Reflections upon the Federal Administrative Judiciary

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The "administrative process" has been studied extensively over time, but the roles and qualifications of those who pass judgment in that process have not been examined with equivalent rigor. Thus, we know from scholarly research and from statutes and case decisions much about the nature of administrative procedures. However, the people who actually make that process operate are little known except to those who are directly involved in the system—the litigants and the lawyers (government and private) who appear before them. As a result, these deciders are aptly named the "hidden judiciary."

Not surprisingly, the federal administrative judiciary, like the administrative process itself, has grown and evolved significantly over the years. The public is not aware of these changes. Therefore, it is important to "discover" and to illuminate the administrative judiciary in order to understand its seemingly infinite variety. Such an analysis is fundamental to any assessment of administrative justice because the quality and fairness of the process can be predicted only by understanding its key element: the administrative judge.

In order to define the universe of the administrative judiciary, the scope of inquiry must be limited. At the outset, the study must be limited to those administrative deciders—whether they are labeled "judges," "examiners," or something else—who actually pre-
side at some kind of hearing, whether formal or informal. Therefore, this study will not encompass the millions of decisions that are rendered by countless other deciders who adjudicate public rights, opportunities, or obligations in other settings that are non-confrontational and often not even face-to-face. As a practical matter, these deciders are the “invisible judiciary,” and they have not yet been subjected to systematic study.

There are, however, two categories of administrative deciders about whom we can aggregate data. First, there are the established Administrative Law Judges (ALJs) who have been anointed by the Administrative Procedure Act (APA) to preside over formal hearings. The second category is far more amorphous, but can still be distinguished from “non-hearing” deciders. The deciders in this category are frequently called “administrative judges” or “hearing examiners.” They do not enjoy the benefits or insulation from agency control as ALJs do under the APA.

This Article will focus on these two categories of administrative deciders. It will assess their qualifications and experience, and it will analyze the type of proceedings over which they preside. Attention will be directed at how they are selected, their range of compensation, and, of critical importance, the degree of independence under which they operate. A complete picture of our federal administrative judiciary should emerge from this study, and an agenda of unresolved issues shall be raised for subsequent consideration.


2. Deciders in this category may include those who make initial grants or denials of benefits (such as National Science Foundation applications) or rights of access to government facilities (for example, the park rangers who control access to national parks), and similar officials. They can be distinguished from the administrative judiciary by the fact that they render their decisions in a non-hearing context. This does not mean, of course, that they are outside the ambit of due process concerns if their decisions affect private rights or benefits. See generally Verkuil, A Study of Informal Adjudication Procedures, 43 U. CHI. L. REV. 739 (1976).

It will become clear that the system under which ALJs and other administrative deciders are chosen is a matter of happenstance, not rational determination. From the arguments presented, there will emerge a recommendation to Congress and to the respective federal agencies that administrative judges be chosen on a more coherent basis that relies upon the importance of the decision being made.

I. THE ADMINISTRATIVE JUDICIARY

The term "federal administrative judiciary" is not frequently used, but it highlights the relationship between the administrative decision system and the federal judiciary. Administrative deciders are significant participants in our constitutional scheme. The recent case of Freytag v. CIR 4 recognizes many of these deciders as "inferior officers" under the appointments clause contained in Article II of the U.S. Constitution. A study of the two categories of administrative deciders—the ALJ and the more generic category of administrative judge—follows.5

A. The ALJ

Administrative Law Judges as a group are among the most diversely talented, well-trained, and deeply entrenched adjudicators in our system, even when they are compared with the federal district and state judiciary. There are almost 1,200 ALJs who are assigned to 30 federal agencies.6 This is approximately equivalent to the number of judges on the federal trial bench. While it is impossible to compare their respective workloads in any meaningful way, the ALJs probably decide more "cases" each year than do their federal judicial counterparts.7

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4. Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631 (1991) (holding that special trial judges of the Tax Court are "inferior officers" under Article II, § 2, cl. 2, and that the Tax Court itself is a "court of law" under that provision).
5. Despite the possibility of confusion based on similarity of titles, it seems preferable to label the latter category in a positive way rather than simply as "non-ALJs."
6. Statistics provided by Office of Personnel Management (Oct. 1, 1991) (the precise total was 1,184 on that date, of which over 800 were in the Social Security Administration). By comparison, there are about 636 federal district judges deciding cases in the federal courts. If bankruptcy judges and magistrates are included within the definition of the federal trial bench, then the total number (1,250) would approximate the size of the ALJ corps. Statistics provided by Federal Judicial Center (Aug. 1, 1991) (636 federal district judges, 291 bankruptcy judges, and 323 magistrates).
7. The Director of the Administrative Office of the U.S. Courts reports that for the year ending June 30, 1991, there were 207,742 civil cases and 47,035 criminal cases filed in the district courts. Report Highlights Judiciary's Workload, The Third
In terms of salary, the ALJs cost the government about $100 million per year. (They receive an average annual salary of about $83,000.)

By contrast, the 636 federal district judges (who receive annual salaries of $125,000 each) cost about $80 million per year. If the salaries of bankruptcy judges and magistrates are included (at $115,092 each), their service costs the government another $70 million or so. Thus, the federal investment in ALJs is two-thirds that of the entire investment in the trial-level judiciary. This is a significant commitment of resources to a cadre of deciders who often go overlooked in the federal decision universe.

As the government may rightly expect, ALJs are impressively credentialed. A survey concludes that twenty-one percent of them attended “prestigious” law schools and that ninety-four percent graduated in the top half of their respective classes (thirty percent graduated in the top ten percent).

