APA-Adjudication: Is the Quest for Uniformity Faltering

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APA-ADJUDICATION: IS THE QUEST FOR UNIFORMITY FALTERING?

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I. DEVELOPMENT OF THE APA'S ADJUDICATION PROVISIONS

As we pause to commemorate the fiftieth anniversary of the Administrative Procedure Act (APA),¹ it is well to hark back to its foundation—the 1941 Report of the Attorney General's Committee on Administrative Procedure—and, not incidentally, to the contributions of its Staff Director, Walter Gellhorn.

One of the main reasons for the formation of the Committee was the controversy over the lack of uniformity among agency hearing officers and the perceived procedural unfairness of agency adjudication. As the Committee's Report states, "Most of the controversy over administrative procedure has centered around formal adjudication."² The Report went on to describe the lack of uniformity that existed in 1941:

The methods of hearing and initial decision and the internal procedural structure vary from agency to agency. In general, it has been customary to designate hearing officers before whom evidence may be adduced—whether they be a board of three or more individuals, or, as is more common, a single hearing officer, variously known as a trial examiner, a referee, a presiding officer, a district engineer, a deputy commissioner, or a register. These hearing officers have been selected in various ways.

* * *


No less varied is the weight attached by the several agencies to the judgments of those who conduct the hearings. In most of the agencies the person who presides is an adviser with no real power to decide.

* * *

Even in the common situation where a hearing officer is without real power to decide, his duties and powers vary considerably.

* * *

Just as there is variation in the part played by the hearing officer in the process of deciding, so the agencies differ in their choice of methods of reaching the ultimate decision. 3

This led the Committee to conclude that:

[W]here agencies have recognized the importance of hearing officers in the salaries paid, in the independence of view encouraged and accorded, and in the importance given to their decisions, the positions have attracted and held men 4 whose ability and fairness have been recognized by the bar and the public. Where the opposite has happened, progressive decline has occurred.

* * *

This is the heart of formal administrative adjudication. It cannot succeed without competent and well-paid men exercising functions of responsibility and interest. 5

The Committee then went on to recommend a highly structured system of “hearing commissioners,” to be appointed by a newly created Office of Federal Administrative Procedure, for seven-year terms (subject to a one-year “provisional appointment”), with “substantial” but tiered salaries. (Agencies that “deal with many small cases” could request permission from the Office to pay the lower salary.) 6

It is striking that the Committee’s report, recommendation and draft bill focused so heavily and almost exclusively on the need to establish a system of hearing commissioners to handle all on-the-record adjudications. The full Committee’s recommendations on hearing procedures were much less prescriptive. Title III (“Administrative Adjudication”) of the proposed bill 7 almost completely revolves around the hearing commissioners’ status, powers, and duties. In the interest of maintaining flexibility, the majority of the Committee eschewed a proposed code of administrative procedures, preferring instead to rely on the creation of the hearing commissioner system and on the proposed new Office of Federal Administrative Procedure to provide additional uniformity. 8 However, three (ultimately

3. Id. at 44-45.
4. The use of “men” is a sign of the times, but see Crittenden. infra note 44.
6. Id. at 46.
7. Id. at 192-202 (including proposed bill).
8. See id. at 191-92 (providing “prefatory explanation to the bill”).
influential) Commissioners felt strongly enough about the need for more prescriptive and uniform procedures that they departed from the majority and went so far as to draft a "code of standards of fair procedure." 9

The APA, of course, ultimately reflected both points of view—a heavy reliance on a system of "hearing examiners" (now "administrative law judges") and a rather prescriptive (albeit not inflexible) set of formal hearing procedures, reflected in Sections 5, 7, and 8 of the APA (now 5 U.S.C. §§ 554, 556, and 557). 10

