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## Greater Independence for ALJs Plus Cost Savings for Agencies: The Coast Guard Model

Walter J. Brudzinski

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# **Greater Independence for ALJs Plus Cost Savings for Agencies: The Coast Guard Model**

**By Walter J. Brudzinski\***

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The Administrative Procedure Act (APA) identifies federal Administrative Law Judges (ALJs) as agency employees with expertise in the subject matter they adjudicate.<sup>1</sup>

Their decisional independence is protected by separating them from their agency's investigating and prosecuting functions, and they are accorded protections in hiring, salary, and tenure.<sup>2</sup> They function pursuant to the APA and their own agency's rules.<sup>3</sup>

As of June 2009, twenty-nine federal agencies employ 1,413 ALJs with the Social Security Administration employing 1,166, or 82.5% of that total.<sup>4</sup> The U.S. Office of Personnel Management (OPM) sets the qualifications and administers the selection and employment of ALJs.<sup>5</sup> Agencies interview and appoint as many ALJs as are necessary to hold hearings required to be conducted in accordance with the APA, selecting from OPM's register of qualified candidates.<sup>6</sup> Of significance to this article, ALJs from one agency may be assigned to hear cases temporarily for other agencies when

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1. Administrative Procedure Act, 5 U.S.C. §§ 550-559, 701-706, 1305, 3105, 3305, 3344, 4301, 5335, 5372, 7521 (2006).

That Act contemplated the existence of impartial factfinders, with substantive expertise in the subjects relevant to the adjudications over which they preside, who would be insulated from the investigatory and prosecutorial efforts of employing agencies through protections concerning hiring, salary, and tenure, as well as separation-of-functions requirements. The decisions of such impartial factfinders were made subject to broad review by agency heads to ensure that the accountable appointee at the top of each agency has control over the policymaking for which the agency has responsibility.

Recommendations of the Administrative Conference of the United States (ACUS), 57 Fed. Reg. 61759, 61760 (Dec. 29, 1992). Congress terminated ACUS by Pub. L. No. 104 - 52, 109 Stat. 480 (Nov. 19, 1995). However, the Omnibus Appropriations Act, 2009 authorizes \$1.5 million in start up funds for ACUS. See Pub. L. No. 111-8, 123 Stat. 524, 656 (Mar. 11, 2009). See also 5 U.S.C. §§ 554 (a)(2), (d), 556(a)(3), (c) (2006) (referring to the administrative law judge as the "presiding employee").

2. *Id.* See also 5 C.F.R. §§ 930.201-930.211 (2009).

3. 5 U.S.C. §§ 551-559 (2006).

4. OPM STATUS REPORT ON ALJs BY AGENCY AND LEVEL (June 2009).

5. 5 C.F.R. pt. 337 (2009); 5 C.F.R. §§ 930.201-930.21 (2009).

6. 5 U.S.C. § 3105 (2006).

caseloads warrant and with the approval of OPM.<sup>7</sup> To further ensure ALJ decisional independence, agencies may not rate an ALJ's job performance or grant any monetary, honorary, or incentive pay.<sup>8</sup> ALJs are paid out of agency funds, but OPM sets ALJ pay.<sup>9</sup> Finally, agencies may remove ALJs "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board."<sup>10</sup>

## I. ONGOING DEBATE

Despite these protections to ensure decisional independence, ALJ impartiality has been questioned for decades because the perception is that ALJs, employed by their agencies, cannot be truly independent or impartial.<sup>11</sup> These complaints have led to the notion that ALJs who are not in a separate corps or a centralized hearing panel are biased in favor of the agency simply because they are hired and paid

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7. 5 U.S.C. § 3344 (2006); 5 C.F.R. § 930.208 (2009).

8. 5 C.F.R. § 930.206 (2009).

9. 5 C.F.R. § 930.205 (2009).

10. 5 U.S.C. § 7521 (2006); 5 C.F.R. § 930.211 (2009); and 5 C.F.R. §§ 1201.121-1201.148 (2009).

11.

Administrative law judges sometimes have trouble proving their neutrality and independence because the agency for which they work is often directly involved in the cases they handle. Some agencies insist on having administrative judges who once worked for the agency, and such "inbreeding" tends to raise doubts about the judges' independence.