They average fifty-eight years in age, are ninety-plus percent white males, and fifty-five percent of them were attorneys for the federal government before they became ALJs. The ALJs acknowledge that they enjoy less prestige than do federal judges. Nonetheless, in education, training, and experience, they seem no less qualified than bankruptcy judges and magistrates, if not members of the federal bench. Moreover, ALJs, unlike federal district judges, are chosen in a nonpolitical way by an elaborate selection system that is run by the Office of Personnel Management. They enjoy a more secure tenure and compensation than do bankruptcy judges or magistrates because they do not serve terms. Rather, they effectively receive life tenure subject to removal for good cause. Consequently, ALJs rank almost as high as the fed-
eral bench in terms of job security. These protections provide ALJs with a certain degree of judicial independence. However, they are by definition bound by the decisional authority of the agencies for which they work.

The investment of public resources in these non-Article III "judges" testifies to their importance in our adjudicative universe. Yet their work remains largely unappreciated, if not unknown, and their role in the APA's administrative scheme continues to be ambivalent. They remain a highly qualified and well compensated cadre of deciders which has yet to find a secure and defined role in our administrative structure.

B. The Emerging Category of "Administrative Judge"

One reason that ALJs are in a state of flux is that there are other administrative deciders who do similar work but who are neither comparably protected in their independence nor compensated at similar levels. As a result, whereas the ALJs as a group rival the federal trial judiciary and adjuncts in both number and compensation, they are numerically overshadowed by another group that is almost twice the size of the ALJ corps and decides more cases, but does so with less prestige, compensation and job security. This second group may be the real hidden judiciary.

In an effort to determine the universe of non-ALJ hearings that are conducted by federal agencies, the Administrative Conference conducted a survey in 1989. The survey found that there were eighty-three types of active cases, almost 350,000 annually, that non-ALJs were conducting outside the APA formal-hearing framework. These cases engaged over 2,600 presiding officers, either on

APA was enacted. Therefore, ALJs enjoy a tenure not significantly different in practice from the members of the federal bench. In fact, a Senate committee has noted, "In essence, individuals appointed as ALJ's hold a position with tenure very similar to that provided for Federal judges under the Constitution." S. REP. NO. 697, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 496-97.

13. A recent study has collected valuable data on these non-ALJ hearings and presiding officers. See J. FRYE, SURVEY OF NON-ALJ HEARING PROGRAMS IN THE FEDERAL GOVERNMENT (1991) (study conducted for ACUS).


15. The survey, dated June 28, 1989, asked all agencies to list information about deciders who conducted oral hearings not required by statute to be on the record. See J. FRYE, supra note 13, at app. A.

16. Id. at 4.
a full-time or part-time basis, who ranged in grades between GS-9 and GS-16.\textsuperscript{17} Thus, the "non-ALJ corps" is about twice as large as is the ALJ corps, and it carries a decision load that is at least the magnitude of that carried by the ALJs.\textsuperscript{18} For the first time we may now identify with some accuracy the decision world of federal administrative law, at least at the hearing level.\textsuperscript{19} These data invite a series of more detailed inquiries.

When the non-ALJ hearing data are disaggregated, they reveal a concentration in only a few case and decider types. By far the largest category of cases arose in the Executive Office of Immigration Review of the Department of Justice. This office accounted for about 152,000 of the 350,000 annual caseload, roughly forty-five percent of the total. This office employed about seventy-six full-time "administrative judges."\textsuperscript{20} The next largest category of cases arose in Health and Human Services, where presiding officers employed by insurance carriers (whose numbers were not calculated) decided 68,000 cases per year, comprising twenty percent of the total caseload.\textsuperscript{21} The third largest category arose in the Department of Veterans Affairs, which decided 58,000 cases per year (seventeen percent). The deciders involved in disability and benefits determinations ranged widely in experience, grade, and legal training.\textsuperscript{22}

\textsuperscript{17} Id. at app. B.

\textsuperscript{18} The estimate of ALJ hearings is difficult to make because statistics are not collected outside the SSA context, where over 250,000 ALJ decisions were rendered in 1990. See SSA Office of Hearings and Appeals, Key Workload Indicators 3rd Quarter Fiscal Year 1991 at 2 [hereinafter SSA-OHA Annual Report]. The last effort to collect ALJ adjudication statistics for all agencies was done in 1980 by the Administrative Conference. See Uniform Caseload Accounting System, Federal Administrative Law Judge Hearings: Statistical Report for 1976-78 (1980) (documenting about 20,000 ALJ decisions outside of SSA).

\textsuperscript{19} By drawing the line at "some kind of hearing," we exclude, of course, the potentially larger category of non-hearing decisions made informally by the federal government which are beyond the scope of this Article. See supra note 1.

\textsuperscript{20} J. Frye, supra note 13, at app. B. The number of Immigration Judges is now approaching 100. Discussion with Chief Judge William Robie (Jan. 29, 1992).

\textsuperscript{21} J. Frye, supra note 13, at app. B. The use of private deciders as hearing officers in Medicare reimbursement cases was upheld over due process challenge in Schweiker v. McClure, 456 U.S. 188 (1982). For a discussion of the due process requirements for decider impartiality, see infra text accompanying notes 35-43.

\textsuperscript{22} The VA employs 44 lawyers and 22 nonlawyers at grade GS-15, who sit in panels of 3 as the Board of Veterans Appeals. It also employs 1,692 nonlawyers on a part-time basis whose grades range from G-9 to GS-13. See J. Frye, supra note 13, at app. B.; infra text accompanying notes 51-68.
These three agencies account for over eighty percent of the caseloads studied, and they range through a remarkable variety of decider qualifications, from administrative judges to nonlawyer and even nongovernmental examiners. They employ procedures that range from the equivalent of formal APA hearings to informal processes from which there is no appeal. These decisions are often similar to the kinds of decisions traditionally made by ALJs. It is not obvious why the presiding official over these case types is sometimes an ALJ and sometimes a non-ALJ. Moreover, it is not clear what case characteristics trigger the use of APA formal hearings with ALJ presiders, in contrast to less formal hearings with non-ALJ presiders.

