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Management of Federal Agency Adjudication

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MANAGEMENT OF FEDERAL AGENCY ADJUDICATION

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It is well known that during both the regulatory decade of the 1970's and the deregulatory 1980's, federal agencies generally relied on rulemaking as the procedure of choice for making policy. By all indications, the growth of agency proposed and final rules was strong and persistent. A key indication of rulemaking's centrality was the succession of Presidential Executive Orders issued to bring this type of agency activity under firmer White House control.[2] In short, Professor Davis' oft-quoted 1970 proclamation that notice-and-comment rulemaking is "one of the greatest inventions of modern government,"[3] seemed to be not only prescient but quite justifiable.

Little noticed amidst this *illumina* of rules was the fact that agency adjudication–the seemingly forgotten half of the administrative Procedure Act's procedural framework (and by far the most disputed part in the debate surrounding its passage)[4]–was still there for the using. And when a series of developments began "to take the bloom off the rulemaking rose,"[5] agency administrators were able to turn to the shelf and discover that adjudicating individual cases might be a promising alternative–a way to get things done without OMB review and with less intrusive judicial review. If rulemaking was the hare, adjudication had become the tortoise.

Not that agency adjudication hadn't also undergone some changes since 1946. The government's agency caseload had grown in a fashion parallel to its rulemaking load–it had shot up in the 60's and 70's and had leveled off in the 80's. The number of federal administrative law judges (ALJs) grew rapidly from 196 in 1947 to 278 (1954, 494 (1962), 792 (1974), 1,070 (1979), 1,119 (1981), where it remains today.[6] More importantly the character

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[2]Exec. Order No. 11,821, *amended by* Exec. Order No. 11,949 (President Ford); Exec. Order No. 12,044 (President Carter), Exec. Order Nos. 12,291, 12,498 (President Reagan)

[3]Administrative Law Treatise (1970 Supplement) (§ 6.15); reaffirmed in 1 Administrative Law Treatise (2nd ed. 1978) (§ 6.1).

[4]*See* Musolf, Federal Examiners and the Conflict of Law and Administration 35-46, Johns Hopkins Press (1953); reprinted by Greenwood Press, Westport, CT, (1979).

[5]*See* Scalia, Back to Basics: Making Law Without Making Rules, Regulation, July/Aug. 1981 at 25, 26

[6]*See* Lubbers, A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level, 65 JUDICATURE 266, 268 (Table 1) November 1981.

of agency adjudications had changed with more fact-based benefit, labor and enforcement cases and proportionately fewer policy-laden economic regulatory and rate cases.[7] Finally, just as commentators were decrying the encumbrances on the once simple notice-and-rulemaking process, critics were pointing out that the agency adjudication process-once thought to be an expeditious alternative to court litigation-had itself taken on trappings of trial-type, adversarial formality.[8] The reaction to this recognition was an increasing reliance on "informal adjudication," "non-APA" adjudication, and "alternative dispute resolution."

This pattern of federal agency adjudication has become increasingly variegated. The many available options and strategies obviously pose challenges for legislators, agency administrators and managers. It is the purpose of this paper to describe existing patterns of agency adjudication and to focus on management initiatives that have attempted to come to grips with these options and strategies. Philip Harter's companion paper will focus on the promise of alternative dispute resolution (ADR) as it can be applied to the special world of agency adjudication.

Overview of an Agency Case

We will postpone for the moment a prolonged discussion of the "continuum" of agency adjudication which ranges from the most informal decision (*e.g.*, a determination to disclose an agency "record" requested under FOIA) to the most formal trial-type proceeding held under the Administrative Procedure Act hearing requirements (5 U.S.C. §§ 554, 556-57). At the outset, it is useful to describe in some detail the major stages of a typical case on the formal end of the spectrum. A familiarity with these stages is necessary for anyone seeking to practice case management. These stages can be divided into three: prehearing, hearing and posthearing. A fourth, follow-on stage (judicial review) needs also to be kept in mind.

The Prehearing Stage

A case may begin in several different ways, depending on the type of case and the particular agency's case initiation procedures. Some cases are triggered by an application, a private complaint, a petition or a preliminary determination of violation made at an inspection. This initial step may lead to a denial of the petition or application, or to a citation or notice of violation based upon the private complaint or preliminary investigation. Further procedural steps may take place prior to referral of the case to an administrative law judge (ALJ) for hearing. These steps might include a formal order of investigation, a formal complaint, a staff

[7] *Id.* at 269-270.

[8] *See* Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 311-313 (1978) (noting criticism of the APA as overjudicialized).

recommendation of hearing, completion of an environmental impact statement and issuance of a formal order or notice of hearing. Of course, not all cases go through the same prehearing stages. Moreover, as the Administrative Conference learned in its statistical study of agency adjudication,[9] it is often difficult for an agency to pin down the exact date that a case originates, especially if the first action in the case occurs in a field office. This presented a data-gathering problem since the pre-hearing stage often appears misleadingly short.

The Hearing Stage

The hearing stage encompasses the period during which the ALJ has control of the case. This stage often begins when the case is referred to the Chief ALJ's office. The case is then assigned to the ALJ who is to preside over it. Other key dates in this stage include the prehearing conference, the first day of hearing, the last interlocutory order (if any), the last day of hearing, the completion of the record/filing of final briefs, and date of the ALJ's decision or order. At some agencies, in simpler cases, ALJs issue an oral decision from the bench (read into the transcript).[10]

Presiding ALJs are given broad powers by the Administrative Procedure Act to control the hearings,[11] although they lack contempt powers. Hearings are "on the record" and are transcribed verbatim. Under the APA, "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."[12] However, in certain types of cases oral hearings may be omitted or truncated: "In . . . 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."[13] This flexibility inherent in the APA's provisions concerning cross-examination and in the special provisions for benefits and initial licensing cases are often forgotten by those who criticize the APA's "formalism."[14]

For case tracking purposes, the hearing stage dates (from referral to the Chief ALJ to issuance of ALJs decision) are relatively certain and reliably retrievable. Thus statistics

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[9]Federal Administrative Law Judge Hearings-Statistical Report for 1976-1978, Administrative Conference of the U.S. (1980). (Introductory essays in that publication describe the data gathering methods in detail.)

[10]This has been the practice, for example, at the National Transportation Safety Board.

[11]5 U.S.C. § 556(c)(5).

[12]5 U.S.C. § 556(d).

[13]*Id.*

[14]This point is well made in Verkuil, *supra* note 7 at 313-315.

collected for this stage (for similar case type categories) should prove useful to managers and analysts alike.

The Posthearing Stage

The posthearing stage begins when the ALJ's decision or order is released. The case then may or may not be reviewed by the agency head (*i.e.*, a full board or commission, a panel thereof, or an individual administrator) or a delegate of the agency head (*e.g.*, a judicial officer or review board). Review procedures vary almost as widely as prehearing procedures.[15] In some agencies, review by the agency head is within the discretion of the agency and is infrequent. In others, appeal may be had by right and review is frequent. Under some agencies' statutes, review is mandatory. Thus a series of posthearing events may take place in an agency adjudication: the filing of an appeal (sometimes called "exceptions"), the filing of briefs by the petitioners (and, thereafter, the respondents), oral argument to the reviewing body, and final agency action. Some agencies utilize an intermediate review board for some or all the cases, before consideration by the agency head.

The APA does allow initial decisions by ALJs to "become [] 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."[16] Other statutes, however, may require review. The APA also gives agency heads great leeway in the scope of their review of ALJ decisions: "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."[17] In practice, however, this free hand has been somewhat circumscribed by reviewing courts.

From the standpoint of case tracking, this stage is relatively coherent in each agency although cross-agency comparisons are difficult due to the variety of review structures. Moreover, even within an agency, because the review structure is normally quite separate from the ALJ office, the logistics of following cases through both stages are problematic. Different docket personnel are often involved at each stage and the ALJ office usually loses track of cases after initial decisions are issued.

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[15] *See* ACUS Recommendation 83-3 "Agency Structures for Review of Decisions of Presiding Officers under the Administrative Procedure Act, 1 CFR § 305.83-3; Cass, Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis, 66 B.U.L. Rev. 1 (1986).

[16] 5 U.S.C. § 557(b).

[17] *Id.*

Judicial review

Although the vagaries of judicial review of agency decisions are beyond the scope of this paper, agency case managers must keep in mind the impact of judicial oversight. Formal agency adjudications are normally reviewed on the basis of the record assembled by the agency. Reviewing courts' factual review is based on the substantial evidence test–meaning that if the court finds substantial evidence to support the agency's decision (even if there may also be substantial evidence to support another outcome) the decision is to be sustained.[18] However, to obtain an affirmance, the basis for the final agency decision must be adequately spelled out. Sometimes, of course, the agency simply relies on the reasoning of the ALJ's initial decision or that of its intermediate decisionmaker, which is then reviewed by the court. But if the agency head reverses or modifies the underlying decision, the reviewing court will look for adequate justification for such departure in the agency's final decision.

