



AMERICAN BAR ASSOCIATION

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STATEMENT

of the

AMERICAN BAR ASSOCIATION

submitted to the

**SUBCOMMITTEE ON FEDERAL WORKFORCE AND
AGENCY ORGANIZATION**

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

on the subject of

**“Fair and Balanced? The Status of Pay and Benefits for
Non-Article III Judges”**

May 16, 2006

The American Bar Association is pleased to submit this statement to the House Government Reform Subcommittee on the Federal Workforce and Agency Organization for the record of the May 16, 2006, hearing on the status of pay and benefits for Non-Article III judges. We thank the Subcommittee for demonstrating its concern for the unique function of the administrative judiciary within the federal workforce by holding this focused hearing. This statement summarizes the ABA's positions regarding the adequacy of, and problems with, current administrative law judge (ALJ) pay; the incompatibility of the concept of adjudicative independence with a pay-for-performance salary scheme; the need for ALJ retirement enhancements; and our concerns over the strained relationship between the Office of Personnel Management (OPM) and the ALJ community.

ALJ Compensation and Pay Compression

The ABA has long advocated that the compensation of ALJs needs to be appropriate to their judicial status and functions. Unfortunately, we are farther from achieving this goal today than we were in 1990, when Congress enacted a separate pay scale for ALJs, which was supposed to improve compensation: in the intervening years, entry-level ALJ salaries have declined significantly in relative value, and increasing numbers of experienced ALJs have been prevented from collecting cost-of-living adjustments and/or locality pay adjustments due to pay compression. Long-term solutions are needed to fix these problems, which threaten to impair the quality of the federal administrative judiciary.

ALJ compensation used to fall under the General Schedule but is now controlled by a separate pay scale that is linked to the Executive Schedule. Enacted by Congress in 1990 to improve ALJ pay, the revised pay schedule has backfired: rather than improving ALJ pay over the years, it has not even succeeded in maintaining the parity that previously existed with the compensation paid to other senior-level government attorneys. This

deterioration in ALJ basic pay is the result of ALJs not receiving many of the cost-of-living adjustments (COLAs) that were granted under the General Schedule during the past fifteen years. In 1991, ALJ entry level basic pay was comparable to the pay at GS-15, steps 5 and 6; today, ALJ basic pay has slipped to a rate comparable to the pay at GS-14, steps 7 and 8.

Needless to say, over the last decade, entry-level ALJ salaries have not kept pace with salaries for the most senior government attorneys under the General Schedule or in the Senior Executive Service (SES), or for experienced attorneys in the private sector. And the gap keeps widening. This is creating an anomaly in comparative pay-ranking that is inequitable to ALJs and adverse to the goal of attracting and retaining the best and the brightest to serve as ALJs: in some agencies, the pay of career staff officials who are responsible for selecting cases for ALJ assignment are making more money than the ALJs. As William J. Cowan, Deputy Chief Administrative Law Judge with the Federal Energy Regulatory Commission pointed out in his testimony before this Subcommittee, “We cannot hope to attract the senior agency staff and SES attorneys who are the natural candidates for prospective ALJ positions as this pay inequity continues and the disparity increases. Nor can we hope to attract candidates from the pool of private practitioners who practice before our agencies. While we can never expect to match the kind of salaries offered by top national law firms, the present entry level pay for ALJs is so low as to virtually assure that the ALJ program will be bottom feeding from the private bar, attracting only those whose practices are unsuccessful or worse.”

In 1999, Congress attempted to rectify these problems by enacting legislation (Pub. L. No. 106-97) granting the President authority to authorize the same annual COLA for ALJs that is authorized for the General Schedule and to adjust ALJ basic pay within the statutorily mandated range of 65% to 100% of Executive Level IV. Since then, ALJs have received a yearly COLA and in 2002 also received a small supplemental adjustment. Unfortunately, recent COLA authorizations do nothing to recoup the cumulative loss of wages resulting from COLAs that were denied in the past, and the modest supplemental

adjustment, while greatly appreciated, nevertheless was insufficient to restore ALJ pay to a rate comparable to where it was in 1991, *vis-a-vis* the General Schedule.

In addition to the incremental erosion of pay since 1991, the adequacy of ALJ pay has been undermined by the spiraling problem of pay compression. Pay compression results from both the statutory cap on basic salary for each level of ALJ pay and the statutory cap on locality pay. The statutorily-set ALJ pay schedule is divided into three levels: AL-1 (for Chief ALJs), AL-2 (for Deputy or Regional Chiefs), and AL-3 (for line ALJs). The AL-3 pay level contains six steps (AL-3A through AL-3F) that incrementally increase pay as experience is gained. The vast majority of the approximately 1,400 ALJs are paid at the AL-3F level -- a reflection of the fact that on average, the members of the current administrative judiciary, according to OPM, have served, as ALJs for 21 years.