Congress passed the APA without dissent. 11 This was quite an achievement for the drafters, given the acrimony that had surrounded the previously vetoed Walter-Logan Bill. It was the introduction of that bill, which attempted to codify the American Bar Association's then strongly held antipathy to agency decisionmaking, that had led President Roosevelt to create the blue-ribbon Attorney General's Committee. The unanimity evidenced the achievement of a workable compromise. As Attorney General Tom Clark recognized in his comment on the Senate bill, there was a need to "deal horizontally with the subject of administrative procedure, so as to overcome the confusion which inevitably has resulted from leaving to basic agency statutes the prescription of the procedures to be followed, or in many instances, the delegation of authority to agencies to prescribe their own procedures." 12 On the other hand, he also noted that previous

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11. See Gellhorn, supra note 9, at 231-32.

bills had failed because, "in their zeal for simplicity and uniformity, they propose too narrow and rigid a mold."\(^{13}\)

It is the thesis of this essay that this successful quest for flexible uniformity is in danger of coming apart. Others have written about the more topical threats to the APA's rulemaking provisions posed by pending regulatory "reform" legislation.\(^{14}\) I would suggest that the uniformity and integrity provided by the APA's formal adjudication provisions are also threatened, but by a kind of neglect that has led to erosion, circumvention, and avoidance of the very adjudication procedure that was the APA's centerpiece.

**II. EVOLUTION OF APA ADJUDICATION IN PRACTICE**

The first years of the hearing examiner program were not without controversy, with a politically tinged "fiasco," largely involving the selection of examiners at the National Labor Relations Board.\(^{15}\) But once the selection process was regularized, the program administered by the Civil Service Commission began to grow. The number of hearing examiners grew steadily from 196 in June 1947 to 278 in June 1954, 494 in July 1962, and 792 in February 1974.\(^{16}\)

With this growth there also began to be a broadening of the use of hearing examiners. At first they were used primarily in economic regulatory programs administered by the independent regulatory agencies. In fact, apart from the NLRB's unfair labor practice cases, which have always been quite adversarial, most hearing examiners at the outset were assigned to licensing cases—in which policy issues were paramount and in which the presiding examiners often issued recommended decisions (which cannot

\(^{13}\) Id. Attorney General Clark also recognized the special effort taken to "reconcile" the views expressed by the proponents and the affected government agencies. Id.


\(^{15}\) The "fiasco" concerned the initial disqualification of incumbent NLRB examiners for the new position. A special rating board disqualified and downrated most of them amidst charges that conservatives were engineering a housecleaning. After lawsuits were brought, nearly all were re-rated and found qualified. See Ralph Fuchs, The Hearing Examiner Fiasco under the Administrative Procedure Act, 63 HARV. L. REV. 738 (1950); Antonin Scalia, The ALJ Fiasco—A Reprise, 47 U. CHI. L. REV. 57 (1979).

become final without further agency review) as opposed to initial decisions.17

This began to change in the 1960's, when the first wedge of benefits cases heard by hearing examiners at the Social Security Administration (SSA) began to widen,18 and in the 1970's and 1980's, when civil penalty cases began to be assigned to the newly renamed "administrative law judges" (ALJs). Indeed the name change—which was not without controversy19—was in part fueled by the recognition that the actual role of the hearing officers was becoming more judge-like.

This name-change along with the influx of benefits and enforcement cases, both of which are more fact-bound and more likely to be reviewed by special quasi-independent appeal boards,20 tended to change the role and self-perception of ALJs.

The term "hearing examiner," which connotes more of a bureaucratic role than a judicial role, was first phased out by a Civil Service Commission regulation in 1972, and the APA was finally amended to substitute "administrative law judge" in 1978.21 The transformation from bureaucratic adviser to judge was something for which the ALJ community fought long and hard for. This fight was aided by the rapid growth of the Social Security Administration's ALJ cadre. The political power of ALJ organizations was markedly increased by having a thousand SSA judges located in numerous congressional districts. This effort, replete with a paid lobbyist who was a former member of Congress, culminated in legislation that raised ALJ pay to the level of the Senior Executive Service (SES) (but exempted them from the SES performance appraisal system), eliminated the grade differential between SSA ALJs and others, and arguably cemented

17. Id. at 383-85.
20. For example, initial decisions in SSA benefit cases are reviewed by the SSA Appeals Council, decisions in Department of Labor black lung benefit cases by a departmental Benefits Review Board, and decisions in OSHA civil penalty cases heard and reviewed in the independent Occupational Safety and Health Review Commission.
the ALJ’s special status in the government and legal communities. But at what price?

