The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJ's

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I. THE CURRENT PROHIBITION AGAINST PERFORMANCE APPRAISAL OF ALJs

Administrative law judges (ALJs), unlike almost all other federal executive branch employees, are excluded from the civil service performance appraisal system. Although the 1978 Civil Service Reform Act exempted ALJs from the definition of "employees," the 1978 General Accounting Office Study found that ALJs had similar responsibilities to those of other federal employees who were subject to performance appraisal. ACUS supports management norms for ALJs and proposes an approach for evaluating judicial performance at the state and federal level.
(the Act) makes it possible for agencies to bring actions against almost all federal employees based on unacceptable performance, the Act explicitly exempts ALJs from performance appraisals. The Act also created the Senior Executive Service (SES) for most top level "supergrade" employees, other than Presidential appointees and ALJs, in the executive branch. In addition to providing SES members with certain benefits (increased compensation, opportunities for bonuses and sabbaticals, and limited job protections), the Act also requires a system of performance evaluations that affects both compensation and possible removal from the SES. Therefore, under present law, almost all career federal employees in the executive branch, including senior managers, are subject to annual performance appraisals. The major exception is ALJs.

This is not the only impediment to agency attempts to exert managerial control over ALJ performance. ALJs are also exempt from the stan-

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ee" for the purpose of performance appraisals. Other exempted employees include those of the CIA and other national security agencies, foreign service members (who have their own "up-or-out" system), certain employees stationed outside of the United States, certain medical personnel in the Department of Veteran Affairs, temporary employees of less than one year, and Presidential appointees. 5 U.S.C. § 4301 (1988).


3. Prior to passage of the 1978 Reform Act, agencies could bring actions based only on conduct impairing the "efficiency of the service." L. Hope O'Keeffe, Note, Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability, 54 GEO. WASH. L. REV. 591, 602 (1986). This extremely well-researched note was very helpful in preparing this present analysis.

4. The exemption was created to maintain "the present system of providing protection for administrative law judges." Id.

5. See 5 U.S.C. § 3131-3152 (creating SES to ease recruitment and retention of highly competent and qualified executives).


7. 5 U.S.C. §§ 4311-4315 (1988). The criteria for SES performance appraisals are, as specified in section 4313:

   based on both individual and organizational performance, taking into account such factors as—(1) improvements in efficiency, productivity, and quality of work or service, including any significant reduction in paperwork; (2) cost efficiency; (3) timeliness of performance; (4) other indications of the effectiveness, productivity, and performance quality of the employees for whom the senior executive is responsible; and (5) meeting affirmative action goals and achievement of [EEO] requirements.

Id.
dard requirement that appointees in the competitive service serve a prob-
bonary period before being granted full appointment. In addition, ALJ pay, until recent amendments to the pay laws, was “prescribed by [The Office of Personnel Management (OPM)] independently of agency recommendations or ratings,” and ALJs were entitled to regular within-grade “step increases” without being subject to the usual rule requiring agency-head certification that the employee’s work “is of an acceptable level of competence.” The new ALJ pay system, enacted in 1990, formalized OPM control over ALJ pay according to a specific statutorily mandated schedule of pay levels tied exclusively to seniority for all ALJs. The only exception was for those few ALJs who OPM placed in higher pay categories, primarily chief ALJs or others with managerial duties.

Although the Administrative Procedure Act (APA) contains several provisions intended to safeguard the independence of ALJs from agency control, it never has explicitly barred agencies from conducting performance evaluations. The APA’s provisions on ALJ pay, as discussed above, provide that the Civil Service Commission (CSC), now OPM, set ALJ pay “independently of agency recommendations or ratings.” This provision, however, cannot be read to prohibit such ratings entirely—indeed it assumes such a rating procedure. In addition, the disci-

8. 5 U.S.C. § 3321 (1988); 5 C.F.R. § 2.4 (1993) (outlining probationary period required for employees selected from registers or promoted to managerial positions) and 5 C.F.R. § 930.203a(b) (1993) (providing that probationary period does not apply to ALJ appointments).


12. As of May 1992, only 38 of the 1185 ALJs were in these higher pay categories. All others were in categories based solely upon the length of service. Chart reproduced in The Federal Administrative Judiciary, ACUS RECOMMENDATIONS AND REPORTS 1063 (1992) [hereinafter THE REPORT].


14. Indeed, Attorney General Clark’s one caveat to the Administration’s support of the bill that became the APA was the inclusion of the language making ALJ pay independent of agency recommendations. Clark reported that the Acting Director of the Bureau of the Budget “deems it highly desirable that agency recommendations and ratings be fully considered by the Commission.” Letter from Attorney General Thomas Clark, to Senator Pat McCarran, Chairman of the Senate Judiciary Comm. (Oct. 19, 1945), reprinted in ATTORNEY GENERAL’S MANUAL ON THE APA 123-25 (1947).
iplinary and removal provisions in section 11 of the Act (which survive today as 5 U.S.C. § 7521) require that an agency wishing to discipline or remove an ALJ must bring charges before the CSC (now the Merit Systems Protections Board (MSPB)) showing good cause for the action. The MSPB has ruled that a "good cause" charge may be based on an agency's productivity evaluations.

Nevertheless, the statutory ban on ALJ "performance appraisals" and the even broader longstanding CSC/OPM rule that "[a]n agency shall not rate the performance of an administrative law judge," when combined with the high threshold of proof demanded by the MSPB for charges brought against ALJs on productivity grounds, have made it very difficult for agencies to exert managerial control over their ALJs.

One perceptive commentator has written:

Despite these apparently dispositive provisions proscribing agencies' ratings of ALJs' performance, agencies face strong pressures to curb ALJs who deviate from desired norms. Agency managers are thus frustrated by the delicate balance inherent in managing a group of critical employees charged with implementing an agency's policy but nevertheless supposedly independent of the agency. The APA and agencies' enabling statutes authorize agencies to review ALJs' decisions, sometimes even de novo, as the primary means of ensuring ALJs' accountability. However, from the perspective of the agency, the right to review ALJs' decisions supplies insufficient control. Review permits only an after-the-fact correction of a single decision, and, although dislike of reversal undoubtedly shapes ALJs' decisions, it does not normally modify behavior as effectively as the choice between conforming to a given norm and suffering direct adverse consequences. Agencies, therefore, gaze lustfully at the forbidden fruit of performance evaluations.

Although ALJs, once appointed, essentially achieve life tenure, it never was contemplated that ALJs would be immune from any performance reviews. For example, in 1941, the Attorney General's Committee

17. 5 C.F.R. § 930.211 (1993). This regulation "has remained essentially the same since [1947]." O'Keeffe, supra note 3, at 610 n.113.
18. See infra notes 60-69 and accompanying text (describing MSPB's required burden of proof in productivity-based cases).
20. Few ALJs have been removed under Section 7521 of the Civil Service Reform Act, 5 U.S.C. § 7521, and, as with other federal employees after 1978, ALJs have no mandatory retirement age. See Pub. L. No. 95-256, § 2(c), 92 Stat. 191 (1978) (repealing requirement in 5 U.S.C. § 8335, of mandatory retirement at age 70).
on Administrative Procedure recommended that an Office of Administrative Procedure be created to appoint examiners, exercise general supervisory powers, and remove examiners after a for cause hearing.\textsuperscript{21} The Committee also recommended a seven-year fixed term.\textsuperscript{22}

The APA, while affording the ALJs various protections and omitting fixed term appointments, did provide the Civil Service Commission (now OPM) with the authority to “make investigations, require reports by agencies, issue reports . . . promulgate rules, appoint advisory committees . . . [and] recommend legislation . . . ”\textsuperscript{23} The Commission did make an initial attempt to evaluate and rate incumbent examiners after the passage of the APA but that attempt foundered.\textsuperscript{24}

II. The 1978 General Accounting Office Study

After its failed attempt to evaluate and rate examiners, the Commission eschewed any attempt to evaluate sitting ALJs, and instead concentrated on the selection and assignment process. Because agencies essentially are barred from any sort of formal performance evaluation, management concerns began to escalate. In 1978, the General Accounting Office (GAO) released a major study on the administrative adjudication process\textsuperscript{25} primarily concerned with the ineffectiveness of agency personnel management with respect to ALJs.

