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ADMINISTRATIVE PRESIDING OFFICIALS TODAY

*Charles H. Koch, Jr.**

Introduction

Lloyd Musolf offers the results of a survey that helps us see what administrative presiding officials were like and how they viewed their job as they began under the Administrative Procedure Act (APA)¹ in 1948. As it happens, the Administrative Conference of the United States (ACUS) directed a study of the "administrative judiciary" (ACUS Study Group) in 1992.² Several surveys of presiding officials were conducted as part of that study. Thus, we have recent surveys of attitudes and perceptions.³ The results of those surveys might help illustrate the problems that have evolved since the Musolf survey.

As part of the study group, I assumed primary responsibility for its empirical work. This responsibility gave me a very close look at the administrative law judge (ALJ) corps. What I saw was, to put it bluntly, alarming. My biases are always with the government employees and officials, having been one myself. Indeed, I dedicated my treatise to civil servants.⁴ Still, the more I dealt with the ALJ corps, the more concerned I became. The system has some very serious personnel problems and real, practical solutions are being supplanted by theoretical ones. Our survey provides some of the insights necessary to begin adjusting the debate.

The first step in confronting the existing problems requires a shift from the current tendency to view the system from the presiding officials' perspective to seeing it from

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This article is in part based on several surveys conducted for the Administrative Conference of the United States in 1992 of which the author was a consultant. The views expressed herein, however, are solely those of the author and do not necessarily represent the views of the Administrative Conference, its membership, or the other members of its study team.

1. 5 U.S.C. § 556 (1988).

2. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1992 RECOMMENDATIONS AND REPORTS 771 [hereinafter ACUS STUDY].

3. We conducted two surveys: one surveyed those classified as ALJs, and the other, those presiding officers not falling within the category of ALJ. *Id.* at app. IV(A), (D) [hereinafter 1992 ALJ Survey and AJ Survey, respectively]. Belinda Hatzenbuehler, currently with Lyon & McManus, Orlando, Florida, provided invaluable assistance in developing, administering, and evaluating the surveys.

4. CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE (1985).

the citizens' perspective, from which the problems look quite different. Unfortunately, the ACUS Study Group could not find the resources to survey the systems' clients and their representatives. Much of those findings expressed below, then, are based on testimony and other expressions by representatives of those groups.

Some Proposals

Considering that the first step must be to refocus the debate on the problems of those who appear before these adjudicators, a number of reforms are necessary to further or protect those interests. These reforms, however, are not the ones currently being advocated because the presiding official organizations are dictating the reform debate.

From my participation with the ACUS Study Group, I perceive that the problems involve the failure of an unacceptable number of presiding officials, particularly those in the privileged position of ALJ, to perform their function fairly and with an acceptable level of competence and diligence. As with any large group, there are poor performances and failures of integrity. Unlike other groups, those responsible for the failures here are insulated from criticism. Aggravating the situation is the fact that the individuals most often adversely affected are already very disadvantaged people. We *must* find a way to monitor the presiding officials so that these individuals are not subjected to breakdowns in the administrative process.

In many cases, it is the agency that is trying to find ways to assure adequate and fair performance by its presiding officials. Obviously, such efforts by the agency may appear to challenge adjudicative independence and decisionmaking freedom. For that reason, agency management, no matter how well intended, is suspect and vulnerable.⁵ An ACUS recommendation sought a monitoring method that did not involve the agency administrators. Rather, it suggested the chief ALJs be given this responsibility.⁶

A far better way to deal with the complaints *against* presiding officials would be an independent monitoring system. This ombudsman approach meets the real problems in the administrative judiciary.⁷ Such a system would be far less intrusive than any alternative and yet provide an effective avenue for correcting misconduct. Such a system would be flexible enough to respond to individual situations with well tailored remedies while protecting decisionmaking independence.

Moreover, the ombudsman system has the advantage of removing the complain-

5. It is interesting that, while the ALJs complained of the "Reagan monster" in the 1980s, they had their most heated confrontation with the Carter administration. As the Clinton administration begins to understand the impediment the ALJs have created for the delivery of government service it can be expected to have the same difficulties.

6. The Federal Administrative Judiciary (Recommendation No. 92-7), 1 C.F.R. § 305.92-7(III)(B)(3) (1992).

7. Such monitoring would not be inconsistent with the concept of judges. The original ombudsmen were in fact designed to correct the abuses of judges, not administrative officials. *See generally* WALTER GELLHORN, *OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* (1966).

ant from the center of the controversy. An ombudsman approach to citizen complaints does not require complainants to participate directly in the process, unless they wish to participate to assure satisfactory resolution of the complaint. This system will not place the burden on private citizens, and correction of problems will not depend on the complainant's vigor and tenacity.

Remedies considered by the ombudsman can be active and flexible. In countries with ombudsman systems, the ombudsman's investigations often vindicate the bureaucrat. Where the ombudsman finds a problem, informal techniques generally suffice.⁸ I expect a presiding official ombudsman to have much the same experience. However, if informal devices are not sufficient in a particular case then the ombudsman should be empowered to pursue more formal remedies.

An ombudsman system alone is not sufficient, however. For one thing, a reactive, complaint-driven system cannot adequately protect those who most need protection and are the least likely to complain. Moreover, a complaint system will rarely address consistently inadequate or incompetent performance. Also, any such system necessarily contains many structural and psychological deterrents to punishing ALJs for misconduct. Indeed, a complaint system is in place and it does not work. While such a system can be vastly improved, it cannot solve many of the problems.

In addition to an independent monitoring system, therefore, I would develop a system of periodic reevaluation of ALJs. This was proposed to the ACUS Study Group and then again to the ACUS governing body. However, ACUS was only willing to go so far as recommending internal periodic reevaluation.⁹ I am convinced that periodic review by a body independent of both the agency and the ALJs will be the only meaningful way to adjust consistently inadequate and damaging conduct. Unlike the current system, this approach will be sensitive to gradations of poor performance rather than considering only the most egregious cases. In addition, it will permit flexible remedies, commensurate with specific weaknesses in the performance of individual ALJs.

Moreover, general, periodic evaluations would force the system to focus on the positive as well as the negative. The evaluation process would create a device for praising that large number of ALJs who conscientiously and competently perform their duties. While none of us enjoy being evaluated, the good judges should appreciate that the evaluation process will result in public recognition of their performance in a way that is unfortunately absent in our current system. Indeed, the evaluators should be instructed to readily praise good performance as well as criticize bad performance.

The basic mechanics of my proposal would include a periodic review by an impartial panel.¹⁰ Any period would be somewhat arbitrary but I would recom-

8. *Id.*

9. 1 C.F.R. § 305.92-7(III)(B)(3) (1992).

10. A study conducted by the General Accounting Office (GAO) suggested evaluation of ALJs by an independent panel of attorneys and, not surprisingly, almost three-quarters of the ALJs disagreed with this proposal. U.S. GENERAL ACCOUNTING OFFICE, SURVEY OF ADMINISTRATIVE LAW OPERATIONS response 10 (1978) [hereinafter GAO STUDY].

mend a seven-year period. That period might be justified because it tends to be the prescribed tenure of many commissioners and board members. However, I would also consider an initial probation period of one year. A new ALJ would not automatically be evaluated by a panel at the end of the probation period, but if problems are discovered, then a panel should be convened to consider continuation of the appointment.

The evaluation panels should be drawn from federal judges and magistrates. Not only will judges be structurally independent but they will bring with them an understanding of the judging function. Dr. Paula Burger, in her study of ALJs, observed: "[O]ne is struck by how many problems administrative law judges share with the judges of our Article III courts."¹¹ In addition to independence and expertise, this mechanism has the incidental value of compelling an exchange which will be of value to both sets of judges.

The ALJ organizations have been promoting another type of solution: the ALJ panel or pool in which all the ALJs are housed in one agency. Many ALJs support this idea. The 1992 ALJ Survey found that 79% wanted separation from the agency.¹² Seventy-six percent thought the absence of a corps was a problem.¹³

To me, the ALJ pool idea goes in exactly the wrong direction. First, it further insulates the presiding officials from public scrutiny and solidifies the closed club environment. Second, much of the problem is the well-entrenched, senior members of the ALJ corps who are most likely to control the ALJ pool. Some indication of this problem surfaced from consideration of the Study Group's recommendation to empower the chief ALJs. The recommendation sought a type of peer evaluation which could be accomplished without compromising independence. Many complained, however, that the chief ALJs were, themselves, a substantial threat to ALJ independence. While many chief ALJs do perform well, others are overbearing and use their powers to control their colleagues.¹⁴ It seems that an ALJ pool run by ALJs would present a greater danger to the ALJs' independence than anything the agency administrations could accomplish under current law.

Another drawback to the pool idea is that it fails to confront the real problem. Clear benefits must be found in order to justify creating an entirely new structure that would destroy the fundamental advantages of having expert decisionmakers experienced with specialized processes. It is clear from the surveys, though, that the ALJ problem is not structural.

