

A unified corps of ALJs: a proposal to test the idea at the federal level

by Jeffrey S. Lubbers

The administrative law judge (ALJ) is the central figure in formal administrative adjudication. This year 1,119 ALJs are employed by 29 federal agencies, and they decide more than 250,000 cases annually. In fact, they outnumber district judges two to one and they hear many more cases.¹ Although almost all the decisions of ALJs are “initial decisions” subject to review by a board, commission or agency head, in practice most of those initial decisions become the final agency ruling. Thus it is important to understand the role of ALJs and the operation of the ALJ program on the federal level in order to evaluate the fairness and efficiency of the administrative process, and the effectiveness of federal judicial administration generally.

The federal ALJ program, based on requirements of the 1946 Administrative Procedure Act (APA), is fairly easy to describe.² The Office of Personnel Management (OPM)—formerly the Civil Service Commission—through its Office of Administrative Law Judges is exclusively responsible for the initial examination, certification for selection, and compensation

of ALJs. OPM determines the minimum experience needed to be an ALJ, and OPM conducts interviews, administers a test of writing ability, evaluates the experience of applicants and ranks eligible applicants on one or both of two registers maintained by OPM—one for those positions at the GS-15 level (primarily at the Social Security Administration) and one for GS-16 level positions.

When an agency needs to appoint an ALJ, it

The opinions of the author in this article are his own; they have not been reviewed or approved by the Administrative Conference of the United States or by any of its standing committees.

1. In FY 1980, for example, Social Security ALJs alone terminated 252,023 cases whereas all federal district court judges terminated 192,475 civil and criminal cases. Operational Analysis of the Office of Hearings and Appeals, SSA Publication No. 70-031 (September 30, 1981); “Federal Workload Statistics,” Administrative Office of the U.S. Courts (September 30, 1981).

2. For an excellent two-part article on the selection process, see Mans, *Selecting the hidden judiciary: how the merit process works in choosing administrative law judges*, 63 JUDICATURE 60, 130 (1979). See also Lubbers, *Federal Administrative Law Judges: A Focus on our Invisible Judiciary*, 33 AD. L. REV. 109 (1981).

*The increasing importance of ALJs in
the federal administrative process raises*

new concerns

about their

independence.

Perhaps the

answer is a central panel system

that separates them from the agencies they serve.



selects a name from the register of eligibles using procedures required by statute and OPM regulation.³ Generally speaking, most ALJs are recruited from within the government, often from within the appointing agency, largely because the salary ceiling for federal employees makes it difficult to attract experienced private practitioners.⁴

3. The Administrative Conference has suggested reforms in the selection process: see ACUS Recommendation 69-9, 1 C.F.R. §305.69-9 (1981). OPM is also reviewing its selection procedures. See Sharon, "Validation of the Administrative Law Judge Examination," Report to the Office of Personnel Management (June 1980).

4. As of October 1980, a GS-15's salary ranged from \$44,547 to the ceiling of \$50,112 and all GS-16s were at the ceiling. See E.O. 12248, 45 Fed. Reg. 69,201 (1980).

Few women or members of minority groups are ALJs. According to the general counsel of OPM, out of 1,127 ALJs, only 43 were women and only 54 were members of minority groups. *Hearings on H.R. 6768 Before the House Comm. on Post Office and Civil Service*, 96th Cong., 2nd Sess. 6 (1980). There is little doubt that the application of veterans preference to the hiring of ALJs has retarded the entry of women into the corps.

In an interview with the author last year, Judge Marvin Morse, the director of OPM's Office of ALJs and the first ALJ to serve in that post, said his office is seeking to increase the percentage of women and minority members in the corps.

A mere listing of some of the types of matters acted upon by ALJs shows how important they are to our daily lives and to the national economy: licensure and route certification of transportation by air, rail, motor vehicle or ship; licensure of radio and television broadcasting; establishment of rates for gas, electrical, communication and transportation services; compliance with federal standards relating to interstate trade, labor-management relations, advertising, communications, consumer products, food and drugs, corporate mergers and anti-trust; regulation of health and safety in mining, transportation and industry; regulation of trading in securities, commodities and futures; adjudication of claims relating to Social Security benefits, workers' compensation, international trade and mining; and many other matters.

The ALJ's role in such hearings is basically the same as that of any other trial judge—namely to administer oaths, issue subpoenas authorized by law, hold prehearing conferences, take or order the taking of depositions, question witnesses, vote on procedural motions, regulate the course of the hearing and

**In 1946 there
were only 196
federal ALJs;
today there are
over 1000.**

make findings of fact and conclusions of law.⁵

In this article, I briefly document the changing nature of the role of administrative law judges in the federal administrative process, and I discuss, in light of this change, concerns about the independence of ALJs as reflected by the Administrative Procedure Act (APA) and other statutes. Finally, I address proposals that

ALJs be made into a unified corps—to act as a separate and independent administrative judiciary—and I suggest that we partially restructure the current system to test the practicality of such proposals.

