BACKGROUND REPORT FOR RECOMMENDATION 83-3

AGENCY REVIEW OF ADMINISTRATIVE LAW JUDGES' DECISIONS

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I. Introduction

Adjudicatory hearings in federal administrative agencies generally are presided over by administrative law judges (ALJs).[1] With rare exception the presiding ALJ will render a decision subject to review and confirmation by some other official or group of officials within the agency.[2] In many instances the nominal reviewing official is the head of the agency (including within that term members of collegial bodies) although in other cases subordinate officials are charged with that responsibility.[3] The Administrative Conference some fifteen years ago adopted Recommendation 68-6 encouraging increased delegation of authority to decide adjudicatory cases to two groups other than agency heads. The Recommendation advocated granting greater authority to subordinate reviewers in some instances (through the establishment of intermediate review boards) and to ALJs in others (through more deferential, certiorari-type review standards).[4] This report examines the impact of various intra-agency review processes and discusses the appropriate locus and scope of intra-agency review. Part I attempts to place the problem of intra-agency review. Part I attempts to place the problem of intr-agency review in perspective, relating it to other administrative law issues. Part II discusses ACUS Recommendation 68-6 and its effect on agency review of ALJ decisions. Part III explores review processes at selected agencies, and Part IV evaluates the utility of different review processes.

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1. 5 U.S.C. § 556(b)(3) (1976). More than 1,100 ALJs are employed by twenty-nine federal agencies; the number of ALJs is roughly twice the number of United States District Judges. See Lubbers, Federal Administrative Law Judges: A Focus on Our Invisible Judiciary, 33 AD. L. REV. 109 (1981). For a list of the types of cases presided over by ALJs as well as other information concerning ALJ decisionmaking, see ADMINISTRATIVE CONFERENCE OF THE U.S., FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS -- STATISTICAL REPORT FOR 1976-1978 (1980) (hereafter ACUS STATISTICAL REPORT).

2. 5 U.S.C. § 557(b) (1976). See Appendix 1 to Part III, infra, text at notes 309-354. The term "agency" is used here to indicate "independent" agencies, executive departments, and bureaus within such departments (e.g., the Social Security Administration of the Department of Health and Human Services).

3. Review processes are summarized infra, text at notes 144-168.

4. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, REPORTS AND RECOMMENDATIONS 122-24 (1968) (hereinafter ACUS 68-6).

1. Intra-Agency Review in Perspective: Two Models of Agency Adjudication

A. Bipolar and Other Approaches to Agency Action

Determination of the appropriate level and intensity of intra-agency review necessarily implicates assumptions about the nature of the adjudication. Two very different models of agency decisionmaking are reflected in administrative law writing. One, which may be called the "judicial model," posits a process by which a neutral arbiter weighs evidence and ascertains facts.[5] The paradigm of the matters at issue is the descriptive fact: an "objective" determination that something did happen, does exist, is of a certain nature or dimension.[6] The contrasting model is the "political model," in which decisions do not turn on descriptive facts but on the identity of interested parties, the intensity of their interests, and on assumptions about the impact of particular decisions on future events.[7] Of course, there are many decisions that encompass aspects of both models--indeed, it may be argued that every decision in the real world of administrative action encompasses elements of both--but most writing about administrative law is premised on these as the

5. See, e.g., Freedman, Review Boards in the Administrative Process, 117 U. PA. L. REV. 546, 558-59 (1969).

6. See, e.g., K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.02-7.03 (2d ed. 1978). To a significant degree, disputes over entitlement to social security disability insurance funds are disputes over matters of descriptive fact: what is the nature of the claimant's injury, what tasks can he perform? what has he done since the injury? The decisionmaking process is described in R. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION (1973); J. MASHAW, BUREAUCRATIC JUSTICE (1983); and sources cited in note 81, infra.

7. 1 K. DAVIS, supra note 6, at §§ 7.02-7.03; see also Jaffe, The Illusion of the Ideal Administration, 86 HARV. L. REV. 1183 (1973); Robinson, The Federal Communications Commission: An Essay on Regulatory Watchdogs, 64 VA. L. REV. 169, 175-76 (1978). A paradigm of this model in the administrative context is the Federal Communication Commission's decision whether, and on what basis, to allow "pay" television (especially cable-delivered pay television) to compete with commercial broadcast television. See First Report and Order on Subscription TV Programs Rules 52 F.C.C.2d 1 (1975) (full cite at note 232 infra).

classic examples of the two distinct kinds of decision administrators make.[8]

Although there is widespread acceptance of these as useful abstractions of administrative decisionmaking, there is not consensus on the models' implictions for administrative organization and operation. One school would build administrative procedure rather rigidly around the models. Those who adopt this "bipolar" approach would use different decisionmaking processes and different decisionmakers for the decisions suited to the judicial model from those persons and processes used for decisions apposite to the political model.[9] The classic division of processes is between trial-type proceedings adjudicating disputed matters of descriptive fact and less structured proceedings that seek to identify a consensus among interested parties on policies to be applied prospectively.[10] It often is argued that this is the approach followed by the Administrative Procedure Act of 1946 (APA),[11] separating adjudication (judicial model) from

8. See, e.g., K. DAVIS, supra note 6, at §§ 7.03, 7.05; Freedman, supra note 5; Mayton, The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking, 1980 DUKE L.J. 103; Pierce, The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Engergy Policy, 31 HASTINGS L.J. 1 (1979); Pops, The Judicialization of Federal Administrative Law Judges: The Implications for Policy Making, 81 W. VA. L. REV. 169 (1979); Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 HARV. L. REV. 921 (1965).

9. This position is taken generally by the authorities cited at note 8, supra, as well as by numerous judicial opinions, see, e.g., Association of National Advertisers, Inc. v. Federal Trade Comm'n, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980); compare id. with Cinderella Career & Finishing Schools, Inc. v. Federal Trade Comm'n, 425 F.2d 583 (D.C. Cir. 1970).

10. Professor Davis characterizes the distinction as one between processes for determining "adjudicative facts" and "legislative facts," see K. DAVIS, note 6 supra, at §§ 7.03, 7.05, and points to two Supreme Court decisions from the early part of this century as establishing the distinction between the procedures, id. at § 7.03, citing Londoner v. Denver, 21-U.S. 373 (1908), and Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

11. 60 Stat. 237 (1946), as amended, codified at 5 U.S.C. § 551 et seq. (1976).

rulemaking (political model).[12] Despite the textual provision for informal adjudication and formal rulemaking, the APA generally follows a bipolar approach in its division of issues and procedures. Adjudication frequently involves adversary presentation of evidence, cross-examination, oral argument as well as written, and restriction of the basis for decision to those matters adduced at "trial."[13] Rulemaking usually looks toward formulation of a "statement of general or particular applicability and future effect designed to ... prescribe law or policy ..."[14] Its process is comparatively informal, consensual, and non-adversarial, consisting of a public notice that policy is to be made, followed by receipt of written comments, evaluation of record and non-record material, and announcement of a rule.[15]

The Attorney General's Manual on the Administrative Procedure Act, issued shortly after adoption of the APA, emphasizes the Act's embrace of the bipolar approach:

> [T]he entire Act is based on a dichotomy between rule making and adjudication .... Rule making is ... essentially legislative in nature, not only because it operates in the future but because it is primarily concerned with policy considerations. The object of the rule making proceedings is the implementation or prescription of law or policy for the future rather than the valuation of respondent's past conduct....

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12. See, e.g., United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 224 (1972); See also statement of Carl McFarland, a member of the Attorney General's Committee on Administrative Procedure which drafted the basic blueprint for the APA, testifying as Chairman of the American Bar Association Committee on Administrative Law, Hearings on Administrative Procedure Before the House Committee on the Judiciary, 79th Cong., 1st Sess. 29 (1945): "There are two kinds of operations as all studies have indicated and any practitioner knows: Number 1, the issuance of a general regulation, which is similar to a statute; Number 2, the matter of an adjudication, similar to the judgment of a court."

13. See 5 U.S.C. § 556 (1976); see also Davis, Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer, 1977 DUKE L.J. 389; Pops, supra note 8.

14. 5 U.S.C. § 551(4) (1976).

15. 5 U.S.C. § 553 (1976).

> Conversely, adjudication is concerned with the determination of past and present rights and liabilities.[16]

The APA reinforced this view by creating a special class of officials to preside over adjudication.[17] These officials, formerly "hearing examiners," now administrative law judges, are insulated from contact with agency personnel who investigate and prosecute cases.[18] In addition, they are almost wholly outside the direct control of the more politically-responsive officials who head the employing agency and who decide the rulemaking issues that a bipolar approach assimilates to the political model.[19] Thus, ALJs are protected against removal by their employing agencies except for good cause as determined by the Merit Systems Protection Board (formerly part of the Civil Service Commission).[20] Their pay is set by the Office of Personnel Managment (OPM, formerly the Civil Service Commission) independently of agency recommendations or ratings.[21] Assignment of cases to hearing examiners is required to be in rotation so far as is practicable, and the Act forbids agencies from requiring them to "perform duties inconsistent with their duties and responsibilities as hearing examiners.[22]

In opposition to the bipolar approach are a number of writings claiming (for different reasons) that the polar models' utility does not extend to service as templates for administrative

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16. See U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14-15 (1947) [hereafter ATTORNEY GENERAL'S MANUAL].

17. 5 U.S.C. §§ 556(b)(3), 3105 (1976).

18. 5 U.S.C. § 554(d) (1976).

19. See generally Scalia, The ALJ Fiasco: A Reprise, 47 U. CHI. L. REV. 57 (1979).

20. 5 U.S.C. § 7521 (1976).

21. 5 U.S.C. § 5372 (1976).

22. 5 U.S.C. § 3105 (1976).

procedure.[23] The common complaint is that while it may be useful to think of the judicial and political processes as legitimate mechanisms for resolving different sorts of disputes, administrators cannot simply identify a problem as belonging to one model or the other and then apply that model's process.[24] One argument is that no administrative problem fits well under either paradigm but rather all fall somewhere between and thus require intermediate procedures.[25] A related argument is that some administrative problems are suited neither to trial-type proof nor to consensual, interest-based resolution, meriting instead a "managerial" or "scientific" decision process.[26] Still other dissenters from the bipolar approach urge that values inherent in broadened participation in public decisionmaking support blurring the line between the judicial and political models, promoting the involvement of more parties in adjudications and granting interested parties more control over decision in rulemakings.[27]

The significant point for analysis of administrative adjudications is that most of these non-bipolar approaches would provide some "political" input in cases that seem largely amenable to the judicial model. If adjudications cover matters that are not wholly separable from political concerns, the means of decision and the deciding officials also need not be wholly

23. See Boyer, Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 MICH. L. REV. 111 (1973); Jaffe, supra note 7; Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U. L. REV. 885 (1981); Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure, 118 U. PA. L. REV. 485 (1970); Stewart, Regulation, Innovation, and Administrative Law: A Conceptual Framework, 69 CAL. L. REV. 1256 (1981). Cf. Linde, Due Process of Lawmaking, 55 NEB. L. REV. 197 (1976).

24. Boyer, supra note 23, at 169; Robinson, supra note 23, at 536.

25. E.g., Robinson, supra note 23 at 536-39.

26. Boyer, supra note 23, at 150-164. See also Stewart, supra note 23, at 1368 (recommending a "scientific" analysis of an agency decision's "effect upon innovation").

27. See Mashaw, supra note 23; Mashaw, Conflict and Compromise Among Models of Administrative Justice, 1981 DUKE L.J. 181; Stewart, supra note 23, at 1372.

apolitical.[28] Despite the substantial congruence of the APA and the bipolar approach, this more synthetic view of administrative process also receives support from the Act. Administrative law judges, while largely segregated from contact with and control by others within their employing agency, are not wholly separate from the agency staff that may be initiating, approving, or prosecuting cases before them -- the ALJs and staff share a common boss.[29] Nor is this a matter merely of interest to those who draw organizational charts, since the agency head explicitly is authorized to dispense with initial decisions by ALJs and instead decide matters himself or in reviewing ALJs' initial decisions to exercise the full powers he would have had absent ALJ decision.[30] An agency head may, if he deems it proper, reverse the ALJ on any ground so long as there is a reasonable basis for the ultimate decision, a requirement that would obtain in all events.[31] Outside of findings on witness credibility, where demeanor is important, few determinations seem as a matter of law wholly committed to disposition by ALJs.

The agency head may, of course, act in a "judicial" manner, just as an ALJ presumably does. But the agency head is unlikely to preclude "political" considerations to the same degree. Unless the agency head makes policy decisions as abstractions from real-world problems, utterly without concern for the nature and identity of the competing interests, his policies will have some flavor of political decisionmaking.[32] In reviewing adjudications or in adjudicating matters himself, the agency head necessarily is sensitive to the political considerations that informed the policy decisions.[33] Indeed, it is his capacity, unique within the agency, to evaluate those considerations that prompted the APA's crafters to retain agency review of adjudications; wholly independent adjudications, lacking the agency head's sensitivity to factors not easily captured in rule form, might produce policies at odds with those the agency, acting

28. See Robinson, supra note 7, at 228; Scalia, supra note 19.

29. 5 U.S.C. §§ 556(b), 557(b), 3105 (1976); see FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 55-60 (1941) [hereafter FINAL REPORT].

30. 5 U.S.C. § 557(b) (1976).

31. See e.g., Federal Communications Comm'n v. Allentown Broadcasting Corp., 349 U.S. 458 (1955); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

32. See Jaffe, supra note 7, at 1188.

33. Id., at 1194-96.

within its delegated power, seeks to advance.[34] Politically responsive decisionmaking need not imply a preference for Democrats over Republicans or any other decision basis that most would view as unrelated to the merits of the contest. It does imply a concept of decision on the merits that potentially includes an array of factors outside the judicial ken.[35]

The APA's approach to administrative process, thus, is rather ambivalent. The APA, however, is only one factor governing the nature of agency decisions. Another factor is the legislation specifically concerned with each agency or program. While many of these are silent as to decisional process, many do specify the considerations critical to decision, the manner in which decision should be reached, and the organization of the administrators involved.[36] In some instances, Congress has chosen decisional processes or considerations that seem more plainly patterned on the judicial model than the broadly-applicable adjudication provisions of the APA. During the 1970s, for example, Congress passed legislation setting up two agencies charged exclusively with adjudicating cases.[37] In each case, another agency decides

34. See FINAL REPORT, supra note 29 at 57-58.

35. See Posner, The Behavior of Administrative Agencies, 1 J. LEGAL STUD. 305, 316-20 (1972); Robinson, supra note 7, at 224-36.

36. See Jaffe, supra note 7, at 1188-89.

37. The Occupational Safety and Health Review Commission, which is separate from the Occupational Safety and Health Administration of the Department of Labor (OSHA), was created by the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-6788 (1976), to adjudicate contests over OSHA citations. The Federal Mine Safety and Health Review Commission hears enforcement actions brought by the Department of Labor's Mine Safety and Health Administration and was crated by the Federal Mine Safety, and Health Amendments Act of 1977, 30 U.S.C. § 801 et seq. (Supp. IV 1980).

whether to pursue particular cases and adopts the substantive rules that implement the organic legislation.[38] Congress also has in some instances mandated "hybrid" procedures that seem plainly to mix policy formulation with decision of descriptive fact.[39] The more usual pattern is for Congress to identify relevant considerations, without precise definition of them, and to require or not require "hearings," without detailing what function the hearings or the various putative participants in them should perform.[40] Specific legislation, thus, provides no clear picture of a general, congressionally-dictated pattern for agency adjudication even though it gives substantial direction in some particular instances.

B. ALJs: The Cases for More Independence and Less

In most cases, then, the nature of the administrative adjudication, whether strictly adhering to the judicial model or conforming more to some other paradigm, must be determined without explicit congressional guidance. One may make some inferences from the APA, procedural provisions in other statutes, and the specific substantive considerations those statutes make relevant, but significant room is left for disagreement premised on different notions of how certain administrative decisions should be made. The numerous discussions of administrative adjudications in general and of the role of administrative law judges in particular reflect these different conceptions of administrative decisionmaking.[41]

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38. Both adjudicating agencies deal with regulations enacted and citations isused by the Labor Department. 29 U.S.C. §§ 655, 659, 662 (1976); 30 U.S.C. § 811 (Supp. IV 1980). See generally Currie, OSHA 1976 AM. B. FOUND. RES. J. 1107 (describing the operaton of, and problems with, the administrative scheme for occupational safety and health); Sullivan, Independent Adjudication and Occupational Safety and Health Policy: A Test for Administrative Court Theory. 31 AD. L. REV. 177, 187-83 (1979) (describing the competing bills concerned with this division of responsibility, the opposed factions, and the compromise enacted).

39. See, e.g., Federal Trade Commission Improvement Act of 1974 (Magnuson-Moss Act), 15 U.S.C. § 57a (1976).

40. See, e.g., Communications Act of 1934, 47 U.S.C. § 151 et seq. (1976).

41. See, e.g., Davis, supra note 13; Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975); Pops, supra note 8; Scalia, supra note 19; Verkuil, The Emerging Concept of Administrative Procedure, 78 COLUM. L. REV. 258 (1978).

ALJs themselves almost invariably embrace the judicial model as the appropriate paradigm for all ALJ decisionmaking. They have pressed vigorously for more insulation from agency control, notably advocating creation of a "unified ALJ corps" wholly divorcing ALJs from affiliation with any substantive agency.[42] They labored hard to earn the appellation "administrative law judge" instead of the less judicial "hearing examiner."[43] ALJs also have argued for more security and less variation in pay and civil service rank and vigorously oppose any scheme for critical evaluation of their work, urging their need for something that approaches the same independence as Article III judges (who are granted lifetime tenure and guaranteed irreducible pay).[44] ALJs are fond of pointing out that the Attorney General's Committee on Administrative Procedure (which in its 1941 Final Report set out the basic blueprint for the APA) in proposing a statutorily recognized class of "hearing commissioners" had stated the necessity of giving these officials both status and independence, saying that to secure "men of ability and prestige" the Congress must grant them "a tenure and salary which will give assurance of independent judgment."[45]

42. FEDERAL ADMINISTRATIVE LAW JUDGES' CONFERENCE, STATEMENT AND RECOMMENDATIONS TO THE UNITED STATES CIVIL SERVICE COMMISSION 12-13 (1973); see also Gladstone, Commentary: The Adjudicative Process in Administrative Law, 31 AD. L. REV. 237, 243 (1979); Segal, The Administrative Law Judge: Thirty Years of Progress and the Road Ahead, 26 A.B.A.J. 1424-28 (1976).

43. Congress initially had used the title of "examiner" rather than the term "hearing commissioner" (see FINAL REPORT, supra note 29, at 46-53), later changed to "hearing examiner," 80 Stat. 386, 415 (1966). The statutory change to "administrative law judge" was effected in 1978, Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183, although the title already had been granted six years earlier by the Civil Service Commission, 37 Fed. Reg. 16,787 (1972).

44. See FEDERAL ADMINISTPATIVE LAW JUDGES' CONFERENCE, supra note 42; Administrative Law Judge System: Hearings Before Subcomm. for Consumers of Sen. Comm. on Commerce, Science & Transp., 96th Cong., 2d Sess. (Sept. 4 & 5, 1980), at 61-101 (testimony of William E. Fowler, Jr., William J. O'Brien, Peuben Lozner, Ernest G. Barnes, and William Fauver) [hereafter cited as ALJ Hearings].

45. FINAL REPORT, supra note 29, at 46.

The ALJs also have asserted the undesirability of agency control over ALJ selection, especially opposing the device of "selective certification" which allows agencies to add to the requirements for ALJ appointment generally used by the Office of Personnel Management.[46] A typical additional requirement is the Federal Communications Commission's insistence that its ALJs before appointment have at least two years experience in the preparation, presentation, or hearing of formal cases in communications law.[47] Such criteria are criticized as biasing selection in favor of agency employees and, by implication, as giving the official selecting among ALJ candidates too much control over the selection.[48] The ALJs support the basic ALJ slection process that limits agency involvement to a choice among three persons picked by the Office of Personnel Managemant on the basis of its criteria, which are unrelated to the subject matters that may come before an ALJ or the interests of the employing agency.[49]

Acceptance of the judicial model in its pristine form is consistent with some positions taken by non-ALJs as well. Decisions of the Supreme Court respecting damage liability in civil suits, for example, appear to be consistent with acceptance of the judicial model of ALJs' operation. The Court has found judges absolutely immune from damage liability for the performance of their judicial duties but has provided executive officers below the President -- including Cabinet officers and presidential aides -- only a "qualified immunity" that may offer considerably less

46. E.g., ALJ Hearings, supra note 44, at 74 (statement of William Fauver on behalf of the Administrative Law Judges' Conference).

47. See Lubbers, supra note 1, at 117.

48. See, Davis, supra note 13, at 402-406; Miller, The Vice of Selective Certification in the Appointment of Hearing Examiners, 20 AD. L. REV. 477 (1968).

49. ALJ Hearings, supra note 44, at 74; see 5 C.F.R. § 930.203 (1981).

protection to those officials.[50] The Court has held squarely that ALJs are to be viewed as judges for liability purposes, drawing no distinction among ALJs or the types of cases before them.[51] Actions of officials at the U.S. Civil Service Commission, the predecessor agency to OPM, also have been in keeping with the judicial model. The Commission was charged with evaluation of the proper level and range of ratings for ALJs, and over a period of years, it consistently adjusted ratings so that they increased in rank and compressed in range.[52] Excepting chief ALJs, all administrative law judges are either GS-15 or GS-16;[53] in only two agencies do some ALJs occupy each grade; and at all but four of the remaining agencies the grade occupied by all ALJs is GS-16.[54] The impact of higher grade levels and fewer gradations is reduction in ALJ incentives to decide cases in a fashion that will permit advancement, since for ALJs, like federal judges, opportunity for advancement is slight.[55]

The judicial view of ALJs and agency adjudication has not gone unchallenged. Professor (now Judge) Scalia, for example, has argued that administrative adjudication should be considered in

50. Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982); Butz v. Economou, 438 U.S. 478 (1978). The Court recently decided that the President, like ALJs, enjoys absolute immunity from damage liability for official conduct. Nixon v. Fitzgerald, 102 S.Ct. 2690 (1982). Although the Court was unanimous in finding ALJs absolutely immunized, four justices thought the President should not be so broadly protected, a veiw consonant with that of lower courts. See Halperin v. Kissinger, 6506 F.2d 1192 (D.C. Cir. 1979), aff'd by an equally divided Court, 452 U.S. 713 (1981); Clark v. United States, 481 F. Supp. 1086 (S.D. N.Y. 1979), appeal dismissed, 624 F.2d 3 (3d Cir. 1980).

