Despite this circumvention, the application of veterans' preference to the ALJ selection process has had a materially negative effect on the potential quality of the federal administrative judiciary primarily because it has effectively prevented agencies from being able to hire representative numbers of qualified women candidates as ALJs. There is also some evidence that application of the veterans' preference may have adversely affected the hiring of racial minorities. Thus, agencies are prevented from being able to select the best qualified ALJs for specific positions from a pool of representative applicants. The Conference recognizes the general policy of veterans' preference in Federal hiring reflects a valid social concern, particularly as it helps those who leave military service enter the Federal civilian workforce. But, in view of the conflict between this policy and the valid need of Federal agencies to have an opportunity to select the best qualified ALJs from among representative applicants, the Conference recommends Congress abolish veterans' preference in the particular and limited context of ALJ selection.<sup>364</sup> In that connection, it should be noted that in 1978, Congress created

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<sup>364</sup> The Conference has recommended a similar modification to the veterans' preference in this context before. See Conference Recommendation 69-9, 1 CFR 305.69-9 ¶ A(4) (1988).

a similar narrow exemption for members of the Senior Executive Service. Moreover, there is no veterans' preference in the selection for any other Federal judicial position.

The Conference's recommendation on the selection of ALJs would leave with OPM the responsibility for preparing the register of eligibles (i.e., for determining the basic qualifications for the position and rating the applicants). OPM is urged to ensure that all applicants placed on the register are in fact qualified to fulfill the responsibilities of being an ALJ.

In conjunction with this, however, the recommendation would also expand the choices that agencies would have in selecting from among those qualified applicants. Under this recommendation, after OPM rated the applicants, it would compile a register of all applicants deemed qualified following the final rating process. An agency could request a certificate with the names of all applicants whose numerical ratings placed them in the highest-ranked 50 percent of the register. Agencies could also request a certificate containing a smaller number of names or applicants in a higher percentile. The agency would have the authority to hire anyone on the certificate.<sup>365</sup>

In addition, if, following review of the highest-ranked 50 percent, an agency needed to review additional names to find a suitable candidate, it could request an additional certificate from OPM. Such an exception should be invoked rarely, and only upon a showing of exceptional circumstances.

The Conference recognizes that any limitation on the number of qualified candidates on the certificate, including the "top three" limitation now in place, might be criticized as arbitrary. By recommending the highest-ranked 50 percent of the applicants OPM has determined to be qualified, the Conference is attempting to balance two factors. The Conference recognizes the agencies' strong interest in having a substantially larger pool of qualified candidates from which to select ALJs who meet their varying criteria and needs. It also recognizes the importance of ensuring that such a pool is highly qualified, as measured by a uniform objective rating system. The Conference believes that its recommendation provides a reasonable balance of these factors. It provides a pool large enough that agencies should be able to find candidates for ALJ positions who satisfy their varying and specific needs. At the same time, OPM estimates the top 50 percent of the register corresponds to those applicants with scores of 85 or better out of 100.

Agencies would also have access to a computerized database that would contain the complete application files of individual applicants on their certificate, including numerical ratings, geographical or agency preferences, particular kinds of experience, and veteran status. This database would allow agencies the option to narrow the list of qualified applicants and focus on those whom they would like to consider further. For example, an agency could search for all candidates willing to relocate to New York City, who spoke Spanish, and had ratings in the top 20 percent.

To ensure that the register contains a broad range of qualified applicants, the Conference also recommends that OPM and hiring agencies expand recruitment of women and minority applicants for ALJ positions. In addition, because questions have been raised about OPM's

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<sup>365</sup> In order to implement this recommendation, Congress would need at a minimum to modify the veterans' preference to eliminate the provision restricting the passing over of veterans, so agencies would have the ability to hire any qualified applicant on the certificate.

current method of assessing litigation experience for the purposes of scoring applicants for ALJ positions, the Conference recommends OPM review its rating criteria to determine whether they are appropriate.

For much of the last decade, the register has been closed, thus precluding newly interested applicants from being considered for ALJ positions. Although OPM deferred reopening the register pending the outcome of the Conference's consideration and recommendations, it has announced the register will be reopened in the spring of 1993. While the Conference's recommendations would significantly affect the ALJ selection process, the impact would come mostly at the end of the process, after OPM has evaluated and rated the new applicants. This procedure is likely to be a time-consuming one, given the expected large influx of applicants. Therefore, the Conference supports reopening the application process, so that OPM can begin rating the candidates now, even though the recommended changes in the later stages have not yet been implemented. This way, when and if those changes are in place, the updated register will be readily available. It should be noted, however, the Conference is also recommending OPM review some of its rating criteria, which would need to be done before it begins rating new applicants.

OPM has indicated that it has a planned program to expand recruitment of women and minority applicants for the register. The Conference both encourages OPM to give such a program a high priority, and recommends OPM and the hiring agencies take steps in particular to recruit among minority bar associations and other institutions with large numbers of minorities or women.

The Conference's view is that implementing these recommendations will provide agencies the opportunity to select ALJs from a broad range of highly qualified candidates and to hire the best applicants from a representative register.

### **ALJ Evaluation and Discipline**

At present, ALJs, virtually alone among Federal employees, are statutorily exempt from any performance appraisal. Although agencies may seek removal or discipline of ALJs "for good cause" by initiating a formal proceeding at the MSPB, the Board has applied standards that have strictly limited the contexts in which such actions may successfully be taken against an ALJ. For example, agency actions premised on low productivity have never been successful before the Board.

The Conference recognizes the importance of independence for ALJs. Their role under the APA as independent fact finders requires they be protected from pressure in making their decisions. There can be a tension, however, between this independence and the agency's role as final policymaker, including the need for consistency of result and political accountability. Moreover, agencies have a legitimate interest in being able to manage their employees, including ALJs, in order to ensure the adjudicatory system is an efficient and fair one.

The Conference, therefore, recommends that a system of review of ALJ performance be developed. Chief ALJs would be given the responsibility to coordinate development of case processing guidelines, with the participation of other agency ALJs, agency managers and others. These guidelines, which would address issues such as ALJ productivity and step-by-step time

goals,<sup>366</sup> would be one of the bases upon which Chief ALJs would conduct regular (e.g., annual) performance reviews. Judicial comportment and demeanor would be another basis for review. Another factor on the list of bases for performance review, which list is not intended to be exclusive, would be the existence of a clear disregard of, or pattern of non-adherence to, properly articulated and disseminated rules, procedures, precedents and other agency policy. Such performance review systems need not involve quantitative measures or specific performance levels, but they should provide meaningful and useful feedback on performance.<sup>367</sup>

Conversely, ALJs should also have a mechanism for dealing with legitimate concerns about improper agency infringement of, or interference with, their decisional independence. Under the Conference's recommendation, each agency employing ALJs should set up a system for receiving and investigating allegations of such activity by agency management officials and, where warranted, referring them to the appropriate authorities for action.<sup>368</sup> OPM would have oversight responsibility, and could, upon request by an ALJ or at its own discretion, review an agency's response to such allegations, and recommend appropriate further action.

Under the Conference recommendation, the Chief ALJs' responsibilities would also include developing ALJ training and counseling programs designed to enhance professional capabilities and to remedy individual performance deficiencies, and, in appropriate cases, issuing reprimands or recommending disciplinary action.<sup>369</sup>

Recently, attention has been focused on allegations of prejudice against certain classes of litigants by some ALJs.<sup>370</sup> While there is no known evidence that such a problem is widespread, the Conference's view is it is important to have a mechanism for handling complaints or allegations relating to ALJ misconduct, including allegations of bias or prejudice. The Conference, therefore, recommends that Chief ALJs, either individually or through an ALJ peer review group, receive and investigate such complaints or allegations, and recommend appropriate corrective or disciplinary actions. To the extent practicable, such investigation and the processing of any corrective or disciplinary recommendation should be expedited to protect affected interests and create public confidence in the process. Where appropriate, consensual resolutions are encouraged. The Conference also recommends agencies publicize the existence of their complaint procedures, in published rules and procedures or in some other appropriate fashion, and inform complainants in a timely manner of the disposition of their complaints.

The Conference is also recommending OPM assign the various responsibilities relating to ALJs to a specific unit within that agency. Such a unit would, among other things, have responsibility for overseeing personnel, hiring and performance matters involving Chief ALJs,

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<sup>366</sup> See Conference Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR 305.86-7 (1992), at ¶2.

<sup>367</sup> Many states now use performance reviews for their state court judges and ALJs. The performance of Federal magistrate-judges is evaluated as a condition of reappointment. Even some Federal courts are beginning to experiment with evaluation of judges' performance.

<sup>368</sup> Such authorities might include OPM for certain lesser sanctions, and the Office of Special Counsel or MSPB in more serious cases.

<sup>369</sup> See 43 Op. Att'y Gen. 1 (1977) (discussing certain limitations on agency's authority to reprimand ALJs).

<sup>370</sup> See, e.g., U.S. GAO, Social Security: Racial Difference in Disability Decisions Warrants Further Investigation, GAO/HRD-92-56 (April 1992). Cf. Ninth Circuit, Gender Bias Task Force, Preliminary Report (Discussion Draft) (July 1992) at 93-103 (discussing gender bias issues relating to disability determinations).

thus providing them additional insulation from agency pressures. Because of the increased importance of the position of Chief ALJ under this proposal, Congress also should consider making the position subject to a term appointment, as it has done for Chief Judges of United States District Courts.

The Conference also recommends proceedings before the Merit Systems Protection Board involving charges against ALJs be heard by a three-judge panel. Judging administrative law judges is a sensitive process, and the benefit of collegial decision making in this context seems worth the added cost. The panel should be selected from a pool of ALJs. Currently, MSPB has only one ALJ. So long as this is the case, the pool should consist of ALJs from other agencies, but the panel in a particular case should not involve ALJs from the same agency as the respondent ALJ.

### **Policy Articulation**

As discussed, the APA model of agency decision making is based on the use of independent ALJs to find facts and to apply agency policy to those facts. This system requires granting ALJs independence as fact finders, but it also must ensure agency policymakers are able to establish policies in an efficient manner for application by ALJs in individual cases. The methods available to agencies include promulgation of rules of general applicability, the use of a system of precedential decision,<sup>371</sup> or other appropriate practices, such as proper use of policy statements.<sup>372</sup> Such policy statements must be properly disseminated.

Where the agency has made its policies known in an appropriate fashion, ALJs and AJs are bound to apply them in individual cases. Policymaking is the realm of the agency, and the ALJ's (or AJ's) role is to apply such policies to the facts the judge finds in an individual case.