A reduced role in regulatory adjudication

When the APA was enacted in 1946, there were 196 ALJs, of whom 125 (64 per cent) were engaged in conducting hearings for agencies generally considered to be economic regulatory agencies. This year the overall number of ALJs was 1,119, but only 109 (less than 10 per cent) were employed by economic regulatory agencies. By contrast, 695 ALJs are employed by the Social Security Administration alone, and another 266 are employed by five labor-related agencies.

Table 1, which traces this development from 1947 to 1981, shows the almost uninterrupted growth of the Social Security ALJ corps, engendered largely by hearings under the Medi-

5. These powers are specified in the APA, 5 U.S.C. §556(c).

Table 1 Federal ALJs by type of agency (1947-1981)

	June 1947 ³	June 1954 ⁴	July 1962 ⁵	February 1974 ⁶	January 1979 ⁷	January 1980 ⁸	June 1981 ⁹
Economic regulatory agencies ¹	125 (63.8%)	165 (59.4%)	221 (44.7%)	153 (19.3%)	157 (14.7%)	142 (12.4%)	109 (9.7%)
Labor-related agencies ²	35 (17.9%)	49 (17.6%)	74 (15.0%)	143 (18.1%)	210 (19.6%)	257 (22.4%)	266 (23.8%)
Social Security Administration	13 (6.6%)	20 (7.2%)	164 (33.2%)	431 (54.4%)	660 (61.7%)	698 (60.9%)	695 (62.1%)
Other agencies	23 (11.7%)	44 (15.8%)	35 (7.1%)	65 (8.2%)	43 (4.0%)	49 (4.3%)	49 (4.4%)
TOTALS	196	278	494	792	1070	1146	1119

1. CAB, CFTC, CPSC, EPA, FCC, FDA, FERC, FTC, ICC, ITC, SEC, NRC and predecessor agencies.

2. NLRB, Labor, OSHRC, FMSHRC, FLRA.

3. Mans, "Selecting the hidden judiciary," 63 JUDICATURE 60, 64 (1979).

4. Kintner, Doyle, Reynolds and Winnings, "Appointment and Status of Federal Hearing Officers," Report of Committee on Hearing Officers of the President's Conference on Administrative Procedure (1954), Appendix D.

5. Lester, "Report on Section II Hearing Examiners," Committee on Personnel, Administrative Conference of the U.S. (1962), p. 25. (Indian Affairs judges not included.)

6. Social Security Administration Subcommittee draft report to Civil Service Commission Study Committee for the Effective Utilization of Administrative Law Judges (La Macchia Report) (1974) Exhibit 2. (Does not include temporary ALJs.)

7. Mans, "Selecting the hidden judiciary," 63 JUDICATURE 60, 64 (1979).

8. "Federal Administrative Law Judge Hearings—Statistical Report for 1976-1978," Administrative Conference of the U.S. (1980), p. 21.

9. Table supplied by Office of Administrative Law Judges, U.S. Office of Personnel Management. See Table 2 of this article.

care and Medicaid programs established in the 1960s and the Supplemental Security Income program in 1972.⁶ Almost as striking is the growth in the labor-related agencies, which now employ nearly a quarter of all ALJs.

Table 1 suggests two trends in administrative law which impel renewed critical examination of the formal agency adjudicative process and the ALJ's role in it. One is the growing dissatisfaction with formal, so-called "trial-type" procedures as a means of resolving the kinds of "policy" issues that customarily arise in licensing, merger and other cases involving economic regulation. Some of these issues are largely normative, involving a choice from among several reasonable alternatives. Others involve risk assessment and making extrapolations or other predictions from frequently imperfect data and scientific knowledge.

More and more, these questions tend to be taken out of the familiar formal adjudicative

process and to be resolved by rulemaking or by procedural devices such as those instituted by the Food and Drug Administration and Civil Aeronautics Board to avoid or restrict the scope of evidentiary hearings.⁷ In 1977, the Senate Governmental Affairs Committee, after a comprehensive study of delay in the administrative process, approved of the movement away from formal adjudication in certain types of cases:

Because formal adjudicatory procedures are not well-suited to certain kinds of cases now handled by such procedures and unnecessarily delay these cases, the [APA] should be amended to provide for a modified procedure to govern those cases. Specifically, the modified procedure should be made applicable to cases involving market entry and exit, rate regulation, approval of financial transactions and technical decisions.⁸

The proposed modified procedure called for legislative-type hearings in which oral arguments and written testimony would be permitted but without cross-examination, followed, where necessary, by an adjudicative hearing in which cross-examination would be permitted to resolve particular factual disputes. This model likely would reduce (though not eliminate) the need for ALJs in licensing agencies, since they would presumably only be required in the adjudicative hearing stage.