It is not independence the ALJs lack but rather an effective individual grievance procedure. While some individual feelings of threats to independent judgment surfaced, such problems did not appear to be systemic. Therefore, a solution that

11. PAULA P. BURGER, JUDGES IN SEARCH OF A COURT: CHARACTERISTICS, FUNCTIONS AND PERCEPTIONS OF FEDERAL ADMINISTRATIVE LAW JUDGES 362 (1984) [hereinafter BURGER STUDY].

12. 1992 ALJ Survey, *supra* note 3, response 23i.

13. *Id.*, response 23k.

14. For example, the Labor Department recently brought personnel action against its chief ALJ for "abusing the powers of his office over a period of at least five years." Frank Swoboda, *Labor Dept. Trying to Oust Administrative Law Judge: Nahum Litt Accused of Abusing Powers of Office*, WASH. POST, Feb. 12, 1994, at C1.

can target the problems more precisely may be of greater value with far less negative potential. Perhaps the ombudsman system could not only protect the public from the presiding officials but also protect the presiding officials from oppressive agency management. This dual jurisdiction makes sense because most of these problems arise from the agency attempting to correct inadequate or inappropriate performance. Moreover, as the surveys suggest, oppressive agency management problems involve individual situations. Where the agency management goes too far in a particular case, the ombudsman could step in.

An ombudsman could investigate complaints and pursue a wide range of methods for correcting either presiding officials or agency misconduct. Again, where the problem does involve presiding official misconduct, the independent authority of the ombudsman will avoid challenges of management oppression. As to an ALJ's complaint against the agency, the ombudsman's options should range from informal guidance to the power to take formal action against the offending agency official.

Still, much of the tension is caused by the reality that many ALJs are not performing their functions adequately or, sometimes, with integrity. Correcting such individual problems will always create controversy. The correction process must be fair to the employees, but this sensitivity does not diminish the obvious need for such correction processes.

All of the above proposals that address this problem involve somewhat *ex post* solutions. The selection process, however, provides the initial opportunity to improve ALJ performance. The selection process has been discussed in depth in the ACUS Study and elsewhere.¹⁵ But I wish to emphasize one very strong conclusion: The present ALJ corp simply has too many people who should not be in a position of judging others, especially those with no power. The selection process must be designed to assure that citizens meet the right kind of individual when they come before the government. I would go so far as to suggest serious consideration of sophisticated personality testing.

Scope of the Study

ALJs have been surveyed on a number of occasions. We found four studies all completed about a decade ago to be particularly useful.¹⁶ Our survey endeavored to update much of the information gleaned from these four studies.¹⁷

15. ACUS Study, *supra* note 2, at 931.

16. The most useful study was conducted by Paul Burger in 1978. See BURGER STUDY, *supra* note 11. Another useful study was conducted by Amiel Sharon for the Office of Personnel Management (OPM). See AMIEL T. SHARON, VALIDATION OF THE ADMINISTRATIVE LAW JUDGE EXAMINATION (1980) [hereinafter SHARON STUDY]. As its title suggests, the Sharon Study's primary goal was to develop the basis for evaluation of the ALJ examination process. A third study that contributed some useful information was undertaken by the General Accounting Office. See GAO STUDY, *supra* note 10. The fourth study, which focused on the SSA, sent the questionnaire in 1982 and published the results in 1985. See DONNA P. COFER, JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING PROCESS (1985) [hereinafter COFER STUDY].

17. In our survey, we tried to categorize the ALJs along functional lines. As we knew, and the ALJs pointed out in responding, these categories are no more than approximations. See 1992 ALJ Survey, *supra* note 3. Many ALJs preside at hearings involving several of these functions. Nonetheless,

We sent our survey to some 1150 sitting ALJs and 610 responded (about 53%). We compiled the data in three different forms.¹⁸ First are the responses from all ALJs surveyed.¹⁹ Second are the responses from Social Security Administration (SSA) ALJs.²⁰ Third are the responses from non-SSA ALJs.²¹

Forty-five years is a long time and much has happened since then.²² One major development is that Musolf's hearing examiners have become "judges," specifically, administrative law judges. However, the federal system utilizes some 2700 presiding officials who are not classified as ALJs. They are not covered by the APA provisions regulating ALJs and otherwise do not acquire the privileges of ALJs. John Frye called these "administrative judges" (AJs) and for convenience that term will be used here.²³ There are no studies of AJs similar to those of ALJs listed above. Thus, in order to compare the information about working environments and attitudes that we had for ALJs, we surveyed a selected sample of AJs. To the extent possible, we attempted to match the basic questions asked in the four ALJ surveys and our own ALJ survey.

Because of limited resources, we restricted our survey to a representative sampling of "AJs." For this survey, we selected six agencies that employed a large number of AJs: Board of Veterans Appeals (BVA), Equal Employment Opportunity Commission (EEOC), Merit System Protection Board (MSPB), Board of Patent Appeals/Interferences (BPA), Department of Immigration and Naturalization Services (INS), Defense Department (DISCR), Armed Services Board of Contract Appeals (ASBCA), Trademark Trial and Appeal Board (Trademark),

we wanted to be able to group responses according to functional categories that exist in the administrative process generally. These categories are:

<i>Functional Category</i>	<i>Agencies</i>
Civil Rights Enforcement	— HUD
Health and Safety	— OSHRC, NTSB, FMSHRC, DEA, FDA, DOT (Coast Guard & Office of Secretary)
Environmental	— EPA
Securities and Commodities	— SEC, CFTC
Trade Regulation	— FTC, USITC, USPS, USDA, Commerce
Labor Relations	— NLRB, FLRA, MSPB
Licensing and Ratemaking	— FCC, FERC, ICC, FMC, NRC
Program Grants and Resource Management	— SBA, Education, HHS (Dept. Appeals), Interior
Individual Economic Support	
A. SSA	— SSA
B. Other	— Labor

It was particularly necessary to separate SSA ALJs from the others. Judges in that agency so dominate the pool that we needed to segregate their responses where appropriate.

18. These forms are reproduced with the final statistics in the ACUS Study and reference will be made to the responses printed in that study. ACUS STUDY, *supra* note 2, at app. IV(A)-(D).

19. These responses are contained in the 1992 ALJ Survey, *supra* note 3.

20. ACUS STUDY, *supra* note 2, at app. IV(B) [hereinafter 1992 ALJ Survey, SSA only].

21. ACUS STUDY, *supra* note 2, at app. IV(C) [hereinafter 1992 ALJ Survey, non-SSA].

22. Scalia chronicled the "fiasco" in the conversion. Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979).

23. John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992) [hereinafter *Frye Study*].

and the Nuclear Regulatory Commission, Atomic Safety & Licensing Board Panel. AJs from these agencies provided 264 responses out of 380 requests or a response rate of 69%.²⁴

Below is an effort to organize the data acquired through these surveys so as to help identify some of the problems. This data is grouped according to problem areas which might be explored. Where appropriate, I have compared the 1992 findings with those in the four surveys conducted a decade ago, particularly those by Burger.²⁵

PRESIDING OFFICIALS' PERCEPTION OF THE POTENTIAL CHALLENGE TO THEIR
INDEPENDENCE, AND REALISTIC RESPONSES

Lawyers become very anxious when a process does not follow a familiar form. Yet, the essence of the administrative process is tailoring procedures to meet specific decisionmaking needs. Lawyers instinctively rebel against these "deviations" from the norm and hence a natural tension always exists in the administrative process. For this reason, reform in administrative process must always test for overcommitment to legal tradition.

Fortunately, the Supreme Court has consistently supported procedural flexibility. For example, in *Withrow v. Larkin*,²⁶ the Court said that a process was not defective merely because administrative adjudicators engaged in functions that would be traditionally separate. A defective process required proof of actual bias, not merely the absence of familiar structure.²⁷ Similarly, in *McClure v. Schweiker*,²⁸ the Court refused to invalidate a process just because the entity hiring the adjudicators had some stake in the outcome. It again required proof of actual bias.²⁹ Thus, in practice, administrative adjudicators are afforded much leeway in decisionmaking.

Actual independence is crucial; thus we closely considered federal adjudicators' opinions about the challenges to independence. The 1992 survey inquired into actual interference in ALJ decisionmaking in several different ways.³⁰ First, it asked the general question as to whether ALJs perceived any "threats to independent judgment."³¹ It also asked the specific question of whether they perceived "pressure for different decisions."³² We also asked other questions that related to independence.

A decade ago, Burger found very little evidence of challenges to ALJ indepen-

24. The ACUS Study also published the results of this survey and that source is referred to herein. See AJ Survey, *supra* note 3.

25. See BURGER STUDY, *supra* note 11; COFER STUDY, *supra* note 16; GAO STUDY, *supra* note 10; SHARON STUDY, *supra* note 16.

26. 421 U.S. 35 (1975).