When Congress or the agencies choose to utilize an administrative judge rather than an ALJ, they are opting for a decider who has less decisional independence, lower pay and benefits, and less job security. The selection and appointment procedures for administrative judges are controlled by the agencies themselves. By contrast, the Office of Personnel Management oversees the ALJ appointment and selection process. Despite these differences, it appears that litigants and the public do not object to the process by which administrative judges are selected.

II. RATIONALIZING THE USE OF ALJs: MIXED SIGNALS FROM CONGRESS AND THE COURTS

The search to understand why ALJs do not appear to be utilized in a systematic way begins with Congress, but it also extends to the Supreme Court. On the one hand, both bodies have empowered agencies to make decisions with less formality than would be required of the judiciary. At the same time, however, the increased latitude that Congress and the Court have granted administrative decision-making has blurred the line between those areas in which ALJs are required and those in which administrative judges will suffice.

23. The other significant categories of cases are those conducted by the Coast Guard in the civil penalty arena (navigation, marine safety, and pollutant discharges) which number about 20,000 and are decided by 10 nonlawyer Coast Guard officers. (The high caseload per decider is explained by the fact that only about 7% of the total go to hearing.) See J. FRYE, supra note 13, at 43–44. Other significant caseloads involve EEOC which uses about 79 GS-11 to GS-14 attorneys to decide about 6,227 cases and the Board of Contract Appeals which utilizes about 80 attorneys (grades ranging between GS-14 to GS-18) to decide some 5,000 cases.

24. The similarity of the case types will be discussed in terms of the SSA and VA disability process at infra notes 54–69 and accompanying text.
A. The Due Process Clause and ALJs

In *Wong Yang Sung v. McGrath*, the Court held that the Due Process Clause, as well as agency statutes, could require the presence of APA hearing examiners. The case was quickly reversed by legislative action that rejected the use of ALJs as presiding officers in immigration and deportation cases. The Court subsequently acceded to this legislative reversal. By failing to equate due process requirements with formal hearings under the APA, Congress and the Court greatly reduced the potential role of the ALJ. Nevertheless, in retrospect, the decision to decouple the use of ALJs and formal hearings from the Due Process Clause seems to have been the only sensible course. The "due process revolution" of the 1970s that was inspired by *Goldberg v. Kelly* would surely have swamped the administrative decision process had ALJs been required every time that procedural due process was invoked.

In the 1970s another development occurred that expanded the potential use of ALJs. The Social Security Administration (SSA) had long utilized ALJs, even though it was not required by the APA "on the record" hearing requirements to do so. By the 1970s the number of disability determinations had skyrocketed with the advent of expanded coverage. It quickly became apparent that the number of ALJs who were making disability determinations would far outstrip those making all other formal decisions in govern-

27. 397 U.S. 254 (1970). *Goldberg* created a "due process revolution," in the late Judge Henry Friendly's words, by specifying in detail the procedural ingredients required to satisfy due process in the informal administrative setting (i.e., revocation of AFDC payments). Ironically, however, *Goldberg* mandated little in terms of decider independence, requiring only that deciders not have previously participated in decisions they are called upon to review. Id. at 271. See generally Verkuil, supra note 2, at 750 n.45.
28. The demise of the right-privilege distinction and the concomitant rise in the number and kind of interests protected by due process, see, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972), created a veritable landslide of due process adjudications at the state as well as federal level that could potentially have been included within the APA formal hearing requirements. The realization that the administrative decision system could be overwhelmed by these new procedural rights undoubtedly contributed to the Court's modification of them in cases like *Mathews v. Eldridge*, 424 U.S. 319 (1976).
Remarkably, this expanded use of ALJs emerged without APA compulsion in that no “on the record” hearing was mandated in the disability context.

In Richardson v. Perales the Court made it clear that the so-called “three hat role” of the ALJ (representing the claimant, the government, and impartial decider) was entirely consistent with statutory and constitutional norms. Thus a new category of ALJ who presided over benefactory rather than regulatory decisions emerged. These ALJs had the unusual distinction of conducting informal rather than formal hearings; in return they received a lower grade (GS-15 rather than GS-16). By presiding over informal, non-lawyer-dominated hearings, ALJs departed from their traditional association with the trial-type process that had been contemplated by APA formal adjudication procedures. Nevertheless, different though it may have been, this category expanded the ALJs’ use dramatically. It also raised the prospect that ALJs could be used in other non-formal hearing settings, and it effectively expanded the relevant qualifications and talents that ALJs needed in order to preside effectively.

As it endorsed the use of ALJs in the informal setting of SSA disability proceedings, the Court also accepted a low threshold for decider independence outside the APA formal hearing context. In Arnett v. Kennedy a divided Court allowed a government employee to be disciplined by his superior for making statements...
against that superior. Similarly, in *Withrow v. Larkin* the Court permitted the potential conflict of interest that exists when the investigatory and adjudicatory functions are combined into a single entity in the state informal hearing context. For due process purposes the Court seems willing to narrow the bias or conflict of interest inquiry into one involving only pecuniary interests.

Moreover, the Court has encouraged experimentation with creative decision techniques that question the need for any type of government deciders, not only ALJs. For example, in *Schweiker v. McClure*, the Court upheld, against due process challenges alleging bias, the use of non-lawyer, privately contracted deciders to resolve Medicare reimbursement claims. This remarkable decision effectively contradicted established notions of decider formality by not only privatizing the deciders but also placing them beyond the exclusive control of the legal profession. Moreover, the Court refused to mandate an administrative or judicial appeal process as part of a due process requirement.

