Summary of Administrative Law Judge Responsibilities

Daniel F. Solomon

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Summary of Administrative Law Judge Responsibilities

By Daniel F. Solomon*

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Administrative law judges hear trials brought by litigants under statutes authorizing a hearing "on the record." They are creatures of the Administrative Procedure Act, enacted in 1946 to bring due process and uniformity to administrative adjudication.¹ In most agencies the trials are exactly like bench trials heard by federal district court judges.²

In general, hearing procedures are established by 5 U.S.C. §§ 554-556, which require notice to the parties and an opportunity to be heard. Subject to published rules of the agency and within its powers, administrative law judges may:

1. Administer oaths and affirmations;
2. Issue subpoenas authorized by law;
3. Rule on offers of proof and receive relevant evidence;
4. Take depositions or have depositions taken when the ends of justice would be served;
5. Regulate the course of the hearing;
6. Hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution.

* Compiled by Daniel F. Solomon, Administrative Law Judge, Department of Labor, for the Federal Administrative Law Judge Conference. All materials are furnished by the correspondents in their individual, rather than in any official capacity.

¹ Federal administrative law judges are appointed under 5 U.S.C. § 3105 (2006). See A GUIDE TO FEDERAL AGENCY ADJUDICATION 164 (Michael Asimow, ed. 2003). For example, subject to published rules of the agency, administrative law judges are empowered to administer oaths, issue subpoenas, receive relevant evidence, take depositions, and regulate the course of the hearing. These fundamental powers arise from the Administrative Procedures Act "without the necessity of express agency delegation and an agency is without the power to withhold such powers" from its administrative law judges. Id. (internal quotation omitted). The Administrative Procedure Act seeks to affirm and protect the role of the administrative law judge, whose "impartiality," in the words of the Supreme Court in Marshall v. Jerrico, Inc., 446 U.S. 238, 250 (1980), "serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime."

7. Inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
8. Require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;
9. Dispose of procedural requests or similar matters;
10. Make or recommend decisions;
11. Take other action authorized by agency rule.\(^3\)

However, because the enabling statutes and procedures are not uniform, significant variations have occurred, and although some agency operations are similar, none are exactly the same. Below is a summary.

I. COMMODITIES FUTURES TRADING COMMISSION\(^4\)

Until recently, the Commodities Futures Trading Commission (CFTC) had two administrative law judges (ALJs) and one administrative judge (Judgment Officer)\(^5\) that hear "reparations" cases, private causes of action for money damages caused by violations of the Commodity Exchange Act and agency-implemented regulations.\(^6\) Most cases involve allegations of fraud on investors. Reparations are non-APA cases.\(^7\) ALJs hear the cases alleging damages of over $30,000 (using full discovery and hearing procedures) and the Judgment Officer hears cases under $30,000

\(^4\) Courtesy of Judge Bruce Levine.
\(^5\) Contact, U.S. COMMODITY FUTURES TRADING COMMISSION, http://www.cftc.gov/Contact/index.htm (last visited Oct. 15, 2011). Currently the only Administrative Law Judge is Bruce Levine; the other Administrative Law Judge position is vacant. \textit{Id.} The Judgment Officer is Philip McGuire. \textit{Id.}


(using lesser procedures, including a telephone hearing or informal non-trial type hearing).  

ALJs also hear traditional APA administrative enforcement cases brought by the CFTC’s Division of Enforcement, which seek civil monetary penalties and non-monetary sanctions for violations of the Commodity Exchange Act (analogous to cases heard at the Federal Trade Commission (FTC), among other agencies).  

Last, ALJs hear an array of APA registration cases.

The case load has decreased: the two ALJs currently have an aggregate of twenty-two cases, twenty of which are the non-APA reparations cases, and the Judgment Officer has seventeen of the simple and smaller reparations cases.

Appeals from decisions are reviewed de novo by the Commission (again, like the FTC), with further right of appeal to the U.S. Courts of Appeal.

II. DRUG ENFORCEMENT ADMINISTRATION

The government is represented by trial attorneys from the Drug Enforcement Administration (DEA) and Office of Chief

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10 See generally 17 C.F.R. §§ 3.1-3.75 (2011). For the rules pertaining to cases arising from a suspension and revocation of registration pursuant to section 8(a)(2) of the Commodity Exchange Act, see id. § 3.55. For the rules pertaining to cases arising under suspension or modification of registration pursuant to section 8a(11) of the Commodity Exchange Act, see id. § 3.56.

11 See Sarah N. Lynch, Judge Files Complaint Alleging Misconduct At The CFTC, AUTOMATED TRADER (Dec. 10, 2010), http://www.automatedtrader.net/real-time-dow-jones/35884/judge-files-complaint-alleging-misconduct-at-the-cftc. Judge Levine describes a “dwindling case load in the reparations office” that drops on average about one new complaint a week. Id.


Counsel,\textsuperscript{15} and the respondents overwhelmingly are represented by private counsel.\textsuperscript{16} The attorneys are required to file prehearing statements and supplements, and to engage in a significant level of prehearing procedures, including limited discovery, requests for subpoenas, etc.\textsuperscript{17} Briefs are required following the conclusion of the hearing in to address specific issues directed by the ALJ.\textsuperscript{18}

The ALJ issues a recommended decision subject to a final agency decision, which is issued by the DEA Deputy Administrator.\textsuperscript{19} Interlocutory appeals to the Deputy Administrator during the litigation are rare and must by authorized by leave of the presiding ALJ.\textsuperscript{20} Appeal from the final decision is taken to U.S. Circuit Court of Appeals where the litigation is conducted.\textsuperscript{21}

III. DEPARTMENT OF INTERIOR

At the Department of Interior (DOI), two divisions contain ALJs; the Probate Hearings Division and the Departmental Cases Hearings Division.

The Probate Hearings Division serves as the Department's administrative trial court for Indian probate cases.\textsuperscript{22} By way of


\textsuperscript{15} See Wendy H. Goggin, Chief Counsel, U.S. DRUG ENFORCEMENT ADMINISTRATION, http://www.justice.gov/dea/agency/goggin.html (last visited Oct. 15, 2011). The Office of Chief Counsel for the Drug Enforcement Administration is made up of over 100 attorneys and support staff.

\textsuperscript{16} 21 C.F.R. § 1316.50 (2011) ("Any person entitled to appear in a hearing may appear in person or by a representative in any proceeding or hearing . . .").


\textsuperscript{18} 21 C.F.R. § 1316.64 (2011) ("Any party in the hearing may file . . . proposed findings of fact and conclusions of law . . .").

\textsuperscript{19} 21 C.F.R. §§ 1316.65, 1316.67 (2011).

\textsuperscript{20} 21 C.F.R. § 1316.62 (2011).


\textsuperscript{22} For rules and regulations applicable in Indian Affairs hearings and appeals, see 43 CFR §§ 4.200-4.340 (2011); see also 25 U.S.C.A. §§ 2-9 (2006) (granting authority to the Probate Hearings Division).
formal hearings conducted by ALJs and Indian probate judges, and informal proceedings conducted by attorney decision makers, the Division determines the rightful heirs and beneficiaries of decedents who owned property held in trust by the United States on their behalf.\textsuperscript{23} The Division determines the validity of wills, decides what claims against the estate will be allowed, and orders distribution of the trust property to those entitled to receive it.\textsuperscript{24} The Division is headed by Chief ALJ Earl Waits, located in the Arlington Office of Hearings and Appeals (OHA).\textsuperscript{25} The Division's other judges and attorney decision makers are located in ten field offices throughout the West.\textsuperscript{26} Its decisions may be appealed to the Interior Board of Indian Appeals.\textsuperscript{27}

The Departmental Cases Hearings Division serves as the DOI's administrative trial court for cases involving lands and resources under the DOI's jurisdiction.\textsuperscript{28} Through formal hearings conducted by ALJs under the Administrative Procedure Act, the Division decides grazing appeals, surface coal mining cases,\textsuperscript{29} civil penalty assessments under various wildlife and resource protection laws, certain cases involving the Indian Self-Determination and Education Assistance Act (ISDA), disputed issues of material fact with respect to conditions and prescriptions in hydropower licenses, contests of mining claims, Alaska Native allotment applications, and other asserted interests in federal land.\textsuperscript{30} The Division also conducts hearings on other matters upon request from a bureau or office, an

\textsuperscript{23} For informal probate proceedings before an attorney decision maker, see 43 C.F.R. §§ 30.200-30.207 (2011); for formal probate proceedings before an administrative law judge or Indian probate judge, see 43 C.F.R. §§ 30.210-30.246 (2011).

\textsuperscript{24} 43 C.F.R. § 30.120 (2011).

\textsuperscript{25} About the Office of Hearings and Appeals, OFFICE OF HEARINGS AND APPEALS (Oct. 22, 2010), http://www.oha.doi.gov/about_phd.htm.

\textsuperscript{26} Id.

\textsuperscript{27} Id. For general rules applicable to proceedings on appeal before the Interior Board of Indian Appeals, see 43 C.F.R. §§ 4.310-4.318 (2011).

\textsuperscript{28} See About the Departmental Cases Hearings Division, OFFICE OF HEARINGS AND APPEALS (Apr. 29, 2009), http://www.oha.doi.gov/about_dchd.htm.


OHA appeals board, or the Director. Examples include adjudications pertaining to oil and gas leases, rights-of-way, and alleged trespasses on federal lands. The Division is headed by a supervisory ALJ and is located in OHA's Salt Lake City office. Most of its decisions may be appealed to the Interior Board of Land Appeals. Decisions in cases, which are referred to the Division by the Interior Board of Indian Appeals, are appealable to the Interior Board of Indian Appeals, except that ISDA decisions involving the Indian Health Service are appealable to the Departmental Appeals Board within the Department of Health and Human Services.

Division decisions that are not administratively appealable include those determining issues of material fact with respect to conditions or prescriptions that the Departments of Agriculture, Commerce, or Interior develop for inclusion in hydropower licenses under the Federal Power Act. Such determinations are final for the departments involved.