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

52. See Scalia, supra note 19, at 65-68.

53. See Lubbers, supra note 1, at 112-13; Scalia, supra note 19, at 68-69.

54. See Lubbers, supra note 1, at 112-13; Scalia, supra note 18, at 62-63. GS-15 ALJs are employed by the Coast Guard, Department of Housing and Urban Development, Internal Revenue Service, and the Social Security Administration. Both GS-15 and GS-16 ALJs are employed by the Department of the Interior and the Department of Labor.

55. See Scalia, supra note 19; see also Macy, The APA and the Hearing Examiner: Products of a Viable Political Society, 27 FED. B. J. 351, 355 (1967).

the context of overall agency decisionmaking.[56] Viewing the former as governed by the judicial model and the latter by the political model leads to incompatible decisions -- the ALJ cannot resolve questions of descriptive fact without any impact on agency policy since the two sorts of decision cannot easily be separated and examination of the matters subject to ALJ decision (e.g., the rates charged for various services by AT & T) in any event belies the fiction of policy-neutral decisionmaking.[57] Scalia urges that ALJs be treated like any other employee, letting the agency policymakers decide what issues to entrust to ALJs and what issues to pass on to others.[58] The present structure of agency personnel hampers what Scalia sees as a sensible recognition that all agency determinations ultimately must be governed by the political decisions of the agency head and other high-ranking policymakers. The limited provision for ALJ advancement, and the even more limited role for control of ALJ assignments and pay, frustrates efforts to shape ALJs' decisions in accord with policymakers' desires and at the same time, since ALJs in several agencies account for more than half of the statutorily restricted number of "super grade" positions, decreases agency heads' ability to attract and retain capable policymaking personnel.[59] Scalia applauds selective certification as a useful if modest step toward integration of ALJs into the agencies for which they work, but finds it far from enough.[60]

To the extent ALJ decisions do involve matters other than disputes over descriptive facts, the failure to integrate ALJs into the agency decisionmaking apparatus has two serious drawbacks. First, divergent views of what policies should be pursued will lead to increased time and cost in the administrative litigation and review process. The ALJ may believe one policy is being followed by the agency for which he works. If a different policy is favored by the agency head, some ALJ decisions may be reversed that would have been fashioned differently (and affirmed) had the policy been understood by the ALJ; or the policy differences may go unresolved for some time, thus impeding accomplishment of the agency head's objective and confusing persons who must deal with the agency.[61] Second, the existence

56. Scalia, supra note 19; see also Pops, supra note 8, at 197-203.

57. Scalia, supra note 19, at 75.

58. Id. at 62, 78.

59. See generally id.

60. Id. at 73-75.

61. See FINAL REPORT, supra note 29, at 57-58.

of a group within an agency insulated from agency policy decisionmaking processes encourages use of alternative routes for policy making and implementation. Other things being equal, the agency head should prefer to channel resources away from ALJs and adjudicative processes that must involve ALJs, substituting in their stead more malleable proceedings that are more easily supervised by the agency head.[62] In large measure, the separateness of ALJs within the agency perpetuates a two-tier administrative process, making it more difficult to find ways of combining aspects of adjudication and rulemaking in the manner best suited to resolution of each type of controversy.[63] Moreover, in instances where problems are tackled by rulemaking although there are serious factual disputes as to which parties could contribute a considerable amount of useful information, the decision reached may be less desirable perhaps than one reached through a case-by-case process. Although recently some statutes have specifically authorized ALJ participation in rulemaking proceedings,[64] such participation is both exceptional and severely limited in scope.

If the separation of officials who do not merely find descriptive facts presents difficulties for the agency operation, explicating the basis for a system that produces neither complete ALJ independence nor complete integration is critical. Putting aside a compromise between incompatible notions of agency operations -- perhaps the true explanation, but of little use -- for all who advocate some half-way house between the two polar views it is necessary to articulate the purposes of insulating ALJs and the concerns that preclude their complete insulation. The factors may, and probably do, affect administrative adjudication far from uniformly, dictating far greater independence of adjudication from policy-making in some cases than in others.

The Attorney General's Committee indicated that fear of factual prejudgment in cases where agencies acted both as prosecutors and adjudicators to enforce statutory or regulatory

62. This desire would follow from almost any hypothesis as to how administrators behave. See generally A. DOWNS, INSIDE BUREAUCRACY (1967); W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); Posner, The Behavior of Administrative Agencies, 1 J. LEGAL STUD. 305 (1972).

63. See Pops, supra note 8; see also Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975).

64. E.g., Magnuson-Moss Act, 15 U.S.C. § 572 (1976); Occupational Safety and Health Act, 29 U.S.C. § 655(b)(3) (1976).

commands was the principal motivation in separating ALJs from agency control.[65] Agencies engaged in licensing,[66] in resolution of essentially private disputes,[67] or in benefits administration,[68] rather than in enforcement activity, might exercise considerable power over ALJs and agency adjuciations without triggering that concern. It is by no means clear, however, that others believe factual prejudgment is the critical factor in determining the appropriate locus and extent of inquiry into ALJs' actions. The congressional committees that considered the APA did not identify the factors they thought controlled the shape of agency adjudication, but they did reject some proposals of the Attorney General's Committee as insufficiently insulating ALJs from agency influence.[69]

C. Control of Adjudication: The Role of Review

The tension between the judicial and political models in tandem with the absence of a consensus that one should and the other should not completely govern administrative adjudication (much less consensus on some intermediate position) frustrates attempts to design easily implemented, logically consistent decision-making structures. Either polar view, of course, can be satisfied. The problems seen by wholehearted adherents of the judicial model can be addressed by making ALJs and their decisions wholly independent of control by others. In a similar vein, one solution to the problems perceived by Scalia and others who find the judicial model an inappropriate guide for ALJ decisionmaking would be abolition of the class of ALJs as presently constituted. Rather than a statute-based class of semi-insulated hearing officers, ALJs' duties would be performed by agency employees of whatever level, background, and organizational affiliation the supervising officials deemed appropriate to the particular case or

65. See FINAL REPORT, supra note 29, at 58-60.

66. E.g., Federal Communications Commission (FCC).

67. E.g., National Labor Relations Board (NLRB).

68. E.g., Social Security Administration (SSA).

69. The Attorney General's Committee, for instance, had proposed appointment of ALJs for seven-year terms rather than the indefinite term with protection against removal chosen by Congress. See FINAL REPORT, supra note 29, at 47-48.

issue.[70] Hearing officers then might well occupy a considerable variety of GS grades; some might come from backgrounds that did not involve extensive experience in administrative litigation; and they might be located in a number of different departments, perhaps a separate hearing officer bureau, perhaps under the aegis of the agency's General Counsel, perhaps attacked to bureaus charged with substantive regulation. Hearing officers, as ordinary agency employees, might even perform other functions -- the hearing officer in a major FCC rate hearing, for instance, might be a legal assistant to the Commission chairman, a member of the General Counsel's staff, or a deputy to the Chief of the Common Carrier Bureau. While the present system inevitably treats ALJs the same in nearly all respects regardless of differences in the nature of the cases they hear, the missions of the agency for which they work, or the interests and identities of parties before them, integrating them into the agencies would allow their pay, working conditions, and so on, to be tailored to reflect (at least some of) the myriad factors that distinguish one ALJ from another.

The limits to this solution, however, illustrate the difficulty of identifying the appropriate manner and measure of review for ALJ decisions: a general problem of large organizations, especially true for governmental enterprises, is how to secure the appropriate behavior by employees.[71] This problem applies even to acts of "ordinary" employees (not subject to the special strictures preventing agency control over ALJs).[72] Making hearing officers as independent of, or as subject to, supervising employees as the agency head chooses and as the civil service laws allow would probably be more efficient (a term explored in greater detail infra in Part III), but it would not ensure that all agency decisions are made in accord with

70. While this solution would meet the objections of those who have been most critical of the organization of agency adjudication increasingly along lines of the judicial model, no one seriously advances this as a possibility for more than a few "rare" cases. See generally COMPTROLLER GENERAL OF THE U.S., ADMINISTRATIVE LEGAL PROCEDURE: BETTER MANAGEMENT IS NEEDED (1978); Boyer, supra note 23; Pops, supra note 8; Robinson, supra note 23; Scalia, supra note 19.

71. See, e.g., K. ARROW, Control in Large Organizations, in ESSAYS IN THE THEORY OF RISK-BEARING 223 (1971); J. GREEN & J. LAFFONT, INCENTIVES IN PUBLIC DECISIONMAKING (1979); Cass, Damage Suits Against Public Officers, 129 U. PA. L. REV. 1110, 1160-79 (1981); Shavell, Risk Sharing and Incentives in the Principal and Agent Relationship, 10 BELL J. ECON. 55 (1979).

72. See, e.g., Alchian & Demsetz, Production, Information Costs, and Economic Organization, 62 AM. ECON. REV. 777 (1972); Holmström, Moral Hazard and Observability, 10 Bell J. ECON. 74 (1979).

the agency head's wishes. Focusing on the characteristic of subordinates' decisions that may be most likely to diverge, there is, for instance, no guarantee that decisions by subordinates who are in theory fully subject to the agency head's control will conform to a single policy view. Apart from the policy variation that must be experienced over time with changed circumstances and different leadership, there is bound to be some difference in agency decisions. So long as all decisions cannot be made by a single individual, disparate perceptions of what agency policy is and should be -- as well as divergent interpretations and assumptions on a host of subsidiary matters that inform policy -- promote differences among the decisions.

These differences can be reduced by efforts to attract people whose views closely approximate those of the agency head, or whose interests closely parallel those of the agency head. Finding people whose views closely match yours is not easy,[73] nor is it

73. The divergence of individuals' beliefs and preferences follows almost axiomatically from the concept of rational, self-interested behavior, since what benefits one individual almost never will benefit another to just the same extent. Individuals can, of course, share preferences that are extremely similar in some respects or can identify activity that satisfies disparate preferences. Even where smoothly functioning markets exist, however, only limited information about others' preferences is revealed. See Alchian, The Meaning of Utility Measurement, 43 AM. ECON. REV. 26 (1953); Friedman, The Methodology of Positive Economics, in M. FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS 3 (1953); Waldner, The Empirical Meaningfulness of Interpersonal Utility Comparisons, 4 J. PHIL. 87 (1972). Extensive literatures have developed attempting to interpret the choices people make so as to identify underlying preferences and to construct decisionmaking processes that will reveal preferences. See, e.g., S. BRAMS & F. FISHBURN, APPROVAL VOTING (1983); D. MUELLER, PUBLIC CHOICE (1979); W. RIKER & P. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY (1973); Simon, On How to Decide What to Do, 9 BELL J. ECON. 494 (1978). One point that emerges clearly is the difficulty of securing information about others' beliefs and shaping joint efforts to harmonize differences. Cf. K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) [a general treatment of the desirability and difficulty of shaping joint decisionmaking in this fashion]. Everyday examples of the result of these difficulties abound, witness the surprise experienced by President Dwight Eisenhower when [some of] the actual preferences of Earl Warren were made clear[er] after his appointment to the Supreme Court or President Richard Nixon's similar dismay at the views in fact held by Miles Kirkpatrick, not surmised until after his appointment to head the Federal Trade Commission.

simple to give people incentives correctly to identify and fully to implement your views, in part simply because of difficulties ex ante in articulating (indeed, arriving at) your views on every relevant subject. Investment in making decisions and spelling out rules to guide subordinates is, of course, useful for securing conforming behavior but, as with the investment in identifying compatible employees or structuring employees' incentives to compatibility, may be costly if it is to have significant effect.

A second mechanism for reducing the disparity in agency decisions is to review subordinates' decisions.[74] This is in fact a large part of what makes the first mechanism work, since absent some form of review it is difficult to reward conforming behavior or punish behavior that departs from your wishes, the stuff incentives are made of.[75] Despite the significance of review, this plainly is a costly means to uniformity, imposing especially on the agency head's time. In structuring the agency's decisions, then, the agency head will be required to balance the requisite investment of resources against the importance of suiting his views on a given issue. Decision both as to the selection of personnel and the use of review will turn on this balance. Thus, agency heads, where they are free to do so, presumably entrust important decisions to individuals in whom they repose great trust, and in the case of truly important decisions the agency heads also become personally involved, while less important decisions are entrusted to employees who may reflect the agency heads' view less closely, and truly unimportant decisions are made with finality by such employees.

Review in the normal course is complementary to job controls (controls over employees' appointment, work assignment, pay, promotion, tenure, and so on), although it also constitutes an independent control over subordinate employees.[76] Without the related controls over the structure and rewards of the job, review

74. See, e.g., Alchian & Demsets, supra note 72; Fama, Agency Problems and the Theory of the Firm, 88 J. POL. ECON. 288 (1980); Jensen & Meckling, Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure, 3 J. FINANCIAL ECON. 305 (1976).

75. See Alchian & Demsetz, supra note 72; see also McKean, Property Rights Within Government and Devices to Increase Governmental Efficiency, 39 S. ECON. J. 177 (1972).

76. See Holmström, supra note 72; Stiglitz, Incentives, Risk, and Information: Notes Toward a Theory of Hierarchy, 6 BELL J. ECON. 552 (1975).

guards against adverse impact from acts of subordinates.[77] Moreover, dislike of reversal, a subset of our general dislike of criticism, may prove some incentive for subordinates to modify their conduct in a fashion desired by the reviewer.[78] Obviously, however, review is apt to be its most effective when attached to the full complement of job controls. That nexus allows it in important ways to affect performance incentives as well as the effect of decisions already made.[79]

If supervisors with the full panoply of controls must make difficult determinations concerning what decisions to delegate to which subordinates -- and along with that, how much to invest in selecting subordinates, in spelling out decision standards, and in policing subordinates' decisions -- taking the APA's current provisions as a given presents more difficult choices on a narrower range of issues. In the adjudication context, supervisors must decide what review function to exercise or to delegate, how much to spell policies out in advance, and how much to defer to the initial decisionmaker, but they seldom need decide who should preside over hearings, how to select those employees, and what sort of job controls to exercise.[80] For those commentators who accept (as a political reality or theoretical desideratum) the uneasy compromise of adjudication by ALJs inside but separate from agencies, rather than advocating total ALJ independence or total agency control, the remaining questions are what sort of job controls, if any, are in order, and what sort of agency review is appropriate.

A number of proposals for altering review of ALJs' performance have been put forward. Many have called for increased scrutiny of ALJ decisions in a fashion that might provide greater job controls without an increase in political input of the magnitude that necessarily would accompany integration of ALJs into

77. Cf. FINAL REPORT, supra note 29, at 76-79 (respecting role of judicial review).

78. See, e.g., Cass, First Amendment Access to Government Facilities, 65 VA. L. REV. 1287, 1329 n.207 (1979); see also C. HORSKY, THE WASHINGTON LAWYER 78 (1952).

79. The absence of such a connection may explain some of the difficulty commentators experience in attempting to determine what motivates judges. See, e.g., R. POSNER, ECONOMIC ANALYSIS OF LAW 415-17 (2d ed. 1977).

80. These matters are, generally, removed from their discretion. See 5 U.S.C. §§ 556, 557, 3105, 5372, 7521 (1976).

agencies.[81] The Comptroller General, for example, in a 1978 report to Congress concluded that additional review of ALJs is required to identify and correct unsatisfactory ALJ performance.[82] Yet the Comptroller also concluded that agency review of ALJ decisions was a cause of increased cost and delay in agency adjudications and recommended a reduction in intra-agency review of specific ALJ Decisions.[83] In place of such agency review, the Comptroller advocated that the Civil Service Commission (or some similar agency), be appointed to supervise ALJ decisionmaking, measuring ALJs' performance against both quantitative and qualitative standards.[84] In a similar vein, a bill introduced in the 96th Congress would have entrusted review of ALJ performance to the Administrative Conference.[85] In reporting out the bill, the House of Representatives' Committee on Post Office and Civil Service said that it was "providing, for the first time since enactment of the Administrative Procedure Act, a system for periodic appraisal of, and disposition of complaints about, administrative law judge performance."[86] This bill was not enacted into law in the 96th Congress, but similar measures for external evaluation are certain to be put forward in the future.

Proposals for review outside the employing agency, external review, represent at least a partial rejection of the judicial model of ALJ action. Unless the review is limited to examination of the ALJ's diligence without regard for the consonance of his decisions with agency policies, the external review necessarily increases the impact of political decisionmaking on agency adjudication. By tying the review to job controls, the process raises ALJ's incentives to conform to agency policymakers'

81. See, e.g., COMPTROLLER GENERAL, supra note 70; MASHAW, GOETZ, GOODMAN, SCHWARTZ, VERKUIL & CARROW, SOCIAL SECURITY ADMINISTRATION DISABILITY HEARING SYSTEM (1978); Chassman & Rolston, Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process, 65 CORNELL L. REV. 801 (1980); but see Mashaw, How Much of What Quality? A Comment on Conscientious Procedural Design, 65 CORNELL L. REV. 823 (1980).

82. COMPTROLLER GENERAL, supra note 70.

83. Id. at v-vii.

84. Id.

85. H.R. 6768, 96th Cong. 2d Sess. (1980).

86. H.R. Rep. No. 1186, House Comm. on Post Office and Civil Service, 96th Cong., 2d Sess. 15 (1980).

views.[87] Plainly, the mixing of political and judicial models comes in many gradations, and external review could provide the most minimal political input. One who accepts the judicial model of agency adjudication might embrace external review as a check on misfeasance or nonfeasance but advocate that the review go no further than guarding against serious departures from clearly articulated agency policy.[88] The external review, in other words, might use a standard for qualitative review similar to the clearly erroneous standard for appellate court review of trial judges' factfinding. Requiring agency policymakers to spell policies out in advance in a fashion that makes the policy clear to others grants far less scope to the political factors than does allowing agency policymakers to reverse ALJ decisions at will. There is some logical basis, thus, for the Comptroller General's recommendation that external review be increased and internal review decreased.

Still, proposals for review of ALJ decisions on non-quantitative grounds,[89] and for the use of job controls to alter ALJ's decisionmaking incentives[90] are to some degree in conflict with the judicial model of agency adjudication. And as one moves away from that model it is difficult to support the location of job controls outside the agency rather than within. Surely if external review is designed to see that ALJ decisions conform to agency policies, that is a job the agencies are better situated to perform. The policymaking officials within the agency, after all, set those policies and better than any other

87. See authorities cited at notes 71-79 supra.

88. This approach is not dissimilar to that suggested by some for assessing the propriety of judicial performance in the context of damage suits, see, e.g., Stump v. Sparkman, 435 U.S. 349 (1978), at 364-69 (Stewart, J., dissenting), 369-70 (Powell, J., dissenting).

89. E.g., COMPTROLLER GENERAL, supra note 70. Some discussions of ALJ performance have focused less on the quality of ALJ decisions than on the disparity among ALJs in any given agency in number of decisions issued, a matter more easily policed without affecting decision incentives so directly.

90. E.g., Scalia, supra note 19.

official can interpret and identify deviations from them.[91]

While intra-agency review is useful, and is widely used, to guard against adverse effects of subordinates' decisions, however, it also has the potential to introduce new problems. In part, this is because resources must be used in review, and it always is an open question whether they are being used wisely. Choosing how to review ALJ actions requires decisions on several subsidiary issues: the review may be searching or pro forma; it may be readily available or granted only in special cases; the reviewer may be by an individual or a group; and the review may consist of a single review or multiple levels. For each of these choices, the cost of that particular sort of review may be assailed as too high and its benefits as too low, although the removal of job controls from agency supervisors' hands (rightly or wrongly) limits alternatives for shaping ALJs' behavior. Finally, just as preferences for some variant of the judicial or the political model inform most discussion of agency action, they also provide additional grounds for criticism of agency review as allowing, respectively, too little or too much leeway to judgments of officials divorced from the apparatus more explicitly concerned with agency policymaking.[92]

II. ACUS Recommendation 68-6

A. Genesis

Concern over the manner in which agencies reviewed ALJ decisions led the Administrative Conference of the United States

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91. The relation of adjudicatory decisions to statutory mandate, as opposed to administrative policy, may not be seen as so plainly a matter within agency policymakers' peculiar competence. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (declaring need for judicial scrutiny of agency action to assure constancy with statutory design). At the same time, there is little reason to suppose that another administrator is better suited to make that judgment. Cf. NLRB v. Hearst Publications, 322 U.S. 111 (1944) (Congress intended to leave interpretation of statutory term to agency charged with statute's effectuation); Landes & Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J. L. & ECON. 875 (1975) (courts, outside the relatively direct influence of political actors, serve better to interpret meaning of statutes according to intent of those critical to their enactment).

92. See Cramton, A Title Change for Federal Hearing Examiners? "A Rose By Any Other Name . . .", 40 GEO. WASH. L. REV. 918 (1972); Davis, supra note 13; Pops, supra note 8; Scalia, supra note 19.

(hereafter ACUS or the Conference) to commission a study of ALJ review in the late 1960's. The resulting reports, by Professor James Freedman and by Emory Ellis, then Executive Secretary to the Conference, spurred adoption of ACUS Recommendation 68-6 in 1968. This Part examines the origin and impact of 68-6.

Professor Freedman's report found two principal difficulties with agency review of ALJ decisions. One objection focused on the impact such review had on the particular parties involved in disputes subject to ALJ decisionmaking, while the other complaint dealt with the implications of the generally used review process for agency policymaking. The first complaint was that the decision of adjudicatory proceedings had become a lengthy affair.[93] Freedman referred to the untoward length of adjudicatory proceedings as the problem of "delay," the same term earlier used by Dean Landis.[94] There are two components to delay: the length of time taken to resolve a proceeding and the number of days during the proceeding in which participation by theparties, or their surrogates is required. Although increases in either component of delay impose some costs on litigants before agencies, the costs are not the same. An increase in the "active" part of the proceeding imposes monetary costs of participation directly on the parties involved. An increase in the part of the proceeding during which parties are "passive" (including time during which there may be no activity by anyone, the "warehousing" or "queuing" time spent waiting for the proceeding to advance in line at any stage) does not have this effect; but since it also lengthens the time during which litigants are uncertain about the outcome, it, too, impairs litigants' abilities to plan their affairs.