III. THE DRIFT AWAY FROM ALJS

A look at the number of ALJs in the federal government shows a tremendous increase since 1947—from 196 to 1,333 in March 1996. Most of this increase, however, occurred between 1947 and October 1982, when the number was 1,183. Since then, the number has increased only 11.3 percent in 14 years. Moreover, all of the growth has been in the Social Security Administration. In 1947, only 13 of 196 (6.6 percent) were in the SSA. In 1978, the number had jumped to 660 of 1,071 (61.6 percent); in 1984, 760 of 1,121 (67.8 percent); and today, 1,060 of 1,333 (79.5 percent). Since 1978, in fact, there has been a steady decline in the number of non-SSA ALJs—from 410 to 361 in 1984 and 273 in 1996. Factor in the other two largest employers of ALJs, the NLRB and the Department of Labor, and the decline of the government-wide use of ALJs is even more apparent. Apart from the big three agencies, there were 170 ALJs in other agencies in 1984; now there are 155.22 And as of March 1996, the number of ALJs working for economic regulatory agencies had declined to 3.3 percent.23

To some extent, of course, this decrease reflects the effect of deregulation—the elimination of agencies like the CAB and ICC. But the number of agencies and departments employing ALJs has stayed about the same (approximately 30) since 1978. What is striking is how few ALJs are employed by most administrative and regulatory agencies. For example, the Departments of Agriculture, Commerce, Education, HUD, and Justice have only 4, 1, 1, 5, and 6 ALJs, respectively. The Departments of Defense, State, and Veterans Affairs have none. The five bank regulatory agencies share 2; major adjudicatory and enforcement agencies like the CFTC, FTC, ITC, MSPB, and SBA have 1 or 2 each; and the CPSC, EEOC, NRC, and Postal Rate Commission have none.

This is not because agencies have stopped adjudicating. They have just limited their reliance on ALJs. “Non-ALJ adjudicators” are sprouting faster than tulips in Holland. Nearly three thousand such officials are deciding cases every day, and the number is growing. John Frye’s study, using 1989

22. The figures in this and the next paragraph were previously collected by the author and were included in Lubbers, supra note 16, at 383-85. The most recent figures were supplied by the OPM on March 1, 1996 (on file with author).
23. These include the 44 judges at the CFTC, EPA, FCC, FERC, FMC, FTC, SEC, and the Office of Financial Institution Adjudication.
data gathered by the Administrative Conference, identified 2,692 non-ALJ adjudicators along with others not counted.

Their numbers have surely grown since then with the rapid growth in immigration and asylum judges and the Agriculture Department's newly created National Appeals Division (NAD). The Department of Justice now relies on about 200 immigration judges and 260 asylum officers, and the NAD is staffed with about 80 "hearing officers" across the country to hear appeals from departmental actions.

In addition, there are numerous other large groupings of "administrative judges" (AJs). There are about 80 AJs who serve on Boards of Contract Appeals in about a dozen agencies. The Department of Commerce employs over 50 administrative patent judges and administrative trademark judges; the Defense Department uses hundreds of hearing officers (but no ALJs); and the Department of Veterans Affairs has a 55-member Board of Veterans Appeals (but no ALJs). The MSPB has 55 administrative judges that hear federal employee appeals (and 1 ALJ); the EEOC uses some 95 to 100 AJs (but no ALJs); and the NRC uses 11 full-time

25. Id. at 349-52 app. B.
26. See The Federal Administrative Judiciary, supra note 18, at 931-50, for a description of their cases.
29. Telephone call to Asylum Branch, INS (Apr. 5, 1996). These positions were created in 1990; as of April 1991, there were 120 asylum officers. See The Federal Administrative Judiciary, supra note 18, at 853.
30. Conversations with Fred Young, Deputy Director, NAD (March 1996).
31. See Frye, supra note 24, at 349.
32. Their names are listed in LEADERSHIP DIRECTORIES, INC., FED. YELLOW BOOK 11-97 (Winter 1996).
33. See Frye, supra note 24, 349-52 app. B.
34. Telephone call to the Board of Veterans Appeals (Apr. 5, 1996).
and 22 part-time Atomic and Safety Licensing Board members (and, currently, no ALJs).\(^{37}\)