The Federal Administrative Law Judges Conference has pointed out that due to pay compression, many ALJs at level AL-3E, the vast majority of ALJs at level AL-3F, and all ALJs at levels AL-2 and AL-1 earn exactly the same rate of pay. Furthermore, assuming the status quo, these ALJs, unlike the vast majority of the federal workforce, will not receive any locality- or base-pay increases next year or the year after and on into the future. Their salaries will not keep pace with inflation, and the longer they work, the more they can “look forward” to their salaries continuing to decrease in relative value. This has created an inequitable and demoralizing pay system that effectively penalizes those ALJs who have the most experience, length of service or supervisory responsibilities. In addition, it provides no incentive for the more senior judges to take on the administrative tasks of a Chief or Deputy Chief Judge.

While we do not know for certain, we suspect that pay compression adversely affects the salaries of close to 2/3 of the administrative judiciary. Even though Nancy H. Kichak, Associate Director of the Strategic Human Resources Policy Division of OPM, reported to this Subcommittee last week that about 43 per cent of ALJs currently are paid at capped rates, we are hesitant to rely on that lower assessment in light of the fact that last year, in his written statement to this Subcommittee, the OPM Associate Director

minimized the effect of pay compression, dismissing it as only affecting ALJs at the top two tiers (AL-1 and AL-2) of the salary scale.

OPM has not been responsive to the ALJ community's concerns over pay parity issues, stating that they see no evidence that pay is inadequate or that pay compression has resulted in significant retention or recruitment problems. We have three concerns with OPM's assessment. First, we question whether OPM is using the right subsets of public employees for pay-level comparison purposes. Second, OPM has ignored the effect of the growing pay disparity between entering ALJs and both senior agency staff and SES attorneys, which we believe is highly significant because these latter groups comprise the most natural pool candidates for prospective ALJ positions. Finally, the number of ALJs who are resigning is not a good measure of the inadequacy of ALJ pay or the severity of the problem of pay compression. That the current rate of resignations is not alarming may be due to multiple other external factors, such as a bulge in the number of ALJs who are approaching retirement age, or a sluggish economy. Even absent other causes, an analysis based on resignation rates would be short-sighted and side-steps the fact that it is inequitable to deny a majority of ALJs cost-of-living adjustments simply because they have reached the statutory cap.

Inadequate or stagnant salaries steadily undermine morale, diminish the importance of retaining experienced jurists, and reduce the value we, as a society, place on the work performed by the administrative judiciary. We should address these problems now, not after we do lose high numbers of experienced and able ALJs.

During the 108th Congress, the ABA supported H.R. 3737 (Jo Ann Davis, R-VA) because it would have provided a solution to pay compression and established a statutory framework for addressing pay adequacy issues that respected the unique function of the administrative judiciary within the Executive Branch. While similar legislation has not been introduced this Congress, we recommend that this Subcommittee give consideration to the bill's provisions as a possible blueprint for much needed remedial action in this area.

ALJ Pension Enhancement

Congressional review of ALJ compensation would not be complete without an examination of the current ALJ pension system. The ABA urges Congressional establishment of a retirement plan for federal administrative law judges that is appropriate to their judicial status and functions and that is separate from retirement plans of other career civil servants. The ABA supports enactment of H.R. 1864 (Wynn, D-MD), the Administrative Law Judges Retirement Act of 2005, providing enhanced ALJ retirement benefits, modeled after the Congressional retirement plan. *See* the Federal Employees' Retirement System Act of 1986 (P.L. 99-335).

As Administrative Law Judge Ronald Bernoski, on behalf of the Association of Administrative Law Judges, pointed out in testimony before this Subcommittee last week, "Virtually all Federal judges, Federal judicial officers, and state judges have retirement pension benefits substantially greater than the pensions provided to administrative law judges. Four groups of Article I Federal judicial officers that have enhanced CSRS pensions identical to that which the administrative law judges now seek are: (1) U.S. Bankruptcy Judges, (2) U.S. Magistrates, (3) U.S. Court of Federal Claims Judges, and (4) U.S. Court of Appeals for the Armed Forces Judges....Members of Congress, Congressional staffers, and many federal law enforcement employees also have the same enhanced CSRS and FERS pensions that the administrative law judges now seek...." The ABA's policy and accompanying explanatory report (which is not adopted as policy) are attached to this statement as Appendix A and will provide you with a more detailed analysis of this issue.

**ALJ Adjudicative Independence Precludes Imposition of a
Pay-for-Performance Salary System**

The adjudicative function performed by ALJs and the delicately balanced relationship that ALJs must maintain with their employing agencies distinguish ALJs from the rest of an agency's workforce. The Administrative Procedure Act established the adjudicative independence of the administrative judiciary to enable ALJs to make fair, impartial decisions without fear of undue agency pressure or agency reprisal. To preserve ALJ independence, federal regulations explicitly prohibit an agency from rating the performance of an administrative law judge or granting a monetary or honorary award for superior adjudicative performance. 5 C.F.R. §930.211 and §930.215(b).