Increases in both the time and costliness of agency decisions put pressure on some putative litigants to find means of avoiding agency adjudications. This last factor, the settlement impetus of long and costly proceedings, does not affect litigants equally. Some are in a much better position than others to cope with the costliness and uncertainty of long proceedings and longer agency decision time. Someone who during the pendency of a proceeding is receiving benefits that the decision might terminate, for instance, is apt to be much less bothered by the lengthiness of the proceeding than someone whose benefits commence only after a favorable decision. Similarly, a party with a great stake in the

93. Report of the Committee on Agency Organization and Procedure in Support of Intermediate Appellate Boards; Subparagraph 1(a) of Recommendation No. 6, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, REPORTS AND RECOMMENDATIONS 125 (1968) [hereafter Freedman Report].

94. Id. at 125-26, relying on J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 5 (1960).

outcome will be much more burdened by delay than a party with a relatively slight stake (contrast a business seeking a licence to operate with a challenger to the license). Inequality of the effects of delay probably translates into a pattern of settlements more favorable to some parties and less favorable to others than agency decisions would be.[95] Thus, the longer and costlier the agency adjudicatory proecess, the greater the amount of activity shaped not by the agency's substantive rules, but by the settlement process that only in part reflects those rules.[96]

The second complaint noted by Freedman was that agency adjudication did not reflect coherent policies.[97] Decisions lacked predictability, and the reasons for them were often unclear.[98] The failure of agencies to formulate policies broadly and follow them consistently does not have a single simple explanation. Rather, this failure must be understood as the product of a variety of reasons related to the nature of large bureaucracies handling complex problems of interest to different parties.[99] The agency seldom will have a well-defined, easily applied mandate from the legislature, often because the legislature could not agree on concrete goals for the

95. The situation described here has analogies in many other areas, including for instance litigation arising out of automobile accidents. See H. ROSS, SETTLED OUT OF COURT 233-43 (1970); Bombaugh, The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform, 71 COLUM. L. REV. 207, 214, Table 3 (1971).

96. For an analogous discussion in the area of "plea bargaining" in criminal cases, see Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 MICH. L. REV. 463, 507-39 (1980).

97. Freedman Report, supra note 93 at 125, 126-27.

98. This complaint has been voiced by a host of commentators. See, e.g., H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962); Robinson, supra note 23.

99. See generally, K. ARROW, supra note 71; R. CYERT & J. MARCH, A BBEHAVIORAL THEORY OF THE FIRM (1963), J. MARCH & H. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISIONMAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS (1976); J. THOMPSON, ORGANIZATIONS IN ACTION (1967).

agency.[100] Groups with divergent interests will seek to influence the agency's decisions, and the manner and magnitude ofeach interest's efforts will vary from decision to decision.[101] Even if all parties were agreed on the appropriate goals -- a rarity in agency decisionmaking -- the problem confronted by the agency may pose issues beyond our current capacity to address and resolve.[102] Indeed, such limits to our processes of ratiocination underlie much of the increased

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100. See, e.g., Aranson, Gellhorn & Robinson, A Theory of Legislative Delegation (Sept. 1982, on file with author); see also Fiorina, Legislative Choice of Regulatory Form: Legal Process or Administrative Process?, 39 PUBLIC CHOICE 33 (1982); Jaffe, supra note 7. The art of ambiguity is one mechanism for surmounting difficulties of harmonizing divergent individual values. The best-known discussion of this subject is K. ARROW, supra note 73, at 46-73. Cogent discussions of these difficulties also include A. FELDMAN, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY 138-95 (1980); A. MacKAY, ARROW'S THEOREM: THE PARADOX OF SOCIAL CHOICE (1980); A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970).

101. See, e.g., R. CASS, REVOLUTION IN THE WASTELAND: VALUE AND DIVERSITY IN TELEVISION 37-55 (1981); Cutler and Johnson, Regulaton and the Political Process, 84 YALE L.J. 1395 (1975); Lazarus & Onek, The Regulators and the People, 57 VA. L. REV. 1069 (1971); Peltzman, Toward a More General Theory of Regulation, 19 J. L. & ECON. 211 (1976); Robinson, supra note 7; Stigler, The Theory of Economic Regulation, 2 BELL J. ECON. & MGT. SCI. 3 (1971).

dissatisfaction with government regulation.[103] As the information available to agency decisionmakers changes (with changing factual settings, increased information from research, or different inputs from affected parties) and as the political forces alter the composition of agency leadership and the perception of agency priorities, it is natural that agency policies will change. Agencies start, thus, with several important impediments to the formulation of coherent policies.

Moreover, even were they operating in a static world with fixed, agreed-upon goals and constant positions espoused by politicians and other parties, agency decisionmakers might not always find it worthwhile to formulate broad policies. There are costs to creation of general rules, granting our competence to make them. It might be inefficient to attempt broad prescriptions in preference to ad hoc adjudication once general goals are

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102. The difficulties of decisionmaking operate at two levels: first, there are impediments to an individual's projecting what course of action will satisfy best his own interest; second, there are additional impediments to a social planner's determination of a course of action that will be in society's best interest. At both levels, problems of gathering, evaluating, and assimilating information are involved; at the secondary (planning) level the problems concern identifying individuals' preferences as well as determining the strategy that will optimize them. This last difficulty is complicated by the difficulty of aggregating individual preferences, see authorities cited supra at notes 73 and 100. The overarching difficulty of comprehensive decisionmaking in complex situations, which has come to be known as the problem of "bounded rationality" is discussed in Simon, A Behavioral Model of Rational Choice, 69 Q. J. ECON. 99 (1955). A further elaboration of this and subsidiary problems, including some relating to individul prediction of one's own preferences, in March, Bounded Rationality, Ambiguity, and the Engineering of Choice, 9 BELL J. ECON. 587 (1978). The implications of this problem, at least at its secondary level, are implicit in M. FRIEDMAN, CAPITALISM AND FREEDOM (1962), and explicit in Diver, Policymaking Paradigms in Administrative Law, 95 HARV. L. REV. 393 (1981).

103. An amusing as well as enlightening discussion of government misthinking is B. ACKERMAN & J. HASSLER, CLEAN COAL, DIRTY AIR (1981). Less light-hearted but equally critical is Peltzman, An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments, 81 J. POL. ECON. 1049 (1973).

adopted.[104] The latter may give the appearance ofunpredictability but may track agency goals more closely than a fuller ex ante description of agency policy, especially where the policy must be applied to a wide variety of different situations.[105] It well may be the case that a comprehensive rule would either produce the wrong result (judged by the agency's goals) in many instances or be subject to frequent exceptions, in which case the rule in practice takes on the same form as ad hoc adjudication.

Finally, assuming agreement among citizens, legislators, and agency heads on the goals to be pursued by the agency, and further assuming agency interest in and competence to translate those goals into coherent statements of policy, agency action still might not appear consistently to advance comprehensible policies. To the extent agency leaders must delegate tasks to subordinates (including the tasks of information-gathering and evaluation, as well as decisionmaking that is more plainly policy-linked), consistency will diminish. Each person within an agency has some interests that are not fully shared by other agency personnel.[106] It is costly to monitor employee behavior, and nonprofit, governmental bureaucracies seem to lack other means available to private firms for making individual employees' interests conform more closely to the enterprise's interest.[107]

Professor Freedman did not detail all the costs and causes of the two principal problems of agency adjudication on which he focused. He did, however, write with an awareness that neither the causes nor the effects of these complaints were simple.[108] And he plainly appreciated, as did the Conference, that no simple solution could eliminate the complaints.[109] Still, he believed

104. See Ehrlich & Posner, An Economic Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257 (1974).

105. Id.; See also Diver, Optimal Precision of Administrative Rules, 93 YALE L.J. 65 (1983).

106. See, e.g., J. GREEN & J. LAFFONT, supra note 71; Jensen & Meckling, supra note 74; McKean, supra note 75.

107. See Cass, supra note 71, at 1164-74. The mechanisms for reduction of the impact of "moral hazard" (the opportunity to indulge in individual self-interest at others' expense) in private, profit-oriented firms are discussed in Fama, supra note 75; Holmström, supra note 72; Jensen & Meckling, supra note 75; Stiglitz, supra note 71.

108. Freedman Report, supra note 93 at 125-26.

109. Id. at 150-54.

that progress in alleviating both problems could be made by relatively small changes in agency review of adjudicatory decisions. In brief, he proposed reducing the review burden on agency heads in order both to decrease the time necessary for review (ameliorating the delay problem) and to increase the personal participation of agency heads in cases they did review (thus increasing the likelihood that high-level agency review would be used to shape policy).[110] The specific means suggested for reducing agency heads' review burden were (1) permitting review of ALJ decisions at the discretion of the agency (using that term to mean the head of an agency or members of a multimember commission) with unreviewed decisions becoming final agency action, and (2) establishing appellate review boards intermediate between the ALJ and agency head.[111]

At the time Professor Freedman wrote, three agencies had, pursuant to enabling legislation, adopted such procedures. The Civil Aeronautics Board (CAB) had provided for review of ALJ decisions in the Board's discretion, while intermediate appellate review boards had been established at the Federal Communications Commission (FCC) and the Interstate Commerce Commission (ICC). In nearly all other federal agencies, ALJs rendered initial decisions that routinely were reviewed by agency heads.[112] The reports by Freedman and Ellis declared that discretionary review at the CAB and the use of intermediate review boards at the FCC and ICC seemed to have reduced the average time for decision at those agencies.[113] Freedman and Ellis also reported that persons who worked with these agencies generally were pleased with the results of the new decisionmaking processes. They felt that the agencies produced better reasoned opinions that were more predictable. Freedman noted that, with respect to the FCC's Review Board, the praise perhaps should be qualified because the Board was given a relatively narrow range of inquiry and, hence, should be expected

110. Id. at 134-37.

111. Id. at 136-37.

112. Freedman did not discuss instances in which the review function was delegated to an individual agency employee, as in the Judicial Officer programs at the Post Office Department (now the U.S. Postal Service) and the Department of Agriculture. Few agencies, however, use this process. See discussion in Part III, infra.

113. Freedman Report, supra note 93 at 137; Report in Support of Discretionary Review of Decisions of Presiding Officers; Subparagraph 1(b) of Recommendation No. 6, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, REPORTS AND RECOMMENDATIONS 155, 160-63 (1968) [hereafter Ellis Report].

to act more quickly and consistently.[114] Nonetheless, he credited as significant to improving the quality of opinion writing the assignment of opinion-writing responsibility to individual board members (who, like judges, signed the opinions) and the greater direct involvement of the Review Board members (as opposed to Commissioners) in review and evaluation of each case.[115] In light of these findings, the Conference adopted ACUS Recommendation 68-6, Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency:

> 1. In order to make more efficient use of the time and energies of agency members and their staffs, to improve the quality of decisions without sacrificing procedural fairness, and to help eliminate delay in the administrative process, every agency having a substantial caseload of formal adjudications should consider the establishment of one or more intermediate appellate boards or the adoption of procedures for according administrative finality to presiding officers' decisions, with discretionary authority in the agency to affirm summarily or to review, in whole or in part, the decisions of such boards or officers.
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> 2. Section 8 of the Administrative Procedure Act, 5 U.S.C. §557, should be amended as necessary to clarify the authority of agencies to restructure their decisional processes along either of the following lines:
>
> (a) Intermediate appellate boards
>
> (1) Whenever an agency deems it appropriate for the efficient and orderly conduct of its business, it may, by rule or order:
>
> (a) Establish one or more intermediate appellate boards consisting of agency employees qualified by training, experience, and competence to perform review functions,
>
> (b) Authorize these boards to perform functions in connection with the disposition of cases of the same character as those which may be performed by the agency,

114. Freedman Report, supra note 93, at 131.

115. Freedman Report, supra note 93, at 131-33.

(c) Prescribe procedures for review of subordinate decisions by such boards or by the agency, and

(d) Restrict the scope of inquiry by such boards and by the agency in any review, without impairing the authority of the agency in any case to decide on its own motion any question of procedure, fact, law, policy, or discretion as fully as if it were making the intitial decision.

(2) Any order or decision of an intermediate appellate board, unless reviewed by the agency, shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as orders and decisions of the agency.

(3) A party aggrieved by an order of such board may file an application for review with the agency within such time and in such manner as the agency shall prescribe, and every such application shall be passed upon by the agency.

(4) In passing upon such application for review, an agency may grant, in whole or in part, or deny the application without specifying any reasons therefor. No such application shall rely upon questions of fact or law upon which the intermediate appellate board has not been afforded an opportunity to pass.

(5) An agency, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or other action made or taken by an intermediate appellate board.

(6) If an agency grants an application for review or undertakes review on its own motion, it may affirm, modify, reverse, or set aside the order, decision, report or other action of the intermediate appellate board, or may remand the proceeding for consideration.

(7) The filing of an application for agency review shall be a condition precedent to judicial review of any order of an intermediate appellate board.

(8) Agency employees performing review functions shall not be responsible to or subject to the supervision or direction of any employee or agent engaged in the performance of investigative or prosecuting functions for any agency.

(b) Discretionary review of decisions of officers

(1) When a party to a proceeding seeks administrative review of an initial decision rendered by the presiding officer (or other officer authorized by law to make such decision), the agency may accord administrative finality to the initial decision by denying the petition for its review, or by summarily affirming the initial decision, unless the party seeking review makes a reasonable showing that:

(a) A prejudicial procedural error was committed in the conduct of the proceeding, or

(b) The initial decision embodies (i) a finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide; (ii) a legal conclusion which is erroneous; or (iii) an exercise of discretion or decision of law or policy which is important and which the agency should review.

(2) The agency's decision to accord or not to accord administrative finality to an initial decision shall not be subject to judicial review. If the initial decision becomes the decision of the agency, however, because it is summarily affirmed by the agency or because the petition for its review is denied, such decision of the agency will be subject to judicial review in accordance with established law.

B. Implementation

The impact of Recommendation 68-6 is difficult to assess. Only one other agency, the Nuclear Regulatory Agency (formerly the Atomic Energy Commission), uses an intermediate appellate review board similar to those used by the FCC and ICC,[116] and Congressional authorization to establish such a board antedates 68-6.[117] Several other agencies utilize review boards to

116. The NRC review board, its history and operation are described in Cotter, Nuclear Licensing: Innovation Through Evolution in Administrative Hearings, 34 AD. L. REV. 497 (1982). Unlike the boards at the FCC and ICC, the NRC's intermediate review largely is conducted in part by part-time employees. See infra text accompanying notes 173-179.

117. Atomic Energy Act of 1954, 42 U.S.C. § 2241 (1976).

examine ALJ decisions, but these panels constitute the final agency review, replacing review by the agency head.[118]

Discretionary review, however, is increasingly used to reduce the review burden of agency heads. More than one-third of the agencies employing ALJs provide for discretionary review in at least some instances.[119] The three agencies using intermediate review boards to screen ALJ decisions all provide for further review at the discretion of the agency members.[120] Adding these to the ten agencies providing for discretionary review of ALJ decisions directly by the agency head or his delegate, almost half the agencies employing ALJs provide some discretionary review. At the same time, a majority of agencies also still provide, in at least some cases, for review as of right to a party filing timely exceptions,[121] and ALJs for five agencies render recommended decisions (in some or all cases) that automatically are reviewed by the agency before becoming final.[122] Nonetheless, in

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118. These agencies are: Department of Housing and Urban Development, Department of Interior, Department of Labor, and the Social Security Administration of the Department of Health and Human Services. Their operations are further described in Appendix 1 to Part III, infra.

119. Ten of the twenty-eight agencies for which information was available, or roughly 46 percent, provided for discretionary review in some or all cases: CAB, EPA, FMHRC, HUD, Interior, Labor, MSPB, OSHRC, SEC, and SSA.

120. See 10 C.F.R. § 2.786 (1981) (NRC); 47 C.F.R. § 0.365 (1980) (FCC); 49 C.F.R. § 1100.98 (1980) (ICC).

121. These agencies include: Department of Agriculture, Bureau of Alcohol, Tobacco & Firearms, Commodities Future Trading Commission, Consumer Product Safety Commission, Environmental Protection Agency, Federal Communications Commission, Federal Energy Regulatory Commission, Federal Labor Relations Authority, Federal Maritime Commission, Federal Trade Commission, Food & Drug Administration, Department of Interior, Interstate Commerce Commission, Department of Labor, Maritime Administration, National Labor Relations Board, National Transportation Safety Board, Nuclear Regulatory Commission, Securities Exchange Commission, U.S. Coast Guard, and U.S. Postal Service.

122. These agencies are: Civil Aeronautics Board, Drug Enforcement Administration, Interstate Commerce Commission, Merit Systems Protection Board, and U.S. International Trade Commission.

contrast to the situation in 1968, the certiorari-type review advocated by 68-6 for agencies with heavy adjudicatory decision caseloads has been adopted by most of the agencies with heavy caseloads. Ranked according to number of cases closed in the most recent year for which figures are tabulated, nine of the fifteen agencies with heaviest caseloads (including six of the first seven) provide for discretionary review.[123] The agencies dovary dramatically as to the degree to which discretion is exercised to grant review and the frequency with which such review results in reversal of the ALJ's decision.[124]

The reasons why some agencies have and others have not implemented the reforms suggested by 68-6 are not easily discerned. The differences in the types of cases heard by ALJs, the simplicity or complexity of cases, their similarity or dissimilarity, the constituencies of the agencies, and the nature of each agency's legislative mandate all may play a role. To some extent, the impact of factors such as these on the shape of agency review is explored in Parts III and IV of this report. Here, only one impediment to fuller implementation of 68-6 -- legislative inaction -- is discussed.

The second paragraph of 68-6 recommended the enactment of legislation to clarify (more precisely, to grant clearly) the authority for agencies to alter their review procedures in accord with the suggestions of the first paragraph of 68-6. Specifically, 68-6 proposed amendment of §8 of the Administrative Procedure Act, codified at 5 U.S.C. §557 (1976), to empower agencies to create intermediate appellate review boards or adopt certiatori-type review practices.

Section 557 as written is not entirely clear as to the extent to which review of ALJ decisions by agency heads or at least by a delegate of the agency head, is required. The section states that when the agency head does not preside at an adjudicatory hearing, the presiding employee (ALJ) shall render an "initial decision" unless the agency, in certain classes of hearings, chooses to have the record certified to it for decision (bypassing any ALJ decision) or chooses to style the ALJ decision as only a

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123. Ten of the first 15 in number of ALJs provide discretionary review. It should be noted, however, that agencies with heavier caseloads tend to use discretionary review by review boards or individual designates, or discretionary review following board or individual designate review, rather than the process apparently contemplated by ACUS 68-6: discretionary agency head review without an intervening review authority. See text at note 155, infra.

124. See Parts III and IV and Appendices, infra.

recommended decision.[125] The exceptions contemplate agency decision where the ALJ decision stage is eliminated or automatic agency review where the ALJ decision is only tentative or recommended. In all other cases, the initial decision of the ALJ "becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency . . . ."[126] Section 557 notes that the issues reviewed may be limited "on notice or by rule."[127] The final subpart of §557 states:

> (c) Before a recommended, initial, or tenative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for consideration of the employees participating in the decisions--
>
> (1) proposed findings and conclusions, or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions . . . .

This language might be construed to mean that in all adjudicatory cases parties are entitled both to propose findings prior to ALJ decision and to file exceptions after ALJ decisions. Moreover, the entitlement to file exceptions may imply an obligation on the part of the agency to review each case in which exceptions are filed. The ultimate extension of this implication would be that a full review is required, not simply a determination that no serious issue is presented meriting such comprehensive

125. 5 U.S.C. § 557(b) (1976).

126. Id.

127. Id.

review.[128] Alternatively, the section could be read as permitting agencies to refuse review altogether (by delegating to the ALJ the responsibility to hear objections, by construing satisfaction of §557(c)(1) and (3) as obviating any entitlement to file exceptions -- that is reading (c)(1) and (c)(2) as alternatives rather than prescriptions for different levels of administrative decisionmaking -- or by reading the agency's right to limit issues on review as including the right to deny review or to review as one might a petition for certiorari). The proposal for legislative action in 68-6 was designed to cure just this ambiguity.

Despite the introduction of legislation designed to implement the proposal, Congress has not yet amended §557. In 1976, the Senate Committee on the Judiciary favorably reported, and the Senate passed, S.796, which would have added to §557 a subsection (d) providing:

> Each agency may establish, by rule, one or more agency appeal boards for review of decisions of presiding employees . . . An agency may provide by rule that decisions . . . ,including [ALJ's initial decisions and] agency appeal board decisions, become final unless reviewed by the agency in its discretion.[129]

Passage by the Senate came late in the session,[130] and the legislation died with adjournment of the 94th Congress. The next Congress considered a bill, S.2490, similar to S.796, and the Judiciary Committee's Subcommittee on Administrative Practice and Procedures held hearings on the bill,[131] but it was never reported out of committee. Bills also were introduced in both

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128. See Administrative Procedure Act Amendments of 1978: Hearings on S. 2490 Before the Subcomm. on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary, 95th Cong., 2d Sess. 603 (1978) [hereafter 1978 Hearings]. The argument that this must be the proper interpretation of these provisions and that in 5 U.S.C. § 557(b) (1976) declaring that on review of initial decisions an agency has the same power as if it made the initial decision "except as it may limit the issues on notice or by rule" is forcefully made in Auerbach, Scope of Authority of Federal Administrative Agencies to Delegate Authority to Hearing Examiners, 48 MINN. L. REV. 823, 853-61 (1964).

129. S. Rep. No. 1258, 94th Cong., 2d Sess. 15 (1976).

130. See 122 Cong. Rec. 34, 442 (Oct. 1, 1976).

131. See 1978 Hearings, supra note 128.

houses during the 96th Congress (S.67 and H.R. 1866) to implement ACUS Recommendation 68-6, but these, too, failed to pass.

