1984

# Federal Agency Adjudications: Trying to See the Forest and the Trees

Jeffrey Lubbers

# Federal Agency Adjudications: Trying to See the Forest and the Trees

by Jeffrey S. Lubbers*

No issue pervaded the debates leading to the passage of the Administrative Procedure Act more than the appropriateness of administrative agency adjudication and the proper role of the hearing officer.[1]

In the late 1930's a special committee of the American Bar Association, concerned about agency use of untrained, easily influenced, subordinate employees to preside over hearings, warned that "a combination of legislative, executive, and judicial power should not be exercised by the same group of Federal officers and employees."[2] The committee proposed a Federal administrative court with both appellate and trial jurisdiction, composed of 41 justices plus a number of "commissioners" to hear testimony. This view received a stimulus by President Roosevelt's Committee on Administrative Management which not only concluded that independent agencies "constitute a headless 'fourth branch' of the Government," but also recommended that the agencies be divided into separate administrative and judicial sections.[3] Focus on the role of the hearing officer was heightened by a series of Supreme Court decisions beginning with the first *Morgan* case's proclamation that, "The one who decides must hear."[4]

In 1939 the debate came to a head for the first time. The ABA had withdrawn its support for an administrative court bill and had instead thrown its weight behind the Walter-Logan bill which provided for use of hearing boards in single-headed agencies, and hearing examiners in multi-headed agencies with a system of intensive administrative and judicial review.[5] The bill was passed by Congress but President Roosevelt vetoed it in strong terms as motivated by "a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation." He also complained that "a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of courts, in which lawyers play all the speaking parts, to the simple procedure of administrative hearings which a client can understand and even participate in."[6]

In his veto message, President Roosevelt announced that he was asking his Attorney General to form a Committee on Administrative Procedure to study the operations of the regulatory agencies. The Attorney General's Committee, through its in-depth study of the agencies, managed to remove the bitterness from the debate, and though differences remained among members as to the feasibility of omnibus legislation, the entire Committee did agree to the need to "improve the process of formal adjudication by bringing about a more uniformly high quality of hearing officers."[7]

In 1946, after the wartime interruption, the complicated and compromise-laden Administrative Procedure Act that we know today was unanimously passed by both Houses of Congress and signed by President Truman.[8] Commentators of the day considered the Act's provisions regarding hearing examiners to be among the most important changes effected by the Act.[9] And in the years following the passage of the APA, much ink was spilled in trying to apply the provisions of the new Act to the incumbent hearing examiners in the various regulatory agencies.[10]

Now in 1984, the inkwell is pumping again. Although the Administrative Procedure Act has remained essentially unchanged since 1946, the adjudication system it spawned has undergone a rather striking transformation, and administrative law commentators are again beginning to call for revisions in the system.[11] The purpose of this article is to examine the contours of the administrative adjudication system, to provide facts as to current agency caseload, to alert readers to the broad variety of cases handled by agency administrative law judges (ALJs) and other "non-ALJ" hearing officers and to consider how these trends affect proposals to reform the system.

### *Trends from 1946 to 1984*

As has been documented elsewhere,[12] the steady growth in the number of Federal ALJs has finally leveled off, but there are still five times as many APA-appointed administrative law judges in 1984 as there were in 1947:

| | |
|---|---|
| June, 1947: | 196 |
| June, 1954: | 278 |
| July, 1962: | 494 |
| February, 1974: | 792 |
| January, 1979: | 1071 |
| January, 1980: | 1146 |
| June, 1981: | 1119 |
| October, 1982: | 1183 |
| April, 1983: | 1158 |
| June, 1984: | 1121 |

But this increase masks the roiling that is going on below the surface. In 1947 64% (N = 125) of the total were concentrated in the economic regulatory agencies and 6.6% (N = 13) were in the Social Security Administration. At the end of 1978, 14.7% (N = 157) were in the economic regulatory agencies and 61.6% (N = 660) in Social Security. By 1984 the original ratio was almost exactly reversed with only 6.5% (N = 73) in the 12 economic regulatory agencies, while 67.8% (N = 760) were in Social Security. In fact three agencies (Social Security, National Labor Relations Board and Department of Labor) employ 85% (951) of the 1121 judges, and 24 of the 29 agencies employ 12 or fewer judges. During this period, labor related ALJs also increased steadily from

*Jeffrey S. Lubbers is Research Director of the Administrative Conference of the United States and Deputy Chair, FBA Section on Administrative Law. The views expressed are solely those of the author and are not attributable to any other source.