It is fair to say that by the 1990s the Court has moved towards greater decisional freedom under the Due Process Clause. From its earlier position in *Wong Yang Sung* of equating due process to for-

37. *Id.* at 55. The Court may have reasoned that this combination of functions at the state level had its counterpart in the organizational structure of many independent federal agencies, such as the FTC, where the Commission in effect approves the commencement of investigations and issuance of complaints by its enforcement staff and then sits in judgment on the resulting case.
38. *Gibson v. Berryhill*, 411 U.S. 564 (1973), makes this distinction clear. The fact that a private board of optometrists was authorized by state law to regulate their competitors (with possible pecuniary benefit) condemned the arrangement under due process standards. *See also Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (invalidating the practice of allowing municipal mayors to determine traffic violations and impose fines, which accounted for a substantial portion of village revenue); *Tumey v. Ohio*, 278 U.S. 510 (1927) (holding unconstitutional the practice of allowing municipal mayors to determine Prohibition violations and impose fines payable to their municipalities).
40. Justice Powell likened the private deciders in the case to government officials. "The hearing officers involved in this case serve in a quasi-judicial capacity, similar in many respects to that of administrative law judges." 456 U.S. at 195. The comparison seems questionable, if not invidious, since ALJs are obviously better trained and have a higher status than the private contract deciders involved in hearing reimbursement cases.
41. *Id.* at 198–99. Subsequent to this decision Congress provided for an appeal to an ALJ in cases where the amount in controversy is $500 or more. Pub. L. No. 99-509, § 9341(a)(2)(B) (1986) (codified as amended at 42 U.S.C. § 1395(b)(2)(B) (1988)). This amendment is yet another illustration of the different view that Congress and the courts often take about the necessity for formality in deciders or process.
mal APA hearings, the Court has evolved from the Goldberg requirement of specifying procedures for due process to a world that can readily accept an informal process of infinite variety. In this environment the decider need not be APA-qualified, nor must the APA formal hearing process serve as a baseline. This informal process, which is not defined by the APA, remains an amorphous competing model. The only informal processes contained in the APA are the bare bones procedural guidelines of section 555. The question whether an informal process can be generalized from existing agency practices remains uncharted territory under the APA.

B. Congressional Reactions to Decider Formality

Over the last forty years Congress has not sent consistent signals about the use of ALJs either. Congress intended the APA to leave to individual agencies the discretion whether to employ ALJs, restricting the requirements for ALJs to those agencies whose organic legislation mandated "on the record" hearings. Of course, the APA was drafted against a background of existing statutes that contained the "on the record" requirement. Therefore, many regulatory agencies instantly were required to employ ALJs in 1946. The first task that the Civil Service Commission faced in 1947 was to determine whether incumbent deciders at these agencies with "on the record" statutes were qualified to serve as "hearing officers" under the APA.

Once the APA was launched, however, Congress has not expanded the number of agencies required to use APA-qualified hearing examiners, even though those agencies perform work that is as important as those with "on the record" requirements. Congress simply has not added significantly to those agency statutes that require "on the record" hearings, even though the expanded use of

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45. The failed attempt to review individually the qualifications of these 197 incumbent hearing officers rather than accept them as a group is told in Fuchs, The Hearing Examiner Fiasco under the Administrative Procedure Act, 63 HARV. L. REV. 737 (1950). See also Scalia, supra note 1 (discussing present day problems of appointment and grading of ALJs).
ALJs was the basic premise of the APA. Indeed, Congress has instead accepted—if not endorsed—the large category of non-ALJ administrative judges that exist throughout government.

On the other hand, Congress has increased the independence and stature of existing ALJs in several significant ways. In accepting the Civil Service Commission's conversion of APA hearing examiners to administrative law judges, it did much more than merely approve a name change. This decision effectively legitimated a federal administrative judiciary. It sanctioned the establishment of a corps of deciders who today rival federal and state judges in terms of their qualifications and benefits. And this trend continues. Recently, Congress further boosted the status of ALJs by approving a new pay structure that eliminated the two-grade system and increased their salary. Both of these developments suggest that Congress is not fully comfortable with the more limited role of hearing examiners originally contemplated by the APA.

These achievements surely suggest that one of the more effective lobbies in government involves ALJs and their support group, the organized bar. The bar has been single-minded in its insistence that the value of decider independence can be best served by utilizing ALJs in the formal hearing setting. Lawyers quite naturally desire to conform the administrative process to the judicial process with which they are most comfortable. The current debates in Congress that surround the desirability of an independent ALJ

46. Of course the fact that Congress accepted the use of ALJs in the SSA disability hearing process even without the on the record requirement has vastly enhanced their number and influence.

47. Congress also approves by statute the specific use of non-ALJs in contexts where ALJs are also used, such as the Merit Systems Protection Board. In the latter situation, ALJs and non-ALJs are used to decide disciplinary cases. The MSPB employs 66 administrative judges, who make initial decisions in personnel appeals involving federal employees, and one ALJ who is required by statute to hear initial decisions in cases brought by agencies against other ALJs. See 5 U.S.C. § 7521 (1988); 5 C.F.R. § 1201.131 (1991).