Robert Pear, *Administrative Law Judges are Washington's Potent Hybrid*, THE N.Y. TIMES, Nov. 23, 1980, at 3. Martin Tolchin, *The Nation: In Federal Departments; Are Judge and Agency Too Close for Justice?*, THE N.Y. TIMES, Feb. 5, 1989, at 3. See also Antonin Scalia, *The ALJ Fiasco – A Reprise*, 47 U. CHI. L. REV. 57 (1979). Edward J. Schoenbaum, *Improving Public Trust & Confidence in Administrative Adjudication: What an Administrative Law Judge Can Do*, 21 J. NAALJ 1 (2001). For a more comprehensive discussion of the origin and history of federal administrative law judges see Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 ADMIN. L. REV. 1 (1997).

by the very agency for which they adjudicate cases.<sup>12</sup> However, this notion is essentially an appearance issue since the APA ensures that agencies cannot raise or lower ALJ pay based on decisions or performance.<sup>13</sup>

The debate has affected state ALJs as well.<sup>14</sup> In response, most states and three major cities have moved the ALJ's function from agencies to central panels of administrative adjudication.<sup>15</sup> However, similar efforts to establish a totally separate corps of ALJs at the federal level have not been successful.<sup>16</sup> While the intent was to provide greater independence for ALJs as well as generate significant cost savings, agency concerns over loss of policymaking control and

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12. Edward J. Schoenbaum, *Improving Public Trust & Confidence in Administrative Adjudication: What an Administrative Law Judge Can Do*, 21 J. NAALJ 1, 6 (2001).

13. 5 U.S.C. § 5372 (2006); 5 C.F.R. §§ 930.201-211 (2009).

14. See, e.g., Terrance R. Harders, *Striking a Balance: Administrative Law Judge Independence and Accountability*, 19 J. NAALJ 1 (1999); John W. Hardwicke, *The Central Panel Movement*, 53 ADMIN. L. REV. 419 (2001).

15. Duane R. Harves, *Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota*, 65 JUDICATURE 257 (1981). More than half of the states (twenty-seven), plus the cities of New York and Chicago, as well as the District of Columbia have moved the administrative law judge function from the adjudicating agency to a separate agency created solely for the purpose of adjudication. Those separate agencies are referred to as a Central Panel (CHP), Central Hearing Agency (CHA), or Office of Administrative Hearings (OAH). Those states and cities are: Alabama, Alaska, Arizona, California, City of Chicago, Colorado, District of Columbia, Florida, Georgia, Hawaii, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York City, North Carolina, North Dakota, Oregon, South Carolina, Tennessee, Texas, Washington, Wisconsin, and Wyoming. National Association of Administrative Law Judiciary, <http://www.naalj.org.panel.html> (last visited Mar. 22, 2010). The concept of severing hearing functions from departments and agencies and vesting them in a single adjudicative entity is commonly referred to as the creation of a "central panel." Peter L. Plummer, *Administrative Law: The State Office of Administrative Hearings and Rules*, 85 MICH. BAR J. 18 (2006).

16. For example, between 1983 and 1993, from the 98th to the 103rd Congress, Senator Hugh Heflin introduced six bills to establish a separate corps of federal ALJs known as the "Administrative Law Judge Corps Act." S. 1275, 98th Cong. (1983); S. 673, 99th Cong. (1985); S. 950, 100th Cong. (1987); S. 594, 101st Cong. (1989); S. 826, 102nd Cong. (1991); and S. 486, 103rd Cong. (1993). There have been other initiatives as well but none was enacted into law.

loss of their ALJs' expertise, among other things, prevented any initiatives from being enacted into law.<sup>17</sup>

The debate on centralizing federal administrative adjudication is ongoing and not likely to be resolved in the near future, at least on a theoretical level.<sup>18</sup> There are several agencies with ALJs that adjudicate cases for other agencies, but pursuant to agency specific legislation.<sup>19</sup> Meanwhile, ALJs continue to suggest improvements in due process administrative adjudication that would further advance independence for ALJs.<sup>20</sup> ALJ independence has its limits simply

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17. 131 Cong. Rec. S5235 (1985) (statement of Senator Heflin); 139 Cong. Rec. S16567 (daily ed. Nov. 19, 1993) (Letter from Robert B. Reich, Secretary of Labor).