Court challenges to agency orders can also be based on broader, legal or constitutional bases, which if sustained by the courts, can lead to major impacts on the agency's adjudication process. Remands and reopenings not only play havoc with case-tracking statistics, and disrupt case assignments and scheduling, they also have ripple effects throughout an agency's adjudicative system.[19] Some mechanism has to be developed to translate judicial doctrine into agency policy transmitted down into the adjudicative system. This has been an especially big problem where agency policymakers have resorted to selective "nonacquiescence" in judicial review decisions, by refusing to apply the court's holding to any cases but the one actually reversed.[20]

The Role of the Administrative Law Judge

As may be inferred from the foregoing description, the administrative law judge is the key actor in agency adjudication. ALJs preside over all agency adjudications (and those rulemakings) that are required by statute to be determined on the record after opportunity for an agency hearing.[21] In those "APA hearings" (often as interchangeable with "formal hearings") only an ALJ or the agency head (single administrators, board or commission or

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[18] 5 U.S.C. § 706(2)(E). *See Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (explaining the meaning of the substantial evidence test).

[19] *See* Schuck and Elliot, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984 (study of judicial remands of agency cases).

[20] *See* Estreicher and Reveresz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679 (1989).

[21] 5 U.S.C. §§ 553(c), 554(a). On-the-record rulemaking (sometimes called formal rulemaking) is cumbersome and rarely required by statute.

members thereof) may preside-and it is exceedingly rare for the agency head to do the presiding.[22]

To protect ALJs from undue agency pressure, the APA gave them independence in matters of appointment, pay and tenure. Agencies can appoint them only after applicants have passed a competitive "merit selection" examination administered by the Office of Personnel Management (OPM) which may not delegate this responsibility to the appointing agency.[23] ALJ pay must also be set by OPM independently of agency recommendations or ratings.[24] The APA provides that ALJs are to be assigned to cases "in rotation so far as practicable,"[25] "may not perform duties inconsistent with their [ALJ] duties and responsibilities,"[26] and may not "be responsible to or subject to the supervision or direction of" agency prosecutors or investigators.[27] They are exempt from agency performance appraisals[28] and are subject to discipline and removed only for "good cause" as determined by the independent Merit Systems Protection Board (after an APA hearing).[29]

The Supreme Court has recognized that the ALJ's role is "functionally comparable" to that of a trial judge conducting civil proceedings without a jury.[30] A Senate committee has gone so far as to declare: "In essence individuals appointed as [ALJs] hold a position with tenure very similar to that provided for federal judges under the Constitution."[31]

This is not to say that ALJs are completely independent agents. They are agency employees who are bound to apply the published rules of the agency. And as pointed out above, the agency head may rather freely reverse the ALJ's initial decisions. They also remain subject to the general administrative direction of the employing agency. As the OPM Bulletin on ALJs points out, ALJs "are subject to agency administrative directions in such non-

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[22] 5 U.S.C. § 556(b). The APA does, however, permit other employee boards to preside over "specified classes of proceedings" when so provided by statute. *Id.*

[23] 5 U.S.C. §§ 1104(a)(2).

[24] 5 U.S.C. § 5372.

[25] 5 U.S.C. § 3105.

[26] *Id.*

[27] 5 U.S.C. § 554(d)(2).

[28] 5 U.S.C. §§ 4301(2)(D), 5335(a)(5).

[29] 5 U.S.C. § 7521.

[30] *Butz v. Economou*, 438 U.S. 478, 513 (1978).

[31] Administrative Law Judges-Civil Service, Senate Report 95-697, Legislative History of P.L. 95-251, 95th Cong., 1st Sess. 2 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 496, 497.

adjudicatory matters as hours of duty, travel, parking space, office space, office procedures, staff assistance and organizational structure. Of course, administrative direction in such matters may not be used as a means of affecting, controlling, or sanctioning Administrative Law Judges' decisions in 'formal' proceedings."[32]

ALJ Demographics

As of March 25, 1991, there were 1,090 ALJs employed by 31 federal department and agencies. Another 12 agencies borrow ALJs under the "loan" program administered by OPM. Approximately 71% of these ALJs are employed by the Social Security Administration and another 15% are employed by the U.S. Department of Labor and the National Labor Relations Board. The other 28 agencies employ the remaining 14%. Only about 200 of the 1,100 ALJs are based in the Washington, D.C. area with the others located across the country.

Applicants for ALJ positions must meet a series of minimum qualifications requirements.[33] They must be attorneys with a minimum of seven years of experience involving the preparation, presentation, hearing and/or review of formal cases before either an administrative agency or a court. Minimally qualified applicants are then rated by OPM on a numerical scale. They are asked to submit a "supplemental qualifications statement" which describes their experience in (a) rules of evidence and trial procedures, (b) analytical ability, (c) decision ability, (d) oral communications ability and judicial temperament, and (e) writing ability. Those scoring high enough on this statement are then given a written demonstration, a panel interview, and a reference check. The maximum composite score for any applicant based on this examination is 100, but federal law also requires that "veterans preference points" (5 for veterans, 10 for disabled veterans) be added to the score.

Applicants who score above 80 points are then placed on a roster of eligibles (highest scores at the top) and they are referred to employing agencies for filling vacant positions as they occur in various geographical areas of the applicants' choice. Veterans' preference also obtains in the agency selection from the register-an agency may not select a non-veteran over a veteran with an equal or higher score.

OPM's Office of ALJs has been very diligent in maintaining and improving its process for examining and qualifying ALJ applicants. In most respects it is a true merit selection system, far more rigorous than the ad hoc selection process for most state and federal judges. However, recruitment of women and minorities has lagged considerably. Over 90% of

[32] Administrative Law Judge Program Handbook, U.S. Office of Personnel Management (Office of Administrative Law Judges at 2 (May 1989)). This is an excellent compendium of information on the ALJ program.

[33] *Id.* at 5-6.

all ALJs are white males. Of the 1,024 ALJs in 1989, 38 (3.71%) were women, 26 (2.54%) were black and 25 (2.44% were Hispanic).[34] Almost as troubling is the fact that many ALJs apparently see the position as one to retire from-the mean age of ALJs is approximately 58.[35]

It is a shame that the ALJ corps is not able to attract a wider pool of younger and more diverse judges. Congress should seriously consider whether the detriments of applying veterans preference to this position outweigh the benefits.

The ALJ's Role Under the APA

Under the Administrative Procedure Act, ALJs are (subject to the agency's published rules and to the powers granted to the agency by statute) authorized to:

1. administer oaths and affirmations;

2. issue subpoenas authorized by law;

3. rule on offers of proof and receive relevant evidence;

4. make 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 case by the consent of the parties;

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 ¶ (6) of at least one representative of each party who can negotiate over the resolution of the dispute;

9. dispose of procedural requests or similar matters;

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[34] See Office of Personnel Management, "Announcement of Revisions in Administrative Law Judge Examination," 55 Fed. Reg. 52340, 52341 (December 21, 1990) (citing those figures).

[35] OPM, Administrative Law Judge-Program Handbook @ p. 4 (May 1989).

10. make or recommend decisions in accordance with 5 U.S.C. 557; and

11. take other action authorized by agency rule consistent with the procedural provisions of the Administrative Procedure Act, 5 U.S.C. 551-559.[36]

Several of these powers have led to questions.

[36]5 U.S.C. § 556(c). Clauses 7 and 8 were added by the Administrative Dispute Resolution Act of 1990, Pub. L. 101-552.

Subpoenas

The authority of ALJs to issue subpoenas on behalf of the agency seems relatively clear. However, in practice there remains some reluctance on the part of a few agencies to allow the ALJ to issue them without some sort of agency head approval or signature. This problem led the Administrative Conference in 1974 to urge (so far unsuccessfully) that the APA be clarified to provide that presiding officers in all APA adjudications be authorized to sign and issue subpoenas.[37] More recently, the Conference focused on the need to encourage in the Social Security ALJs to use the subpoena power they possess. ACUS Recommendation 90-4 urged ALJs to issue subpoenas on their own motion "where necessary to ensure that medical evidence is complete, and to obtain other evidence not otherwise available."[38] It further recommended that subpoenas requested by claimants should be issued except where the ALJ finds good cause not to and proposed that SSA develop "form subpoenas" for use by disability claimants along with instructions.

Rules of Evidence

The authority to "receive relevant evidence," when coupled with the APA provision in § 556(d), has led to questions about whether more guidance is needed to either make these evidentiary rulings easier or to give ALJs more encouragement to clamp down on irrelevant and case-lengthening submissions. Section 556(d) states:

> "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."

Bearing in mind that administrative adjudication does not involve juries, and that therefore many of the technical evidentiary rules concerning the admission of prejudicial evidence need not apply, the drafters of the APA sought to avoid the use of these technical rules of evidence. However, over the years, concerns grew that ALJs were too often lax in excluding

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[37]ACUS Recommendation 74-1, "Subpoena Power in Formal Rulemaking and Formal Adjudication" 1 CFR § 305.74-1 (1991).