27. *Id.*

28. 456 U.S. 188 (1982).

29. *Id.*

30. In surveying attitudes, it is useful to inquire into the same information in different ways. This check seemed particularly important in the 1992 ACUS Study because of the obvious connection between the study and actual recommendations.

31. 1992 ALJ Survey, *supra* note 3, response 14m.

32. *Id.*, response 14h.

dence. As to the question concerning threats to independent judgment, only 1.5% of the non-SSA ALJs responded that it was a significant problem and another 1% responded that it was somewhat of a problem.³³ Thus, 97.5% of the non-SSA ALJs responded that lack of independence was not a problem. As to the question of pressure for different decisions, only 1% of the non-SSA ALJs responded that it was a significant problem and 1.9% responded that it was somewhat of a problem. Thus, 97.1% of the non-SSA ALJs responded that such interference was not a problem. The SSA ALJs, however, felt their independence was more threatened.³⁴

The 1992 ALJ Survey did not find as positive a situation. Fifteen percent of the non-SSA ALJs responded that threats to independence were a problem, with 8% saying this was frequently a problem.³⁵ Nine percent responded that pressure to make different decisions was a problem and 4% found it to be a frequent problem.³⁶ As with the Burger study, the SSA ALJs expressed more concern: 33% of the SSA ALJs found threats to independence to be a problem, with 21% saying this was a frequent problem.³⁷ Twenty-six percent found pressure to make different decisions, with 10% finding it to be a frequent problem.³⁸

Because AJs have no formal protection, one might expect them to express a far higher level of anxiety. However, AJs reported *less* of a problem than ALJs. Ninety-one percent of the AJs described themselves as independent.³⁹ About 70% reported that threats to independent judgment were not a problem, with 18% reporting that this was occasionally a problem and 10% reporting that it was frequently a problem.⁴⁰ About 80% reported that pressure for different decisions was not a problem and most of the remainder reported that it was only occasionally a problem.⁴¹ Only 2% reported that it was frequently a problem.⁴²

The contrast between the AJ and ALJ attitudes is significant because the AJs have none of the structural protections afforded ALJs. Thus, we asked the AJs to compare their position with that of ALJs. They divided nearly equally among greater, the same, or lesser, regarding independence from agency supervision and authority.⁴³ These findings add support to the notion that structural protections are

33. BURGER STUDY, *supra* note 11, at 365.

34. While most SSA ALJs did not perceive the specific problem of pressure for different decisions, almost half perceived the more vague problem of threats to independence. As to the more specific question of pressure for different decisions, 6.7% of the SSA ALJs found it to be a significant problem and 12% found it to be somewhat of a problem. As to the more general question of threats to independence, 27.9% of the SSA ALJs found it to be a significant problem and 16.7% found it to be somewhat of a problem. Thus, only 55.4% of the SSA ALJs felt no threats to their independence. *Id.* at 365. The Cofer Study confirms the existence of this perception on the part of SSA ALJs. She reported that 70.1% of the SSA agreed that there was agency pressure against allowances. COFER STUDY, *supra* note 16, at 223. This pressure was not overt or direct, however. *Id.* at 171.

35. 1992 ALJ Survey, non-SSA, *supra* note 21, response 14m.

36. *Id.*, response 14h.

37. 1992 ALJ Survey, SSA only, *supra* note 20, response 14m.

38. *Id.*, response 14h.

39. AJ Survey, *supra* note 3, response 23c.

40. *Id.*, response 24m.

41. *Id.*, response 24h.

42. *Id.*, response 24h.

43. *Id.*, responses 28a, b.

not important to a *feeling* of independence and perhaps to actual independence. In short, from the data, I must conclude that both a sense of independence and actual independence derive from other sources.

The contrast between past and current attitudes and between ALJs and AJs held up when we asked whether they had experienced pressure to do things "that are against their better judgment." The 1992 ALJ Survey shows that 34% of the ALJs believed they were asked to do things that are against their better judgment, with 11% being frequently asked to do so.⁴⁴ Thirteen percent of the SSA ALJs reported that they were frequently asked to do things against their better judgment and another 29% were occasionally asked to do so.⁴⁵ Only 6% of the non-SSA ALJs reported that they were frequently asked to do things against their better judgment, with another 13% saying they were asked to do so occasionally.⁴⁶ Again these responses are more negative than the past responses.⁴⁷

Responses from the AJs were more positive than those from the ALJs. About three-quarters reported that they were never or rarely asked to do things in their work that were against their better judgment.⁴⁸ Most of the rest said they were only sometimes asked to do so and only about 4% said they were often or usually asked to do so. Again, the group with less structural protection seemed less anxious.

Note also that the anxiety is not generalized. From discussion with ALJs, I have determined that the problems are particularized.⁴⁹ Looking at the variety of the responses to questions about independence combined with interviews, I have concluded that it is likely that problems are agency, or perhaps even individual, specific. If so, across-the-board solutions are less likely to confront the tensions that raise anxiety concerning independence. Solutions capable of sensitivity to individual circumstances seem much more appropriate. As suggested above, one such approach might be to create an administrative adjudicator ombudsman office to deal with these individual problems.

ASSURING ADEQUATE AND HONEST PERFORMANCE OF THE ASSIGNED JUDGING FUNCTION

Starting with the Carter administration, when the responsibility of the administrative judiciary shifted dramatically to implementation of entitlement programs, efforts have been made to assure adequate, sensitive and honest performance of the judging function.⁵⁰ Before that time, most ALJs presided over massive regula-

44. 1992 ALJ Survey, *supra* note 3, response 15e.

45. 1992 ALJ Survey, SSA only, *supra* note 20, response 15e.

46. 1992 ALJ Survey, non-SSA, *supra* note 21, response 15e.

47. The GAO Study also attempted to measure the negative impact of certain aspects of the job. GAO Study, *supra* note 10, response 44. ALJs then almost never worried about being asked to do things that were against their better judgment. About 80% responded that they were never or rarely asked to do so; whereas about 5% said they were often or usually asked to do so. *Id.*, response 44.

48. AJ Survey, *supra* note 3, response 27e.

49. Such discussion is the best information available because, in order to maintain anonymity, we could not ask for more agency-specific responses and hence we do not know where the anxiety resides.

50. COFER Study, *supra* note 16, at 75-107.

tory cases in which the private respondent was much better represented than the agency and usually had considerable power. In short, interested parties could protect themselves. The shift in the dominant administrative function put citizens at risk who lacked these types of protection.

The agencies involved in these functions have continually searched for management methods in an effort to protect the public from ALJ misconduct. The ALJs have resisted such efforts for both good and bad reasons. The reality is that performance management is increasingly important as the disadvantaged and powerless appear more often before administrative presiding officials. But, the countervailing reality is that the agencies face considerable disadvantages in performance management of presiding officials.

Still, it must be noted that presiding officials' view of agency management type relationships may be more ambiguous than alleged. The 1992 ALJ Survey asked whether current ALJs were confronted with "too close supervision."⁵¹ Almost 90% of the ALJs found that the prospect of excessive supervision was either not a problem or not applicable.⁵² The current SSA ALJs found close supervision to be a slightly more frequent problem than non-SSA ALJs.⁵³ Nearly 80% of the AJs reported that excessive supervision was not a problem, with most of the remainder reporting that it was only sometimes a problem.⁵⁴

Presiding officials' view of institutional interference were also ambiguous. About 61% of the ALJs found that agency interference was a problem, with 26% finding it to be a frequent problem.⁵⁵ Again, however, AJs seemed to have less problems with interference than ALJs. About two-thirds of the AJs disagreed that agency interference was a problem and only 11% strongly agreed and another 23% agreed.⁵⁶

When asked about overburdening caseload and pressure to make quicker decisions, ALJs found these to be a problem, with 34% finding caseload a frequent problem and 40% finding pressure to make quicker decisions a frequent problem.⁵⁷ Pressure on output is perceived as much more of a problem in the SSA than in other agencies, with 41% of the SSA ALJs finding caseload a frequent problem and 54% of them finding pressure to make faster decisions a frequent problem.⁵⁸ AJs were slightly less concerned with pressure for quicker decisions,⁵⁹ and were slightly more concerned with too great a caseload.⁶⁰

Nonetheless, both groups indicated considerable satisfaction with their jobs. Alarming, however, is that satisfaction among ALJs seems to be going down

51. 1992 ALJ Survey, *supra* note 3, response 14l.

52. *Id.*, response 14l. In contrast, nearly all the ALJs found this not to be a problem a decade ago. BURGER STUDY, *supra* note 11, at 365.

53. Compare 1992 ALJ Survey, SSA only, *supra* note 20, response 14l with 1992 ALJ Survey, non-SSA, *supra* note 21, response 14l (4% SSA only; 3% non-SSA).

54. 1992 AJ Survey, *supra* note 3, response 24l.

55. 1992 ALJ Survey, *supra* note 3, response 23a.