Congress recognized that the duties performed by ALJs are not analogous the duties performed by other members of the Executive Branch workforce when it created a separate ALJ pay category in 1990. The U.S. Supreme Court, likewise, affirmed the unique status of ALJs within the Executive Branch in 1978, affirming that ALJs are functionally equivalent to federal trial judges *Butz v. Economou*, 438 U.S. 478 (1978); *Federal Maritime Com'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); see also, *Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 31(1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges.)

Even though OPM officials acknowledge that ALJs are different from other federal workforce employees and that ALJ independence is essential, they refuse to acknowledge the inherent incompatibility of a pay-for-performance salary system with the preservation of ALJ adjudicatory independence and have expressed certainty that a pay-for-performance salary system can be constructed in a way that will not diminish or chill the decisional independence of ALJs.

We reiterate our opposition to the concept of a pay-for-performance salary structure for the administrative judiciary. Any proposal to improve ALJ pay that directly or indirectly links pay to performance clearly would violate existing statutes and regulations and jeopardize the decisional independence of ALJs and the integrity of the administrative hearing process. Accordingly,

attempts to find a surrogate mechanism for awarding merit increases to individual ALJs based on some measure of performance are equally suspect.

This does not mean that there should not be checks on ALJ performance. Indeed, many checks currently exist. The manner in which an ALJ carries out his or her duties may be evaluated, without fear of compromising decisional independence, through a system of peer review without violating judicial independence principles if the purpose is to measure and improve performance. Some departments and agencies have adopted rules and practices to address complaints of misconduct and disability of administrative law judges. *See* Procedures for Internal Handling of complaints of Misconduct or Disability, 46 Fed. Reg. 28050 (1981), as amended 48 Fed Reg. 3085 (1983) and 52 Fed Reg. 32973 (1987). Further, ALJs who fail to carry out the duties assigned to them are subject to remedial action by their chief judge and, in serious cases, disciplinary action before the Merit System Protection Board. Current procedures require that a complaining agency demonstrate good cause for discipline of an ALJ in an APA hearing on the record before the Merit System Protections Board. 5 U.S.C. § 7521; 5 C.F.R. ¶ 930.210(b). In addition, Congress requires that ALJs from certain departments and agencies file annual reports disclosing case processing times and dispositions.

It is important to be absolutely clear that our opposition is specifically limited to the imposition of any salary system that directly or indirectly links pay to performance. We support efforts to improve the performance and professional capabilities of administrative law judges absent such links, and we believe that administrative law judges should be subject to, and accountable under, appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct (1990). Such efforts are fully compatible with the objectives of the APA and will protect the public interest in independent, impartial, and responsible decision-making in the administrative adjudication process. In an effort to be reconcile OPM's insistence on establishing a performance management system with the need to preserve the core tenets of ALJ independence, the ABA and other organizations representing the ALJ community suggested to OPM officials that an appropriate Model Code of Judicial Conduct be codified in law or regulation as a standard of satisfactory conduct or performance for ALJs. Many organizations specifically recommended codification of the Model Code of Judicial Conduct for Federal Administrative Law Judges,

which was adapted from the ABA Model Code of Judicial Conduct and endorsed in 1989 by the National Conference of the Administrative Law Judiciary of the ABA but never presented to the ABA's policy-making body for Association-wide approval. Nevertheless, it enjoys extensive support in the ALJ community. Unfortunately, OPM has not indicated a willingness to consider this proposed compromise.

**Reinstate the OPM Office of Administrative Law Judges or Establish an
Administrative Law Judge Conference of the United States**

Finally, we would like to make a few observations about the relationship between OPM and the administrative judiciary. Over 1400 ALJs perform judicial services throughout the government, serving approximately 30 different Cabinet-level and independent agencies. By design, ALJs are insulated from the entities for which they work. While this is necessary to protect adjudicatory independence, the downside is that ALJs do not have employers who represent their interests, coordinate their activities, provide policy guidance, etc.. As result, the APA tasked OPM with managing the ALJ program, including serving as their ombudsman. It undermined its ability to fulfill this latter role when it eliminated the Office of Administrative Law Judges during its reorganization in 2003. Since then, the ALJ community has had no dedicated point of contact at OPM through which information can be obtained and shared, efforts coordinated and concerns expressed. We therefore urge OPM to immediately reestablish the Office of Administrative Law Judges. If OPM is unwilling to do that, we urge Members of Congress and OPM to support transferring OPM's Congressionally-mandated ALJ functions to an Administrative Law Judge Conference of the United States, as contemplated by H.R. 5177 (106th Congress, 2000) and H.R. 3961 (105th Congress, 1998). The ABA adopted policy in support of the creation of an Administrative Law Judge Conference in 2004. A copy of our policy and explanatory report is attached as Appendix B for your ready reference.