### **The Concept of an ALJ Corps**

There has been over the last decade considerable discussion of the concept of an ALJ corps. Although there have been differences among the specific proposals, the concept in general includes separating ALJs from individual agencies, and placing them in a new, separate agency. Recent legislative proposals provided, among other things, that new ALJs would be selected by a chief judge of the corps, and that ALJs would be divided into several general subject matter divisions (such as health and benefits; safety and environment; and communications, public utility and transportation regulation).<sup>373</sup>

The Conference discussed these recent legislative proposals to establish a centralized ALJ corps as a means of handling some of the issues addressed in this recommendation. Some of these recommendations are independent of such proposals; others are inconsistent with them. The Conference concluded there is no basis at this time for structural changes more extensive than those proposed here.

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<sup>371</sup> See Conference Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR 305.89-8 (1992) ¶1 at n. 2.

<sup>372</sup> See Conference Recommendation 92-2, "Agency Policy Statements," 57 FR 30101, 30103 (1992), to be codified at 1 CFR 305.92-2.

<sup>373</sup> See S. 826 and H.R. 3910, 102d Cong.

## Recommendation

### I. Congressionally Mandated Use of ALJs and AJs<sup>374</sup>

A. When Congress considers new or existing programs that involve agency on-the-record adjudications, it should seek to preserve the uniformity of process and of qualifications of presiding officers contemplated by the APA, by providing for the use of administrative law judges (ALJs) in all appropriate circumstances.<sup>375</sup> To further this goal, Congress should consider converting certain existing administrative judge (AJ) positions<sup>376</sup> to ALJ positions. In determining the appropriateness of converting existing AJ positions to ALJ status and of requiring the use of ALJs in particular types of new adjudications, Congress should consider the following factors, if present, as indicia to weigh in favor of requiring ALJ status:

1. The cases to be heard and decided are likely to involve:

- a. Substantial impact on personal liberties or freedom;
- b. Orders that carry with them a finding of criminal-like culpability;
- c. Imposition of sanctions with substantial economic effect; or
- d. Determination of discrimination under civil rights or other analogous laws.

2. The procedures established by statute or regulation for the cases heard and decided are, or would be, the functional equivalent of APA formal hearings.

3. The deciders in such cases are, or ought to be, lawyers--taking into consideration the possibility that some programs might require other types of specialized expertise on the part of adjudicators or on panels of adjudicators.

4. Those incumbent AJs in such cases who are required to be lawyers already meet standards for independence, selection, experience, and compensation that approximate those accorded to ALJs.

B. When Congress determines it should require ALJs to preside over hearings in specific classes of existing federal agency adjudications at which ALJs do not now preside, it should specify that those AJs presiding over such proceedings at that time who can satisfy the Office of Personnel Management's eligibility qualifications for ALJs be eligible for immediate appointments as ALJs.

C. Congress should provide that OPM should no longer be responsible for reviewing and ruling on agency requests for additional ALJ positions. Decisions relating to an agency's need

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<sup>374</sup> The recommendations in this Part I are interdependent with those of Parts II and III urging improvements in the selection and evaluation processes for ALJs.

<sup>375</sup> This recommendation is not intended to be seen as encouraging increased formalization of administrative adjudicatory processes.

<sup>376</sup> The term "administrative judge," as used here, includes non-ALJ hearing officers, whatever their title, who preside at adjudicatory hearings.

for more or fewer ALJ positions should be made by the individual agencies through the normal resource allocation process.

## **II. ALJ Selection**

A. Congress should authorize where required, and OPM should establish, a process for the selection of qualified ALJs by federal agencies that contains the following elements:

1. OPM should continue to administer the process for determining whether applicants are qualified to be on the register of those eligible for ALJ positions and for rating such applicants. OPM should ensure that all applicants appearing on the register are in fact qualified to fulfill the duties of an ALJ under applicable law, including that they have the capability and willingness to provide impartial, independent fact finding and decision making. To the extent that this may require revising the examination process, OPM should make the appropriate changes.

2. Those applicants determined by OPM to be qualified should be listed on the register with their numerical scores noted. Agencies seeking to fill ALJ positions should be allowed to request a certificate containing the names of those applicants whose numerical ratings place them in the highest-ranking 50 percent of the register of eligible applicants. Agencies should have the discretion to request a certificate with a smaller number of percentage of the register. Agencies should also be given access to a computerized database containing the complete application files of those applicants on the certificate.

3. A hiring agency should be permitted to select any applicant from the certificate who, in the agency's opinion, possesses the qualifications for the particular position to be filled. An agency may request that OPM provide an additional number of names upon a showing of exceptional circumstances.

B. OPM and the hiring agencies should give a high priority to expanding recruitment of women and minority applicants for ALJ positions. OPM also should review its ALJ application criteria to determine whether its current method of assessing litigation experience is appropriate.

C. OPM immediately should implement Parts II (A)(1) and (B), which may involve revisions to the examination or scoring process. Pending implementation of the other recommendations in this Part, OPM should open the register application process as soon as possible, and keep it open continuously.

D. In order to implement the proposals in paragraphs II (A) and (B) above, Congress should abolish the veterans' preference in ALJ selection.

## **III. ALJ Evaluation and Discipline**

Congress should authorize, where necessary, and OPM and the agencies that employ ALJs should establish, the following processes for assisting ALJs and the agencies that employ them to carry out their responsibilities to the public and to individual parties:

### *A. Organization*

1. OPM should assign a specific unit the responsibility for (a) overseeing those matters concerning the selection of ALJs, (b) overseeing all personnel, hiring and performance matters

that involve Chief ALJs, (c) acting on allegations of improper interference with decisional independence of ALJs, (d) conducting regular performance reviews of Chief ALJs, and (e) periodically publishing reports on the effectiveness with which OPM's responsibilities are performed and seeking recommendations as to how the program may be improved.

2. Each agency that employs more than one ALJ should designate a Chief ALJ, who is given the responsibility within the agency to do the tasks assigned to the Chief ALJ under this Part III.<sup>377</sup>

3. OPM should provide guidance and assistance to aid Chief ALJs fulfilling the responsibilities given to them under this Part III.

4. OPM and the agencies should ensure that Chief ALJs are insulated from improper agency influence when carrying out the responsibilities described in this Part III.<sup>378</sup>

#### *B. Evaluation and Training*

Chief ALJs should be given the authority to:

1. Develop and oversee a training and counseling program for ALJs designed to enhance professional capabilities and to remedy individual performance deficiencies.

2. Coordinate the development of case processing guidelines, with the participation of other agency ALJs, agency managers and, where available, competent advisory groups.

3. Conduct regular ALJ performance reviews based on relevant factors, including case processing guidelines, judicial comportment and demeanor, and the existence, if any, of a clear disregard of or pattern of non-adherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy.

4. Individually, or through involvement of an ALJ peer review group established for this purpose, provide appropriate professional guidance, including oral or written reprimands, and, where good cause appears to exist, recommend disciplinary action against ALJs be brought by the employing agency at the Merit Systems Protection Board (MSPB) based on such performance reviews.

#### *C. Complaints About ALJs*

Each agency that employs ALJs should set up a system for receiving and evaluating complaints or allegations of misconduct by an ALJ, including bias or prejudice.

1. The Chief ALJ in each agency, individually or through involvement of an ALJ peer review group established for this purpose, should be given responsibility for receiving and investigating such complaints.

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<sup>377</sup> In agencies with large numbers of ALJs, the Chief ALJ might appropriately delegate some or all such responsibility to deputy or regional chief ALJs.

<sup>378</sup> Congress also should consider making the position of Chief ALJ subject to a term appointment. This suggestion does not result from a finding by the Conference that any number of current Chief ALJs are not functioning effectively. The Conference notes, however, that Chief Judges of United States District Courts are subject to term appointments and believes it is appropriate to consider whether a similar limitation should apply to Chief ALJs.

2. If a Chief ALJ determines that ALJ misconduct occurred, the Chief ALJ should recommend the agency take appropriate corrective action, or, in appropriate cases, recommend that disciplinary action against the ALJ be brought by the agency at the MSPB.

3. If a Chief ALJ determines further investigation by another authority is warranted, he or she should refer the case to that authority.

4. Each agency should make known to interested persons in an appropriate fashion the existence of such complaint procedure.

5. Where allegations of misconduct implicate a Chief ALJ, they should be referred to OPM for such investigation and recommended action.

6. Complainants should be given notice of the disposition of their complaints.

#### *D. Complaints by ALJs*

Each agency that employs ALJs should set up a system for receiving and investigating allegations of unlawful agency infringement on ALJ decisional independence or other improper interference in the fulfillment of ALJ responsibilities. Such a system should be subject to OPM oversight. Where investigation reveals the probable occurrence of such an impropriety, the matter should be referred to the appropriate authority for review and recommended action designed to remedy the situation and prevent recurrence, including the issuance of oral or written reprimands and other appropriate sanctions.

#### *E. MSPB Panels*

MSPB should assign cases involving charges against ALJs to a three-judge panel of ALJs drawn from a pool. No judge on the panel should be from the same agency as the respondent ALJ.

### **IV. Policy Articulation**

To ensure that ALJs and affected persons are aware of their responsibilities, agencies should articulate their policies through rules of general applicability, a system of precedential decisions, or other appropriate practices.<sup>379</sup> Congress, the President, and the courts should encourage such policy articulation.

### **V. The Concept of an ALJ Corps**

Congress should not at this time make structural changes more extensive than those proposed here, such as those in recent legislative proposals to establish a centralized corps of ALJs.

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<sup>379</sup> See generally Conference Recommendation 71-2, "Articulation of Agency Policies," 1 CFR 305.71-2 (1992); Conference Recommendation 87-7, "A New Role for the Social Security Appeals Council," 1 CFR 305.87-7 (1992); Conference Recommendation 89-8, "Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions," 1 CFR 305.89-8 (1992); Conference Recommendation 92-2, "Agency Policy Statements," 57 FR 30101, 30103 (1992), to be codified at 1 CFR 305.92-2.