56. AJ Survey, *supra* note 3, response 26a.

57. 1992 ALJ Survey, *supra* note 3, responses 14c, g.

58. 1992 ALJ Survey, SSA only, *supra* note 20, responses 14c, g.

59. 1992 AJ Survey, *supra* note 3, response 24g.

60. *Id.*, response 24c.

even though their status, privileges, compensation and structural protection are increasing. Burger found that the ALJs were generally satisfied with their job. Over 97% were satisfied with their position and duties and over three-quarters of these were very satisfied.⁶¹ About 94% were satisfied with the substantive area of law and 77% with the conditions of employment.⁶² The 1992 ALJ Survey found that only 65% reported that they were very satisfied with their jobs, but most of the remainder said they were somewhat satisfied.⁶³ Nearly all were satisfied with the nature of their duties, with 81% being very satisfied.⁶⁴ Almost all were satisfied with the substantive area of the law.⁶⁵ However, over half were either not satisfied or only somewhat satisfied with the conditions of employment.⁶⁶ The responses for SSA ALJs vary little from the overall responses.⁶⁷

AJs seemed to be more satisfied with their jobs.⁶⁸ Virtually all, 99%, felt satisfied with their duties, with 77% being very satisfied.⁶⁹ Nearly 100% were satisfied with the substantive area of law, with 75% very satisfied.⁷⁰ About 80% were satisfied with conditions of employment but only 34% were very satisfied.⁷¹ In sum, 97% were satisfied overall.⁷² However, the AJs divided at about one-third each among strongly agree, agree, or disagree as to whether a serious problem existed for the following conditions: lack of status, poor image, inadequate hearing facilities and staff support, poor salaries, lack of perquisites, and need for increase in judicial powers.⁷³ About two-thirds of the AJs were at least sometimes bothered by the perception that others who performed the same work received more deference, with over 45% thinking that occurred often or always.⁷⁴

I draw three conclusions from these responses, which influence the reform proposals outlined above. First, the tension over performance management, here as elsewhere, is inevitable, but this kind of management is more often accepted by presiding officials than some assert. Second, here, as elsewhere, the outward manifestations of this tension are very individualized and must be met with mechanisms that can offer individualized solutions. Third, the structural and formalized solutions are not as effective as less formal approaches.

The solution to the management problems the ALJs consistently prefer is an ALJ pool. The 1992 ALJ Survey found that 79% wanted separation from the agency.⁷⁵ Seventy-six percent thought the absence of a corps was a problem.⁷⁶

61. BURGER STUDY, *supra* note 11, at 86-87.

62. *Id.* at 86-87.

63. 1992 ALJ Survey, *supra* note 3, response 22d.

64. *Id.*, response 22a.

65. *Id.*, response 22c.

66. *Id.*, response 22b.

67. 1992 ALJ Survey, SSA only, *supra* note 20, response 22.

68. AJ Survey, *supra* note 3, response 25.

69. *Id.*, response 25a.

70. *Id.*, response 25c.

71. *Id.*, response 25b.

72. *Id.*, response 25d.

73. *Id.*, responses 26c-h.

74. *Id.*, response 27j.

75. 1992 ALJ Survey, *supra* note 3, response 23i.

76. *Id.*, response 23k.

The ALJs' position has not changed in a decade. The GAO Study found that 73% of the ALJs agreed to a great extent or better that an independent corps would be an improvement.⁷⁷ The Cofer Study found that 83% of the SSA ALJs favored the ALJ corps idea.⁷⁸ The Burger Study found nearly 70% favored an independent corps.⁷⁹

I, like many others, find the ALJ pool solution misdirected and more likely to aggravate problems than solve them. The ALJs want to combine to further insulate themselves from oversight. The presiding officers need more management, not insulation. Still, the most effective management cannot generally be performed by the agency. Thus, I recommend performance management by periodic evaluation by independent but not permanent panels. Not surprisingly, ALJs do not like such reforms. For example, the GAO survey found that most ALJs would not favor a system with set terms and renewal upon a review by an independent panel of attorneys.⁸⁰

MONITORING POLICY INTEGRITY

Even more sensitive than performance management is the process of monitoring policy integrity. Presiding officials see themselves as adjudicators and not as policymakers. Nonetheless, they implement agency policy and hence the agency's policy choices have no effect unless the agency can assure that the presiding officials are faithful to those choices. Agencies increasingly complain that some presiding officials consistently ignore agency policy choices.

Failure to Assure Policy Integrity

Both types of presiding officials found that policymaking, or furthering a policy agenda, was not one of their roles.⁸¹ Moreover, they claimed not to seek to bring about policy change.⁸² Factors which might be considered somewhat less policy neutral—balancing interests, protecting public interest and clarifying agency policy—found

77. GAO STUDY, *supra* note 10, response 7-1.

78. COFER STUDY, *supra* note 16, at 227.

79. BURGER STUDY, *supra* note 11, at 414.

80. GAO STUDY, *supra* note 10, response 12. The GAO Study also found that about 85% of the ALJs disagree with the proposal for set terms for ALJs. *Id.*, response 11.

81. Most ALJs in the 1992 ALJ Survey rated influence and furthering policy goals as unimportant, with most of the remainder rating these factors as only somewhat important. 1992 ALJ Survey, *supra* note 3, at responses 20g, h. The 1992 ALJ Survey found that over 91% believed making policy not part of their job and two-thirds believed educating the public not part of their job. *Id.*, responses 9i, j. Most ALJs in the Burger Study also rated commitment to policy goals and desire to have influence as not important, with most of the remainder rating those factors as only moderately important. BURGER STUDY, *supra* note 11, at 78, 289.

Similarly, over half of the AJs rated these two as of little or no importance, with most of the remainder rating them as only moderately important. Four AJs ranked policy goals and only one ranked having influence as first. AJ Survey, *supra* note 3, responses 21g, h. Only 10% ranked policy goals and having influence within the top three functions of their office. *Id.*, response 21.

82. The 1992 ALJ Survey found that 2% of the current ALJs frequently suggest policy changes and another 22% occasionally do so. 1992 ALJ Survey, *supra* note 3, response 10k. AJs were slightly more likely to do so with 54% reporting that they rarely or never did so and 44% reporting that they did so occasionally. AJ Survey, *supra* note 3, response 13k.

a rather ambiguous response. One can conclude, however, that few regarded these activities as very important.⁸³ Our AJ study arrived at much the same results.⁸⁴ AJs also did not consider making agency policy as part of their job.⁸⁵ Eighty-six percent said that their job did not include making policy to a significant extent and most of the rest said their job included policymaking only to some extent.⁸⁶

On the other hand, a very large percentage of ALJs found their job to a great extent involved "applying" agency policy.⁸⁷ About three-quarters of the AJs found that their job involved to a great extent applying agency policies and regulations.⁸⁸

Still, we found the ALJs surprisingly resistant to the idea that they were required to follow the agency policy. This absence of commitment to agency policy decisions creates serious potential unfairness.⁸⁹ This resistance, however, might have been directed at less formal policy pronouncements. The 1992 ALJ Survey found that they considered agency regulations as the primary source of policy direction. Ninety-five percent of the ALJs considered such regulations were very important to their decisions, with almost all of the rest finding regulations somewhat important.⁹⁰ Nearly 90% of the AJs felt that agency regulations were very important to their decisions and the rest thought those regulations were moderately important.⁹¹ About half of the AJs believed they had the same duty as ALJs to follow agency policy but about 28% thought they had less of a duty to do so.⁹²

83. 1992 ALJ Survey, *supra* note 3, responses 9h-l. The related activity of interpreting statutes was considered moderately important by almost 90% of the ALJs. *Id.*, response 9f.

84. AJ Survey, *supra* note 3, response 15.

85. *Id.*, response 15.

86. About a third thought their job involved to a great extent and another third to some extent "clarifying" agency policy. *Id.*, response 15. About half thought that their job did not involve protecting the public interest. *Id.*, response 15. They also considered the related activity of interpreting statutes as part of their job. *Id.*, response 15.

87. 1992 ALJ Survey, *supra* note 3, responses 9d, e.

88. AJ Survey, *supra* note 3, response 15.

89. Some ALJs make little effort to understand and consistently apply agency policy. The 1992 ALJ Survey found that 21% of the current ALJs consult with superiors about difficult cases. 1992 ALJ Survey, *supra* note 3, response 10c. SSA ALJs are slightly more likely to do so than non-SSA ALJs. About a third of all ALJs consult with other ALJs either during or before a hearing but few do so frequently. *Id.*, responses 10f, g.

A little less than 50% of the AJs reported that they rarely or never consulted with superiors about difficult cases. AJ Survey, *supra* note 3, response 13e. But over a third did so occasionally and 17% did so frequently. *Id.*, response 13e. About half of the AJs occasionally consulted with other AJs prior to a hearing with 29% doing so frequently. *Id.*, response 13f. About 40% of the AJs occasionally consult with other AJs during a hearing and a third do so frequently. *Id.*, response 13g. AJs seem more willing to seek advice especially from their peers.