IV. DEPARTMENT OF LABOR

ALJs from the U.S. Department of Labor's Office of Administrative Law Judges preside over matters concerning black lung benefits and longshore workers' compensation (the largest in volume) and cases arising from over eighty labor-related statutes and regulations, including, for example, such diverse subjects as:

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31 About the Office of Hearings and Appeals, supra note 25.
32 Id. For procedural rules applicable to appeals concerning federal oil and gas royalties, see 43 C.F.R. §§ 4.901-4.909 (2011). For procedural rules applicable to appeals concerning nondiscrimination in activities conducted under permits, right-of-ways, public land orders, and other federal authorizations granted or issued under Title II of Public Law 93-153, see 43 C.F.R. §§ 27.10-27.12 (2011).
33 See About the Departmental Cases Hearings Division, supra note 29.
34 For Secretary of Interior hearings and appeals procedure, see 43 CFR § 4.1-4.1610 (2011).
35 For general rules applicable to proceedings on appeal before the Interior Board of Indian Appeals, see 43 C.F.R. §§ 4.310-4.318 (2011).
36 Id. § 45.60(d).
37 Id.
- Grants administration relating to training of the unskilled and economically disadvantaged
- Civil rights
- 21 distinct types of Whistleblower complaints involving such matters as corporate fraud, nuclear, environmental, pipeline safety, aviation and commercial trucking statutes. Recently, new causes of action were added by the FDA Food Safety Modernization Act; the 2010 Patient Protection and Affordable Care Act; and the Dodd-Frank Wall Street Reform and Consumer Protection Act has three applicable areas that necessitated new Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002
- Minimum wage disputes
- Enforcement actions involving the working conditions of migrant farm laborers
- Disputes involving child labor violations hearings on mine safety variances
- OSHA formal rulemaking proceedings
- Contract disputes
- Civil fraud in federal programs
- Employee polygraph tests
- Certain recordkeeping required by ERISA
- Standards of conduct in union elections.  

The Office of Administrative Law Judges is headquartered in Washington, D.C. Since cases are heard throughout the country, however, district offices are located in seven other metropolitan areas. There are currently thirty-nine administrative law judges.

The Office of Administrative Law Judges (OALJ) has innovated with projects such as implementation of a computerized

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41 Id.
case-tracking system in the early 1980s, establishment of uniform rules of practice and procedure and rules of evidence that mirror the Rules of Civil Procedure and Rules of Evidence for the United States District Courts, development of a series of Judges' Benchbooks to assist judges in research on important case areas, implementation of a settlement judge procedure for alternative dispute resolution, and the use of electronic media for the dissemination of the Department's adjudicative decisions.\textsuperscript{42}

Judges comprise the Board of Alien Labor Certification Appeals (BALCA) under the Immigration & Nationality Act (INA), which hears claims for permanent certification and most of the decisions are \textit{en banc}.\textsuperscript{43} Individual judges hear H-1B visa cases and other temporary INA visa cases.\textsuperscript{44} The Department of State issues the visas. Until recently, Department of Labor administrative law judges comprised the Department of Labor Board of Contract Appeals. Judges hear such public contracts matters under statutes like the Service Contract Act and the Davis Bacon Act.\textsuperscript{45}

Hearings may take from a matter of hours to days or weeks depending on the type of case.\textsuperscript{46} However, the drafting of decisions under the substantial evidence rule requires scrutiny of all evidence and consideration of all arguments. In some areas the law is arcane and writing is a time consuming task.\textsuperscript{47} Some of the decisions may be final and others are recommended, depending upon the precise statutory authority.\textsuperscript{48} Final ALJ decisions can be appealed to the

\textsuperscript{42} See Mission Statement, supra note 39.
\textsuperscript{48} 29 C.F.R. §§ 18.57-.58.
Benefits Review Board (BRB), which uses § 706 APA substantial evidence test review. \(^4^9\) In 2008, the BRB remanded a third of the Black Lung claims, and a much smaller percentage in the Longshore and Harborworkers’ Act programs, which includes extensions under the Defense Base Act and the War Hazards Act for further review. \(^5^0\) Recommended decisions can be appealed to the Administrative Review Board (ARB), \(^5^1\) which issues final agency decisions for the Secretary of Labor in cases arising under a wide range of worker protection laws, primarily involving environmental, transportation, and securities whistleblower protection; H-1B immigration provisions; child labor; employment discrimination; job training; seasonal and migrant workers; and federal construction and service contracts. \(^5^2\) Further appeals may be taken to the circuit courts. \(^5^3\) After a review of Department of Labor administrative law judge procedures and duties, the First Circuit Court of Appeals determined that Department of Labor ALJs are functionally equivalent to Federal District Judges. \(^5^4\)

V. DEPARTMENT OF TRANSPORTATION \(^5^5\)

The Department of Transportation Office of Hearings is an independent unit established within the Office of the Assistant Secretary for Administration for organizational and administrative purposes only. \(^5^6\) The Office of Hearings is responsible for the conduct, in accordance with the Administrative Procedure Act of


\(^{5^1}\) 29 C.F.R. § 2.8 (2011).

\(^{5^2}\) For agencies which fall under the authority of the Office of the Secretary of Labor see 29 C.F.R. § 1 App. A (2011).


\(^{5^4}\) See generally Rhode Island Dept. of Environmental Management v. United States, 304 F.3d 31, 39-51 (1st Cir. 2002) (discussing that in the context of sovereign immunity, the decisions of an ALJ are reviewed in the same context as the district court).

\(^{5^5}\) Courtesy of Chief Judge Ronnie A. Yoder.

\(^{5^6}\) 49 C.F.R. § 1.59(1) (2011).
formal hearing proceedings instituted under legislation vesting executive authority and responsibility in the Secretary of Transportation or as delegated to the operating administrations. The judges hold hearings for the Office of the Secretary (OST), primarily in aviation matters, and most of the Department’s component modal administrations that need formal Administrative Procedure Act hearings (including the Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA), Federal Railroad Administration (FRA), Maritime Administration (MARAD), National Highway Transportation Safety Administration (NHTSA), and the Pipeline and Hazardous Materials Safety Administration (PHMSA)). The statutes under which these proceedings may arise include the Federal Aviation Act, the Civil Rights Act, the Commercial Space Launch Act, the Hazardous Materials Transportation Act, the Surface Transportation Assistance Act, the Merchant Marine Act, the Motor Vehicle Information and Cost Savings Act, the Airport and Airway Development Act, and the Airport and Airway Safety and Capacity Expansion Act of 1987.

Judicial review is in the Circuit Court of Appeals for the District of Columbia or the U.S. Circuit Court of Appeals in which the person resides or has its principal place of business in FAA civil penalty cases, FMCSA civil penalty cases, cases involving

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transportation of hazardous materials,\textsuperscript{62} and most OST proceedings.\textsuperscript{63} However, in OST airport fee cases, judicial review is in the Circuit Court of Appeals for the District of Columbia or the U.S. Circuit Court of Appeals where the airport giving rise to the written complaint is located.\textsuperscript{64}

There are two ALJs and five full-time support staff, including two attorney advisors.\textsuperscript{65} Since 1990, each DOT administrative law judge has disposed of an annual average of eighty-four cases, including thirteen requiring an oral hearing.

VI. DEPARTMENT OF EDUCATION\textsuperscript{66}

Under 20 U.S.C. §1234(a), the Office of Administrative Law Judges, United States Department of Education has jurisdiction for programs concerning grants made to states that involve:

1. Hearings for the recovery of funds.
2. Withholding hearings.
3. Cease and desist hearings.
4. Other proceedings as designated by the Secretary.
5. Cases involving federal impact aid distributed to school systems due to a federal presence in their district.
6. Matters involving civil rights such as discrimination due to age, race, etc. and Title IX.\textsuperscript{67}

The majority of cases are for the recovery of funds from grants made to states. A request for the return of funds is based upon allegations that the funds were improperly accounted for or misspent.\textsuperscript{68} In civil rights cases, litigants have the option to choose

\textsuperscript{63} Id. § 46110(a).
\textsuperscript{64} Id. § 47129(c)(5).
\textsuperscript{66} Courtesy of Chief Judge Allen Lewis.
\textsuperscript{68} See 34 C.F.R. § 81.30 (2011) (for the basis of the recovery funds).
the federal district court or to request the Education Department to pursue the matter administratively.\(^6^9\) The civil rights area has been quiet for many years.

After the judge issues an initial decision in the recovery of funds or Federal Impact Aid Area, an appeal may be taken to the Secretary.\(^7^0\) Thereafter, further review may be had in the appropriate U.S. Courts of Appeal.\(^7^1\) An appeal of a civil rights case is made to the Civil Rights Reviewing Authority (a board within the department)\(^7^2\) and, thereafter, to the U.S. Court of Appeals.\(^7^3\)

**VII. ENVIRONMENTAL PROTECTION AGENCY**

The environmental statutes under which proceedings are brought before the Environmental Protection Agency (EPA)\(^7^4\) include:

- Clean Air Act (CAA)\(^7^5\)
- Clean Water Act (CWA)\(^7^6\)
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)\(^7^7\)
- Emergency Planning and Community Right-To-Know Act (EPCRA)\(^7^8\)
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)\(^7^9\)
- Marine Protection, Research and Sanctuaries Act (MPRSA)\(^8^0\)

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\(^7^0\) 34 C.F.R. §§ 81.42-81.43 (2011).
\(^7^1\) 34 C.F.R. § 21.56 (2011). If the applicant is dissatisfied with the award determination in the final decision, judicial review may be sought within 30 days. *Id.*
\(^7^2\) 34 C.F.R. § 33.39 (2011).
\(^7^4\) See generally 40 C.F.R. § 22.1 (2011).
\(^7^5\) 42 U.S.C. § 7601(a) (2006).
• Safe Drinking Water Act (SDWA)\textsuperscript{81}
• Solid Waste Disposal Act, as amended by the Resource
• Conservation and Recovery Act (RCRA)\textsuperscript{82}
• Toxic Substances Control Act (TSCA)\textsuperscript{83}
• Subchapter II of TSCA, known as the Asbestos Hazard
Emergency Response Act (AHERA)\textsuperscript{84}

Cases are governed by 40 C.F.R. § 22 – Consolidated Rules of
Practice Governing the Administrative Assessment of Civil Penalties
and the Revocation or Suspension of Permits. The EPA processes
and procedures mirror those of a federal district court, with cases
involving contested complex factual and novel legal issues, millions
of dollars, a lot of fact and expert testimony, discovery and pre-trial
proceedings, hearings with live testimony, etc.\textsuperscript{85}