**Agency Caseloads and ALJ Positions 1978 versus 1983-84**

| Agency[a] | ALJs—1/79 | New cases filed with ALJs—1978 | ALJs—6/84 | New cases filed with ALJs—1982* or 1983 |
|---|---|---|---|---|
| Agriculture, Department of | 5 | 247 | 5 | 250 |
| Alcohol, Tobacco & Firearms, Bur. of (Dept. of Treasury) | 1 | 96 | 1 | 107* |
| Civil Aeronautics Board | 17 | 93 | 4 | 43 |
| Commerce, Department of[b] | 3 | 19 | 1 | 107* |
| Commodity Futures Trading Commission | 4 | 336 | 4 | 858* |
| Consumer Product Safety Commission | 1 | 4 | 0[i] | (a) |
| Drug Enforcement Administration (Dept. of Justice) | 1 | 31 | 1 | 47 |
| Environmental Protection Agency | 6 | 104 | 6 | 340 |
| Federal Communications Commission | 14 | 127 | 12 | 246 |
| Federal Energy Regulatory Commission | 23 | 137 | 21 | 109 |
| Federal Labor Relations Authority | 4 | (f) | 11 | 746 |
| Federal Maritime Commission | 7 | 88 | 6 | 163 |
| Federal Mine Safety and Health Review Commission | 12 | 2,147 | 12 | 1,284 |
| Federal Trade Commission | 12 | 17 | 8 | 7 |
| Food and Drug Administration (Dept. of H.H.S.) | 1 | 3 | 1 | 1* |
| Housing and Urban Development, Department of | 1 | 131 | 1 | 37 |
| Interior, Department of the[c] | 8 | 1,513 | 9 | 500* |
| Interstate Commerce Commission | 61 | 1,371 | 10 | 77 |
| Labor, Department of | 49 | 2,769 | 84 | 14,457 |
| Merit Systems Protection Board | 1 | 27[g] | 3 | 182 |
| National Labor Relations Board | 98 | 5,378 | 107 | 4,961 |
| National Transportation Safety Board | 6 | 568 | 5 | 524 |
| Nuclear Regulatory Commission | 1 | 10 | 3 | 14 |
| Occupational Safety and Health Review Commission | 47 | 4,331 | 22 | 1,325 |
| Securities and Exchange Commission | 8 | 30[h] | 6 | 92 |
| Small Business Administration | 0 | (a) | 1 | 7 |
| Social Security Administration (Dept. of H.H.S.) | 660 | 196,428 | 760 | 363,533 |
| U.S. Coast Guard (Department of Transportation) | 16 | 681 | 11 | 605 |
| U.S. International Trade Commission | 2 | 24 | 2 | 9* |
| U.S. Postal Service | 2 | 133 | 4 | 477 |
| | 1,071[e] | 216,843 | 1,121 | 391,108 |

*Note:* The 1978 figures are from "Federal Administrative Law Judge Hearings—Statistical Report for 1976-1978" Administrative Conference of the U.S. (1980) pp. 21, 33. The 1984 ALJ totals were supplied by the Office of Administrative Law Judges, U.S. Office of Personnel Management, June 8, 1984. The 1983 caseload figures were compiled by the author from agency responses to Administrative Conference survey dated August 22, 1983. Responses are on file at the Administrative Conference. Where 1983 figures were not available, 1982 figures were used as noted. "New cases" denote only those cases that reached the stage of referral to the agency's office of ALJs for potential hearing. A large percentage of these cases are resolved prior to actual hearing.

*Footnotes*

a. Agencies are only those employing at least one full-time ALJ during the period. Other agencies that have occasional APA hearings may borrow ALJs from other agencies, subject to approval by the Office of Personnel Management, 5 U.S.C. § 3344. In 1983 such agencies reporting APA hearings include the CPSC, Department of Education, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board and Federal Reserve Board. Total cases amount to about 75. No such figures are available for 1978.

b. 1978 figures are for Maritime Administration (later transferred to Department of Transportation). 1984 figures are primarily for National Oceanic and Atmospheric Administration.

c. Does not include figures for Indian probate cases (2083 new cases in 1978; 2961 in 1982) which are not subject to the APA and are heard by 10 special hearing officers, but which are otherwise similar to ALJ cases.

d. The NRC's adjudicatory hearings are presided over by three-member Atomic Safety Licensing Boards (drawn from a larger "panel"). One of the three members is normally a lawyer but need not be an ALJ. ALJs serve on these boards and also preside individually over antitrust and civil penalty cases. Caseload figures reflect all cases filed with the boards and ALJs.

e. Corrected total; total in 1978 compilation was erroneously given as 1070.

f. The FLRA was created in 1979. In 1978, equivalent cases under Executive Order 11491 were handled by the Department of Labor. There were 251 new cases in that program in 1978.

g. The MSPB was created in 1979. Figures for 1978 are from the Civil Service Commission.

h. This year was aberrational for the SEC. New cases for every other year between 1975 and 1983 were between 64 and 106.

i. The CPSC's ALJ position has remained vacant since 1979.