Burger's inquiries regarding "patterns of communication" suggest that ALJs do not often seek outside advice on difficult cases. Since the difficulty of a case is likely to stem from the closeness of the policy question, this inquiry suggests that ALJs tend to resolve ambiguous policy questions themselves. Very few of them consulted either the chief ALJ or other ALJs for help with such cases.

This information suggests that ALJs are inclined to resolve individual controversy as best they can and let the review stages of the adjudicative process resolve the policy questions. Yet, the GAO Study found that ALJs rarely engaged in research on agency policy, legal precedent or technical issues. They almost never did so regarding short cases and did so only about a third of the time in long cases. GAO Study, *supra* note 10, response 13-16.

90. 1992 ALJ Survey, *supra* note 3, response 16b.

91. AJ Survey, *supra* note 3, response 16b.

92. 1992 ALJ Survey, *supra* note 3, response 28.

On the other hand, while the ALJs considered themselves bound by agency regulation, they did not feel constrained by less formal expressions of policy.⁹³ The failure to heed official public statements of policy violates the presiding officials' own view that they should not engage in policymaking. More importantly, as the agency is bound by nonlegislative policy pronouncements, so too are its adjudicators (unlike judges). That is, if they ignore the agency statements of policy, not only are the adjudicators arrogating to themselves a policymaking function but they are violating the law.⁹⁴

Thus, the agencies have a legitimate need to monitor faithfulness to its policy. The challenge is to create a mechanism for assuring policy integrity without creating the appearance of interfering in individual determinations.

Absence of Clear Policy Expression Aggravates the Problem

To some extent, the problem may involve inadequate communication as well as ineffective monitoring. One of the most pressing problems identified by both groups was the absence of policy guidance.

The 1992 ALJ Survey found that current ALJs saw the lack of policy direction to be a problem. Thirty-five percent thought it was occasionally a problem and another 9% regarded it a frequent problem.⁹⁵ Two-thirds of the AJs reported that lack of policy direction from the agency was not a problem but a third did find this to be either sometimes or frequently a problem.⁹⁶ About a quarter of the AJs agreed or strongly agreed that inadequate policy guidance was a problem at their agencies.⁹⁷

Can Administrative Review Assure Policy Integrity?

The traditional legal approach to policy integrity is through review by a superior adjudicative authority. For several reasons, some involving the presiding officials' attitudes and others simple practicality, administrative review is inadequate for this purpose in many administrative programs, particularly mass justice programs.⁹⁸

The opinions of the administrative review authority are one avenue of communication between the presiding officials and the agency policymakers but many practical factors diminish the effectiveness of such communication.⁹⁹ In mass justice systems

93. *Id.*, responses 16h, i.

94. For an excellent and complete discussion of this law, see Joshua Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653 (1992).

95. 1992 ALJ Survey, *supra* note 3, response 14c.

96. AJ Survey, *supra* note 3, response 24e.

97. *Id.*, response 26i.

98. The 1992 ALJ Survey found that about one-third of the ALJs were bothered by too much review. 1992 ALJ Survey, *supra* note 3, response 15d. About three-quarters of the AJs were rarely or never bothered about this and only 10% of the AJs were often bothered by too much review. AJ Survey, *supra* note 3, response 27d. ALJs think that administrative review causes unreasonable delay. GAO STUDY, *supra* note 10, response 16-2.

99. Burger offered these observations about the practicality of administrative review:

[H]eavy caseloads have an impact on the uniformity of the law. Just as busy appellate courts provide only limited supervision of the lower courts' work, so too are agency reviewing authorities constrained by the pressure of numbers from scrutinizing all ALJ decisions. . . . Less is known

which now dominate administrative adjudications, concepts of precedent or even consistency have little practical meaning. For this reason, it is useful to note the difference perceived by SSA ALJs and non-SSA ALJs in the influence of prior agency decisions. The 1992 ALJ Survey found that nearly all non-SSA ALJs believed that published agency opinions were important, with 84% saying they were very important.¹⁰⁰ On the other hand, SSA ALJs rated such opinions important less often, with only 58% considering those opinions to be very important.¹⁰¹

In addition, administrative review authorities are not primarily concerned with monitoring policy integrity.¹⁰² The ALJs apparently perceive that the review authority focused on fact-finding, either interpreting the same facts differently or finding other facts to be determinative.¹⁰³ The GAO found that most reversals were the result of a different interpretation of the factual record.¹⁰⁴

ALJs do not feel they receive adequate feedback on policy type issues from the administrative review authority.¹⁰⁵ The 1992 ALJ Survey found that nearly half of the ALJs thought the lack of clear standards for review was a problem.¹⁰⁶ A quarter of the AJs responded that the absence of review standards was either sometimes or frequently a problem.¹⁰⁷ Still, almost three-quarters believed that lack of agency standards for review of their decisions was not a problem.¹⁰⁸

about the basis on which agency heads select cases for discretionary review [than appellate courts], a matter complicated by differences in agency structure and procedures. Nonetheless, in most of the agencies the majority of ALJ decisions are not reviewed and become the final agency decisions. The degree of independent judgment they exercise is thus of paramount importance for ALJs and for other federal judges as well. *BURGER STUDY*, *supra* note 11, at 362.

100. 1992 ALJ Survey, non-SSA only, *supra* note 21, response 16d. About 90% of the AJs found published agency opinions to be very important to their decisions. 1992 AJ Survey, *supra* note 3, response 16d.

101. 1992 ALJ Survey, SSA only, *supra* note 20, response 14d. The SSA mass justice situation might explain efforts towards more manageable communication of authority in that agency. Cofer found that SSA ALJs favored an effort to create a system of organizing representative cases in order to make available a practical method for using prior decisions in the SSA context. *COFER STUDY*, *supra* note 16, at 169. The impracticality of systematic access to these decisions may be one major cause for this perception.

102. See Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 284 (1990).

103. This is interesting since in many mass justice programs the ALJs hold hearings as appeals of decisions reached at some other level. The record compiled at this other level is often important. However, three-quarters of all ALJs felt that the record was not adequate to support the decision at the keep level, with 39% finding it was frequently not adequate. 1992 ALJ Survey, *supra* note 3, response 11a. About three-quarters also thought that the record was not adequate to prepare them for their hearing, with 44% finding this frequently occurred. *Id.*, response 11b.

SSA ALJs reported an even poorer performance at the other level. Ninety-three percent found the record inadequate to support the decision at the keep level, with over half finding the record frequently inadequate for that purpose. 1992 ALJ Survey, SSA only, *supra* note 20, response 11a. Ninety-two percent found the record inadequate to prepare them for their hearing, with 56% finding the record frequently inadequate for that purpose. *Id.*, response 11b.

104. The GAO Study found that review authorities rarely found the ALJs misapplied the law or committed factual error. *GAO STUDY*, *supra* note 10, response 41.

105. The GAO Study found that less than 60% of the ALJs perceived that they receive adequate feedback and over 30% of the ALJs reported no feedback. *Id.*, response 40.

106. AJ Survey, *supra* note 3, response 14f.

107. *Id.*, response 24f.

108. *Id.*, response 24f.

As might be expected, ALJs may believe that those conducting the administrative review do not have superior judgment or competence. The 1992 ALJ Survey found that 62% of the current ALJs thought that those who review their work were not nearly as qualified as they, with 29% frequently thinking so.¹⁰⁹ Seventy-four percent of the current SSA ALJs thought that officials who review their work were not nearly as qualified as they, with 31% frequently thinking so.¹¹⁰

In addition, the 1992 ALJ Survey found that 62% of the ALJs thought that review by unqualified persons was a problem, with 33% thinking this was frequently a problem.¹¹¹ The current SSA ALJs found this to be more of a problem than current non-SSA ALJs.¹¹²

Only about half the ALJs believed that those who review their work were not nearly as qualified as they are.¹¹³ A quarter sometimes held that belief and 14% often or always believed that way.¹¹⁴ However, nearly two-thirds reported that review by persons who they thought were unqualified was not a problem.¹¹⁵

More Systemic Approach Assuring Policy Integrity is Necessary

The nature of review itself, however, prevents it from assuring policy uniformity and consistency in many administrative programs. Review is reactive and individualized. That means policy integrity protection depends on individual champions. Moreover, where the review authority is handling thousands of cases, the review authority does not have the time or resources to engage in more generalized policy considerations. Where review generates thousands of opinions, those opinions cannot be read, much less applied.

Another ACUS study found that administrative review in mass justice systems, if approached in the traditional way, are very ineffective monitors of policy integrity.¹¹⁶ While that study recommended reforms in such systems to allow these authorities to have a strong policy guidance role, absent such reforms, or even with them, review cannot protect the public from consistent policy deviations by individual presiding officials.