The courtroom is located in Washington, D.C. but hearings are
held all over the country, generally where the respondent is located.\textsuperscript{86}
Hearings are held in secure federal or state courtroom facilities.\textsuperscript{87}
Hearings last about three to five days on average.\textsuperscript{88} Judges wear
black robes; evidence is taken under oath; the hearing is on the
record, with limited evidence to some extent; parties are generally
represented by counsel, as is the EPA; and the decision is issued in
writing months after hearing following submission of the transcript
and post hearing briefs.\textsuperscript{89}

Decisions after summary adjudication or hearing can be
appealed by either side to the Environmental Appeals Board, and

\textsuperscript{85} See 40 C.F.R. § 22.4(c) (2011).
\textsuperscript{86} See About EPA, U.S. ENVIRONMENTAL PROTECTION AGENCY (Nov. 14,
2011, 9:30 AM), http://www.epa.gov/aboutepa/index.html#offices (for more
information on locations).
\textsuperscript{87} U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA OFFICE OF
ADMINISTRATIVE LAW JUDGE PRACTICE MANUAL 1, 27 (2011), available at
\textsuperscript{88} Id.
\textsuperscript{89} Id.
from there, by the respondent generally, to the circuit court.\textsuperscript{90} There are three ALJs, who each hold three to six hearings per year on average in EPA cases, but EPA ALJs also hold hearings and handle cases for the Patent & Trademark Office, Internal Revenue Service, Equal Employment Opportunities Commission, and Bureau of Alcohol Tobacco and Firearms.\textsuperscript{91}

VIII. FEDERAL ENERGY REGULATORY COMMISSION

The Federal Energy Regulatory Commission's (FERC), principal areas of regulation are the following:\textsuperscript{92}

1. Interstate transmission and wholesale sales of electric power under the Federal Power Act (FPA).\textsuperscript{93} Congress recently has expanded FPA jurisdiction over interstate transmission of electric power to encompass not only access and rates, but also reliability.\textsuperscript{94}

2. Hydroelectric dams under the FPA.\textsuperscript{95}

3. Natural gas pipelines' interstate transmission and wholesale sales of natural gas under the Natural Gas Act; and rates charged by pipelines for the interstate transmission of oil under the Interstate Commerce Act.\textsuperscript{96}

The rules governing FERC procedures are contained in 18 C.F.R. § 385. They are similar to the Federal Rules of Civil Procedure, though not as comprehensive. Commission proceedings generally are initiated by two types of filings:

\textsuperscript{90} 40 C.F.R. § 22.4(a) (2011).
\textsuperscript{91} Id.
\textsuperscript{92} See What FERC Does, FEDERAL ENERGY REGULATORY COMMISSION (Dec. 3, 2010), http://www.ferc.gov/about/ferc-does.asp.
\textsuperscript{93} Id.
\textsuperscript{96} Id. § 7172(a)(1)(C).
1. Filings that entities must make as a prerequisite to taking certain action, such as a request for authority to expand a natural gas pipeline, or notice of a rate increase for transmission of electric power; and
2. Complaints seeking either alteration of the existing legal rules of allegedly unjust and unreasonable tariff provisions or redress for violations of those rules.\(^9\)

The Commission reviews these initial pleadings as well as the responsive protests, in the case of all filings other than complaints, and answers, in the case of complaints, and decides if the pleadings raise material issues of fact that require a hearing.\(^9\) If the Commission finds a hearing warranted, it will normally prescribe settlement judge procedures, where the Chief Judge assigns a settlement judge to mediate informal, confidential negotiations.\(^9\)

If the ensuing negotiations reach an impasse, the Chief Judge terminates the settlement procedures, designates the case Track I, II or III based on its complexity, and appoints a judge to preside over the hearing.\(^10\) The case's track designation dictates the deadlines for commencement of the hearing, filing of reply briefs and issuance of initial decisions.\(^10\) The Presiding Judge initiates the prehearing phase of the proceeding by scheduling a prehearing conference at which the "participants," all parties, plus Commission trial staff, work out a procedural schedule.\(^10\) Prior to the hearing, the participants conduct discovery; file written direct, answer and rebuttal testimony; and file a joint statement of the issues and pretrial

\(^{9}\) Id. § 385.217(b).
\(^{9}\) Id. § 385.603(e).
\(^{10}\) Id. § 385.603(g) & (h).
\(^{10}\) Id. § 1301.5(b)(1)-(3) (2011). A Track I request can be answered with available records or information and will usually be responded to within twenty days. Id. § 1301.5(b)(1). A Track II request needs records or information from other offices or requires other Governmental agencies to be consulted before a response can be issued. Id. § 1301.5(b)(2). A request in Track III requires a decision from another office or agency which requires a considerable amount of time and, thus, these cases take the longest to process. Id. § 1301.5(b)(3).
\(^{10}\) 18 C.F.R. § 385.1007(a) (2011).
Participants may seek summary disposition of some or all of the issues.\textsuperscript{103} Hearings range from a few days to several weeks, and principally consist of live cross-examination of the witnesses who have filed written testimony.\textsuperscript{105} Following the hearing, the participants file initial and reply briefs, usually simultaneously.\textsuperscript{106} The final step of the hearing phase is, of course, the issuance of the initial decision.\textsuperscript{107} Participants have thirty days to file briefs on exceptions that challenge the Commission’s initial decision.\textsuperscript{108} Participants supporting the initial decision may file opposition briefs.\textsuperscript{109} A participant may file a brief excepting to part of the initial decision, and then file a subsequent brief opposing exceptions to other parts of the initial decision.\textsuperscript{110}

The Commission reviews the briefs, and issues an order affirming or reversing the initial decision, or affirming some parts and reversing others.\textsuperscript{111} Parties aggrieved by the Commission’s decision may seek rehearing, and must do so to preserve further rights to appeal.\textsuperscript{112} Agency staff may not request rehearing of an order or respond to the parties' requests. Once aggrieved parties have exhausted the rehearing process, they may petition for review of an order in the appropriate federal court of appeals.\textsuperscript{113}

\textsuperscript{103} Id. § 1308.32(a).
\textsuperscript{104} Id. § 1308.32. An appeal or counterclaim may be dismissed if the matter has been settled, if the party no longer wants to pursue the matter, or if the party failed to prosecute the matter or comply with regulations. Id.
\textsuperscript{105} Id. § 401.84(a).
\textsuperscript{106} Id. § 385.706.
\textsuperscript{107} Id. § 385.708. Usually the presiding officer will prepare a written initial decision, but “the presiding officer may issue an order stating that an oral initial decision will be issued.” Id.
\textsuperscript{109} Id. § 385.711(a)(1)(ii).
\textsuperscript{110} Id. § 385.711(a)(1)(iii).
\textsuperscript{111} Id. § 385.712(c).
\textsuperscript{112} Id. § 385.713(a)(3)-(b) (2011).
FERC currently employs fifteen ALJs, including a Chief Judge and a Deputy Chief Judge. The number of hearings held varies from year to year. Roughly 80% of the cases settle, so a substantial amount of time is spent in acting as settlement judges.

IX. FEDERAL COMMUNICATIONS COMMISSION

At the Federal Communications Commission (FCC), formal on-the-record hearings may be “conducted by the Commission, by one or more commissioners, or by a law judge designated pursuant to section 11 of the Administrative Procedure Act.” “Presiding Officers” designated to preside at the Commission must be Administrative Procedure Act appointed ALJs.

Under the Communications Act § 309(e), a formal hearing is required if the Commission finds that an application presents a “substantial and material question of fact,” or that it is otherwise unable to conclude that granting the application would serve the public interest.

Types of Hearings:
- Application Renewal or Denial
- Revocation/Show Cause

115 Information courtesy of Chief Judge Richard Sippel.
118 47 U.S.C. § 309(e) (2006); see also Astrolines Comm’ns Co. v. F.C.C., 857 F.2d 1556, 1561 (D.C. Cir. 1988) (describing two-step test); Gencom, Inc. v. F.C.C., 832 F.2d 171, 181 (D.C. Cir. 1987) (concluding from affidavit petition that the ultimate fact in dispute has been established); Citizens for Jazz on WRVR, Inc. v. F.C.C., 775 F.2d 392, 395 (D.C. Cir. 1985) (hearing required when totality of evidence raises sufficient doubt on question of whether granting/renewing license would be in public interest).
120 47 C.F.R. §1.91 (2010). “If it appears that a station license or construction permit should be revoked and/or that a cease and desist order should be issued, the Commission will issue an order directing the person to show cause why an order . . . should not be issued.” Id.
- Forfeiture Proceedings\textsuperscript{121}
- Section 208 Damages\textsuperscript{122}
- “Loan Cases” from Other Agencies\textsuperscript{123}
- Judges Available for ADR if requested\textsuperscript{124}

Discovery and Hearing Procedures:
- General Hearing Provisions\textsuperscript{125}
- Discovery Procedures\textsuperscript{126}
- Presiding Judge Authority\textsuperscript{127}
- Adjudicatory Regulation\textsuperscript{128}
- Discovery Procedures and Adjudicatory Hearings\textsuperscript{129}

Character of Licensees:
- Policy Regarding Character Qualifications in Broadcast Licenses.\textsuperscript{130}

Cases may be appealed from the Commission to circuit courts.