**Citations:**

57 FR 61760 (December 29, 1992)

\_\_ FR \_\_\_\_ (2011)

1992 ACUS 28 (vol. 1)

**APPENDIX C: COST ELEMENTS: VALUES & SOURCES**

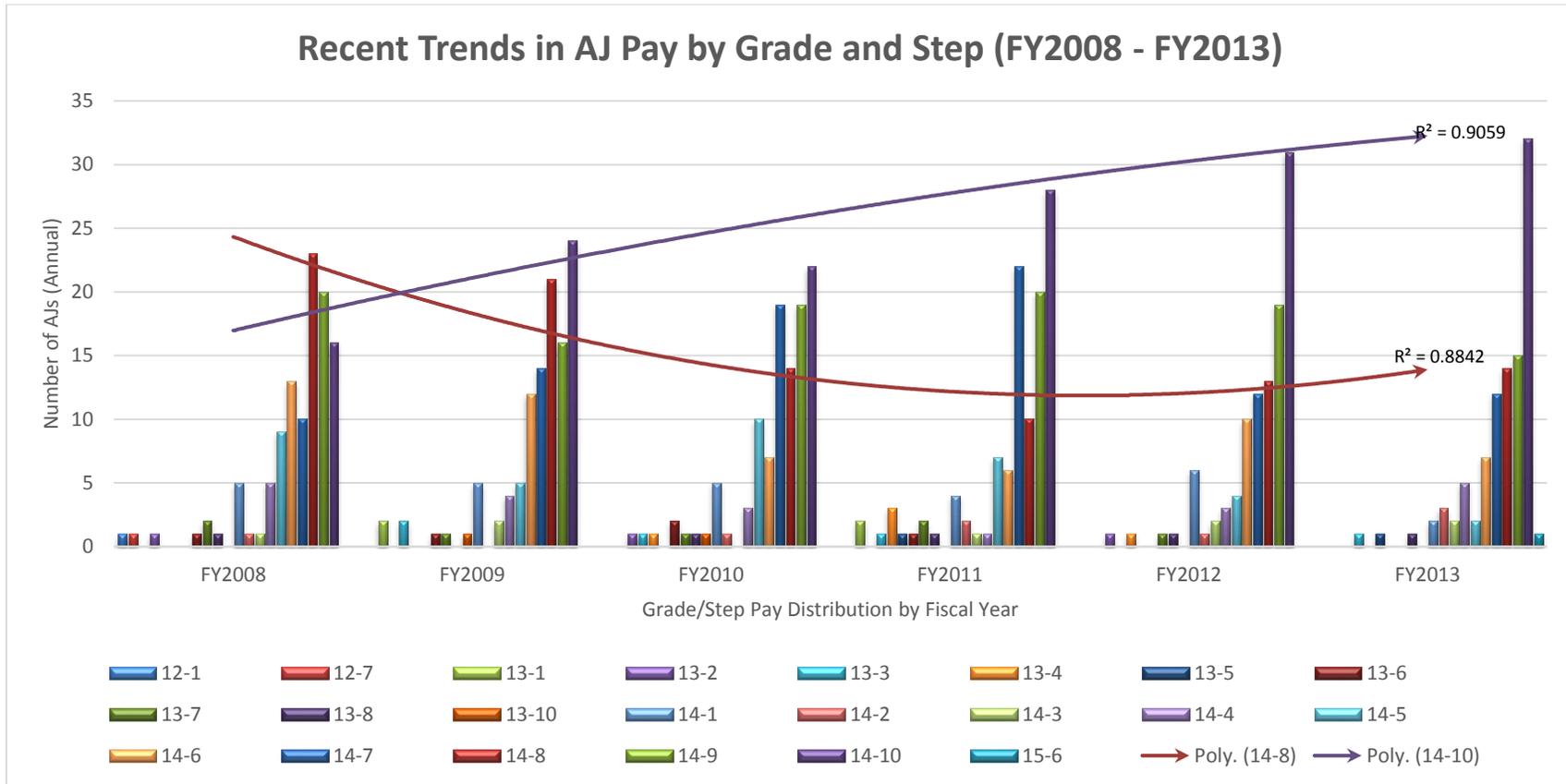
**1. Cost Elements: Summary Table**

Cost Elements	Value(s)	Sources & Notes
<i>Adjudicators:</i>		
<i>EEOC Adjudicators (AJ &amp; ALJ) – Total Number</i>	95	Base value for number of EEOC adjudicators derived from total of number of full-time EEOC AJs (89) plus full-time equivalents (FTEs) of hours worked by part-time EEOC AJs (6). <i>See</i> Summary EEOC AJ Data (2008 - 2013) provided to ACUS (Nov. 4, 2013); OMB Circular A-76 (2003) (providing FTE conversion factor of 1,776 annual hours).
<i>EEOC Adjudicators (AJ &amp; ALJ) – Projected Growth Rate</i>	Low=(-7); Medium=No Change; High=(+16)	Medium scenario assumes no change in the number of EEOC adjudicators over the 10-year term. The low and high scenarios respectively assume a modest net decline (-7) or increase (+16) in adjudicators over the same period. For the high scenario, the projected number of adjudicators as of Year 10 (i.e., 111) approximates the total annual number of EEOC adjudicators (full-time judges + FTEs of part-time judges) in the 2008 - 2011 period.
<i>AJ Pay Distribution</i>	GS-13 (6%); GS-14 (93%); GS-15 (1%) Low=Step 4; Medium=Step 7; High=Step 10	For grade distribution of AJs, <i>see</i> Summary EEOC AJ Data (2008 - 2013) provided to ACUS (Nov. 4, 2013). With respect to within-grade steps, due to data limitations and need to simplify the cost modeling process, the pay distribution of adjudicators within GS Grades 13, 14, and 15 is assumed as follows for each of the three cost scenarios: Low=Step 4; Medium=Step 7; High=Step 10. The step levels for each cost scenario are drawn from EEOC-provided supplementary grade/step data for AJs for FYs 2008 - 2013. <i>See</i> Supplementary EEOC Data (2008 - 2013) provided to ACUS (Feb. 11, 2014); <i>see also</i> Appendix C.2 – Cost Estimates: Recent Trends in AJ Pay (FY2008 – FY2013) (graphical depiction of supplementary EEOC data).
<i>ALJ Pay Distribution</i>	<i>See</i> Appendix D (distribution of ALJs among AL-3/A, AL-3/C, AL-3/F & AL-2 pay rates under L/M/H scenarios)	Estimated ALJ pay distribution within the AL-3 level is modeled to reflect relative GS grade distribution of EEOC AJs in recent years (2008 - 20013). <i>See</i> EEOC AJ Data provided to ACUS (Nov. 4, 2013). The “high” scenario largely mirrors relative pay distribution of EEOC AJs among entry-level (AL-3/A = 6%), mid-range (AL-3/C = 93%), and senior (AL-3/F=1%) pay levels. The “low” scenario generally inverts the pay distributions in the high scenario (94%/6%/0%). The “medium” scenario strikes a middle-ground approach (60%/39%/1%) between the “high” and “low” scenarios. With respect to ALJ management, the low estimate assumes one Chief ALJ (AL-2), while the medium and high estimates additionally assume one or two Regional Chief ALJs (AL-2) respectively.

Cost Elements	Value(s)	Sources & Notes
<b>Salaries:</b>		
<i>GS Basic Pay Rates</i>	See Appendix B (GS-13, GS-14 & GS-15 basic pay)	See Exec. Order 13,641 (April 5, 2013), Schedule 1; OPM, "Salary Table 2013-GS" (2013).
<i>ALJ Basic Pay Rates</i>	See Appendix B (AL-3/A, AL-3/C, AL-3/F & AL-2 basic pay)	See Exec. Order 13,641 (April 5, 2013), Schedule 10; OPM, "Salary Table No. 2013-ALJ" (2013).
<i>GS Locality Pay Rates</i>	See Appendix B (GS-13, GS-14 & GS-15 basic pay)	Locality pay is based on median of locality pay for applicable GS grades/steps in pay areas (i.e., counties or other jurisdictions) in which EEOC district or field offices are currently located. See Exec. Order 13,641 (April 5, 2013), Schedule 9; OPM, "GS 2013 Locality Pay Tables" (2013).
<i>ALJ Locality Pay Rates</i>	See Appendix B (AL-3/A, AL-3/C, AL-3/F & AL-2 basic pay)	Locality pay is based on median of locality pay for applicable ALJ rate/level in pay areas (i.e., counties or other jurisdictions) in which EEOC district or field offices are currently located. See OPM, "2013 Locality Rates of Pay Administrative Law Judges" (2013).
<i>GS/ALJ Pay (Projected Growth Rates - Basic &amp; Locality Pay)</i>	Low=1.5% (Triennial); Medium=1.5% (Biennial); High=1.5% (Annual)	Projected federal pay growth rate (medium scenario) is based on average growth rates in recent years (2008 - 2013). "High" and "low" scenario growth rates respectively represent one year less or more between pay increases relative to "medium" scenario. Pay increases apportioned between basic pay (1%) and locality pay (0.5%). See, e.g., OPM, "Salary Table 2013-GS" (2013); Congressional Research Service, <i>Pay and Pension Increases Since 1969</i> (Jan. 2010).
<b>Benefits:</b>		
<i>FERS</i>	11.9% basic pay	See Congressional Research Service, RL30023, <i>Federal Employees' Retirement System: Budget and Trust Fund Issues 5</i> (June 2013); OPM, <i>Benefits Administration Letter No. 11-304</i> (June 2011).
<i>FEGLI</i>	33% of "Basic Insurance Amount" (.75¢ per \$1,000 basic pay)	See OPM, <i>FEGLI Program Booklet for Federal Employees 6</i> (Aug. 2004).
<i>TSP - Basic</i>	1% basic pay	See Congressional Research Service, RL30387, <i>Federal Employees' Retirement System: The Role of the Thrift Savings Plan 5</i> (March 2013).
<i>TSP - Matching (Statutory Agency Contribution)</i>	agency matching contribution up to 5% basic pay	See Congressional Research Service, RL30387, <i>Federal Employees' Retirement System: The Role of the Thrift Savings Plan 5</i> (March 2013).
<i>TSP - Matching (Projected Agency Matching Contribution)</i>	Low=1.9%; Medium=2.25%; High=2.63%	The "medium" estimate for agency matching contribution is based on the weighted historical average of recent deferral rates by participating employees covered by the Federal Employee Retirement System. See Federal Retirement Thrift Investment Board, <i>Participant Behavior and Demographics: Analysis of 2006 - 2010</i> (2013). "Low" and "high" values represent respectively slightly lower and higher participation/deferral rates (by about 5%) relative to "medium" scenario.

Cost Elements	Value(s)	Sources & Notes
<i>Other Costs:</i>		
<i>OPM ALJ Fee</i>	\$1,633	<i>See Social Security Administration, Office of Inspector General, A-05-12-22144, Interagency Agreements with Office of Personnel Management for ALJ Services 6 tbl. 1 (Feb. 2013).</i>
<i>OPM ALJ Fee (Projected Growth Rates)</i>	Low=5%; Medium=7%; High=9%	Projected growth rate (“medium” scenario) represents median annual increase in OPM ALJ fees in recent years (2005 - 2012). <i>See SSA OIG, Interagency Agreements with OPM for ALJ Services 6 tbl. 1 (Feb. 2013).</i> Growth rates for “low” and “high” scenarios represent respectively 2% lower and 2% higher annual fee increase relative to “medium” scenario.
<i>AJ Performance (Cash) Awards</i>	Low = 4-yr. weighted avg. (biennial); Medium = 4-yr. weighted avg. (2 out of 3 years); High = 4-yr. weighted avg. (annual)	EEOC did not grant any performance (cash) awards to AJs in FY 2012 and FY 2013; however, the agency did grant such awards in FYs 2008 - 2011. <i>See Summary EEOC AJ Awards Data (2008 - 10) provided to ACUS (Feb. 11, 2014).</i> It is not known when, and to what extent, EEOC will resume granting cash awards to AJs. The Medium scenario assumes cash awards will resume in Year 1, and continue to be awarded two out of every 3 years thereafter. Low scenario assumes cash awards will resume in Year 2, and continue to be awarded biennially thereafter. High scenario assumes cash awards will resume in Year 1 and continue to be awarded annually. Amount of performance (cash) awards based on 4-year weighted average for cash awards collectively granted to AJs on an annual basis in FYs 2008 through 2011. [Note: By law, ALJs are prohibited from receiving performance or incentive awards.]