[38]ACUS Recommendation 90-4 "Social Security Disability Program Appeals Process: Supplementary Recommendation" -3, 1 CFR § 305.90-4 (1991).

the irrelevant, immaterial or unduly repetitious evidence, feeling that the only risk of reversal was in excluding admissible evidence. Thus the tendency became "letting the evidence in for whatever its worth."[39] The Federal Rules of Evidence (FRE) were enacted in 1975, applicable to federal court adjudication (jury and non-jury alike).[40] In 1986, the Administrative Conference urged agencies to give greater authority and encouragement to ALJ exclusion of unreliable or repetitious evidence by reference to FRE Rule 403 which allows for exclusion of evidence when its probative value is substantially outweighed by other factors, including its potential for undue consumption of time. The Conference, however, did not wish for Congress to simply require agencies to use the FRE in its totality.[41] More recently, however, as the FRE has become increasingly familiar to the bench and bar, there has been more movement toward adoption of at least a modified FRE by federal agencies. The Department of Labor has done so[42] and the American Bar Association and Federal Bar Association are considering a study based on the Department's experience.[43] This may result in wider use of the FRE, and perhaps, better managed adjudications.

Controlling Hearings

The authority to "regulate the course of the hearing" has led to questions about the ALJ's authority to take immediate action against disruptive actions by participants in the hearing.

Because most agencies have or claim statutory authority to regulate the conduct of attorneys through exclusion from particular proceedings or disbarment from future proceedings, the ALJ's power to exclude attorneys is derivative. ALJ exclusion of disruptive counsel has been sustained on occasion, but these decisions have treated the exclusions not as disciplinary measures but as flowing from the common-law right of an adjudicator to protect the integrity of

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[39] *See* Pierce, Use of the Federal Rules of Evidence in Federal Agency Adjudications, 39 Admin. L. Rev 1 (1987).

[40] Federal Rules of Evidence, Pub. L. 93-595, 88 Stat. 1726 (1975).

[41] ACUS Recommendation 86-2 "Use of the Federal Rules of Evidence in Federal Agency Adjudications,". 1 CFR 305.86-2 (1991), *relying on* Pierce, *supra* note 3.

[42] Department of Labor final rule, 55 Fed. Reg. 13218 (April 9, 1990).

[43] The Federal Bar Association has encouraged agencies to consider use of the Federal Rules, FBA Resolution 91-5, "Administrative Agency Adoption of Uniform Rules of Evidence Patterned After Federal Rules of Evidence (April 13, 1991). The ABA is also considering the matter. Both bar associations based their effort in part on a study by Professor Michael Graham, Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach, U. Ill. L. Rev. ___ (1991) (forthcoming).

the adjudicatory process.[44] ALJ actions in this regard must be grounded in agency statutory authority and in regulations implementing that authority. Moreover, such action would normally be reviewable by the agency head and subject to judicial review. Future debarment actions normally require separate formal hearings.[45]

ALJ's Insulation

Some of the APA provisions designed to protect the ALJ's independence from agency coercion also have the effect of insulating the presiding ALJ from the agency policymakers. Some critics have asserted that, at least in nonaccusatory proceedings, this wall of separation has become too restrictive.[46]

In addition to the prohibition (discussed earlier) against having ALJs be responsible to or supervised by agency investigators or prosecutors, two other "separation of functions" provisions in the APA serve to insulate them. Section 554(d)(1) provides that an ALJ may not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate." As Professor Asimow has stated, this 'hearing officer nonconsultation rule' has always been shrouded in mystery."[47] If read literally, it would bar conversations between judge and law clerk on disputed facts. And although many have argued that it should only be applied to consultations with outsiders, the Supreme Court has not followed that view.[48]

This provision must be read with the even broader separation of functions provision in § 554(d):

> "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 § 557 of this title, except as witness or counsel in public proceedings."

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[44] *See* Levinson, Professional Responsibility Issues in Administrative Adjudication, 2 BYU J. of Pub. L. 219, 242-251 (1988).

[45] *See* the SEC's debarment regulation, 17 CFR § 201.2(e) (1990).

[46] *See* Asimow, When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies, 81 Colum. L. Rev. 759 (1981).

[47] *Id.* at 763.

[48] *Butz v. Economou*, 438 U.S. 478, 513-14 (1978) (dictum).

This means that a certain class of employees, investigators or prosecutors in the particular case being adjudicated or one that is factually related may not furnish off-the-record advice to any decisionmaker. Thus, ALJs are clearly barred from being advised by internal staff investigators or prosecutors, even if the "non-consultation" rule were to be applied only to outsiders.

From a management point of view, what issues are raised by these provisions? It is easy to see that ALJs should be insulated from adversary staff in accusatory proceedings like civil penalty proceedings or license revocation cases. But what about non-accusatory adjudication such as ratemaking, initial licensing, merger approvals and similar economic regulatory cases? The APA specifically exempts these types of cases from the separation of functions requirements, yet according to Asimow, most agencies adhere to them anyway–thus preventing ALJs from seeking the assistance of uninvolved staff experts, supervisors or colleagues of involved staff adversaries, and other staff members who might help the judge come to a faster, better-informed decision.[49]

As Asimow has commented,

> While these costs [of strict separation of the adjudicator from uninvolved experts] may be acceptable in accusatory adjudications, they must be minimized in economically significant, nonaccusatory disputes that by law or custom are settled by formal adversarial adjudications. In such disputes, the economic and environmental impact of the decision is frequently far-reaching and often unpredictable, and the costs of error are very high. Moreover, such matters are procedurally cumbersome and already take an unbearably long time to conclude. Agencies must engage in prophecy and resolve obstruse economic, technological, or scientific questions that are seldom quantifiable and that trigger intense professional controversy. The claims of diverse economic, social, and political interests conflict irreconcilably, and the agency must select from an almost limitless number of policy options and solutions. Consequently, the

[49] *Id.* at 797-799.

> decisionmakers urgently need as much technical, legal and political advice as can be provided.[50]

A final separation of functions issue also has management implications. Once the ALJ has issued his or her initial or recommended decision and it is before the agency head for review, there is nothing in the APA that would prevent the agency head from asking the ALJ for advice or clarification about the decision. Yet this is apparently rarely if ever done and an Administrative Conference recommendation proposing this practice in appropriate circumstances was tabled after ALJ opposition.[51]

Can ALJs Be Managed?

The short answer to this question is yes and no. While it is true that ALJs are statutorily exempt from employee performance appraisals, they are not necessarily immune from performance evaluations. Courts have reasoned that because an ALJ may be removed for poor performance, it follows that an agency may gather data and form an opinion of an ALJ's performance. 930.211 Prohibits agency rating, ranking, or evaluating.

Much of the law concerning the limits of ALJ independence derives from MSPB and court decisions construing the "for good cause" standard for ALJ discipline and removal actions found in 5 U.S.C. § 7521. In his exhaustive study of the "good cause" provision for the Administrative Conference, Professor Victor Rosenblum examined the history and application of the provision.[52] He wrote in 1984 in the context of a surge of disciplinary actions against ALJs, including, for the first time, removal actions based on allegations of low productivity rather than acts of misconduct.[53] Most of these proceedings resulted from a long-lasting dispute between the Social Security Administration and its ALJs over elements of the agency's case management program.[54]

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[50] *Id.* at 800.

[51] *See* Transcript of Twenty-third Plenary Session of Administrative Conference of the U.S. 29-117 (December 11, 1981).

[52] Rosenblum, Contexts and Contents of "Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors, 6 W. New Eng. L. Rev. 593 (1984).

[53] *See* Timothy, Disciplinary Proceedings Against Federal Administrative Law Judges, 6 W. New Eng. L. Rev. 807 (1984).

[54] *See, e.g.*, Social Security Administrative Law Judges: Survey and Issue Paper, Subcomm. on Social Security of the House Comm. on Ways and Means, 96th Cong. 1st Sess. (Comm. print 1979); The Role of the Administrative Law Judge in the Title II Social Security Disability Program, Report by the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. (Committee Print 1983).