18. Jeffrey S. Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 275 (1981).

19. The Occupational Safety and Health Review Commission (OSHRC), the Mine Safety and Health Review Commission (MSHRC), and the National Transportation Safety Board (NTSB) are independent agencies that hear cases brought by the Department of Labor (for OSHRC and MSHRC) and the Federal Aviation Administration (for NTSB) respectively. Also,

The Office of Hearings [of the U.S. Department of Transportation] is composed of administrative law judges, who hold hearings under the Administrative Procedure Act (5 U.S.C. § 551 et seq.) ("APA") for the Department's Office of the Secretary (primarily in aviation matters) and the Department's component modal administrations that need formal APA 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").

U.S. Department of Transportation, <http://www.dot.gov/ost/hearings/> (last visited Mar. 8, 2010).

20. For more information, see the American Bar Association's Section of Administrative Law and Practice Report to the President Elect of the United States 2008, entitled "Improving the Administrative Process," which is available at <http://www.abanet.org/adminlaw/Report>, and the Federal Administrative Law Judges Conference's Report to the President-Elect of the United States, entitled "Advancing the Judicial Independence and Efficiency of the Administrative Judiciary," which is available at <http://005754d.netsolhost.com/briefingbook.pdf>. However, those improvements do not address ALJs hearing cases from other

because “administrative adjudicators are . . . employees whose job it is to help the agency make decisions with respect to individual cases . . . .”<sup>21</sup> And, ALJs are required to follow agency regulations as binding authority.<sup>22</sup>

## II. PRACTICAL PROBLEMS

Setting up a centralized corps of approximately 1,500 federal ALJs to adjudicate cases for twenty-nine disparate agencies separately staffed with one to 1,166 ALJs can present extraordinary managerial challenges.<sup>23</sup> That is why “a central panel for smaller agencies . . . makes sense for several reasons, including the desire to achieve economies of scale. However, this thinking does not apply equally to all agencies and all situations, especially not to a large independent agency [with a large number of ALJs].”<sup>24</sup>

In 1981, Jeffrey Lubbers suggested a pilot program to test the idea of a federal centralized corps of smaller agencies.<sup>25</sup> He proposed transferring ALJs from seventeen selected agencies having fewer than seven ALJs into a separate corps to adjudicate those

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agencies or removing Federal Administrative Law Judges from their agencies into a separate corps.

21. See Harves, *supra* note 15. See also 5 U.S.C. § 554(d) (“the employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title”); see also ATTORNEY GENERAL’S MANUAL ON THE APA § 7(b) (1947) (ALJs must comply with agency policies and procedures).

22. “Administrative [law] judges must follow the agency’s legislative rules . . . . The only true source of their authority is the agency itself, and their judgment must be informed by the agency’s [judgment] . . . an important distinction between [ALJs] and Article III judges . . . .” James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1199 (2006) (footnotes omitted).

23. OPM Status Report on ALJs by Agency and Level (June 2009).

24. Robert A. Christianson, *Symposium: Modern Ethical Dilemmas for ALJs and Government Lawyers: The Proposal of a Uniform Code of Judicial Conduct for Administrative Law Judges*, 11 WIDENER J. PUB. L. 57, 58 (2002).

25. See Lubbers, *supra* note 18. Mr. Lubbers is currently Professor of Practice in Administrative Law, Washington College of Law, American University. In 1981 he was the senior staff attorney in the Office of the Chairman of the Administrative Conference of the United States.

agencies' cases for a period of five years.<sup>26</sup> His plan required legislation but the efficiencies realized would likely "mute any opposition . . . since adjudication is not as central to the missions of most of these agencies as it is to the others."<sup>27</sup> He also suggested that the entire corps of ALJs could be centralized into separate panels of specialization.<sup>28</sup> These are excellent ideas, but none was enacted into law. That leaves us looking for other methods to test the idea on a small scale without the need for Congressional action.

### III. COAST GUARD ALJS

Since the mid-1990s, Coast Guard ALJs have been adjudicating cases for other agencies on a reimbursable basis.<sup>29</sup> The Office of Chief Administrative Law Judge did not seek to test the idea of centralized administrative adjudication but simply needed to maintain a sufficient number of ALJs in major port cities throughout the United States to respond to cycles of surges in Coast Guard cases that needed adjudication. During periods when there were fewer Coast Guard cases to adjudicate, its ALJs heard cases from other agencies.<sup>30</sup>

Coast Guard ALJs adjudicate primarily merchant mariner license, document, and certificate suspensions and revocations.<sup>31</sup> Its ALJs have varied in number and have been located in major port cities such as Boston, New York, Norfolk, Jacksonville, New Orleans, St. Louis, Houston, Long Beach, San Francisco, and Seattle. The Chief Judge sits in Washington, D.C. Although the number of licensed

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26. *Id.*

27. *Id.* at 276.