Thank you for this opportunity to present the views of the ABA. We stand ready to assist you in whatever way we can. Please contact Denise Cardman, Deputy Director of Governmental Affairs at: cardmand@staff.abanet.org or by phone at: 202/662-1761.

APPENDIX A

AMERICAN BAR ASSOCIATION

Retirement Plan for Federal Administrative Law Judges Adopted on February 9, 2004

RESOLVED, That the American Bar Association encourages Congress to establish a retirement plan for federal administrative law judges that is appropriate to their judicial status and functions and that is separate from retirement plans of other career civil servants.

REPORT

Federal administrative law judges have been members of the American Bar Association, Judicial Division, National Conference of the Administrative Law Judiciary, since 1971; this resolution renews and extends existing American Bar Association policy.¹

The American Bar Association has previously endorsed enhancements of compensation for federal administrative law judges, by supporting establishment of a pay schedule for administrative law judges separate from other career civil servants.²

Retirement benefits are a substantial part of the compensation benefits that are made available to federal administrative law judges but present retirement systems are not adequate or consistent with the recruitment needs or status of administrative law judges.

Federal administrative law judges are appointed under 5 U.S.C. § 3105.3 Their powers emanate from the Administrative Procedure Act.⁴ Extensive prior legal

¹ The American Bar Association has adopted policy supporting the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000 and 2001. Indeed, the Association's commitment to the independence of the administrative judiciary is reflected in the jurisdictional authority of the Standing Committee on Judicial Independence, which is authorized to promote this value.

² Policy to this effect was adopted 20 years ago, in 1983.

³ See also, 5 U.S.C. sec. 5372 (a) ("For the purposes of this section, the term 'administrative law judge' means an administrative law judge appointed under section 3105.")

⁴ See, A Guide to Federal Agency Adjudication, Michael Asimow, ed., 164 (American Bar Association Administrative Law Section 2003). For example, subject to published rules of the agency, administrative law judges are empowered to administer oaths, issue subpoenas, receive relevant evidence, take depositions, and regulate the course of the hearing. These fundamental powers arise from the Administrative Procedures Act "without the necessity of express agency delegation" and "an agency is without the power to withhold such powers" from its administrative law judges. *Id.* The Administrative Procedures Act seeks to affirm and protect the role of the administrative law judge, whose "impartiality," in the words of the Supreme Court in *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980), "serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime."

In order to accomplish this goal, Congress requires Office of Personnel Management to maintain a register of qualified applicants, and to test and evaluate prospective applicants. Office of Personnel Management has been recognized for doing an excellent job. In fact, in 1992, the principal investigator for the Administrative Conference of the United States (ACUS) wrote:

experience is necessary for the position because it provides maturity, a reliable record, experience with problems likely to be encountered as an administrative law judge, and first-hand knowledge of rules of the operation of the courts.⁵

The Supreme Court has declared that federal administrative law judges are functionally just like other federal trial judges.⁶ Although federal administrative law judges are judicial officers, they do not have a judicial retirement system.⁷

It is important to ensure that the federal government can attract highly qualified candidates for the administrative law judge position. Maintaining appropriate pay and pension reform will assure that the American people have highly qualified administrative law judges to adjudicate their administrative claims.

It is important that the demographic pool of administrative law judges does not become stagnant. Recent studies show that, as a body, administrative law judges retire on the average of eight to ten years later than the average federal civilian employee.⁸ Regenerating the pool will also enable greater diversity in the corps of judges.

Administrative law judges are the oldest discernable group of federal employees.⁹ As a result, more administrative law judges die on the job proportionally than in any other civilian federal occupation.¹⁰

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. Paul Verkuil, "Reflections upon the Federal Administrative Judiciary," 39 UCLA L. Rev. 1341 (1992).

⁵ Amiel T. Sharon and Craig B. Pettibone, "Merit Selection of Federal Administrative Law Judges," 70 *Judicature* 216, 218 (1987).

⁶ See, Butz v. Economou, 438 U.S. 478 (1978); Federal Maritime Com'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002); see also, Rhode Island Dept. of Environmental Management v. United States, 304 F.3d 31(1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

⁷ Four groups of Article I federal judicial officers have enhanced pensions: (1) U.S. Bankruptcy Judges, (2) U.S. Magistrate Judges, (3) U.S. Court of Federal Claims Judges, and (4) U.S. Court of Appeals for the Armed Forces Judges. Members of Congress, Congressional staffers, and many federal law enforcement employees also have the same enhanced pensions that may be appropriate for administrative law judges, but they do not also have separate pension plans such as those in force for the Article I federal judicial officers. The American Bar Association adopted policy in favor of enhanced state Administrative Law Judge compensation and retirement in 1998.