Taking its cue from a Congressional directive expressing concern about the high rate at which ALJs were reversing initial disability claim determinations made at the state level and the variance in these rates among ALJs, SSA embarked on a series of measures to scrutinize individual ALJ decisional activity. Based on a review of ALJ allowance rates, individual ALJs with the highest allowance rates were targeted for full review of all their decisions by the SSA Appeals Council. Individual "counseling" sessions for ALJs were also proposed by SSA, though never implemented. Furthermore SSA, in memoranda to its ALJs, focused heavily on allowance rate "goals."[55] The SSA ALJ Association sought injunctive relief against these practices in 1984, and although the court denied injunctive relief because the practices complained about had been changed, it severely criticized the agency's "unremitting focus on allowance rates in the individual ALJ portion of the [review program] [which] created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof."[56]

In another challenge to SSA procedures brought by an individual ALJ, the agency fared somewhat better. The Second Circuit affirmed the district court's dismissal of the ALJ's claim that his decisional independence had been infringed by the SSA's "peer review program," even though the court had found that some of the components of the program may have been "questionable."[57] The Second Circuit was equally supportive:[58]

> "Regarding the Secretary's policy of settling a minimum number of dispositions an ALJ must decide in a month, we agree with the district court that reasonable efforts to increase the production levels of ALJs are not an infringement of decisional independence."
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> "The settling of reasonable production goals as opposed to fixed quotas is not in itself a violation of the APA."
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[55]The agency's measures are described in the district court's opinion in *Association of Administrative Law Judges, Inc., v. Heckler*, 594 F. Supp. 1132 (D.D.C. 1984).

[56]*Id.* at 1143.

[57]*Nash v. Bowen*, 869 F.2d 675 (2nd Cir. 1989).

[58]*Id.* at 686.

The court went on to uphold the Secretary's setting of "monthly production goals."

In the administrative arena, SSA also sought to remove several ALJs on grounds of low productivity. Again, the results were mixed. In the lead case, *SSA v. Goodman*,[59] the agency charged that the judge's productivity was "unacceptably low" because his average monthly disposition rate was only half the agency-wide average of about 31 cases per month. It was also shown that the judge's annual average "pending" caseload was 64 compared with 178 for all SSA judges. The MSPB ALJ recommended dismissal of Goodman, but the full Board unanimously reversed. In what can only be described as a compromise verdict, the Board established the principle that "there is no generic prohibition to" filing charges based on low productivity. It also characterized Goodman's manner of handling his cases as "unreasonably methodical." Nevertheless the Board ruled that the agency's showing that Goodman's disposition rate was half the national average was not adequate proof of the charge. The Board cited the agency's acknowledgement that its cases "did vary in difficulty" and "are not fungible" and ruled that if the agency's case relied totally on comparative statistics, that more proof of their validity was needed. Several subsequent SSA actions against ALJs of low productivity also failed on these grounds, and several judges (including Goodman) were awarded attorneys fees for their trouble.[60]

In the end, although the MSPB established the principle that agencies could base removal actions on grounds of low productivity, the amount of statistical proof required (especially giving the dearth of government statistics on agency adjudication) may make such cases nearly impossible to win. Still, the threat of such an action, and the possibility of having to mount an expensive defense to it, may itself serve as a spur to agency productivity efforts.

A better approach for everyone would be a consensus-based approach to setting productivity standards. As Professor Rosenblum has concluded:

> Failure quantitatively to meet a minimum or to stay within a maximum average disposition rate could, arguably, provide a rebuttable presumption of good cause, if the

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[59] 19 M.S.P.R. 321 (1984). The description relies on Rosenblum, *supra* note 51 at 620-627.

[60] *See Social Security Administration v. Balaban*, 33 M.S.P.R. 309, 314-316 (1987); *Social Security Administration v. Goodman*, 33 M.S.P.R. 325, 329-32 (1987). For a useful digest of MSPB decisions concerning ALJs *see*, Streb, "The ALJ Digest: A Summary of Statutes, Regulations of MSPB and OPM and Decisions of MSPB and the Courts Concerning Disciplinary and Other Actions Affecting Administrative Law Judges." Office of Administrative Law Judge, MSPB, July 6, 1990.

> rates have been determined for each agency through consultations with and recommendations by representative experts from the bench, bar and academia concerned with that agency's administrative adjudication, and if the agency has made reasonable effort to accommodate to particular judges' perceived and expressed needs for assistance.[61]

In its Recommendation 86-7, the Administrative Conference has also recognized the need for appropriately derived productivity norms:

> 1. *Personnel management devices.* Use of internal agency guidelines for timely case processing and measurements of the quality of work products can maintain high levels of productivity and responsibility. If appropriately fashioned, they can do so without compromising independence of judgment. Agencies possess and should exercise the authority, consistent with the ALJ's or other presiding officer's decisional independence, to formulate written criteria for measuring case handling efficiency, prescribe procedures, and develop techniques for the expeditious and accurate disposition of cases. The experiences and opinions of presiding officers should play a large part in shaping these criteria and procedures. The criteria should take into account differences in categories of cases assigned to judges and in types of disposition (*e.g.*, dismissals, dispositions with and without hearing). Where feasible, regular computerized case status reports and supervision by higher level personnel should be used in furthering the systematic application of the criteria once they have been formulated.[62]

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[61]Rosenblum, *supra* note 51 at 642.

[62]ACUS Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication," 1 CFR § 305.86-7 (1991).

Role of the Chief ALJ

OPM has authorized the creation of about two dozen chief ALJ positions with higher grade levels than the other ALJs at the agency.[63] The establishment of such positions is based on certifications from the agency that their chiefs devote a significant portion of their time to administrative and management duties. There are, however, no government-wide norms as to what those duties should entail. The General Accounting Office urged that the chief judges at each agency play a lead role in establishing performance standards for the quality and quantity of the ALJ's work and that they also "review the procedures by which cases are formally adjudicated to determine if simplified procedures can be used."[64]

A Congressional study focusing on delay in the regulatory process also urged agency chief judges to take more responsibility for reviewing the work of their judges, for both quality and quantity.[65] This is an issue that deserves more consideration by OPM and Congress.

ALJs and IGs

Another potential player in the debate over management of the adjudicative process is the agency inspector general. IGs are in place in virtually all the agencies employing ALJs and are charged with, among other things, promoting the economy, effectiveness and efficiency in the administration of agency programs.[66] The IG's independence and authority to investigate certainly carries with it the potential to encroach upon the ALJ's decisional independence.

The tension has actually occurred in a related administrative judicial context in which judges of the U.S. Court of Military Navy-Marine Corps Court of Military Review (a legislatively created tribunal for resolving military classification and discharge disputes) sought an injunction to prevent the Department of Defense IG from requiring the judges to appear before the IG to answer questions regarding improper influence allegedly exerted against judges in their review of a court-martial conviction. The U.S. Court of Military Appeals granted the petition and

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[63]"Chief" status is conferred by (and may be revoked by) the agency head.

[64]"Administrative Law Process: Better Management is Needed," Comptroller General, Report to the Congress 48 (May 15, 1978) (FPCD-78-25).

[65]Study on Federal Regulation (Volume IV "Delay in the Regulatory Process") Sen. Comm. on Governmental Affairs Committee Print 110-112, 95th Cong. 1st Sess. (July 1977).

[66]*See* the Inspector General Act of 1978, Pub. L. 95-452, 92 Stat. 1101, 5 U.S.C. App. *See also,* The Inspector General Act of 1978: A Ten-Year Review, Sixty-first Report by the House Comm. on Government Operations, House Report 100-1027, 199th Cong. 2nd Sess. (October 3, 1988).

appointed a special master from one of its member judges to investigate the underlying allegations.[67]

The court did not dispute the IG's authority to investigate certain improprieties such as "an allegation that an appellate military judge has submitted a false voucher or has made a false claim for reimbursement of travel expenses incurred in performing his duties as a judge."[68] On the other hand, the court concluded that "investigation of a court's deliberative processes . . . is limited by a judicial privilege protecting the confidentiality of judicial communications."[69]

One such dispute has so far surfaced in the ALJ arena. At the Nuclear Regulatory Commission, pursuant to a Congressional request, the agency IG conducted an inquiry into the mechanics of the issuance of an initial decision authorizing a full power license for the Seabrook power plant.[70] The Congressional request was based on the suggestion that sometime between the rendering of the initial decision by the Atomic Safety and Licensing Board, the NRC's adjudicatory tribunal, and the release of the decision to the parties and the public four days later, it was "corruptly" changed. The Office of the IG conducted an investigation of the panel staff although the Office conspicuously refrained from interviewing the Board members themselves. In this case the NRC IG was quite properly sensitive to the concern that the judges' decisional independence not be infringed.

ALJ Corps Proposals

Whether or not there is a problem of insufficient actual or perceived independence of federal ALJs or inefficiencies due to the decentralized nature of the administrative judiciary, one solution that has persistently been proposed has been the "ALJ corps bill."[71] This legislation would separate the ALJs from the employing agencies and put them in the employ of a new agency known as the Administrative Law Judge Corps. The Corps would be headed by a

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[67] *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988).

[68] *Id.* at 337.

[69] *Id.*

[70] *See In the Matter of Public Service Company of New Hampshire, et al. (Seabrook Station Unit 1 and 2)*, Docket Nos. 50-443-OL, 50-444-OL, Memorandum from Administrative Law Judge Ivan W. Smith. (August 7, 1990).

[71] S. 594, 101st Cong., 1st Sess., 135 CONG. REC. 2711-13 (1989). *See generally* Administrative Law Judge Corps Act: Hearings on S. 594 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. (1989); Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983).