## 2. Cost Elements: Recent Trends in AJ Pay



(*Note:* Trend lines for GS-14/8 (red) and GS-14/10 (purple) based on formulae using second order polynomials. R-squared values depict the degree of “fit” between the trend lines and data, with values at or near “1” showing the greatest reliability.)

**APPENDIX D: FEDERAL PAY RATES: CURRENT & PROJECTED GROWTH RATES**

<b>2013 General Schedule (GS) Basic Pay Rates</b>			
	<b>Step 4</b>	<b>Step 7</b>	<b>Step 10</b>
<b>GS 13</b>	\$78,841	\$86,008	\$93,175
<b>GS 14</b>	\$93,166	\$101,635	\$110,104
<b>GS 15</b>	\$109,591	\$119,554	\$129,517

<b>2013 General Schedule (GS) Locality Pay Rates (Median of US Jurisdictions with EEOC Offices)</b>			
	<b>Step 4</b>	<b>Step 7</b>	<b>Step 10</b>
<b>GS 13</b>	\$95,137.00	\$103,786.00	\$112,434.00
<b>GS 14</b>	\$112,423.00	\$122,643.00	\$132,862.00
<b>GS 15</b>	\$132,243.00	\$144,266.00	\$155,500.00

<b>2013 ALJ Basic Pay Rates</b>	
<b>AL-3A</b>	\$103,900
<b>AL-3C</b>	\$119,900
<b>AL-3F</b>	\$143,700
<b>AL-2</b>	\$151,800

<b>2013 ALJ Locality Pay Rates (Median of US Jurisdictions with EEOC Offices)</b>	
<b>AL-3A</b>	\$125,501
<b>AL-3C</b>	\$144,827
<b>AL-3F</b>	\$165,300
<b>AL-2</b>	\$165,300

<b>Federal Pay (Locality &amp; Basic) – Projected Growth Rates (Year 1 - Year 10)</b>	
<b>Low</b>	1.5% triennially
<b>Medium</b>	1.5% biennially
<b>High</b>	1.5% annually

**APPENDIX E: EEOC ADJUDICATORS: PROJECTED GROWTH RATES**

<b>Projected EEOC Adjudicator Growth Rates (Year 2 - Year 10)</b>	
<b>High</b>	Annual (+1) & Biennial (+2)
<b>Medium</b>	No change
<b>Low</b>	Biennial (-1)

<b>Projected ALJ Pay Distribution (Year 1)</b>			
	<b>Low</b>	<b>Medium</b>	<b>High</b>
<b>AL-3A</b>	92%	60%	6%
<b>AL-3C</b>	7%	37%	90%
<b>AL-3F</b>	0%	1%	1%
<b>AL-2</b>	1%	2%	3%

**Projected Number of EEOC Adjudicators**

	<b>Low</b>	<b>Medium</b>	<b>High</b>
<b>Current (2013)</b>	--	95	--
<b>Year 1</b>	93	95	98
<b>Year 2</b>	92	95	99
<b>Year 3</b>	92	95	101
<b>Year 4</b>	91	95	102
<b>Year 5</b>	91	95	104
<b>Year 6</b>	90	95	105
<b>Year 7</b>	90	95	107
<b>Year 8</b>	89	95	108
<b>Year 9</b>	89	95	110
<b>Year 10</b>	88	95	111

**APPENDIX F: EEOC ADJUDICATORS: OTHER COSTS**

<b>Projected EEOC AJ Performance (Cash) Awards</b>	
<b>ANNUAL AWARD AMOUNTS</b>	
<b>All Scenarios</b>	<b>Historical 4-yr. Weighted Average for EEOC AJ Awards (FY 2008 - FY 2011)</b>
<b>AWARD FREQUENCY</b>	
<b>High</b>	<b>Annual</b>
<b>Medium</b>	<b>2 out of every 3 years</b>
<b>Low</b>	<b>Biennial</b>

<b>OPM Pro Rata ALJ Fees – Projected Growth Rates (Year 1 - Year 10)</b>	
<b>Low</b>	<b>5%</b>
<b>Medium</b>	<b>7%</b>
<b>High</b>	<b>9%</b>

**APPENDIX G: PROJECTED PAY DISTRIBUTION OF EEOC ADJUDICATORS: ALL SCENARIOS**

<b>Projected AJ GS Grade/Step Distribution (Y1 - Y10) (Low)</b>										
	<b>Y1</b>	<b>Y2</b>	<b>Y3</b>	<b>Y4</b>	<b>Y5</b>	<b>Y6</b>	<b>Y7</b>	<b>Y8</b>	<b>Y9</b>	<b>Y10</b>
<b>GS-13</b>	6	5	5	5	5	5	5	5	5	5
<b>GS-14</b>	86	86	86	85	85	84	84	83	83	82
<b>GS-15</b>	1	1	1	1	1	1	1	1	1	1
<b>Projected AJ GS Grade/Step Distribution (Y1 - Y10) (Medium)</b>										
	<b>Y1</b>	<b>Y2</b>	<b>Y3</b>	<b>Y4</b>	<b>Y5</b>	<b>Y6</b>	<b>Y7</b>	<b>Y8</b>	<b>Y9</b>	<b>Y10</b>
<b>GS-13</b>	6	6	6	6	6	6	6	6	6	6
<b>GS-14</b>	88	88	88	88	88	88	88	88	88	88
<b>GS-15</b>	1	1	1	1	1	1	1	1	1	1
<b>Projected AJ GS Grade/Step Distribution (Y1 - Y10) (High)</b>										
	<b>Y1</b>	<b>Y2</b>	<b>Y3</b>	<b>Y4</b>	<b>Y5</b>	<b>Y6</b>	<b>Y7</b>	<b>Y8</b>	<b>Y9</b>	<b>Y10</b>
<b>GS-13</b>	6	6	6	6	6	6	6	6	6	7
<b>GS-14</b>	91	92	94	95	97	98	100	101	102	103
<b>GS-15</b>	1	1	1	1	1	1	1	1	1	1
<b>ALJ ~ Projected Level/Rate Distribution (Y1 - Y10) (Low)</b>										
	<b>Y1</b>	<b>Y2</b>	<b>Y3</b>	<b>Y4</b>	<b>Y5</b>	<b>Y6</b>	<b>Y7</b>	<b>Y8</b>	<b>Y9</b>	<b>Y10</b>
<b>AL-3A</b>	87	47	11	6	6	6	6	6	6	6
<b>AL-3C</b>	5	43	79	77	69	61	53	47	42	37
<b>AL-3F</b>	0	1	1	7	15	22	30	35	40	44
<b>AL-2</b>	1	1	1	1	1	1	1	1	1	1
<b>ALJ ~ Projected Level/Rate Distribution (Y1 - Y10) (Medium)</b>										
	<b>Y1</b>	<b>Y2</b>	<b>Y3</b>	<b>Y4</b>	<b>Y5</b>	<b>Y6</b>	<b>Y7</b>	<b>Y8</b>	<b>Y9</b>	<b>Y10</b>
<b>AL-3A</b>	57	27	5	5	4	4	5	5	4	4
<b>AL-3C</b>	35	58	73	62	53	43	32	30	29	27
<b>AL-3F</b>	1	8	15	26	36	46	56	58	60	62
<b>AL-2</b>	2	2	2	2	2	2	2	2	2	2
<b>Projected ALJ Level/Rate Distribution (Y1 - Y10) (High)</b>										
	<b>Y1</b>	<b>Y2</b>	<b>Y3</b>	<b>Y4</b>	<b>Y5</b>	<b>Y6</b>	<b>Y7</b>	<b>Y8</b>	<b>Y9</b>	<b>Y10</b>
<b>AL-3A</b>	6	5	4	5	3	3	4	4	3	3
<b>AL-3C</b>	88	72	57	39	25	15	14	13	14	14
<b>AL-3F</b>	1	19	37	55	73	84	86	88	90	91
<b>AL-2</b>	3	3	3	3	3	3	3	3	3	3

## APPENDIX H: SAMPLE ANNUAL (INCREMENTAL) COST EQUATION

In simplified form, the incremental cost equation for any given year (i.e., Year 1 - Year 10) is as follows:

### *Incremental Costs of Using ALJs in Year X =*

[(# of ALJs x Locality Pay x L/M/H Projected Growth Rate) + (# of ALJs x FERS benefits) + (# of ALJs x FEGLI benefits) + (# of ALJs x TSP-Basic benefits) + (# of ALJs x TSP-Matching benefits x L/M/H Projected Deferral Rate) + (# ALJs x OPM ALJ Fee x L/M/H Growth Rate)]

*minus*

[(# of AJs x Locality Pay x L/M/H Growth Rate) + (# of AJs x FERS benefits) + (# of AJs x FEGLI benefits) + (# of AJs x TSP-Basic benefits) + (# of AJs x TSP-Matching benefits x L/M/H Projected Deferral Rates) + (AJ Performance (Cash) Awards)]

**APPENDIX I: ANNUAL COSTS: HIGH, PRIMARY, AND LOW SCENARIOS AT 3% AND 7% DISCOUNT RATES**

**Annual Costs (Low Scenario)**

	Year 1 (2015)	Year 2 (2016)	Year 3 (2017)	Year 4 (2018)	Year 5 (2019)	Year 6 (2020)	Year 7 (2021)	Year 8 (2022)	Year 9 (2023)	Year 10 (2024)
Total Incremental Costs	\$1,633,488	\$2,440,397	\$3,283,939	\$3,482,811	\$3,731,501	\$3,827,439	\$4,147,130	\$4,144,807	\$4,319,632	\$4,366,053
Discount Rate - 3%	\$1,633,488	\$2,367,185	\$3,086,903	\$3,204,186	\$3,321,035	\$3,291,598	\$3,483,589	\$3,357,293	\$3,412,509	\$3,361,861
Discount Rate - 7%	\$1,633,488	\$2,269,569	\$2,857,027	\$2,855,905	\$2,835,940	\$2,717,482	\$2,778,577	\$2,569,780	\$2,505,387	\$2,357,669