While general legislation to implement 68-6 has not been enacted, Congress has legislated respecting specific agencies' review procedures on at least five occasions since the Conference adopted 68-6. The tenor of these specific enactments generally, although not uniformly, has been in accord with 68-6. In 1970, the Congress created the Occupational Safety and Health Review Commission (OSHRC). The enabling statute, followed by the implementing regulations, plainly provides for review of ALJ decisions at OSHRC's discretion.[132] Two years later, in amending the Workers' Compensation Act of 1927, Congress established the Benefits Review Board within the Department of Labor and made Board review of initial decisions by ALJs in compensation cases a matter of right.[133] In 1977, the Federal Mine Safety and Health Review Commission was established with express statutory provision for discretionary review of ALJ decisions.[134] In specifying a means for review of ALJ decisions by the Federal Labor Relations Authority (FLRA), Congress appears again to have expressed a belief that review should be at the discretion of the agency. The relevant statute declares that "[t]he Authority may, upon application . . . review [ALJ decisions] . . . . If the Authority does not undertake to grant review . . ., the action shall become the action of the Authority . . . ."[135] FLRA regulations, however, appear to provide review of right to parties filing timely exceptions to ALJ decisions.[136] Finally, Congress amended the Interstate Commerce Act of 1887 in 1976, 1978, and 1980, limiting review of initial decisions by the full commission in the process.[137] Review of right was retained at the initial level of ICC divisions and boards, but review by the full commission now is possible, as a rule, only on the Commission's action, to be exercised in matters

132. See 29 U.S.C. § 661 (1976); 29 C.F.R. § 2200.92(a) (1980).

133. See 33 U.S.C. § 921(b) (1976).

134. See 30 U.S.C. § 823(d)(2)(A)(i) (Supp. IV 1980).

135. See 5 U.S.C. § 7105(f) (Supp. IV 1980).

136. See 5 C.F.R. § 2423.29(a) (1981).

137. See 49 U.S.C. §§ 10322, 10327 (Supp. IV 1980).

of "general transporation importance" or where new evidence has surfaced.[138]

As with general reform of agency review proceduces, there have been instances in which proposals to alter individual agencies' procedures in the direction suggested by 68-6 have not succeeded. Repeated efforts to amend §10 of the National Labor Relations Act have foundered. In 1971, a bill that would have made ALJ decisions final, subject to discretionary review by the National Labor Relations Board, was the subject of hearings in the House but died in committee.[139] Two similar bills met a like fate in 1976.[140] The following year one such measure was passed by the House but was not voted on by the Senate.

In sum, at both the agency and congressional levels, there has been a drift toward the agency review processes proposed by ACUS Recommendation 68-6, but full implementation has not occurred at either level.

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138. See 49 C.F.R. §§ 1011.1-1011.3, 1011.6(e), 1115.2, 1115.3 (1982).

139. See Amendments to Expedite the Remedies of the National Labor Relations Act: Hearings on H.R. 7152 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 1st Sess. (1971).

140. H.R. 8110, H.R. 8408, 94th Cong., 1st Sess. (1975); See Oversight Hearings Before the Subcomm. on Labor Management Relations of the House Comm. on Education and Labor, 94th Cong. 1st sess. (1975).

III. Agency Review of ALJs' Decisions: Current Practices

A. Selecting Discriminators for Description and Evaluation

Disparities in agency review of ALJs' decisions are at once a consequence of congressional and administrative failure fully to adopt ACUS 68-6 and probably also a cause of some resistance to the Conference's recommendation. The existence of different sorts of intra-agency review is not likely to be the product of accident. It may be that deviations from the patterns suggested by 68-6 for agencies with "a substantial caseload of formal adjudication" are the result of misunderstanding of the impact the suggested procedures would have on review of a given class of adjudications. It is perhaps just as likely, however, that the differences in review are rational responses to differences in the decisions at issue, the personnel involved, the agency structure, or other matters that distinguish one agency adjudication from another.

Any attempt to assess the sort of review appropriate to ALJ decisions faces two related obstacles. The first obstacle is one of description, the second, one of evaluation. Description of the relevant setting is a necessary prelude to discussion of the appropriate review. But exactly what factors are relevant to the setting is problematic absent clear standards for evaluation. Unless the full complexity of the world is to be replicated, it is necessary to select among the factors that differentiate agencies and adjudications. In examining current practices for agency review of ALJs' decisions, one encounters a host of variables that distinguish review practices among agencies, and even review of different ALJ decisions within an agency. Among the points of difference are the procedures used to obtain review, the number of review levels, the identity of reviewing personnel, the individual or collegial nature of the reviewing authority, the extent of the deference to the subordinate decisionmaker's determination, the organization of the agency, the type of issue reviewed (for instance, facts pertaining to a single individual might receive treatment different than interpretation of economic data affecting matters of industry-wide or inter-industry interest), and the statutory mandate under which the substantive dispute arises. Additionally, factors less immediately assimilated to review processes may play important roles in distinguishing the nature of review at one agency from that at another, including the size of the agency, the number of ALJs employed by it, the volume of cases handled by the agency's ALJs, and the agency's mission and clientele (e.g., is the agency charged with comprehensive regulation of a single industry? or does it deal with a variety of groups, industries, and individuals?).

These factors can be segregated into two major groups. One set of variables, which may be called process variables, directly determines the manner in which decisions are made and reviewed.

The process variables critical to review are who reviews, what sort of review is given. These inquiries include the background and job structure of the number of reviewers, the deference paid to the ALJ on review, the availability of subsequent intra-agency review, and the deference paid to the preliminary agency reviewers. Decision respecting process variables initially rests with Congress, but now frequently is within the agency's control. The other factors, which may be termed situation variables, do not directly control the method of review but may contribute as much or more to determining how long it takes and how well it works.

The generally accepted criteria for evaluating governmental processes do not readily reveal which of these factors is critical, although consideration of the criteria does suggest some matters to which descriptive efforts should be sensitive. The three common evaluative criteria are (1) efficiency of the process, (2) accuracy of the result, and (3) acceptability to the parties. The first criterion, efficiency, incorporates the judgment that, other things being equal, the process should cost as little as possible and involve as little delay as possible.[141] The second criterion, accuracy, asks that the end product of agency decisionmaking be faithful to the statutory mandate at issue. The third criterion, acceptability, places value on the sense of parties to a proceeding that the process is fair. Obviously, none of the three criteria provides a precise measure of desirability and, more important, absent incorporation of some other standard the three criteria lack any common denominator in which adjustments among them can be made. While processes that rate highly on all three grounds universally will be preferred to those that do poorly on all grounds, other comparisons almost certainly will produce dispute. For example, any choice between one process that seems inefficient but very acceptable and a second process that seems efficient but less acceptable will depend on assessments of the extent to which one goal or the other is compromised and on the relative importance of the goals. These judgments are bound to be both imprecise and subjective.

Moreover, theoretical objections to these criteria are compounded by the practical problem of obtaining useful data. Many of the easily described aspects of agency adjudication and review do not readily correlate with these criteria. Granting both the measurement difficulties, especially as to accuracy and acceptability, and the problem of balancing the three, however,

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141. See, e.g., Boyer, supra note 23, at 145-46. The notion of efficiency used here by focusing on process costs captures only a subset of the considerations more generally subsumed under the rubric of efficiency. See, e.g., A. SEN, supra note 100, at 21-32, 196-200.

these still allow some rough measure of a review process' propriety. For each criterion, some information is available that should allow defensible inferences about it to be drawn.

The efficiency criterion can be broken down into several subparts. The monetary cost concerns affect both government and nongovernment parties, and the time concerns (another measure of cost) can be divided into active (the time consumed by decisionmaking) and passive (warehousing or waiting) components, as well as into pre-review and review phases. The direct costs can be dissociated further into the cost of government reviewers (including the opportunity-cost of review time), the cost of support staff involved in review, costs borne by nongovernmental parties, and the cost of these parties' suupporting personnel (lawyers, expert witnesses, and so on). It is not necessary that the subparts of the efficiency criterion move in concert; a review process might, for example, impose high costs on government and minimal direct costs on nongovernment parties. Information on most subparts is not easily gained. The data available permit assessment of the following: the time consumed by the whole decision and review process; the time taken for review alone; the level (and, hence, cost) of the nominal reviewer(s). Albeit imperfect substitutes for information on all of the subparts, these factors give some indication of the efficiency of review.

The accuracy criterion is less easily used. In a real sense, fidelity to statutory command cannot be ascertained. Unless disparate interpretations of the legislative mandate are advocated, there is no need for concern over accuracy. Yet, whenever different views are advanced, there is some ambiguity (often a great deal) in the congressional directive the agency is engaged in elaborating and implementing. There is no arbiter of the true legislative intent, assuming a single, determinate, legislative intent can exist. ALJs, administrative reviewers, courts, and legislators now in office may offer plausible and incompatible interpretations. Reference to the discretion vested in those who are charged with executory powers does not offer an easy solution, since the extent of that discretion is an integral part of the argument over statutory meaning. Nonetheless, it plausibly may be presumed that within any administrative body the agency head (or his delegate) is best situated to interpret the agency's mandate. Global definitions of right and wrong aside, the lawmaking process generally contemplates subsequent harmonization of conflicting interests at the administrative level, and the agency head is most likely to be sensitive to this task. The frequency with which ALJs' decisions are reversed by whomever the agency head charges with review responsibility, thus, may serve to measure the contribution of agency review to increased accuracy.

The final criterion, acceptability, is the most unwieldy of the three. Professors Walker and Thibaut have endeavored to ascertain preferences for various procedures, largely through the use of simulations using students as surrogates for parties to litigation.[142] Their research revealed a preference for relatively great amounts of client control over civil litigation, but there is no similar research on preferences among review processes nor is there information on the intensity of process preferences. Common sense may supply a basis for guessing what the parties' preferences generally would be, but translating that guess into information on actual preferences in specific situations is difficult. It seems safe to assume that parties generally would prefer review mechanisms that allow review at their behest but not otherwise, agency officials would prefer review at their option, and ALJs would favor limiting review to a minimum. It also seems that the strength of those preferences would vary with the value of the interest at stake. The nongovernment parties have the most directly in issue, the ALJs least, but the intensity of individual interests in particular cases cannot readily be predicted. Some information on the interest in review may be derived from the frequency with which it is sought by those with an opportunity to demand it and granted by those with authority to deny it. On the other hand, the demand for review may to a significant degree be a function of the effect of review on tolling the impact of the ALJ's ruling. Even if the initial decision is quite unlikely to be reversed, there may be considerable value to one party in postponing the decision's

142. See, e.g., studies discussed in Walker, Lind & Thibaut, The Relation Between Procedural and Distributive Justice, 65 VA. L. REV. 1401, 1407-11 (1979). See also J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE (1975); Thibaut & Walker, A Theory of Procedure, 66 CALIF. L. REV. 541 (1978); Lind, Thibaut & Walker, Discovery and Presentation of Evidence in Adversary and Non-adversary Proceedings, 71 MICH. L. REV. 1129 (1973).

The preference found by Walker, Thibaut and Lind for greater participation in and control over proceedings affecting one has been articulated by others who place reliance on deontological reasoning rather than experimentaion. See, e.g., Mashaw, supra note 23; Michelman, Formal and Associational Aims in Procedural Due Process, in DUE PROCESS, NOMOS XVIII, at 126 (J. Pennock & J. Chapman, eds.); Saphire, Specifying Due Process Values: Toward a More Pesponsive Approach to Procedural Protection, 127 U. PA. L. RFV. 111 (1978); Summers, Evaluating and Improving Legal Process -- A Plea for "Process Values," 60 CORNELL L. REV. 1 (1974).

effect. This is especially true in enforcement actions involving termination of a substantial government benefit.

Another possible indicator of the value of a case to the government and nongovernment parties, and inferentially the value of review, may be the length of time taken at the ALJ decision stage. The commitment of resources to a lengthy proceeding is determined in part by the value of the decision. The difficulty of the factual issues, however, also will affect the length of proceedings, and this factor need not be coincident with the policy impact or monetary stakes of the dispute. Moreover, length of ALJ proceedings may not indicate the value of review (in subjective, nonmonetary terms) insofar as relatively small claims have great importance to impecunious parties.

The three evaluative criteria provide guidance to discussion of agency adjudication and review processes that is necessary, but not sufficient. The indicators of efficiency, accuracy, and acceptability noted above should be addressed so far as possible, but selection among the myriad factors that play a part in determining whether particular processes will be efficient, accurate, and acceptable means of making specific decisions must still depend to some extent on intuition. To minimize the impact of the choice of descriptive aspects on ultimate conclusions, the Report uses four different descriptive components. First, a typology of current agency review is developed based on three process variables. Second, expanded descriptions including attention to situation variables as well as process variables are given for selected agencies. Third, a shorter description is given of decision and review at every agency, organized according to the typology. Finally, statistical information is assembled on decision and review at the agencies employing ALJs, and possible correlations with the evaluative criteria are examined both for factors relevant to the typology and for other factors that may be significant. The first and second descriptions form sections B and C of this Part. The third and fourth segments, descriptive and statistical information for all agencies, are in the appendices to this Part, and the correlations are presented as an appendix to Part IV. Information in all four segments is discussed in Part IV.

B. Typology of Review

The typology uses three factors: the level of the reviewing authority (agency head or subordinate), the composition of the reviewing authority (individual or group), and the manner by which review is obtained or denied (automatic review, review as of right at the behest of interested parties, review at the discretion of

the reviewing authority, or no review). The first of these three factors should reflect, at least in some measure, the significance of the decision being reviewed, higher level review presumably being consonant with more important decisions. The second factor also indicates the extent of the agency's resource commitment to review: other things being held equal, the greater the number of persons committed to the review process, the greater the importance attached to review. The last factor affects review at each stage if there is more than one potential level for review. Arguably it provides some insight as to the degree of deference accorded the decision reviewed. Where there is no review, obviously, deference to the subordinate's decision is complete. Where review is automatic, little deference is implied; even though such review could, in theory, be coupled with review standards that resulted in affirmance of the prior decision except in extraordinary cases, such deference is inconsistent with a scheme that provides review in all cases.[143] Together, then, these three factors should describe the finality of ALJ and subsequent intra-agency decisions and the nature of the agency's commitment of resources to the review process.

Using these three factors, no fewer than twenty-two different review categories can be identified. Of these, only fourteen seem to be in use, although the number could reduce to twelve depending on one's definition of what constitutes an agency (should a sizeable bureau that in many ways operates autonomously within an executive department, for instance, be considered the agency when evaluating the review level within the agency? or should the department be viewed as the agency and its cabinet officer as the relevant agency head?). Only instances in which the administrative law judge actually renders a decision, rather than all proceedings in which ALJs participate, are included.

The eight null sets among the review categories possible using these three discriminators are: first stage review by appeals board (automatically following a recommended decision, as of right following an initial decision, or in the board's discretion following initial decisions by an ALJ) and further agency review of right; discretionary agency review of an appeals board determination (following either a recommended decision or an initial ALJ decision) reviewed in the board's discretion; appeals board review as the final agency review of an ALJ's recommended

143. The sitution would be similar to that of a football team where the coach insisted on sending in plays to the quarterback, but the coach always sent a player in not with a play but instead with the message that the quarterback should do what he thought best. But see the information re CAB review of foreign carrier permits decisions, at Appendix 2 to Part III, infra.

decision; and discretionary appeals of the determination of a designate who reviews initial ALJ decisions either of right or in his discretion. Failure to use some of these review mechanisms indicates that where there is sufficient concern to require automatic review of ALJ decisions, review will be initially at a high level within the agency. The presence of other null sets may be explained by reluctance to require review of appeals board decisions. Such review mechanisms would require a great commitment of agency resources and would be incompatible with the use of review boards to reduce agency heads' workloads. The categories now used are described below. The categories proceed generally from those implying least to those implying greatest deference to the ALJ's decision. The empty categories are numbered but are not discussed.

1.-3. Review by Agency Head

In three categories, the administrative law judge's decision receives review from the agency head directly, without the substitution or interposition of any intermediate level of review. All three categories represent review practices currently in use. Indeed, in twenty-four of the twenty-eight agencies for which figures are available on review of ALJ decisions, there is direct review by the agency head (in a multimember agency, the agency members) in at least some cases. Included in this group are nearly all the independent regulatory agencies. The agency head in many instances will rely on a subordinate to review in detail the record and objections to the ALJ's decision,[144] but at least nominally (and in some cases in actuality) the responsibility for evaluating the decision lies with the agency head.

144. The degree to which such staff support can be used (without eviscerating the requirement that the nominal decider in fact decide each administrative adjudication) and the extent to which reviewing courts can scrutinize the decisional processes used are discussed in the four Morgan cases: Morgan v. United States, 298 U.S. 468 (1936); Morgan v. United States, 304 U.S. 1 (1938); Morgan v. United States, 307 U.S. 183 (1939); United States v. Morgan, 313 U.S. 409 (1941). For a discussion of the effect of these cases on American administrative law, see Gifford, The Morgan Cases: A Retrospective View, 30 AD. L. REV. 237 (1978).

1. Recommended Decision: Automatic Review

In five agencies, the ALJ in some cases makes only a recommended decision which then automatically is reviewed by the agency head.[145] Caseloads subject to this review process tend to be low.[146] None of the agencies using this process is a cabinet-level department, although one (The Drug Enforcement Agency of the Department of Justice) is a departmental bureau.[147] The cases are a mix of licensing and enforcement proceedings. Some present rather special considerations -- such as the potential for involvement of sensitive foreign policy issues in Civil Aeronautics Board decisions respecting foreign air carriers or the concern over the extent of decisional authority appropriately granted to an ALJ in Merit System Protection Board cases adjudicating sanctions against another ALJ -- that on their face are plausible explanations for extremely nondeferential review.

2. Review of Right

The largest single category is review by the head of the ALJ's agency at the behest of a party or on the agency head's own motion. Review of right is provided in fifteen agencies. The agencies in this category include independent regulatory commissions (old and new), a cabinet department, and bureaus within cabinet departments. The cabinet department, however, provides secretarial review of right only for a very few cases

145. The agencies are: Civil Aeronautics Board (CAB); Drug Enforcement Agency (DEA); Interstate Commerce Commission (ICC); Merit Systems Protection Board (MSPB); and U.S. International Trade Commission (USITC). In other cases there is provision for use of these procedures at the agency head's discretion. See notes 326 and 328, infra. See also Appendix 2 to Part III, Review and Decision Data, infra [hereafter Review Data].

146. See Review Data, Appendix 2.2, infra.

147. The Bureau may be seen as an agency or as part of an agency (the Treasury Department). See category 20, text at notes 166-167, infra. See also note 2, supra. Its existence as an entity within the Treasury Department has statutory basis and is not merely a departmental convenience of organization. For a list of agencies designated as "separate statutory agencies," see 5 C.F.R. § 737.31 (1981).

comprising a very small percentage of its adjudications.[148] The other agencies in this category do not all have caseloads that conform to this pattern. Some of the caseloads subject to agency head review of right are extraordinarily small,[149] while others are extremely large;[150] the caseloads in this category in all but four agencies fall below the median for agencies employing ALJs, but those four agencies are within the top ten in numbers of initial decisions, and all ALJ decisions at those agencies receive agency head review of right.[151] The cases span enforcement, licensing, and resolution of what essentially are disputes between private parties. The proceedings at most of the agencies principally may be characterized as enforcement actions, but in number of cases the largest group is dispute resolution between private parties.[152]

3. Discretionary Review

The second largest grouping under the review typology presented here is composed of agencies that provide for review of ALJ decisions by the agency head at his discretion. There is no intermediate review stage, but the agency head, if he wishes, may defer to the ALJ rather than review the decision even though a party takes exception to the decision. The agency head also may choose to review on his own initiative.[153] The borders of this category and the review of right category are not drawn with bright lines. The agency head may in fact review each decision

148. See Review Data, Appendix 2.1, 2.2, 2.4, infra, discussing the Department of Labor.

149. E.g., Food and Drug Administration and Maritime Administration. See Review Data, Appendix 2.1, 2.2, infra.

150. E.g., National Labor Relations Board. See Review Data, Appendix 2.1, 2.2, infra.

151. These agencies are: Federal Energy Regulatory Commission; National Labor Relations Board; National Transportation Safety Board; and the United States Coast Guard. See, Review Data, Appendix 2.1, 2.2, 2.4, infra.

152. The NLRB handles the lion's share of these cases. See Review Data, Appendix 2.4, infra.

153. Although agencies could provide for review only if a party appealed the ALJ's decision, I have found no instance where review by agency head is provided without own motion review.

and "grant review" where he believes either a mistake was made by the ALJ or the case is of sufficient importance (whether for reasons intrinsic or extrinsic to the basis for decision) to merit additional participation by the parties or some other expanded review process. This discretionary review would differ little from a process that afforded parties review as of right. At the opposite pole, a discretionary review process might demand a clear showing of a substantial departure from agency or judicial precedent or otherwise require a high threshold to be crossed before review would be granted. As described in their regulations, the seven agencies in this category arguably fall closer to the latter than to the former description of discretionary review. Whether this is so in practice is more difficult to say.[154] Despite the fact that ACUS 68-6 promoted discretionary review for agencies with substantial adjudicatory caseloads, only one agency in this category (Occupational Safety and Health Review Commission) falls above the median in number of initial decisions.[155] The cases subject to discretionary agency head review include licensing decisions and enforcement actions with the latter overwhelmingly dominant.

4-12. Review by Appeals Board

The use of appeal boards already has been touched upon in connection with implementation of ACUS Recommendation 68-6. There are nine possible review categories using appeal board review of ALJ decisions. Each category is defined by the basis on which the ALJ's decision is reviewed and by the basis on which the appeals board decision is reviewed. Currently, only three of these categories are used. Seven agencies may be classed among these categories. Possible review categories not currently used are: 4. Recommended Decision, Further Agency Review of Right; 5. Board Review of Right, Further Review of Right; 6. Discretionary Board Review, Further Review of Right; 7. Recommended Decision, Discretionary Further Review; 9. Discretionary Board Review, Discretionary Further Review; and 10. Recommended Decision, No Further Review.

154. The data on review in these agencies (Civil Aeronautics Board, Environmental Protection Agency, Federal Mine Safety and Health Review Commission, Department of Housing and Urban Development, Merit Systems Protection Board, Occupational Safety and Health Review Commission, and Securities and Exchange Commission) are less than uniform. See Review Data, Appendix 2.2, 2.4, infra.

155. See Review Data, Appendix 2.2 infra.

8. Board Review of Right, Discretionary Agency Review

Three agencies provide review of right by appeal boards to parties filing timely requests for review, with further review at the discretion of the agency head. In terms of adjudication caseloads, the agencies are quite disparate, ranking near the top, middle, and bottom among agencies employing ALJs. All three, however, are independent, multimember, regulatory agencies that perform licensing functions and that deal on a continuing basis with particular industries.