Chief ALJ and divided into eight subject-matter divisions each headed by a division chief ALJ. The chief and division chiefs (all appointed by the President with the advice and consent of the Senate) would form a Council which would administer the Corps. It would assign judges to divisions, appoint new ALJs (from an OPM register), prescribe rules of practice and procedure for cases heard by the Corps, and manage the Corps' operations. The bill also includes new provisions for the discipline and removal of ALJs. The bill acknowledges the potential for change in the dynamics of agency review of ALJ decisions by mandating a study of this subject.

This concept (which has been enacted in over a dozen states)[72] has consistently received the support of the major ALJ organizations as well as the American Bar Association, but it has been opposed by the executive branch (as well as by some ALJs)[73] and has fallen short of passage. (In the 101st Congress, S. 594 was reported favorably on a vote of 9-5 by the Senate Judiciary Committee.[74] It never reached the floor. In the House, no action was taken although subcommittee hearings have been held in earlier Congresses.)

Support for the concept is based on two separate arguments-efficiency and fairness (or at least perceptions of fairness). Opposition to the idea is based both on a generalized feeling that the current system is not "broke" and that changes to it would lessen expertise in the administrative judiciary and create a new "bureaucracy" of judges independent of agency policy inputs. Indeed, despite the passage of a decade, the basic arguments pro and con remain little different from the ones I summarized in a 1981 article for Judicature:[75]

> Proponents of the corps concept point to the following benefits:
>
> • Operational efficiency would be enhanced by a corps made up of interchangeable judges, who could be assigned to agency cases

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[72]The states with "central panels" for all or some of their agency hearings include: CA, CO, FL, HA, MA, MD, MN, MO, NJ, NC, ND, PA, TN, WA, WI, WY. Letter to author from Randy E. Bloom, State of New Jersey Office of Administrative Law. New York City also using a similar system, although the Governor of New York vetoed a state-wide system in July, 1989.

[73]*See* Hearings on S. 594, *supra* note 70. Testimony of witnesses from the National Conference of Administrative Law Judges, Federal Administrative Law Judges Conference, Association of [SSA] Administrative Law Judges and the American Bar Association in support of bill, and the Department of Justice, Social Security Administration, and the Forum of United States Administrative Law Judges opposing the bill.

[74]Administrative Law Judge Corps Act, Report of the Sen. Comm. on the Judiciary, 101st Cong., 2d Sess., Report 101-467 (September 19, 1990).

[75]Lubbers, *supra* note 5, at 273-275.

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

• Individual ALJs would acquire a diversified 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. 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 independent 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.

• 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 [now Justice] Antonin Scalia has argued that a multi-level system would be more efficient and would also inject needed performance incentives into the corps.

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. 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 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. 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. 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 of familiarity with the judges), leading to an overall lengthening of the decisional process.

All of these arguments still apply today, although the dominance of the three agencies (SSA, NLRB and the Labor Department) in the ALJ cadre tends to make the case for the corps somewhat more difficult to make. Clearly the efficiency argument retains force with respect to the other 28 agencies with a few ALJs, and I continue to believe that an experiment with a pooling of judges among some of those agencies would be a good idea.[76] Another change which may take some of the steam out of the corps proposal is a recent pay raise for all ALJs-with a proportionally larger raise going to lower graded social security ALJs who have been among the strongest proponents of the corps legislation.[77]

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[76]The experiment was described in Lubbers, Federal Agency Adjudications: Trying to See the Forest and the Trees, 31 Fed. Bar News & J. 383, 386 (November, 1984). The recent banking legislation, the Financial Institutions Reform, Recovery and Enforcement Act of 1989, required the five bank regulatory agencies, which had theretofore borrowed their ALJs from other agencies, to organize such a pool. Pub. L. 101-73 § 916(1), 103 Stat. 183 (1989).

[77]Pub. L. 101-509, § 104; Stat. 1445-1446. *See also*, OPM interim ALJ pay regulations, 56 Fed. Reg. 6208 (Feb. 14, 1991). The new pay scale substitutes for the former GS-15-18 scale a new set of 8 levels AL-1, AL-2 and AL-3 (A through F). AL-1 equals the basic pay for level IV of the Executive Schedule (the top of the Senior Executive Service scale). AL-2 is 95% of that amount and AL-3 (F), the lowest level, is 65% of that amount. Most ALJs are at the AL-3 (E) or AL-3 (F) levels. The rate for the former GS-15 judges (mostly Social Security judges) was proportionately higher.

Management Initiatives

Other than managing the ALJs themselves, what types of initiatives can agencies pursue to introduce more efficiency and expedition into their adjudication process? The Administrative Conference studied one of the more efficient adjudicative operations in the federal government, the Department of HHS Departmental Appeals Board[78] which adjudicates disputes arising out of the Department's many grant programs. The Conference distilled a series of recommendations for case management.[79]

Several general recommendations were made, covering the proceeding as a whole:

> 2. *Step-by-step time goals.* Case management by presiding officers and their supervisors should be combined with procedures designed to move cases promptly through each step in the proceeding. These include (a) a program of step-by-step time goals for the main stages of a proceeding, (b) a monitoring system that pinpoints problem cases, and (c) a management committed to expeditious processing. Time guidelines should be fixed in all cases for all decisional levels within the agency, largely with the input of presiding officers and others affected. While the guidelines should be flexible enough to accommodate exceptional cases and should maintain their nonobligatory nature, they should be sufficiently fixed to keep routine items moving and ensure that any delays are justified. Agencies should encourage a management commitment by including specific goals or duties of timely case processing in pertinent job descriptions.
>
> 3. *Expedited options.* Agencies should develop, and in some instances require

[78] Formerly known as the HHS Grant Appeals Board. *See* Cappalli, Model for Case Management: The Grant Appeals Board, 1986 ACUS Recommendations and Reports 663.

[79] ACUS Recommendation 86-7, "Case Management as a Tool for Improving Agency Adjudication." 1 CFR § 305.86-7 (1991).

parties to use, special expedited procedures. Different rules may need to be developed for handling small cases as well as for larger ones that do not raise complex legal or factual issues.

4. *Case file system.*

(a) Agencies should develop procedures to ensure early compilation of relevant documents in a case file. This will help the presiding officer delineate the legal and factual issues, the parties' positions and the basis for the action as promptly as possible. The presiding officer may then structure the process suitably and issue preliminary management directives.

(b) Disputes preceded by party interactions or investigations which create a substantial factual record, as in most contract and grant disputes, are especially amenable to this approach. Cases involving strong fact conflicts or in which data are peculiarly within the possession of one party who has motivations to suppress them may be less suitable for a case file system.

5. *Two stage resolution approaches.* In proceedings where the case file system is less appropriate, as where factual conflicts render discovery important, agencies should consider using a two-phase procedure.

(a) Phase one might be an abbreviated discovery phase directed by a responsible official, with the product of that discovery forming the "appeal file" for the next phase. Alternatively, parties could be channeled into a private dispute resolution mode, such as mediation, negotiation or arbitration, which, even if unsuccessful, can serve to define major issues and to advance development of the record. Before employing this alternative, agencies would

> have to determine whether the confidentiality rule that normally attaches to arbitration, mediation and negotiation is so critical that it cannot be abandoned for the sake of a more efficient second stage.
>
> (b) A second stage, if necessary, should proceed under active case management, as recommended.

The step-by-step time guideline suggestion in ¶ 2 was bolstered by a detailed examination of the experience of three other agencies (Civil Aeronautics Board, NLRB, and FTC) which also developed successful case processing systems incorporating such guidelines.[80]

The "private dispute resolution mode" suggestion in ¶ 5 was the Administrative Conference's first tentative reference to what would become a major theme in ensuing years: alternative dispute resolution.

The Prehearing Stage

The recommendation concerning compilation of a case file has special significance for the prehearing stage. A consistent theme of Administrative Conference recommendations over the years is that agency presiding officers should make better use of prehearing conferences. As early as 1970, ACUS asserted that presiding officers should normally hold at least one prehearing conference in complex or potentially lengthy cases and that evidentiary witness lists be exchanged by the parties at that time.[81] Twenty years later, ACUS reiterated the usefulness of such conferences, this time in the context of cases at the other end of the complexity spectrum, social security cases. ACUS urged SSA to encourage its ALJs to use prehearing conferences "to frame the issues involved in ALJ hearings, identify matters not in dispute, and decide appropriate cases favorably without hearings."[82] Telephone prehearing conferences were also contemplated, but a caution was given that when claimants were not represented by counsel (a dwindling number of SSA cases) prehearing conferences were rarely appropriate.[83]

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[80] Pou and Jones, Agency Time Limits as a Tool for Reducing Regulatory Delay, 1986 ACUS Recommendation Reports 835.