\textbf{X. FEDERAL LABOR RELATIONS AUTHORITY}\textsuperscript{131}

Jurisdiction for ALJs at the Federal Labor Relations Authority (FLRA) is limited to reviewing unfair labor practice complaints issued by the General Counsel and review of applications for the

\textsuperscript{121} 47 C.F.R. § 1.80 (2010).
\textsuperscript{122} 47 C.F.R. § 1.722 (2010). In order to recover damages, the complainant must produce a clear request for damages. \textit{Id.}
\textsuperscript{125} 11 F.C.C. 2d 185 (1968).
\textsuperscript{126} 26 F.C.C. 2d 331 (1970).
\textsuperscript{127} 58 F.C.C. 2d 331 (1970).
\textsuperscript{128} 91 F.C.C. 2d 527 (1982).
\textsuperscript{130} Courtesy of Chief Judge Charles Center.
award of fees made pursuant to the Equal Access to Justice Act.\textsuperscript{132} Procedural rules are set forth at 5 C.F.R. § 2423.20 with the following features:

- Twenty days to file an answer to the ULP complaint\textsuperscript{133}
- Motions must be in writing\textsuperscript{134}
  - Prehearing motions filed ten days before hearing\textsuperscript{135}
- Disclosures must be filed fourteen days prior to hearing\textsuperscript{136} and include:
  - Witness names and synopsis of testimony
  - Documents to be offered as evidence
  - Theory of the case
- Sanctions permitted by regulation\textsuperscript{137}
  - Exclusion of evidence, witnesses, raising objections, certain relief, or a particular defense.
- Use of a settlement judge process is voluntary and offered in every case\textsuperscript{138}
- Post hearing briefs are required\textsuperscript{139}
- Bench decisions are authorized under limited situations\textsuperscript{140}

Hearings are typically no longer than two days, with the General Counsel and the charging party presenting one side of the case and the charged party presenting the other in an adversarial

\begin{itemize}
\item \textsuperscript{132}See generally, 5 C.F.R. §§ 2420-2430 (2011) (concerning Federal Labor Relations Authority and General Counsel of the Federal Labor Relations Authority).
\item \textsuperscript{133}Id. § 2423.20(b).
\item \textsuperscript{134}Id. § 2423.21. All motions must be in writing unless they are made during a prehearing conference or hearing. Id.
\item \textsuperscript{135}Id. § 2423.21(b)(1).
\item \textsuperscript{136}Id. § 2423.23.
\item \textsuperscript{137}Id. § 2423.24(e).
\item \textsuperscript{138}Id. § 2423.25(d). The administrative law judge may assign a judge or other official to conduct negotiations for settlement. Id.
\item \textsuperscript{139}Id. § 2423.33 ("posthearing briefs may be filed with the Administrative Law Judge within a time period set by the Judge, not to exceed 30 days from the close of the hearing").
\item \textsuperscript{140}Id. §§ 2423.34, 2423.31.
\end{itemize}
setting with direct and cross-examination. However, the rules of evidence are not strictly followed per the regulations. The General Counsel has the burden to prove the allegations in the complaint by a preponderance of the evidence, and the respondent has the burden to prove any applicable affirmative defenses. The rules of evidence are not strictly followed per the regulations.

The FLRA has three judges. All decisions issued by ALJs are recommended decisions to which exceptions may be filed by either side. Exceptions must be filed with the FLRA within twenty-five days of service of the decision. If no exceptions are filed, the ALJ’s decision becomes the final decision of the FLRA without precedential significance. If exceptions are filed, the FLRA issues a decision affirming or reversing in whole or in part the ALJ’s decision or it may remand the matter. Once the FLRA issues a final decision, it may be appealed to federal court.

XI. FEDERAL MARITIME COMMISSION

The Federal Maritime Commission primarily enforces the Shipping Act of 1984, as amended (Shipping Act). It also has

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141 Id. § 2423.30 ("A party shall have the right to appear at any hearing in person, by counsel, or by other representative; to examine and cross-examine witnesses; to introduce into the record documentary or other relevant evidence; and to submit rebuttal evidence").

142 Id. § 2423.31(b). Rules of evidence do not need to be strictly followed and the Administrative Law Judge "may exclude any evidence that is immaterial, irrelevant, unduly repetitious, or customarily privileged." Id.

143 Id. § 2423.32.

144 See supra note 125.


146 5 C.F.R. § 2423.34 (2011).

147 Id. § 2423.40.

148 Id.

149 Id. § 2423.41(a).

150 Id. § 2423.41(b).


152 Courtesy of Chief Judge Clay Guthridge.

enforcement responsibilities for the Foreign Shipping Practices Act of 1988,\textsuperscript{154} Section 19 of the Merchant Marine Act, 1920,\textsuperscript{155} and Financial Responsibility for Death or Injury to Passenger and for Non-performance of Voyage.\textsuperscript{156}

Office of the Administrative Law Judges (OALJ) "holds hearings and renders initial or recommended decisions in formal rulemaking and adjudicatory proceedings as provided in the Shipping Act of 1984, and other applicable laws and other matters assigned by the Commission, in accordance with the Administrative Procedure Act and the Commission’s Rules of Practice and Procedure."\textsuperscript{157} There are currently two judges in the OALJ.\textsuperscript{158}

The Shipping Act provides that a proceeding may be initiated by a private complainant against another private party: "A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within three years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation."\textsuperscript{159} The Commission may also initiate proceedings that are assigned to the OALJ: "The Federal Maritime Commission, on complaint or its own motion, may investigate any conduct or agreement that the Commission believes may be in violation of this part."\textsuperscript{160}

When the Commission initiates a proceeding, the Commission’s Bureau of Enforcement represents the Commission.\textsuperscript{161} Private parties, including corporations, "may appear in person or by an officer, partner, or regular employee of the party, or by or with counsel or other duly qualified representative."\textsuperscript{162} The Commission

\textsuperscript{154}Id. §§ 42301-42307.
\textsuperscript{155}Id. §§ 42101-42109.
\textsuperscript{156}Id. §§ 44101-44106.
\textsuperscript{157}46 C.F.R. § 501.5(e) (2010).
\textsuperscript{159}46 U.S.C. § 41301(a) (2006).
\textsuperscript{160}Id. § 41302(a). Any agreement that is violation of this part can be disapproved, canceled, or modified by the commission.
\textsuperscript{161}46 C.F.R. § 501.5(h) (2010).
\textsuperscript{162}Id. § 502.21(a).
may admit persons who are not attorneys into practice before the Commission.⁶³

In 1984, the Commission promulgated the current version of its Rules of Practice and Procedure that control litigation before the OALJ.⁶⁴ Although there have been a few amendments, the Rules remain substantially as they existed in 1984. The Rules provide that “in proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.”⁶⁵

Historically, the Commission has established a preference for deciding proceedings without conducting an oral hearing.⁶⁶ The Commission may review initial decisions issued by the OALJ based on exceptions to any conclusions, findings, or statements contained in such decision filed by one of the parties,⁶⁷ or the Commission may determine to review on its own initiative.⁶⁸ “A decision or order of dismissal by an administrative law judge shall only be considered final for purposes of judicial review if the party has first sought review by the Commission pursuant to [46 C.F.R. § 502.227].”⁶⁹ The courts of appeals other than the Federal Circuit has jurisdiction to review the Commission’s final order.⁷⁰

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⁶³ *Id.* § 502.27. A person who is not an attorney may be admitted to practice before the commission if he or she is a citizen of the United States, files proof to the satisfaction of the commission, and is competent to advise and assist in the presentation of matters before the commission. *Id.*


⁶⁶ *See Questions, FEDERAL MARITIME COMMISSION,* http://www.fmc.gov/questions/default.aspx#420 (last visited Sept. 22 2011). An oral hearing is a last resort when settlement efforts have not succeeded “or the ALJ cannot issue an early decision.” *Id.*


⁶⁸ *Id.* § 502.227(a)(3).

⁶⁹ *Id.* § 502.227(a)(4).

XII. FEDERAL MINE SAFETY HEALTH REVIEW COMMISSION

Under the Mine Act, the Department of Labor issues regulations covering health and safety in the nation’s mines.171 The Federal Mine Safety and Health Review Commission172 is an independent adjudicative agency that provides administrative trials and appellate review of legal disputes arising under the Federal Mine Safety and Health Act of 1977 (Mine Act).173 Federal mine inspectors employed by the Department’s Mine Safety and Health Administration (MSHA) enforce these regulations by issuing citations and orders to mine operators.174

Most Commission cases involve civil penalties assessed against mine operators and address whether the alleged safety and health violations occurred175, as well as the appropriateness of proposed penalties.176 Other types of cases include challenges to orders to close a mine, miners’ charges of safety-related discrimination177, and miners’ requests for compensation after a mine has been idled by a closure order178.

ALJs decide cases at the trial level.179 The five-member Review Commission provides appellate review.180 Commissioners are appointed by the President and confirmed by the Senate.181

177 See 29 C.F.R. § 2700.40 (2011) (covering complaints of discharge, discrimination or interference); see also The Mine Act § 105(c), 30 U.S.C. § 815(c) (2006) (Secretary of Labor represents the miner).
Review of an ALJ decision by the Review Commission is discretionary and requires the vote of two Commissioners. Most of the cases accepted for review are generated from petitions filed by parties adversely affected by an ALJ decision. However, the Review Commission can direct a case for review on its own motion. An ALJ’s decision that is not accepted for review becomes a final, non-precedential order of the Commission. Appeals from final Commission decisions are to the U.S. Courts of Appeals and may be filed in either the Circuit Court for the District of Columbia or in the circuit court for the jurisdiction where the mine is located.

XIII. FEDERAL TRADE COMMISSION

At The Federal Trade Commission (FTC), the Office of Administrative Law Judges performs the initial adjudicative fact-finding in commission administrative complaint proceedings, guided by the Federal Trade Commission Act, the Administrative Procedure Act, relevant case law interpreting these statutes, and the FTC’s Rules of Practice. The ALJ assigned to handle each complaint issued by the Commission holds pre-hearing conferences, resolves discovery disputes, evidentiary disputes, and procedural disputes; and conducts the full adversarial evidentiary hearing on the

184 See 29 C.F.R. § 2700.71 (2010).
187 Courtesy of Michael D. Chappell, Chief ALJ.
190 See generally 16 C.F.R. § 3.1 (2011).
191 16 C.F.R. § 0.14 (2011). “Administrative law judges are officials to whom the Commission, in accordance with law, delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law, to be exercised in conformity with Commission decisions and policy directives and with its Rules of Practice.” Id.
record. The ALJ issues an initial decision which sets out relevant and material findings of fact with record citations, explains the correct legal standard, applies the law to the facts, and, where appropriate, issues an order on remedy.

Jurisdiction: Cases are complaints issued by the FTC under the FTC Act. Most cases are anti-trust, involving mergers and acquisitions, but some cases are consumer protection issues (deceptive product or health-related claims or advertisements).

Parties: Corporations, companies, and, sometimes, individuals who control the companies.

Appellate process: An initial decision is rendered, usually establishing a one year deadline from the date the complaint is issued. Once issued, the initial decision becomes the decision of the Commission thirty days after service on the parties, unless notice of appeal is filed. The decision of the Commission may be appealed to a U.S. Courts of Appeals, like a district court decision.