The GAO study found that, although ALJs are agency employees with virtually guaranteed tenure, the APA specifically prohibited agency performance evaluation of ALJs.\textsuperscript{26} These critical personnel management evaluations were not assigned to any other organization or person. Without such evaluations, it is difficult, if not impossible, to meet personnel management needs. The GAO study found that agencies are unable to:

- Identify unsatisfactory ALJs and take personnel action;\textsuperscript{27}
- Make effective use of ALJs to ensure maximum productivity;\textsuperscript{28}

\begin{itemize}
  \item[21.] See O'Keeffe, supra note 3, at 597-98 (citing APA's Legislative History).
  \item[22.] Id.
  \item[24.] The Report, supra note 12, at 833-35; see also Ralph F. Fuchs, The Hearing Examiner Fiasco under the Administrative Procedure Act, 63 Harv. L. Rev. 737, 755-59 (1950) (stating that attempt to disqualify 28% of existing examiners failed for political reasons).
  \item[26.] Id.
  \item[27.] Id. at iv.
  \item[28.] Id.
Plan adequately for ALJ requirements to meet workload;²⁹
Provide the CSC, now OPM, with information to determine the adequacy of its ALJ certification practices;³⁰
Develop ALJs to their maximum potential through training or diversity of experience;³¹
Establish appropriate management feedback mechanisms to determine the effectiveness of an ALJ personnel management system.³²

The GAO study recommended that Congress amend the APA to:
1) Assign responsibility for periodic evaluations of ALJs’ performance to a specific organization.³³ The responsible organization could be the CSC, now OPM, by itself or as a part of an ad hoc committee composed of attorneys, federal judges, chief ALJs, agency officials, and ACUS;³⁴
2) Clarify OPM’s scope in performing its normal personnel management functions in the case of ALJs—issuing personnel management guidelines and periodically evaluating agency compliance;³⁵ and
3) Establish an initial probationary period of up to three years to eliminate automatically guaranteed appointment and tenure.³⁶

A contemporaneous study by the Senate Governmental Affairs Committee urged that “[c]hief ALJs should take more responsibility for reviewing the work of their ALJs for both quality and productivity."³⁷

These recommendations were supported by evidence that productivity among ALJs, even within the same agency, varied considerably. The GAO study, for example, found that at the National Labor Relations Board (NLRB), the nine most productive ALJs averaged twenty-nine case dispositions per year and the twenty-three least productive ALJs averaged twelve cases.³⁸ At the Occupational Safety and Health Review Commission (OSHRC), the GAO found that six ALJs averaged ninety-five case dispositions, and thirteen averaged forty-four cases.³⁹ The So-

²⁹. Id.
³⁰. GAO STUDY, supra note 25.
³¹. Id.
³². Id.
³³. Id. at v-vi.
³⁴. Id. at v-vi.
³⁵. GAO STUDY, supra note 25.
³⁶. Id.
³⁸. GAO STUDY, supra note 25, at 32. The figures are for FY 1975.
³⁹. Id.
cial Security Administration (SSA), as will be discussed below, identified ALJs who were performing well below average in terms of monthly case dispositions. While these are admittedly rough indications, not involving qualitative judgments, at a minimum, they present discrepancies that need to be explained.

Perhaps in response to these studies, and in keeping with the spirit of the civil service reform, Congress in 1979 and 1980 developed several legislative proposals for limited ALJ terms, coupled with performance evaluation by outside bodies, such as OPM or ACUS, with the assistance of peer review panels. These proposals, however, were never enacted, partly because of opposition by ALJ organizations and partly because election year politics in 1980 dampened Congress's enthusiasm for the various pending "regulatory reform" proposals.

III. LAWSUITS BY AND AGAINST ALJs

In the 1980s, legislative proposals concerning ALJs shifted to discussions of the ALJ Corps bill, while debates over personnel evaluation shifted to the Social Security arena. A dispute between SSA management and SSA ALJs over performance evaluation arose in the late 1970s. The dispute was subjected to mixed signals by Congress.

40. See infra notes 45-70 and accompanying text (describing litigation between SSA and its ALJs).
41. GAO Study, supra note 25, at 32.
42. A more recent anecdote from the Interior Department shows that in 1987 the productivity of its Indian Probate Judges (then AJs, now ALJs) increased from 200-250 to 300-360 cases annually after a reduction in the number of judges. U.S. Department of the Interior, Final Report on the Organization, Management and Operation of the Office of Hearings and Appeals (1990).
43. See O'Keeffe, supra note 3, at 602-03 and accompanying notes (discussing legislative proposals on limited terms and performance evaluations for ALJs).
44. Moreover, one potential overseer of ALJ performance was notably unenthusiastic about this proposed assignment. See Resolution on an Enhanced Role for the Administrative Conference in Procedural Reform, 1979 Report, Administrative Conference of the United States 71 (1980) (stating that "undesirable additions to its primary responsibilities include . . . [s]electing or evaluating individual administrative law judges."). Id. at 74.
46. See House Subcomm. on Social Security, Social Security Administra-
the courts,\textsuperscript{48} and the MSPB,\textsuperscript{49} none of which provided clear signals as to the limits of agency management prerogatives with respect to ALJs. Numerous cases have resulted either from ALJ organizations suing the Social Security Administration to block management initiatives, or from the SSA bringing charges “for good cause” against individual low-producing ALJs pursuant to 5 U.S.C. § 7521. Each effort has met with mixed success.

The ALJ-sponsored suits arguably have established the principle that it is improper for the agency to subject only those ALJs with high allowance rates\textsuperscript{50} to review, counseling, and possible disciplinary action.\textsuperscript{51} It remains unclear, however, whether the courts would have been so critical if similar review had also been extended to ALJs with low allowance rates.\textsuperscript{52} Agencies also appear to be courting judicial opprobri-

\begin{itemize}
  \item For an overview of the dispute between ALJs and the SSA over compilation of ALJ statistics, see \textit{Association of Admin. Law Judges}, 594 F. Supp at 1142; and O’Keeffe \textit{supra} note 3, at 606, n.84. Since O’Keeffe’s article was published, the Second Circuit rejected an ALJ challenge to SSA productivity initiatives, finding SSA’s “goal” of 338 ALJ decisions per year to be reasonable. \textit{Nash v. Bowen}, 869 F.2d 675, 680 (2d Cir. 1989).
  \item An allowance rate, also known as “reversal rate,” \textit{Nash}, 869 F.2d at 879, refers to the rate at which an ALJ issues decisions allowing benefits. \textit{Association of Admin. Law Judges}, 594 F. Supp. at 1141-43.
  \item For a discussion of these suits, see \textit{infra} notes 60-71 and accompanying text.
  \item \textit{See Nash}, 869 F.2d at 681 (stating that “[t]o coerce ALJs into lowering reversal rates—that is, into deciding more cases against claimants—would, if shown, constitute in the district court’s words, ‘a clear infringement of decisional independence’”). See \textit{also Association of Admin. Law Judges}, 594 F. Supp. at 1143 (criticizing SSA practices, but declining to grant injunction because “defendants appear
um if they establish quantitative caseload quotas (or even goals, if they are unreasonable). On the other hand, agency efforts to promote uniformity and efficiency in ALJ decisionmaking, including the keeping of individualized case-production statistics and the establishment of "reasonable goals," have been upheld by the same courts that otherwise have been critical of agency actions.

Most of the cases resulting in removals or suspensions of ALJs have been based on past misconduct, on-the-bench actions, or most frequently, other behavior. Cases involving "insubordination" also have led to have shifted their focus.