Congress has even gone so far as to approve the use of non-ALJ adjudicators and non-APA procedures in the assessment of agency civil penalties.\(^{38}\) Debarment and suspension of government contractors and grantees also continue to be heard and decided by non-ALJ adjudicators.\(^{39}\)

In short, the initial trial level in federal agency adjudication is becoming almost as variegated as the agency appellate structures—which have always been "unregulated" by the APA.\(^{40}\)

IV. REASONS FOR THE DRIFT

Why has this occurred? Why have most agencies (with congressional endorsement) voted with their feet by running away from the ALJ program? In my opinion, it is because of a perception that, compared to non-ALJ adjudicators, ALJs are less desirable because of their cost, restrictions on their selection, and their effective immunity from performance management.

A. Cost Considerations

ALJs' salaries range from $75,205 to $115,700, but after 6 years, most have reached the level of $104,130.\(^{41}\) On the other hand, most AJs are paid in the GS-12 to GS-15 range ($41,104 to $88,326).\(^{42}\)

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37. E-mail from William J. Olmstead, Associate General Counsel for Licensing and Regulation, NRC (Apr. 5, 1996).
42. See Frye, supra note 24, at 349-52. The range given is from GS-12 (step 1) to GS-15 (step 10). See Exec. Order No. 12,994, supra note 41.
B. Selection Difficulties

It is very difficult for agencies to hire the applicant (or even the type of applicant) they want for an ALJ position. The strict provisions of the competitive civil service, as historically applied to ALJ hiring, require agencies to select from a register of candidates served up by the Office of Personnel Management (OPM). The ranking process for the register highly values litigating experience (without sufficiently distinguishing between types of litigators) and service as a veteran, while giving short shrift to special expertise and diversity values. This means that an agency seeking a judge with an economics or social services background, for example, cannot hire one from the register unless such a person happens to be at the top of the list. It also means that women (who tend to lack veterans' preference points) have become very underrepresented in the ALJ corps.

Contrast these hurdles with the ease with which an agency can typically hire lawyers—including lawyers who serve as non-ALJ adjudicators. Because lawyers are in the “excepted” service, they can be hired by agencies almost as readily as they are by private-sector firms.

C. Management Issues

ALJs are exempt by statute and by OPM regulation from both the first-year probationary period and the performance ratings that are applied to most other federal employees. AJs on the other hand, typically can be made subject to performance measures. Although the APA does provide a process for disciplining or removing ALJs “for cause,” a series of decisions by the MSPB makes it difficult for agencies to successfully bring complaints against ALJs for lack of productivity.

Agency managers obviously have great incentive to opt for using hearing officers who can be selected Strategically, who are easier to manage, and

43. See The Federal Administrative Judiciary, supra note 18, at 931-50, for a detailed description of the ALJ selection process.
45. See The Federal Administrative Judiciary, supra note 18, at 931-50, for a detailed description of the selection processes for non-ALJ adjudicators.
47. Id. at 595-600.
who can be procured at bargain rates. Is it any wonder that the ALJ (outside of the SSA with its burgeoning caseload due to the graying of America) is becoming an endangered species? And what is the outlook for the 80 percent of the ALJs at the SSA? Already there are indications that the new SSA is looking for ways to reduce its dependence on ALJ.48

V. THE NEED TO REDIRECT REFORM EFFORTS

Surprisingly little attention is being paid to the issues of whether, and to what extent, this tide of balkanization and antipathy toward using ALJs should be stemmed.49 Unlike the last major legislative attempt to amend the APA that occurred from 1979 to 1981,50 none of the leading regulatory reform bills addresses agency adjudication.51 Various bills address the particular wish lists of specific groups of non-ALJ adjudicators. Immigration judges,52 MSPB AJs,53 and DVA AJs54 have all promoted legislation to increase their pay and status (although none of these bills has proposed making them ALJs). But the only major legislation to address ALJs and APA adjudication in recent years is the “ALJ Corps” bill that (in various iterations) has received serious consideration for over 15 years.55