49. The ABA has long supported enhancements to ALJ independence as well as expansion of the role of ALJs. In 1986, for example, the ABA gave an award to the Social Security ALJs for upholding the integrity of administrative adjudication by attacking in court agency mandates for decision quotas and percentage outcomes. See Bono, Administrative Report, Judges' J., Winter 1992, at 23, 41.
corps are part of this ongoing effort to judicialize the administrative process.\footnote{See, e.g., S. 594, 101st Cong., 1st Sess., 135 Cong. Rec. S2711–13 (daily ed. Mar. 15, 1989). One can also read the recent legislation which subjects the decisions of the Veterans Administration to (limited) judicial review as further evidence of Congress' interest in judicializing the administrative process. See Veterans' Judicial Review Act of 1988, Pub. L. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.).}

However, it is not clear that the continued concern over decider independence at the administrative level will enjoy sustained support. The cost of using ALJs rather than other decider alternatives and the problems that heightened decider independence can cause for caseload management have generated resistance within agencies, and have helped spawn the expanded use of non-ALJs documented herein. Thus, these conflicting approaches may well cause Congress to reconsider the ALJ role in the future.

III. THE INDEPENDENCE OF THE ALJ

Ironically, ambivalence towards the use and role of ALJs is related to the quality that many perceive as their greatest asset: their strict independence from participant or agency control. This very quality motivated the drafters of the APA to create the formal adjudication process in 1946.\footnote{Before the APA, hearing examiners were described by Congress as biased and partisan. See Scalia, supra note 1, at 57.} However, while the APA protected the ALJ from improper agency control over the decision process, it also ensured that the outcome of ALJ decisions would rest formally in the hands of the agency head.\footnote{The final decision is that of the agency and no deference is due the ALJs decision. See 5 U.S.C. § 557 (1988).} This compromise over the functions that ALJs perform under the APA serves to confuse their role today. The ALJ acts independently in all significant respects during the course of the decision process, but once her decisions are made, they are not granted the respect of finality or even deference.

Today disputes over ALJ independence are rarely about fundamental issues such as ex parte contacts or agency coercion; rather, they involve trivial squabbles over perquisites and benefits.\footnote{See Moss, Judges Under Fire: ALJ Independence at Issue A.B.A. J., Nov. 1991, at 56, 59 (documenting ALJ complaints over agency assignment of parking spaces and attendance at training conferences).} Legitimate agency reservations about the ability to control ALJs' performance under the APA are growing. In the process, these concerns have spawned the variety of non-ALJ deciders discussed here. Since the Supreme Court has established that administrative
decider independence rarely poses a serious due process issue, agencies (and Congress itself) are free to seek more efficient alternatives. In this setting the question becomes whether the use of ALJs is good policy, not whether they are necessary to satisfy fundamental notions of fairness. In making the policy determination, independence becomes a variable, not a constant. It must be subjected to scrutiny before deciding to formalize administrative deciders any further.

A. ALJ Independence as a Challenge to Agency Control: The Social Security Administration and the Veterans' Administration

As anyone who labors in the academic community will attest, the security of tenure has costs as well as benefits. This is no less true with regard to ALJs. Once one passes the point at which independence is a due process desideratum, it becomes an issue that is part of any tradeoff between management efficiency and decider prerogatives. Today that is the framework within which the issue is debated. Indeed, the continuing saga of the SSA's attempts to place productivity and quality-control standards on the ALJs who decide its disability cases captures the current debate well.

Since Social Security ALJs decide so many cases that have similar fact patterns, to which they apply a single legal standard and to which they are assigned randomly, the SSA naturally desires to impose uniform standards of case management to achieve greater consistency in outcomes. A decision system that handles an excess of 250,000 cases annually and that employs upwards to 800 ALJs cannot ignore the search for systemic solutions. However, these management techniques have a tortured history. The agency has experimented with decision "quotas" to try to regularize the number of cases that are decided by each ALJ per month. Inasmuch as the cases are assigned randomly, the SSA has also experimented with "goals" for allowance rates as well. The SSA and its independent-minded ALJs are locked in a continuing struggle over the proper parameters of these management standards.54

From a management perspective, there is no doubt that productivity and even allowance-rate goals are sensible control mechanisms. However, when faced with a corps of independent deciders who view themselves as the functional equivalent of federal district judges, and who are willing to go to court and to Congress to defend their claims to independence, there is not much an agency can do to force caseload management. Indeed, this seems to be the conclusion that has been reached by the SSA and its Office of Hearing and Appeals. It has jettisoned controversial techniques such as workload quotas and non-acquiescence in court of appeals decisions. The agency has concluded that quotas and allowance-rate goals should be abandoned because they are of limited use in a system of independent deciders. Today the battle for management control at the SSA seems to be over, a fact which is corroborated by no suits having been filed by AUs against the agency during the last five years.

The SSA-ALJ experience is the prime example of the tension between management control and decider independence. It has subsided primarily because of the strength of the ALJs on the independence issue. The political lessons of this experience are clear: Management techniques are no match for claims of independence. Once the ALJ is chosen as a decider, judicial-type prerogatives place control over the process in his or her "court." The decision arena reflects a setting where individual decision-making prevails over attempts to regularize outcomes on a statistical basis.

But imagine another reality. Suppose that deciders other than ALJs were chosen to decide disability cases. Would management techniques be easier to implement? Could the outcomes be different? It so happens that there is a disability decision system of comparable magnitude to the SSA that does not employ ALJs. The

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55. The agency has also had its fights with the courts. In order to help achieve uniform policy it has refused to accept as precedent some decisions of federal courts. This practice has attracted the ire of the courts, Congress, and the bar. See Estreicher & Revesz, Nonacquiescence by Federal Administrative Agencies, 98 YALE L.J. 679 (1989). The agency's nonacquiescence policy was reversed by regulation in 1987.