[81] ACUS Recommendation 70-4 (formerly No. 21) "Discovery in Agency Adjudication" § 1, Recommendations and Reports of the Administrative Conference of the United States (vol. 1) 38 (1970).

[82] ACUS Recommendation 90-4, *supra* note 37, § 2.

[83] *Id.*

The importance of the prehearing conference was also recognized in the recently enacted Alternative Dispute Resolution Act, which amended the APA's list of presiding officer's powers by adding the explicit power of requiring the attendance at prehearing conferences of at least one representative of each party who has authority to negotiate over settlement of the case.[84]

This legislation will go a long way to helping to implement another key element of Recommendation 86-7, much of which derived from the successful mediation activity performed by the Departmental Appeals Board in HHS.[85]

> 6. *Seeking party concessions and offering mediation.* Presiding officers should promote party agreement and concessions on procedural and substantive issues, as well as on matters involving facts and documents, to reduce hearing time and sometimes avoid hearing altogether. Agencies should also (a) encourage decisional officers to resolve cases (or parts thereof) informally, (b) provide their officers training in mediation and other ADR methods, and (c) routinely offer parties the services of trained mediators.

The prehearing phase is also often the best time to consider using the settlement judge technique for resolving cases, discussed at greater length by Philip Harter.

The Hearing Stage

Recommendation 86-7 also prescribes several other nuts-and-bolts techniques for presiding officers to use in managing the hearings:

> 7. *Questioning techniques.*
>
> (a) Requests for clarification or development of record. If a party makes a statement in a notice of appeal, brief, or other submission which a presiding officer does not understand, doubts, or wishes clarified, the officer

[84] 5 U.S.C. § 556(c)(8).

[85] *Supra* note 77.

should consider requiring the party to expand upon its position. The ambiguity may relate to a factual matter, or an interpretation of a legal precedent or a document. Similarly, by preliminary study of the case file, the presiding officer could identify missing information and require the party with access to such information to remedy the deficiency. The officer could also issue "invitations to brief" difficult questions of statutory interpretation or the like.

(b) Written questions for conference or hearing. The presiding officer should manage cases so as to limit issues, proof, and argument to core matters. Having ascertained the factual and legal ambiguities in each side's case by careful study of the briefs and documentation submitted, the presiding officer should structure a prehearing conference or hearing as forum for addressing these ambiguities by seeking responses to carefully formulated questions and providing appropriate opportunity for rebuttal. In this way, and by otherwise seeking to identify the specific questions in dispute early on, the presiding officer would focus parties' attention on key issues and deflect unproductive procedural maneuvers.

8. *Time extension practices.* Time extensions should be granted only upon strong, documented justification. While procedural fairness mandates that deadlines may be extended for good cause, presiding officers should be aware that casual, customary extensions have serious negative effects on an adjudicatory system, its participants, and those wishing access thereto. Stern warnings accompanying justified extensions have had good success in curtailing lawyers' requests for additional time.

9. *Joint consideration of cases with common issues.* Whenever practicable and fair,

> cases involving common questions of law or fact should be consolidated and heard jointly. Consolidation could include unification of schedules, briefs, case files, and hearings.
>
> 10. *Use of telephone conferences and hearings.* Presiding officers should take full advantage of telephone conferences as a means to hear motions, to hold prehearing conferences, and even to hear the merits of administrative proceedings where appropriate. While telephone conferences may be either employed regularly for handling selected matters or limited to a case-by-case basis at the suggestion of the presiding officer or counsel, experience suggests that maximum benefits are derived when telephone conferences are made presumptive for certain matters.

All of these suggestions are more or less applicable to most types of agency adjudications, although one must always remember the difference in presiding officer responsibilities in different types of cases. For example, while an SSA ALJ may not have to worry about settlement negotiations, multi-party proceedings or extensive procedural maneuvering, he or she must be especially diligent in making sure the claimant's evidence is complete. This "apples and oranges" problem is the reason that there may never be a truly uniform "code" of administrative adjudicative procedures. Nevertheless, on a "macro" scale, there are some initiatives looking toward greater uniformity that are worth mentioning.

The Administrative Conference's Manual for Administrative Law Judges is one long-standing effort to bring more uniformity to agency adjudications.[86] The aforementioned study of the applicability of a modified set of the Federal Rules of Evidence to agency adjudications is another. Perhaps the most ambitious is an ongoing Administrative Conference effort to draft a set of "model" rules of practice and procedure for agency ALJ proceedings. The Conference's effort is based on successful agency efforts to develop consolidated rules of practice for all of the adjudications heard by ALJs in that agency. For example, the Department of Labor's consolidated rules of practice cover over 60 different types of hearings ranging from

[86] Ruhlen, Manual for Administrative Law Judges, Administrative Conference of the U.S. (rev. ed. 1982) (1st ed. 1974).

benefit cases (black lung compensation) to civil money penalty and other enforcement cases.[87] The Department of Agriculture has a similar set of unified agency rules of practice.[88] Most recently Congress required the five federal banking regulatory agencies to develop a uniform set of rules of procedure for their adjudications.[89] The Conference's working group hopes to develop model rules (with commentary) that can be used as a reference point for other such efforts.

The Posthearing Stage

Delays in the agency review stage have bedeviled administrative adjudicators for a long time. A major problem that was addressed by the Administrative Conference in one of its earlier recommendations was the commonplace statutory or regulatory requirement that the agency head review all of the decisions issued by the agency's ALJs. This problem was exacerbated in some multi-member boards or commissions where the entire body did the reviewing. The Conference first urged agency heads to use intermediate appellate boards to screen the appeals.[90] Needless to say, this is a time-saver only if the intermediate board screens enough cases. The model has been used sparingly, most notably at the NRC and FCC with mixed success.[91] Second (and more significantly), the Conference urged that agency reviewing officials use (and be authorized to use) a system of discretionary review of initial decisions.[92] In other words, that the agency should announce that it will deny petitions for review or summarily affirm initial decisions unless petitioners make a reasonable showing of an erroneous material finding of fact or legal conclusion or that the decision has a policy importance that warrants review. With some important exceptions,[93] most agencies now utilize the discretionary review model.

Use of these screening techniques should bring down the average post hearing elapsed time for all cases, but delay problems persist in those cases accepted for review by agencies. For example, an internal SEC study of adjudications in the 8¾ years since January

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[87]29 CFR Part 18 (1990). DOL Chief ALJ Nahum Litt estimated the number of statutes covered, conversation with the author, April 1991.

[88]7 CFR § 1.130 (1991).

[89]Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73 § 916 (2), 103 Stat. 183.

[90]ACUS Recommendation 68-6, "Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency. ¶ 2(a), 1 CFR § 305.68-6 (1991).

[91]Indeed, recently both the NRC and FCC have proposed elimination of their intermediate review boards. NRC proposed rule, 55 Fed. Reg. 42947 (October 24, 1990), is still pending. The FCC proposed elimination of its Review Board at 55 Fed. Reg. 28063, 28065 (July 9, 1990), but decided to retain it, 56 Fed. Reg. 787, 790 (January 9, 1991).

[92]ACUS Recommendation 68-6, *supra* note 89, § 2(b).

[93]Cf. the NLRB, SEC and FTC.

1982, found that the average elapsed time for the ALJ phase of the case was 13 months while the Commission took 17 additional months to render its decision.[94] Rough statistics developed by the Administrative Conference, collated by the Senate Governmental Affairs Committee in 1977, showed that the agency review phase exceeded the hearing phase in both licensing and ratemaking cases and was a significant period in enforcement cases as well.[95]

Reduction in these delays requires a combination of internal management initiatives and outside oversight. Obviously, if pressures are brought to bear on agency administrators and chairmen, steps can be taken to raise the priority of completing action on appealed cases. Time limits can be promulgated and honored (at least by enforced explanation as to why the time limit has been missed). More frequent board and commission meetings can be devoted to decisional activity. More resources can be devoted to opinion writing staffs. Of course, a willingness to decide politically difficult cases without undue procrastination is also necessary.

But little is likely to happen without outside monitoring of each agency's record in this area. Congressional oversight in this area does take place occasionally when delay problems emerge out of the mist. The problem is that there is too much mist–and it can only be dispelled by a concerted effort to collect and evaluate agency statistics on administrative adjudication.

Need for Statistics on Administrative Proceedings

There is no dearth of data concerning activity of the federal courts. Extensive statistics have been systematically collected and disseminated since 1940 in the annual reports of the Director of the Administrative Office of the U.S. Courts. Moreover, in 1968, the Federal Judicial Center was created to serve as the research arm of the courts, and it has relied heavily on the statistics gathered by the Administrative Office.

In the administrative arena, a small unit in the Department of Justice compiled statistics on formal proceedings conducted by hearing examiners from 1957-1959. This effort was continued by the Temporary Administrative Conference in 1961-62 and by a Senate Judiciary Subcommittee in 1963-65. These disjointed efforts led to a mass of rather unusable data. In 1973, ACUS began another effort to compile statistics on agency cases (called the Uniform Caseload Accounting System) which led to two volumes of data arranged by agency and

[94]Remarks Before the Twenty-Third Annual Rocky Mountain State-Federal-Provincial Securities Conference by Commissioner Mary L. Schapiro at page 8 (October 12, 1990).