This legislation would extract the ALJs out of their employing agencies and locate them in a new agency that would be headed by a presidentially appointed Chief ALJ. Agencies that need an ALJ would have one assigned

48. See Social Security Administration, Pub. No. 01-005, Plan for a New Disability Claim Process (September 1994). The description of the proposed new "administrative appeals process" (at pp. 33-34) includes the use of an "adjudication officer" who will handle the initial aspects of the case for the ALJ and who will have full authority to grant (but not deny) claims. While apparently intended to be a subordinate assistant to the ALJ, it is not difficult to envision that greater reliance on adjudication officers might reduce the number of ALJs at the SSA.

49. One would think, for example, that the various ALJ organizations would be quite concerned about the welfare of "future generations of ALJs." See Brian C. Griffin & Gary J. Edles, An Alternate Look at the Administrative Conference's Recommendations on the Administrative Judiciary, 32 Judges' J. 38, 39 (1993) ("Clearly this [growth in non-ALJ adjudicators] is (or should be) a concern shared by ALJs.").

50. See Scalia, supra note 15. The first sentence of then-Professor Scalia's article is "The subject of administrative hearing officers is once again on the agenda of federal regulatory reform." Id.

51. Levin, supra note 15.
53. Id. at 860 n.349.
54. Id. at 865 n.99.
55. See Jeffrey S. Lubbers, A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level, 63 Judicature 266 (1981).
by the Corps. The newer versions of the bill have sought to address agency concerns by dividing the Corps into specialized panels, creating a complaint handling board, allowing the Chief ALJ to be selected from managerial ranks, and capping the Corps's budget. Nevertheless, the bill remains controversial and has its fervent supporters and detractors.

While I see some merit in the latest versions of the proposal and believe that the model has worked well in some states, I do not think the legislation is the answer to the problems sketched out above. For one thing, the sponsors have never come to grips with the reality that 80 percent of the Corps would serve in the SSA panel. And SSA benefit cases—typically brief, nonadversarial hearings without government counsel involved—are distinctly different from most of the other cases that would be heard by the Corps.

More fundamentally, enactment of the Corps bill would make agencies even less inclined to go the APA/ALJ route. At least agencies now know that cases assigned to ALJs are assigned to their own ALJs—who are presumably expert in the agency's programs. If agencies had less confidence in the expertise of Corps ALJs and even less say in their

56. *See* S. 486; H.R. 1802, 104th Cong., 1st Sess. (1995). The House bill was approved by the Subcommittee on Commercial and Administrative Law on September 14, 1995. No committee action has taken place in the Senate on the identical Senate bill as of this writing. The Clinton Administration, while not taking a position on S. 486, transmitted specifications of a “supportable bill” to “reorganiz[e] the Federal Administrative Judiciary.” It suggested retaining ALJs within their employing agencies but under the administrative control of a new “Administrative Office for the ALJ Corps.” The specifications also endorsed opening up the selection process and creating a “Complaint and Resolution Board.” Letter from Lloyd D. Cutler, Special Counsel to the President, to Senator Howell Heflin (Aug. 24, 1994) (Attachment 1).

57. Indeed, there is now division within the ranks of the Federal Administrative Law Judges Conference (FALJC), which in prior years had been in the forefront of support for the Corps bill. In 1994, the Executive Committee of the FALJC voted not to endorse S. 486, which had passed the Senate in 1993. H.R. 1802, as introduced in the 104th Congress, was identical to S. 486. See Letter from William Pope, President, FALJC, to FALJC membership (July 24, 1995) (on file with author). The main points of disagreement were with (1) the selection process for the chief and division chief judges, (2) the chief judge’s power to order transfers and reductions in force, and (3) the restrictive appropriations cap.


selection than they do now, wouldn't agencies also tend to work harder to avoid APA/ALJ hearings than they do under the current flawed system?