17.9% (N = 35) in 1947 to 19.6% (N = 210) in 1979 to 21.1% (N = 236) in 1984.[13]

Even more dramatic than the shift in "ALJ-power" is the correlative caseload trend.[14] As the accompanying table indicates, the most dramatic development has been the burgeoning Social Security caseload (primarily disability cases) which has jumped 85% to 363,533 new case filings from 1978 to 1983. During this period, the Labor Department has shown the largest percentage jump as new filings increased more than fivefold to 14,457—with much of the increase represented by black lung benefits cases and longshoremen's and harbor workers' compensation cases. Except for these huge SSA and Labor Department benefit programs, only the steadily flowing NLRB unfair labor practice cases, and the dwindling mine safety and occupational safety and health enforcement cases amounted to more than one thousand new filings in 1983. Severe drop-offs from 1978 levels were experienced by the ICC, CAB, FTC, and Interior, while other agency programs (most notably the CFTC's reparations program, Commerce's fishery civil penalty cases, the Postal Service's false representation cases and the FLRA's Federal unfair labor practice cases) have shown large percentage increases. Still it is inescapable that the administrative law judge in today's Federal Government has become less an organizer and initial decider of regulatory policy issues and more the (often-final) dispenser of disability benefits or arbiter of civil money penalties—cases where factfinding, demeanor evidence, fairness and speed are hallmarks, and policy issues absent or submerged.[15]

### *The ALJ Corps Bill*

This shift in the role of agency adjudication away from deciding regulatory policy issues, with increased emphasis on "mass justice" cases has helped revive proposals to separate agency adjudicators from the rest of the agency. Already Congress has followed this reasoning in several specific enforcement programs involving a high volume of fact-based cases: the Department of Labor must enforce its mine safety and occupational health and safety programs by bringing violators before two special independent adjudicatory agencies that hear and decide challenges to the citations.[16] A third adjudicatory agency, the National Transportation Safety Board hears and decides pilot license denial, revocation and suspension cases brought by the FAA.[17] And finally, the Merit Systems Protection Board, with its system of 3 ALJs and approximately 100 hearing officers hearing various employee appeals, with review by an independent board, is the most recent example.[18]

Proponents of separation would now extend this principle to the entire corps of administrative law judges. A proposal, supported by the Federal ALJ professional organization,[19] to establish a nationwide Corps of Federal Administrative Law Judges has been introduced by Senator Howard Heflin as S. 1275,[20] and two hearings have been held on the bill in the 98th Congress.[21] The Heflin bill would remove the ALJs from the supervision and control of the agencies where they are currently employed and transform them into an independent unified corps. The concept of a unified corps (which is in place in 8 states)[22] has produced some weighty, but still largely theoretical, arguments for and against,[23] and the Heflin bill in particular has already been the subject of much spirited criticism and approval.[24] The bill would not disturb the agencies' ability to review ALJ initial decisions, instead a trial bench would be created outside the agencies, divided into divisions;[25] managed by a chief judge and division chief judges who are selected by a high-level nominating commission, with all judges subject to an elaborate removal and discipline procedure.[26] Most of these details have been aired sufficiently elsewhere,[27] but the makeup of the divisions in light of current caseloads is worthy of examination.

***"A proposal, supported by the Federal ALJ professional organization,[19] to establish a nationwide Corps of Federal Administrative Law Judges has been introduced . . ."***

The bill specifies that from four to ten divisions be created, with the exact number and make up subject to adjustment at any time by the "council" of the corps, comprised of the chief judge and the division chief judges. Initially, however, the bill establishes seven named divisions reflecting various areas of specialization.[28]

It is possible, using these divisions, and projecting current agency judge positions and caseload, to gain some idea of the size and workloads of these divisions. According to a list of current agencies fitting within these divisions, prepared by two supporters of the bill,[29] the following sizes and caseloads can be derived:

(1) Division of Communications, Public Utility and Transportation Regulation: 56 ALJs, 652 cases;
(2) Division of Health, Safety and Environmental Regulation: 66 ALJs, 4685 cases;
(3) Division of Labor (sic): 84 ALJs, 14,457 cases;
(4) Division of Labor Relations: 118 ALJs, 5707 cases;
(5) Division of Benefits Programs: 760 ALJs, 363,533 cases;
(6) Division of Securities, Commodities and Trade Regulation: 25 ALJs, 1163 cases;
(7) Division of General Programs and Grants: 12 ALJs, 858 cases.

This projection indicates one of the primary weaknesses of the proposed omnibus ALJ corps: two of the divisions, each swallowing whole the existing ALJ contingent and caseload of an individual agency (SSA and DOL), dwarf the rest of the corps. Furthermore, a third division is simply an amalgam of the NLRB and FLRA cases—perhaps a sensible combination, but one that Congress eschewed when it created the FLRA in 1978. The remaining four divisions do represent real consolidation and potential savings and efficiencies, though specialists in the various fields of law represented might have some difficulty in accepting them.

The comprehensiveness of a corps encompassing all current administrative law judges is appealing, but I believe that the lack of balance in the proposed divisions and the real differences among the covered agencies suggests the need for caution and further analysis. As an initial point, I would urge that it is foolish to try to assimilate the Social Security Administration's ALJs into the unified corps—even an anaconda can't digest an elephant. Rather, any problems of real or perceived lack of decisional independence[30] on the part of the 760 SSA ALJs who operate in 10 regional and 131 field offices throughout the United States[31] (including some bilingual judges in Puerto Rico) deserve separate consideration. If the problems are sufficiently documented, then perhaps there is a need for an administrative "Social Security Review Commission" with trial judges and reviewing officials totally separated from the rest of the Department of HHS.[32] Such a court could also be made into a more generalized disability and retirement benefits court, thereby encompassing the similar black lung and longshoremen's and habor workers' cases in the Department of Labor, (still leaving DOL with a relatively large residuum of cases) and conceivably the non-APA cases heard by the Board of Veterans Appeals and the Railroad Retirement Board.