56. Conversation with Michael Astrue, General Counsel, Dep't of Health and Human Services (Dec. 12, 1991).

57. This inaction has also led to a significant drop in appeals to the federal district court from ALJ decisions from over 29,000 in 1984 to about 10,000 in 1989. See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1989 ANNUAL REPORT 7 (1989). Another factor affecting appeal rates to the federal courts may simply be that the rate of decisions favorable to the claimant has gone up from less than 50% in the 1970s to over 62% in 1990. Also, partially favorable decisions have been possible since 1986. See SSA-OHA ANNUAL REPORT, supra note 18, at 2.
Department of Veterans' Affairs handles about 4.5 million claims annually. The agency initially decides these cases by utilizing over 1,600 non-lawyer deciders in regional offices. This group is comparable to the state officials who initially decide SSA disability cases. Obviously, the state deciders are less susceptible to management control by the SSA because they are not directly employed by the administrative agency. Thus, the DVA disability system has the additional advantage of greater agency control over the initial application stage.

Appeals from the DVA regional offices go to the Board of Veterans Appeals (BVA) which holds hearings and sits in three-person panels (two GS-15 lawyers, one GS-15 medically trained official). These panels are designated as non-adversary in nature.\footnote{58. See 38 C.F.R. §§ 3.102, 3.103 (1991).} There are 66 BVA members, and they render over 44,000 decisions annually.\footnote{59. Statistics provided to author by DVA personnel in October 1991.} There is no judicial appeal on the merits from the BVA decisions, although the Court of Veterans Appeals has recently been installed as an Article I court of limited review.\footnote{60. See 38 U.S.C. §§ 4051-52 (1988); Veterans' Judicial Review Act of 1988, Pub. L. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.); see also Stichman, The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings, 41 ADMIN. L. REV. 365 (1989).}

There are many similarities and differences between the SSA and the DVA. First, they have in common a massive decision burden; second they must apply a myriad of individual circumstances to a complicated disability standard. They differ in that the DVA deals with a designated portion of the public that Congress specifically wants to benefit, whereas the SSA deals with the needs of the population as a whole.

There is no easy way to decide whether one system renders "better" or more correct decisions than the other. Both have elaborate internal mechanisms for achieving fair and efficient decisions, although the SSA also has available the corrective of judicial review. When ALJ decisions are reversed in significant number by the district courts,\footnote{61. In some years, district courts have reversed up to 50% of the time. Statistics provided by SSA-OHA (Nov. 27, 1991) (in 1984 and 1985, the reversal rate for ALJ neared almost 50%). Currently the reversal rate is around 20%. \textit{Id.}} a further control on decision quality exists that does not, by definition, apply to previously non-reviewable BVA de-
decisions. Today the Court of Veterans Appeals performs that quality-control function in certain respects.\textsuperscript{62}

As a practical matter, one can only conclude that the two decision systems are \textit{different}, not “better” or “worse.” BVA members are not ALJs (although they would like to be\textsuperscript{63}), and they sit in panels. The advantage of panels is that they tend to decide by consensus and are therefore more likely to reach a more correct (or less extreme) result.\textsuperscript{64} This should be even more true in circumstances where one of the three panelists is medically trained, since medical issues are central to the disability determination.\textsuperscript{65}

A disadvantage of panels could be their cost. Still, the cost need not be triple. Only one opinion is written, and methods for achieving decisional efficiency are readily developed by the panelists.\textsuperscript{66} Moreover, if one takes a rough cut at the number of cases that are decided by the BVA, in contrast to those decided by the individual ALJs at the Social Security Administration, the productivity issue seems to disappear. The 66 BVA members decide about 44,000 cases per year, an average of 666 cases per member annually (or 55 cases per BVA member monthly).\textsuperscript{67} This total compares favorably with the ALJ “suggested” monthly average of 31 cases.\textsuperscript{68}


\textsuperscript{63} BVA members currently serve terms of six years. They are considering asking Congress to convert them to ALJs with the equivalent lifetime tenure. Conversation with VA personnel (Oct. 1991).

\textsuperscript{64} In research done on SSA decision-making, regression analysis showed that reformulating ALJs in panels of three tended to cut off the tails of extreme grants or denials. See J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil & M. Carrow, \textit{Social Security Hearings and Appeals} 21–27, 43–46 (1978) [hereinafter \textit{SOC. SEC. HEARINGS & APPEALS)].

\textsuperscript{65} The Court of Veterans Appeals appears to have limited the significance of the medically trained BVA panel member by requiring panels to refute medical evidence only through consideration of other expert medical evidence and not through general conclusions reached by the panels and their medically trained members. See \emph{e.g.}, Colvin v. Derwinski, No. 90-196 (U.S. Ct. Vet. App. Mar. 8, 1991). This ruling could well encourage the Veterans Administration to discontinue the use of medical members on panels and utilize them instead as experts. Discussion by author with VA officials. But there is no evidence that the removal of medically trained members from BVA panels would lead to better decisions; in fact, the presence of these decision experts can give credibility to the decision process that is lacking in the SSA program.

\textsuperscript{66} See \textit{SOC. SEC. HEARINGS & APPEALS}, \textit{supra} note 64, at 43–45.

\textsuperscript{67} The BVA denies benefits in about 75\% of the cases it reviews, a denial rate significantly higher than SSA-ALJs who deny only about 25\%. See \textit{supra} note 57.

\textsuperscript{68} See cases cited \textit{supra} note 54. If one simply divides the number of cases decided in 1990 by the number of ALJs assigned (258,181 ÷ 696), the average is approximately 371 cases per ALJ per year, or 30.9 per month. See \textit{SSA-OHA ANNUAL REPORT}, \textit{supra} note 18, at 1–2.
This comparison of two similar decider schemes suggests several conclusions. If ALJs are not necessarily better or more efficient deciders than are BVA members, what is their advantage in this context? Indeed, when many similar cases have to be decided in circumstances where consistent outcomes are desirable, maximum independence of deciders may not be an institutional asset. It is at least arguable, in other words, that the great value of the ALJ—that of decisional independence—is wasted in a system where caseload management must be the critical variable. This does not mean that ALJ independence lacks value in other decision contexts. Indeed, the case for decider qualifications varies with the kind of case to be decided. ALJ independence can be a crucial ingredient to fair decision-making in circumstances where institutional pressure may affect outcomes on the individual case.