The parties to the settlement in Bono v. SSA, agreed that, among other things, 1) the SSA and its Office of Hearings and Appeals (OHA) has "the authority to exercise administrative and management functions over its corps of" ALJs; 2) the OHA "may maintain records on individual ALJs" including total cases decided and reversal rates; 3) "OHA will not issue directives or memoranda" establishing quotas or goals. Bono v. SSA, C.A. No. 77-0819-CV-W-4 (W.D. Mo. 1979), reprinted in Social Security Disability Reviews: The Role of the Administrative Law Judge: Hearing Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. 448 (1983).

53. See Nash, 869 F.2d at 680 (stating that "policies designed to insure a reasonable degree of uniformity among ALJ decisions are not only within the bound of legitimate agency supervision but are to be encouraged.").


55. E.g., SSA v. Burris, 39 M.S.P.R. 51 (1988) (stating that abusive language toward supervisors would have warranted 30-day suspension; misuse of free mail privilege would have warranted 60-day suspension; removal on other grounds), aff'd 878 F.2d 1445 (Fed. Cir. 1989), cert. denied 493 U.S. 855 (1989); SSA v. Friedman, 41 M.S.P.R. 430 (1989), (holding that canceling hearings without reason warranted 14-day suspension); SSA v. Glover, 23 M.S.P.R. 57 (1984) (holding that vulgarity toward supervisor, throwing files warranted 120-day suspension); SSA v. Carter, 35 M.S.P.R. 485 (1987) (holding that sexual harassment of employees warranted 70-day suspension); Department of Commerce v. Dolan, 39 M.S.P.R. 314 (1988) (holding that kicking employee warranted 14-day suspension); In re Glover, 1 M.S.P.R. 660 (1980) (holding that seizing memo, pushing employee, pressing cover of copy machine on employee's hand warranted 30-day suspension); In re Spielman, 1 M.S.P.R. 53 (1979) (holding that falsifying facts on ALJ application to seek higher grade warranted 60-day suspension). For more on these cases, see Paul J. Streb, The ALJ Digest, (July 6, 1990) (unpublished memorandum, on file with ACUS).

Since 1946, agencies have brought fewer than two dozen suits to discipline or remove ALJs under section 7521. Streb, supra; and cases cited in James P. Timony, Disciplinary Proceedings Against Federal Administrative Law Judges, 6 W. NEW. ENG. L. REV. 807, 807-08 n.1-2 (1984) [hereinafter Timony, Disciplinary Proceedings] (listing cases since 1946); and O'Keeffe supra note 3, at 606-08 n.86. Removals of
disciplinary actions.56 This latter type of charge is strengthened by the generally accepted notion that ALJs are subject to the general administrative direction of the employing agencies. The OPM Program Handbook on ALJs, for example, states that, “[ALJs] are subject to agency administrative direction in such nonjudiciatory matters as hours of duty, travel, parking space, office space, office procedures, staff assistance and organizational structure.”57

Thus it seems clear that the MSPB procedure is a sufficient “weapon” against ALJs engaged in misconduct or insubordination.58 The difficulty


In 1992, the SSA sought to remove an ALJ for (1) improperly applying Social Security law and an overly high reversal rate and (2) improperly treating pro se claimants. SSA v. Anyel, 58 M.S.P.R. 261 (1993). The MSPB’s ALJ rejected SSA’s first reason and accepted the second reason but reduced the penalty to a 90-day suspension. Id. See also Benton v. United States, 488 F.2d 1017 (Ct. Cl. 1973) (holding that ALJs total disability could constitute good cause, but not involuntary retirement). These cases do not, of course, reflect resignations, or post-charge settlements.

56. E.g., SSA v. Brennan, 27 M.S.P.R. 242 (1985) (holding that refusing to follow case processing procedures, including routing of mail, use of worksheets, etc. warranted 60-day suspension), stay denied by, 27 M.S.P.R. 439 (1985), aff’d, 787 F.2d 1559 (Fed. Cir. 1986), cert. denied, 479 U.S. 985 (1986); SSA v. Manion, 19 M.S.P.R. 298 (1984) (holding that refusing to schedule hearings warranted 30-day suspension); SSA v. Arterberry, 15 M.S.P.R. 320 (1983) (holding that refusing to hear cases outside area warranted 30-day suspension); SSA v. Boham, 38 M.S.P.R. 540 (1988) (holding that refusing to hear cases requiring travel warranted 75-day suspension).

57. OFFICE OF PERSONNEL MANAGEMENT, ADMINISTRATIVE LAW JUDGES PROGRAM HANDBOOK (1989). The Handbook goes on to caution that “[o]f course, administrative direction in such matters may not be used as a means of affecting, controlling, or sanctioning [ALJs’] decisions in ‘formal’ proceedings.” Id. at 9.

58. Agencies, however, will not always prevail in misconduct or insubordination claims. See SSA v. Glover, 23 M.S.P.R. 57, 70-78 (1984) (stating that criticizing staff member in decision or in memo to supervisor is not good cause for discipline); SSA v. Brennan, 27 M.S.P.R. 242, 248-49 (1985) (holding that critical memo to supervisor...
with the disciplinary process comes with respect to cases involving low productivity or inefficiency. In these cases, all involving the SSA, the agency has been unsuccessful in its cases before the MSPB. 59

In the trilogy of SSA-ALJ productivity cases decided by the MSPB in 1984, 60 the agency brought to the MSPB what it considered to be evidence of unacceptably low productivity. In the lead case, 61 SSA produced evidence that the judge’s disposition rate for the years 1980-81 was fifteen to sixteen cases per month, compared to an average of thirty to thirty-two for all SSA ALJs. 62 In addition, his average monthly “pending” caseload for 1981 was sixty-four, compared with 178 for all SSA ALJs. 63 After a hearing, the MSPB ALJ rejected the ALJ’s legal defenses and recommended dismissal. 64

The full MSPB heard oral arguments on the case and unanimously ruled that although “there is no generic prohibition to the filing of this charge,” 65 the SSA’s evidence that the ALJ’s case dispositions were half the national average was not enough to show unacceptably low productivity “[i]n the absence of evidence demonstrating the validity of using its statistics to measure comparative productivity.” 66 The Board opined that SSA cases were not fungible and that SSA’s comparative statistics did not take into sufficient account the differences among these types of cases. 67 The same reasoning later was applied to two other cases against SSA ALJs with similar productivity records. 68

The result amounted to a pyrrhic victory for the SSA: the agency is not good cause for discipline); SSA v. Burris, 39 M.S.P.R. 51, 60-63 (1988) (holding that failure to stop criticizing agency in decision was not good cause for discipline). In each of these cases, however, discipline was approved on other grounds. It also is fair to ask whether “insubordination” covers an ALJ’s repeated failure to follow agency policy. To date, no charges brought on failure to follow agency policy have been identified.

59. See infra notes 60-71 and accompanying text (describing trilogy of SSA productivity-based suits against ALJs).


61. Goodman, 19 M.S.P.R. at 321.

62. Id.

63. Id. See also Rosenblum supra note 49, at 621 (citing MSPB ALJ’s recommended decision).

64. Goodman, 19 M.S.P.R. at 321.

65. Id. at 330.

66. Id. at 331.

67. Id. at 332.

68. Brennan, 19 M.S.P.R. at 335; Balaban, 20 M.S.P.R. at 675.
won the right to bring charges against low producing ALJs but was handed a virtually insurmountable burden of proof. Despite that social security disability cases, because of their high volume and relative fungibility, lend themselves to statistical comparison (at least when compared to other types of agency adjudication), the MSPB found that several years' worth of half-of-average production did not meet its burden of proof without greater analysis of the particular cases heard by the cited ALJ.

Moreover, two of the ALJs involved in these cases later recovered attorney fees of almost $250,000 from the government. It is thus not surprising that SSA has brought no productivity-based charges to the MSPB since 1984.