Therefore, I do not believe the Corps bill is the cure for what ails the current federal administrative adjudicative system. Rather I would suggest a new reform agenda designed to return to a more ordered and consistent approach to formal administrative adjudication across the government.

VI. AGENDA FOR REFORM

The basic purpose of the following proposals is to reinvigorate the demand among agencies and their congressional overseers and patrons for using ALJs. This requires making ALJs more cost-effective by reducing their monetary and managerial costs and by increasing the perceived value of their work product. I am pursuing this because I think highly skilled, independent, bureaucratically separate, specialized, highly regarded administrative judges are a crucial linchpin of our system of administration. I believe the 1941 Attorney General's Committee's vision of a uniform professional cadre of such officers was a good one and I would like to see us return to it. To those ends, I suggest the following steps be taken:

A. Establish an Administrative Office for Agency Adjudication

Such an office—similar to the Administrative Office of the U.S. Courts and to the original Attorney General's Committee proposal for an Office of Fair Administrative Procedure—would bring a higher level of attention to the ALJ system than has been possible through the years by the chronically understaffed, low-profile Office of Administrative Law Judges in OPM.

B. Return to a Multi-Tiered Corps of ALJs

The Attorney General's Committee originally suggested a two-level structure, allowing agencies with a high volume of small cases to seek permission from the Office of Fair Administrative Procedure to use the lower salary level. The APA's implementation went even further. As then-Professor Scalia, pointed out in 1979, "As late as 1953, the 294 APA hearing examiners were distributed broadly among five grade levels from

60. Without them, we might perhaps be better off emulating the Australian system by having agency actions reviewable in one or more Administrative Appeals Tribunals, with judicial review on legal matters available in federal court. See Kim Rubenstein, An Outline of Australian Administrative Law (paper delivered at American Bar Association Symposium, Feb. 2, 1996) (on file with author).
GS-11 to GS-15."\textsuperscript{61} He went on to call "for a return to a multi-grade structure."\textsuperscript{62} Instead the ALJ organizations persuaded Congress to go the other way and do away with the remaining two-step (GS-15/GS-16) division between "benefits" judges (primarily SSA judges) and the other "regulatory" judges.\textsuperscript{63} The current salary provisions retain this unitary model by providing for automatic step increases for seniority and a higher grade only for chief judges.\textsuperscript{64} I agree with Justice Scalia, and would reverse this trend. I would permit agencies the leeway to seek permission to create categories of ALJs on a much wider salary range—say from GS-12 to the SES. The title of ALJ (along with the protections and status it affords) would continue, and the wider salary range would afford agencies and applicants more flexibility while also creating a real career path for aspiring administrative judges.

C. Introduce More Flexibility into the Selection Process

Ideally, the hiring process for ALJs should be removed from the tight strictures of the civil service selection process, as is the current process for hiring federal lawyers, now generally applicable to non-lawyers, so that a more flexible system of merit selection can be devised. I would retain a screening step (perhaps by the new Administrative Office) but would allow agencies much greater leeway to choose from among pre-screened qualified applicants. If the current basic system is maintained, the certificates presented to agencies should be enlarged, veterans preference for this position should be reduced or eliminated, and the ranking process should give greater weight to specialized experience.\textsuperscript{65} A probationary period should also be considered.\textsuperscript{66}

\begin{itemize}
\item \textsuperscript{61} Scalia, \textit{supra} note 15, at 62.
\item \textsuperscript{62} \textit{Id.} at 75.
\item \textsuperscript{63} Pub. L. No. 101-509, Title V, § 529, 104 Stat. 1445 (Nov. 5, 1990). \textit{See also supra} note 41.
\item \textsuperscript{64} \textit{See} 5 U.S.C. § 5372a(a) (1994). But as of March 1996, only 38 of the 1,333 were in the higher pay categories reserved for managers. \textit{See supra} note 22.
\item \textsuperscript{65} \textit{The Federal Administrative Judiciary, supra} note 18, at 954-66. Also, see the formal recommendation of the Administrative Conference, ACUS Recommendation 92-7, 1 C.F.R. § 305.92-7 (Part II) (1993), 57 Fed. Reg. 61,760 (Dec. 29, 1992), \textit{reprinted in} Lubbers, \textit{ supra} note 46, at 613-38.
\item \textsuperscript{66} This option for the agencies was recommended by the Attorney General’s Committee Report, \textit{supra} note 2. Such a probationary period is required for other employees selected from registers or promoted to managerial positions. 5 U.S.C. § 3321 (1994); 5 C.F.R. § 2.4 (1995).
\end{itemize}
D. Allow Peer-Review Based Evaluation