**Annual Costs (Medium Scenario)**

	Year 1 (2015)	Year 2 (2016)	Year 3 (2017)	Year 4 (2018)	Year 5 (2019)	Year 6 (2020)	Year 7 (2021)	Year 8 (2022)	Year 9 (2023)	Year 10 (2024)
Total Incremental Costs	\$1,115,002	\$1,953,573	\$2,677,696	\$2,911,502	\$3,206,586	\$3,510,885	\$3,719,137	\$3,780,874	\$3,931,831	\$3,979,601
Discount Rate - 3%	\$1,115,002	\$1,894,966	\$2,517,034	\$2,678,582	\$2,853,862	\$3,019,361	\$3,124,075	\$3,062,508	\$3,106,147	\$3,064,293
Discount Rate - 7%	\$1,115,002	\$1,816,823	\$2,329,595	\$2,387,432	\$2,437,006	\$2,492,729	\$2,491,822	\$2,344,142	\$2,280,462	\$2,148,984

**Annual Costs (High Scenario)**

	Year 1 (2015)	Year 2 (2016)	Year 3 (2017)	Year 4 (2018)	Year 5 (2019)	Year 6 (2020)	Year 7 (2021)	Year 8 (2022)	Year 9 (2023)	Year 10 (2024)
Total Incremental Costs	\$1,048,256	\$1,545,003	\$2,062,892	\$2,526,909	\$3,016,054	\$3,276,097	\$3,498,851	\$3,602,370	\$3,764,516	\$3,849,326
Discount Rate - 3%	\$1,048,256	\$1,498,653	\$1,939,118	\$2,324,757	\$2,684,288	\$2,817,443	\$2,939,035	\$2,917,920	\$2,973,968	\$2,963,981
Discount Rate - 7%	\$1,048,256	\$1,436,853	\$1,794,716	\$2,072,066	\$2,292,201	\$2,326,029	\$2,344,230	\$2,233,469	\$2,183,419	\$2,078,636

**APPENDIX J: BREAKDOWN OF ANNUAL COSTS: PRIMARY SCENARIO AT 7% DISCOUNT RATE**

<b>Year</b>	<b>Salary</b>	<b>Benefits</b>	<b>Other Costs (AJ Awards &amp; OPM ALJ Fees)</b>	<b>Annual Total</b>	<b>Annual Costs Per ALJ</b>
Year 1	\$832,377	\$151,715	\$130,910	\$1,115,002	\$11,737
Year 2	\$1,449,948	\$233,564	\$133,311	\$1,816,823	\$19,124
Year 3	\$1,862,677	\$290,725	\$176,193	\$2,329,595	\$24,522
Year 4	\$1,942,140	\$307,355	\$137,938	\$2,387,432	\$25,131
Year 5	\$1,981,780	\$317,930	\$137,296	\$2,437,006	\$25,653
Year 6	\$1,998,938	\$323,513	\$170,278	\$2,492,729	\$26,239
Year 7	\$2,022,319	\$331,802	\$137,700	\$2,491,822	\$26,230
Year 8	\$1,897,294	\$311,714	\$135,134	\$2,344,142	\$24,675
Year 9	\$1,819,420	\$300,304	\$160,738	\$2,280,462	\$24,005
Year 10	\$1,716,607	\$301,250	\$131,128	\$2,148,984	\$22,621

**APPENDIX K: BREAKDOWN OF ANNUAL COSTS: HIGH SCENARIO AT 7% DISCOUNT RATE**

<b>Year</b>	<b>Salary</b>	<b>Benefits</b>	<b>Other Costs (AJ Awards &amp; OPM ALJ Fees)</b>	<b>Annual Total</b>	<b>Annual Costs Per ALJ</b>
Year 1	\$746,249	\$160,103	\$141,904	\$1,048,256	\$10,696
Year 2	\$1,073,001	\$214,459	\$149,393	\$1,436,853	\$14,514
Year 3	\$1,372,358	\$264,438	\$157,920	\$1,794,716	\$17,769
Year 4	\$1,601,927	\$305,217	\$164,921	\$2,072,066	\$20,314
Year 5	\$1,779,969	\$342,581	\$169,651	\$2,292,201	\$22,040
Year 6	\$1,799,503	\$353,496	\$173,031	\$2,326,029	\$22,153
Year 7	\$1,823,134	\$342,186	\$178,910	\$2,344,230	\$21,909
Year 8	\$1,729,347	\$325,326	\$178,797	\$2,233,469	\$20,680
Year 9	\$1,676,588	\$325,333	\$181,498	\$2,183,419	\$19,849
Year 10	\$1,598,405	\$300,411	\$179,820	\$2,078,636	\$18,726

**APPENDIX L: BREAKDOWN OF ANNUAL COSTS: LOW SCENARIO AT 7% DISCOUNT RATE**

<b>Year</b>	<b>Salary</b>	<b>Benefits</b>	<b>Other Costs (AJ Awards &amp; OPM ALJ Fees)</b>	<b>Annual Total</b>	<b>Annual Costs Per ALJ</b>
Year 1	\$1,277,635	\$188,453	\$167,400	\$1,633,488	\$17,564
Year 2	\$1,883,415	\$266,541	\$119,613	\$2,269,569	\$24,669
Year 3	\$2,370,221	\$328,327	\$158,479	\$2,857,027	\$31,055
Year 4	\$2,400,042	\$338,112	\$117,750	\$2,855,905	\$31,384
Year 5	\$2,350,150	\$336,405	\$149,386	\$2,835,940	\$31,164
Year 6	\$2,275,066	\$330,079	\$112,336	\$2,717,482	\$30,194
Year 7	\$2,302,434	\$335,041	\$141,102	\$2,778,577	\$30,873
Year 8	\$2,143,609	\$319,233	\$106,939	\$2,569,780	\$28,874
Year 9	\$2,065,573	\$309,731	\$130,082	\$2,505,387	\$28,150
Year 10	\$1,959,852	\$297,170	\$100,647	\$2,357,669	\$26,792

## **APPENDIX M: MSPB ADMINISTRATIVE JUDGE POSITION DESCRIPTION**

### **MSPB—Administrative Judges/Hearing Examiners—Job Duties**

If the judge is an attorney-examiner, or AJ, his or her duties are as follows: “The Administrative Judge’s (AJ) principal duty is to adjudicate appeals. As part of this process, the AJ must perform the following: Conduct prehearing and status conferences in order to explore the possibility of settlement and to narrow and simplify the issues in the case; advise the parties with regard to their respective burden of proof, duties, and responsibilities; oversee the discovery process; advise the parties with respect to settlement negotiations and provide them with help in facilitating that process; conduct hearings (including convening the hearing as appropriate, regulating the course of the hearing, maintaining decorum and excluding any person from the hearing for good reason); and issue initial decisions. The AJ has significant discretion in managing his/her caseload in accordance with Board Policy concerning quality, production, and timeliness. The AJ’s initial decision may form the bases for subsequent precedential Board or court decisions. Depending upon the result of the case, initial decisions also can have significant and lasting effects on the careers and retirements of the affected individuals. The above description of duties represents the position of an Administrative Judge who is at the full performance level, routinely assigned the most complicated and sensitive cases.”

General Attorney Series (0905)—Grade Range GS-13/15

*Source:* MERIT SYS. PROT. BD., JOB ANNOUNCEMENT NO. MSPB-EXE-2013-0005 (Sept. 2013), available at <https://www.usajobs.gov/GetJob/ViewDetails/351586400>.

## **APPENDIX N: ORGANIZATIONAL CHARTS**

This appendix includes organizational charts for the following agencies that employ non-ALJ adjudicators:

1. Social Security Administration (SSA)
2. Department of Justice (DOJ)
3. DOJ's Executive Office of Immigration Review (EOIR)
4. Department of Transportation's (DOT) Office of Hearings
5. Department of Interior (DOI)—Assistant Secretary of Policy, Management, and Budget
6. DOI Office of Hearings and Appeals
7. Department of Labor (DOL)—Office of the Secretary of Labor
8. Merit Systems Protection Board (MSPB)
9. Railroad Retirement Board (RRB)
10. United States Department of Agriculture (USDA)
11. USDA's National Appeals Division (NAD)

SOCIAL SECURITY ADMINISTRATION

February 3, 2014

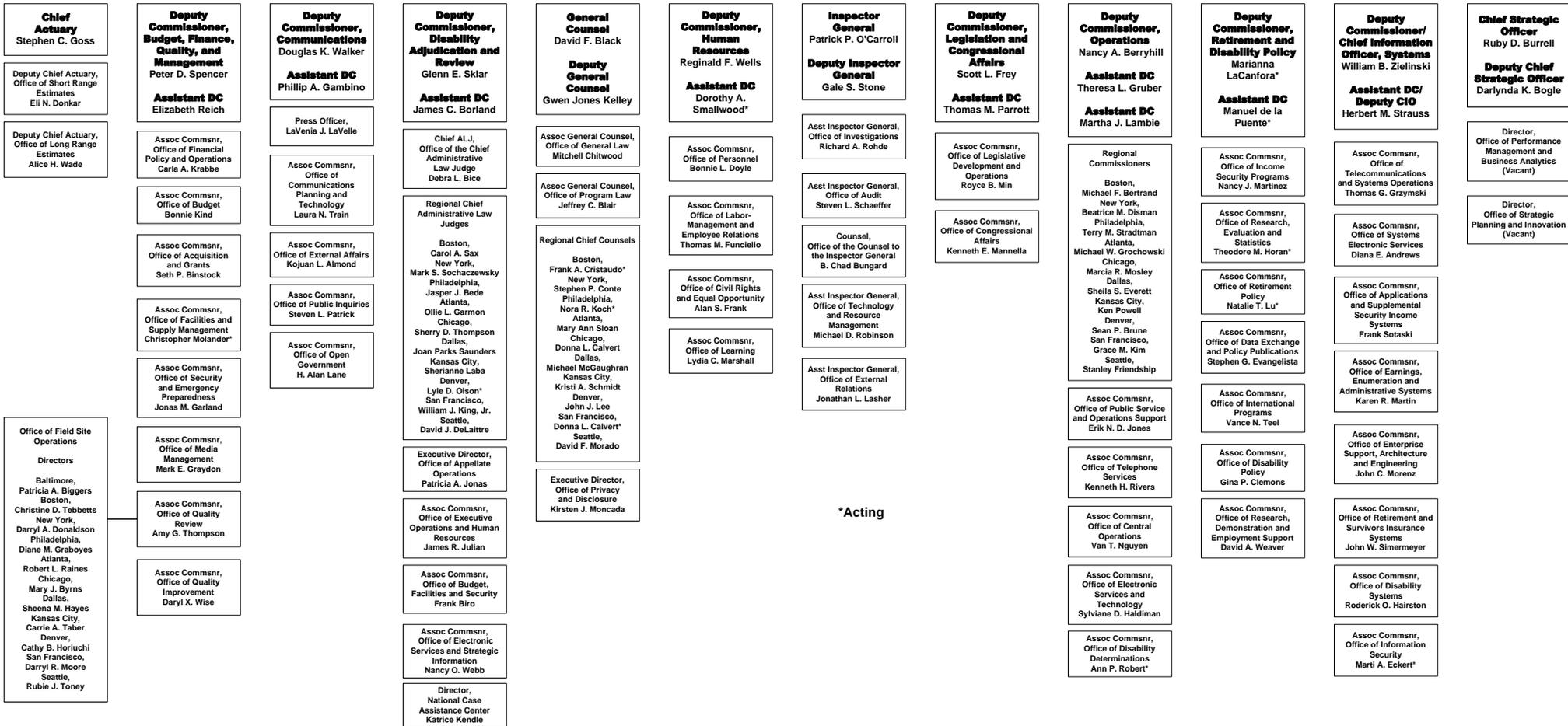
**Commissioner**  
**Carolyn W. Colvin\***