Nevertheless, this trilogy of cases, by establishing the principle that agencies may, for the purpose of bringing actions under section 7521 of the Act, collect case-production statistics, does provide a basis for agency managerial initiatives notwithstanding the statutory exemption of ALJs from the performance appraisal system.

The "good cause" standard for disciplining "bad apple" ALJs is seen correctly as a protection of the ALJs' decisional independence. The MSPB takes the "good cause" test quite seriously and, obviously, an agency will think twice before mounting an expensive, time consuming, and disruptive case against one of its own sitting ALJs. This is as it should be. Agencies should view the initiation of disciplinary proceedings, whether on grounds of misconduct, insubordination, or low productivity, as a last resort.

Consistent with this view, however, agencies should establish other approaches for assessing and dealing with apparent or alleged instances of misbehavior, bias, or unacceptably low productivity on the part of their ALJs. The two guiding principles for doing this ought to be safe-

69. See supra text accompanying notes 65-68 (describing standard of proof required).

70. These recoveries occurred in the Goodman and Balaban cases. Telephone interview with Larry Mason, Executive Assistant to the SSA Associate Commissioner, Office of Hearings and Appeals, Aug. 1992. See also SSA v. Goodman, 33 M.S.P.R. 325 (1987) (finding Goodman entitled to attorney fees and urging settlement as to proper amount).

71. In some respects using productivity statistics for managerial initiatives is not new. As early as 1960, the Civil Service Commission denied a petition from 19 ICC examiners who challenged a new agency monthly work report. John W. Macy, Jr., The APA and the Hearing Examiner: Products of a Viable Political Society, 27 FED. B. J. 351, 424 (1967). The Commission stated that "... regardless of this independent status, a hearing examiner is nonetheless an employee and it is both the agency's right and duty to have an account of his work and his hours of duty." Id.
guarding decisional independence and peer review. It is interesting that few ALJs surveyed for this report noted problems with overly close supervision of work (four percent) or with pressure from agencies for different decisions (eight percent). On the other hand, forty percent of ALJs complain of pressure from agencies for faster decisions.\textsuperscript{72}

IV. ACUS SUPPORTS MANAGEMENT NORMS FOR ALJs

In 1978 ACUS combined these two principles of decisional independence and peer review into an approach to develop appropriate managerial norms for ALJs at the SSA.\textsuperscript{73} In Recommendation 78-2, ACUS stated:

The Bureau of Hearings and Appeals (BHA) [now Office of Hearings and Appeals (OHA)] possesses and should exercise the authority, consistent with the administrative law judge’s decisional independence, to prescribe procedures and techniques for the accurate and expeditious disposition of Social Security Administration claims. After consultation with its administrative law judge corps, the Civil Service Commission, and other affected interests, [OHA] should establish by regulation the agency’s expectations concerning the administrative law judges’ performance. Maintaining the administrative law judges’ decisional independence does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies underlying the Social Security Administration’s fulfillment of statutory duties.\textsuperscript{74}

In 1986, in its Recommendation 86-7 on case management in agency adjudication, ACUS refined and generalized its earlier recommendation\textsuperscript{75} and advocated the use of internal agency guidelines for timely case processing and measurements of the quality of work product to maintain productivity and responsibility.\textsuperscript{76} ACUS reiterated that agencies possess and should exercise the authority, consistent with the ALJs’ decisional independence, to formulate written criteria for measuring case handling efficiency, to prescribe procedures, and to develop techniques for the expeditious and accurate disposition of cases. It also stressed that the experiences and opinions of presiding officers should play a large

\textsuperscript{72} THE REPORT, supra note 12, at 1071 (Question 14).


\textsuperscript{74} Id.

\textsuperscript{75} ACUS Recommendation 86-7, Case Management as a Tool for Improving Agency Adjudication, codified at 1 C.F.R. § 305.86-7 (1993). This recommendation was adopted by President Bush’s Executive Order 12,778, 56 Fed. Reg. 55,195 (1991).

\textsuperscript{76} 1 C.F.R. § 305.86-7 (1993).
part in shaping these criteria and procedures. The criteria should take into account differences in categories of cases assigned to ALJs and the types of disposition (e.g., dismissals, dispositions with or 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.

Under both the 1978 and 1986 recommendations, ACUS emphasized safeguarding decisional independence, as well as significant ALJ participation in the development of reasonable guidelines. Application of such criteria would not only improve agency-wide performance (indeed, the criteria should be established and applied at the agency-review stage as well), they also would make it possible for agencies to better address individual managerial problems. In addition, the chief ALJ, or other managing official (e.g., Director, Office of Hearings), could circulate statistics on case dispositions among the agency judges, creating "peer pressure" among ALJs.

This "peer pressure" likely would have a beneficial effect on ALJ performance. Indeed, agencies employing large numbers of ALJs or Administrative Judges (AJs) who resolve the same types of disputes (e.g., SSA disability cases, immigration cases) should circulate periodic statistical analyses of aggregate and individual decisionmaking patterns. Through this mechanism, each judge would be able to compare his or her pattern of decisionmaking with that of his or her peers and with other group norms. The ability to self-identify as, for instance, an unusually low-productivity adjudicator or an unusually generous or stingy adjudicator, when combined with peer pressure, should enhance both productivity and inter-judge consistency. Indeed, to their credit, most ALJs responding to the survey acknowledge that mediocrity of some ALJs is at least a "somewhat" serious problem.

Where peer pressure does not solve a problem of unacceptably low productivity, other measures should be available to an agency. Under existing MSPB caselaw, agencies have to document fully a statistical case to succeed in showing that low productivity is cause for discipline or dismissal under section 7521. If, however, agencies follow Recommendations 78-2 and 86-7 and develop, with ALJ participation, appro-

77. For a discussion of the 1978 and 1986 ACUS recommendations, see supra notes 73-76 and accompanying text.
78. THE REPORT, supra note 12, at 1075. Of those responding, 17% labeled ALJ mediocrity a "very" serious problem, while 56% labeled it a "somewhat" serious problem. Id.
79. Supra notes 65-69 and accompanying text.
appropriate norms and statistical records, the MSPB route should become more feasible. This is not to say that chief ALJs and office managers should rush to bring actions against less-than-average producers, because some judges obviously produce on average less than others.\textsuperscript{80} Other techniques, such as counseling, training, and opportunities to improve performance should be tried before filing charges with the MSPB. Nevertheless, the possibility of filing charges should remain a real one.

V. A PROPOSED APPROACH

To eliminate any further confusion about agencies' ability to develop, maintain, and enforce these appropriately developed standards, the flat statutory exemption of ALJs from the performance appraisal system, and the broader OPM regulation prohibiting agencies from "rating" the performance of ALJs, should be modified.

One might conclude legitimately that both provisions simply should be repealed, especially because the new salary statute for ALJs effectively ensures compliance with the APA's mandate that agency ratings or recommendations not influence OPM's setting of ALJ pay.\textsuperscript{81} Indeed, given the security of ALJ pay, one possible approach to performance evaluation of ALJs would be to maintain the section 7521 procedure for misconduct or insubordination cases only, and simply to subject ALJs to either the SES\textsuperscript{82} or the general employee personnel appraisal system.\textsuperscript{83} After all, both systems are replete with provisions that ensure that the evaluations and resulting adverse actions are fair.\textsuperscript{84}

\textsuperscript{80} See O'Keeffe, supra note 3, at 618 (pointing out danger of allowing production quotas to keep ratcheting upwards: "The purpose of the quota is to encourage underproducers to catch up with the average. Then the average goes up. However, if the quota is based on the average, the quota goes up. Standards simply edge higher and higher").

\textsuperscript{81} See supra notes 9-12 and accompanying text (describing changes in ALJ pay standards).

\textsuperscript{82} See supra notes 5-7 and accompanying text (describing SES).

\textsuperscript{83} See O'Keeffe, supra note 3, at 602 (discussing \textit{inter alia}, general employee performance evaluations).