B. ALJ Independence as an Assurance of Objectivity

While one could infer from the above discussion that ALJs are not necessary in the benefits context, the use of an independent ALJ could still be quite significant in other contexts. Consider those cases where one's liberty is at stake or where the government seeks to enforce its will upon individuals. These “enforcement” cases require deciders who enjoy maximum independence from agency control because their work is closest to that of federal district judges in criminal and civil cases. One growing category of cases of this kind—administered by the Department of Justice—does not utilize ALJs. The Office of Immigration Review decides 152,400 immigration cases per year. Each of these cases involves decisions of critical importance to the individual, such as whether an alien must be deported or excluded from entry to the United States.

The procedures employed by the Office for Immigration Review in deportation and exclusion cases embody most of the requirements of APA formal adjudication, and the Executive Office for Immigration Review has become functionally separate from the

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69. This is a much debated issue. On one side are representatives of claimants who believe fervently that judicial review of ALJ decisions is the best way to ensure correctness; on the other side is scholarly research which suggests that an internally managed system is the best way to create overall norms of correctness or at least consistency. See J. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims (1983).

70. See J. Frye, supra note 13, at 28.

The Department has responded to some criticism of its approach to independence of the administrative judges, but the Department has resisted the logical extension of immigration judges to ALJs. Perhaps the reasons for its reluctance are historical since the Wong Yang Sung case and its aftermath specifically freed the immigration process from the due process strictures of the APA. Perhaps the reasons are more practical. Not many agencies favor the ALJ selection process that the OPM requires or the degree of independence that ALJs assert from agency control. For whatever reasons, immigration judges remain a category of deciders who function much like ALJs but do not achieve their level of status and independence.

Another category of deciders who also make decisions that require maximum independence and integrity are those administrative judges who adjudicate the grant or denial of security clearances for Defense Department contractor personnel. Unlike the immigration judges, this small cadre of eight deciders has a caseload of about 650 annually. However, they decide matters of grave importance to individuals who are often unable to work in their chosen fields without the requisite security clearances. These cases are administered by the DOD's Directorate for Industrial Security Review (DISCR). As a military function, this agency is exempted from the APA, but its procedures are controlled by executive order. The presiding officers who hear security clearance cases are GS-15 lawyers. Recently the ABA has recommended that they be converted to ALJs to ensure their independence from the DOD.

73. See supra notes 27–28 and accompanying text; see also Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1 (1984).
74. The selection process leads to the creation of a register that limits the agency's choices to the top three candidates. See sources cited infra notes 80–81. Moreover, there may be fiscal reasons not to use ALJs. The ALJs are paid on a new schedule which is greater than the GS-15 level of immigration judges. But see infra note 88.
75. Testifying in opposition to a bill to convert immigration judges into ALJs, the late Attorney General William French Smith stated "[A]bsence of accountability . . . would only compound existing management problems." Verkuil, supra note 72, at 1196 n.323 (citation omitted).
The agency has not yet taken a position on that issue, but it might be expected to resist this idea much as the Department of Justice has resisted with regard to immigration judges.

In these classes of cases, the maximum independence of ALJs has much to offer. Understandably, the institutional values of the agencies potentially conflict with the goal of highly independent fact finding. Even if such were not the case—and it may well not be—the perception of independence will be better assured by the use of ALJs, rather than agency-controlled administrative judges or hearing examiners.

IV. THE ADVANTAGES AND DISADVANTAGES OF ALJs: AN ASSESSMENT

The foregoing discussion demonstrates how uneven and unplanned is the use of ALJs in our administrative decision system. While ALJs are clearly a formidable corps of decision-makers, they compete against less protected groups of deciders who have equal magnitude and strength. Obviously, Congress and the agencies must believe that deciders other than ALJs can offer greater advantages; otherwise, this decider variety would not exist. Not surprisingly, the two reasons for this variability that seem to make the most sense relate to control and cost. They are both legitimate agency concerns.

The “control” issue does not implicate due process issues that might stem from improper agency contacts with deciders. Rather, the “control” issue concerns questions regarding management accountability and the selection process. The management accountability problem has already been discussed in connection with SSA disability decision-making. In general, agencies are dissatisfied with the OPM selection process that requires them to select ALJs from among a restricted list of candidates who may not best meet agency needs. Moreover, the strict use of the “Veterans preference” further restricts agencies’ opportunities to appoint qualified women and minorities.81

80. Congress mandates a preference for veterans for all government positions, but, with respect to ALJ selection, it has a precise tie-breaker effect of 5 to 10 points on a 100 point scale. See 5 U.S.C. §§ 2108, 3309 (1988).
81. The number of women and minorities on the ALJ corps are undoubtedly held down by the Veterans preference. Since 1984, veterans have composed about 39% of all ALJ applicants and 67% of all appointees. As of March 1990, 5.41% of ALJs were women, 2.93% were black and 2.75% hispanic. Statistics provided by Office of Personnel Managers/Office of Administrative Law Judges (“OPM/OALJ”) (Mar. 25, 1991).
Agencies that do hire ALJs from the OPM register have developed a variety of means to ameliorate the restrictive effects of the register, but those that need not select from it have an easier time creating their own list of deciders. For example, at the Executive Office for Immigration Review, immigration judges are hired much as are government attorneys who are part of the exempt service. It is understandable why agencies would prefer to avoid the ALJ hiring process if they are not compelled to use it. Therefore, reform of the selection process should be (and is) a concern for OPM as well as for the agencies and Congress.