⁸ "The Administrative Law Judges Retirement Act of 2003: a Proposal to Enhance the Retirement Annuity for Administrative Law Judges," Association of Administrative Law Judges' Retirement Committee (2001, revised 2003), <http://www.aalj.org/pension.html#report>, p. 12, citing OPM Administrative Law Judge Report, Table 8 (1999).

⁹ See, Office of Personnel Management, Cognos PowerPlay Web Explorer, <http://www.fedscope.opm.gov/index.htm>, Table 10, The Fact Book, Office of Personnel Management, Federal Civilian Workforce Statistics, <http://www.opm.gov/feddata/01factbk.pdf> (2001 Edition) and data compiled by Association of Administrative Law Judges. Administrative law judges are currently part of the Civil Service Retirement System (CSRS) and the Federal Employee Retirement System (FERS). Under the CSRS, at age fifty-five, after thirty (30) years of participation, retirees can receive fifty-three per cent (53%) of their highest three years of government earnings. The most a federal retiree may earn in this plan is eighty per cent (80%) of the highest three years of earnings. This can be achieved with forty-one years and ten months' service. This is a traditional defined benefit plan, but it only applies to ALJs whose federal service began before 1984, when the retirement plan was changed to FERS. Under FERS, participants

Most (ALJs) are appointed later in life than other federal employees and therefore must work until age 75, 80 or older in order to attain a decent pension under the current federal program based on 30 years of service that was designed for career employees entering federal service in their 20's or 30's with a reasonable expectation of retiring at age 55-65. As a result, more ALJs die in office, proportionally, than any other federal civilian occupation.

Given the current retirement structure, there is little incentive for administrative law judges to retire. The Congressional Budget Office has reviewed the administrative law judge retirement dilemma and has determined that using proposed H.R.2316, "The Administrative Law Judges Retirement Act of 2003," pension reform can be accomplished at a very low cost.¹¹ Under these circumstances, the American Bar Association should recommend that federal administrative law judges should be provided retirement plans appropriate to their status.

Respectfully submitted,

Richard N. Bien

receive one per cent (1%) for each year of service at retirement. Enrollees also contribute to Social Security and may participate in the Thrift Savings Plan. Up to five per cent (5%) of Thrift Savings contribution is matched under this plan. There is a ceiling on contributions, however, so that administrative law judges may not contribute as much proportionally as the general federal workforce population. *See*, Office of Personnel Management Retirement Information, <http://www.opm.gov/retire/html/faqs/faq11.html> and Association of Administrative Law Judges' Retirement Committee Report, *supra* (2001, revised 2003). Association of Administrative Law Judges' Retirement Committee Report, *supra* (2001, revised 2003). Under the existing CSRS and FERS retirement system for federal employees, an adequate pension can be earned only after a full and long career in government service of about thirty (30) years. *Id.* The lack of an adequate pension is causing a large and increasing number of administrative law judges to work into old age to achieve a federal pension based on the government-wide average length of service of thirty (30) years. *Id.* Consequently, the percentage of administrative law judges who will have to work at or beyond age seventy-five (75) to achieve a thirty (30) year pension will nearly double in ensuing years to about twenty-three per cent (23%) of the current administrative law judge workforce. *Id.* At least another sixteen per cent (16%) of administrative law judges will have to work at or beyond ages seventy (70) through seventy-four (74) to achieve thirty (30) years of federal service. *Id.* In other areas of the federal workforce, employees at or over the age of seventy (70) are unusual. *Id.*

¹⁰ At the Social Security Administration alone, in Fiscal Year (FY) 2002, six (6) administrative law judges died while in service; in FY 2001, three (3) deaths occurred; in FY 2000, eight (8) deaths were recorded; and in FY 1999, four (4) deaths occurred to administrative law judges. *See*, Office of Personnel Management, Cognos PowerPlay Web Explorer, <http://www.fedscope.opm.gov/index.htm>. It is also reasonable to assume that because of advanced age, the need for more medical leave is requested by administrative law judges than any other body, but these statistics are not maintained.

¹¹ *See*, Congressional Budget Office Report dated September 9, 2003. The Congressional Budget Office found the low net direct cost based upon (1) a 2004-2013 ten-year direct cost to the federal government of \$34 million for increased Civil Service Retirement System and the Federal Employee Retirement System retirement benefits to administrative law judges that will be paid out of the Office of Personnel Management's Civil Service Retirement and Disability Fund, and (2) 2004-2013 ten-year revenues of \$20 million from the administrative law judge's additional contributions to the pension plans that are provided for in the bill.