11. Board Review of Right, No Agency Review

Two agencies use appeals boards as the sole forum for intra-agency review and provide review as of right at the board level. One other agency arguably might be classifed in this category, depending on its characterization as agency or subordinate bureau.[156] Cases subject to this review involve benefits administration, licensing, and enforcement. The two executive departments that use this review (Interior and Labor) employ it for relatively large numbers of cases, while the departmental bureau (Maritime Administration of the Department of Commerce) has a very small caseload.[157]

12. Discretionary Board Review, No Agency Review

Four agencies use discretionary review by an appeals board as the final stage of agency review. Three of these agencies are executive departments, and the fourth is the Social Security Administration of the Department of Health and Human Services. The cases decided by the cabinet departments fall generally under the heading of licensing decisions, while SSA determinations concern individual claims for governmental benefits. Except for SSA, the agencies use this review process for very small numbers of cases.[158] SSA, on the other hand, has an enormous caseload, accounting for about ninety-five percent of all formal adjudications in federal agencies.[159]

156. See 5 U.S.C. § 737.31 (1981), and notes 2 and 147 supra.

157. See Review Data, Appendix 2.2 infra.

158. Id.

159. Id., Appendix 2.1, 2.2.

13.-21. Review by Individual Designate

All but one of the remaining review categories provide for review by an individual designate of the agency head. There are nine possible categories involving designate review. Current agency practices can be classified under seven of these categories. The two categories not used are: 17. Designate Review of Right, Discretionary Agency Review; and 18. Discretionary Review by Designate, Discretionary Agency Review.

13. Recommended Decision, Agency Review of Right

Only one agency now provides for a recommended decision by the ALJ, reviewed automatically by a designate of the agency head, with further review by the agency head as a matter of right. The Bureau of Alcohol, Tobacco, and Firearms of the Department of the Treasury provides for automatic review by a regional administrator of any ALJ decision involving contested applications for certain authorizations regarding alcoholic beverages, explosives, firearms, and ammunition. Further review by the Director of the Bureau is available of right.[160]

14. Designate Review of Right, Further Review of Right

Although several agencies provide for review of ALJ decisions as of right before a designate of the agency head, only one arguably provides further review as a matter of right. It is, in fact, two agencies, one (the Coast Guard, a bureau of the Department of Transportation) the head of which reviews ALJ decisions on violation of agency rules or statutory provisions the agency is charged with enforcing, the other (National Transportation Safety Board) a separate collegial body with responsibility for reviewing decisions of the first. A relatively large group of cases is subject to this review. The absence of other agencies in this category, or of any agencies in category 17 and category 18 may reveal that commitment of review functions to a designate is designed (at least in large part) to reduce the review burden on the agency head and providing for review of the subordinate's decision as a matter of right would reduce the benefit of that deflection of responsibility. That the only "agency" in this category is the fictive combination of two agencies that are formally separate indicates that a second stage review of right is provided only where the dynamics of decisionmaking might shift dramatically from one level to the next, as it might (but this does not mean it necessarily will)

160. 27 C.F.R. §§ 200.105-200.116 (1982).

where the first-level decisionmaker is not responsible directly to the second-level reviewer.

15. Discretionary Review by Designate, Further Review of Right

Only one agency at present uses review procedures that provide for a designate in his discretion to review ALJ decisions with review of right by the agency head at the second stage. The Department of Labor uses this process for one type of enforcement action.[161] If the designate, by decision or by denying review, upholds a determination that the relevant statutory provision has been violated, the Secretary of Labor must decide whether to impose the statute's presumptively prescribed sanction, or, on petition of the affected private party, to take some other action.[162] Decisions under this particular regulatory program are rare and appeals almost nonexistent.[163]

16. Recommended Decision, Discretionary Further Review

Automatic review of an ALJ's recommended decision by a designate followed by discretionary review at the second review level is also used in one agency, although in that agency the subsequent review is not at the agency head level. Again, this procedure is used in one type of case adjudicated in the Department of Labor involving the determination of wage rates to be paid by certain government contractors.[164] A relatively small caseload is affected.

161. These involve proceedings contesting violations of the Walsh-Healey Public Contracts Act of June 30, 1936, 49 Stat. 2036 codified at 41 U.S.C. § 35-45 (1976). See 41 C.F.R. §§ 50-203.10, 50-203.11 (1982).

162. 41 C.F.R. § 50-203.11(g), (h) (1982).

163. Only one initial decision in such a case was rendered in Fiscal Year 1978, and that decision was not reviewed. See Review Data Appendix 2.2, infra.

164. Cases in this category involve disputes arising under the Davis-Bacon Act, 46 Stat. 1494, codified at 40 U.S.C. § 276a et seq. (1976). See 29 C.F.R. §§ 1.12-1.16 (1982).

19. Recommended Decision, No Agency Review

The final three categories of designate review are ones in which there is no agency head review following decision by a designate. All three categories describe currently used practices, although for two categories only one agency uses the procedure and in each case the agency more appropriately could be listed under another category.[165] The first of these categories provides review automatically of recommended ALJ decisions. Review at one departmental bureau is provided by the bureau head with no subsequent review by the department head. The bureau's caseload is fairly small, principally concerned with licensing decisions. Like the determinations discussed in category 13 above, also subject to automatic review the decisions here involve permits to engage in activities relating to substances frequently linked with organized criminal activity. Automatic review in both instances may be explicable on this ground.

20. Designate Review of Right, No Agency Review

This category is used by more agencies than is any other category of designate review. Only agency head review of right (category 2) and discretionary review by agency head (category 3) now are used by more agencies. Five agencies use this procedure and two more could be added if not viewed as separate from their "umbrella" executive departments. Most of the agencies in this category are executive departments;[166] nearly all the cases subject to this review are enforcement actions; and the caseloads for which this review is used at most of the agencies are of moderate size, generally falling in the middle quintile for agencies employing ALJs.[167]

21. Discretionary Review by Designate, No Agency Review

One agency, the Department of Housing and Urban Development, provides for discretionary review by a designate and no subsequent

165. See discussion of cases in categories 19 and 21 text at note 349, infra, and immediately following note 354. See also notes 2 and 147, supra.

166. Agencies using this sort of review are: Departments of Agriculture, Health and Human Services, Interior, and Labor, as well as the U.S. Postal Service (formerly a Cabinet-level executive department), the Bureau of Alcohol, Tobacco and Firearms, and the Environmental Protection Agency.

167. See Review Data, Appendix 2.2, infra.

review by the agency head. The individual reviewer decides whether an appeal from a license suspension should be allowed. The merits of the appeal, however, will be heard and finally decided by a collegial appeals board.[168] Review was granted for all of the small number of decisions during the time for which data are available.

22. No Review

The categories have been organized generally from those by implication granting least deference to the administrative law judges' decisions to those granting most deference. It is difficult to defer to the ALJ decision more fully than by providing no avenue for intra-agency review.

Only one instance has been found of a federal agency providing no review of an ALJ decision. In proceedings before ALJs at the Department of Labor challenging the imposition of civil penalties under the Fair Labor Standards Act for violation of the act's restrictions on use of child labor, the ALJ decision is the final action within the department. This process was the subject of discussion in the Supreme Court's 1980 decision in Marshall v. Jerrico, Inc.[169] The Jerrico case involved a due process challenge to child labor civil penalty determinations on the ground that since the amounts paid as penalties were kept by the Department of Labor (pursuant to the Fair Labor Standards Act, the penalties are used to cover part of the department's costs of determining violations)[170] the departmental decision was biased.[171] Among the factors relied on by the Court in rejecting this contention was the absence of intra-agency review of the ALJ decision. The Office of Administrative Law Judges did

168. See 24 C.F.R. §§ 1720.605 - 1720.635 (1982), and discussion of category 21 at text following note 354, infra.

169. 446 U.S. 238 (1980).

170. 29 U.S.C. § 216(e) (1976).

171. Cf. Ward v. Village of Monroeville, 409 U.S. 57 (1972) (Mayor whose town received "substantial portion" of its funds from fines held to be too biased to adjudicate traffic penalty cases); Tumey v. Ohio, 273 U.S. 510 (1927) (mayor who personally retained a portion of fines along with the municipality and certain other municipal employees held too partial to decide alcohol-related penalty cases).

not receive the penalty funds. Instead they went to the Employment Standards Administration; and although the Regional Administrators of that bureau initially evaluated complaints and decided whether to prosecute the violation charge, no one in the Administration's line of authority participated in adjudicating or reviewing the complaint.[172]

C. Review at Selected Agencies: Group and Individual Designates

Appendix 1 to this Part discusses, in the order set by the typology above, the number and nature of the adjudications and the process by which they are reviewed, at all of the agencies employing ALJs. This section provides a more detailed, though still brief, look at a small subset of agencies. The agencies chosen all use someone other than the agency head to review the

different ways congenial to the agency head. More formal, ALJs' decisions, in some instances providing the ultimate, in other cases an intermediate, decision for the agency. Leaving the agency head as the nominal reviewer accords an agency de facto flexibility to allocate review responsibilities in a variety of institutional allocations of review inevitably accompany decision overtly to confide review responsibilities to subordinates. It may be easier to draw inferences about appropriate means for review from evaluation of how these latter delegations work than from attempting to capture the less stable relations that may inhere in agency head review.

The first two case studies are of agencies that use intermediate, collegial review boards. Both agencies are multi-member independent regulatory commissions. The third case study is of an executive department at which final review authority is confided to a collegial board, and the fourth study is of an executive department that uses individual designates to review ALJ decisions.

Nuclear Regulatory Commission

Adjudication and intra-agency review at the Nuclear Regulatory Commission (NRC) does not fit the usual patterns for federal agencies. The basic approach may be described best as providing for review of right by a review board intermediate between the initial decisionmaker and the agency head. There are, however, some complicating factors. First, the initial decision in matters

172. The Court also stressed the small amount collected from child labor civil penalty assessments.

relating to the grant, suspension or modification of a license need not be made by an ALJ. The NRC does employ ALJs, who may be assigned to preside over and decide certain cases,[173] but each also may operate as a member of an adjudicating board. By statute, the NRC may use Atomic Safety and Licensing Boards to perform the functions normally assigned to ALJs.[174] The Boards operate as ALJs would and are subject to limitations on contacts inside and outside the agency similar to those binding ALJs at other agencies.[175] Boards are composed of three members drawn from the Atomic Safety and Licensing Board Panel, a group of 24 full-time NRC employees and 31 part-time consultants.[176] Panel members are lawyers, scientists, and engineers.[177] The presiding officer of each Board must be "qualified in the conduct of administrative proceedings,"[178] and he may be the ALJ or another qualified Panel member.[179]

Additional complicating factors concern the locus and availability of review. Most decisions of Licensing Boards are reviewable by Appeal Boards. Like the Licensing Boards, each Appeal Board consists of three members drawn from a larger Panel. The Atomic Safety and Licensing Appeal Panel has thirteen

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173. 10 C.F.R. § 2.704(a) (1981). The NRC now employs three ALJs. See Letter to Jeffrey S. Lubbers from B. Paul Cotter, Jr., Chief Administrative Judge, NRC, Jan. 11, 1983 (on file with author). Note that the figures used in the Appendices to Parts III and IV, infra (showing, for instance, one ALJ at the NRC) are not current figures, but are intended to correlate with the available data on decisions and review in ACUS STATISTICAL REPORT, supra note 1.

174. 42 U.S.C. § 2241 (1976).

175. See 10 C.F.R. §§ 2.719, 2.780 (1981); Asimow, When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies; 81 COLUM. L. REV. 759, 804-806 (1981).

176. U.S. NUCLEAR REGULATORY COMMISSION; 1981 ANNUAL REPORT 144 [hereafter 1981 ANNUAL REPORT].

177. Id. at 144, 182-183.

178. 10 C.F.R. § 2.787 (1981).

179. The presiding officer also may be a member of the Commission or a non-Panel Commission officer. See 10 C.F.R. § 2.074(2) (1981).

full-time and three part-time members, including two nuclear engineers, an electrical engineer, two physicists, and eleven lawyers.[180] While most Licensing Board decisions are appealable to an Appeal Board by any party or reviewable sua sponte by the Appeal Board,[181] decisions to grant full-power operating licenses to nuclear power plants must be reviewed by the Commission.[182] The review is automatic, but only goes to the issue of whether the initial decision should be allowed to take effect. This "effectiveness" review is without prejudice to the more comprehensive review by the Appeal Board or to subsequent review by the Commission.[183] Outside the effectiveness context, review of initial decisions is by the Appeal Board, and Appeal Board decisions are in turn reviewable by the Commissioners in their discretion.[184] The NRC's rules declare that review ordinarily will not be granted unless it appears that the Appeal Board's resolution of an important issue of fact was both clearly erroneous and contrary to the Licensing Board or that an important question of law or policy is involved.[185]

The NRC's adjudication and review process has been the subject of controversy in several respects. Most visible, perhaps, is the debate over what shape the hearings concerning licensing and rulemaking announcing licensing standards must take. The decisions of the Supreme Court and the U.S. Court of Appeals for the D.C. Circuit in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.[186] have spawned a burgeoning commentary on nuclear power decisions, administrative process, and

180. See 1981 ANNUAL REPORT, supra note 176, at 184; Letter to the Author from B. Paul Cotter, Jr., Chief Administration Judge, NRC, Sept. 10, 1982.

181. 10 C.F.R. §§ 1.761, 1.785 (1981).

182. 10 C.F.R. § 2.764 (1982), in 46 Fed. Reg. 47,766 (Sept. 30, 1981).

183. Id. See also 1981 ANNUAL REPORT, supra note 176, at 143.

184. 10 C.F.R. § 2.786 (1981).

185. 10 C.F.R. § 2.786(4) (1981).

186. 435 U.S. 519 (1978), reversing 547 F.2d 633 (D.C. Cir. 1976).

judicial review.[187] Less notorious than issues of judicial competence and agency authority is the dispute over the way in which NRC decisionmaking works. One view of the process is captured by the statement in a study of the NRC's Appellate System conducted by the Commission's Office of the General Counsel: "The present system is fairly efficient and results in decisions that are well reasoned."[188] The study did note that the Commissioners were not involved in adjudications as early or as much as they should be. It suggested that more liberal referralof cases from the Licensing Boards and Appeal Boards to the Commission -- a seldom-used procedure already provided for in the Commission's rules[189] -- where important issues are involved and provision for interlocutory Commission review of the Board's decisions would remedy that defect.

Another NRC employee, however, offers a different view of the Commission's adjudication process:

> The NRC goes to extraordinary lengths to assure accuracy and acceptability of its decisions. The hearing process has three levels of review, is extremely generous in matters of public participation, and places a high value on the rational quality of its decisions. These decisions have not been timely, however. Traditional trial type hearings have inflicted serious delay. Money and resources expended have been enormous. Uncertainties have surpassed certitudes.[190]

This criticism of the efficiency of NRC decisionmaking focuses especially on the Appeal Boards' frequent review on its own motion of issues raised by Licensing Board determinations and the Appeal Boards' penchant for review of critical determinations de

187. See, e.g., Breyer, Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy, 91 HARV. L. REV. 1833 (1978); Byse, Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View, 91 HARV. L. REV. 1823 (1978); Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 HARV. L. REV. 1805 (1978).

188. OFFICE OF THE GENERAL COUNSEL, U.S. NUCLEAR REGULATORY COMMISSION, STUDY OF THE NUCLEAR REGULATORY COMMISSION'S APPELLATE SYSTEM 42 (1980) [hereafter STAFF STUDY].

189. See 1- C.F.R. §§ 2.718(i), 2.785(d) (1981). The NRC, in line with the suggestions in the Study, now uses this procedure more often. See Letter, supra note 173.

190. Tourtellotte, Nuclear Licensing Litigation: Come on In, the Quagmire is Fine, 33 AD. L. REV. 367, 369-70 (1981). But see Letter, supra note 173.

novo.[191] Also criticized is the length and detail of the opinions the Boards write.[192] The result is a pattern of agency decision and review that is time-consuming because much of the hearing is recapitulated in the Licensing Board opinion, because so many issues, even ones abandoned by parties to the hearing, are reviewed by the Appeal Board, and because the review is fairly searching.[193]

The charges that NRC adjudication is time-consuming and that the review process contributes substantially to delay receive support from data available concerning formal agency adjudications. In the period from which the data are drawn, FY 1976 - FY 1978, only two agencies had average adjudication times longer than that at NRC.[194] Moreover, the review process took relatively longer than the initial decision; for the period examined, the NRC had the second lengthiest review process and the seventh longest initial decision time. Perhaps the most important contribution to delay, however, is time spent preparing for the initial hearing or otherwise waiting -- the initial decision takes over a year on average, the review process requires an additional year and a half, and another two years is spent in preliminaries and waiting. While the review process at NRC adds to the time taken and the cost, implicit and explicit, of review (the increased cost of construction of nuclear power plants has been estimated to be about $1 million for each day of delay),[195] the contribution of NRC review to the accuracy of the decision is questionable. Although every one of the twenty-eight initial decisions rendered from FY 1976 through FY 1978 was reviewed, none was reversed and only one was modified.

Some measure of delay in NRC adjudication is understandable, especially in cases involving the initial licensing of nuclear power plants. Nuclear licensing inevitably affects important, conflicting values. The need for energy -- and especially for assured sources of energy, domestically controlled, at reasonable prices -- is opposed to concerns over environmental degradation and personal safety.[196] The environmental and safety concerns

191. Tourtellotte, supra note 190, at 476-82.

192. Id. at 378-79. The NRC has adopted a somewhat different opinion format since Mr. Tourtellotte's critique was written. See Letter, supra note 173.

193. Tourtellotte, supra note 190, at 381-82.

194. See Review Data, Appendix 2.1 infra.

195. Cf. Breyer, supra note 187, at 1838.

196. See id. at 1835-40.

are perhaps more poignant in these controversies than in the general run of government decisions since nuclear plants involve materials that are both extremely dangerous and dangerous for a long time (plutonium, for instance, is radioactive for about 250,000 years, and nuclear waste is toxic for at least several hundred years).[197] The concerns on both sides are not just deeply-felt, they also affect a broad spectrum of individuals. Consumers of energy and of products for which energy constitutes a substantial factor of production, residents and would-be residents of the area near the proposed plant site, persons who fear that they or their offspring might be affected by the plant's operationor disposal of its waste -- all these diffuse groups are affected by the licensing decision. That interests are intense may lead to considerable pressure to use processes that allow parties substantial latitude to shape and contribute to the determination. That the interests of many are involved may justify more involvement of the officials in shaping the decision irrespective of the parties' wishes. The NRC, thus, understandably uses decisional processes that both allow considerable scope to parties and permit consideration of issues sua sponte with which the active parties are not (or no longer) concerned.

These concerns do not, however, explain the lengthiness of the review process. Particularly, they do not explain why the NRC uses an intermediate review board fashioned largely in accordance with the judicial model. The Appeal Board was created when the Atomic Energy Commission handled the regulatory responsibilities now performed by the NRC as well as the energy planning and development functions assigned to the Energy Research and Development Administration (now the Department of Energy) in 1974 when Congress bifurcated the AEC.[198] In considering whether the Appeal Board would still be necessary once the Commission's workload was reduced, the Senate Committee on Government Operations declared:

> Even in its new role as a Commission with only regulatory responsibility, it is unreasonable to expect that the five Commissioners would be able to do what the appeal panel now does in terms of reading and analyzing the

197. Id. at 1844, n.42; Cohen, The Disposal of Radioactive Wastes from Fission Reactors, SCIENTIFIC AM., June 1977, at 21, 23-27.

198. See STAFF STUDY, supra note 188, at 1-4; supra note 116, at 499-501.

voluminous case records and technical reports, and at the same time perform all of the Commission's other regulatory roles. The continued existence of the appeal panel will ensure that the Commission will be able to oversee the licensing and rulemaking workload while carrying out its principal administrative and coordinating functions essential to the Nation's health, safety, security, and energy supply.[199]

The Committee did not examine the role played by the Appeal Board or inquire into its appropriateness.

While the gravity and intensity of the public concerns in nuclear licensing support the use of deliberate processes, it is not plain that the Appeal Board serves that end or does so well enough to merit its apparent cost. If the general impetus for intra-agency review is increasing accuracy of policy interpretation rather than factual accuracy, that hardly explains the role the Appeal Board plays. The Appeal Board is bound by the same restraints on ex parte contacts that confine the Licensing Board members, and, like the Licensing Board, Appeal Board members do not perform other policy-making functions within the Commission.[200] Factual accuracy should be sufficiently assured by the processes used by the Licensing Board and by using technically qualified deciding personnel on Licensing Boards selected from the Panel membership in light of the nature of each case.[201] Moreover, justification of the Appeal Board for its contribution to factual or policy accuracy is difficult in light of the record of NRC review, which despite its lack of speed seldom produces anything other than an affirmance.

When the NRC staff studied the appeals process and decided that the Appeal Board should be retained, it did not hesitate long on this issue. Yet the only reason offered by the staff study for retaining the Appeal Board was that it served to "highlight the signficant issues and problem areas" for Commission review.[202]

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199. S. REP. NO. 980, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 5470, 5519.

200. See 10 C.F.R. §§ 2.780, 2.785, 2.787; Asimow, supra note 175, at 804-807.

201. The selection of Licensing Board members for each case is described in 10 C.F.R. § 2.721 (1981); 1981 ANNUAL REPORT, supra note 176, at 144.

202. See STAFF STUDY, supra note 188, at 36-37.

Without the Appeal Board, the Commissioners probably would not be able as easily to review licensing decisions and would not be able personally to devote the time now given by the Appeal Boards to review (the Boards spend an estimated 15,000 man-hours per year, approximately 60% of that on review and 20% on opinion-writing).[203] The key question, of course, is whether it is necessary to spend so much time on review. It is difficult in light of the data to believe that the intermediate review at NRC does much more than increase acceptability of the decisional process -- it does not appear to increase accuracy and certainly does not advance efficiency. Allowing discretionary, policy-oriented review of Licensing Board decisions by Commissioners, assisted by their staffs, would seem a satisfactory alternative to the present review system.

Federal Communications Commission

The Federal Communications Commission (FCC) has adopted a highly-structured approach to review of administrative law judges' decisions, using first a review board based quite plainly on the judicial model of agency action[204] and subsequently review by the Commission members that seems based more on the political model.[205] The FCC's intermediate review board, known simply as the Review Board, currently is composed of three members, although at times it has had as many as five.[206] The Board members are assisted by a small staff of attorneys, engineers and clerical employees. Review by the Board is available as a matter of right to any party filing timely exceptions.[207] The Commission in its discretion may review decisions of the Board on request of a party or on its own motion.[208] It may decline review without opinion.[209]

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203. Id. at 33.