Though they continue to receive serious consideration,⁹ those proposals to amend the APA have not been enacted, partly because agencies have been able to use the existing flexibility in the Act to develop modified procedures tailored to their individual needs. And, of course, the increasing momentum of substantive deregulation has changed the rules in several key agencies—leading to an even more striking reduction in the need for trial-type decisionmaking as market forces are substituted for regulation.¹⁰

More benefits and enforcement cases

The second trend—the veritable explosion of benefits cases and of enforcement cases—is just as dramatic. The great majority of ALJs in the federal government preside over such cases; Social Security Administration (SSA) ALJs handle over 200,000 cases annually, and Department of Labor ALJs handle several thousand more benefits cases involving black lung benefits claims and longshoremen's compensation.¹¹ Though SSA procedural rules offer the opportunity for a hearing that has nearly all

6. The 1972 Supplemental Security Income (SSI) Amendments to the Social Security Act (Pub. L. 92-603), occasioned a contentious dispute over whether the hearing officers for the new program were required to be fully-qualified ALJs or whether they could be HEW staff attorney-claims examiners. See *Federal Administrative Law Judge Hearings—Statistical Report for 1976-1978*, Administrative Conference of the U.S. (1980) 14-15. Eventually they were made "temporary ALJs" until 1977 when Congress made them fully qualified ALJs. Pub. L. 95-216 §371 (1977). Rosenblum, *The Administrative Law Judge in the Administrative Process: Interrelations of Case Law with Statutory and Pragmatic Factors in Determining ALJ Roles*, printed in Subcomm. on Social Security of the House Comm. on Ways and Means, 94th Cong., 1st Sess., Recent Studies Relevant to the Disability Hearings and Appeals Crisis, 171, 212-30 (Comm. Print December 20, 1975).

7. See "Avoidance of Evidentiary Hearings in Initial Licensing Decisions" (draft), Administrative Office of the U.S. (1981).

8. Senate Committee on Gov't Affairs, Study on Federal Regulation, Vol. IV: DELAY IN THE REGULATORY PROCESS, 95th Cong. 1st Sess. xiii, as cited by Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COL. L. REV. 258, 322 n.326 (1978).

9. See S.262 and H.R. 3263, 96th Cong., 2nd Sess. (1980), and H.R. 746, 97th Cong., 1st Sess. (1981).

10. For example, the number of ALJs at the ICC has dwindled from 61 in January 1979 to 28 in June 1981, mostly in response to the deregulation of trucking in 1980. And if the FCC begins to issue broadcast licenses through an auction or lottery procedure, an ALJ will not be necessary to take the bids or spin the wheel. See Pub. Law 97-35 §1241, 95 STAT. 736 (Aug. 13, 1981) which has authorized the FCC to "in its discretion grant an application based on a system of random selection" in radio and television comparative licensing.

11. See *Federal Administrative Law Judge Hearings—Statistical Report for 1976-1978*, supra n. 6, at 230.

the elements of a formal APA hearing, these cases in practice generally involve short, informal hearings in which the government is not represented by counsel and the claimant is often unrepresented.¹²

Some have concluded from this, and from the fact that other disability programs in the United States and other countries use non-ALJ panels,¹³ that SSA cases do not require the involvement of fully-qualified ALJs. However, a recent comprehensive study of the system concluded that the costs of using ALJs are not prohibitive

in view of the added perceptions of fairness and the actual informality of the process, as well as

12. See, generally, Mashaw, Goetz, Goodman, Schwartz, Verkuil and Cartow, *SOCIAL SECURITY HEARINGS AND APPEALS* (1978).

13. The Veterans Administration runs the largest disability program in the country, with three-member non-ALJ panels which include a physician. See F. Davis, *Judicial Review of Benefits Decisions of the Veterans Administration*, Administrative Conference of the U.S. (1978).

Many other nations also use multi-member panels and non-lawyer adjudicators. See Skoler and Weixel, *Social Security Adjudication in Five Nations: Some International Perspectives and Comparisons*, 33 *AD. L. REV.* 269 (1981).

The Administrative Conference and ALJs

The Administrative Conference of the United States, a permanent, independent federal agency, was established in 1968 to recommend improvements in the administrative procedures that all federal departments and agencies follow.¹ The Conference, which consists of 91 members,² meets regularly in committees to develop recommendations, and it takes formal positions on those proposals in semi-annual plenary sessions. Since 1968, the Conference has adopted more than 80 formal recommendations on subjects ranging from the procedures of specific agencies (like the Internal Revenue Service and the Customs Service) to topics of interest to many agencies, such as judicial review of agency action, procedures for assessing civil money penalties and techniques of notice-and-comment rulemaking.³

When the Conference first began operation in 1968, it focused strongly upon adjudication under the Administrative Procedure Act, urging improved agency practices in areas like discovery, the issuing of subpoenas, summary decisions, interlocutory appeals and agency appellate review. Its recommendations thus implicitly affected the administrative law judge's behavior in presiding over APA adjudications.