28. *Id.*

29. Interview with Joseph N. Ingolia, Coast Guard Chief Administrative Law Judge in Washington, D.C. (Mar. 11, 2008).

30. *Id.*

31. 46 U.S.C. §§ 7701-7705 (2006); 33 C.F.R. pt. 20 (2009); 46 C.F.R. pt. 5 (2009). Merchant Mariners' Licenses, Documents, Certificates of Registry, among others, are now referred to as Credentials. 74 Fed. Reg. 11196, 11216 (proposed Mar. 16, 2009) (now codified at 46 C.F.R. § 10.107(b)). Coast Guard ALJs also hear Class II Civil Penalties assessed under subsection 311(b) of the Federal Water Pollution control Act (33 U.S.C. § 1321(b)(6)) and Class II civil penalties assessed under section 109 of the comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9609(b)).



merchant mariners has remained at approximately 200,000, the number of Coast Guard Administrative Law Judges dropped from a high of sixteen in 1981 to six in 1999 due to a decrease in the number of cases referred for hearing and new procedural rules which greatly decreased the necessity for in-person hearings.<sup>32</sup>

As the number of Coast Guard cases gradually decreased, there were periodic surges and contractions in the number of cases referred for hearing as the result of the agency's shifting priorities.<sup>33</sup> This presented both a problem and an opportunity for the Chief Administrative Law Judge. With each contraction in the number of cases, there was an obligation to adjust the number of ALJs downward.<sup>34</sup> Conversely, with each surge in the number of cases, more ALJs were needed, but it was not practicable to hire additional ALJs and bring them up to speed only to have the surge be short lived. And obtaining ALJs from other agencies on a temporary basis was also not practicable because the time required for a new ALJ to learn Coast Guard law and procedure would exceed the time required for additional ALJ services. Therefore, maintaining a sufficient number of permanent ALJs necessary to meet surges in major port cities where the Coast Guard had traditionally initiated most suspension and revocation cases was the best choice.<sup>35</sup>

During times when the Coast Guard was referring fewer cases for adjudication, the Office of Chief Administrative Law Judge would respond favorably to requests for ALJs to assist other agencies with cases needing adjudication.<sup>36</sup> The first wave of new cases came from the National Oceanic and Atmospheric Administration (NOAA), which needed help in adjudicating its commercial fisheries enforcement cases. NOAA's sole ALJ had retired, thereby creating a temporary need for adjudicative services that Coast Guard ALJs provided initially through the ALJ temporary loan program under 5

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32. Office of Chief Administrative Law Judge Records. There are now six ALJs plus one Chief Administrative Law Judge authorized for New York, NY; Baltimore, MD; Washington, D.C.; New Orleans, LA; Houston, TX; Alameda, CA; and Seattle, WA.

33. Interview with Ingolia, *supra* note 29.

34. *Id.*

35. *Id.*

36. *Id.*

U.S.C. § 3344 (2006) and 5 C.F.R. § 930.208 (2006).<sup>37</sup> Coast Guard ALJs were able to learn quickly the agency's substantive law and procedural rules to adjudicate these enforcement civil penalty cases.<sup>38</sup> Formal, extensive ALJ training was not required. This arrangement proved satisfactory to both agencies and was eventually made permanent through legislation and Memorandum of Agreement (MOA) wherein Coast Guard ALJs continue to adjudicate NOAA cases on a reimbursable basis.<sup>39</sup> When there are changes in the laws or regulations, NOAA provides appropriate training to Coast Guard ALJs.<sup>40</sup>

Shortly thereafter, the Department of Commerce's Bureau of Export Administration, now called the Bureau of Industry and Security,<sup>41</sup> entered into an MOA with the Coast Guard Office of Chief Administrative Law Judge to have its Export Administration Act enforcement cases heard on a reimbursable basis by Coast Guard Administrative Law Judges, with OPM's approval.<sup>42</sup> As with NOAA

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37. When OPM discontinued this temporary arrangement, NOAA hired an ALJ. After legislation passed allowing Coast Guard ALJs to hear NOAA cases, the Coast Guard hired the NOAA ALJ. Office of Chief Administrative Law Judge Records; Interview with George Jordan, Coast Guard Director of Judicial Administration in Washington, D.C. (Mar. 11, 2008).