The Department of Labor's cases also deserve special attention.[33] As mentioned above, Congress has already seen fit to separate entirely two major adjudicative

programs from DOL policymakers and enforcers. And in the two largest programs that are currently handled by DOL ALJs (making up 85% of the office's 1983 APA caseload) Congress has directed that agency review be conducted by a separate reviewing agency, the "Benefits Review Board"[34] with a large, but not complete,[35] degree of internal independence. Congress could easily move to make that independence complete if it wished to.

As for the proposed Division of Labor Relations, the two component agencies, the NLRB and FLRA, are both structured so that an independent general counsel has complete discretion to bring cases before the ALJs, creating an effective separation between the prosecuting and judging functions.[36] It might be argued that the possibility of undue decisional pressure from agency Members on ALJs is still present, but the strong opposition to the Heflin bill by NLRB ALJs would seem to rebut any such suggestion.[37]

Thus, using the Heflin bill's proposed divisions as a benchmark, three of the divisions (Labor, Labor Relations, and Benefits Programs) lose much of their appeal when examined closely. The other four make more sense, though I believe it is unnecessary at this time to include the four previously discussed adjudicatory agencies (OSHRC, FMSHRC, NTSB and MSPB). It is also arguably premature to include the economic regulatory agencies, most of which still have a medium volume of relatively specialized cases, and most of which are still adjusting to the effects of the deregulation movement which is tending to reduce their caseloads while shifting their emphasis toward enforcement and away from initial licensing. These agencies would include the CAB, EPA, FCC, FERC, FMC, FTC, NRC and SEC. In effect, then, I would whittle down the corps to an experimental program, with one division—an expanded "general programs division"—with ALJs from the following agencies:

| | |
|---|---|
| Coast Guard | 11 |
| Interior | 9 |
| Agriculture | 5 |
| CFTC | 4 |
| Postal Service | 4 |
| ITC | 2 |
| Alcohol, Tobacco & Firearms | 1 |
| Commerce | 1 |
| Drug Enforcement Admin. | 1 |
| FDA | 1 |
| HUD | 1 |
| SBA | 1 |
| | 42 ALJs |

This proposal is a slightly scaled down version of an experimental corps to be administered by the Office of Personnel Management, that I proposed in 1981[38] and that the Chairman of the Administrative Conference, Loren Smith, suggested to Senator Heflin in 1983.[39] As Chairman Smith said, "If these . . . ALJs (plus a chief judge, augmented by a few more judges who would also cover agencies that occasionally need an ALJ, but do not employ one full-time) were transferred into a corps under OPM control to service all but the specifically excluded agencies, the idea would be put to a good test."[40]

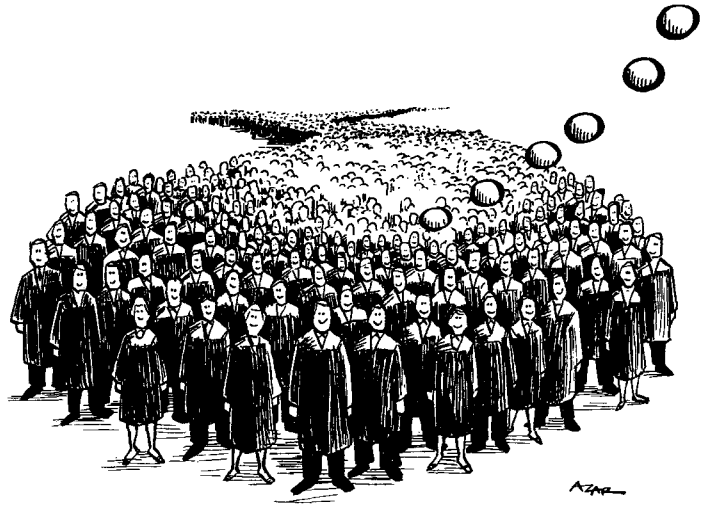
The proposal did not, however, go unchallenged. Joseph Morris, General Counsel of OPM, testifying in opposition to the Heflin bill, also criticized the experiment as espoused by Mr. Smith:

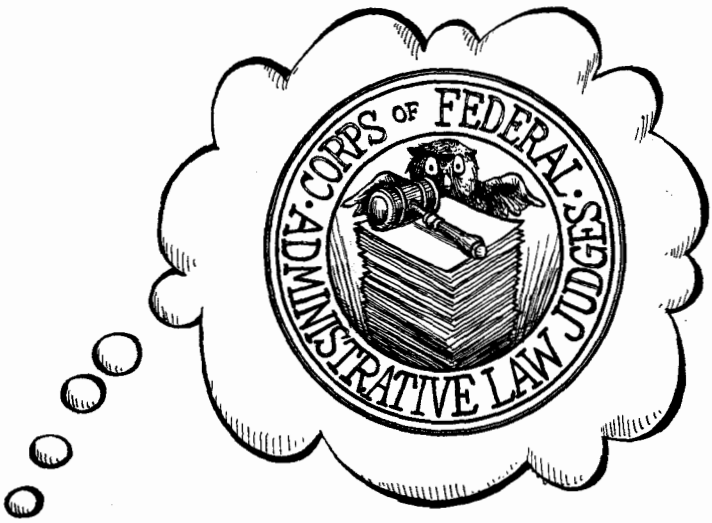
> My friend, Loren Smith, has suggested an experiment that would exclude from a corps the large bulk of the members of the present administrative law judiciary, those presiding over cases in SSA, the Department of Labor, and the National Labor Relations Board.
>
> Interestingly, it is those administrative law judges whose work falls most clearly and most cleanly in the area of adjudicative and quasi-adjudicative work in the executive branch as opposed to ratemaking, rulemaking, and other quasi-legislative activities in the executive branch.
>
> Put otherwise, it is in the smaller agencies, in the minority of members of the existing administrative law judiciary, that we find the most critical and the most apparent need for subject matter expertise.
>
> It is in the larger agencies employing administrative law judges that there appears on the face of it, under the principles motivating the Administrative Procedure Act, a greater fungibility of judges—fungibility in the sense that less subject matter expertise is required because the areas are less technical or they are more akin to issues that arise in common law proceedings.
>
> So, it is our view that the proposal for an experimental corps that would exclude the large agencies employing ALJ's contains an irony that ultimately defeats the wisdom of the proposal, and that irony is precisely that such an experiment would focus on the fungibility of those ALJ's who are least fungible and would exclude from the scope of the experiment those ALJ's who, among ALJ's, are most fungible; that is, who have the most adjudicative, least regulatory or rulemaking work to do. Therefore, we think that the proposed experiment is ill-advised.[41]

I believe that Mr. Morris' focus on "fungibility" misses the point of the experiment somewhat. It is certainly an over-generalization to claim that ALJs employed by larger agencies (or, more precisely, employed by agencies with the largest number of ALJs) are more fungible than those employed by smaller agencies. Indeed the proposal reflects an attempt to assess carefully the suitability of including various ALJs into an experimental corps based upon existing agency structures, the transferability of expertise, and upon the need for a manageable experiment. Furthermore, because economy of scale is one of the strongest reasons in favor of a unified corps, it makes more sense, on that basis at least, to combine many smaller ALJ contingents than to combine a few larger ones.

### *Tip of the Iceberg?*

The proposal for a unified corps of ALJs, which I suggest may be too inclusive (especially with respect to Social Security cases), does have a key limitation: it does not include presiding officers who are not ALJs. This






is a practical, even sensible, limitation since ALJs are appointed under a common system, possess a common degree of independence and act in cases that Congress has deemed to be formal proceedings subject to the APA.[42] Nevertheless, if only to place the ALJ corps proposal in context and to consider its possible growth, it is advisable to consider the many other programs involving relatively formal adjudications that are presided over by hearing officers who are not administrative law judges.

Some of these programs are explicitly excepted from all of the APA's adjudication requirements, e.g., cases involving the selection or tenure of federal employees (except ALJs), certification of worker representatives, or conduct of military or foreign affairs functions.[43] Except for these, all other adjudicative programs are covered by the APA, and where the adjudication is "required to be determined on the record after opportunity for an agency hearing,"[44] any hearing must be presided over by either the agency head (a rare event) or one or more ALJs—unless, another statute specifies that a particular category of proceedings is to be presided over by designated boards or employees.[45] Of course, if an "on-the-record" hearing is not required in a program, the agency is free, within the bounds of due process, to utilize any employee as a presider.

It should not be surprising then that there are some significant statutorily designated boards and employees hearing formal, "on the record" cases, and many presiding officers hearing less formal cases throughout the Government.[46]

Marvin Morse has recently identified in these pages 342 "attorney examiners," as classified by OPM, now hearing cases in the Government.[47] These include 119 MSPB hearing officers,[48] 78 "administrative judges" who serve on Boards of Contract Appeals[49] in ten agencies, 51 Department of Justice immigration judges, 40 members of the Board of Veterans Appeals, 26 members of various tribunals in the Department of the Interior, 15 Social Security Administration Appeals Council members, and 7 Department of Commerce Trademark Trial and Appeals Board members, and 6 Small Business Administration hearing officers.

In addition to this list there are scores of other hearing officers who serve in various roles and capacities throughout the government.[50] Some of the more significant clusters include the 21 full time and 27 part time officers[51] who, along with 3 ALJs, comprise the NRC's Atomic Safety and Licensing Board Panel; the 37 full time lawyers with scientific background who serve on the Boards of Patent Appeals (30) and Patent Interferences (7) in the Department of Commerce; 86 "attorney examiners" at the EEOC who conduct hearings and make recommended decisions involving equal employment complaints against federal agencies; 9 "appeal referees" at the Railroad Retirement Board; 5 presiding officers in Department of Energy's Office of Hearings and Appeals; 4 members of the Department of HHS Grant Appeals Board;[52] 4 full time hearing examiners at the Department of Defense who hear industrial security clearance review cases; 3 members of the Department of State's Foreign Service Grievance Board; and many other individuals too numerous to identify.

