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.

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.

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.

²The 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).
Federal administrative law judges are appointed under 5 U.S.C. § 3105. Their powers emanate from the Administrative Procedure Act. 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. 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 compensation and that ALJs are functionally equivalent to other Federal trial judges.

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, including:

- agency civil penalty matters;
- air transportation safety;
- alien labor certification and attestations;
- antitrust;
- banking practices;
- child labor violations;
- civil fraud in federal programs;
- civil rights matters;
- commodity futures;
- contract disputes;

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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.”


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).
education grants;
employee polygraph tests;
environmental degradation;
food and drug safety;
grants administration;
hazardous materials;
housing violations;
interstate and retail pricing of electricity, oil, and natural gas utilities;
immigration law;
international aviation;
international trade;
labor;
Medicare;
migrant farm labor;
mine safety;
minimum wage disputes;
occupational workplace conditions;
postal rates;
Social Security Act benefits;
standards of conduct in union elections;
telemcommunications licensing;
unfair labor practices;
whistleblower complaints involving aviation, nuclear, energy, environmental, securities and commercial trucking statutes; and
worker compensation type claims.

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 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.\(^9\)

\(^8\) 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”).

On May 21, 1991, the National Conference of Administrative Law Judges (NCALJ)\textsuperscript{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.\textsuperscript{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 \textit{Azdell}\textsuperscript{12} was pending, OPM suspended the examination process for administrative law judges (ALJ). Therefore, the ALJ register became dated. With one

\textsuperscript{10} Now the National Conference of the Administrative Judiciary.

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

\textsuperscript{12} \textit{Meeker v. Merit Systems Protection Board}, 319 F.3d 1368 (Fed. Cir. 2003).
exception, 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, the Federal Circuit determined that the suspension of testing was a reviewable employment practice. 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), resulting in irreparable harm to an ALJ on the PRL and a preliminary injunction against its continued improper administration of the PRL.

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.

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

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).

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.


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.
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.

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

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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.
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,
Louraine Arkfeld, Chair, Judicial Division
August, 2005

1. **Summary of Recommendation**

To encourage 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 for operation of the administrative law judge program. The proposed Conference will assure high standards for Federal Administrative Law Judges, will promote professionalism, and will promote public confidence and will maximize administrative efficiency by consolidation of services and duties and elimination of unnecessary administrative duplication. Moreover, it will provide regular reports to the Congress on agency compliance with the Administrative Procedure Act and the provisions relating to ALJ utilization, management and compensation.

2. **Approval by Submitting Entity**

The Judicial Division Council approved the recommendation on April 29, 2005.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**

   Yes. Policy approved in August, 1988 encouraged legislation to enhance the judicial independence and efficiency of Federal administrative law judges through the establishment of a government-wide corps of administrative law judges, consistent with seven specified provisions. This recommendation is similar, but is not the same as that proposal.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

   As a general proposition, the ABA has requested improved coordination among Federal agencies and increased public and private oversight of regulatory action. This recommendation would continue that policy through the elimination of duplication, and would provide accountability to the agencies, the administrative judiciary, and establish an oversight mechanism. ABA policy measures expressed in 1983, 1989, 1998, 2000 and 2001 support the independence and integrity of the administrative judiciary. With respect to the recruitment and selection of administrative law judges employed by Federal agencies, the ABA currently recommends that OPM and Congress, where necessary, 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 (note that it was abolished in 2003); With respect to the performance
and professional capabilities of ALJs employed by Federal agencies and the handling of
complaints by and against such ALJs, support the implementation of appropriate procedures for
handling complaints against ALJs including allegations of bias or prejudice, support the use of
three-judge panels of ALJs for handling charges against ALJs before the Merit Systems
Protection Board and support the implementation of appropriate procedures for handling
complaints by ALJs. Policy adopted August, 1994. In November, 1992 the ABA urged OPM to
reopen the ALJ register that had been closed to new applicants for two years within thirty days.
The current register has been closed since 1997.

5. What urgency exists which requires action at this meeting of the House?

For prospective ALJs, this is an urgent matter.

6. Status of Legislation (if applicable)

There is no pending legislation. In 1998 and 2000 Bills were submitted in the House of
Representatives.

7. Cost to the Association (both direct and indirect costs)

There are no costs to the Association.

8. Disclosure of interest

None.

9. Referrals.

So far, the Government Public Sectors Lawyers Section, the Health Law Section and the Tort
Trial and Insurance Practice Section have agreed to co-sponsor the Recommendation and Report.
It has also been circulated to the Administrative Law and Regulatory Practice Section, the Senior
Division, the Federal Bar Association and we are in the process of sending it to other entities.
10. Contact Person (prior to the meeting)

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11. Contact Person (who will present the report to the House)

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