Reform of the administrative judiciary must include finding workable methods for doing so. Generalized agency efforts to assure policy integrity, however, have created tensions. The present ACUS recommendation admonished ALJs of their duty here and hoped that this could be accomplished informally by the chief ALJs.¹¹⁷ I conclude, based on statements made to the study group, that this method will not be adequate. Therefore, I recommend that the periodic

109. 1992 ALJ Survey, *supra* note 3, response 15i.

110. 1992 ALJ Survey, SSA only, *supra* note 20, response 14i.

111. 1992 ALJ Survey, *supra* note 3, response 14i.

112. Compare 1992 ALJ Survey, SSA only, *supra* note 20, response 14i with 1992 ALJ Survey, non-SSA, *supra* note 21, response 14i (74% SSA only; 40% non-SSA).

113. ALJ Survey, *supra* note 3, response 27i.

114. *Id.*, response 27i.

115. *Id.*, response 24i.

116. See generally Koch & Koplow, *supra* note 102.

117. The ACUS Study recommends discipline of ALJs for "a clear disregard of or pattern of nonadherence to properly articulated and disseminated rules, procedures, precedents, and other agency policy." 1 C.F.R. § 305.92-7(III)(B)(3)(1993).

evaluation suggested above include consideration of faithfulness to the law and agency policy.

EFFECTIVENESS OF PRESIDING OFFICIAL PROBITY AND RESOLVE AS A SAFEGUARD

Much stronger than any structural safeguards is the protection created by presiding officials' probity and resistance to distortions of the proper working of the system. Our survey, as did the others, discovered an overwhelming commitment to personal and systemic integrity.

Commitment to Personal Integrity

We asked the current ALJs which words best describe their role. Ninety-six responded that "judge/adjudicator" best described their role.¹¹⁸ The terms "decision-maker" and "fact-finder" also received more than 90%.¹¹⁹ Few current ALJs described their role as "cog" or "referee."¹²⁰ Most thought their role was "important," with 62% thinking that term very aptly described their role.¹²¹

We asked the same question of AJs, again with similar results.¹²² Virtually all thought very appropriate a description of themselves as "judge/adjudicator," "decision-maker" and "fact-finder."¹²³ Nearly 90% thought they were "important" but 31% felt that description was only somewhat appropriate.¹²⁴ Perhaps more telling is the fact that three-quarters thought a description as a "cog" was inappropriate and only 3% thought that description very appropriate.¹²⁵

The 1992 ALJ Survey found that 89% of the ALJs rated independence as a very important factor and most of the remainder rated it important.¹²⁶ The views of AJs is much the same: About 82% rated independence of the job as very important and 97% rated it as at least moderately important.¹²⁷ In short, administrative presiding officials find independence very important.

Thus, it is encouraging that presiding officials generally found that "independent" aptly described their role. In fact, 90% of ALJs said that "independent" very much described their role and the remainder found that term somewhat descriptive.¹²⁸ Noteworthy is the fact that 90% of the SSA ALJs said that "independent" very much described their role and the remainder found that term somewhat descriptive.¹²⁹ AJs also felt that "independent" described their role.¹³⁰

118. 1992 ALJ Survey, *supra* note 3, response 21a.

119. *Id.*, responses 21d, e.

120. *Id.*, responses 21g, h.

121. *Id.*, response 21b.

122. AJ Survey, *supra* note 3, response 23.

123. *Id.*, response 23. We asked of current ALJs the open ended question: "How would you describe your role in the administrative process." Almost all ALJs responded that they were "judges." 1992 ALJ Survey, *supra* note 3, response 6 (written comments on file with the author). We also asked the same question of AJs and they responded in much the same fashion. AJ Survey, *supra* note 3, response 22 (on file with the author).

124. AJ Survey, *supra* note 3, response 23b.

125. One of these described themselves as a "vital cog." *Id.*, response 6 (written comments on file with the author).

126. 1992 ALJ Survey, *supra* note 3, response 20a.

127. AJ Survey, *supra* note 3, response 21a.

128. 1992 ALJ Survey, *supra* note 3, response 21c.

129. *Id.*, response 21c.

130. AJ Survey, *supra* note 3, response 23.

Attitude Towards External Activities

The surveys found some consensus on appropriate conduct in several areas. The caution of both groups suggests a general regard for the dangers of outside contacts and relationships.

The 1992 ALJ Survey found that current ALJs rarely communicate about their cases outside the agency, with only about 15% doing so even occasionally.¹³¹ That survey found that nearly half talk to agency staff about cases, with 22% frequently doing so.¹³² However, most thought social contacts with agency staff or private attorneys was inappropriate but many thought this practice was somewhat appropriate.¹³³

AJs apparently believe they are under similar constraints. Over 90% rarely or never had communications with those outside the agency about their cases.¹³⁴ Over half rarely or never had communication with the staff about a case,¹³⁵ but 29% occasionally had such communications and 14% had them frequently.¹³⁶ However, most AJs thought that social contacts with agency attorneys or private attorneys was at best only sometimes appropriate and about 40% thought that such contacts were inappropriate.¹³⁷

Presiding officials also limited their lobbying activity. Nonetheless, most thought suggesting procedural change and working for changes in substantive policy were appropriate.¹³⁸ Most thought lobbying Congress on behalf of ALJs was appropriate.¹³⁹ About three-quarters thought suggesting proceedings, investigations, or study was appropriate.¹⁴⁰

AJs agreed as to permissible activities outside the adjudicative process. Nearly 90% thought suggesting procedural changes to the agency and about 70% thought suggesting policy changes to the agency were at least appropriate.¹⁴¹ About three-quarters regarded suggesting other investigations or studies to the agency as at least sometimes appropriate.¹⁴² Some 70% thought lobbying Congress on behalf of AJs was at least sometimes appropriate.¹⁴³

Nearly all ALJs thought talking to the media about a case before, during, or after the final decision, was inappropriate.¹⁴⁴ Almost none talk to the media about

131. 1992 ALJ Survey, *supra* note 3, response 10j.

132. *Id.*, response 10i.

133. *Id.*, responses 24e, f.

134. AJ Survey, *supra* note 3, response 13j.

135. *Id.*, response 13i.

136. *Id.*, response 13i.

137. *Id.*, responses 18e, f. Those in the EOIR were particularly adamant about their distance from immigration. (Their strong expression was no doubt generated by a mistake in our characterization of them on our survey form.)

138. 1992 ALJ Survey, *supra* note 3, responses 24g, h.

139. *Id.*, response 24i.

140. *Id.*, response 24j.

141. AJ Survey, *supra* note 3, responses 18g-j.

142. 1992 ALJ Survey, *supra* note 3, responses 18g-j.

143. *Id.*, response 18i.

144. *Id.*, responses 24b-d.

their decisions.¹⁴⁵ Almost all AJs thought that talking to the media during the hearing was inappropriate.¹⁴⁶ About three-quarters believed talking to the media after the case was still inappropriate.¹⁴⁷ The 1992 ALJ Survey found that ALJs do not participate in the decision after the hearing. Few participated in oral argument, talked to agency staff, helped prepare documents, or observed oral argument.¹⁴⁸ A very few supplied written clarification and studied briefs.¹⁴⁹ The only post-hearing activity that a significant number engaged in was assisting in writing the final agency decision.¹⁵⁰

AJs' conduct after their decision was similarly isolated. Nearly all responded that they did not participate in oral argument.¹⁵¹ More than 90% reported that they rarely or never supplied written clarification, talked with agency staff, helped prepare documents, or observed oral argument.¹⁵² About a quarter reported that they frequently assisted in writing the final opinion.¹⁵³ About a third at least occasionally study appellate briefs but only 8% frequently did so.¹⁵⁴

Conscientious Performance

Our survey also found considerable support for the idea that presiding officials are conscientious. Of the current ALJs, 54% frequently read relevant court opinions and another 41% occasionally did so.¹⁵⁵ Fifty-four percent frequently read final agency decisions and 33% read those decisions on occasion.¹⁵⁶ A little over half read commercial services, with only 16% frequently doing so.¹⁵⁷ About two-thirds read decisions of other ALJs, with 26% doing so frequently.¹⁵⁸ Less than half consulted with other ALJs.¹⁵⁹ The 1992 ALJ Survey, however, found some drop off in background preparation.¹⁶⁰

Our study found that many AJs engaged in background preparation. Nearly all read final agency decisions frequently.¹⁶¹ About 90% read decisions of other presiding officers.¹⁶² And nearly all read federal court decisions at least occasion-

145. *Id.*, response 13b.

146. AJ Survey, *supra* note 3, response 18b.

147. *Id.*, responses 18c, d.

148. 1992 ALJ Survey, *supra* note 3, responses 13a, d, f, g.

149. *Id.*, responses 13c, e.

150. *Id.*, response 13h.

151. AJ Survey, *supra* note 3, responses 17a.

152. *Id.*, responses 17c, d, f, g.

153. *Id.*, response 17h.

154. *Id.*, response 17e.