\textsuperscript{84} See id. at 623 n.207 (listing provisions that ensure evaluations and actions are fair):

\ldots 5 U.S.C. § 4302(b)(6) (1982) (no employee can be disciplined for poor performance without being given an opportunity to improve); \textit{id.} § 4303(b)(1)(A) (an employee subject to removal is entitled to 30 days advance notice identifying specific instances of unacceptable performance); \textit{id.} § 4303(c)(2)(A) (a demotion or removal may be based only on unacceptable performance during the immediately preceding year); \textit{id.} § 4303(c)(2)(D) (an em-
Similarly, it is not difficult to conceive of a structural system to honor separation-of-functions concerns and to provide peer review in such evaluations. Most agencies have (or could have) chief ALJs, who could perform this task well. Large-volume agencies have deputy chiefs or regional chiefs. While these chiefs, like other top managers in agencies, are appointed to the position by the agency,\(^5\) it has been recognized that his or her position, and the increased compensation that comes with it, rests in the individual's "substantial administrative and managerial responsibilities" and not on their policy expertise.\(^6\) Thus, it is unlikely that agencies would exert improper pressures on chief ALJs to use improper criteria in effectuating a performance appraisal system.

Employee whose performance improves is entitled to have his or her record cleared of any reference to the performance based adverse action); \(id.\) § 4301(3) (defining unacceptable performance as the failure to meet established standards).

\(id.\)

The SES performance appraisal system contains similar safeguards, including peer review (performance review boards) and GS-15 job guarantees if removed. \(5\) U.S.C. §§ 4311-4315 (1988).

Moreover, the rate of removals under either system is extremely low: of 2.1 million federal employees (not including postal workers), 425 were removed in fiscal year 1989 and 403 in fiscal year 1990 on the basis of performance. OFFICE OF PERSONNEL MANAGEMENT, OFFICE OF WORKFORCE INFORMATION, PERSONNEL SYSTEMS AND OVERSIGHT GROUP (1992).

From an SES workforce of about 8000, four were dismissed in fiscal year 1988, five in fiscal year 1989, three in fiscal year 1990, and zero in fiscal year 1991. OFFICE OF PERSONNEL MANAGEMENT, OFFICE OF EXECUTIVE MANAGEMENT POLICY, HUMAN RESOURCES DEVELOPMENT GROUP (1992). The newly installed recertification process for SES members has led to nine removals or demotions. Mike Causey, Big Bosses Pass Test, WASH. POST, Mar. 20, 1992, at C2.

This level of annual removal for performance of about one in 5000 general workers and one in 2500 SES members should not greatly concern ALJs—especially if any application of such a system made it clear that evaluation did not infringe upon the ALJ's decisional independence. Attorney General Levi's Opinion provides the guidance that an agency could not reprimand an ALJ for issuing an opinion in a case notwithstanding the agency's commitment to a federal judge that it withhold administrative action. Administrative Procedure Act—Reprimand of Administrative Law Judge, 43 Op. Att'y Gen. 9 (1977). The Opinion characterized the ALJ's action as an exercise of "judgment, which in the context, was essentially judicial." \(id.\)

85. See Rosenblum, supra note 49, at 613-14 (citing Attorney General Katzenbach's opinion that agencies may promote ALJs to Chief ALJs without Civil Service Commission participation). See also Administrative Procedure Act, Promotion to Chief Hearing Examiner at Increase Compensation, 42 Op. Att'y Gen. 289 (1964) (presenting Attorney General Katzenbach's opinion).

Nevertheless, if chief ALJs were given the lead role in this area, it would be wise to protect them from improper pressures from the agency by making their appointment and removal subject to review by OPM. This would permit chief ALJs to engage in normal supervisory and managerial responsibilities without arousing fear that their actions might be based on impermissible pressure or motives. Chief ALJs should, however, be required to submit their performance appraisal system, including any productivity guidelines, to OPM for its review and certification. This would ensure action by the chief ALJ while also removing the agency (qua agency) from the evaluation process. If this system were put in place, section 7521 should be amended to have the chief ALJ, in the name of OPM, bring the charges against wayward ALJs before the MSPB. Finally, although performance-based monetary bonuses may be problematic, there is no reason why the chief ALJ could not be authorized to recommend nonmonetary awards or commendations to outstanding ALJs.

The success of this approach to performance appraisal depends heavily on participation of ALJs in the development of appropriate performance criteria and guidelines. In some situations, peer review of problem performers can be useful as well. Several agencies, in fact, already have instituted peer review for certain types of complaints or allegations against ALJs. The Department of Labor’s Office of Administrative Law Judges (DOL ALJs) has established peer review procedures for handling complaints of misconduct or disability on the part of ALJs. The DOL ALJs have set up an informal inquiry advisory committee consisting of three members selected by the Chief ALJ from a panel of six judges elected by the DOL ALJs. Although not frequently used, this proce-

87. It might be argued that it is unnecessary to institute a somewhat cumbersome and possibly disruptive system of annual performance appraisal of all ALJs. Arguably, it might be sufficient to amend the performance appraisal exemption to allow agencies to appraise ALJs on an individual basis as a prelude to bringing a charge under section 7521. Chief ALJs then would wait until sufficient “probable cause” was established before undertaking a written appraisal of an ALJ’s performance, thus giving the ALJ a chance to respond to the appraisal and to improve his or her performance. This would add to the notice, fairness, and documentation of an ensuing action at the MSPB.


89. See O'Keeffe, supra note 3, at 625 n.219 (reporting that procedure has been invoked twice as of 1985). According to the Deputy Chief ALJ, the procedure has not been invoked in the past five years, although it has been “suggested” several
The peer review system is a good model for other large ALJ corps. The SSA recently has defended several class action lawsuits alleging that several ALJs were biased and has instituted a similar procedure modeled on the peer review system for allegations of misconduct by federal Article III judges.

Obviously, agencies with fewer judges will find it more difficult to set up peer review panels (although the SES performance review board system copes with this by rotating peers from among the smaller agencies). On the other hand, chief ALJs in these agencies will have a closer relationship with individual ALJs, thus making many of the managerial tasks easier. Moreover, the promulgation of a model code of judicial conduct for ALJs will help provide significant assistance in misconduct or complaint cases.

Finally, one aspect of the MSPB process during a “good cause” hearing merits reform: the Board at present, and for over a decade, has employed only a single ALJ to preside over misconduct cases (and a few other low-volume categories of cases). This places that individual ALJ in the uncomfortable position of repeatedly having to judge his

90. For a description of these cases, see *Judicial Independence of Administrative Law Judges at the Social Security Administration, Hearings before the House Subcomm. on Social Security, of the House Comm. on Ways and Means*, 101st Cong., 2d Sess. 72 (1990) (statement of Jonathan M. Stein, General Counsel, Community Legal Services, Inc.). These allegations have led to a GAO investigation that concluded that ALJ decisions had shown a statistically significant bias against black applicants. *General Accounting Office, Social Security: Racial Difference in Disability Decisions Warrant Further Investigation* (1992). The GAO study discloses that more than 10% of SSA ALJs had allowance rates that disfavored black claimants by more than 25%. Id. See also Stephen Labaton, *Benefits Are Refused More Often to Disabled Blacks, Study Finds*, N.Y. Times, May 11, 1992 at Al. SSA Commissioner King raised concerns about GAO’s methodology but also pledged vigorously to deal with the problems raised by the report. Letter from Commissioner King, to Lawrence J. Thompson, GAO (Feb. 4, 1992), reprinted in *General Accounting Office, Social Security: Racial Difference in Disability Decisions Warrant Further Investigation* 74-76 (1992).


93. In 1993, the MSPB’s only ALJ retired, and the agency began borrowing ALJs to hear these cases. Telephone interview with OPM, November 1993.
peers with no realistic chance of recusal. Given the nature of these cases, it would be far better for MSPB to expand its pool of available ALJs to hear such cases.