38. Most of NOAA's cases referred to Coast Guard ALJs are brought under the Magnuson-Stevens Fishery Conservation and Management Act. 16 U.S.C. §§ 1801 *et seq.*

39. National Sea Grant College Program Reauthorization Act, § 10, Pub. L. 105-160, 112 Stat. 21, 27 (Mar. 6, 1998) (codified at 15 U.S.C. § 1541):

[n]otwithstanding section 559 of title 5, with respect to any marine resource conservation law or regulation administered by the Secretary of Commerce acting through the National Oceanic and Atmospheric Administration, all adjudicatory functions which are required by chapter 5 of title 5 to be performed by an Administrative Law Judge may be performed by the United States Coast Guard on a reimbursable basis.

40. Training or briefings from other agencies, if necessary, are provided during Coast Guard ALJs' annual training conferences.

41. Through an internal organizational order, the Department of Commerce changed the name of Bureau of Export Administration to Bureau of Industry and Security, 67 Fed. Reg. 20630 (Apr. 26, 2002).

42. Export Administration Act of 1979, 50 U.S.C. §§ 2401-2420 (2000) (hereinafter, the Act). From August 21, 1994 through November 12, 2000, the Act

cases, Coast Guard ALJs were able to learn quickly the agency's substantive law and procedural rules to adjudicate these enforcement civil penalty cases, obviating the necessity of additional formal training.

After the September 11, 2001 attacks, the number of Coast Guard cases decreased once again due to the Coast Guard's greater emphasis on port safety and security.<sup>43</sup> Meanwhile, Congress created the Transportation Security Administration (TSA).<sup>44</sup> Originally under the Department of Transportation, TSA assumed the day-to-day federal security screening operations for passenger, air cargo, and facility security. In 2002, Congress created the Department of Homeland Security (DHS), and both TSA and the Coast Guard were transferred to that new agency.<sup>45</sup>

Shortly thereafter, the Coast Guard Office of Chief Administrative Law Judge entered into a Memorandum of Agreement with TSA wherein Coast Guard Administrative Law Judges agreed to adjudicate TSA civil penalty cases on a reimbursable basis, similar to NOAA and BIS.<sup>46</sup> TSA currently refers fewer cases for adjudication because it now has resources in place to pursue settlement prior to referral.

Pursuant to OPM's request, the Coast Guard Office of Chief Administrative Law Judge agreed to provide adjudicative services on a reimbursable basis to the Office of Special Master, Department of Justice, to adjudicate Victim Compensation Fund claims arising from

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was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, the last of which was August 3, 2000 (3 C.F.R. pt. 397 (2001)), continued the regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1706 (2000)) (IEEPA). On November 13, 2000, the Act was reauthorized and it remained in effect through August 20, 2001. Executive Order 13222 of August 17, 2001 (3 C.F.R. pt. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 7, 2003 (68 Fed. Reg. 47833, Aug. 11, 2003), continues the regulations in effect under IEEPA. 15 C.F.R. pt. 700-774.

43. This policy provided that only cases in which the Coast Guard Investigating Officers sought revocation of a merchant mariner's credentials would be taken to hearing; otherwise, they would be disposed of through settlement unless impracticable. Interview with Jordan, *supra* note 37.

44. Aviation and Transportation and Security Act, Pub. L. 107-71, 115 Stat. 579 (Nov. 19, 2001).

45. Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

46. 49 C.F.R. pt. 1515 (2009).

the September 11, 2001 attacks. This arrangement was temporary and involved only one Coast Guard ALJ who heard cases in New York City from the summer of 2003 to the end of the program in June 2004.<sup>47</sup>

In 2004, per MOA between the Coast Guard and Customs and Border Protection (CBP), Coast Guard ALJs began hearing customs brokers' license suspension and revocation cases with OPM approval.<sup>48</sup> CBP did not request that Coast Guard ALJs undergo any formal training and, so far, has referred only a few cases for adjudication.

In 2006, the Coast Guard ALJs assumed duties as fact finders for the hydroelectric dam licensing renewal process administered by the Federal Energy Regulatory Commission (FERC) through NOAA's National Marine Fisheries Service (NMFS).<sup>49</sup> Because the substantive law and procedural rules were new, NMFS provided the initial training to Coast Guard ALJs and legal support staff. So far, two cases have been referred to the Office of Chief Administrative Law Judge for resolution.