APPENDIX B

AMERICAN BAR ASSOCIATION

Administrative Law Judge Conference of the United States
Adopted on August 9, 2005

RECOMMENDATION

RESOLVED, that the American Bar Association encourages Congress to establish The Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to Administrative Law Judges including their testing, selection, and appointment.

REPORT

Federal administrative law judges (“ALJ”) have been members of the American Bar Association, Judicial Division, National Conference of the Administrative Law Judiciary, since 1971; this resolution renews and extends existing American Bar Association policy.¹

The Office of Personnel Management (“OPM”) is mandated to administer the ALJ program and to maintain a register of qualified applicants and test and evaluate prospective applicants.² However, OPM recently closed its Office of Administrative Law Judges and has otherwise failed to adequately service the agencies and the judges under its mandate. In 2003, the functions were dispersed to other OPM divisions, without notice to the agencies or to ALJs regarding the terms of transfer. Thus, there is no central administrative office to administer the administrative law judge program at OPM, and there is no agency that provides suggestions to Congress to improve the administrative adjudication process.

¹The American Bar Association has adopted policy supporting the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000 and 2001. Indeed, the Association’s commitment to the independence of the administrative judiciary is reflected in the jurisdictional authority of the Standing Committee on Judicial Independence, which is authorized to promote this value.

² The classification of “administrative law judge” is reserved by OPM for the specific class of appointments made under 5 U.S.C. § 3105 and applies to all agencies:

“The title ‘administrative law judge’ is the official class title for an administrative law judge position. Each agency will use only this official class title for personnel, budget, and fiscal purposes.” 5 C.F.R. § 930.203b.

5 C.F.R. § 930.201 requires OPM to conduct competitive examinations for administrative law judge positions and defines an ALJ position as one in which any portion of the duties includes those which require the appointment of an administrative law judge under 5 U.S.C. 3105. ALJs can only be appointed after certification by OPM:

An agency may make an appointment to an administrative law judge position only with the prior approval of OPM, except when it makes its appointment from a certificate of eligibles furnished by OPM. 5 C.F.R. § 930.203a. Id. § 930.203a; see also 5 U.S.C. § 5372 (2000) (providing for pay for administrative law judges, also subject to OPM approval).

The Administrative Law Judge Conference of the United States will perform those functions and enhance the independence of decision-making and the quality of adjudications of administrative law judge hearings under the Administrative Procedure Act (“APA”). The Administrative Law Judge Conference of the United States would be similar to the Judicial Conference of the United States, which provides administrative functions for Federal Article III judges, but its creation would effect no change in the current relationship between ALJs and the agencies where they serve. Rather the new Conference would assume the current responsibilities of OPM with respect to administrative law judges, including their testing, selection, and appointment.

Federal administrative law judges are appointed under 5 U.S.C. § 3105.³ Their powers emanate from the Administrative Procedure Act.⁴ Extensive legal experience is necessary for the position, because experience provides maturity, expertise in compiling a reliable record, first-hand knowledge with problems likely to be encountered as an administrative law judge, and intimacy with rules of evidence and procedure similar to those used in administrative hearings.⁵ After reviewing the duties of the office, the Supreme Court has declared that federal administrative law judges are like other federal trial judges for tenure and compensation⁶ and that ALJs are functionally equivalent to other Federal trial judges.⁷

Cases heard and decided by ALJs involve billions of dollars and have considerable impact on the national economy. In fact, a single ALJ may handle a single case that may affect millions of people and involve billions of dollars. ALJs adjudicate cases involving a wide range of regulatory matters...

The Office of Personnel Management

The need for a separate agency to manage the ALJ program is prompted by longstanding problems with OPM’s administration of the program. The APA contemplated that the Civil Service Commission (now OPM)⁸ would oversee merit selection and appointment of ALJs and would also act as an ombudsman for the ALJ program but OPM has essentially abandoned that role. Section 1305 provides that for the purpose of sections 3105 (appointment), §3344 (loans), and §5372 (pay) OPM “may.. investigate, require reports by agencies, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees.” Although the OPM

³ See also, 5 U.S.C. sec. 5372 (a) (“For the purposes of this section, the term ‘administrative law judge’ means an administrative law judge appointed under section 3105.”)

⁴ See, A Guide to Federal Agency Adjudication, Michael Asimow, ed., 164 (*American Bar Association Administrative Law Section*, 2003). For example, subject to published rules of the agency, administrative law judges are empowered to administer oaths, issue subpoenas, receive relevant evidence, take depositions, and regulate the course of the hearing. These fundamental powers arise from the Administrative Procedures Act “without the necessity of express agency delegation” and “an agency is without the power to withhold such powers” from its administrative law judges. *Id.* The Administrative Procedure Act seeks to affirm and protect the role of the administrative law judge, whose “impartiality,” in the words of the Supreme Court in *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980), “serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime.”