155. 1992 ALJ Survey, *supra* note 3, response 10c.

156. *Id.*, response 10b.

157. *Id.*, response 10d.

158. *Id.*, response 10a.

159. *Id.*, responses 10f, g.

160. Cf. BURGER STUDY, *supra* note 11, at 224; see also SHARON STUDY, *supra* note 16, responses 122, 125, 126.

161. AJ Survey, *supra* note 3, response 13b.

162. *Id.*, response 13a.

ally, with three-quarters reading them frequently.¹⁶³ Over 80% used commercial services or industry publications at least occasionally.¹⁶⁴

ALJs also engaged in general professional development. About three-quarters of the current ALJs reported attending professional meetings and seminars but only 8% do so frequently.¹⁶⁵ Over a third talked to the private bar about the agency, with only 3% doing so frequently.¹⁶⁶ Many AJs engage in more general professional contacts. Almost half at least occasionally talked to members of the private bar about agency procedures.¹⁶⁷ Over 90% reported attending professional meetings or seminars although only 20% did so frequently.¹⁶⁸

It seems, however, that the agencies do little to assist the presiding officials in continuing their training and education. As budgets tighten, what little is available in this regard disappears. Certainly if the presiding officials have the will, the government should give them the opportunity to continue to improve.

DOES THE SYSTEM RECRUIT THE RIGHT EXPERIENCE, TRAINING, AND PERSONALITY TYPES

Unlike other legal systems, ours converts practicing attorneys into judges; in particular, we use former litigators as trial judges. In other systems, judges are trained for that purpose because those systems recognize that judging is a quite different function from advocacy.

Whatever the validity of our approach generally, it is not sound for the *administrative* judiciary. First, administrative presiding officials are primarily factfinders (rather than procedural referees) and should be knowledgeable in the relevant disciplines. Second, most administrative presiding officials now deal with the lower and powerless strata of our society. They need special skills to do so with fairness and sensitivity. We have not been careful in assuring that we recruit those with these skills and aptitudes.

Formal Qualifications are Adequate

The quality of the presiding officials as a group is impressive and there is little difference between the qualifications of ALJs and AJs. The 1992 ALJ Survey found that 93% of the current ALJs graduated in the top half of their class.¹⁶⁹ About 23% graduated in the top 10% and about 60% in the top quarter.¹⁷⁰ About 17% of the ALJs were members of law review.¹⁷¹ By comparison, the AJ population surveyed had slightly less impressive credentials but still represent an impressive group. As with ALJs, almost 90% of the AJs graduated in the top half and nearly 50% in the

163. *Id.*, response 13c.

164. *Id.*, response 13d.

165. 1992 ALJ Survey, *supra* note 3, response 10o.

166. *Id.*, response 10m.

167. AJ Survey, *supra* note 3, response 13m.

168. *Id.*, response 13o.

169. 1992 ALJ Survey, *supra* note 3, response 36.

170. *Id.*, response 36.

171. *Id.*, response 37.

top quarter. They were slightly below the ALJs in the other categories. About 20% graduated in the top 10%;¹⁷² over 12% were members of law review;¹⁷³ and 13% of the AJs graduated from the "prestige" law schools.¹⁷⁴

Nonetheless, the 1992 ALJ Survey found that nearly three-quarters of the ALJs felt that mediocrity among ALJs was a problem but only 17% thought it was a very serious problem.¹⁷⁵ Most AJs did not think mediocrity of AJs was a serious problem but 43% would at least agree it was a problem.¹⁷⁶ As might be expected, most of both groups believed they were qualified.¹⁷⁷

The experience of the ALJ population is more diverse than many believe.¹⁷⁸ The 1992 ALJ Survey found that 36% classified their primary professional experience as private practice.¹⁷⁹ Those coming out of private practice had rarely appeared before either the employing agency or other federal agencies.¹⁸⁰ They varied in age more than one might expect as well.¹⁸¹

172. AJ Survey, *supra* note 3, response 3.

173. *Id.*, response 4.

174. *Id.*, response 2. Although such lists are always disputable, for purposes of comparison, we used the Cartter Report list relied on by Dr. Burger. Those 15 prestigious law schools are: Chicago, Columbia, Cornell, Duke, Harvard, Michigan, Northwestern, N.Y.U., Pennsylvania, Stanford, Texas, University of California at Berkeley, UCLA, Virginia, and Yale. BURGER STUDY, *supra* note 11, at 107, 107 n.c.

175. 1992 ALJ Survey, *supra* note 3, response 23g.

176. AJ Survey, *supra* note 3, response 26g.

177. The GAO Study found that about 85% said that "rarely" they felt they were not fully qualified to handle their jobs with another 11% having these feelings sometimes or rather often. GAO STUDY, *supra* note 10, response 44-7. In the 1992 ALJ Survey, no ALJs reported that they frequently felt they were unqualified and only 2% reported that they occasionally had those feelings. 1992 ALJ Survey, *supra* note 3, response 15g. It is difficult to interpret this change of attitude.

Most AJs also feel they are qualified to do their job. AJ Survey, *supra* note 3, response 27g. About 16% rarely or sometimes felt they were not qualified. 1992 ALJ Survey, *supra* note 3, response 27g. This reflects a healthy state of affairs that may no longer exist with ALJs. AJs generally have confidence in their abilities and yet sometimes contemplate possible weaknesses.

178. Although today ALJs might be lumped together as "old, white men," in fact they come from a culturally diverse background and many from groups who were the object of discrimination in the legal profession of their generation.

Any number of sources support the conclusion that the ALJ corps is overwhelmingly white and male. The 1992 ALJ Survey found that 94% were male and 6% female. 1992 ALJ Survey, *supra* note 3, response 26. It found that 94% were white, 3% Hispanic and the remaining 3% divided evenly among blacks, Asians, and Native Americans. *Id.*, response 27. Our survey of the AJ population found that it is also predominantly white and male. About 80% were male and about 84% are white. AJ Survey, *supra* note 3, response 8a. Nine percent were Black, 3% Hispanic, 3% Asian and 1% Native American. AJ Survey, *supra* note 3, response 8b.

The Burger study suggests considerable diversity in social status and shows considerable social mobility. Burger found that, while only a quarter came from blue-collar worker backgrounds, in over two-thirds of their homes, the primary wage earner did not have a college degree and over one-third did not have a high school diploma. BURGER STUDY, *supra* note 11, at 113, 115. Minority religious groups are also substantially overrepresented relative to society in general. *Id.* at 117.

179. 1992 ALJ Survey, *supra* note 3, response 25a.

180. BURGER STUDY, *supra* note 11, at 141.

181. The 1992 ALJ Survey found that 94% of the current ALJs were over 45. 1992 ALJ Survey, *supra* note 3, response 5. These were spread fairly evenly among 5 year periods. Seventy percent had served less than 15 years. *Id.*, response 2. Burger concluded that "our data showed little evidence of a group of gray eminences who had become calcified over long years of being on the bench." BURGER STUDY, *supra* note 11, at 143.

Our AJ survey asked more open-ended questions about the nature of the AJs' primary professional experience. Still, the results indicate considerable diversity. Their answers fell into 57 categories.¹⁸² Although some of these categories were quite similar, overall they demonstrated a significant range. The vast majority listed legal experience, but other occupations were represented, including engineer, scientist, physicist, university professor, and various types of medical professions. About 23% called themselves former government attorneys, with several of the other categories suggesting government experience. About 8% were either judges or examiners. Our survey also found a wide range both in terms of years at the agency and in service as an AJ.¹⁸³

Overcommitment to Litigation Experience

The 1992 ALJ Survey found that nearly 80% characterized their experience as litigation.¹⁸⁴ Nearly all of those responding to the 1992 ALJ Survey considered trial experience as at least important, with 72% finding it very important.¹⁸⁵

Nonetheless, the characterization of their role suggests that litigation experience does not provide the crucial training and background. ALJs found factfinding and making credibility determinations to be the most important parts of their jobs.¹⁸⁶ AJs found factfinding to be the most important and making credibility determinations third most important.¹⁸⁷ Very few members of either group characterized their role as "referee."¹⁸⁸ Nor do the key skills listed by both sets of presiding officials suggest that trial experience insures the relevant skills. Nearly all current ALJs rated analytical skills very important¹⁸⁹ and nearly all would rate writing ability as at least important.¹⁹⁰ Our AJ study showed that nearly all AJs rated analytical skill and reasoning ability as indispensable.¹⁹¹ They also all rated writing ability as at least important, with 73% finding it indispensable.¹⁹²

Litigation training and experience would not appear the best indicator of these crucial skills. Surely, these skills could be acquired in any number of other ways.

182. AJ Survey, *supra* note 3, response 9.

183. Three-quarters had been at the agency from 1-11 years with fairly even distribution among those years. *Id.*, response 11. Similarly about three-quarters had been AJs for 1-11 years with fairly even distribution among those years. *Id.*, response 11. (The longest tenure was 31 years.)