Later, as the new health and safety agencies began to assert themselves in the 1970s, the Conference turned more toward procedural improvements in rulemaking, which had become the federal government's primary policymaking tool. Now, as "regulatory reform" has become a paramount issue, the administrative law community has begun to pay more attention to the decisional process and to the

deciders—the more than 1,100 administrative law judges who rule in enforcement, licensing and benefits cases every day.

What specifically has the Conference done in relation to ALJs? Its very first recommendation, in 1968, was intended to improve the adequacy of hearing facilities available for agency adjudications. It called upon the General Services Administration (GSA) to prepare an inventory of available federal and non-federal sites, to acquire and operate multi-agency hearing rooms in the cities where they are needed, and to make other reforms.⁴ Since the GSA has only partly carried out these responsibilities, the Conference has published its own *Directory of Hearing Facilities* (1981).⁵

Through one of its most popular publica-

1. 5 U.S.C. §§571-576 (1976).

2. The Conference includes a chairman and council appointed by the President, 44 designees of the principal federal agencies, and 36 members appointed by the chairman from outside the government. The chairmanship is a full-time position, but other members serve on a part-time, uncompensated basis.

3. Conference recommendations are codified in 1 C.F.R. Part 305 (1981). For a bibliography of Conference studies, see 33 *AD. L. REV.* 235 (1981).

The Office of the Chairman coordinates the research program, assists in developing recommendations, seeks the implementation of recommendations by Congress and the agencies, and acts as a clearinghouse of information to those interested in administrative law and regulatory reform. Copies of Conference publications may be obtained from the Librarian of the Administrative Conference of the U.S., 2120 L Street, N.W. (Suite 500), Washington, D.C. 20037.

4. 1 C.F.R. §305.68-1 (1981).

5. The directory, which covers all 50 states, is designed to help ALJs schedule hearings at appropriate sites by describing courtrooms, conference and hearing rooms for proceedings and by listing persons to contact to reserve space.

the costs involved in changing the system.¹⁴ There is little doubt then that the disability claims hearing process will continue to require a large number of ALJs.

14. Mashaw, *supra* n. 12, at 35-38.

15. There is a trend in recent legislation to authorize federal agencies to impose civil money penalties through administrative law judge hearings as opposed to court collection proceedings. See Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COL. L. REV. 1436 (1979). The Administrative Conference has, in general, supported this trend. See Recommendations 72-6, 79-3, 1 C.F.R. §305.72-6, 79-3 (1981).

tions the *Manual for Administrative Law Judges* (1974), the Conference provides practical pointers on all phases of the ALJ's job, an especially useful service for the newly appointed ALJ. And last summer the Conference issued a report of caseload and elapsed-time statistics on formal adjudications in federal agencies entitled *Federal Administrative Law Judge Hearings—Statistical Report for 1976-1978*. It describes and provides comparative statistics for over 170 categories of proceedings in the 28 federal agencies that employed at least one full-time ALJ during the three-year period.

Several of the Conference's current research projects touch upon administrative law judge issues. In the past few years, for example, several regulatory reform bills introduced in Congress included proposals to give ALJs fixed renewable terms—and to assign to the Administrative Conference the task of administering a system for evaluating individual ALJ performance.⁶ The Conference has never taken a position on the difficult question

6. See, e.g., S. 262 and H.R. 6768, 96th Cong., 2nd Sess. (1980).

7. Rosenblum, "Evaluation of Administrative Law Judges: Aspects of Purpose, Policy and Feasibility" (Second Draft), paper prepared for Administrative Conference of the U.S. (1981). The study is now being considered by the Conference's Committee on Agency Organization and Personnel.

8. *Avoidance of Evidentiary Hearings in Initial Licensing Decisions* (Draft) Administrative Conference of the U.S. (1981).

9. Forthcoming report by Professor Ronald Cass, Boston University School of Law.

10. See the article by Levinson in this issue. His compilations on innovations in state administrative procedure are on file at the Administrative Conference.

The other major growth area is enforcement. Most of the agencies employing ALJs (including the five labor-related agencies) conduct proceedings to discipline license-holders, revoke licenses, issue cease-and-desist orders or impose civil money penalties.¹⁵ In these cases—which likely will increase in number as regulators concentrate less on developing new regulations and more on enforcing the rules already on the books—adjudicatory fact-finding and demeanor evidence are often at the center of the case, and policy issues absent or submerged.

whether ALJs should be appointed for fixed terms, and Congress did not enact any of those proposals. But because the idea of periodic evaluation, whether or not tied to fixed terms, was gaining wider support, the chairman has commissioned a study of the feasibility of systematic evaluations.⁷

The Conference has also sought to learn more about the techniques licensing agencies like the Civil Aeronautics Board, the Interstate Commerce Commission, the Federal Communications Commission, the Food and Drug Administration and the Environmental Protection Agency are using to define and narrow the issues in evidentiary hearings.⁸ These agencies have devised "paper hearings," show-cause orders, summary decision techniques and panel hearings to handle licensing more expeditiously—all part of a trend away from formal ALJ hearings in economic regulatory agencies.