As I have suggested before,67 the current prohibitions of performance appraisals and ratings should be eliminated and a system of peer review, supervised by chief ALJs, should be established. Many federal and state courts have established judicial evaluation programs, and ALJs in a large number of states are also subject to performance evaluation. Such a system should be feasible and consistent with judicial independence values in the federal ALJ program as well.

E. Maintain Other Key APA Protections of ALJ Independence

ALJs should continue to be located in organizationally distinct offices; they should not be assigned any extra-judicial duties; and the “for cause” disciplinary hearing process at MSPB should be retained.68

F. Encourage Experimentation with Pools or “Minicorps”

One of the attractive arguments for the ALJ Corps bill, is its potential to introduce economies of scale into programs with a small number of ALJs. The banking agencies have already established such a pool, and there are other agencies (i.e., trade agencies, business-related agencies) that might benefit from such an arrangement.

G. Give ALJs More Authority

Agency heads should be encouraged to delegate more decisional authority to ALJs—through self- or legislatively imposed limitations on agency review. The need for political control of agency adjudication diminishes in high-volume, fact-based enforcement and benefit adjudications.69 ALJ decisions should ordinarily speak for the agency, except in rare cases where a new major policy issue is involved or where the ALJ’s fealty to established law and policy is questioned.

More courtroom authority is also needed. In this day of metal detectors in courtrooms, ALJs need more authority to control hearings. This should

67. Lubbers, supra note 46, at 603-07. See also ACUS Recommendation 92-7, supra note 66, at pt. III.
68. MSPB should, however, assign such cases to ALJs drawn from a pool. See ACUS Recommendation 92-7, supra note 65, at pt. III(E). The addition of peer-review based performance evaluation would inform this process, when necessary.
69. See Gifford, supra note 10.
include more power to sanction disruptive or frivolous behavior and more authority to reject duplicative or irrelevant evidence.

H. Increase Opportunities for Training and Continuing Legal Education

A professional group of judges requires initial and periodic training in legal, technical, and information resources management issues. Few agencies can afford either initial or periodic training at present. This is penny-wise and pound-foolish.

I. Enlarge the Role of ALJs in ADR

A few years ago, we used to say that ADR was the "wave of the future." But it is here today, and many agencies have developed ADR programs using mediators and other outside "neutrals." With appropriate safeguards, ALJs can and should serve as neutrals in settlement judge programs, minitrials, and even negotiated rulemaking.

J. Mandate the Use of ALJs

The Administrative Conference has already suggested that, even under current circumstances, Congress should take pains to ensure that certain types of cases be heard by ALJs. If all or most of the foregoing nine recommendations are acted upon, it will be feasible for Congress to mandate that most agency formal hearing be conducted by ALJs. This would mean converting many of the current AJ positions to ALJ positions.

CONCLUSION

The current decline in agency use of administrative law judges to conduct formal adjudications poses a threat to the uniformity and consistency of administrative decisionmaking procedure envisioned by the framers of the APA. To reverse this trend, regulatory reformers need to

71. These include those cases likely to involve:
   a. substantial impact on personal liberties or freedom;
   b. orders that carry with them a finding of criminal-like culpability;
   c. imposition of sanctions with substantial economic effect; or
   d. determination of discrimination under civil rights or other analogous laws.
ACUS Recommendation 92-7, supra note 65, at pt. I.
refocus their attention on the issue and sponsor a series of interrelated improvements to the ALJ program.