Agencies also report many programs involving the use of employees with other functions who serve as part-time presiding officers or board members. For example, the Federal Service Impasses Panel, an entity within the FLRA, reports a pool of 120 potential hearing officers available from its staff to conduct factfinding hearings in labor impasses. And the Department of Defense utilizes over one hundred part-time members of boards for the correction of military records. Finally, two agencies reported hiring presiding officers on a contractual basis (Department of Education Appeal Board, 27 of 30 members; DOD's CHAMPUS program, 9 hearing officers).

As stated above, the proposed ALJ corps bill ignores all of these non-ALJ hearing officers. The only provision relating to non-APA cases is permissive—it permits agencies (and courts) to refer any case to the corps where such a reference is found to be desirable and appropriate.[53] But Professor Harold Levinson has raised the question of whether these non-ALJ hearing officers, who lack even the current independence enjoyed by ALJS, should also be brought into the corps.[54] The result, of course, would be a much bigger corps, but with the benefit that there would no longer be distinctions between those judges who currently function under the APA and those who are governed by special statutes. This, with the addition of such other Article I courts such as the Tax Court and the Claims Court,[55] is the administrative trial court writ large. It is certainly useful to think in these logical, thicket-clearing terms, but before such a braod swath is actually cut, a much better survey of this dense underbrush is needed.

### *Conclusion*

There is much ferment in the field of administrative adjudication at present. Not only are there movements to modify the *way* adjudications are performed (witness the trend toward "alternative dispute resolution"),[56] but renewed debates about how best to *structure* administrative adjudication are also being heard. There is new recognition that the overall scheme by which the government decides cases—some in Article III district courts, some in quasi-Article III forums like bankruptcy courts and magistrates, some in Article I courts like the Tax Court and Claims Court, some in traditional agencies operating under the APA and using ALJs, some in special adjudicatory agencies, and some in agency hearings presided over by non-ALJs—needs a comprehensive review. It is a healthy development that this variegated system is getting renewed attention, spurred by the

debate over the proposed Federal unified corps of administrative law judges. It would be beneficial to fashion a manageable experiment to try out the corps concept on the Federal level, but this focus on the corps bill should not obscure the reality that the role of the ALJ has changed dramatically in recent years and that there is a much larger world of non-APA, non-ALJ adjudication in the agencies that deserves just as much understanding and study.

## FOOTNOTES

[1]*See* Musolf, *Federal Examiners and the Conflict of Law and Administration* (1953) for a richly rewarding account of these debates and their aftermath. The following portion of the text draws heavily from pages 38-43. For a more recent dissertation on these issues, *see* Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (1978).

[2]Annual Report of the American Bar Association, LXI (1936), 731.

[3]President's Committee on Administrative Management, *Report with Special Studies* 40 (1937).

[4]*United States v. Morgan*, 298 U.S. 468 (1936). This was the first in a series of Supreme Court cases growing out of a Department of Agriculture ratemaking. Challengers to the rates objected that the Secretary had not personally heard or considered the evidence and arguments but had relied on the views of subordinates and that the hearing officer had prepared no tentative report to which the plaintiff might file exceptions. The Supreme Court agreed and remanded the case.

[5]*See* Musolf, *supra* note 1 at 41-42.

[6]*Message from the President of the United States Returning without Approval the Bill (H.R. 6324) Entitled, "An Act to Provide for the more Expeditious Settlement of Disputes, and for other Purposes*, H. Doc. 986, 76th Cong., 3d Sess., pp. 2-3.

[7]*Final Report of the Attorney General's Committee on Administrative Procedure*, p. 6 (1941). Printed as S. Doc. No. 8, 88th Cong., 1st. Sess. (1941).

[8]Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (current version at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521 (1982). In 1978, the APA was amended to substitute the title "administrative law judge" for the earlier designation, "hearing examiner." Act of March 27, 1978, Pub. L. 95-251.

[9]*See* Musolf, *supra* note 1 at 46 ("Here the Act accomplished the most decisive changes . . . .").

[10]*See* Fuchs, *The Hearing Examiner Fiasco under the Administrative Procedure Act*, 63 Harv. L. Rev. 759 (1950); Thomas, *The Selection of Federal Hearing Examiners; Pressure Groups and the Administrative Process*, 59 Yale L.J. 431 (1950). For a later account by the then-Chairman of the Civil Service Commission, *see* Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 Fed. Bar. J. 351 (1967).

[11]*See, e.g.*, Symposium: *Administrative Law Judges*, 6 W. N. Eng. L. Rev. 587 (1984); Symposium: *The Central Panel System: A New Framework for the Use of Administrative Law Judges*, 65 Judicature 233 (November, 1981).