The Conference also recently commissioned a study of the way agencies structure and conduct their review of initial decisions made by ALJs. There are wide variations among agencies such as final review boards, intermediate review boards, judicial officers, and panels of commissioners. The study will delve into issues of organizational structure, status, independence, authority and efficiency.⁹

Finally, in recognition of the innovations taking place on the state level, the Conference decided to sponsor Professor L. Harold Levinson's study of developments in state hearing officer programs¹⁰ and to co-sponsor with AJS the ALJ workshop held last spring.

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Given the nature of the issues involved (and in some programs, the high volume of cases), the ALJ's decision is rarely reversed by the agency in such cases. Therefore, the ALJ's hearing and decision are governed by strict procedural safeguards, and the need for an independent fact-finder is quite apparent.

It is in these enforcement cases that questions are most often raised about agency ALJs deciding cases that another arm of their employing agency has initiated.¹⁶ Paradoxically, however, the high-volume nature of many of these benefits and enforcement programs also puts a premium on quantitative performance and even facilitates its evaluation, thus leading to an inevitable clash of independence values and productivity values

Consider, for example, the recent brouhaha that developed between the Social Security ALJs and the management of the SSA's Office of Hearings and Appeals, resulting in an inter-cine lawsuit.¹⁷ Among the management initiatives most strenuously opposed by members of the SSA ALJ corps were a peer review program, a monthly production goal/quota and a quality assurance program designed to identify ALJs whose decisions deviated significantly from the agency-wide trend. A federal Appeals Court has ruled that SSA ALJs can challenge the agency action, and returned the case to district court for further consideration.

Protecting ALJ independence

The Administrative Procedure Act contains several provisions designed to preserve the independence and impartiality of the ALJ. It limits the role of the employing agency in the selection and appointment process,¹⁸ and it requires that the ALJ (and other agency decisionmakers) conduct business in an impartial manner.¹⁹ Moreover, if a party files a disqualification petition against an ALJ in any case, the agency must determine that issue on the record, as part of the decision in that case.²⁰ The APA also prescribes that an ALJ may not be responsible to, or subject to supervision by, anyone performing investigative or prosecutorial functions for an agency.²¹ This "separation of functions" requirement is designed to prevent the investigative or prosecutorial arm of an agency from controlling a hearing or influencing the ALJ.

Finally, to ensure that the ALJ is insulated

Some observers suggest the quasi-independence of ALJs should be transformed into complete independence.

from improper agency pressure and controls, the APA contains two other provisions to make the ALJ more independent of the employing agency: ALJs are to be assigned to their cases in rotation so far as practicable, and they may not perform duties inconsistent with their role as ALJs.²² They also receive their pay as prescribed by the Office of Personnel Management, independently of agency recommendations or ratings,²³ and they are removable only for good cause after a hearing before the Merit Systems Protection Board.²⁴

Despite these safeguards, some observers suggest this quasi-independent status of ALJs

16. For example, a major issue in the recent debate over new fair housing enforcement legislation concerned the supposed bias inherent in having HUD ALJs hear HUD-investigated cases. See 38 CONG. QUARTERLY WEEKLY REPORT 1175 (1980). Alternative enforcement schemes were proposed, but the legislation failed to pass.

17. *Nash v. Califano*, 613 F.2d 10 (2nd Cir. 1980). (Upholds standing of SSA ALJ to challenge management's productivity initiatives). For a full report of this controversy, see Subcommittee on Social Security of the House Committee on Ways and Means, *Social Security Administrative Law Judges: Survey and Issue Paper* (Committee print, 1979).

18. See Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 59 (1979).

19. 5 U.S.C. §556(b) (1976).

20. *Id.*

21. 5 U.S.C. §554(d) (1976).

22. 5 U.S.C. §3105 (Supp. III 1979).

23. 5 U.S.C. §5372 (Supp. III 1979).

24. 5 U.S.C. §7521 (Supp. III 1979); 5 C.F.R. §1201.131 (1980), 44 Fed. Reg. 3946, 3953 (1979).

should be transformed into complete independence. Indeed, Congress has, in several enforcement programs, provided specifically for increased separation of agency prosecuting and adjudicating functions. In 1947, shortly after the passage of the APA, Congress passed the Taft-Hartley Act, which created a strict separation between the NLRB general counsel and the Board, its staff and its ALJs.²⁵ In other programs, Congress has gone even further.