It has been suggested that MSPB could have these cases heard by a panel of three ALJs, with two of them employed by agencies other than the MSPB or the prosecuting agency, and assigned in rotation from a list kept by OPM.94 Multi-judge peer review panels are common in both the states and federal system95 and could be incorporated easily into the MSPB procedure.96

VI. EVALUATION OF JUDICIAL PERFORMANCE
AT THE STATE AND FEDERAL LEVEL

Evaluation of judicial performance is hardly a new or radical idea. Evaluation programs exist at both the federal and state court levels, and ALJs in a large number of states are also subject to performance evaluation.

The American Bar Association (ABA) has issued Guidelines concerning the proper role of such evaluations that supply specific performance measures to be applied.97 The ABA Guidelines recognize that ALJ evaluation programs should be “structured and implemented so as not to impair the independence of the judiciary.”98 The ABA Guidelines also encourage performance evaluations for “self-improvement,” “effective assignment and use of judges within the judiciary,” “improved design and content of continuing judicial evaluation programs,” and “retention

95. Timony, Disciplinary Procedures, supra note 55, at 809 (citing California’s commission system in particular).
96. Indeed, this would not require a statutory amendment because the APA permits agencies to use “one or more” ALJs to preside over hearings. 5 U.S.C. § 556(b)(3) (1988). Furthermore, OPM administers an ALJ “loan program” where “[a]n agency . . . which occasionally or temporarily is insufficiently staffed with [ALJs] . . . may use [ALJs] selected by [OPM] with the consent of other agencies.” 5 U.S.C. § 3344 (1988). If the many MSPB AJs were converted to ALJs, the need for loans would be eliminated.
97. ABA SPECIAL COMMITTEE ON EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (Aug. 1985) (hereinafter ABA GUIDELINES).
98. Id., Guideline 1-2, at ix.
The ABA Guidelines provide the following criteria for performance evaluation:

1. **Integrity**—avoidance of impropriety and appearance of impropriety, freedom from bias, impartiality;
2. **Knowledge and understanding of the law**—legally sound decisions, knowledge of substantive, procedural and evidentiary law of the jurisdiction, proper application of judicial precedent;
3. **Communication skills**—clarity of bench rulings and other oral communications, quality of written opinions, sensitivity to the impact of demeanor and other non-verbal communications;
4. **Preparation, attentiveness and control over proceedings**—courtesy to all parties, willingness to allow legally interested persons to be heard unless precluded by law;
5. **Managerial skills**—devoting appropriate time to pending matters, discharging administrative responsibilities diligently;
6. **Punctuality**—prompt disposition of pending matters and meeting commitments of time according to rules of court;
7. **Service to the profession**—attendance at and participation in continuing legal education, ensuring that the court is serving the public to the best of its ability;
8. **Effectiveness in working with other judges**—extending ideas and opinions when on multi-judge panel, soundly critiquing work of colleagues.

Whether or not they follow the ABA Guidelines, judicial evaluation programs increasingly are used at the state level. According to the latest survey of state activity, “six states and the courts of the Navajo Nation operate judicial evaluation programs, and eight states are actively developing a program or are close to implementing one.” The purposes of

99. *Id.*, Guideline 1-1, at ix.
100. *Id.*, Guideline 3-0, at x.
101. *Id.*, Guideline 3-1, at x.
102. ABA GUIDELINES, supra note 97, Guideline 3-2, at x.
103. *Id.*, Guideline 3-3, at xi.
104. *Id.*, Guideline 3-4, at xi.
105. *Id.*, Guideline 3-5, at xi.
106. *Id.*, Guideline 3-6, at xi.
107. ABA GUIDELINES, supra note 97, Guideline 3-7, at xii.
108. *Id.*, Guideline 3-8, at xii.
109. Susan Keilitz and Judith White McBride, Judicial Performance Evaluation Comes of Age, 16 STATE CT. J. 4, 6-9 (1992). The six states with established pro-
some of these programs include generating information to be used in judicial retention elections or in reappointment decisions.\textsuperscript{110}

The federal judiciary also has shown interest in judicial evaluation. Under the auspices of a Judicial Conference Subcommittee on Judicial Evaluation, the U.S. District Court for the Central District of Illinois recently completed a pilot judicial evaluation project involving the voluntary participation of judges and attorneys.\textsuperscript{111} The report on this pilot project states that "the response of participants was overwhelmingly positive."\textsuperscript{112} In addition, the Seventh, Eighth, and Ninth Circuit Courts of Appeals have used performance evaluations in making retention decisions for bankruptcy judges and magistrates.\textsuperscript{113} Finally, Congress has expressed its concerns about current arrangements relating to discipline and removal of federal judges by creating the blue-ribbon National Commission on Judicial Discipline and Removal, which recently published its report recommending, among other things, consideration of a judicial evaluation program in the federal courts.\textsuperscript{114}

Within the state administrative judiciary, there is considerable use of performance evaluation. All but four of the eighteen states (plus New York City) that have adopted the "central panel" model of agency adjudication, whereby some or all state ALJs are located in a central organization to be assigned to agency cases on an as-needed basis,\textsuperscript{115} use at least the normal type of civil service evaluation. Eight states (plus New York City) submitted to ACUS specially tailored performance appraisal forms for their judges, and one state, Maryland, submitted its proposed plan.\textsuperscript{116}

\textsuperscript{110} Id.

\textsuperscript{111} Id.


\textsuperscript{113} Id. at 1.

\textsuperscript{114} REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 155 (1993).


\textsuperscript{116} The eight states submitting appraisal forms were Colorado, Florida, Minnesota,
Perhaps the most sophisticated evaluation program is New Jersey's.\textsuperscript{117} The New Jersey Office of Administrative Law has developed an evaluation system designed to reflect performance of ALJs, to indicate the need for improvement, and also to assist in the Governor's reappointment decisions.\textsuperscript{118} The system, using a combination of performance evaluation techniques, focuses on three areas of judicial performance: competence, conduct, and productivity.\textsuperscript{119}

The ALJ's competence, in New Jersey's system, is evaluated primarily based on the judge's written decisions. The New Jersey Office of Administrative Law randomly selects decisions in the judge's area of expertise and reviews them for factors such as structure and substance, including: clarity, proper differentiation of significant and insignificant facts, and proper consideration of statutory, regulatory, and constitutional principles.\textsuperscript{120}

The conduct of an ALJ is evaluated primarily through the use of case-specific questionnaires directed to counsel and parties on a random basis. Attorneys, pro se litigants, other litigants, and state agencies receive separate questionnaires. The attorney questionnaires are quite technical and relate to substantive legal issues as well as to settlement skills. The party questionnaires are less technical and relate more to the judge's conduct of the hearing and ability to explain the process to the litigant. The agency's questionnaire is mainly concerned with the judge's written decision, but also includes topics such as the judge's compliance with timeframes.\textsuperscript{121}

In addition, the New Jersey system evaluates how the ALJ handles his or her caseload. Computer generated reports indicate the average

\textsuperscript{117} Telephone Interview with Randye E. Bloom, Assistant Director, Judicial Evaluation and Education, New Jersey Office of Administrative Law (July 1992) (confirming written materials on file at ACUS).

\textsuperscript{118} New Jersey ALJs initially are appointed by the Governor and confirmed by the Senate for a one-year term. After the first year, the Governor may reappoint (without Senate confirmation) for four additional years. Subsequent reappointments are for five-year terms and require Senate confirmation. The New Jersey Office of Administrative Law conducts evaluations every year for the first five-year term, in only the fourth and fifth years of the second term, and in the fifth year of the third term. When reappointment decisions are pending, the Director sends a confidential letter to the Governor about the incumbent based on the evaluations. \textit{Id.}

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.}
time per case, average time from the judge’s receipt of the file to the issuance of a decision, and other administrative timing matters. After all of the above data is gathered, each judge is afforded an opportunity to review the collected information. The New Jersey Office of Administrative Law formerly used four performance levels (marginal, acceptable, commendable and distinguished), but eliminated these ratings when it stopped using evaluations for salary review. Today, the Office simply provides the ALJ with the summary results of the evaluation.