204. See 47 C.F.R. §§ 0.161, 0.361-0.365 (1982); see also discussion of the judicial model text at notes 5-6, supra.

205. See 47 C.F.R. §§ 1.1115, 1.117 (1982); See also discussion of political model, text at note 7, supra.

206. Letter to the author from Roberta Poindexter, Administrative Assistant to the Review Board, Sep. 30, 1983.

207. 47 C.F.R. § 1.276(a)(1) (1982).

208. 47 C.F.R. §§ 1.115, 1.117 (1982).

209. 47 C.F.R. § 1.115(g) (1982).

The FCC's Review Board reflects the influence of the judicial model of agency decisionmaking. All of the Board's current members are lawyers.[210] Indeed, ten of the eleven persons who have served on the Board have been trained in law; the remaining member (one of the original four Board members) was an engineer.[211] The Commission in delegating review authority to the Board expressly limited the Board to duties not inconsistent with review of ALJs' initial decisions.[212] Further, the Board is directed, among other things, to produce in each case an opinion "signed by one of its members, who shall be responsible for its preparation."[213] There is no provision in the FCC rules--and apparently these rules are observed in practice--for the Chairman, Commissioners, General Counsel or other FCC staff to communicate with Review Board members about FCC policy or adjudication issues, except that the Bureaus that are parties to proceedings may, like all parties, communicate with the Board by formal written submissions served on all other parties.[214] The Board's operation is fairly similar to a court's:

> When exceptions, briefs and related pleadings have been filed, the Board begins its study of a case, and if one or more of the parties has requested oral argument, argument is scheduled before a panel of the Board. Panels, which consist of three Board members, are assigned in rotation. Although neither the Act nor the Commission's Rules requires that oral argument be held if requested, it is the Board's practice to grant all such requests. Following argument, the panel meets to decide the case, and one of them is assigned, this also on a rotating basis, to be responsible for the preparation of the decision. He may supervise the writing of the decision or he may write it himself, which he frequently does. When the decision meets his approval and that of the other panel members, it is adopted and published. The professional staff assists the Board in preparation for oral argument and in the

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210. See FCC News Releases Nos. 01868, Nov. 20, 1980; 096659, Feb. 4, 1981; and 003419, Sep. 17, 1981.

211. See Releases cited supra note 210, and FCC News Releases Nos. 21096, June 8, 1962; 68215, May 17, 1971; 22897, June 12, 1974; 26401, Jul. 23, 1974; 47904, Mar. 19, 1975; 01431, Nov. 7, 1980; 01868, Nov. 20, 1980; and 001792, June 25, 1981.

212. 47 C.F.R. § 0.361(a) (1982).

213. 47 C.F.R. § 0.361(d) (1982).

214. See Letter to the author from Sylvia D. Kessler, former Member, Review Board, Sep. 24, 1982.

drafting of decisions. The extent of the Board's review of the initial decisions is not limited; it can be virtually a de novo evaluation, but in practice the Board usually limits its study to those matters raised by the exceptions and briefs.[215]

The judicial nature of the Board also is reflected in the fact that these civil service appointments generally are held until retirement from the government. The average term of service on the Board for its first five members are in excess of twelve years,[216] and although the next three members served a relatively short average period of about six years,[217] that figure is considerably in excess of Commissioners' average tenure.[218] Moreover, the Board members, like ALJs, both have risen to a level within the civil service that makes further advancement unlikely and usually are appointed relatively late in their careers, reducing the probability that the position will be used as a springboard to higher office.[219] The typical announcement of a member's departure from the Board indicates that he or she is retiring from the government after more than thirty years of federal service.[220] These factors reduce the Board members' incentives to take account of political factors.

One aspect of the Board members' backgrounds, however, might give some cause for questioning whether the lack of Commission and staff influence comes from a desire for judicial decisionmaking or from confidence that the Board members' views on policy issues will be congruent with the views of agency members and staff. If inbreeding and a consequent lack of detachment from and objectivity about politically responsive agency decisions is the

215. Berkemeyer, Agency Review by Intermediate Boards, 26 AD. L. REV. 61, 63-64 (1974).

216. See authorities cited at notes 210 and 211, supra.

217. See id.

218. See STAFF OF SENATE COMM. ON COMMERCE 94TH CONG., 2D SESS., APPOINTMENTS TO THE REGULATORY AGENCIES 406-408 (Comm. Print 1976); Robinson, supra note 7, at 183-84. Of the seven FCC members serving at the time of this writing, only one has been on the Commission six or more years. If one calculates terms of service from the agency's inception, a considerably longer average is produced than has obtained recently. See STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION: VOL. I, THE REGULATORY APPOINTMENTS PROCESS 558 (Comm. Print 1977).

objection to selective certification for ALJs at agencies like the FCC,[221] that objection certainly could be made about members of the Review Board. Board members without exception have been long-time FCC employees. They have been assistants to FCC Commissioners and have worked in and headed various FCC divisions with substantive authority.[222] Two factors caution against interpreting this pattern as indicative of Commission efforts principally to secure officials with policy views consonant with the appointing Chairman's rather than to secure officials knowledgeable in the substantive areas subject to FCC adjudications. First, the considerably longer term for Board members than for Commissioners (and especially longer as compared to FCC Chairmen)[223] in combination with a total absence of reassignments from the Review Board to other duties within the FCC belies the policy link in Board membership. Second, many of the Board members were appointed from positions that are relatively "policy neutral." Four of the eleven members who have served on the Board were appointed from positions in the FCC's Office of Opinions and Review, the body that drafts opinions for the FCC Commissioners, and three were appointed from the office of the General Counsel.[224] Both offices serve to a greater degree than the FCC's substantive bureaus more as implementers than as formulators of Commission policy. At the same time, those offices provide experience in facets of agency adjudication that may be useful to a judicially-oriented review panel.

The Board's decisions are subject to review by the Commission on the Commission's own motion or on a discretionary grant of a petition for review. The grounds for Commission review are:

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219. See authorities cited at notes 210 and 211, supra.

220. See, e.g., FCC News Releases Nos. 68215, May 17, 1971 (31 years); 22897, Jan. 12, 1974 (30 years); 01431, Nov. 7, 1980 (31 years); 001792, June 25, 1981 (32 years).

221. See ALJ Hearings, supra note 44, at 74; Davis, supra note 13, at 402-406; Miller, supra note 48.

222. See authorities cited at notes 210 and 211, supra.

223. One study has calculated that the average term of service for FCC Chairmen has been just over two years. SENATE COMM. ON GOVERNMENT OPERATIONS, supra note 218, at 558.

224. See authorities cited at notes 210 and 211, supra.

> (i) The Board's findings are not supported by substantial evidence in the record as a whole; (ii) the Board's decision involves prejudicial errors of substantive or procedure law; (iii) the Board's decision is arbitrary or capricious; (iv) the Board's decision conflicts with Commission policy; or (v) the Board's decision raises a novel or important issue of law or policy which warrants Commission review.[225]

When the FCC Commissioners decide to review, they usually provide opportunity for parties to file briefs and to present oral argument. The historical pattern described by a former Review Board Chairman is for the Commission to grant less than one review petition in ten for review of Board decisions (thus, the Commission members grant review for about five percent of the Board's decisions), and to reverse, modify, or remand about three percent of the Board's decisions.[226] In FY 1978, the most recent year for which data are available, the Commission displayed a bit more interventionist tendencies: 78 initial decisions were issued by the Commission's ALJs; 24 were passed on by the Review Board (17 were affirmed); and 15 Board decisions were reviewed by the Commission.[227]

The FCC's two-step review process generally has been praised. Professor Freedman's report and the subsequent adoption of ACUS Recommendation 68-6 were based in considerable part on the favorable reaction to the FCC's adjudicatory process expressed by people involved in adjudication before the FCC.[228] The FCC's review process is neither especially quick nor especially slow for the decisions involved. On average, review takes a year and a third, a figure exceeded by only two other agencies.[229] ALJs' decisions at the FCC, however, on average take the same amount of time as review, an initial decision time exceeded by only three agencies.[230] Relative to other federal agencies, then, FCC review -- by the Board and, less frequently, by the Commission -- does not contribute disproportionately much or little to adjudications' decision time, but the review process does appear relatively productive. The percentage of initial decisions reversed at the FCC is quite high compared to other federal agencies (about one in

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225. 47 C.F.R. § 1.115(b)(5) (1982).

226. Berkemeyer, supra note 215, at 64.

227. See ACUS STATISTICAL REPORT, supra note 1, at 115.

228. See Freedman Report, supra note 93, at 131-37.

229. See Review Data, Appendix 2.1, infra

230. Id.

seven decisions reviewed) while the percentage of decisions reviewed is low.[231] Thus, while review at the FCC requires substantial investments of both time and personnel, those review resources appear to be relatively well spent.

Perhaps the most important feature of the FCC's process using the Review Board and the Office of Opinions and Review is that time is freed for the Commissioners to concentrate on policy issues either in the limited number of adjuciations the Commissioners dispose of or in rulemaking proceedings. The FCC has in recent years engaged in quite a few rulemakings of industry-wide significance, in some cases of importance to several industries.[232] The increasing use of rulemaking to set policy has been praised by some commentators and may be a direct result of the Commission's ability to shift some of the review load to staff.[233] Despite the recent decision by Congress that two of the FCC's seven Commissioners are superfluous, the FCC does have broad regulatory powers over telecommunications common carriage, including a burgeoning group of specialized services and new delivery technologies, and over broadcasting, including broadcast by satellites, and from time to time has asserted jurisdiction over related communications media.[234] Any structure that gives Commissioners the ability to concentrate on more general matters of policy seems beneficial in this context so long as the Commissioners and those who deal with the FCC are relatively satisfied with the competence of the intermediate decisionmaker.

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231. Id.

232. See, e.g., First Report and Order on Subscription TV Program Rules, 52 F.C.C.2d 1 (1975), reconsideration denied, 54 F.C.C.2d 797 (1975), rev'd, Home Box Office v. Federal Communications Comm'n, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829; Inquiry Into the Fconomic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 951 (1979); Cable Television Syndicated Exclusivity Rules, 79 F.C.C.2d 663 (1980).

233. Among the more notable paens to rulemaking are K. DAVIS, DISCRETIONARY JUSTICE 56-57 (1969), and Judge Skelly Wright's opinion for the court in Naional Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672 (D.C. Cir. 1973).

234. See Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. (1976); Midwest Video Corp. v. Federal Communications Comm'n, 440 U.S. 689 (1979).

Identifying just why these groups are satisfied with the intermediate decisionmaker--why the combination of a judicial intermediate review board and certiorari-type Commission review works fairly well at the FCC--however, is difficult. Although casual observation of a problem as multi-faceted as this cautions against certainty in proposing explanations, the nature of the decisions at issue may be the critical factor. The adjudication caseload at the FCC is both substantial and varied, involving routine licensing decisions, a heterogeneous group of enforcement actions, ratemaking proceedings that range from simple to extraordinarily complex, and reparations proceedings akin to private lawsuits. Most of these cases involve important issues of fact, and some require considerable technical expertise in making decisions on factual issues. In many categories of FCC adjudication, the policy issues seem to be resolved at the level of the substantive bureau that decides whether to press for an adjudication, with the decision not to pursue a case the staff's lever for implementing policy.[235] In two sorts of cases this does not seem to be true, but those cases may illustrate by way of exception why the general run of FCC adjudications seems well suited to a judicial resolution subject to a "loose" policy check. One sort of exceptional case is a major ratemaking proceeding such as many of those involving AT&T. So many policy issues and fact issues are inextricably intertwined in those cases that the decision to examine a tariff cannot alone account for much of the policymaking. Yet it may serve the political interests of all FCC Commissioners to have more than one level of well-trained, dispassionate fact-sifters attempt to identify and resolve the numerous fact issues involved before the policy issues are addressed. Moreover, in the context of so complex a case, the relatively simple policy issues -- basically presenting questions of the extent to which competition should be promoted and theextent to which some services should be subsidized by others[236] -- may be more easily resolved apart from the fact issues.

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235. One area in which such discretion is exercised involves complaints that the fairness doctrine has been violated. See, e.g., Fairness Report Reconsideration, 58 F.C.C.2d 691, 708-11 (1976) (Comm'r Robinson, dissenting); see also Powe, "Or of the [Broadcast] Press," 55 TEX L. REV. 39, 52-53, n. 97 (1976).

236. See, e.g., American Telephone & Telegraph Co., 38 F.C.C.2d 213 (1972); see also COMPTROLLER GENERAL, REPORT TO THE CONGRESS -- DEVELOPING A DOMESTIC COMMON CARRIER TELECOMMUNICATIONS POLICY: WHAT ARE THE ISSUES? (1979); 1 A. KAHN, THE ECONOMICS OF REGULATION 156-77 (1971).

A second sort of FCC case that does not seem well suited to resolution by non-policymaking personnel is the decision among competing applicants for a broadcast license,[237] where the basis for choosing among applicants is nowhere clearly articulated in meaningful fashion. Many commentators who have examined the FCC's comparative licensing process have questioned its rationality.[238] One former commissioner has labelled the process an exercise in "regulatory futility," observing:

> ...the central problem of the broadcast licensing process has been the FCC's inability to develop clear and meaningful selection criteria (in terms of licensee performance or public interest aconcerns), particularly in choosing among competing broadcast applicants. This absence of standards has yielded confusing and inconsistent results as well as inefficient procedures.
>
> There is nearly unanimous agreement both within and outside the agency that something ought to be done to improve the comparative hearing process, but little agreement on what that something should be. Though largely unsuccessful, the Commission itself made some modest efforts in 1965 to clarify its standards on comparative broadcast licensing....Though some changes perhaps could be made that would simplify and clarify the selection standards, I doubt that the results would justify the effort. At bottom, what is needed is not merely clarity but also relevance. It would be relatively simple to devise criteria to separate one applicant from another. The difficulty lies in matching these criteria with some demonstrable public purpose that the selection will further.

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237. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965); Broadcast Renewal Applicant, 66 F.C.C.2d 419 (1977).

238. H. FRIENDLY, supra note 98, at 5-23, 54-57; Anthony, Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings, 24 STAN. L. REV. 1 (1971); Geller, The Comparative Renewal Process in Television: Problems and Suggested Solutions, 61 VA. L. REV. 471 (1975); Robinson, supra note 7, at 237-43; Spitzer, Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC and the Courts, 888 YALE L.J. 717, 732-56 (1979).

> For the most part, the quality of the licensing applications that the Commission examines is meaningful only in terms of thresholds. That is, an applicant's technical and business personnel, its ascertainment of community interests, and its engineering and programming proposals will fall either above or below some minimum level of acceptability. To go beyond an inspection of these basic qualifications produces nothing but a senseless waste of the applicant's and the FCC's reources. Yet confining the Commission's examination to these basic matters that may have some meaningful effect on performance almost invariably provides an insufficient basis for making the choice among competing applicants. The Commission's hearing process rarely will disqualify on the grounds of a basic deficiency an applicant who survives the initial staff scrutiny that precedes the hearing. It is even less likely that this process will eliminate all but one applicant.
>
> Absent meaningful distinctions among applicants, the Commission's choice among them, perforce, will be arbitrary. Arbitrariness per se is not necessarily a bad thing: the government does many things arbitrarily. But if a government agency must make an essentially arbitrary choice, the arbitrariness should equate to randomness rather than to personal whim. The wheel of fortune -- a lottery -- is far preferable to the capricious preferences of bureaucrats.[239]

Recently, the FCC has proposed and Congress has passed legislation authorizing use of a lottery in place of the current system for selecting among licensees.[240]

The significance of the dispute over comparative licensing for present purposes is that, until recently, these cases were

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239. Robinson, supra note 7, at 238-40 (footnotes omitted).

240. See 47 U.S.C. § 309(i), initially added by the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 736. The FCC declined to implement the lottery provision, finding a variety of flaws in the new process. See Random Selection/Lottery Systems, 89 F.C.C.2d 257 (1982). Congress subsequently amended the lottery authorization. Pub. L. No. 259, 97th Cong., 2d Sess., 96 Stat. 1094 (1982).

excepted from Review Board jurisdiction.[241] The area where the Commission's performance was worst in terms of identifying useful criteria, making relevant policy choices in advance, was thought by the FCC to be ill-suited to a judicial review such as the Board's. The policy decision in this area have been made on an ad hoc basis, generally through exercise of the Commission's freedomto characterize facts in a manner suiting its intuitive political judgment.[242] Not coincidentally, this seems to be the class of cases in which FCC reversal of ALJs has been most frequent.[243] Plainly matters as to which policy choices cannot be spelled out ex ante are inappropriate for resolution by agency personnel whose job structure makes them relatively insensitive to the desires of the agency's policymaking officials. That this class of cases only now is being brought within the Review Board's jurisdiction, at a time when the FCC is moving toward spelling out certain policy choices and leaving to random selection the task of choosing among candidates who clear the basic hurdles, may be the best indication of why review at the FCC seems to have worked well.

Department of Interior, Board of Land Appeals

The Department of the Interior's administrative law judges decide over 1,100 cases per year in adjudicatory proceedings involving a wide variety of claims.[244] Most of these decisions

241. See Amendment of Delegation of Authority to Review Board, 88 F.C.C.2d 377 (1981).

242. See, e.g., Cowles Florida Broadcasting, Inc., 60 F.C.C.2d 372 (1976), vacated and remanded sub nom. Central Florida Enterprises, Inc. v. Federal Communications Comm'n, 598 F.2d 37 (D.C. Cir. 1978); modified and reh. en banc denied, 598 F.2d 58 (D.C. Cir.); pet. for cert. dismissed, 441 U.S. 957 (1979); reinstated, 86 F.C.C.2d 994 (1981), affirmed, 683 F.2d 503 (D.C. Cir. 1982). See also Star Television, Inc. v. Federal Communications Comm'n, 416 F.2d 1086, 1089, 1094-95 (D.C. Cir.) (Leventhal, J., dissenting), cert. denied, 396 U.S. 888 (1969).

243. See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 405-406 (1965) (Statement of Comm'r Lee).

244. See ACUS STATISTICAL REPORT, supra note 1, at 184-203.

are subject to review by one of four departmental appeal boards, each with a discrete subject matter jurisdiction.[245] The most prominent of these boards is the Interior Board of Land Appeals (IBLA), which is charged with deciding appeals "relating to the use and disposition of public lands and their resources."[246] The cases reviewed by the IBLA involve a large number of different statutory provisions respecting the use of public lands, covering subjects as diverse as grazing rights to pasture land and mineral rights to submerged land located on the Outer Continental shelf.[247] This heterogeneous collection of cases subject to IBLA jurisdiction generally involves contests over the validity of specific claims to the use of lands or associated resources.[248] Not infrequently, the cases involve disputes over matters such as when a claimant discovered certain minerals on public lands and what steps were taken to establish the claim and to develop the resources,[249] or whether the terms of a grazing permit have been violated.[250] The extent to which disposition of these contests requires resolution of more general questions of appropriate land and resource use has been a matter of some controversy. The suggestion has been made that the IBLA is the Department's principal policymaking body on the land use matters.[251] Board

245. These are the Board of Land Appeals, Board of Surface Mining Appeals, Board of Indian Appeals, and the Teton Ad Hoc Appeals Board. 43 C.F.R. § 4.1(b) (1982). The Board of Contract Appeals hears cases disposed of initially by contract officers, not ALJs. Id. A sixth board, the Alaska Native Claims Appeals Board, was recently abolished. See 47 Fed. Reg. 26, 392, June 18, 1982. The review process for claims within the jurisdiction of the Board of Surface Mining Appeals is described infra, see text at note 345; the review process for cases outside the boards' jurisdiction is described in category 20 of Appendix 1 to Part III, infra.

246. 43 C.F.R. § 4.1(b)(3) (1982).

247. See id.; see also 30 U.S.C. §§ 22, 29 (1976); 43 U.S.C. § 315 (1976); 43 C.F.R. §§ 3300-3340 (1982).

248. See ACUS STATISTICAL REPORT, supra note 1, at 185-88, 190.

249. See 43 C.F.R. §§ 3861-3872 (1982).

250. See 43 C.F.R. §§ 2120.0-3, 2920.9-3 (1982).

251. Strauss, Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law, 74 COLUM. L. REV. 1231, 1235, 1254-65 (1974).

members have reacted sharply to this suggestion.[252] Indeed, one IBLA member, serving as Acting Director of the Office of Hearing and Appeals (OHA), the departmental division that encompasses the administrative law judges and boards of appeal, took pains to note in a report on the organization and operation of OHA and the appeal boards:

> Implicit throughout this paper is the assumption that the Boards of Appeal within the Department were not and are not intended to make policy, but rather to apply existing policy and law to the facts of each case. Since the author was intimately involved in the creation of the Office of Hearings and Appeals in 1970, he can attest that this was the intention. However, the wording of the regulations delegating authority to the Boards, 43 CFR 4.1, 4.21(c), coupled with the entire language of 43 CFR 4.5, regarding the power of the Secretary, might lead one to the conclusion that the intention was otherwise.

The specific denial that IBLA makes policy reflects the critical concern with IBLA's operations: the role its adjudications play in Departmental decisionmaking.[253] Most cases ultimately heard by IBLA initially fall within the jurisdiction of the Bureau of Land Management (BLM). The Director of BLM, or one of his State Directors, usually initiates the contests or rules on claims in a manner adverse to the interests of an appealing party. The next step in the adjudication is a hearing before and decision by an ALJ. Following that, appeal lies to IBLA.[254] There is no IBLA authority to review sua sponte.[255] Once a case has been appealed, however, either by a private party or by BLM officials, the Board is free to review the case de novo.[256]

IBLA provides little opportunity for participation by the parties to the proceeding, but a set of formal procedures

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252. See Frishberg, Hickey & Kleiler, The Effect of the Federal Land Policy and Management Act on Adjudication Procedures in the Department of the Interior and Judicial Review of Adjudication Decisions, 21 ARIZ. L. REV. 541, 554 n.58 (1979).

253. DEPARTMENT OF THE INTERIOR OFFICE OF HEARINGS AND APPEALS, BOARDS OF APPEAL WITHIN THE OFFICE OF HEARINGS AD APPEALS 34 (1977) [hereafter INTERIOR REPORT].