Thus, in 1975 Congress established as an independent agency the National Transportation Safety Board (once part of the Department of Transportation) to hear challenges brought by pilots when the FAA issues license denials, suspensions and revocation actions.²⁶ It also established the wholly adjudicatory Occupational

25. Act of June 23, 1947. See 29 U.S.C. §§153(d), 154 (1976).

26. Pub. L. 93-633 (1975). See 49 U.S.C. §§1422, 1429 (1976).

27. Pub. L. 91-596 (1970); 29 U.S.C. §661 (1976).

28. Pub. L. 95-164 (1977); 30 U.S.C. §823 (Supp. III 1979).

29. See Sullivan, *Independent Adjudication and Occupational Safety and Health Policy: A Test for Administrative Court Theory*, 31 Ad. L. Rev. 177 (1979). See also, e.g., *Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176 (3rd Cir. 1980) (Secretary of Labor may withdraw from a case after ALJ decision but before Commission review).

30. Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 47 (1941). Cited by Scalia, *supra* n. 18, at 58.

31. Hoover Commission on the Executive Branch of Government, *Legal Services and Procedures* 87-88 (1955).

32. Federal Administrative Law Judges Conference, "Statement and Recommendations to the United States Civil Service Commission" 12-13 (1973). "Appendix to Report of the Committee on the Study of the Utilization of Administrative Law Judges" ("La Macchia Commission Report"), U.S. Civil Service Commission (1974).

33. La Macchia Commission Report, *supra* n. 32, at 44-47.

34. Segal, *The Administrative Law Judge: Thirty Years of Progress and the Road Ahead*, 62 A.B.A.J. 1,424 (1976).

In a just-published article, two political scientists have strongly advocated the creation of an administrative court. Marquardt and Wheat, *The Developing Concept of an Administrative Court*, 33 Ad. L. Rev. 301 (1981).

35. See La Macchia Commission Report, *supra* n. 32, at 45, indicating that only two agencies expressed approval of the concept. This may be changing, however. The chairman of the FTC has said that the "idea of assigning administrative responsibility for ALJs to a single entity... merits further consideration." Testimony of Chairman Michael Pertschuk, *Hearings on Administrative Law Judge System Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation*, 96th Cong., 2d Sess. 28 (1980).

36. Many of these points are derived from the Digest of Report of Committee on Independent Corps of ALJ (Appendix to La Macchia Commission Report), *supra* n. 32.

Safety and Health Review Commission²⁷ in 1970 and Federal Mine Safety and Health Review Commission²⁸ in 1977 to hear challenges to civil penalty impositions and abatement orders issued by the Department of Labor. The Safety Board and the two Review Commissions each have a separate corps of ALJs which makes initial decisions on such challenges, subject to review by the Board or Commission.

But even as Congress has created these adjudicatory agencies, which act somewhat like agencies and somewhat like courts (leading to some knotty procedural problems and turf battles),²⁹ it has left unchanged the structure of older enforcement agencies like the FTC, SEC and Postal Service. Meanwhile, it has also created new enforcement agencies like the Consumer Product Safety Commission and Commodity Futures Trading Commission, and added new enforcement programs in the Departments of Agriculture, Commerce, Interior and Labor that lack any elements of separation of prosecutory and adjudicatory functions beyond those specified in the APA.

A unified corps of federal ALJs?

If the current administrative law judge system appears to be diverse, it is largely the result of the reactive nature of Congress. Despite this diversity, or perhaps because of it, there is renewed interest in the potential for increased efficiency and fairness in a unified administrative trial court, or at least a centralized corps of judges to be used by the agencies, but not formally employed or housed by them.

The suggestion that hearing officers be made a unified corps, appointed and employed by an authority other than the agencies, is not new. It was considered and rejected by the study group that originally proposed the APA in 1941;³⁰ it was proposed by the Hoover Commission Report in 1955;³¹ it was espoused by the Federal Administrative Law Judges Conference in 1973;³² it was suggested for study by a federal advisory committee in 1974;³³ and it was advocated by a former ABA president in 1976.³⁴ Agencies have opposed the idea, fearing that they will lose the expertise of ALJs assigned to their agency, delaying and lessening the reliability of initial decisions.³⁵

Proponents of the corps concept point to the following benefits:³⁶

[]

The practical problems of instituting a centralized corps of federal ALJs cannot be ignored.

[]

- Operational efficiency would be enhanced by a corps made up of interchangeable judges, who could be assigned to agency cases as the need arises. Since agency caseloads are not always predictable or within the agency's control, the number of ALJs employed under the present system by agencies may be too high or too low.