Cases: Administrative trials last from about five days (consumer protection type case) to over four months (consummated merger case with government seeking total divestiture).

XIV. THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF MEDICARE HEARINGS AND APPEALS

The Department of Health and Human Services Office of Medicare Hearings and Appeals (OMHA) ALJs handle Medicare

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197 Id.

198 16 C.F.R. § 3.51(a) (2011).


Currently there are approximately seventy ALJs at OMHA in four field offices. The field offices are located in Arlington, Virginia (Mid-Atlantic Field Office); Miami, Florida (Southern Field Office); Cleveland, Ohio (Midwestern Field Office), and Irvine, California (Western Field Office).\footnote{See Office of Medicare Hearings and Appeals, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, http://www.hhs.gov/omha/contacts/offices.html (last visited Sept. 22, 2011).}

In fiscal year 2010, OMHA ALJs handled approximately 45,000 appeals involving approximately 194,068 claims. OMHA ALJs handle appeals of Medicare Parts A, B, C, D, IRMAA and Entitlement cases. Typically, hearings before OMHA ALJs are non-adversarial.\footnote{See generally, 42 C.F.R. § 405.1000 (2010).} However, for Medicare Part C cases, the Medicare Advantage Plan is a party to the appeal.\footnote{See Office of Medicare Hearings and Appeals, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, http://www.hhs.gov/omha/about/index.html (last visited Sept. 22, 2011).} These appeals may be adversarial. The majority of the hearings are by telephone; however, appellants have the option of video-teleconference or in-person hearings. In addition, parties may waive their right to a hearing or the ALJ may decide a case on-the-record if the evidence supports a fully favorable decision. The average hearing takes approximately one hour.

After the ALJ renders a decision, the parties have the right to appeal the decision to the Medicare Appeals Council at the Departmental Appeals Board of the Department of Health and
Human Services and then to a United States district court.\textsuperscript{205} Finally, the Medicare Appeals Council may decide on its own motion to review a decision or dismissal by an OMHA ALJ.

**XV. HOUSING AND URBAN DEVELOPMENT OFFICE\textsuperscript{206}**

Housing and Urban Development (HUD) Office of Administrative Law Judges: On January 6, 2007, in a reorganization following transfer of the HUD Board of Contract Appeals functions to the consolidated federal Civilian Board of Contract Appeals, the HUD Office of Administrative Law Judges (OALJ) and the Office of Appeals (OA) were placed in the newly-established HUD Office of Hearings and Appeals (OHA).\textsuperscript{207} The Director of the OHA – the former Chief of the HUD Board of Contract Appeals – is not an ALJ, but functions as the administrative supervisor of the OALJ.\textsuperscript{208}

Personnel: By February 2008, all four ALJs in the OALJ ceased their HUD employment.\textsuperscript{209} In the absence of HUD administrative law judges, the cases were heard by ALJs from the Environmental Protection Agency (EPA) until the EPA decided to terminate the relationship.\textsuperscript{210} The HUD currently has four ALJs, two law clerks, and two docket clerks.\textsuperscript{211}

Budget: In the past, the OALJ had no budget and no functioning law library. The OALJ relied upon the OHA to seek funding for operations, including travel for hearings, supplies, and online legal research, which has suffered interruption due to contract


\textsuperscript{206} Courtesy of Judge Jeremiah Mahoney.


\textsuperscript{208} Id.

\textsuperscript{209} Mahoney, supra note 206.

\textsuperscript{210} Id.

However, the HUD presented a proposed budget for the 2010 fiscal year that focused on exercising "strong fiscal discipline, consolidating or eliminating [twenty-seven] programs and activities, and investing in initiatives to increase transparency and accountability."  

Functions: The incumbent ALJs\textsuperscript{214} are responsible for conducting hearings under the Administrative Procedures Act for statutory programs administered by the HUD throughout the U.S. and its territories.\textsuperscript{215} The ALJs conduct hearings pursuant to more than a dozen different statutes and regulations, including the following: the Fair Housing Amendments Act of 1988 (amending Title VIII of the Civil rights Act of 1968); the Program Fraud Civil Remedies Act of 1986; imposition of civil money penalties for violation of HUD-administered programs; imposition of penalties and assessment for false claims or statements;\textsuperscript{216} appeals from secretarial debt determinations under the Federal Tort Claims Act; the imposition of sanctions under the Native American Housing Assistance and Self-Determination Act of 1996; section 5 of the Debt Collection Act of 1982; the National Manufactured Housing Construction and Safety Standards Act of 1974; the Interstate Land Sales Full Disclosure Act; section 3 of the Housing and Urban Development Act of 1968 (jobs in housing); Title VI of the Civil Rights Act of 1964; appeals from sanctions imposed by the HUD Mortgagee Review Board; debarment and suspension of participants in HUD programs; the Civil Service Reform Act of 1978; and determination of fees and costs for prevailing parties under 5 U.S.C. § 504.\textsuperscript{217, 218} By contract, HUD

\textsuperscript{212} Mahoney, supra 206.


\textsuperscript{215} See generally id. § 26.28-26.56.


\textsuperscript{217} See 24 C.F.R. § 180.100 (governing Fair Housing cases); id. § 26.1 (governing suspension, debarment and limited denial of participation (LDP) hearings); id. § 25.1 (governing Mortgagee Review Board hearings with hearing procedures set forth in id. §§ 26.1-26.26); id. § 30.1 (governing civil money penalty hearings with procedures set forth in id. §§ 26.27-26.54); id. § 28.1 (governing Program Fraud Civil Remedies hearings with hearing procedures set forth in id. §§ 26.27-26.54).
ALJs conduct hearings for the Drug Enforcement Administration and other federal agencies upon request.\textsuperscript{219}

Hearing Alternatives and Hearing Locations: Whether or not explicitly provided by the statute involved in a matter pending hearing, the OALJ encourages the use of alternative dispute resolution (ADR) procedures, including the appointment of a settlement judge when requested by the parties.\textsuperscript{220} Hearings are conducted at the most suitable location for the respondents and witnesses unless otherwise required by statute or regulation.\textsuperscript{221}

\textbf{XVI. INTERNATIONAL TRADE COMMISSION}\textsuperscript{222}

Under Section 337 of the Tariff Act of 1930, the International Trade Commission (Commission) conducts investigations into allegations of certain unfair practices in import trade.\textsuperscript{223} Section 337 declares the infringement of certain statutory intellectual property rights and other forms of unfair competition in import trade to be unlawful practices.\textsuperscript{224} Most Section 337 investigations involve allegations of patent or registered trademark infringement.\textsuperscript{225} Other forms of unfair competition, such as misappropriation of trade secrets, trade dress infringement, passing off, false advertising, and violations of the antitrust laws, may also be asserted.\textsuperscript{226}

Section 337 investigations are initiated by the Commission following the receipt of a properly filed complaint that complies with

\textsuperscript{218} The ALJs of the HUD Office of Appeals conduct mandated reviews of administrative wage garnishment cases, \textit{id.} \textsection 17.170, 31 C.F.R. \textsection 285.11(f)-(g) (2010), and cases involving administrative offset of various federal payments due to indebted public and private parties, 24 C.F.R. \textsection 17.150-17.161.\textsuperscript{219} Mahoney, \textit{supra} note 206.

\textsuperscript{220} \textit{Court of Appeals}, U.S. \textsc{department of housing and urban development}, http://www.hud.gov/offices/oha/bca/index.cfm (last visited Sept. 22, 2011).\textsuperscript{221} Mahoney, \textit{supra} note 206.

\textsuperscript{222} Courtesy of Judge Theodore Essex.\textsuperscript{223} 19 U.S.C. \textsection 1337 (2006).

\textsuperscript{224} \textit{id.} \textsection 1337(a).

\textsuperscript{225} \textit{id.} \textsection 1337(b).

\textsuperscript{226} Essex, \textit{supra} note 222.
the Commission's rules. A Commission notice announcing the institution of an investigation is published in the Federal Register whenever the Commission votes to institute a Section 337 investigation. When an investigation is instituted, the Chief ALJ at the Commission assigns an ALJ to preside over the proceedings and to render an initial decision (referred to as an “initial determination”) as to whether Section 337 has been violated. At the present time, there are six ALJs at the ITC. The Commission also assigns an investigative attorney from the Commission's Office of Unfair Import Investigations (OUII), who functions as an independent litigant representing the public interest in the investigation. The investigative attorney is a full party to the investigation. In the notice announcing initiation of an investigation, the Commission identifies the entities that may participate in the investigation as parties, namely, the complainant or complainants that allege a violation of Section 337, the respondent or respondents that are alleged to have violated Section 337, and the OUII staff attorney, who is formally known as the Commission Investigative Attorney.

Section 337 specifically declares the infringement of the following statutory rights to be unlawful import practices: a U.S. patent or a U.S. copyright registered under Title 17, a registered trademark, a mask work registered under chapter 9 of Title 17, or a boat hull design protected under chapter 13 of Title 17. In cases involving infringement of these intellectual property rights, there is no injury requirement. In addition to unfair practices based upon infringement of certain specified statutory intellectual property rights, Section 337 also declares unlawful unfair methods of competition.

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228 Id. §§ 210.10(b), 210.43-210.45.
229 Id. § 210.42.
232 Essex, supra note 222.
and unfair acts in the importation and sale of products in the United States, the threat or effect of which is to destroy or substantially injure a domestic industry, prevent the establishment of such an industry, or restrain or monopolize trade and commerce in the United States. Thus, in these types of investigations, threatened or actual injury must be shown.

Section 337 investigations are conducted in accordance with procedural rules that are similar in many respects to the Federal Rules of Civil Procedure. The Commission’s procedural rules are typically supplemented by a set of ground rules issued by the presiding ALJ. The procedural rules and the ALJ’s ground rules provide important instructions and details regarding matters such as the taking of discovery and the handling of motions. A formal evidentiary hearing on the merits of a Section 337 case is conducted by the presiding ALJ in conformity with the adjudicative provisions of the Administrative Procedure Act. Hence, parties have the right to adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and other rights essential to a fair hearing.

Following a hearing on the merits of the case, the presiding ALJ issues an initial determination, certified to the Commission, along with the evidentiary record. In 2005, the President delegated the authority to veto Commission exclusion orders to the U.S. Trade Representative.