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47. The Air Transportation Safety and Systems Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230 (Sept. 22, 2001), established the September 11th Victim Compensation Fund of 2001. According to the Final Report of the Special Master, 2004, the Fund distributed over \$7.049 billion to survivors of 2,880 persons killed in the September 11th attacks and \$1.053 billion to 2,680 individuals who were injured in the attacks or in the rescue efforts conducted thereafter. The average award for families of victims killed in the attacks exceeded \$2 million and the average award for injured victims was nearly \$400,000. For details on how the claims adjudication hearing procedure worked, see Notice of Inquiry and Advance Notice of Proposed Rulemaking 66 Fed. Reg. 55, 901 (Nov. 5, 2001); Interim Final Rule with Request for Comments, 66 Fed. Reg. 66274-01 (Dec. 21, 2001); Final Rule, 67 Fed. Reg. 11233 (Mar. 13, 2002).

48. 19 C.F.R. pt. 111, Subpart D (1998).

49. On August 8, 2005, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, was enacted. Section 241 of that Act amends sections 18 and 4(e) of the Federal Power Act, 16 U.S.C. Chapter 12. Section 241 provides parties a right to an expedited ninety day trial-type hearing before an ALJ on disputed issues of material fact concerning prescriptions or conditions proposed for licensing renewals in hydroelectric dam projects. *See* 50 C.F.R. pt. 221 (2008). ALJs from the Department of Interior (43 C.F.R. pt. 45) as well as the Department of Agriculture (7 C.F.R. pt. 1, Subpart O (2009)) also serve as fact-finders for prescriptions concerning subject matter within the jurisdiction of their respective agencies.

Through another MOA, Coast Guard Administrative Law Judges are now adjudicating within-agency reviews/appeals from applicants denied Transportation Workers Identification Credentials (TWIC) and Hazardous Material Endorsements (HME) by the Transportation Security Administration.<sup>50</sup> There have been a few hearings but most of these cases are adjudicated “on the record” without the need for an in-person hearing.

In 2009, the Office of Chief Administrative Law Judge entered into an MOA with the DHS Office of General Counsel which provides that Coast Guard ALJs will adjudicate cases for all DHS headquarters, offices, and any DHS component on a reimbursable basis. This agreement supersedes the TSA and CBP agreements. The DHS and its agencies still enter into inter/intra-agency agreements that incorporate the main Memorandum of Agreement, detail accounting data for billing purposes, and provide any further specifics of the work requested.<sup>51</sup>

Most cases from requesting agencies referred to Coast Guard ALJs for adjudication eventually settle. Of those that go to hearing, very few have been remanded and none has been reversed so far. The requesting agencies have provided training to Coast Guard ALJs as needed. All requesting agencies require that Coast Guard ALJs apply the agency’s substantive law and procedural rules. Cases are appealed pursuant to the agencies’ rules for final agency action.

#### IV. AGREEMENTS WITH REQUESTING AGENCIES

The MOAs referred to above typically provide that the requesting agencies agree to forward hearing requests and associated documents to the Coast Guard ALJ Docketing Center in Baltimore, Maryland, provide adequate copies of prior ALJ decisions and appellate cases, and inform the Coast Guard Office of Chief Administrative Law Judge when ALJ decisions are appealed. The requesting agencies

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50. Final Rule, Request for Comments, Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License, 72 Fed. Reg. 3492, 3499, 3500, (proposed Jan. 25, 2007) (codified at 49 C.F.R. § 1515.11 (2007)).

51. Memorandum of Agreement between DHS Office of General Counsel and USCG Office of Chief Administrative Law Judge (Apr. 14, 2009).

may also agree to advise and/or provide training to Coast Guard ALJs upon changes in the law or regulations.