**Deputy Commissioner**  
 Carolyn W. Colvin

**Chief of Staff**  
 James A. Kissko

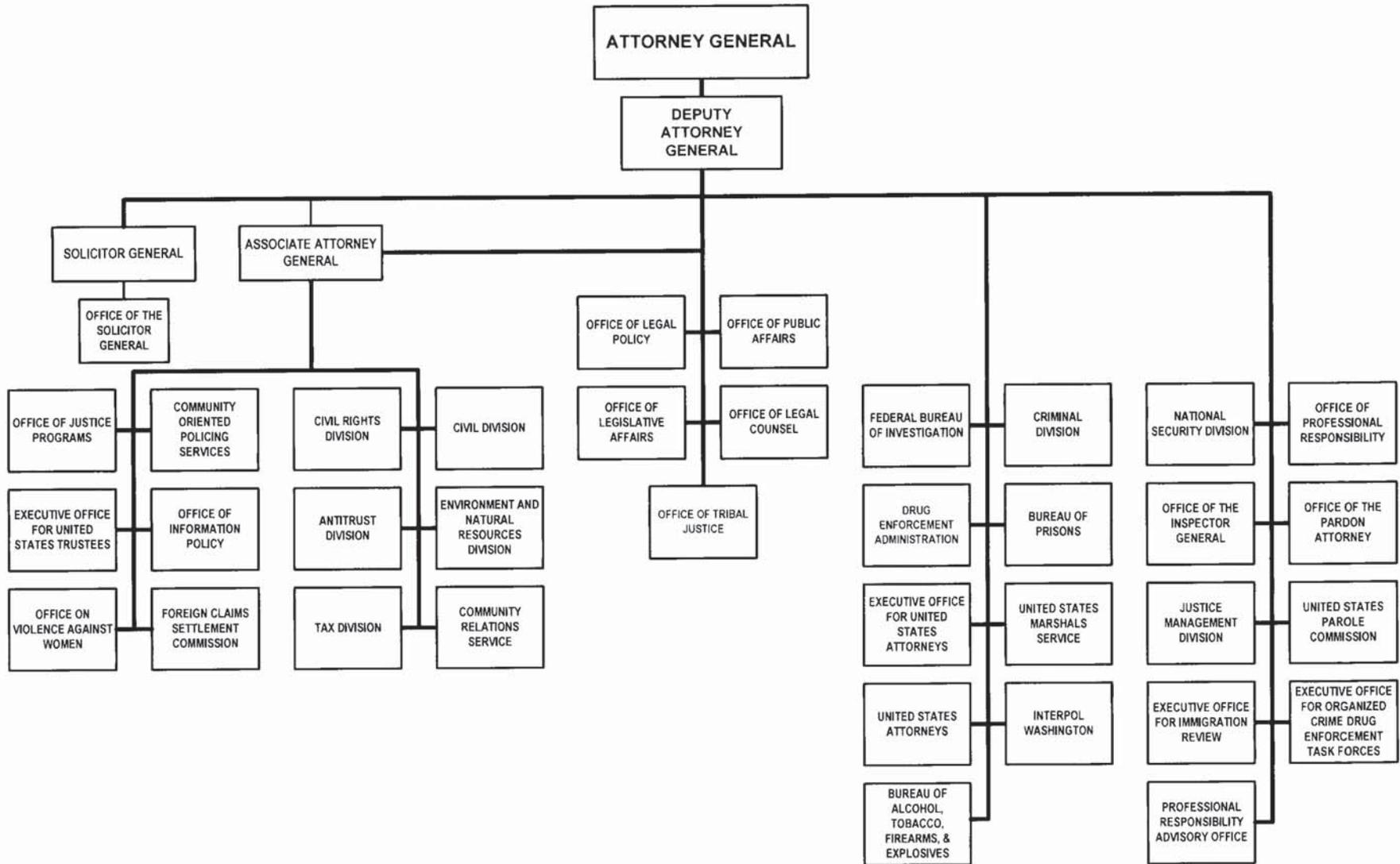
**Deputy Chief of Staff**  
 Katherine A. Thornton

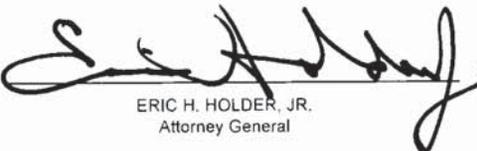
**Executive Secretary,  
 Office of Executive  
 Operations**  
 Karena L. Kilgore



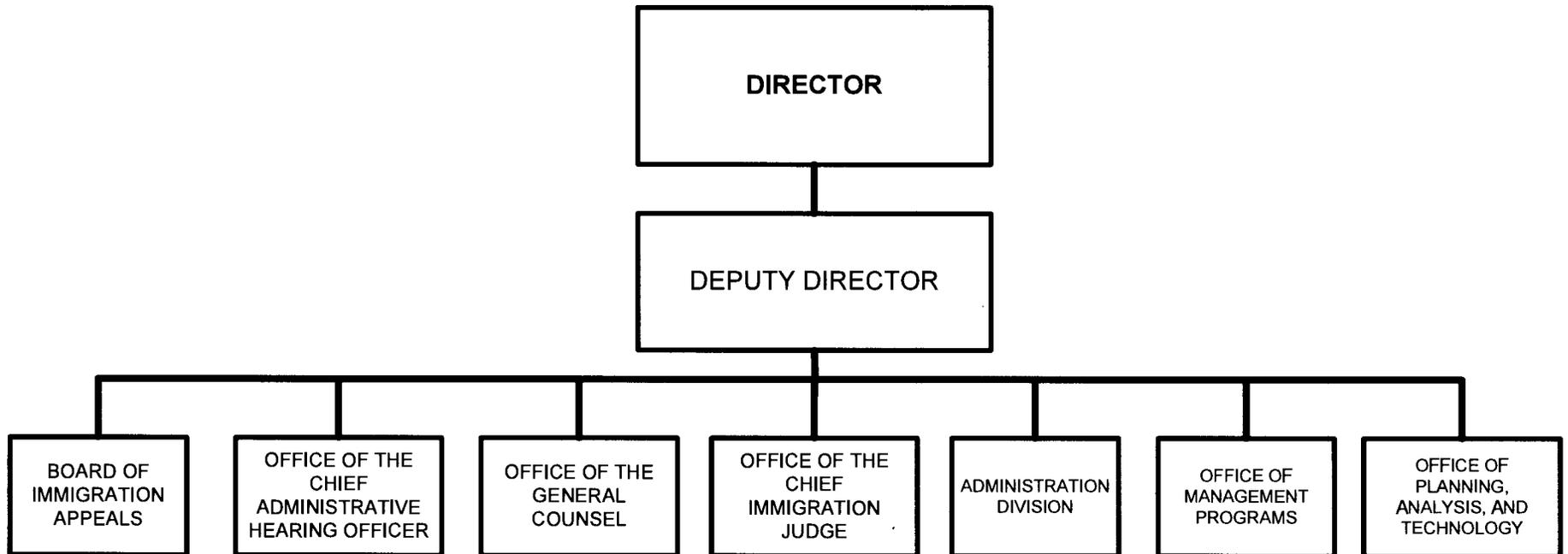
\*Acting

# U.S. DEPARTMENT OF JUSTICE

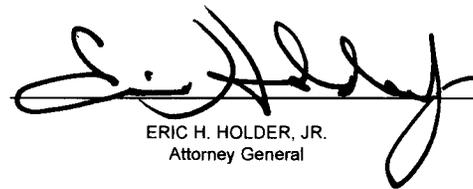


Approved by:  Date: 11/26/12  
 ERIC H. HOLDER, JR.  
 Attorney General

## EXECUTIVE OFFICE FOR IMMIGRATION REVIEW



Approved by:



ERIC H. HOLDER, JR.  
Attorney General

Date:

5/16/13

[Excerpt from DEPARTMENT OF TRANSPORTATION OFFICE OF SECRETARY - FY 2014 CONGRESSIONAL BUDGET JUSTIFICATION, SECTION 6 – ADDITIONAL JUSTIFICATIONS, available at: [http://www.dot.gov/sites/dot.dev/files/docs/OST\\_FY2014\\_Budget\\_Estimates.pdf](http://www.dot.gov/sites/dot.dev/files/docs/OST_FY2014_Budget_Estimates.pdf)]