[95]Study of Federal Regulation, *supra* note 64 at 6.

case type for the years 1975-1978.[96] In 1977, the Senate Governmental Affairs Committee made extensive use of these statistics and concluded that the ACUS "effort is a step in the right direction, but needs refinement, enforcement capability, permanence, and adequate funding."[97]

The Committee went on to formally recommend that:

> • An appropriate committee of the House and Senate should oversee management efforts comprehensively, including the setting and meeting of deadlines, at Federal regulatory agencies. Each agency should be required to submit periodically to Congress a report describing deadlines imposed on agency proceedings, the agency's degree of success in adhering to the deadlines, and the reasons for any delays.
>
> • The Administrative Conference should have the permanent tasks of insuring that statistics are generated by the various agencies, and that the statistics are brought together and comprehensively explored. The information compiled should include the deadlines established for proceedings, the rates of success at meeting these deadlines, and the reasons for failure to meet them.[98]

Despite these words of encouragement, the Administrative Conference had to discontinue its limited statistical efforts in 1979 for budgetary and staffing reasons and has not been able to garner the resources for this important effort in the ensuing decade. (As an aside, for comparative purposes, the Conference total budget grew from $250,000 in 1969 to almost

[96] *See* Federal Administrative Law Judge Hearings: Statistical Report for 1976-1978, *supra* note 8 at 1-6 for a fuller description of this history.

[97] Study of Federal Regulation, *supra* note 64 at 151.

[98] *Id.* at 152.

$2 million in 1990 while the Federal Judicial Center's budget went from $300,000 to over $13 million in the same period.[99]

This lack of statistics on agency adjudication (and on agency rulemaking for that matter) makes it exceedingly difficult to assess agency procedural efficiency, manpower needs, or the need for proposed reforms such as alternative dispute resolution of the ALJ corps bills. Recently, for example, during the consideration of the Fair Housing Act Amendments of 1989, a dispute arose over the relative efficiency of ALJ hearings versus federal district court enforcement. Both the Justice Department and civil rights groups asked Administrative Conference for its 10-year-old data which remains the best available compendium.[100] There is an unquestionable need for these data; with the widespread availability of desktop computers and appropriate software, the benefits of such an effort should exceed the costs by an even larger ratio.

Choice of Forum for Adjudication

Observers of the federal adjudication process may be surprised to read Article III of the Constitution which provides that the "Judicial Power of the United States" shall be vested in courts whose judges enjoy tenure during good behavior and protection against reduction in salary.[101] Obviously, many "federal cases" are decided by adjudicators who are not the sort of "Article III" judges serving under that provision of the Constitution.

As Richard Fallon has admirably detailed,[102] the "article III literalism" position was doomed from the start. The first Congress assigned to Treasury Department officials disputes over veterans' benefits and customs duties. And in 1828 the Supreme Court, through Chief Justice Marshall, held that Congress may create non-article III courts to adjudicate disputes

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[99]The Conference's figures come from the 1969 Annual Report of the Administrative Conference 1 ($250,000 budget for 1969) and the 1990 Annual Report of the Administrative Conference 29 ($1.865 million appropriations for 1990). The Federal Judicial Center's figures come from the Report of the Proceedings of the Judicial Conference of the United States for 1969 3 (Director of FJC reports 1969 appropriation of $300,000) and the FY 1990 Budget of the United States, Appendix 1-B8 ($13.17 million appropriation for 1990).

[100]*Supra* note 8. Ultimately a compromise was reached which provides for administrative enforcement with HUD ALJs, but with the right of respondents to "remove" the case to federal district court. Pub. L. No 100-430, § 8(2), 102 Stat. 1629 (1988) (codified at 42 USC § 3612).

[101]Article III, § 1

[102]Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915 (1988).

in the federal territories.[103] These so-called legislative (or "Article I") courts (because they were created by the legislative branch) survive today in the territories, the District of Columbia, in the military, or in highly specialized situations, such as the adjudication of claims against the United States.

The constitutionality of administrative agency adjudication was established a century later, when the Supreme Court upheld Congress' decision to vest responsibility for deciding cases under the Longshoremen and Harbor Workers' Compensation Act to an administrative agency (on the ground that "public rights" were at issue)-so long as adequate review in an Article III court of the agency's decision exists.[104] Thus the foundation for the New Deal and the APA was laid.

The upshot of the Supreme Court's movement away from Article III literalism is that there now exists a continuum of federal adjudicative forums. The continuum is arranged below according to the status of the adjudicator-which largely corresponds to the independence of the adjudicator and the formality of the adjudication.[105]

Article III Judges

The three-tiered federal judiciary currently contains nine Supreme Court justices, 155 court of appeals judges divided into 13 Circuits (one of which, the Court of Appeals for the Federal Circuit, has a somewhat specialized subject-matter jurisdiction) and 575 district court judges divided into 94 districts.[106] The specialized Court of International Trade (eight judges, five senior judges) is also an Article III tribunal.[107]

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[103] *American Insurance Co. v. Carter*, 26 U.S. (1 Pet.) 511 (1828). Discussed in Fallon, *supra* note 101 at 921-923.

[104] *Crowell v. Benson*, 285 U.S. 22 (1932). Discussed in Fallon, *supra* note 101 at 923-925.

[105] *See* Bruff, Specialized Courts in Administrative Law, Report to the Administrative Conference of the United States, December 14, 1990. In his comparison of federal adjudicators, Professor Bruff pointed out, "The Constitution's focus on life tenure and salary stability as attributes of federal judges suggests that the constitutional statute of their adjudicators depends mostly on their job security." *Id.* at 27.

[106] All statistics compiled from 1991 Judicial Staff Directory, Staff Directories, Ltd., Mount Vernon, Va. (1991). There were also 70 senior circuit judges and 207 district judges.

[107] There are also numerous magistrates, bankruptcy judges and special masters who serve as "adjuncts" to federal district courts.

Article I Judges

Judges on the various legislative courts have come to closely resemble those of the Article III judges. Judges on the Claims Court (16 judges, two senior judges), Tax Court (18 judges, nine senior judges, 14 special trial judges), Court of Military Appeals (two judges, one senior judge) and the new Court of Veterans Appeals (seven judges), have 15-year terms and can be removed only for cause. Although the possibility of reappointment may create some effect on independence values, the terms are quite long and few judges have been denied reappointment. In other respects, the judges on these courts function as Article III judges.

Administrative Law Judges

As described above, there are approximately 1,100 ALJs. It is a simple matter for Congress to mandate the use of an ALJ to preside over agency hearings. Any statute that offers the opportunity for an "APA hearing" (or some variant thereof) or a "hearing on the record" (but not simply a "hearing") is deemed to require an ALJ (or agency head) hearing. There are probably over 500 such statutes in the U.S. Code that so require, many of which contain more than one provision requiring APA hearings.[108]

Much ink has been spilled on the extent of ALJ independence. Suffice it to say that although one often hears about the perceptions among the bar that ALJs are not sufficiently independent (or are too imbued with the agency's mission) and one often hears grumbling from agency officials that ALJs are too independent, the reality is that they have decisional independence, they act like judges (may wear robes and are referred to as "your honor") and agency officials are quite wary of any extra-judicial efforts to influence their decisions. Nevertheless, there have been increasing efforts to separate the adjudicative arm of the program from the policymaking arm–even more so than is now dictated by the separation-of-functions provisions in the APA.[109]

An early example of this was the 1947 Taft-Hartley Act's creation of an independent General Counsel within the structure of the National Labor Relations Board.[110] The General Counsel "prosecutes" these cases before the Board (and its ALJs). An even greater separation has been achieved by the so-called "split-enforcement" model in which the rulemaking and prosecuting agency seeks to enforce its rules before a separate, purely adjudicative Commission with its own ALJs. Examples of this include the Department of Labor's Occupational

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[108]Pierce identified 280 separate evidentiary provisions in 1986. Of course, many more statutes are silent on that point, Pierce, *supra* note 38.

[109]*See* text at notes 70-75, *supra*.

[110]Act of June 23, 1947, c. 120, Title I, § 101, 61 Stat. 139; 29 U.S.C. § 153(d) 1988

Safety and Health Administration (OSHA) and Mine Safety and Health Administration (MSHA) which must seek enforcement by the independent Occupational Safety and Health Review Commission (OSHRC) and Federal Mine Safety and Health Review Commission, (FMSHRC), respectively.[111] The OSHA-OSHRC and MSHA-FMSHRC models have not been free of controversy and, despite careful review of this approach, the Administrative Conference was unable to decide whether or when such a model was preferable to the traditional single-agency model.[112]

"Non-ALJ" Presiding Officers

The APA itself recognizes that many adjudications need not be heard by ALJs. Some types of adjudicatory programs are explicitly excepted from all of the APA's adjudication requirements, *e.g.*, cases involving the selection or tenure of federal employees other than ALJs (now heard by Merit System Protection Board hearing officers), certification of worker representatives (now heard by NLRB regional office personnel) or the conduct of military or foreign affairs functions (there are many military and foreign service boards and panels).