The Coast Guard Office of Chief Administrative Law Judge agrees to control and docket each assigned case in accordance with the requesting agency's appropriate procedural regulations; enter the case information into a database system; maintain accurate paper files; track the status of the cases; inform the parties of the presiding ALJ; forward the case files to the assigned ALJ; render decisions and forward the same to the parties and the agency; provide prescribed periodic billing statements; issue monthly case status reports; and forward closed case files to the agency, among other things.<sup>52</sup>

Of course, the requesting agency also agrees to reimburse the Coast Guard (servicing agency) for the costs of adjudication. All MOAs provide that Coast Guard ALJs shall follow the procedural rules and case law of the requesting agency. However, the DHS MOA provides that in the absence of any specified procedural regulations on the part of a DHS component, the Coast Guard's procedural rules in Part 20 of the Code of Federal Regulations may be used; finally, the MOAs provide that they will remain in effect unless terminated by either party, upon appropriate notice.<sup>53</sup>

The separate inter/intra-agency agreements (sometimes called reimbursable agreements) are based on the MOAs and are entered into each year between the requesting agency and the Coast Guard Office of Chief Administrative Law Judge. These agreements address specific requirements for billing and accounting data such as personnel, travel, and court reporting costs, as well as administrative expenses.<sup>54</sup>

Agency personnel with whom the Office of Chief Administrative Law Judge's management team negotiates and manages agreements for adjudicative services are separated and function apart from personnel involved in the prosecutorial, investigative, and appellate functions.

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52. *Id.*

53. *Id.*

54. Memoranda of Agreement and inter/intra-agency agreements or reimbursable agreements are authorized under 31 U.S.C. § 1535 and the particular agency's statutory and regulatory authority for transferring funds.

## V. AGENCY POLICYMAKING AND EXPERTISE

Since Coast Guard ALJs must follow the requesting agency's laws and regulations, the MOAs may require the requesting agency to provide briefings or training. Regardless, requesting agencies have always responded favorably to the Office of Chief Administrative Law Judge's infrequent requests for training on specific matters concerning the agency's laws or regulations. Training for Coast Guard ALJs occurs on an as-needed basis, usually once per year, with all ALJs meeting over a period from two to four days. Most of the training is devoted to Coast Guard suspension and revocation law, with the remainder of the training time devoted to other agencies.

Coast Guard ALJs apply a variety of substantive laws and procedural regulations to a mix of cases from various agencies. As Mr. Lubbers said, "there is no reason why administrative law judges . . . should not be able to preside over a mix of cases as varied as federal district or state court judges . . ." <sup>55</sup> The experience of Coast Guard ALJs adjudicating cases for other agencies is consistent with this opinion. While there have been occasional remands or partial remands, the author is unaware of any reversals by the requesting agencies.<sup>56</sup>

## VI. INDEPENDENCE

When Coast Guard ALJs adjudicate cases for other agencies, they are identified as "Administrative Law Judge" or as "Administrative Law Judge, U.S. Coast Guard," not as the Administrative Law Judge of the other agency. Titles, *per se*, may trigger a fear in the respondent that the trier of fact is part of the agency that investigates and prosecutes the action and is, therefore, presumptively biased. These signs and symbols are the first indicators to respondents that the person adjudicating their case is not part of the same agency that

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55. Lubbers, *supra* note 18 at 275.

56. As an adjudicator of adversarial cases referred by the requesting agencies, it would not be appropriate for the author to comment on whether the requesting agencies are satisfied with this arrangement. Coast Guard ALJs achieve a greater sense of independence and requesting agencies achieve cost savings while maintaining policy making control.

is bringing the action against them, thereby promoting an appearance of independence.

Another sign and symbol is the ALJ Docketing Center which serves as the “clerk of the court” for all cases that Coast Guard ALJs adjudicate. Agencies forward cases to be adjudicated to the Docketing Center for docketing and ALJ assignment. Upon completion, the Docketing Center returns the case file to the agency.

In addition to the requesting agency benefiting by having Coast Guard ALJs adjudicate its cases, Coast Guard ALJs also benefit by adjudicating a variety of cases, thereby providing a greater sense of professionalism and intellectual stimulation. It also reinforces the independence provided by the APA because Coast Guard ALJs are further separated from the agencies for which they are adjudicating cases.

## VII. COST SAVINGS

The cost-benefit to the requesting agencies is savings realized by not having to employ ALJs. For example, NOAA brings commercial fisheries enforcement cases throughout the United States. It would not be cost effective for NOAA to maintain full-time ALJs in major fishing port cities because its case adjudication history would not support such high levels of ALJ staffing. By using Coast Guard ALJs located in the same regions where NOAA initiates its cases, NOAA can take advantage of economies of scale by utilizing an existing ALJ infrastructure, complete with centralized docketing center, attorneys, administrative staff, and ALJs disbursed throughout the United States.