In general, the evaluation criteria in the state central panels concentrate on three main areas: (1) the ability to preside over hearings, i.e., in conducting orderly, speedy hearings and applying appropriate procedures and principles of law; (2) adequacy of decisionmaking; and (3) interpersonal relations with staff, and caseload management. In most states, the chief ALJ or panel director does the evaluating (although Idaho, Oregon, and Washington have a unique arrangement of evaluating each other’s ALJs). In some states, the purpose of the evaluation (beyond meeting usual civil service requirements) is not explained, although several states explicitly use such evaluations for counseling, training, reassignment, advancement, and even salary adjustments.

Finally, federal AJs, unlike ALJs, are not exempt from performance appraisal, and several important groups of AJs, such as those at MSPB, the Department of Defense Directorate for Industrial Security Clearance Review (DISCR), the Trademark Trial and Appeal Board, and the Department of Health and Human Services Departmental Appeals Board, are subject to performance ratings.

**CONCLUSION**

Although the APA’s procedure for disciplining or removing ALJs for cause after a hearing before the MSPB has worked relatively well in misconduct or insubordination cases (except for the overreliance on the

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123. *Id.*
124. *Id.*
127. THE REPORT, *supra* note 12, at 1031. Among the actual appraisal forms on file at ACUS are those applicable to AJs at MSPB, Department of Defense Directorate for Industrial Security Clearance Review (DISCR), the Trademark Trial and Appeal Board, and the Department of Health and Human Services Departmental Appeals Board.
single ALJ at MSPB), the procedure has not provided a realistic forum for agency dissatisfaction with low-producing ALJs. In misconduct cases, insubordination cases, and judicial disability cases, agencies with a large corps of ALJs should establish peer review panels for handling complaints and for triggering MSPB actions. To assist agencies in holding ALJs accountable for unduly low productivity, the statutory and regulatory impediments to performance appraisals and ratings should either be eliminated or at least modified to clarify that chief ALJs are responsible for the overall management of ALJ performance. Such responsibilities should include developing (with the input of ALJs and advisory groups) appropriate case-processing guidelines; collecting, maintaining, and disseminating data on individual ALJ performance pursuant to those guidelines; conducting performance appraisals of ALJs at appropriate intervals; undertaking counseling, training, or other ameliorative activities; and, where good cause exists, bringing charges against individual ALJs before the MSPB. Chief ALJs, when assigned these specific managerial responsibilities, also should be granted additional independence from agency control by making their appointment and removal subject to OPM review. Establishment of such a system would bring the federal administrative judiciary into the mainstream of judicial administration as it is now practiced in many leading jurisdictions throughout the nation and would improve the development of administrative law.
Appendix

Recommendation of the Administrative Conference of The United States

THE FEDERAL ADMINISTRATIVE JUDICIARY
(RECOMMENDATION NO. 92-7)**

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

The Administrative Conference takes as its starting point in considering the role of the Federal administrative judiciary the role created for "hearing examiners," now redesignated as "administrative law judges," in the Administrative Procedure Act in 1946. That Act contemplated the existence of impartial factfinders, with substantive expertise in the sub-

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* This Appendix is an exact reproduction of the Recommendation as it appeared in the Code of Federal Regulations. For an explanation of the publication policy regarding these recommendations, see 1 C.F.R. § 304.2(a) (1992). Copies of the texts of Recommendations not published in part 305 may be obtained from the Office of the Chairman, Administrative Conference of the United States, 2120 L Street, NW., Suite 500, Washington, DC 20037; telephone: (202) 254-7020.


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

2. In 1969, the Conference addressed some of these issues in the context of hearing examiners. See Conference Recommendation 69-9, 1 C.F.R. § 305.69-9 (part A) (1988). Many of the recommendations set forth here pertaining to selection and training of ALJs are broadly consistent with the earlier recommendation, but to the extent that they differ, this recommendation is intended to supersede part A of Recommendation 69-9.
jects relevant to the adjudications over which they preside, who would be insulated from the investigatory and prosecutorial efforts of employing agencies through protections concerning hiring, salary, and tenure, as well as separation-of-functions requirements. The decisions of such impartial factfinders were made subject to broad review by agency heads to ensure that the accountable appointee at the top of each agency has control over the policymaking for which the agency has responsibility.

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

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

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

The Conference’s general view is that the movement away from the uniformity of qualifications, procedures, and protections of independence

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3. The study underlying this recommendation limited its consideration to adjudicators who preside over some kind of hearing. More informal adjudication processes are outside the scope of the study.
that derives from using ALJs in appropriate adjudications is unfortunate. The Conference believes that, to some extent, this movement away from ALJs toward AJs has been fueled by perceptions among agency management of difficulties in selecting and managing ALJs. These recommendations attempt to address these perceived problems. It should be noted that these recommendations are interdependent. For example, recommendations concerning the conversion of AJ positions to ALJ positions, and creation of new ALJ positions in new programs, are premised on the implementation of improvements in the selection and evaluation processes.

Use of ALJs and AJs

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

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

One critical factor is the nature of the interest being adjudicated. The separation of functions mandated by the APA, as well as the selection criteria designed to ensure the highest quality adjudicators, are of particular value in situations where the most important interests are at stake. Generally speaking, a hearing that is likely to involve a substantial
impact on personal liberties or freedom, for example, is one where use of an ALJ likely would be appropriate. Similarly, cases that could result in an order carrying with it a criminal-like finding of culpability, imposition of sanctions with a substantial economic effect (such as large monetary penalties or some license revocations), or a determination of discrimination under civil rights laws (unless there is an opportunity for a de novo hearing in court) represent categories of proceedings that may call for ALJ use. This characterization should be done for types of cases rather than for particular cases.

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

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

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

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

In situations where Congress does convert AJ positions to ALJ posi-

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4. Grant or contract disputes would not fall within this category, unless a monetary penalty was involved.
tions, those AJs who can satisfy OPM eligibility qualifications should be eligible for immediate appointment as ALJs. Thus, only those existing AJs meeting the standards for ALJ appointment would become ALJs, but they would not be required to go through the competitive selection process.

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

**ALJ Selection**

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

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

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

Despite this circumvention, the application of veterans' preference to the ALJ selection process has had a materially negative effect on the potential quality of the [Federal administrative judiciary primarily because it has effectively prevented agencies from being able to hire representative numbers of qualified women candidates as ALJs. There is also some evidence that application of the veterans' preference may have adversely affected the hiring of racial minorities. Thus, agencies are prevented from being able to select the best qualified ALJs for specific positions from a pool of representative applicants. The Conference recognizes that the general policy of veterans' preference in Federal hiring reflects a valid social concern, particularly as it helps those who leave military service enter the Federal civilian workforce. But, in view of the conflict between this policy and the valid need of Federal agencies to have an opportunity to select the best qualified ALJs from among representative applicants, the Conference recommends that Congress abolish veterans' preference in the particular and limited context of ALJ selection. In that connection, it should be noted that in 1978, Congress created a similar narrow exemption for members of the Senior Executive Service. Moreover, there is no veterans' preference in the selection for any other Federal judicial position.

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

In conjunction with this, however, the recommendation would also expand the choices that agencies would have in selecting from among those qualified applicants. Under this recommendation, after OPM rated the applicants, it would compile a register of all applicants deemed qualified following the final rating process. An agency could request a certificate with the names of all applicants whose numerical ratings placed them in the highest-ranked 50 percent of the register. Agencies

5. The Conference has recommended a similar modification to the veterans' preference in this context before. See Conference Recommendation 69-9, 1 C.F.R. § 305.69-9 ¶ A(4) (1988).
could also request a certificate containing a smaller number of names or applicants in a higher percentile. The agency would have the authority to hire anyone on the certificate.\textsuperscript{6}

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

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

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

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

\textsuperscript{6} In order to implement this recommendation, Congress would need at a minimum to modify the veterans' preference to eliminate the provision restricting the passing over of veterans, so that agencies would have the ability to hire any qualified applicant on the certificate.
method of assessing litigation experience for the purposes of scoring applicants for ALJ positions, the Conference recommends that OPM review its rating criteria to determine whether they are appropriate.