The APA also allows for the possibility that another statute might designate other categories of boards or employees to preside over specific types of APA hearings. Thus the NRC's statute specifies that the Atomic Safety and Licensing Board Panel (made up of technical experts as well as lawyers) hears and decides nuclear power licensing cases using APA hearing procedures.

Finally, perhaps the largest group of non-ALJ adjudicators are used by agencies to preside over hearings that are not required by statute to be "on the record" or "under the APA." In those situations, the agency is free, within the bounds of due process, to fashion its procedures as it sees fit and to use any employee as presider. Some are presided over by statutorily designated officers who are equivalent to ALJs such as immigration judges in the Department of Justice or the "administrative judges" on the various agency Boards of Contract Appeals.[113] Other program areas use presiders appointed on an *ad hoc* basis. At this point the line between "formal" and "informal" adjudication begins to break down.

A recent Administrative Conference survey of federal agencies, seeking information on programs that offer the opportunity for oral hearings presided over by non-ALJs

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[111] *See* Johnson, The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences, 39 Admin. L. Rev. 315 (1987).

[112] ACUS Recommendation 86-4, "The Split-Enforcement Model for Agency Adjudication," 1 CFR § 305.86-4 (1991). The Conference is currently examining another split-enforcement scheme-the National Transportation Safety Board's adjudication of FAA pilot license suspension and revocation cases.

[113] *See* Robie and Morse, The Federal Executive Branch Adjudicator: Alive (and) Well Outside the Administrative Procedure Act? 33 Fed. Bar News & J. 133 (March 1986).

turned up 2,739 presiding officers.[114] Of these, 435 have no other duties and 1,832 have other duties. Even subtracting the 1,692 presiding officers involved with veterans benefits claims cases at the Department of Veterans Affairs, there are nearly as many non-ALJ presiders as ALJs.[115]

There is little uniformity among these presiders.[116] Most fall somewhere between GS-9 and GS-15 on the pay scale (ALJs' salaries roughly correspond to the GS-15 to GS-18 scale).[117] In most cases, they are simply hired like other federal employees (lawyers or non-lawyers), are subject to performance appraisals, and have no special protections against adverse personnel actions. Perhaps most important, there is no real coordinated oversight of the needs or activities of this diverse group of hearing officers–unlike the ALJs, they haven't even organized themselves. Nobody is assessing the independence of these adjudicators, the fairness or efficiency of their proceedings or their appropriate place in the federal adjudicative system. They are now the real "invisible" judiciary.

Informal Adjudication

Even less visible are the less formal adjudications that go on throughout government with varying levels of formality. Many such decisions are reached with only a minimum or procedure, and without oral hearings. Such decisions include determinations to issue loans or grants, release information, conduct audits, approve plans, charge fees, etc. It is impossible to catalog comprehensively these informal adjudications–and the APA provides little guidance to agencies that make these sorts of decisions. Professor Verkuil provided the sharpest focus on a slice of this pie when he examined such programs in four Departments.[118] He found a wide variety of procedural ingredients in the programs–though most made an effort to use an impartial decisionmaker.[119]

Because of the variety of informal processes, the drafters of the APA decline to set out procedure to govern them. A longstanding goal of some administrative reformers have been to amend the APA to add a section on informal adjudication procedures.[120]

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[114] *See* Frye, Study of Non-ALJ Hearing Programs, draft report to the Administrative Conference of the U.S. 15 (March, 1991).

[115] *Id.*

[116] *Id.*

[117] *See* note 76, *supra.*

[118] Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976).

[119] *Id.* at 760, n. 80 (finding that 38 of 42 programs so provided).

[120] *See, e.g.*, Gardner, The Procedures by Which Informal Action is Taken, 24 Admin. L. Rev. 155, 158-166 (1972) (containing a draft "Informal Procedure Act of 1980"). *See also* Levinson, Elements of the Administrative Process: Formal, Semi-Formal, and Free-Form

This has not occurred, despite increasing uncertainty as to what due process requires in varying situations and despite some constructive examples of such provisions in state APAs.[121]

Conclusion

It is hard to believe that Congress has created such a fragmented federal adjudicative system by design. Did members of Congress really stop and think when they placed the trials of numerous types of governmental disputes (*e.g.*, federal tort claims, Freedom of Information Act appeals, Fair Labor Standards Act enforcement cases) in federal district court, others (*e.g.*, social security benefit claims, unfair labor practice charges, or SEC civil penalty cases) before agency ALJs, and other (immigration cases, veterans benefits cases) before non-ALJ hearing officers?

What factors should be considered by Congress in allocating adjudicative responsibilities among article III courts, article I courts, ALJs and non-ALJs? This is a macro-management question of the first order. Public administrators, administrative lawyers and political scientists must focus on this question in the coming decade, or else many of the fine tuning and micro-management initiatives discussed in this paper will quickly become irrelevant.

A Reform Agenda

As suggested above, federal agency adjudication needs to be reexamined on both a macro and a micro level.

On the macro level, the current landscape needs to be remapped and reordered. Congress needs guidance as to how to allocate dispute resolution among Article III courts, Article I courts and administrative agencies. Within the administrative agencies, Congress and agency heads need to be advised on when to choose to require administrative law judges or non-ALJ hearing officers, formal adjudication or informal adjudication, split-enforcement adjudication or traditional single-agency adjudication. The Administrative Procedure Act's adjudication provisions-so painstakingly designed to reflect differences between types of cases-may need fortifying, clarifying or revamping. The role of the administrative law judge in this system needs to be examined with special attention to the judicialization of the position (for better or worse) and to the fact that many important adjudicative programs are being channelled away

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Models, 26 Am. U. L. Rev. 872 (1977).

[121] *See* Model State Administrative Procedure Act, National Conference of Commissioners on Uniform State Laws (1981), providing for "conference adjudicative hearings" (§ 4-401) and "Summary adjudicative hearings" (§ 4-502). The comments to §§ 4-102 and 4-201 indicated the intent and derivation of these provisions.

from ALJs.[122] These fundamental issues should be at the top of the list of administrative law reformers. Not surprisingly, the Administrative Conference is mounting a study of many of these issues.

But there are also more incremental issues that deserve attention. From a management point of view reducing delay in administrative adjudication continues to be important. First and foremost, an adequate statistical collection and data analysis capability for agency cases need to be established. Once the bottlenecks are identified and the causes understood, more definitive suggestions can be made.

In the meantime, however, it is possible to suggest some areas of concern and identify some tentative recommendations.

- Time limits and case tracking should be institutionalized at agencies.

- Model or uniform rules of practice and procedure (including rules of evidence) should be explored.

- ALJs should be given additional means for controlling hearings (including more power to reject duplicative evidence, and sanction frivolous or disruptive behavior).

- Better mechanisms need to be developed for handling complaints against allegedly biased or abusive ALJs.

- Recruitment of ALJs should be enhanced by eliminating veterans preference in hiring for that position.

- Productivity guidelines should be arrived at consensually with each agency's ALJs.

[122]Recently Congress has even authorized agency adjudication of civil money penalties with non-ALJ hearing officers. *See, e.g.*, the Safe Drinking Water Act Amendments of 1986, 42 U.S.C. § 300h-2 (1989 Supp.) and the Water Quality Act, 33 U.S.C. § 1319(g) (1989 Supp.) (authorizing non-ALJs when penalty below $25,000). *See* Edles, Civil Penalties Receive New Attention, 9 Admin. L. Notes 1 (Federal Bar Association) (April 1990).

- Agencies with a few ALJs should experiment with a pool (or "mini-corps") of ALJs.

- ALJs should have more opportunities for training and continuing legal education.

- Telephone and video hearings should be explored.

- Separation-of-functions rules should be loosened in non-accusatory proceedings.

- Agency discovery rules should be reexamined.

- Agency heads should delegate more final decisional authority to ALJs.

- Chief ALJs ought to be given more administrative power and responsibility.

- The administrative process should be made more accessible to those who cannot–or choose not–to hire lawyers.

This is one observer's laundry list of future concerns for public administrators and lawyers concerned about federal agency adjudication. But, in closing, it should be noted that all of these micro issues (and even the macro ones) need to be considered in the context of our societal discouragement with the litigation model and the concomitant movement toward alternative forms of dispute resolution. What is the role of adversarial hearings? When are they to be preferred and when are they necessary only as a last resort? Similarly, when do we need a judge and when do we need a neutral dispute resolution specialist? With this in mind, the focus now shifts to the backdrop–alternative dispute resolution.