The other obvious reason that ALJs are not preferred is their salary and benefit levels. In most agencies the number of Senior Executive Service (SES) positions is strictly limited and is subject to careful negotiation. Under their new pay scale, ALJs are compensated at SES levels. Agencies that are not now bound by the formal adjudication provisions of the APA are not likely to seek inclusion when doing so would significantly raise the cost of their decider corps.

There is another aspect to the compensation and grade issue that has broader, institutional meaning. Presently, the ability of agencies to utilize non-ALJ deciders at grade levels that vary from GS-9 to GS-15 allows for a hierarchy of decider qualifications that could create a fertile selection pool for future ALJs. The creation of a multigrade structure for ALJs was part of the original plan that was rejected in favor of the gradual movement to today's single-grade for ALJs. It may be that the presence of a wide variety of deciders at various grades and qualification levels could form a useful pool of potential applicants for ALJ positions. Congress has eliminated this possibility within the ALJ corps by approving the current single-grade structure. But what of the long-standing confusion over when to utilize ALJs altogether? Congress has estab-

82. Agency use of "special" registers and the practice of hiring transfers from other agencies (notably the SSA) has granted them some flexibility. Interview with Lee Wallis, OPM/OALJ (Dec. 1990).
84. The ACUS study of which this Article is a part is concerned with this issue in a broader context.
85. See supra note 8.
86. See Scalia, supra note I at 62-75 (describing—and arguing for—the original APA plan which utilized promotions of ALJs to higher grades as a quality control technique). The use of multigrade "examiner" positions was specifically approved by the Supreme Court in Ramspeck v. Federal Trial Examiners Conf., 345 U.S. 128 (1953).
lished no reliable indicator that conveys when to require ALJs as deciders and when to permit other agency options. Ironically, agencies are increasingly inclined not to employ ALJs if they can avoid it. Still they seek some of the benefits of ALJ status for their non-ALJ deciders. This issue deserves some attention for it threatens to remove the multigrade aspects of the non-ALJ decider pool.

For example, several bills currently pending in Congress are designed to give ALJ-like protection and benefits to non-ALJs without calling them ALJs. One bill gives such protections to administrative judges. Another, the Merit Systems Protection Board, offers comparable salary benefits to immigration judges. A third does so for the Board of Veterans Appeals. These initiatives suggest that Congress is further balkanizing the administrative judicial process without any overall consideration of decider uniformity issues.

A more systematic approach is needed for Congress and the agencies to determine when to utilize ALJs and when to accept the less independent variety of administrative judges. One suggestion is to incorporate into this analysis the hierarchy of values that are implicit in the concept of flexible due process. The courts and commentators have employed this approach in the past to evaluate specific administrative procedures, but it can easily be extended to decider qualifications alone. The argument for ALJs would be

88. See S. 2099, 102d Cong., 1st Sess., 137 Cong. Rec. S18,417-18 (daily ed. Nov. 26, 1991) (establishing a special pay scale for immigration judges just below that of ALJs). In submitting the bill, Senator Kennedy commented: "Clearly, the responsibilities and duties of immigration judges are on an equal standing with that of administrative law judges, in terms of both their level of authority and complexity of issues adjudicated." 137 Cong. Rec. S18,417 (daily ed. Nov. 26, 1991). One might fairly ask why not just convert immigration judges to ALJs if this is correct?
90. The late Judge Friendly's article, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975), has been enormously influential in the Court's formulation of a flexible due process concept. See, e.g., Mathews v. Eldridge, 424 U.S. 319 (1976). Judge Friendly places government actions that deprive individuals of liberty at the top of a scale of individual interests—termination or reduction of government benefits are placed lower down the scale. Friendly, supra, at 1295-98. Interestingly, Judge Friendly suggested that the further the tribunal or decider is removed from the agency, the less may be the need for other procedural safeguards against bias. Id. at 1279. Thus one could construct a case for using independent ALJs in a nonformal hearing context, much like has been done at SSA. See supra text accompanying notes 51-79.
91. The author's work in this area involves the application of an interest value scale to informal procedures. See Verkuil, supra note 2; Verkuil, supra note 72.
strongest in situations where individual liberty is at stake and weaker where the disbursing of government benefits is involved. On this scale, the use of ALJs in the immigration context takes on heightened importance whereas ALJ use in the disability-benefit arena seems entirely optional. Certainly the ability to experiment with a variety of decider qualifications in non-individual liberty situations should be encouraged. Innovations such as panel decisions, nongovernment (or nonlawyer) decision-makers and multigrade classifications should be studied.

But in the area of individual liberties the arguments against the use of ALJs grow weaker. Moreover, in circumstances where elaborate efforts are made to grant procedural protections that are equivalent to the APA and decider benefits that are comparable to those of ALJs, one wonders why Congress or the agency does not mandate the use of ALJs. If an administrative judge looks like an ALJ and talks like an ALJ and acts like an ALJ, why not make him or her an ALJ? That question is surely pressed in connection with immigration judges, but it also applies to DOD judges who decide security-clearance cases. It may also apply to Merit System Protection Board judges. Assuming that legitimate grievances about the selection process for ALJs are addressed, it becomes increasingly difficult to maintain a satisfactory distinction between ALJs and administrative judges in these settings where liberty or rights to employment are being determined.

IV. Conclusion

The federal administrative judiciary offers a stunning diversity of decider qualifications, benefits, and independence. The present system is a function of history and agency choice more than of congressional plan. The APA itself only began the process of professionalization of the decider corps; forty-five years later it is incomplete. The advantage of the current scheme is its experimental range. We are at the stage now, however, where some systematic rethinking of the choice between ALJs and generic administrative judges might be appropriate. This Article is intended to raise the subject for further debate and study.