⁵ Amiel T. Sharon and Craig B. Pettibone, “Merit Selection of Federal Administrative Law Judges,” 70 *Judicature* 216, 218 (1987).

⁶ *Butz v. Economou*, 438 U.S. 478 (1978).

⁷ *Federal Maritime Com’n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); see also, *Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 31 (1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

⁸ Administration of the ALJ program was originally placed in the Civil Service Commission and was subsequently bifurcated to OPM and the Merit Systems Protection Board (“MSPB”).

Program Handbook, p. 4, affirms those responsibilities, OPM has seldom exercised them, except for regulations, including sometimes less-than-benign changes in selection and RIF regulations.⁹

On May 21, 1991, the National Conference of Administrative Law Judges (NCALJ)¹⁰, in the Judicial Division of the American Bar Association, wrote to OPM, pointing out that:

OPM has not taken a leadership role in the education of either ALJs or the agencies as to the nature of their relationship or the judge's function, or in the supervision or investigation of problems related to that relationship and function. OPM has not conducted or sponsored orientation programs for ALJs or their administrators, has not monitored the appointment of sufficient numbers of ALJs by agencies (although traditionally it has carefully monitored appointments to prevent the appointment of too many), has not adopted or proposed uniform rules for conduct, procedure, robes, support staff, office or hearing space, and has not investigated or made recommendations on any of these questions, or the long-standing strife between the SSA and its ALJs, or, most recently, the apparent due process breakdown at MSPB in connection with projected furlough of ALJs in fiscal 1991.

That letter suggested 10 items that OPM should undertake to improve relationships between ALJs and their agencies and the lot of ALJs generally, including education for ALJs and their reviewing authorities, administrative leave for education, guidelines for offices, staff support, robes and perks, model procedural rules, standards of conduct, appointment of sufficient judges by agencies, a mini-corps, and an investigation of the SSA and furlough situations and pay issues. In June 1991 OPM forwarded that letter to the Administrative Conference of the United States (ACUS) for consideration in connection with its study of the federal administrative judiciary. That study was completed in 1992 and recognized the importance of continuing and improving the position of ALJs and the ALJ program.¹¹ However, OPM neither referenced nor dealt with any of the NCALJ concerns, and OPM undertook no action on the report even though it sponsored it.

In August 1994 NCALJ again sought a response to its letter and was told by OPM in a September 8, 1994, letter that "several of your concerns appear to be more appropriately identified as agency matters" and that "other concerns appear to involve matters which conflict with this agency's evolving policy of returning greater responsibility for personnel management to the agencies." The letter did not address the fact that such a policy might conflict with OPM's responsibilities under the APA. In short, while OPM has responsibility to study and report to Congress concerning the ALJ program, it has not done so and has proclaimed an interest in returning its function to the agencies.

From 1998 to 2004, agencies were generally unable to hire new judges from the OPM register. While *Azdell*¹² was pending, OPM suspended the examination process for administrative law judges (ALJ). Therefore, the ALJ register became dated. With one exception,¹³ agencies could not hire judges from the ALJ Register during this period. In *Bush v. Office of Personnel Management*, 315 F.3d 1358 (Fed. Cir. 2003), after an applicant was rejected in his request to be given part of the ALJ examination,

⁹ See Appointment, Pay, and Removals of Administrative Law Judges, 63 Fed. Reg. 8,874 (proposed Feb.23, 1998).

¹⁰ Now the National Conference of the Administrative Judiciary.

¹¹ 1 C.F.R. § 305.92-7. [57 FR 61760, Dec. 29, 1992].

¹² *Meeker v. Merit Systems Protection Board*, 319 F.3d 1368 (Fed. Cir. 2003).

¹³ In August, SSA was granted a waiver by OPM to hire 126 judges who would have qualified under any scoring formula. See *Hearing Before the Subcommittee on Social Security Of the Committee on Ways and Means House of Representatives*, One Hundred Seventh Congress, Second Session (MAY 2, 2002).

the Federal Circuit determined that the suspension of testing was a reviewable employment practice.¹⁴ On February 27, 2004, the United States Supreme Court finally dismissed the requests for certiorari.

OPM has also failed to follow its own regulations concerning priority placement from the ALJ priority referral list (PRL),¹⁵ resulting in irreparable harm to an ALJ on the PRL and a preliminary injunction against its continued improper administration of the PRL.¹⁶

Various other questions have arisen concerning the appropriate administration of the ALJ program, including the adoption of a Code of Judicial Conduct for ALJs, which OPM has refused to consider as part of its responsibility under present law. While OPM has met periodically with ALJ representatives, it has refused requests to establish an advisory committee or to meet with ALJ representatives on a regular basis to discuss these and other problems concerning the ALJ program.¹⁷

Administration of the ALJ program by OPM has been inadequate, and OPM has repeatedly indicated by words and deeds that it does not want to continue responsibility for the administration of operational programs such as the ALJ program. Indeed, until 1998 the OPM long-range plan did not recognize the ALJ program as one of its responsibilities. From 1994-95 the Office of Administrative Law Judges was upgraded by placing an administrative law judge in charge of the office, but since that time the office director has been a personnel specialist rather than a judge and the office has been subordinated under other testing functions. For many years OPM refused to maintain a continuously open examination for ALJ applicants, and when it finally opened the register continuously, it applied illegal criteria, as noted above, in examining and scoring applicants. As a result of OPM inaction, agencies have not been able to address hiring needs.