[12]Figures below are all derived from periodic reports of the Office of Personnel Management's Office of ALJs. The January, 1979 figure was recomputed. *See* Morse, *The Administrative Law Judge——A New Direction for the Corps?* 30 Fed. Bar N & J 398, 399 (1983); Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 Judicature 266, 268 (1981). The October, 1982 figure is in *Hearings on S. 1275, infra* note 19 at 63. The June 1984 figure has been obtained from OPM by the author.

[13]This includes judges from the FLRA, FMSHRC, Labor Department, NLRB and OSHRC.

[14]*See Federal Administrative Law Judges Hearings—Statistical Report for 1976-1978*, Administrative Conference of the U.S. (1980), for an agency-by-agency analysis of caseloads. Data for 1982-1983 were compiled by the author from agency responses to an Administrative Conference questionnaire dated August 22, 1983. Responses are on file at the Administrative Conference.

[15]*See* Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 Judicature 266, 268-272 (1981) for an elaboration on this trend.

[16]Occupational Safety and Health Review Commission, 29 U.S.C. § 661 (1982); Federal Mine Safety and Health Review Commission, 30 U.S.C. § 823 (1982).

[17]49 U.S.C. §§ 1422, 1429 (1982).

[18]5 U.S.C. § 1201 (1982).

[19]*See Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary*, 98th Cong., 1st Sess. 25 (1983) (statement of the Federal Administrative Law Judges Conference) [hereinafter cited as *Hearings on S. 1275*].

[20]*See* 129 Cong. Rec. S. 6609-10 (daily ed. May 12, 1983) (statement of Sen. Heflin). *See also*, Heflin, *Query: Should Administrative Law Judges be Independent of Their Agencies?* 67 Judicature 369 (1984). A companion bill, H.R. 3539, was introduced by Rep. Shelby in the House of Representatives, on June 12, 1983 and a similar bill, H.R. 5156, was introduced on March 15, 1984 by Rep. Glickman.

[21]*Hearings on S. 1275, supra* note 19. The hearings were held on June 23 and September 20, 1983.

[22]*See* Rich, *The Central Panel System and the Decisionmaking Independence of Administrative Law Judges: Lessons for a Proposed Federal Program*, 6 W. N. Eng. L. Rev. 643 (1984); M. Rich & W. Brucar, *The Central Panel System for Administrative Law Judges: A Survey of Seven States* (1983). The eight states are California, Colorado, Florida, Massachusetts, Minnesota, New Jersey, Tennessee, and Washington.

[23]*See* Lubbers, *supra* note 15, at 273-275 for a listing of pros and cons.

[24]For strong statements of support *see* Palmer and Bernstein, *Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill*, 6 W. N. Eng. L. Rev. 673 (1984); Levant, *A Unified Corps of Administrative Law Judges—The Transition from a Concept to a Reality*, 6 W. N. Eng. L. Rev. 705 (1984). For a rebuttal *see* Zankel, *A Unified Corps of Federal Administrative Law Judges is Not Needed*, 6 W. N. Eng. L. Rev. 723 (1984). All of the above authors are Federal ALJs. *See also* Hearings on S. 1275, *supra*, note 19 for testimony pro and con.

[25]The bill does call for a two year study of the various types and levels of agency review. S. 1275, § 3. For a recent examination of structures of agency review of ALJ decisions, *see* Cass, *Agency Review of Administrative Law Judges' Decisions*, Report to the Administrative Conference of the U.S. (December 1983).

[26]The subject of removal and discipline of ALJs has also been a hot topic lately. *See* Rosenblum, *Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. N. Eng. L. Rev. 593 (1984); Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W. N. Eng. L. Rev. 807 (1984).

[27]Specific criticism of aspects of the bill are contained in Levinson, *The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort* (forthcoming) 19 N. Eng. L. Rev. ——(1984). (Draft on file at the Administrative Conference of the U.S.)

[28]S. 1275 § 2 (proposing codification at 5 U.S.C. § 564). The Glickman bill, H.R. 5156, *supra* note 20, provides for six initial divisions, combining the judges at the Department of Labor, NLRB and FLRA into a single division.

[29]Palmer & Bernstein, *supra* note 24 at 680 n. 39. I have assumed that "Maritime Commission" as listed in their list of agencies subsumed under the Division of General Programs is a misnomer since the Federal Maritime Commission is already listed under Division 1. I have substituted the Small Business Administration which is not listed on their chart. To summarize the list: *Division (1)*: FCC, FERC, ICC, CAB, FMC, NRC; *Division (2)*: OSHRC, FMSHRC, NTSB, EPA, Interior, Commerce, Coast Guard; *Division (3)*: Labor; *Division (4)*: NLRB, FLRA; *Division (5)*: SSA; *Division (6)*: Agriculture, CFTC, SEC, FTC, USITC; *Division (7)*: DEA,

HUD, FDA, ATF, SBA, USPS, MSPB.

[30]The independence of Social Security ALJs in the face of pressures to increase production and to decrease agency allowance rates has been a subject of controversy for years. *See 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).