- Centralized housekeeping and accounting would save money. Present redundancies in law libraries, docket clerks, case-tracking systems, administrative assistants, travel arrangements and the reservation of hearing facilities would be eliminated. And unification would promote uniformity in the quality of office space, law clerks and secretarial assistance.

- Public confidence in the impartiality and independence of ALJs would be enhanced by a divorce from agency administration. Since many ALJs were also formerly lawyers for their agency, since some perquisites of the job (e.g., office space, parking privileges and travel to seminars) remain in agency control, and since long-term association with one agency's policies and personnel may subtly influence behavior, ALJs may be susceptible to a pro-agency bias that would be lessened if they were centralized in a separate corps.

- If judges were not attached to agencies, they would require agencies to articulate their regulations in clearer language, much as federal judges often do.³⁷

- Individual ALJs would acquire a diversi-

fied experience and not become stale from repeatedly hearing similar cases. This, apparently, has been a salutary by-product of the existing, but limited, loan program in which OPM allows understaffed agencies to temporarily borrow the services of willing ALJs from other agencies.³⁸ This diversity of caseload might also stimulate the recruitment of new ALJs.

- Operation of a corps might facilitate performance evaluation of ALJs, both quantitatively and qualitatively. This is obviously a controversial issue since evaluation of judicial performance bears such a close relationship to independence values. But since the agencies would have a less direct interest in the evaluation of any particular judge, it could probably be done more objectively.³⁹

- Operation of a corps might permit a return to a multi-level grade system whereby more routine cases could be handled by lower-level, less experienced ALJs. Professor Antonin Scalia has argued that a multi-level system would be more efficient and would also inject needed performance incentives into the corps.⁴⁰

Opposition to the idea

Opponents think the problems and drawbacks would outweigh any of the advantages, however:

- A unified corps would reduce efficiency, since it would dilute the expertise that staff ALJs bring to their agency. Agency statutes, regulations and precedent can be difficult to master in a short time, and practitioners would be forced to educate—and reeducate—ALJs unfamiliar with the particular field of regulation.

- A new bureaucracy would have to be created to train and rotate over 1,100 judges to 30 agencies for over 200,000 hearings all over the country.⁴¹ If evaluation or promotional responsibilities were also given to the new office, the director's independence and "clout" would become a critical concern. The wrong mix

37. Testimony of Judge William Fauver, *Hearings*, *supra* n. 35, at 80-81.

38. See Pfeiffer, *Hearing Cases Before Several Agencies—Odyssey of an Administrative Law Judge*, 27 *AD. L. REV.* 217 (1975); and Scalia, *The Hearing Examiner Loan Program*, 1971 *Duke L.J.* 319 (1971).

39. Performance evaluation is a crucial part of the corps concept as it now operates in New Jersey and Minnesota.

40. Scalia, *supra* n. 18, at 77-80.

41. Of course, this problem would be eased considerably if the 695 Social Security Administration ALJs were not included.

could lead to greater politicalization than critics find in the current program.

- An equitable system for allocating ALJs to agencies for hearings would have to be devised. Since judges are not “free goods,” perhaps some sort of “user’s fee” would have to be charged agencies.⁴² Otherwise, agencies might draw too liberally upon ALJs for non-judicial functions or reduce their own efforts to settle cases prior to the hearing stage.

- The agency’s reviewing function might be altered in unforeseen ways. Some proponents argue that establishment of a corps should be linked to a restriction of the agency’s ability to review initial decisions of ALJs.⁴³ The wisdom in this is debatable, but without such a change agencies likely would feel the need to review more initial decisions more intensively (in light of their reduced rapport or familiarity with the judges), leading to an overall lengthening of the decisional process.

A proposal for an experiment

It is not easy to resolve this debate on a theoretical level. That is why the experience of the pioneering states like New Jersey and Minnesota should be valuable, especially after the state systems finish their shakedown period and survive the problems of leadership changes. Of course, it should be recognized that the lessons learned in these state “laboratories” may not be so readily transferred to the federal level. A platoon of 41 New Jersey judges may work well, but 1,100 federal ALJs may make for an unmanageable corps. Furthermore, five federal agencies now employ nearly 1,000 ALJs and the other 24 employing agencies average fewer than seven judges each. Proponents of

42. Minnesota imposes such charges. See Harves, 65 JUDICATURE 257 (November, 1981).

43. See testimony of Judge Fauver, *supra* n. 35, at 79-80. See also Marquardt and Wheat, *supra* n. 34, at 312-313.

44. See ACUS Recommendation 69-9, *supra* n. 3.

45. A study prepared by the Federal Administrative Law Judges Conference indicates that from 1972 to 1978 about 90 cases per year were handled by “borrowed” judges, “The Administrative Law Judge Corps of the United States,” (unpublished paper on file at the Administrative Conference).