Summary information about past and present Section 337 investigations can be found by accessing the Section 337

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236 Essex, supra note 222.
239 See id. § 210.35 (pre-hearing, conference procedural guidelines).
240 See id. § 210.36(d); see also 5 U.S.C. §§ 554-56.
242 Essex, supra note 222.
investigational history through record. The Commission may review and adopt, modify, or reverse the initial determination, or it may decide not to review the initial determination. If the Commission declines to review an initial determination, the initial determination becomes the final determination of the Commission.

In the event that the Commission determines that Section 337 has been violated, the Commission may issue an exclusion order barring the products at issue from entry into the United States, as well as a "cease and desist" order directing the violating parties to cease certain actions. The Commission's exclusion orders are enforced by U.S. Customs and Border Protection. Commission orders become effective within sixty days of issuance unless disapproved by the President for policy reasons. Appeals of commission orders entered in Section 337 investigations are heard by the U.S. Court of Appeals for the Federal Circuit.

XVII. NATIONAL LABOR RELATIONS BOARD

Congress established the National Labor Relations Board (NLRB) in 1935 to administer the National Labor Relations Act (NLRA). The NLRB has two primary functions:

- To prevent and remedy unfair labor practices, whether committed by labor organizations or employers, and;
- To establish whether or not certain groups of employees desire labor organization representation for collective-bargaining purposes, and if so, which union.

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246 Id. § 210.43(d)(1).
249 Id. § 210.49(d).
251 Courtesy of Judge Michael A. Rosas.
Procedure: When an unfair labor practice (ULP) charge is filed, the appropriate field office conducts an investigation to determine whether there is reasonable cause to believe the Act has been violated.\textsuperscript{254} If the Regional Director determines that the charge lacks merit, it will be dismissed unless the charging party decides to withdraw the charge.\textsuperscript{255} A dismissal may be appealed to the General Counsel's office in Washington, D.C.\textsuperscript{256}

If the Regional Director finds reasonable cause to believe a violation of the law has been committed, the region seeks a voluntary settlement to remedy the alleged violations.\textsuperscript{257} If these settlement efforts fail, a formal complaint is issued and the case goes to hearing before an NLRB ALJ.\textsuperscript{258} The ALJ issues a written decision that may be appealed to the five-member board in Washington for a final agency determination.\textsuperscript{259} The Board's decision\textsuperscript{260} is subject to review in a U.S. Court of Appeals.\textsuperscript{261} Of the 23,523 ULP charges filed in 2010, 7,696 were settled and 1,243 complaints were issued.\textsuperscript{262}

Rules and Regulations:\textsuperscript{263} The Rules and Regulations and Statements of Procedure are in force and effective as amended from

\begin{equation}
\textsuperscript{253} \text{See What We Do, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/what-we-do (last visited Sept. 22, 2011). The NLRB helps private-sector employees organize bargaining units in their workplace, investigates charges alleging unfair labor practices, encourages settlements between parties, decides cases, and enforces orders. Id.}
\end{equation}

\begin{equation}
\textsuperscript{254} 29 C.F.R. § 101.4 (2010).
\end{equation}

\begin{equation}
\textsuperscript{255} Id. §§ 101.5-101.6.
\end{equation}

\begin{equation}
\textsuperscript{256} Id. § 101.6. The complainant has a right to appeal to the General Counsel in Washington, D.C. within fourteen days. Id.
\end{equation}

\begin{equation}
\textsuperscript{257} Id. § 101.7.
\end{equation}

\begin{equation}
\textsuperscript{258} Id. § 101.8.
\end{equation}

\begin{equation}
\textsuperscript{259} 29 C.F.R. § 101.11 (2010).
\end{equation}

\begin{equation}
\textsuperscript{260} Id. § 101.12. If any party files exceptions to the ALJ's decision, the Board reviews the entire record. Id. If no exceptions are filed, the "judge's decision and recommended order automatically become the decision and order of the Board." Id.
\end{equation}

\begin{equation}
\textsuperscript{261} Id. § 101.14.
\end{equation}

\begin{equation}
\textsuperscript{262} \text{See Graphs & Data, NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/chartsdata/chargeComp#chart1tag (last visited Sept. 22, 2011).}
\end{equation}

\begin{equation}
\textsuperscript{263} \text{See 29 C.F.R. § 101.10 (2010).}
\end{equation}
time to time.264 There is no pretrial discovery in NLRB cases, although the parties have subpoena power under the NLRA.265

The NLRB currently has forty judges who each produce six to twelve written decisions per year, as the overwhelming number of cases settle before or at hearing.266

XVIII. NATIONAL TRANSPORTATION SAFETY BOARD

Under 49 U.S.C. § 1133, the National Transportation Safety Board's (NTSB) administrative law judges conduct formal hearings and issue initial decisions on appeals from all FAA certificate actions and civil penalty actions involving pilots, engineers, mechanics, and repairmen.267 Also covered are petitions for certification that have been denied by the FAA.268

XIX. OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER269

The Office of the Chief Administrative Hearing Officer (OCAHO), established by the Immigration Reform and Control Act of 1986,270 is a component of the Executive Office for Immigration Review (EOIR) within the Department of Justice (DOJ).271 OCAHO currently has one ALJ,272 who adjudicates several types of cases under the Immigration and Nationality Act (INA):273

264 Essex, supra note 222.
265 29 C.F.R. § 101.10(a) (2010).
268 Id. §§ 821.24-821.26.
269 Courtesy of Judge Ellen Thomas.
271 Thomas, supra note 269.
272 Presently, Ana M. Kocur is the acting ALJ for the OCAHO. For biographical information, see Office of the Chief Administrative Hearing Officer, UNITED STATES DEPARTMENT OF JUSTICE (last updated Mar. 2011), http://www.justice.gov/eoir/fs/ocahobio.htm.
1. Employer sanctions.\textsuperscript{274}

This provision establishes civil penalties for employers who fail to prepare and maintain the required paperwork regarding employees' legal authorization to work in the United States, and/or knowingly hire, recruit, or refer for a fee aliens who are not legally authorized to work in the United States.\textsuperscript{275} Employer sanctions cases are brought by the Department of Homeland Security, Immigration and Customs Enforcement (ICE) when the agency issues a Notice of Intent to Fine to the employer, and the employer requests a hearing.\textsuperscript{276} If liability is found, the ALJ can impose monetary sanctions, issue a cease and desist order, and award attorney's fees.\textsuperscript{277}

2. Unfair immigration-related employment practices.\textsuperscript{278}

This provision creates a cause of action against employers or recruiters who discriminate against work-authorized job applicants or employees based on their citizenship status or national origin (in some cases), or who retaliate against employees who engage in activities protected by Section 1324b.\textsuperscript{279} These cases are usually initiated when an individual files a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), within the Civil Rights Division.\textsuperscript{280} The OSC investigates the charge, and then determines whether or not to file a complaint with OCAHO on behalf of the charging party.\textsuperscript{281} If the OSC does not file a complaint, the charging

\textsuperscript{275} For regulations implementing this provision, see 8 C.F.R. § 274a.1 (2010).
\textsuperscript{276} Id. § 274a.9.
\textsuperscript{277} 28 C.F.R. §§ 68.52, 68.54 (2010).
\textsuperscript{279} For rules governing unfair immigration-related employment practices cases, see 28 C.F.R. § 44.100 (2010).
\textsuperscript{280} Id. § 44.300. An individual may file a charge if he or she has been adversely affected by unfair immigration-related employment practices. Id. "Any officer of the Immigration and Naturalization Service who believes that an unfair immigration-related employment practice has occurred." Id.
\textsuperscript{281} Id. §§ 44.302-44.303.
party may file an individual complaint with OCAHO. If liability is found, the ALJ can award back pay, order hiring or reinstatement, and civil penalties where OSC is the complainant.

3. Document fraud: This provision establishes civil penalties for document fraud that relates to satisfying an immigration law requirement or obtaining and immigration-related benefits. Document fraud cases are brought and adjudicated much like employer sanctions cases.

The Rules of Practice and Procedure governing OCAHO proceedings are generally very similar to the Federal Rules of Civil Procedure, with full discovery, motions practice, and summary adjudication. As in federal court, most OCAHO cases are resolved by settlement or summary decision. However, if a formal hearing is required, it is held at the location of the alleged harm. For employer sanctions and document fraud cases, the Chief Administrative Hearing Officer and the Attorney General may administratively review the case at the request of a party before the agency decision becomes final. Discrimination cases become final upon issuance by the ALJs. Once the agency decision becomes final, cases may be appealed to the U.S. Courts of Appeals.

XX. OFFICE OF FINANCIAL INSTITUTION ADJUDICATION

An inter-agency office created by statute in 1991, the Office of Financial Institution Adjudication (OFIA) is responsible for overseeing the administration of all banking administrative

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282 Id. § 44.304.
283 Id. § 68.52.
284 For rules governing document fraud cases, see 28 C.F.R. § 44.100 (2010); see also id. § 270.1.
286 For formal hearing procedures, see id. § 68.39.
287 Id. § 68.53.
288 Id. § 68.52.
289 Id. §§ 68.56-68.57 (2010).
290 Courtesy of Chief Judge Richard Miserendino.
enforcement actions brought by the five federal banking agencies, to wit: the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration.

Cases filed with OFIA are typically complex in nature, concerning a wide variety of banking law and regulatory violations by a financial institution (e.g., operating with inadequate capital and/or an excessive level of interest rate risk); by a Board of Directors or Executive Officer (e.g., breach of fiduciary duty resulting in personal gain or financial loss to the bank or personal dishonesty); or by bank management or employees (e.g., engaging in check-kiting or fraudulent wire transfers or processing loans under false pretenses). Penalties include a cease and desist order, an order of removal and prohibition from future employment with or future participation in the affairs of a federally-insured financial institution, restitution, and the assessment of a civil money penalty.

All banking administrative enforcement hearings are conducted by a U.S. ALJ, who issues a recommended decision to the governing body or head of the appropriate federal banking agency, e.g., the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, and the Board of Directors of the Federal Deposit Insurance Corporation and National Credit Union Administration. Exceptions to the recommended decision may be filed with the appropriate agency head or governing body. The agency decision is subject to review by, and appeal to, the U.S. Courts of Appeals.