The yearly budget for the entire Coast Guard Office of Chief Administrative Law Judge is approximately \$4 million, with \$3 million devoted to salaries and the remainder to operations and rents. Other costs, such as computer and personnel support, as well as some office spaces, are part of Coast Guard general funding.<sup>57</sup> Estimates based on historical caseloads reflect that costs to establish an ALJ office at NOAA would be approximately \$1 million annually and for TSA, approximately \$2.5 million annually.<sup>58</sup> The costs for one ALJ

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57. Office of Chief Administrative Law Judge Records.

58. *Id.*



office with two attorneys/law clerks and two paralegal specialists is estimated at \$600,000 to \$620,000 per year in salary and \$100,000 to \$150,000 in expenses. For two ALJs and a five person staff of three attorneys and two paralegal/administrative staff, the salary cost is just under \$1 million.<sup>59</sup>

According to cost figures compiled by the Coast Guard Office of Chief Administrative Law Judge, for every year Coast Guard ALJs adjudicate cases for other agencies, those agencies individually save from approximately \$1 million to \$2.5 million in ALJ staffing costs, less reimbursement.<sup>60</sup> Based on \$196,000 in reimbursement costs charged back to NOAA in fiscal year 2008, NOAA's savings still came to \$804,000 for commercial fisheries enforcement adjudication. Counting reimbursement costs in the amount of \$3,300 for NMFS/FERC which was also charged back to NOAA, the total net savings for NOAA in fiscal year 2008 amounted to \$800,700.<sup>61</sup>

Fiscal year 2008 reimbursable costs to BIS were \$45,700.<sup>62</sup> Assuming BIS maintained at least one ALJ and staff as described above, its costs would amount to approximately \$1 million per year. By having Coast Guard ALJs adjudicate BIS cases, that agency saved approximately \$954,300.<sup>63</sup>

Based on a \$2.5 million estimate for TSA to maintain ALJs and staff to handle their caseload, reimbursement costs for TSA civil penalty cases were \$110,512 for fiscal year 2008.<sup>64</sup> Coast Guard ALJs recently started adjudicating TWIC and HME cases and the reimbursement costs for those cases was \$22,800. TSA's fiscal 2008 net savings realized by having Coast Guard ALJs adjudicate all of

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59. *Id.* These costs assume no computer resources.

60. According to Coast Guard Office of Chief Administrative Law Judge Records, reimbursements include salaries and employer's contributions for paralegal specialists, attorneys, and judges. Reimbursements also include travel expenses but do not cover the costs of office space and supplies, computer systems, and other fixed costs associated with an agency establishing and maintaining its own Office of Administrative Law Judges. The Coast Guard assumes those fixed costs.

61. Coast Guard Office of Chief Administrative Law Judge Records.

62. *Id.*

63. *Id.*

64. *Id.*

their cases is approximately \$2.4 million for their civil penalty cases as well as for their TWIC and HME cases.<sup>65</sup>

When agencies settle cases prior to referring them to the ALJ Docketing Center, the agency is able to achieve further cost savings and efficiencies because no ALJ resources are triggered. All agencies for which Coast Guard ALJs adjudicate cases attempt to settle cases as early in the process as practicable to save time and costs.

### VIII. RECOMMENDATIONS AND CONCLUSIONS

In the absence of further Congressional action on centralizing administrative adjudication, the Coast Guard ALJ model shows that on a smaller scale, a servicing agency's ALJs can achieve greater independence. More importantly to the requesting agency, it can achieve significant cost savings and still retain policymaking control.

Coast Guard ALJs apply a wide variety of substantive law and procedural rules in adjudicating diverse cases, giving further credence to Mr. Lubbers' claim that "there is no reason why administrative law judges . . . should not be able to preside over a mix of cases as varied as federal district or state court judges."<sup>66</sup>

Presiding over a mix of cases has resulted not only in a small, flexible panel of ALJs capable of responding to surges in its own agency's cases, but also a highly responsive court capable of meeting the APA due process adjudication needs of other federal agencies without ALJs.

Other agencies with smaller groups of ALJs may want to consider following this approach. In addition to providing greater independence for the servicing agency's ALJs and cost savings for the requesting agencies, it has the added benefits of broadening the ALJs' experience and improving job satisfaction.

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65. *Id.*

66. *See* Lubbers, *supra* note 18 at 275.