Maximize Administrative Efficiency

The Administrative Law Judge Conference of the United States will assume all duties with respect to administrative law judges currently mandated to OPM. The budget currently dedicated to administration of an administrative law judges' program by OPM will be transferred to the Administrative Law Judge Conference. Agencies will continue to select ALJs but the selection process and ALJ register will be managed by the Administrative Law Judge Conference of the United States.

It is also anticipated that the office of the Chief Judge will have the capacity to review rules of procedure, rules of evidence, peer review, and where appropriate, make suggestions ~~for~~ to promote administrative uniformity.

¹⁴ Sunsetting American Bar Association policy establishes that with respect to the recruitment and selection of administrative law judges (ALJs) employed by federal agencies, OPM, and Congress, where necessary, are to develop strategies to increase the percentages of women and minority candidates, eliminate veterans' preferences from this process, allow selection by agencies from a broader range of candidates for ALJ positions, and enhance OPM's Office of Administrative Law Judges. Although OPM facially adhered to these requests, it failed to administer the system during the period when it was involved in the *Azdell* litigation.

¹⁵ Under 5 CFR §930.215, an ALJ who is separated from service because of a reduction in force (RIF) is entitled to priority referral for any ALJ vacancy ahead of others on the ALJ register of eligibles maintained by OPM.

¹⁶ *Rutberg v. United States*, No. 98-10752-JUT, Order dated December 10, 1998, 1998 U.S. Dist, LEXIS 19832 (D. Mass., 1998).

¹⁷ In 1998 and 1999, OPM advised ALJs that they are required to maintain active bar status to retain their status as ALJs, although there is no provision in the OPM regulations granting authority to do so. Unlike attorneys, ALJs are barred from the practice of law by the Code of Judicial Conduct (Canon 5F)(ABA, 1990), which has been applied to ALJs by the Merit Systems Protection Board (*In re Chocallo*, 1 MSPBR 612, 651 (1978) and by some agency regulations. In some states, Federal ALJs like other judges, cannot be members of the state bar. E.g. Alabama.

Ensure High Standards

The Administrative Law Judge Conference of the United States will assure high standards for Federal Administrative Law Judges. It will permit the chief judge to adopt and issue rules of judicial conduct for administrative law judges. This is consistent with ABA policy, which states in part, that members of the administrative judiciary should be held accountable under appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.¹⁸

Promote Professionalism

The Conference can be used as a resource for continuing judicial education, consistent with ABA policy.¹⁹ ABA policy also encourages governmental entities at all levels to permit government lawyers, including those in judicial administrative positions, to serve in leadership capacities within professional associations and societies.²⁰

Promote Public Confidence

Establishment of the Administrative Law Judge Conference of the United States will significantly increase public trust and confidence in the integrity and independence of decision making by administrative law judges throughout the Federal Government.

Congressional Oversight

Congress needs a new organization to assure independent review of agency compliance with the APA and reporting to Congress on these important public safeguards for fundamental due process and the fair hearing process before administrative agencies. The Administrative Law Judge Conference of the United States will provide regular reports to the Congress on agency compliance with the APA and the provisions relating to ALJ utilization, management and compensation. This process will assist the Congress in its oversight of agency compliance with the APA. This reform permits Congress to maintain oversight on constitutional safeguards such as the right to an impartial and independent decision maker, notice and opportunity to appear at a hearing, a written explanation for the decision and the issuance of a timely hearing decision. This is consistent with ABA policy that Congress provide a practical process for agency matters.²¹

Respectfully Submitted,

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August, 2005

¹⁸ Policy 101B, 2001, *ABA Policy/procedures Handbook*, 193 (2004).

¹⁹ Standards for the Education of the Administrative Judiciary. Policy 99 A101, *ABA Policy/procedures Handbook*, 268 (2004).

²⁰ Policy 99-A-112. It also encourages governmental entities to adopt standards that would authorize government lawyers, including those in judicial administrative positions, to (1) make reasonable use of government law office and library resources and facilities for certain activities sponsored or conducted by bar associations and similar legal organizations, and (2) utilize reasonable amounts of official time for participation in such activities.

²¹ See ABA Policy, August, 1997, *ABA Policy/procedures Handbook: Policy on Legislative and National Issues*, 233 (2004).