XXI. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

292 Id. § 263.
293 Id. §§ 303.0-303.251.
294 Id. §§ 509, 512.
295 Id. § 747.
297 Id. § 747.1.
298 Id. supra note 290.
299 Id.
The Occupational Safety and Health Review Commission (OSHRC) renders decisions from inspections conducted by the Occupational Safety and Health Administration (OSHA), which is a part of the Department of Labor. OSHRC and OSHA "were created by the Occupational Safety and Health Act of 1970, but the Act mandated that the Review Commission be an independent agency (i.e., not part of another federal department) to ensure that parties to agency cases receive impartial hearings."300

The OSHRC's Office of the Executive Secretary functions much like a court clerk's office. The office "assigns docket numbers to each contest, or new case, at its National Office in Washington, D.C. All affected parties are then notified by mail of the docketing of the case." 301 Thereafter, the Chief ALJ "assigns the case to a judge in Washington, D.C., or one of the agency's regional offices in Atlanta and Denver." 302

OSHRC's Rules of Procedure provide for two levels of adjudication. 303 The first level is a hearing before an ALJ. 304 The second level is review of the ALJ's decisions by the agency's Commissioners in Washington if one of the parties petitions for review. 305 Rules of Procedure may be found in Part 2200 of Title 29 of the Code of Federal Regulations. These rules govern two types of proceedings. 306 The more formal conventional proceedings involve the use of pleadings, 307 discovery, 308 a hearing, 309 and post-hearing briefing or argument. 310 The less formal method, called "Simplified Proceedings," employs fewer legal procedures, is permitted in certain

301 Id.; 29 C.F.R. § 2200.7 (2011).
303 See generally 29 C.F.R. § 2200.90 (2011).
304 Id. § 2200.91.
305 Id. § 2200.92.
306 See generally id. § 2200.1.
307 Id. §§ 2200.30-.41.
308 29 C.F.R §§ 2200.50-.57 (2011).
309 Id. §§ 2200.60-.74.
310 Id. §§ 2200.90-.96.
less complex cases, and can be requested by either party. In Simplified Proceedings, there are no formal pleadings, and early discussion among the parties to narrow the disputed issues is required.

A hearing date is set and a hearing site is selected as close as possible to where the alleged violation(s) occurred. On the hearing date, the ALJ from the OSHRC conducts the adversarial proceedings in accordance with the Commission's rules of procedure. A cited employer or an affected employee may appear with or without legal counsel. The Secretary of Labor, OSHA's representative, is represented by a government attorney and bears the burden of proving the violation(s).

Upon hearing all of the evidence, the judge will issue a written decision based on findings of fact and conclusions of law. As part of the judge's decision, the citations will be affirmed, modified, or vacated. The decision becomes final in thirty days unless within that period one of the parties requests that the decision of the ALJ be directed for review by the three OSHRC commissioners in Washington, D.C. If one of the three commissioners directs that the case be reviewed, the commissioners review all of the evidence, briefs, arguments and the ALJ’s decisions. Thereafter, they render a decision to affirm, modify, or vacate citations and penalties that have been proposed by OSHA. If review of the ALJ’s decisions by the commissioners is not directed, the petitioning party may

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311 Id. §§ 2200.200-.211.
312 Id.
313 29 C.F.R. § 2200.60 (2011). This ensures that the parties have as little inconvenience and expense as possible. Id.
314 Id. § 2200.60-.74.
315 Id. § 2200.22. “Any party or intervenor may appear in person, through an attorney, or through another representative who is not an attorney.” Id.
316 Id. § 2204.104.
317 Id. § 2200.90. The Judge shall also state the reasons or basis for his or her findings based “on all the material issues of fact, law, or discretion presented on the record.” Id.
318 29 C.F.R. § 2200.90 (a) (2011).
request review by an appropriate U.S. Court of Appeals. Any person who is adversely affected or aggrieved may also appeal the decision of the three OSHRC commissioners to an appropriate U.S. Court of Appeals. Review by a court of appeals must be sought within sixty days after the Commission's final decision is issued.

XXII. SMALL BUSINESS ADMINISTRATION

The primary jurisdictional area for the ALJ at the Small Business Administration ("SBA") is found at section 8(a) of the Small Business Act. The section provides for an "on the record" hearing in cases involving the small and disadvantaged business development program, which affords program participants an opportunity to favorably compete for government contracts. These cases involve disputes involving eligibility, termination, and suspension from the program. Unlike most APA proceedings, the Act provides for the review of agency determinations under an "arbitrary and capricious" standard, and the ALJ decision is the final agency decision that is binding on the agency. Other jurisdictional areas include: salary offset proceedings; hearings involving grants to small and women business centers; EAJA; and occasionally cases in other jurisdictional areas authorized by law, regulation, or agreement.

322 29 U.S.C. § 660 (2006). A person may obtain a review in any United States court of appeals for the circuit where the violation allegedly occurred, where the employer has its principal place of business, or in the Court of Appeals for the District of Columbia Circuit. Id.

323 Id.

324 Id.

325 Courtesy of Chief Judge Richard S. Arkow.


328 Id. §§ 134.102, 134.405.

329 Id. §§ 134.406-.408.

330 Id. § 134.102.
The statutes that generate the most cases at the Securities and Exchange Commission (SEC) are the Securities Act of 1933, the Securities and Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940.

The SEC has its own Rules of Practice and are, in most respects, similar to the Federal Rules of Civil Procedure. The hearings are virtually identical to U. S. district court bench trials. Most take several days and can go for a few weeks. The Division of Enforcement prosecutes the case and the respondents are always well represented. Appeals, or “Petitions for Review,” go to the Commission, which conducts a de novo review of the record. The Commission's opinions are appealed to the U.S. Courts of Appeals.

The SEC has four judges and produces about twenty-five initial decisions per year after full evidentiary hearings or summary dispositions, which are mostly follow-up administrative cases where the respondent has been convicted or enjoined. Commission time lines require the SEC to issue an initial decision in 120, 210, or 300 days from service, depending on the type of case. The ALJs have four to five staff attorneys, one paralegal, and one administrative support staff person.

331 Courtesy of Judge Robert Mahony.
333 Id. § 201.300.
334 Id. §§ 201.102, 201.210.
335 Id. §§ 201.410-.411.
336 Id. § 201.58. The appeal must be made within thirty days and the court's determination on any appeal shall be based solely on the factual record. 5 U.S.C. § 504(c)(2) (2006).
340 Mahoney, supra note 331.
XXIV. SOCIAL SECURITY ADMINISTRATION

The Commissioner of Social Security has delegated to its ALJs the authority to hear and decide appealed determinations of claims under Titles II, VIII, XVI, and XVIII of the Social Security Act. The Social Security Administration (SSA) has approximately 1,300 judges in 161 hearing offices located in the ten SSA regions. After a claimant disagrees with a determination issued at the pre-hearing level, an ALJ hearing may be requested. In all but ten states, two reviews are required before an ALJ hearing can be requested. An ALJ’s principal responsibilities are to hold a full and fair hearing and issue a legally sufficient decision. Therefore, an ALJ will consider all the issues raised with the request for hearing, and any issues previously decided in the claimant's favor if the evidence causes the ALJ to question the favorable determination, or the determination is based on an error of law. An ALJ may issue a decision on the record without the need of a hearing when the evidence in the record supports a favorable decision. When a hearing is held, the ALJ looks fully into the issues; questions the claimant and any other witnesses; and accepts as evidence any documents that are material to

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341 Social Security Act §§ 205(a)-(b), 1631(c), 42 U.S.C. §§ 405(a)-(b), 1381(c) (2006).
343 20 C.F.R. §§ 422.203, 404.929, 416.1429 (2011); see id. §§ 404.929-.930, .936 (prehearing level regulations).
344 See Social Security’s Hearing Process, SOCIAL SECURITY ONLINE (Feb. 9, 2011), http://www.socialsecurity.gov/appeals/hearing_process.html#how_to_request_hearing. During the appeals process, the first step is a reconsideration determination where a new decision will be issued “by someone who had no part in the first decision.” Id. If a party still disagrees with the decision, then the party can have a hearing before an ALJ. Id.
347 Id. §§ 416.1441, .1448.
An ALJ’s decision must be based on the findings of fact and fully dispose of all issues raised in the request for hearing.

The final award rate for disabled-worker applicants has varied over time, averaging nearly forty-five percent for claims filed from 1999 through 2008. The percentage of applicants awarded benefits at the initial claims level averaged twenty-eight percent over the same period and ranged from a high of about thirty-five percent to a low of twenty-four percent. The percentage of applicants awarded at the reconsideration and hearing levels are averaging three percent and thirteen percent, respectively. Denied disability claims have averaged over fifty-three percent.

SSA has an Appeals Council, which handles reviews of ALJ decisions. In 2007, 96,260 requests for review were filed. Roughly 15,000 appeals are taken to the United States district courts

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348 See id. § 404.1429 (2011); see also id. § 404.929.
349 Mahoney, supra note 331.
351 Id.
352 Id.
353 Id.
annually.\textsuperscript{355} Over the past five years, Social Security filings are down to 2,735 cases per year.\textsuperscript{356} According to SSA statistics of August 2009, there were 734,199 pending dispositions, which is 20,000 cases below the FY 2009 opening pending – exceeding the end of year goal.\textsuperscript{357}

XXV. UNITED STATES COAST GUARD\textsuperscript{358}

The Coast Guard Administrative Law Judge Program is composed of seven judges who actually are Department of Homeland Security (DHS)/Coast Guard (CG) judges.\textsuperscript{359} They handle Coast Guard cases, NOAA cases, BIS cases and other cases involving components of DHS.\textsuperscript{360} The Coast Guard cases are licensing cases brought under 46 U.S.C. §§7703, 7704. The licenses (credentials) involved include those of Master, Mates, and Pilots down to ordinary seaman.\textsuperscript{361} Those regulations are crafted by the CG and are followed; otherwise the Federal Rules of Civil Procedure are used.\textsuperscript{362} The hearing may be with counsel or pro se.\textsuperscript{363} They involve collisions, allisions, drug violations, and anything else regulations identify affecting safety at sea.\textsuperscript{364} Normal type hearings involve documentary testamentary submissions.\textsuperscript{365} Licenses can be