254. See 43 C.F.R. §§ 4.400-4.476 (1982).

255. INTERIOR REPORT, supra note 253, at App. C, p.i; see 43 C.F.R. §§ 4.1(b)(3), 4.410 (1982).

controls the course of disposition by the Board members. The Board is composed of eight members, seven of them attorneys and all selected from within the Department.[257] The Chief Administrative Judge who occupies a GS-16 postion, coordinates the Board's operations. Cases are assigned to individual Board members by him, with one Board member principally responsible and two other Board members comprising the panel for that case.[258] The Board may provide oral argument, but rarely does so.[259] The principally responsible Board member drafts an opinion or oversees its drafting by a staff attorney, then circulates the opinion to the other panel members. Once two members agree on an opinion, the opinion (and dissent if there is one) is circulated to all IBLA members for comment.[260] The Board's Chief Administrative Judge or any three other IBLA members can block issuance of a decision until the Board can meet and decide whether to consider the case en banc, to modify the decision without further discussion, or to let the panel's decision stand.[261]

While the decision and review process at Interior has been criticized, it has not been contended that IBLA review takes too long or yields too little. The review process at IBLA takes about seven months,[262] a figure that would place it near the middle of the pack, faster than 13 agencies but slower than 11.[263] Interior does not provide data on the time taken for ALJ decisions, but the Department's relatively large caseload per ALJ (about 85 cases per ALJ per year, the sixth highest caseload) supports an inference that ALJ decision time should be short.[264] If the caseload from which appeals to IBLA are drawn

256. INTERIOR REPORT, supra note 253, at App. C, p.i; see 43 C.F.R. § 4.477 (1982).

257. INTERIOR REPORT, supra note 253, at App. C, and attachments.

258. Id., at App. C, p.i.

259. Id. See also 43 C.F.R. § 4.25 (1982); Strauss, supra note 251, at 1255.

260. INTERIOR REPORT, supra note 253, at App. C, p.ii.

261. Id.

262. Id. at p.iii.

263. See Review Data, Appendix 2.1 infra.

264. See ACUS STATISTICAL REPORT, supra note 1, at 21, 185-89; Review Data, Appendix 2.1, infra.

is not significantly different from the departmental caseload generally, the review time at IBLA may be higher than would be expected for the difficulty of its cases, but not dramatically so.[265] The IBLA's rate of reversal of ALJ decisions (almost eight percent) would rank tenth out of twenty-five agencies, and in a much higher percentage of cases (twenty percent) the Board either modified a decision or remanded it.[266] Appeal to courts from IBLA decisions has not produced a reversal rate sufficient to cast doubt on the Board's contribution to accurate decisionmaking.[267]

The argument over IBLA decisionmaking does, nonetheless, concern an aspect of accuracy: the question raised is how well the decisions of bureaucratic officials who are relatively insulated from policymaking officials comport with the interpretations of statutory provisions that those persons expressly charged with formulating agency policy would give.[268] The criticism of the review process is linked to other criticisms of Interior department decisionmaking--that insufficient attention is paid to general policy decisions, that too little use is made of rulemaking.[269] Even taking other deficiences for granted, the contention advanced is that IBLA decisions necessarily make departmental policy without any control by officials suited to perform the policymaking function. The point is made forcefully by Professor Strauss:

> Particularly striking is the absence, even in cases in which significant policy questions are presented, of any explicit provision for secretarial control over the Board's policy conclusions to assure coherence and intelligibility in the Department's interpretive application of the mining laws. The Board, like the Office of Hearing and Appeals generally, was created in response to the pressure of criticism from the private bar that policy and adjudication functions in the Department were too closely linked; with its creation, division of function became complete. Members of the Board,

265. See ACUS STATISTICAL REPORT, supra note 1, at 185-90; Review Data, Appendix 2.1, infra.

266. See INTERIOR REPORT, supra note 253, at Attachment to App. C; Review Data, Appendix 2.1, infra.

267. See INTERIOR REPORT, supra note 253, at App. C, p.iii.

268. See Strauss, supra note 251.

269. See id.

although typically drawn from within the Department, are almost completely isolated from contact with the rest of the Department once on the Board.... The point is strongly made in the Department's regulations that Government counsel appearing before the Board of Land Appeals "shall represent the Government agency in the same manner as a private advocate represents a clients," [43 C.F.R. § 4.3(b)] and that there shall be no oral or written ex parte communication between "any" party and a member of the Office of Hearings and Appeals concerning the merits of a proceeding. [43 C.F.R. § 4.27(b)] The result of these procedures is that departmental officials can argue policy matters--the desirability of overruling outdated or erroneous departmental precent, for example--only through their briefs. The general operating divisions of the Department have no control over the outcome and cannot impose their policy preferences, except by previous adoption of a rule.

The isolation of the Bureau of Land Management ostensibly the principal source of policy concerning mining matters, is particularly dramatic. Before creation of the Office of Hearings and Appeals, the Bureau played a decisive role in litigative as well as in legislative approaches. Provision for an intermediate appeal to its Director from the hearing examiner's decision permitted the Bureau a measure of policy control. The Bureau's function as intermediate appellate body was eliminated, however, because it was viewed as a source of oppressive delay and an example of the combined functions which the proponents of reform believed must be separated. The result was isolation of the Bureau from any contact with a case once a complaint had been made and answered (and perhaps, evidence had been given by Bureau experts). While rules and Manual directives come into being though the Bureau's labyrinthine corridors, the prosecution of litigation is entirely in the hands of the Solicitor's Office; adjudication, with its policy ovetones, belongs to the Office of Hearings and Appeals and its Board of Land Appeals. To the extent policy in mining matters is made by decision rather than rule, the higher levels of the Bureau no longer contribute significantly to its formulation.

To be sure, the independence of the Board, like other tribunals of the Office of Hearings and Appeals, is not without formal limit; the Secretary retains his power of personal decision. The regulations, however, make no formal provision for secretarial review; rather, they state that no departmental appeal will lie from a decision of an appeals board....

Certain informal lines of communication do exist--incursions, perhaps necessary ones, on the spirit if not the letter of the

> rule that the Department appears before the adjudicatory body "as a private advocate." Private communications between the Department and the Director of the Office, who does not ordinarily sit on appeals, have been quite free.
>
> While there is some debate whether he is ever approached on the merits of policy matters, the Director will be told if a particular matter is regarded as "important," and is occasionally asked either to have matters considered en banc or to place himself, ex officio, on the panel. The effect is to underscore the policy implications of the particular case. Communication exists as well in the opposite direction: departmental regulation or forms which by their obscurity have proved particularly productive of litigation are called to attention, sometimes with suggestion for changes that might produce greater clarity or otherwise reduce the litigative workload. And the opinions themselves, concrete examples of the Board's independence, may produce a somewhat greater incentive at higher levels in the Department to act by rule.
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> The total picture, however, remains quite different from one's ordinary expectations about the choice between rulemaking and adjudication. Instead of a single decider, rationally or irrationally allocating choices between the two procedures and itself making the fundamental policy decisions whichever mode is chosen, one finds a frequently unconscious process of allocation and, more important, a process which leads ultimately to different authorities.[270]

OHA officials do not claim that IBLA is integrated into the department's policymaking structure. Indeed, they admit to some difficulty in ascertaining policymakers' views. The OHA officials argue, however, that they do not make policy decisions, that because of their past experience in the department as well as communication with current policymakers, they generally are able to ascertain and implement department policy, and when they get it wrong, they correct it:

> While solving the problem of procedural due process, independent boards of appeal within the Department (and all agencies) raise other problems. The Solicitor, in addition to being the Department's chief legal officer, has traditionally and properly enjoyed a close associaton with the Secretary. So have the various Assistant Secretaries and Bureau Directors. It is entirely natural, therefore, for the Secretary, the Solicitor, the Assistant Secretaries and members of their staffs to look with suspicion at a system that bypasses the very officials upon whom the Secretary most relies for legal advice and policy guidance on an almost daily

270. Id. at 1256-58 (footnotes omitted).

basis. These officials and their immediate staffs are Presidential or Secretarial appointees. Not so the members of OHA. With the exception of the Director, all are members of the career bureaucracy. An incoming, policy-making, Presidential appointee might well feel like a capitve, and view OHA as the tail that wags the dog.

Because OHA is functionally separate from members of the Secretariat, the Solicitor's Office and the Bureaus, it is not always immediately privy to recent policymaking decisions. Conversely, when various Boards of Appeals have requested policy guidance from the Secretariat, it has been difficult in some cases to obtain a response. On some occasions, the request was routinely transmitted to the Solicitor's Office, thus totally frustrating the purpose of the system.

One of the primary reasons for making the Director of OHA a political appointee was to ensure the responsiveness of the entire office to the policies of the existing administration. But this can only succeed if the Director is included in, or at least informed of, policy decisions, communicates them in turn to the Boards and the Hearings Division, and receives in turn a response to his questions regarding policy from the appropriate policy maker.

The Solicitor, Assistant Secretary and Director, BLM, would seem to be more aware of recent departmental policy regarding public lands than the Board of Land Appeals. Thus, there is a conflict between administrative fairness and review by the policymaker himself. But the conflict is not irresolvable, and the problem is more apparent than real. In the 6 1/2 years since the Board of Land Appeals has been in existence, the Board has not been aware of serious dissatisfaction on the part of the BLM. Of course, six of its present members had extensive public land experience, either with BL, or the Solicitor's Office, before coming to the Board. Some of its decisions may have created difficulties, many have been welcomed.

. . . [W]here BLM is unhappily surprised by a Board reversal of one of its decisions or the decision of an administrative law judge, it may and it has petitioned for reconsideration or appealed the ruling of the administrative law judge. On more than one occasion the Board has changed its decision on reconsideration after a more comprehensive presentation of the Bureau's position was made.[271]

271. INTERIOR REPORT, supra note 253, at 32-33 (footnote omitted).

By and large, the complaints about IBLA decisions seem endemic to the bifurcation of adjudication from other agency decisionmaking. On balance, the present system's faults do not seem easily correctable if one feels uncomfortable with a relatively complete integration of all agency functions. Several factors appear to make the current decision and review structure sensible, albeit not perfectly acceptable for all involved. First, the Department of Interior is a large agency with many functions and the agency head cannot reasonably be expected to be personally involved in the bulk of departmental adjudication, even at the review level. Second, delegation of review authority to relatively "judicial" officials has fairly low cost in the cases at issue. While the policy component of some proceedings (such as resolution of claims for arguably conflicting uses of public land,[272] as distinguished from resolution of the technical validity of claims[273]) is significant, and most proceedings have some policy implications, the cases reviewed by IBLA appear largely to raise factual issues that either are or at relatively low cost can be shielded from major policy effect.[274] The real complaint on this score is not that review need include more policymaking personnel but rather that when adjudications conflict with departmental policy -- actually or potentially -- steps need to be taken by the department's policymaking officers to correct the errors. Rulemaking may be a suitable vehicle for effectuating most of these corrections.[275] Finally, the department does provide opportunity for policy input from policymaking officials in the adjudication-review process.[276]

Other steps that might admit of correction of IBLA errors in policy divination at lower cost than rulemakings or petitions to IBLA for rehearing (a process that requires education of IBLA officials, on the policy implications of their decision on the disagreement between IBLA and the policymaking officials, and on the reasons why the IBLA position should be abandoned) may be found. One such step would be to replace IBLA officials with more politically-responsive reviewers. The yield of this move in policy harmony is not likely to be great, however, and it flies

272. See 30 U.S.C. § 22 (1976); 43 C.F.R. § 3871 (1982).

273. See 30 U.S.C. § 29 (1976); 43 C.F.R. §§ 3861-3864 (1982).

274. See Frishberg, Hickey and Kleiler, supra note 252; Strauss, supra note 251, at 1269.

275. See id. at 1264-69.

276. See INTERIOR REPORT, supra note 253.

directly in the face of the objections that led to creation of the Board as presently organized.[277] Another step toward low-cost policy control is to allow some policymaking official whose time and attention are less in demand than the Secretary's to oversee IBLA decisions. But the Department's rules in essence do this. Admitting that the theoretical possibility of secretarial review is not a realistic control, still the Director of OHA is a political appointee with power to call attention to perceived policy problems in proposed IBLA decisions,[278] and the Solicitor can issue rulings that the IBLA considers binding.[279] At bottom, complaints about IBLA operation appear premised on a rejection of the judicial model of agency adjudication, even in the modified form adopted by the Department of Interior.

Department of Agriculture

The Department of Agriculture regulates a wide variety of practices in the production, handling, and marketing of agricultural products, animals, and animal products.[280] Adjudications at the Department generally address allegations that departmental rules or related statutory provisions have been violated.[281] These enforcement actions often are associated with licensing programs, with the adjudicatory proceeding cast in the form of modification suspension, or revocation of a permit to engage in certain regulated activities.[282] Proceedings also may result in orders to cease and desist from specified practices on the threat that noncompliance will result in license revocation. In cases outside the Department's licensing authority, as well as some cases involving licensees or permittees, monetary penalties may be imposed for violation of regulatory or statutory command.[283]

277. See Frishberg, Hickey & Kleiler, supra note 252, at 545-53.

278. INTERIOR REPORT, supra note 253, at 32.

279. Id. at 33.

280. See proceedings listed at 7 C.F.R. § 1.131(1) (1981).

281. See, e.g., 7 C.F.R. §§ 47.2-47.68 (1983).

282. Id.

283. E.g., Horse Protection Act of 1970, 84 Stat. 1406, 15 U.S.C. § 1828 (1976); Packers and Stockyards Act, as amended, 90 Stat. 1249, 7 § 213(b) (Supp. IV 1980).

The Department's resolution of these disputes generally fits the judicial model of agency decisionmaking. Trial-type hearings are held before one of the Departament's five ALJs, and review is available to any party as a matter of right.[284] The reviewing official is the Department of Agriculture's Judicial Officer.[285] The Judicial Officer has no authority to review sua sponte, but he does review matters de novo and has authority to enlarge the issues on appeal to include all he thinks appropriate to disposition of the case.[286] The Judicial Officer is a high-ranking (GS-17) civil servant, a long-time employee of the Department.[287] The position has not been filled by former administrative law judges, and the Judicial Officer is appointed by the Secretary of Agriculture, so presumably he is conversant with and attuned to at least those aspects of departmental policy the Secretary considers important to agency adjudications. Whatever policy connection he may have had before appointment, however, is severed on selection as Judicial Officier, since the Department has a fairly strict rule against ex parte contact with Judicial Officers, as well as with ALJs, by persons within the Department or without.[288] Moreover, the appointment as Judicial Officer apparently runs for the duration of the appointee's government career.[289] The decision of the Judicial Officer is final.[290] The Secretary has retained authority neither to review on his own motion nor on request of a party.

The opportunity, thus, is presented for the judicial operation of the decision and review process to conflict with the more "political" operation of the Department's substantive bureaus.

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284. 7 C.F.R. § 1.145(a) (1981).

285. Id.; 7 C.F.R. § 2.35 (1981).

286. 7 C.F.R. § 1.145(h) (1981).

287. Letter to Richard K. Berg, General Counsel, Administrative Conference of U.S., from Donald A. Campbell, Judicial Officer, U.S. Dept. of Agriculture, Feb. 24, 1983.

288. 7 C.F.R. § 1.151 (1981).

289. This seems to have been the Department's practice and shows no sign of abating -- the present Judicial Officer already has served twelve years in that position -- but there is no departmental rule governing the Judicial Officer's tenure of office. See Letter, supra note 287, at 3.

290. 7 C.F.R. § 1.145(i) (1981).

The bifurcation of administrative processes at Agriculture, however, does not seem to have produced complaints from inside or outside the Department. There may be little objection to dispensing with secretarial review because the press of other duties makes that a high cost process, requiring that the Secretary take time from other matters and perhaps entailing delay in review or causing the Secretary to give less attention to review than is given by a Judicial Officer without other responsibilities.[291] The data on Judicial Officer review at Agriculture support the notion that his review is both expeditious and serious. Review takes less than half as long as the initial decision,[292] and the Judicial Officer reverses the ALJ's decision nearly one time in ten.[293] The value placed on the opportunity for review may be reflected in the fact that parties seek review in almost half the cases decided by the Department's ALJs.[294]

While the data indicate that Judicial Officer review is relatively quick and intense, these factors are not a complete explanation for satisfaction with this process. Some consideration of alternative review methods is necessary to understand acceptance of the present system. Assuming that secretarial review of all ALJ decisions would entail compromise on either the speed of review or attentiveness of the reviewer does not compel the conclusion that all alternatives to review by a

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291. Cf. Freedman Report, supra note 93, at 131-32 (offering a similar explanation for acceptance of the FCC's Review Board). An indication of the range of departmental activities for which the Secretary has overall responsibility can be gleaned from the U.S. DEPARTMENT OF AGRICULTURE, REPORT OF THE SECRETARY OF AGRICULTURE (1981).

292. See Review Data, Appendix 2.1, 2.4 infra.

293. Id. The information on the Department contained in Appendix 2 to Part III is based on ACUS STATISTICAL REPORT, supra note 1, which is a compilation of data submitted by the various bureaus using ALJs. The current Judicial Officer at Agriculture, however, believes the information regarding reversal of ALJ decisions to be erroneous or outdated. He would place the reversal figure at closer to one reversal (or substantial modification) for every two cases heard in the last three years. Letter, supra note 287.

294. See Review Data, Appendix 2.1, 2.4, infra.

policy-insulated figure such as the Judicial Officer are less attractive. Plainly, the Secretary could delegate the review function to someone less insulated from policymaking than the Judicial Officer. The degree to which the review process involves "economies of scale" -- more efficient review being associated with a specialization in that task -- may impose limits on the policy-connectedness of the reviewing official, but more integration into the policymaking structure than characterizes the Department's Judicial Officer clearly is possible.

Some measure of the success of review at Agriculture, thus, inevitably must rest on acceptance of judicial treatment as appropriate to the matters being adjudicated. The cases subject to review by the Judicial Officer to a significant degree present disputes over issues of fact,[295] although by no means are these necessarily simple issues. The Department's regulations on most subjects are incredibly detailed. For example, regulations adopted pursuant to the Packers and Stockyards Act[296] filling ten pages in the Code of Federal Regulations detail procedures for weighing poultry, including the sort of scales to be used, how the scale is to be balanced, adjusted, tested, repaired, and

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295. As intimated above, the separation of "fact" from "policy" issues is by no means an easy task, and there is considerable room for difference in the characterization of any dispute. See text at notes 6-61 supra; see also Robinson, supra note 23, at 503-506; Nathanson, Book Review, 70 YALE L.J. 1210, 1211 (1961). The Judicial Officer at Agriculture demurs from the statement that adjudications at the Department largely raise issues of fact, emphasizing instead the "policy" issues involved in his decisions, including the appropriate sanction to impose where violations have been found. Letter, supra note 287. That the decisions of Agriculture's ALJs and Judicial Officer involve some matters closer to policy than fact is undeniable. Whether one or the other is preponderant is admittedly difficult to say. Still, as compared to other bureaus, the Department of Agriculture seems to have crystallized into rule form many of the broader policy issues committed to it by statute, transforming many such matters into contests over facts at the adjudicatory level.

296. 42 Stat. 159, codified at 7 U.S.C. § 181 et seq. (1976).

read,[297] and when to weigh and re-weigh.[298] The room for policy judgments in adjudication of disputes over rule violationsobviously is minimized when rules are this precise. Of course, policy judgments still are strongly implicated in deciding not whether a rule has been violated but whether to take action against the violator. To a large extent, however, these policy judgments are made by the Department's non-judicial officers who decide when to initiate a proceeding and when and on what terms to withdraw or settle a case. The liberal use of this power is reflected in the fact that roughly seven times as many cases are initiated as are pursued to initial decision.[299]

The Department has not been able to formulate precise rules in all areas. For instance, one charge to the Department under the Agricultural Adjustment Act, as amended, is "to establish and

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297. 9 C.F.R. §§ 201.106-201.108 (1982). The following excerpt is typical:

> (2) Test procedure-weighbeam scales - (i) Error determination. The most precise method of determining the errors during the testsof a vehicle scale equipped with a weighbeam is known as the error-weight procedure. This method is explained in the following paragraphs.
> (ii) Zero-load balance. With all poises at zero, accurately balance the scale at zero with at least 50 pounds of small denomination weights on the platform. These error weights will be used to accurately measure errors and balance changes during the test.
> (iii) The SR (sensitivity reponse). The SR value at zero load shall be determined by increasing or decreasing the amount of error weights on the platform until the appropriate change in the rest point of the weighbeam or balance indicator is obtained. On scales equipped with balance indicators a change in load equal to the minimum weighbeam graduation shall change the position of rest of the balance indicator 0.25 (1/4) inch or the width of the central target area, whichever is greater. On scales not equipped with a balance indicator a change in load not to exceed the value of two minimum weighbeam graduations shall move the weighbeam from a position of rest in the center of the trig loop to a position of rest either at the top or bottom of the trig loop. . . .
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> 9 C.F.R. § 201.106-1(g)(2) (1982).

298. 9 C.F.R. § 201.109-201.110 (1982).

299. See Review Data, Appendix 2.1, 2.4 infra.

maintain such orderly marketing conditions for [certain] agricultural commodities in interstate commerce . . . as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof ... [and] avoid unreasonable fluctuations in supplies and prices."[300] Various provisions in the statute spell out in greater detail the procedures to be followed but require fidelity to the vague standard quoted above.[301] The Act also gives additional ambiguous instructions, such as the requirement, in defining when agreements among industry members on marketing practices (marketing agreements) will be appropriate, that approval be obtained from a certain percentage of industry members who engaged in the business during a "representative period."[302] The sorts of political judgments called for in implementing this legislation are not readily reducible to rules, and the general language of the statute has not been explicated in the Department's regulations.[303] By the same token, the judgments have not been left principally to nonpolicymking personnel. Although appeals from ALJ decisions on petitions for relief from marketing orders are to the Judicial Officer, the Secretary renders the orders respecting marketing agreements.[304] The review accorded these cases does not appear distinguishable from that granted other adjudications at Agriculture. In the period FY 1976 - FY 1978, ALJs passed on

300. 7 U.S.C. § 602(1), (4) (1976).

301. E.g., 7 U.S.C. § 608(c) (1976).

302. 7 U.S.C. § 608(c)(8) (1976).