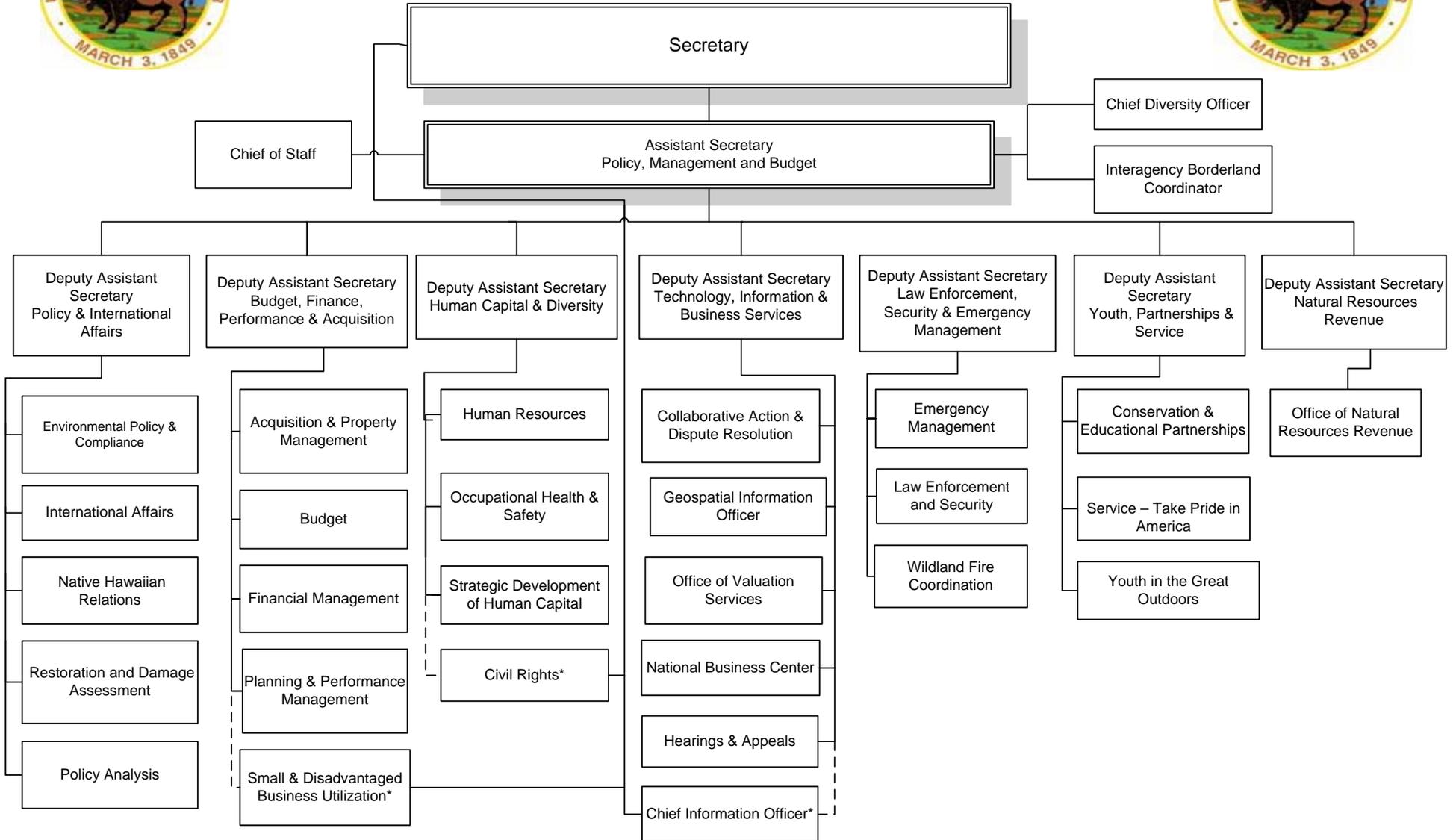
Assistant Secretary for Administration - Reimbursable Program

Office of Hearings

The Office of Hearings is located in the Office of the Assistant Secretary for Administration in order to separate the Office from all investigatory and prosecution functions. The Office of Hearings is composed of administrative law judges, who hold hearings under the Administrative Procedure Act (5 U.S.C. § 551 et seq.) (APA) for the Department's Office of the Secretary (primarily in aviation matters) and the Department's component modal administrations that need formal APA hearings, including the Federal Aviation Administration, Federal Motor Carrier Safety Administration, and the Pipeline and Hazardous Materials Safety Administration.

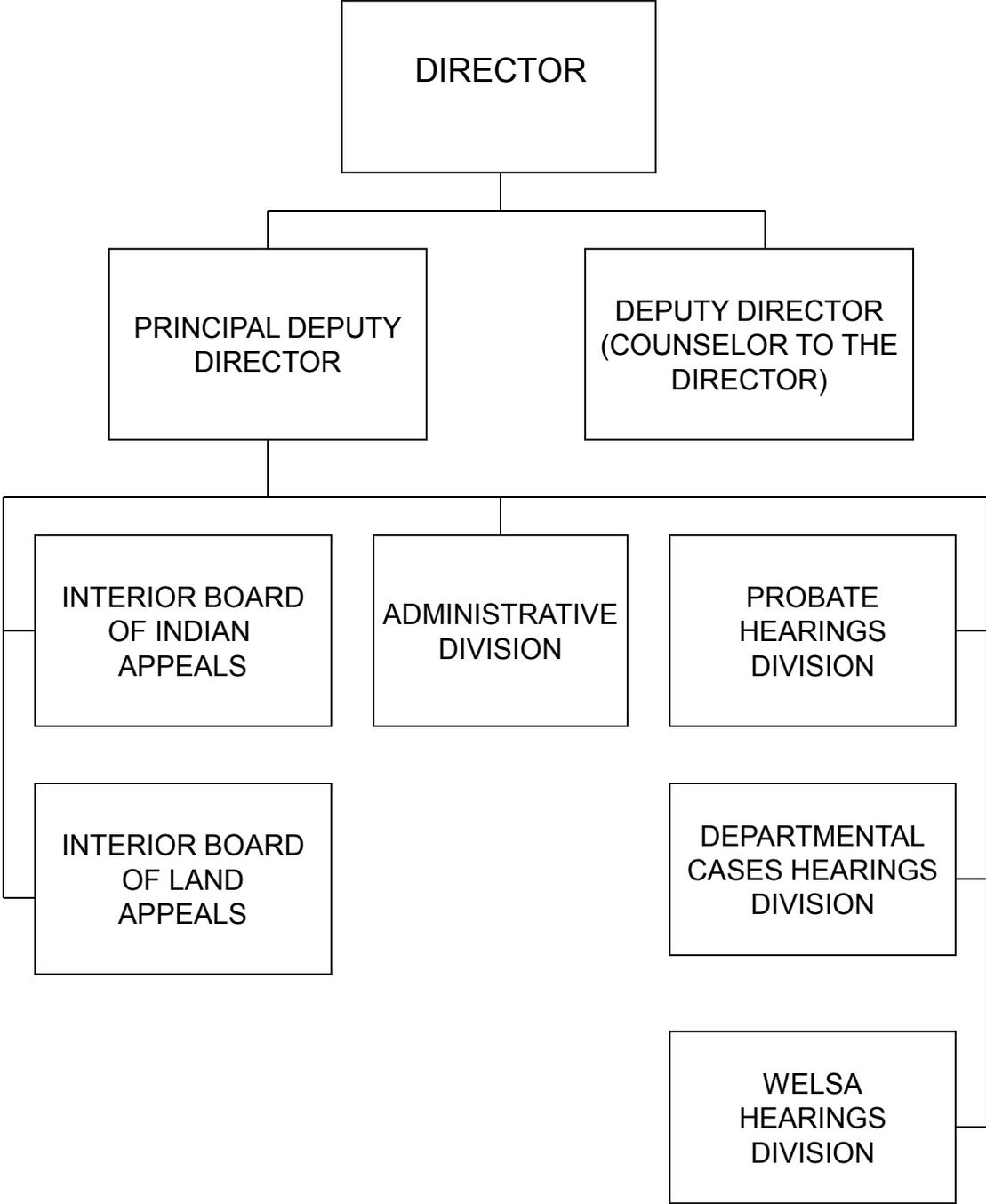


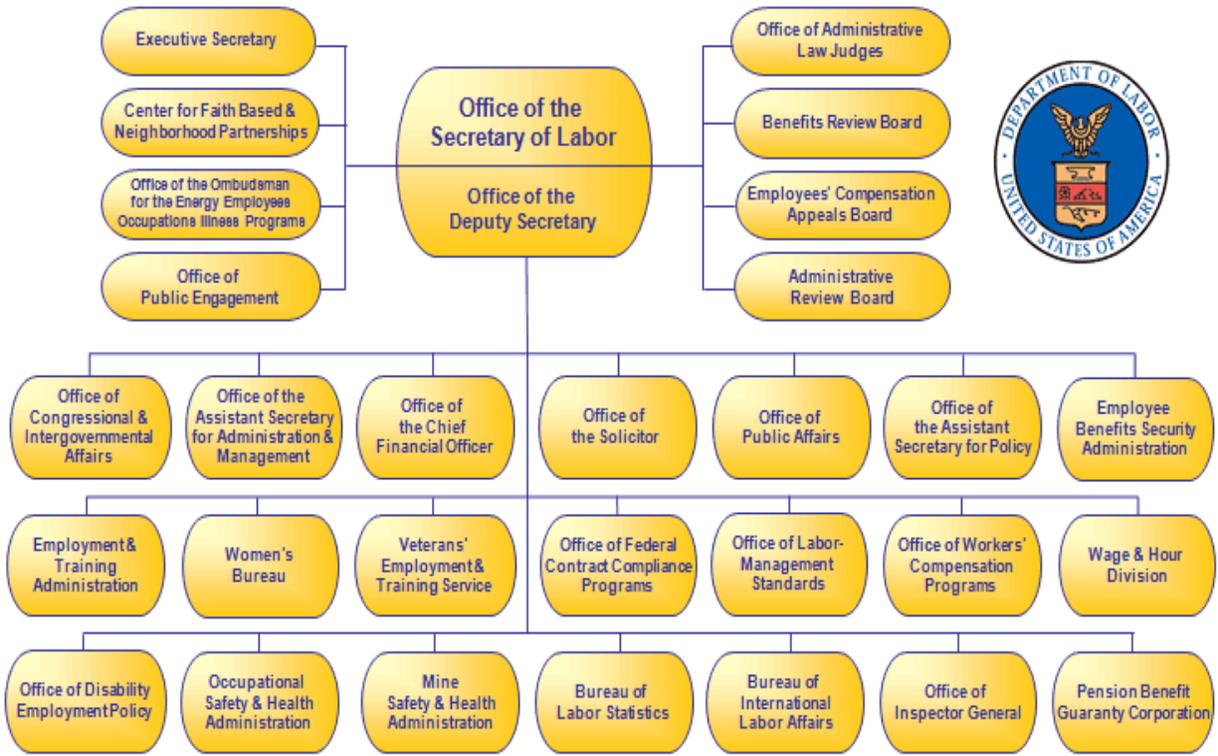
## ASSISTANT SECRETARY- POLICY, MANAGEMENT AND BUDGET