\textsuperscript{356} Id.
\textsuperscript{357} Id.
\textsuperscript{358} Courtesy of Chief Judge Joseph Ingolia.
\textsuperscript{359} See Directory of ALJ Offices and Phone Number, UNITED STATES COAST GUARD (June 29, 2011), http://www.uscg.mil/alj(addresses.asp (providing judges names, office location, and contact information).
\textsuperscript{361} See generally 33 C.F.R. §§ 20.101-.1201 (2011) (providing the basic procedural rules for Coast Guard Cases).
\textsuperscript{362} Id. § 20.101. The Federal Rules of Civil Procedure are used absent a specific provision from the Coast Guard. Id. § 20.103.
\textsuperscript{363} Id. § 20.301. A party can appear without counsel, with an attorney, or with an authorized representative. Id.
\textsuperscript{364} Id. § 20.1307.
\textsuperscript{365} Id. § 20.808. An ALJ enters into the record written testimony of a witness including oral cross-examination. Id.
suspended or revoked.\textsuperscript{366} An administrative law judge’s initial decisions may be appealed to the Commandant within thirty days of issuance of the administrative law judge’s Decision and Order.\textsuperscript{367} If not, it is the decision of the agency.\textsuperscript{368} Unlike any other agency, Commandant’s Decision on Appeal can only be appealed to the NTSB before it’s taken from there to the Federal Courts.\textsuperscript{369}

XXVI. \textsc{United States Department of Agriculture}\textsuperscript{370}

The U.S. Department of Agriculture’s Office of Administrative Law Judges (USDA OALJ) presides over cases arising under approximately forty-five statutes, including the following: Animal Welfare Act;\textsuperscript{371} the Perishable Agricultural Commodities Act;\textsuperscript{372} Federal Crop Insurance Act;\textsuperscript{373} numerous statutes concerning the treatment and sale of horses and farm animals; hydroelectric power cases where Forest Service lands are affected; and cases involving remedies for exposure to diseases such as chronic wasting disease or mad cow disease (although they have not had any mad cow cases).\textsuperscript{374} The USDA OALJ also handles smaller cases concerning such issues as wage garnishment or salary offsets for individual debts owed to the government.\textsuperscript{375} A significant percentage of the time is spent presiding over rulemaking hearings,

\textsuperscript{366} \textit{See} 35 C.F.R. \textsection 20.1301-.1315 (2011) (providing supplementary evidentiary rules for suspension and revocation hearings).

\textsuperscript{367} \textit{Id.} \textsection 20.1001 (2011).

\textsuperscript{368} \textit{Id.} \textsection 20.1101 (2011). If a decision is not appealed then the ALJ’s decision becomes an order thirty days after it has been issued. \textit{Id.}

\textsuperscript{369} \textit{Id.; see also} Dresser v. Ingolia, No. 07-31121, 2009 WL 139662, at *834, (5th Cir. Jan. 21, 2009). Mariner challenging license suspension and revocation proceedings had not exhausted his administrative remedies, as required for federal court to have subject matter jurisdiction under the Administrative Procedure Act (APA), where the Coast Guard dismissed its claim against him without prejudice, despite his claim that he could be harmed if the Coast Guard again commenced proceedings against him. \textit{Id.}

\textsuperscript{370} Courtesy of Marc Hillson, Chief ALJ.

\textsuperscript{371} \textit{See} 7 U.S.C. \textsection 2131 (2006).

\textsuperscript{372} \textit{See id.} \textsection 499(a).

\textsuperscript{373} \textit{Id.} \textsection 400 et seq.

\textsuperscript{374} 7 C.F.R. \textsection 1.1 et seq. (2011).

\textsuperscript{375} \textit{See generally id.} \textsection 3.1-.3.
as ALJs are required by statute to preside in a number of instances, particularly involving marketing agreements for milk, fruits and, vegetables.  

Most adversary hearings are governed by the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings instituted by the Secretary. These rules, although purporting only to cover proceedings instituted by the Secretary, have been applied to many proceedings instituted by private parties. The most notable characteristic of these rules is the general lack of discovery; although, the judge orders an exchange of witness lists and intended exhibits that provide a fairly adequate substitute for discovery. Several specialized types of hearings have separate rules of procedure (hydroelectric power cases allow discovery, and impose extraordinary time limits including ninety days between filing with the Hearing Clerk until the issuance of the administrative law judge’s decision). Rulemaking hearings have a separate set of rules of procedure as well.

Adversary hearings are generally formal and are generally held in a courtroom setting, with a court reporter, formal direct and cross-examination, post-hearing briefs, and a written decision by the judge. Hearings may last less than a day, but in some instances have lasted weeks or months. Occasionally, a judge might issue a bench decision where the case is clear, but that is not typical. Under certain circumstance, the judges hold audio-visual hearings, and the hearing is in a room that is equipped with relatively modern technology for these hearings. Hearings in wage garnishment and related cases are less formal – they are held over the phone and generally do not last thirty minutes, and there is no court reporter and

376 See generally id. § 900.
377 Id. § 1.130.
378 Hillson, supra note 370.
380 Id. § 1.641 (special rules governing the hearing process of hydroelectric power licensing cases); see generally id. § 1.610 et seq.
381 See id. § 900.
382 Id. § 1.141.
383 Id. § 1.142.
384 7 C.F.R. § 1.141 (2010).
no post-hearing briefing. A written decision—which is much shorter than in our other cases—is normally issued within a few days.\footnote{385}

Most cases can be appealed to the USDA judicial officer, and his decisions are generally appealed to the U.S. Courts of Appeals.\footnote{386} Hydroelectric cases are not appealable and the decision is directly forwarded to FERC, and in some instances decisions of the USDA judicial officer are appealable to the federal district courts.\footnote{387}

XXVII. UNITED STATES POSTAL SERVICE\footnote{388}

United States Postal Service – ALJ Subject Matter Jurisdiction

Applicable Statutes and Regulations:

- Denial, Suspension, or Revocation of Second Class Mail Privileges (Periodicals), The Postal Reorganization Act of 1970 §3; 39 C.F.R. § 954 (2011).

\footnote{385} Hillson, \textit{supra} note 370.
\footnote{386} 7 C.F.R. § 1.145 (2010).
\footnote{388} Courtesy of Chief Judge James G. Gilbert.

Appeal to the judicial officer of the United States Postal Service from an initial decision by an ALJ:

• Denial, Suspension, or Revocation of Second Class Mail Privileges (Periodicals): 39 C.F.R. § 954.20 (2011). 391
• Mail Carriage under the Private Express Statutes: 39 C.F.R. § 959.24 (2011). 392
• Program Fraud Remedies Act, 39 C.F.R. § 962.21 (2011). 394
• Mail Withheld: 39 C.F.R. § 964.16 (2011). 396

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389 A party may appeal to a judicial officer by filing exceptions in a brief on appeal within fifteen days from receiving the ALJ’s initial decision. 39 C.F.R. §952.25(a) (2011).
390 A party “may file exceptions in a brief on appeal ... within five days” after receiving the initial decision. Id. § 953.13.
391 “A party may appeal to the Judicial Officer from an initial decision by filing exceptions in a brief on appeal within 15 days from the receipt of a written or oral initial decision.” Id. §954.20.
392 A party may appeal to the judicial officer “by filing exceptions in a brief on appeal within 15 days from the receipt of the Administrative Law Judge’s written initial decision” as long as they have filed an answer. Id. §959.24 (2011).
393 “If neither the applicant nor the Postal Service counsel seeks review, the initial decision on the application shall become a final decision of the Postal Service 30 days after it is issued.” Id. §960.20(a).
394 A Respondent may appeal an initial decision by filing a Notice of Appeal with the Recorder within thirty days after the Presiding Officer issues an initial decision. 39 C.F.R. § 962.21 (2011).
395 Either party may appeal to the judicial officer within fifteen days of receiving the initial or tentative decision. Id. § 963.19.
396 Either party may appeal to the judicial officer within fifteen days after receiving the initial or tentative decision. Id. § 964.16.
• Administrative Offsets against Former Employees: 39 C.F.R. § 966.11 (2011).398

Appeal to in accordance with Administrative Procedure Act from final agency decision by ALJ:


Not surprisingly, the parties in any of the above cases always include the USPS, either as the prosecuting party, or as a respondent. In certain cases, the Inspector General of the USPS, or Inspectional Services, will prosecute the case on behalf of the USPS, particularly in cases involving misuse of the mails.400 In cases involving disputes as to delivery of the mail, or as to periodical status, the Complainant is usually the customer seeking relief from an adverse agency decision.

Cases under the Debt Collection Act of 1982401 and Administrative Offset cases402 include current or former employees seeking relief from a debt alleged to be owed to the USPS, either through overpayment, or through some action of the employee that created the debt. Because the USPS is a large retail organization, issues involving employee theft, mismanagement, and other employee practices may lead to employee debts alleged to be owed to

397 "The initial or tentative decision will become final ten days after its issuance and receipt by the parties" unless either party has filed an appeal. Id. § 965.12.

398 "The initial or tentative decision will become final . . . thirty (30) days after its issuance and receipt by the parties" unless either party has filed an appeal. Id. § 966.11.

399 The hearing official's decision will be the final determination and no reconsideration of the decision will be allowed "unless a motion for reconsideration is filed by either party within 10 days from receipt of the decision and shows good reasons for reconsideration." 39 C.F.R. § 961.9 (2011).

400 Id. § 230.1.
401 Id. § 961.1, 961.11.
402 Id. § 966.1, 966.13.
After final agency action, these cases are appealable in accordance with the Administrative Procedure Act. It is important to note that the APA does not apply to the United States Postal Service, except where specifically noted. As such, appeal rights from a final decision of the Judicial Officer are not always clear. Generally, 39 U.S.C. § 409 (2006) addresses review of USPS decisions, and jurisdiction may be found there for appeal in certain matters. The question is not one that has been litigated with frequency since the Postal Reorganization Act of 1970, which created the USPS as a wholly owned government corporation. Therefore, it is not subject to a straightforward answer in this context. However, it is likely that a final agency decision by the judicial officer would raise a federal question sufficient to establish subject matter jurisdiction in the federal district courts.

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403 Id. § 966.1, 13.
404 39 C.F.R. § 966.11 (2011). The initial or tentative decision will become final thirty days after “receipt by the parties of the initial or tentative decision.” Id.