46. Testimony of Marvin Morse, Director, OPM’s Office of Administrative Law Judges, *Hearings, supra* n. 35, at 58. Recent budgetary constraints have eliminated this “mini-corps.” Statement by Judge Morse at meeting of ACUS Committee on Agency Organization and Personnel, July 15, 1981, and author’s telephone interview with a member of his staff on October 14, 1981.

any reform must bear the burden of attending to the practical details of its proposed application to such a balkanized judiciary.

In my view there is no reason why administrative law judges, selected on the basis of a genuine, even if flawed, merit selection program,⁴⁴ should not be able to preside over a mix of cases as varied as federal district or state court judges, many of whom are selected after less rigorous review. But the practical problems of instituting a centralized corps on the federal level cannot be ignored.

A pilot program would be the best way to test the idea, but it must be broader than the existing loan program, by which underworked judges are temporarily loaned on an ad hoc basis (with approval of the Office of Personnel Management) to understaffed agencies.⁴⁵ OPM has recently taken this one step further by establishing a very small pool (or “mini-corps”) of three judges who reported to OPM and were assigned to understaffed agencies.⁴⁶

I would like to see a more ambitious experiment involving the creation of a larger pool, overseen by OPM, to serve most of the small-volume agencies. The largest agencies would be excluded from the experiment; thus, the Social Security Administration, National Labor Relations Board and Labor Department could retain intact their highly structured systems. The two wholly adjudicatory agencies, Occupational Safety and Health Review Commission and Federal Mine Safety Health Review Commission, would be excluded because they are already functioning as separate trial courts. And the economic regulatory agencies (most of which are medium-volume) would not participate since they must first adjust to the effects of the deregulation movement, which is tending to reduce their caseloads while shifting their emphasis toward enforcement and away from initial licensing. These agencies would include the ICC, FERC, FCC, FTC, FMC, SEC and CAB.

Testing the idea

That leaves 17 agencies (see Table 2) with 68 ALJs currently employed—all but three having seven or fewer ALJs. These 17 agencies conduct a wide variety of proceedings, and undoubtedly have fluctuating caseloads. If these 68 ALJs (plus a chief judge, augmented

**Table 2 Total federal ALJs by agency
June 1, 1981¹**

Social Security Administration	695
National Labor Relations Board	112
Labor, Department of	82
Occupational Safety and Health Review Commission	45
Interstate Commerce Commission	28
Federal Energy Regulatory Commission	23
Federal Mine Safety and Health Review Commission	16
Coast Guard	15
Federal Communications Commission	13
Interior, Department of the	11
Federal Labor Relations Authority	11
Federal Trade Commission	10
Environmental Protection Agency	7
Federal Maritime Commission	7
Securities and Exchange Commission	7
Civil Aeronautics Board	6
National Transportation Safety Board	6
Agriculture, Department of	5
Commodity Futures Trading Commission	4
Postal Service	3
National Oceanic and Atmospheric Administration	3
Merit Systems Protection Board	2
International Trade Commission	2
Bureau of Alcohol, Tobacco and Firearms	1
Drug Enforcement Administration	1
Food and Drug Administration	1
Housing and Urban Development, Department of	1
Maritime Administration	1
Nuclear Regulatory Commission	1
TOTAL	1,119

Source: Office of Administrative Law Judges, U.S. Office of Personnel Management. Data does not include loans or unoccupied slots.

by a few more judges who would also cover agencies that occasionally need an ALJ, but do not employ one full-time) were transferred into a corps under OPM control to service all but the specifically excluded agencies, the idea would be put to a good test.

Implementing the idea would require legislative authorization as well as budgetary resources for OPM (presumably to its Office of ALJs). The experimental program could be established in OPM for a five-year period, and it could require all 17 agencies to use ALJs from this corps (unless OPM granted a waiver because the agency had shown that the extremely technical nature of its cases requires in-house judges). After five years, OPM (or perhaps the Administrative Conference) would be required to submit to Congress an evaluation of the program.

The administrative efficiencies that the agencies would achieve should mute any opposition from these small-volume agencies, especially since adjudication is not as central to the missions of most of these agencies as it is to the others. And any ALJ who balked could transfer to one of the excluded agencies; presumably an equivalent number would wish to transfer into the corps.

It is of course possible to develop scenarios for a corps encompassing all 1,119 ALJs. For example, four panels might be created: claims adjudication, labor relations, non-labor enforcement cases and initial licensing cases with, say, four grade levels corresponding to GS-14 through GS-17. Each panel could be staffed with judges at all four levels. Panel administrators (GS-18) would then assign cases to different level judges depending on their presumed difficulty—though all judges would have the same degree of independence and would be deemed legally and constitutionally qualified to render initial decisions in all cases.

But describing even the skeleton of such a totally revamped system mainly serves to suggest all the nagging loose ends. What is needed is some experience to assess. The states are beginning to provide it, the time has come to institute a pilot program on the federal level, too. □

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