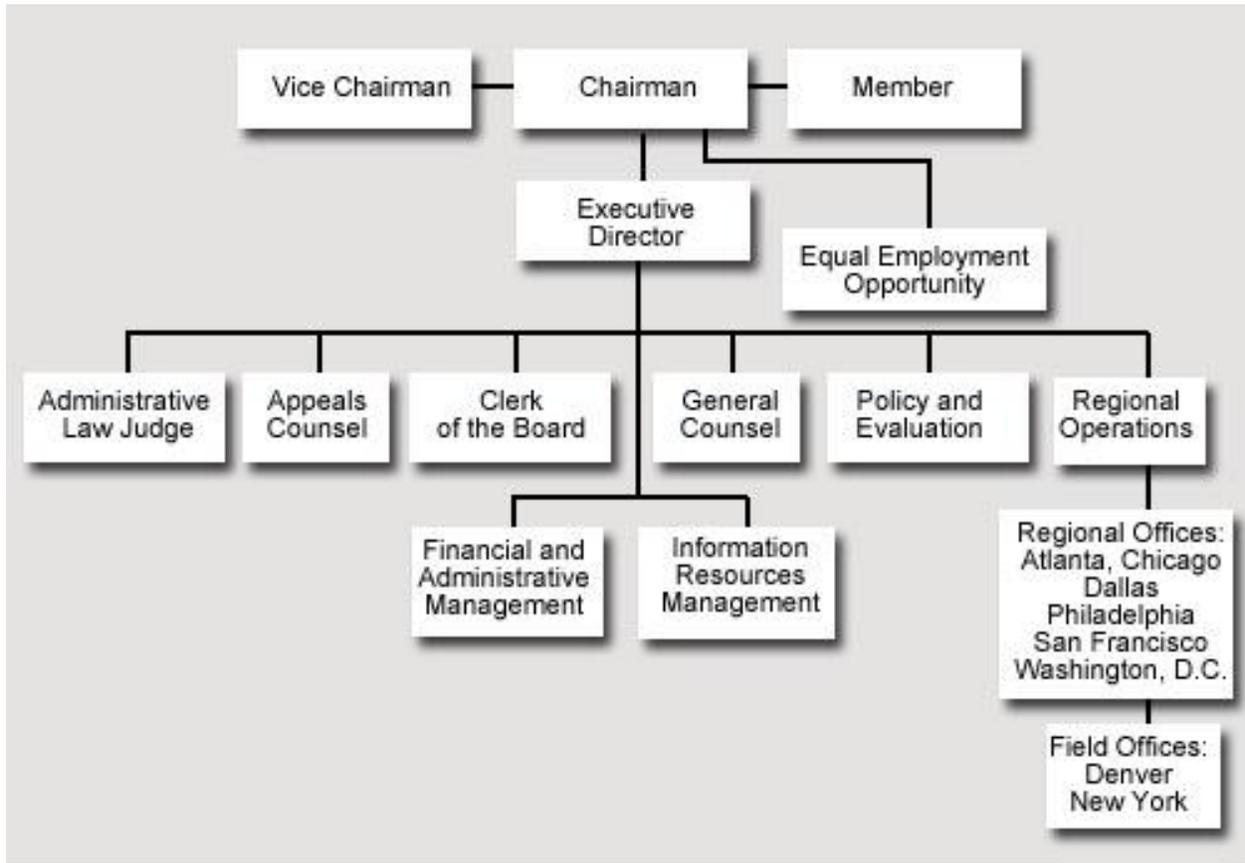
\*Reports to the Secretary of the Interior and receives administrative support and guidance from the Assistant Secretary and Deputy Assistant Secretaries of Policy, Management and Budget.

# OFFICE OF HEARINGS AND APPEALS ORGANIZATION CHART

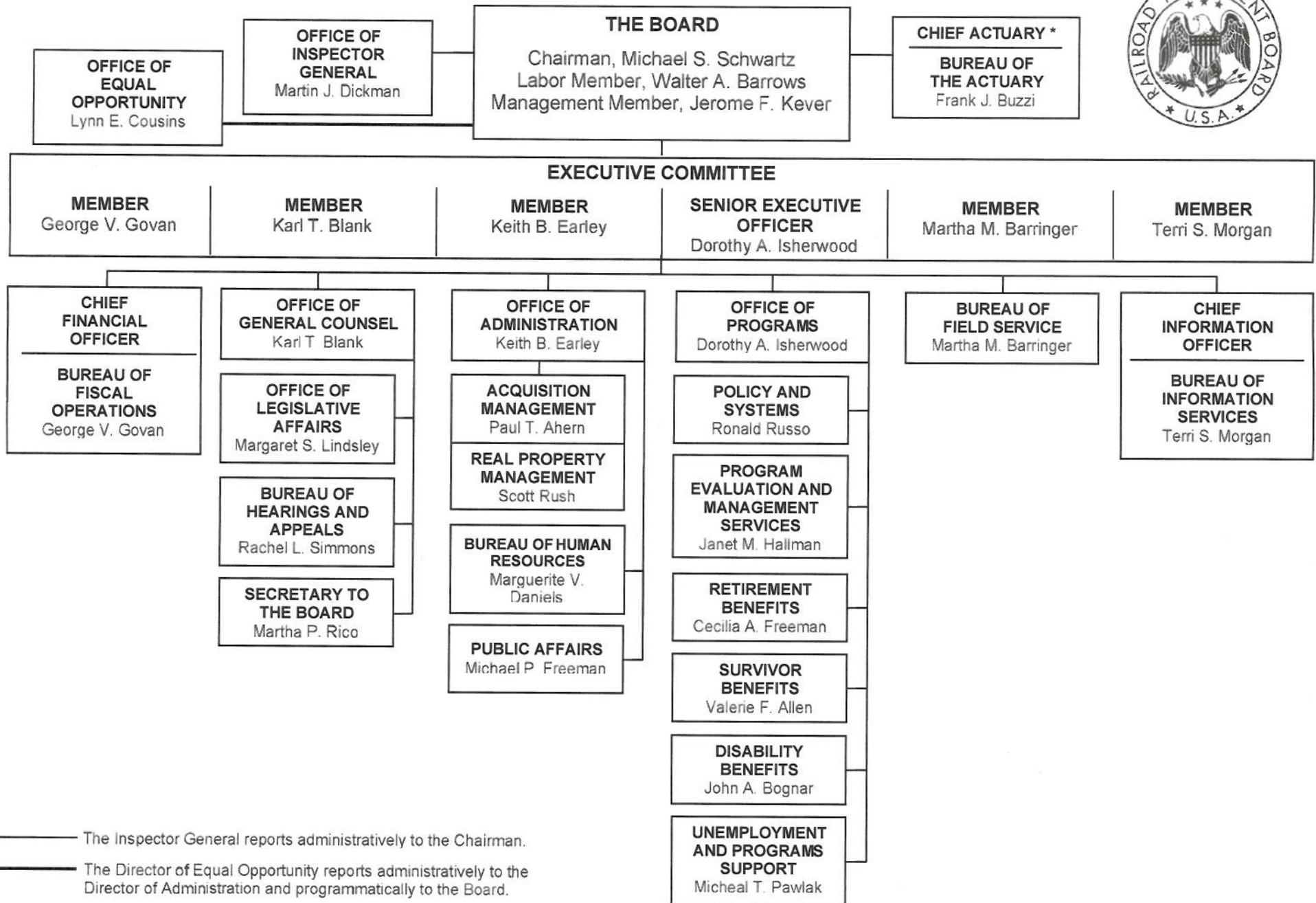




Merit Systems Protection Board



## U.S. RAILROAD RETIREMENT BOARD



— The Inspector General reports administratively to the Chairman.

— The Director of Equal Opportunity reports administratively to the Director of Administration and programmatically to the Board.

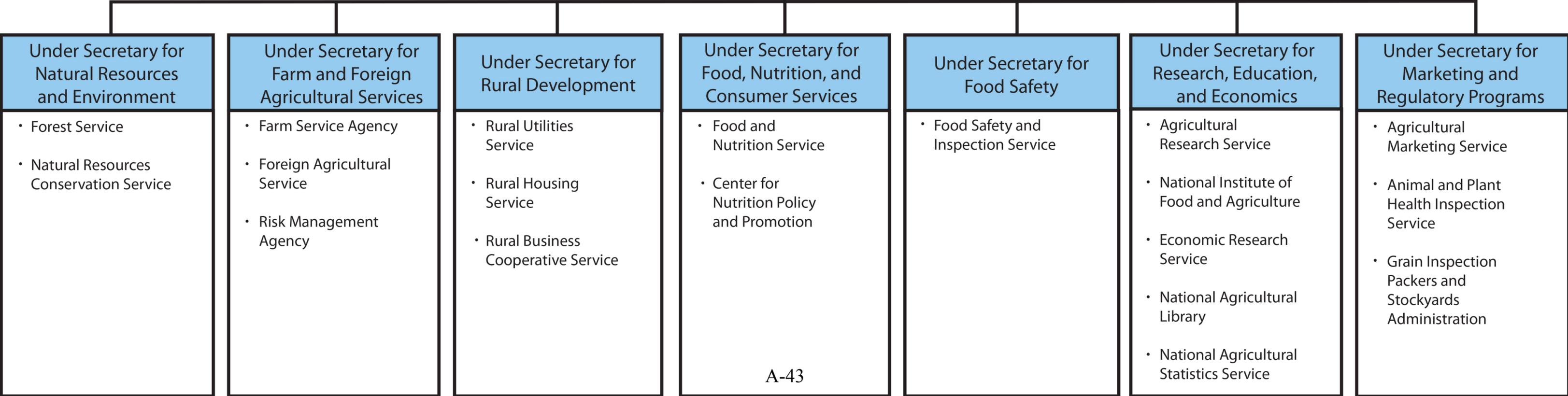
\* Non-voting member of the Executive Committee

SECRETARY

Deputy Secretary

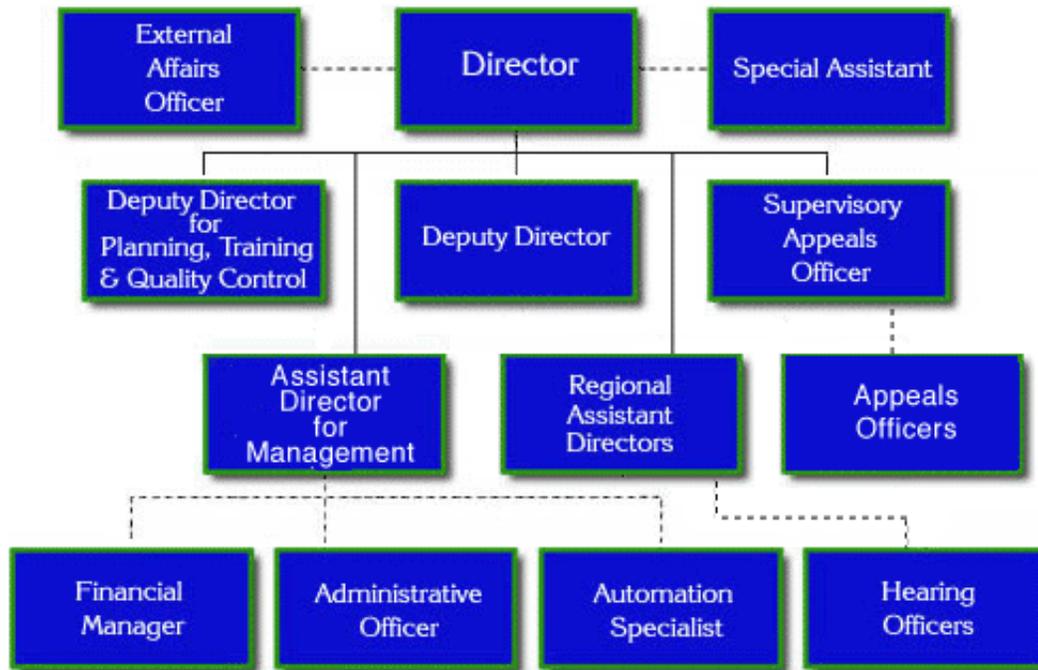


Chief Information Officer





### National Appeals Division Organizational Chart



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