[32]*See Hearings on S. 1275, supra* note 19 at 158 (testimony of Joseph B. Kennedy, suggesting such an independent adjudicatory agency). Two bills have been introduced in the 98th Congress to create a five member Health and Human Services Review Commission, S. 1911 (Sen. Pryor) "A bill to ensure the independence of certain administrative law judges"; and H.R. 3541 (Rep. Wise) (part of a more extensive revision of the Social Security Act). This proposal differs from the "Social Security Court" bill, introduced by Rep. Pickle, H.R. 5700 § 12, 97th Cong., 2d Sess., which would replace the Federal district courts as a forum for judicial review of decisions of the SSA.

[33]*See* comments by the Chief Administrative Law Judge of the Department of Labor, in Litt, *Foreward: This Year's Reform is Next Year's Need for Reform; 6 W. N. Eng. L. Rev. 587, 589 (1984).*

[34]*33 U.S.C. § 921(b) (1982).*

[35]*See Kalaris v. Donovan*, 697 F 2d. 376 (D.C. Cir. 1983), *cert. denied*, 103 S. Ct. 3088 (1983) (members of Benefits Review Board may be removed at the discretion of the Secretary of Labor).

[36]The NLRB general counsel serves a term of four years and, in practice at least, has been insulated from removal for the length of the term, 7 U.S.C. § 153(d) (1982). The FLRA general counsel serves a term of five years, but is removable by the President, 5 U.S.C. § 7104(f)(1) (1982).

[37]*See* Zankel, *supra* note 24, at 723 n. 3., and *Hearings on S. 1275, supra* note 19, at 175-190 (statement of Joseph B. Kennedy containing poll of agency ALJs *re* S. 1275—10 NLRB ALJs voted yes and 20 no).

[38]Lubbers, *supra* note 15. In this proposal I have also excluded the EPA (as a regulatory agency), the FLRA (due to its internal separation), and the NTSB and MSPB (as already independent adjudicatory bodies).

[39]*See Hearings on S. 1275, supra* note 19 at 113 (statement of Loren A. Smith).

[40]*Id.* at 119.

[41]*Hearings on S. 1275, supra* note 19 at 138 (statement of Joseph A. Morris).

[42]For a description of the ALJ program's operations *see* Lubbers, *Federal Administrative Law Judges: A Focus on our Invisible Judiciary*, 33 Ad. L. Rev. 109 (1981). The OPM has recently revised its examination and selection procedures, see Office of Personnel Management, *Administrative Law Judge* (Examination Announcement No. 318) (May, 1984).

[43]5 U.S.C. § 554(a) (1982).

[44]*Id.*

[45]5 U.S.C. § 556(b) (1982).

[46]At some point, of course, these less formal proceedings shade into that rather uncharted mass of agency action known as informal action. See Gardner, *The Informal Actions of the Federal Government*, 26 Am. U.L. Rev. 799 (1977). For the purpose of this article, and the questionnaire to agencies, *supra* note 14, an adjudication program attains a sufficient degree of formality to be included if it offers an *opportunity for an oral fact-finding hearing before a presiding official acting in a quasi-judicial capacity*. Thus, decisions on FOIA requests, camping permits or air traffic control, while technically adjudications, would be distinguishable from that discussed in this article. Creating clear and workable distinctions between these various levels of non-APA adjudications is a project for another day. For one useful attempt, see Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739 (1976).

[47]Morse, *supra* note 12, at 400.

[48]As of August 1984, there were 96 MSPB hearing officers. Telephone interview with MSPB's Office of Administrative Law Judges, August 1984.

[49]These judges are appointed pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1982). The Act provides that the judges are to be appointed in the same manner as administrative law judges, provided that they have at least five years' experience in public contract law. *Id.* § 607(b). The boards review appeals from decisions of agency contracting officers, but, unlike ALJs, the boards' decisions are final agency action. *Id.* § 607(g). The largest board is the Armed Services Board of Contract Appeals which has thirty three members and disposes of approximately 1,000 appeals annually (DOD questionnaire response, *supra* note 14).

[50]Why these officers are not classified as "attorney examiners" by OPM is not known. This information is drawn from responses to Administrative Conference questionnaire, *supra* note 14. Professor Larry Bakken of Hamline University School of Law is currently studying these programs for the Administrative Conference.

[51]Eleven of the full time officers and six of the part time officers are attorneys. Telephone interview with NRC Chief Judge Cotter's Office, July 1984.

[52]For a comprehensive description of the various grant dispute resolution procedures, *see* Steinberg, *Federal Grant Dispute Resolution*, Report to the Administrative Conference of the United States, printed in Mezines, Stein and Graff, *Administrative Law* (chapters 53 and 54) (1983).

[53]S. 1275, 98th Cong., 1st Sess § 2 (1983) (proposing codification at 5, U.S.C. § 568(d)).

[54]Levinson, *supra* note 27 at ——.

[55]*See* 28 U.S.C. §§ 271 et seq. (Claims Court); 26 U.S.C. § 7441 (Tax Court).

[56]The Administrative Conference is currently studying the use of alternative dispute resolution techniques (e.g., arbitration, mediation, conciliation, mini-trials, etc.) by Federal agencies.