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

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

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

**ALJ Evaluation and Discipline**

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

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

The Conference, therefore, recommends that a system of review of ALJ performance be developed. Chief ALJs would be given the responsibility to coordinate development of case processing guidelines, with the participation of other agency ALJs, agency managers and others. These guidelines, which would address issues such as ALJ productivity and step-by-step time goals, would be one of the bases upon which Chief ALJs would conduct regular (e.g., annual) performance reviews. Judicial comportment and demeanor would be another basis for review. Another factor on the list of bases for performance review, which list is not intended to be exclusive, would be the existence of a clear disregard of, or pattern of nonadherence to, properly articulated and disseminated rules, procedures, precedents and other agency policy. Such performance review systems need not involve quantitative measures or specific performance levels, but they should provide meaningful and useful feedback on performance.

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

Under the Conference recommendation, the Chief ALJs' responsibilities would also include developing ALJ training and counseling pro-


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

9. Such authorities might include OPM for certain lesser sanctions, and the Office of Special Counsel or MSPB in more serious cases.
grams designed to enhance professional capabilities and to remedy individual performance deficiencies, and, in appropriate cases, issuing reprimands or recommending disciplinary action.\textsuperscript{10}

Recently, attention has been focused on allegations of prejudice against certain classes of litigants by some ALJs.\textsuperscript{11} While there is no known evidence that such a problem is widespread, the Conference's view is that it is important to have a mechanism for handling complaints or allegations relating to ALJ misconduct, including allegations of bias or prejudice. The Conference, therefore, recommends that Chief ALJs, either individually or through an ALJ peer review group, receive and investigate such complaints or allegations, and recommend appropriate corrective or disciplinary actions. To the extent practicable, such investigation and the processing of any corrective or disciplinary recommendation should be expedited to protect affected interests and create public confidence in the process. Where appropriate, consensual resolutions are encouraged. The Conference also recommends that agencies publicize the existence of their complaint procedures, in published rules and procedures or in some other appropriate fashion, and inform complainants in a timely manner of the disposition of their complaints.

The Conference is also recommending that OPM assign the various responsibilities relating to ALJs to a specific unit within that agency. Such a unit would, among other things, have responsibility for overseeing personnel, hiring and performance matters involving Chief ALJs, thus providing them additional insulation from agency pressures. Because of the increased importance of the position of Chief ALJ under this proposal, Congress also should consider making the position subject to a term appointment, as it has done for Chief Judges of United States District Courts.

The Conference also recommends that proceedings before the Merit Systems Protection Board involving charges against ALJs be heard by a three-judge panel. Judging administrative law judges is a sensitive process, and the benefit of collegial decisionmaking in this context seems worth the added cost. The panel should be selected from a pool of ALJs. Currently, MSPB has only one ALJ. So long as this is the case,

\textsuperscript{10} See 43 Op. Att'y Gen. 1 (1977) (discussing certain limitations on agency's authority to reprimand ALJs).

\textsuperscript{11} See e.g., U.S. GAO, SOCIAL SECURITY: RACIAL DIFFERENCE IN DISABILITY DECISIONS WARRANTS FURTHER INVESTIGATION GAO/HRD-92-56 (April 1992). Cf. NINTH CIRCUIT GENDER BIAS TASK FORCE, PRELIMINARY REPORT (Discussion Draft) (July 1992) at 93-103 (discussing gender bias issues relating to disability determinations).
the pool should consist of ALJs from other agencies, but the panel in a particular case should not involve ALJs from the same agency as the respondent ALJ.

Policy Articulation

As discussed, the APA model of agency decisionmaking is based on the use of independent ALJs to find facts and to apply agency policy to those facts. This system requires that ALJs be granted independence as factfinders, but it also must ensure that agency policymakers are able to establish policies in an efficient manner for application by ALJs in individual cases. The methods available to agencies include promulgation of rules of general applicability, the use of a system of precedential decision,\(^\text{12}\) or other appropriate practices, such as proper use of policy statements.\(^\text{13}\) Such policy statements must be properly disseminated.

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

The Concept of an ALJ Corps

There has been over the last decade considerable discussion of the concept of an ALJ corps. Although there have been differences among the specific proposals, the concept in general includes separating ALJs from individual agencies, and placing them in a new, separate agency. Recent legislative proposals provided, among other things, that new ALJs would be selected by a chief judge of the corps, and that ALJs would be divided into several general subject matter divisions (such as health and benefits; safety and environment; and communications, public utility and transportation regulation).\(^\text{14}\)

The Conference discussed these recent legislative proposals to establish a centralized ALJ corps as a means of handling some of the issues addressed in this recommendation. Some of these recommendations are independent of such proposals; others are inconsistent with them. The

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Conference concluded that there is no basis at this time for structural changes more extensive than those proposed here.

RECOMMENDATION

I. Congressionally Mandated Use of ALJs and AJs

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

1. The cases to be heard and decided are likely to involve:
   a. Substantial impact on personal liberties or freedom;
   b. Orders that carry with them a finding of criminal-like culpability;
   c. Imposition of sanctions with substantial economic effect; or
   d. Determination of discrimination under civil rights or other analogous laws.

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

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

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

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

C. Congress should provide that OPM should no longer be responsible for reviewing and ruling on agency requests for additional ALJ positions. Decisions relating to an agency's need for more or fewer ALJ positions should be made by the individual agencies through the normal resource allocation process.

II. ALJ Selection

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

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

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

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

B. OPM and the hiring agencies should give a high priority to expanding recruitment of women and minority applicants for ALJ positions. OPM also should review its ALJ application criteria to determine whether its current method of assessing litigation experience is appropri-
C. OPM immediately should implement Parts II (A)(1) and (B), which may involve revisions to the examination or scoring process. Pending implementation of the other recommendations in this Part, OPM should open the register application process as soon as possible, and keep it open continuously.

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

III. ALJ Evaluation and Discipline

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

A. Organization

1. OPM should assign a specific unit the responsibility for (a) overseeing those matters concerning the selection of ALJs, (b) overseeing all personnel, hiring and performance matters that involve Chief ALJs, (c) acting on allegations of improper interference with decisional independence of ALJs, (d) conducting regular performance reviews of Chief ALJs, and (e) periodically publishing reports on the effectiveness with which OPM's responsibilities are performed and seeking recommendations as to how the program may be improved.

2. Each agency that employs more than one ALJ should designate a Chief ALJ, who is given the responsibility within the agency to do the tasks assigned to the Chief ALJ under this Part III.18

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

4. OPM and the agencies should ensure that Chief ALJs are insulated from improper agency influence when carrying out the responsibilities described in this Part III.19

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

19. Congress also should consider making the position of Chief ALJ subject to a term appointment. This suggestion does not result from a finding by the Conference that any number of current Chief ALJs are not functioning effectively. The Conference notes, however, that Chief Judges of United States District Courts are subject to term appointments and believes it is appropriate to consider whether a similar limita-
B. Evaluation and Training

Chief ALJs should be given the authority to:

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

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

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

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

C. Complaints About ALJs

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

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

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

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

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

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

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

D. Complaints by ALJs

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

E. MSPB Panels

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

IV. POLICY ARTICULATION

To ensure that ALJs and affected persons are aware of their responsibilities, agencies should articulate their policies through rules of general applicability, a system of precedential decisions, or other appropriate practices.20 Congress, the President, and the courts should encourage such policy articulation.

V. THE CONCEPT OF AN ALJ CORPS

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