The average age of a sitting AJ was 49. *Id.*, response 7. However, the range was fairly great with a standard deviation of 8.7. The youngest was 30 and the oldest was 74. About 60% of them were between 41 and 51.

184. 1992 ALJ Survey, *supra* note 3, response 25b.

185. *Id.*, response 17h.

186. *Id.*, ranking in question 9. Guaranteeing due process was the third and, while more related to litigation experience, such experience is not that important even to that part of the job.

187. AJ Survey, *supra* note 3, ranking in question 15. Guaranteeing due process was second but, while more related to litigation experience, such experience is not that important even to that part of the job.

188. 1992 ALJ Survey, *supra* note 3, response 21h; AJ Survey, *supra* note 3, response 23h.

189. 1992 ALJ Survey, *supra* note 3, response 17-l.

190. *Id.*, response 17j.

191. AJ Survey, *supra* note 3, response 20e.

192. *Id.*, response 20j.

The strong bias in favor of litigation experience no doubt eliminates candidates who otherwise would be competitive in terms of these skills.

Significantly, only about 14% of the AJs classified their experience as that of a trial attorney with another 7% describing their experience as general practice.¹⁹³ Only 19% believed that trial experience was indispensable, and few thought it important.¹⁹⁴

The strong bias in favor of litigation experience in the selection of ALJs may explain the growing commitment to formalism at the expense of flexible and innovative processes. About half of the current ALJs thought compromise of formal procedures was a problem and 13% thought it was frequently a problem.¹⁹⁵ One of the prior studies found that a large percentage, 66%, favored an administrative trial court, completely judicializing the administrative adjudicators.¹⁹⁶ On the other hand, the AJs were not as committed to formalism. Over three-quarters of the AJs did not believe failure to follow formal procedures was a serious problem.¹⁹⁷ Only 5% strongly agreed that it was a serious problem.¹⁹⁸

The justification for administrative adjudicative processes is the opportunity to tailor the processes to the special procedural needs of each particular administrative program. The Supreme Court and generations of commentators have supported the advantages presented by this procedural flexibility. The presiding officials indicated that they try not to be overly committed to formality but they believe in formality. This attitude seems to be forcing more formality into many processes.

Undercommitment to Technical and Substantive Expertise

We asked the current ALJs to rank certain aspects of their function. The most important part of the job, they reported, was marshalling the facts.¹⁹⁹ The most important influences on their decisions, 78% said, were evaluation of the facts.²⁰⁰ More to the point, 94% found applying substantive expertise a significant part of the job, with 64% saying the job involved that function to a great extent.²⁰¹ Nearly all AJs found that their job to a great extent involved factfinding²⁰² and that function was considered the most important.²⁰³ Again, 89% considered applying substantive expertise a significant part of the job, with 71% saying the job involved that function to a great extent.²⁰⁴ Over half of the AJs thought the cases were overly complex in the technical sense but only 5% thought that was frequently a problem.²⁰⁵

193. *Id.*, response 9 (written comments on file with the author).

194. *Id.*, response 20h.

195. 1992 ALJ Survey, *supra* note 3, response 23f.

196. BURGER STUDY, *supra* note 11, at 414.

197. AJ Survey, *supra* note 3, response 26f.

198. *Id.*, response 26f.

199. 1992 ALJ Survey, *supra* note 3, response 9.

200. *Id.*, response 16.

201. *Id.*, response 9e.

202. AJ Survey, *supra* note 3, response 15.

203. *Id.*, response 15.

204. *Id.*, response 15e.

205. *Id.*, response 24d.

Yet, the survey responses suggest that the ALJs' view of the value of substantive expertise is somewhat ambiguous.²⁰⁶ Less than half of the current ALJs considered experience in the substantive area important, and an additional 28% found it very important.²⁰⁷ Overall, therefore, 76% found it at least somewhat important.²⁰⁸

Technical expertise was also generally found important. Only a little over half found technical expertise important and 24% found it very important.²⁰⁹ On the other hand, almost 90% of the AJs found experience in the substantive area at least important and a third found it indispensable.²¹⁰ About 80% found technical expertise at least important and about a quarter found it indispensable.²¹¹

Given the nature of their job, more attention should be given to training presiding officials in the relevant technical areas. Perhaps a greater effort should be made to recruit technical expertise. Indeed, it may be more important than litigation experience in many programs.

The system should certainly assure that technical advice is readily available to presiding officials. One of the arguments for housing the adjudicators in the relevant agency is access to expertise. The 1992 ALJ Survey found that most current ALJs needed expert advice.²¹² The SSA and non-SSA ALJs differed considerably. Nearly all SSA ALJs required experts, with 80% doing so frequently; whereas less than half of the non-SSA ALJs did so.²¹³ Nearly half of the AJs reported that they at least occasionally required experts.²¹⁴ Only about 10% did so frequently.²¹⁵ Thus, presiding officials need expert staff support. The GAO Study found that most ALJs thought improved administrative and/or technical support would improve the administrative process.²¹⁶

More Use of Expert Decisionmakers

Administrative law commentators often advocate incorporating experts into the decisionmaking process. In some cases, members of particular disciplines

206. The Burger study also found that a very small percentage viewed such expertise as indispensable but about a half viewed these as important. BURGER STUDY, *supra* note 11, at 63. On the other hand, one-third found substantive experience unimportant and over half found technical expertise unimportant. *Id.* at 63.

207. 1992 ALJ Survey, *supra* note 3, response 17e.

208. *See id.*, response 17e.

209. *Id.*, response 17i.

210. AJ Survey, *supra* note 3, response 20e.

211. *Id.*, response 20i.

212. 1992 ALJ Survey, *supra* note 3, response 12c.

213. Compare 1992 ALJ Survey, SSA only, *supra* note 20, response 12c with 1992 ALJ Survey, non-SSA only, *supra* note 21, response 12c.

214. AJ Survey, *supra* note 3, response 14c.

215. *Id.*, response 14c. Cofer found that SSA ALJs considered government paid expert witnesses to be as reliable as others. COFER STUDY, *supra* note 16, at 165. Because of the questions she asked on this issue, the results are ambiguous. In the most pertinent part of the survey, she asked respondents to agree or disagree with the following: "The ALJ should put more weight on the claimant's own physician's diagnosis of the claimant than that of the state-paid consulting physician." *Id.* Her computation of the weighted answer was 35% agreeing but 38% disagreeing and another 26% neutral. Perhaps, this indicates nothing more than a general practice of judging the credibility of these witnesses as any others. *Id.*

216. GAO STUDY, *supra* note 10, response 7-9.

should be the decisionmakers. We have not taken full advantage of this possibility.²¹⁷

In many cases, it might make sense to use experts as decisionmakers or at least make them part of the decisionmaking unit, as well as the information gathering process. More flexibility should be built into the selection process to allow for this reform.

Recruiting Judicial Personality

Assuring that citizens are satisfied with the administrative adjudicator is important. One key to their comfort level is the personality and behavior of the presiding official. Yet, many do not take judicial attitude into the hearing room.

Unfortunately, the ACUS Study Group did not have the resources to systematically explore the views of those who appear or their representatives. However, we received enough information from other sources to suggest a need to inquire into this aspect of the system. My initial conclusion is that the system does not do enough to assure that the administrative judiciary will be sensitive to those who appear before it.

Of course, racial and gender bias cannot be tolerated. A recent GAO study made a very strong case that Social Security ALJs make racially biased decisions.²¹⁸ Witnesses before the ACUS study group also raised serious challenges of gender bias.²¹⁹ The system must stamp out any such biases. The ombudsman and periodic review schemes advocated here provide the method for determining the validity of such charges against individual presiding officials.

A more subtle problem may be in the behavior of some ALJs. The way one approaches the process of judging irrevocably affects the fairness and accuracy of the ultimate determination. It is clear to me that a number of the present ALJs should not be in position of judging people. The selection process itself must be made sensitive to behavior and personality factors. Perhaps, some very sophisticated behavioral testing in that process should be considered. The efficacy of such testing, however, is well beyond my expertise.

Conclusion

The federal administrative judiciary is far from perfect and is in need of reform. The first step is a shift in perspective from that of the presiding officials to that of those who appear before the officials. The defects in the system look different from that perspective, and the nature of the reform changes as well. The second step is to look beyond traditional, legalistic structure and search for more practical, human solutions.

217. See Improved Use of Medical Personnel in Social Security Disability Determinations, 1 C.F.R. § 305.89-10 (1989).

218. U.S. GENERAL ACCOUNTING OFFICE, SOCIAL SECURITY: RACIAL DIFFERENCES IN DISABILITY DECISIONS WARRANTS FURTHER INVESTIGATION (1992).

219. *Study Group Hearing*, Washington, D.C. (Oct. 17, 1991) (statement of Eileen P. Sweeney, Staff Attorney, National Senior Citizens Law Center).