303. See, e.g., 7 C.F.R. § 900.3 (1982).

304. 7 C.F.R. § 900.13a (1982). Adjudications involving petitions for relief from marketing orders appear to be excluded from the class of cases subject to Judicial Officer review, and review authority instead seems to have been retained by the Secretary. See 7 C.F.R. §§ 1.131, 2.35 (1981); 7 C.F.R. §§ 900.65, 900.66 (1982). The information concerning the Department's review processes submitted to the Administrative Conference was so construed, see ACUS STATISTICAL REPORT, supra note 1, at 49, and the cases involving these petitions have been treated in the Appendices to this Report as instances of agency head review. The Judicial Officer, however, points out that this construction is not in accord with the Department's practices, which treat these like other adjudicatory cases with review by the Judicial Officer. See Letter, supra note 287.

thirteen petitions for relief from marketing orders.[305] All thirteen were appealed; ten were affirmed; one was reversed, one modified, one remanded.[306] The average review time was less than one-third the time taken to reach the ALJ's initial decision.[307]

Finally, in addition to the division of responsibility between the comparatively judicial Judicial Officer and the more political appointees at Agriculture, the commitment of matters to ALJs for initial decision and the manner chosen for review also seem sensible. Assuming a fairly uniform level of ALJ competence in federal agencies, the fact that the initial decisions take over fourteen months on average, a figure exceeded by decisions at only five other agencies, is consistent with belief that significant issues of some difficulty are presented in the Agriculture department's adjudications. It is not difficult to justify utilizing someone skilled at making factual decisions where complex factual issues are in dispute. The fact that the Department's cases are not predominantly simple, single-issue cases but rather cases of some complexity and, judged by the parties' investment in the proceedings, not inconsiderable value similarly supports the opportunity for review, even though that process adds six more months to decision time.[308] On all grounds, then, adjudication at Agriculture receives high marks.

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305. See Review Data, Appendix 2.4, infra.

306. See ACUS STATISTICAL REPORT, supra note 1, at 48-49.

307. Id.

308. Id.

APPENDIX I TO PART III:
AGENCY REVIEW PRACTICES BY CATEGORY

A. Review by Agency Head

1. Recommended Decision: Automatic Review

Civil Aeronautics Board: Proceedings concerning foreign air carrier permits under the Federal Aviation Act are heard by ALJs who issue recommended decisions to the Board. The Board's decision is subject to approval by the President.[309] The CAB disposed of 21 such cases in fiscal year 1978 (hereinafter FY1978).[310]

Drug Enforcement Administration: A bureau within the Department of Justice, the one administrative law judge of the DEA closed 40 cases in FY1978, issuing recommended decisions in 18 of them. Most of these cases involved denial or revocation of permits to handle controlled substances. Recommended decisions are certified to the Administrator. Of the decisions reviewed in FY1978, 19 were affirmed and only one reversed by the Administrator.[311]

Interstate Commerce Commission: In some cases involving the rates and practices of regulated motor, rail and water carriers and of freight forwarders, and in some cases involving financial transactions of these regulatees, the ICC dispenses with the normal requirement of an initial decision by the ALJ. Instead, the ALJ certifies the record to the Commission for decision and generally drafts a recommended decision that may serve as a basis for the Commission's action. Although over 400 ICC cases may have fallen in this category in FY1978, the vast majority did not proceed past the hearing stage. The large number of cases in which applications and proposals were withdrawn left only 50 cases at the review stage, 10 of which resulted in reversal. The ICC decisionmaking process is discussed in greater detail in review category 8 below.

309. 49 U.S.C. § 1372(f)(2) (Supp. IV 1980).

310. See ACUS STATISTICAL REPORT, supra note 1, at 78-79. This function of the CAB will be transferred to the Department of Transportation as of January 1, 1985, pursuant to Public Law No. 504, 95th Cong., 2d Sess., § 34, 92 Stat. 1744; see 49 U.S.C. § 1551 (Supp. IV 1980).

311. See ACUS STATISTICAL REPORT, supra note 1, at 95-101. Because decisions reviewed include some decided the prior year and less than all decided in the current year (i.e., those decided too late to allow review to be completed in the current year), the number of cases reviewed may differ from the number decided even though all decisions are reviewed.

Merit Systems Protection Board: In cases involving charges against an administrative law judge, hearings are held before the Board or an ALJ. When the ALJ presides, he issues a recommended decision which automatically is reviewed by the Board. In FY1978 jurisdiction over these cases was vested in the U.S. Civil Service Commission, and only one case was heard by the Commission's ALJ.
U.S. International Trade Commission: The Commission, with two ALJs, disposed of 10 cases in FY1978 involving alleged use of unfair trade practices in violation of the Tariff Act. Cases are certified to the Commission with the ALJ's recommended decision.

2. Review of Right

Bureau of Alcohol, Tobacco and Firearms: Proceedings under several different statutes to determine whether certain permits should be revoked are conducted before the Bureau's ALJ. The Director of the Bureau, which is part of the Department of the Treasury, reviews appeals from the ALJ's initial decision.[312] In cases involving disbarment of professionals before the Internal Revenue Service, hearings are presided over by the AT&F administrative law judge and review lies of right to the Secretary of the Treasury. This is a minor part of the ALJ's caseload, accounting for only 9 of the 88 cases closed in FY1978. Review was sought before the Secretary in only one case.

Commodity Futures Trading Commission: ALJs at the CFTC, which currently employs four administrative law judges, rendered initial decisions in approximately 200 cases in FY1978. Most of these adjudicated claims by private parties for reparations from commodity futures traders registered with the CFTC for violation of its regulations. A small number of cases (seven) involved enforcement actions by the Commission against brokers and traders. Review by the Commission is available at the instance of a party or on the Commission's own motion. The Commission acted on 15 cases in FY1978, four of which were enforcement cases.

Consumer Product Safety Commission: Proceedings to determine whether sanctions should be imposed for violation of CPSC standards or of statutes subject to CPSC enforcement are presided over by the CPSC's ALJ. His initial decision is subject to appeal to the Commission within 40 days of issuance. Nine cases were decided in FY1978, and five were reviewed by the Commission.

Environmental Protection Agency: Challenges to denial, cancellation, or suspension of registrations under the Federal Insecticide, Fungicide, and Rodenticide Act are heard before the EPA's seven ALJs. Exceptions may be taken to the ALJs' initial

312. 27 C.F.R. §§ 200.115, 200.116 (1982). See notes 2 and 147 supra.

decisions, and review is available of right before the Administrator. The EPA's rules provide for the appointment of a Judicial Officer to exercise the Administrator's review authority,[313] and the Administrator does, indeed, frequently delegate that authority.[314] The Administrator does not, however, always delegate this authority;[315] under the EPA's rules, the authority remains in the Administrator to determine whether review of any given case is assigned to a Judicial Officer,[316] hence the inclusion of these cases under agency head review. Only two cases were decided under FIFRA in FY1978.

Federal Energy Regulatory Commission: ALJs are used to conduct hearings and render initial decisions in eight different proceedings conducted pursuant to three different statutes. These proceedings generally involve the licensing of energy operations and scrutiny of their rates and practices. Exceptions to ALJ decisions trigger review by the Commission. FERC, which employs 22 ALJs, disposed of 125 cases in FY1978.[317] The Commission reviewed 40 cases; three initial decisions were reversed, and one was modified.

Federal Labor Relations Authority: Federal Service Labor Disputes cases arising under Executive Order No. 11491, now under the purview of the FLRA, formerly were decided by an Assistant Secretary of Labor after hearing and issuance of a recommended decision by the ALJ (or in some instances by another official).

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313. 40 C.F.R. § 164.2(k) (1983).

314. See, e.g., Environmental Defense Fund v. Environmental Protection Agency, 489 F.2d 1247, 1250 (D.C. Cir. 1973) (indicating, on basis of submission by Respondent William D. Ruckelshaus, EPA Administrator, "normal" practice of EPA in certain permit cases is appointment of Judicial Officer.

315. See, e.g., id.; See also Montrose Chemical Corp. v. Train, 491 F.2d 63, 65 (D.C. Cir. 1974).

316. 40 C.F.R. § 164.2(k)(3) (1983).

317. The FERC ranks sixth among agencies in number of ALJs and thirteenth in caseload. This disparity may indicate that FERC cases are of greater than average difficulty or complexity. The low reversal rate for ALJ decisions, see text above, may indicate that the difficulty is technical rather than a product of unclear agency goals.

In FY1978, 267 such cases were decided.[318] The FLRA regulations now governing these cases seem to accord review by the Authority as of right, stating: "After considering the Administrative Law Judge's decision, the record, and any exception . . . the Authority shall issue its decision. Provided, however, that unless exceptions are filed which are timely . . . the Authority may . . . adopt without discussion the decision of the Administrative Law Judge."[319] While this is a review process closer to that existing before establishment of the FLRA (automatic review of recommended decisions), the statute granting FLRA jurisdiction over these cases appears to authorize discretionary review by the Authority.[320]

Federal Maritime Commission: ALJs at the FMC hear a variety of cases under the Shipping Act of 1933, including enforcement actions, licensing decisions, and assessment of rates and practices (of individual maritime enterprises and of agreements between enterprises). As with the FLRA, statute and regulation present different views of the review process. The Appendix to Title 5 of the United States Code contains the Reorganization Plan of 1961, §105 of which, provides for discretionary review by the FMC of the ALJs' initial decisions. The Commission's rules, however, grant without qualification a right of review on filing exceptions within 30 days.[321] The agency's seven ALJs disposed of 110 cases in FY1978, with agency review in 96 cases, 83 of which resulted in affirmance of the ALJ's decision.

Federal Trade Commission: The twelve administrative law judges at the FTC preside over and render initial decisions in enforcement

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318. See ACUS STATISTICAL REPORT, supra note 1, at 238-39. Six more cases under Executive Order No. 11491 were decided in FY1978 by the U.S. Civil Service Commission, which prior to January 1, 1979 had jurisdiction of cases involving employees of the Department of Labor.

319. 5 C.F.R. § 2423.29(a) (1983).

320. See 5 U.S.C. § 7105(f) (Supp. IV 1980): ". . . the Authority may, upon application by any interested person . . . review such action. . . . If the Authority does not undertake to grant review . . . the action shall become the action of the authority. . . ." [emphasis added]

321. See 46 C.F.R. § 502.227(1) (1982).

proceedings under the Federal Trade Commission Act and the Clayton Act.[322] The decision whether an unfair trade practice, false advertising, or a restraint of trade proscribed by those acts has been shown is reviewable by the Commission on its own motion or at a party's behest, through filing within 10 days of the ALJ's decision a notice of intent to appeal. In FY1978, 36 cases were handled by the agency. Initial decisions were rendered in 19 cases, and the FTC reviewed 21 ALJ decisions, affirming 15 and reversing or remanding 6.[323]

Food and Drug Administration: A separate bureau within the Department of Health and Human Services,[324] the FDA passes on license applications for new drugs having use for humans or animals. Hearings are held before the Administration's ALJ, whose initial decision is reviewable by the Commissioner on his own motion or on exception of the parties. There was only one such decision issued in FY1978, and it was reviewed and remanded by the Commissioner.[325] The ALJ also presides over formal rulemaking proceedings and issues initial decisions reviewable as of right by the Commissioner. One rulemaking decision was issued in FY1978.

Department of Labor: Among agencies employing ALJs, the Department of Labor ranks third in number of ALJs and fourth in number of cases adjudicated. Included in its caseload for FY1978 were twelve different proceedings under a variety of statutes. The disparate statutory mandates result in review mechanisms within the Department that fall under six different review categories as defined in this Part. In disputes with grantees under the Comprehensive Employment and Training Act, the ALJs' initial decisions are reviewed by the Secretary if a party files exceptions, or the Secretary decides to review on his own motion,

322. A variety of other statutes are the basis for determination that particular conduct constitutes an unfair or deceptive trade or practice proscribed by § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976).

323. ACUS STATISTICAL REPORT, supra note 1, at 160-163. See note 311, supra.

324. See 5 C.F.R. § 737.71 (1983), and note 147, supra.

325. ACUS STATISTICAL REPORT, supra note 1, at 166-69. In the years FY1976-1978, the ALJ issued three decisions in contested new drug application cases. The Commissioner reviewed these decisions and remanded in all three cases.

within 45 days.[326] Seven cases were heard in FY1978, one of which was reviewed and affirmed.

Maritime Administration: This bureau of the Department of Commerce[327] employs ALJs in hearings concerned with benefits (subsidies under the Merchant Marine Act) and with contract disputes. The ALJs' initial decisions are subject to review as of right by the Administration on timely filing of exceptions. Fourteen cases were decided in FY1978.[328] Review of six cases resulted in one affirmance, three reversals, one modification, and one remand.

National Labor Relations Board: In unfair labor practice cases, one of the agency's 115 ALJs will preside over a hearing and issue an initial decision. Exceptions are reviewed as of right. Nominally, this review is by the Board. In practice, one member is assigned each case and delegates review responsibility to a member of his staff. The staff member prepares a draft decision, and when the Board member is satisfied with the draft, it is circulated to the remainder of the Board for approval. More than 5,000 cases were decided in FY1978 using this decision and review process. Over 700 contested cases received Board review.

National Transportation Safety Board: Hearings are held before ALJs in connection with licensing of airmen under the Federal Aviation Act. Contests of license denials, modifications, suspension, or revocation were heard by ALJs in 242 cases in FY1978, while one and one-half times that number were terminated without hearing. In 93 cases, the Board reviewed decisions on its own or a party's motion, affirming the ALJ's disposition in 53 and reversing, modifying, or remanding in 40.

Securities and Exchange Commission: In proceedings to deny, postpone, suspend, or revoke the registration of a securities broker or dealer, the Commission must review the ALJ's initial decision if a petition for review is filed within 15 days and may review on its own motion within 30 days. Thirty-five such cases were heard in FY1978, and eight were reviewed by the Commission. The same review procedure holds for cases involving withdrawal of registration, suspension, or expulsion of a member of a national

326. If he chooses, the Secretary in any case can limit the ALJ to issuance of a recommended decision. See 20 C.F.R. §8.48 (1982).

327. See 5 C.F.R. § 737.71 (1983), and note 147, supra.

328. The Administration can require issuance of a recommended decision and certification of the record for decision. See 46 C.F.R. §§ 201.158, 201.164 (1982).

securities exchange or the suspension of trading on an exchange, although no such cases were heard in FY1978.

U.S. Coast Guard: License revocation and suspension decisions by the agency's 16 ALJs were reviewed by the Commandant on his own motion or on timely filing of an appeal. At the appeal stage, the Chief Administrative Law Judge for the agency will draft a recommendation to the agency's Chief Counsel, whose recommendation is then forwarded to the Commandant. The Coast Guard is a separate agency within the Department of Transportation.[329] The Commandant's decisions are not appealable within the Department but may be appealed to the National Transportation Safety Board, an independent agency.

3. Discretionary Review

Civil Aeronautics Board: The 11 ALJs at the CAB render a variety of decisions encompassing regulation of domestic airline operations, including actions relating to routes, mergers, rates, and enforcement of CAB regulations or the Federal Aviation Act against suspected violators. In these actions, the ALJ renders an initial decision that, at the behest of a party, is subject to review in the Board's discretion. Petitions for review must demonstrate that: "(i) A finding of material fact is erroneous; (ii) A necessary legal conclusion is without governing precedent or is . . . contrary to law . . .; (iii) A substantial and important question of law, policy or discretion is involved; or (iv) A prejudicial procedural error has occurred."[330] In FY1978, 57 cases subject to these review procedures were closed; review was granted in 11 cases and denied in 9. Six of the decisions reviewed were affirmed.

Environmental Protection Agency: Among the proceedings before ALJs at the EPA are challenges to decisions respecting permits to discharge pollutants into navigable waters. The ALJ's initial decision is appealable to the Administrator who has discretion to grant or deny review.[331] Most permit cases are settled. Of 55 such cases in FY1978, only 6 proceeded to decision after hearing before an ALJ and in none was intra-agency review sought. As with the cases discussed under category 2 above, the Administrator may and often does assign these cases to a Judicial Officer for review but has not adopted a general delegation to that effect.[332]

329. See 5 C.F.R. § 737.71 (1983), and note 147, supra.

330. 14 C.F.R. § 302.28(a)(2) (1982).

331. 40 C.F.R. § 124.91 (1982).

332. See 40 C.F.R. § 22.04(b) (1982), and authorities cited at notes 314 and 315, supra.

Federal Mine Safety and Health Review Commission: One of three independent federal adjudicative agencies (separate from the body promulgating substantive rules to which its cases relate), FMSHRC with 18 ALJs hears and decides enforcement actions brought by the Department of Labor's Mine Safety and Health Administration. In the first half-year of its existence (the last half of FY1978), FMSHRC decided nearly 1600 cases. Initial decisions of the ALJs are appealable to the Commission, which may review at its discretion. Fifteen cases were decided by the Commission in this period.

Department of Housing and Urban Development: HUD's administrative law judge issues initial decisions in a variety of enforcement proceedings. These decisions are reviewable at the discretion of the Secretary, who may decide against review, may review the decision, or may assign a subordinate to review the decision.[333] In FY1978, 68 cases were decided, and 14 were reviewed.

Merit Systems Protection Board: Disputes concerning federal employees' pay, termination, and retirement benefits, or concerning political activities of federal, state, or local governmental employees may be reviewed by the board on its own motion or in the Board's discretion if a timely petition for review is filed.[334] The MSPB was created by the Civil Service Reform Act of 1978,[335] and on January 1, 1979, assumed most of the caseload formerly handled by the U.S. Civil Service Commission, which expired as of that date. In FY1978, the Civil Service Commission decided only five cases in the categories now handled by MSPB.

Occupational Safety and Health Review Commission: This independent adjudicative agency (like FMSHRC, separate from the substantive rulemaking body) ranks fifth in ALJs employed and third in total ALJ caseload. OSHRC adjudicates enforcement actions initiated by the Occupational Safety and Health Administration of the Department of Labor for violation of the Occupational Safety and Health Act. Affected parties can contest OSHA citations and penalties before OSHRC. Initial decisions are reviewed by the Commission on its own motion or in its discretion

333. 24 C.F.R. § 24.8(b), (c) (1982); see also 24 C.F.R §§ 25.4, 3282.152 (1982). Land registration cases follow a different review process.

334. 5 C.F.R. § 1201.113(a) (1983).

335. Pub. L. No. 454, 95th Cong., 2d Sess., Oct. 31, 1978, 92 Stat. 1119. Relevant sections are codified at 5 U.S.C. § 1201 et seq. (Supp. IV 1980).

on petition by a party. The grounds for grant of review are similar to those governing CAB review.[336] In FY1978, the ALJs at OSHRC decided nearly 4,000 cases and the Commission reviewed 160.

Securities and Exchange Commission: In proceedings evaluating applications to exempt securities from provisions of the Securities Act of 1933, of the Public Utility Holding Company Act of 1935, or of the Investment Company Act of 1940, or to suspend or revoke an investment adviser's registration under the 1940 Act, ALJs' initial decisions are reviewable in the Commission's discretion on a showing of prejudicial procedural error, clearly erroneous material factual finding, an erroneous legal conclusion, or special decisional importance meriting Commission attention.[337] In FY1978, there were 15 such cases before the SEC; seven initial decisions were filed by ALJs, and the Commission reviewed nine cases,[338] affirming in all nine.

B. Review by Appeals Board

8. Board Review of Right, Discretionary Agency Peview.

Federal Communication Commission: The FCC's review process is described in greater detail in Part III, supra. It has several interesting features. The ALJ decisions are reviewed by a three-member appellate review board. Review is a matter of right. The Commission may decide without opinion to deny review, or it may on request of a party or on its own motion grant review of Board decisions. When the Commission decides to review, another body, the Office of Opinions and Review, provides the Commissioners assistance in formulating and drafting a decision. This process is applied to a great variety of different determinations, covering routine licensing decisions, multiparty contests for extremely valuable licenses, enforcement actions, ratemaking proceedings, and reparations determinations that resemble private lawsuits. In FY1978, the ALJs at the FCC issued 78 initial decisions; 24 were passed upon by the Review Board, which affirmed 17 decisions; 15 cases were subsequently decided by

336. 29 C.F.R. §§ 2200.91, 2200.92 (1982); see text at note 330, supra.

337. 17 C.F.R. § 201.17(d)(2) (1982).

338. See ACUS STATISTICAL REPORT, supra note 1, at 300-13; see also note 311, supra.

the Commission. Additionally, the Commission directly reviewed ALJ decisions respecting revocation or renewal of broadcast licenses. These cases recently have been placed under Review Board jurisdiction.

Interstate Commerce Commission: Like the FCC, the ICC handles an array of cases that differ in the nature of the interests at stake, the complexity of the issues, and the method in which the cases arise. Licensing decisions, adjudication of complaints, rate investigations, scrutiny of individual enterprises' practices and of agreements among regulated enterprises are included in the ICC's docket. While the FCC employs somewhat more ALJs than the median among federal agencies employing ALJs and has a caseload very slightly above the median, in both departments the ICC is near the top among agencies employing ALJs, ranking fourth in number of ALJs and fifth in number of cases.[338a] The general pattern is for more complex cases to be heard before an ALJ who issues an initial decision that may be reviewed by a division of the ICC (each consisting of three Commission members) on the Commission's motion or as of right on timely exception by a party. The division's decision then is reviewable by the Commission at its discretion if it determines that "a matter of general transportation importance" is involved. This basic review pattern is in reality further complicated by three factors. First, in some instances the ALJ's decision is reviewed by an employee review board rather than a division composed of Commission members. Second, although review at the board or division level is a matter of right, the scope of review is delimited in a manner similar to that guiding discretionary review in other agencies.[339] Third, as noted earlier, in some intances the Commission may dispense with the requirement of an initial decision, in which case the ALJ will draft a recommended decision for Commission action. Eliminating cases that appear to have been removed from the initial decision-and-division or board review process, the ICC disposed of more than 1,000 cases in FY1978 of which about one-fourth proceeded to the review stage.

Nuclear Regulatory Commission: Licensing proceedings before the Commission's ALJs result in issuance of an initial decision that is reviewable as a matter of right by the Atomic Safety and

338a. The ICC's complement of ALJ's and relevant adjudicatory caseload both have declined considerably since the data relied on here were compiled. See Letter to Richard K. Berg from Reese H. Taylor, Jr., Chairman, ICC, July 20, 1983.

339. See, e.g., 49 C.F.R. § 1100.98(b)(2) (1982). Compare id. with 14 C.F.R. § 302.28(a)(2) (1982) (CAB); 17 C.F.R. § 201.17(d)(2) (1982) (SEC); 29 C.F.R. § 2200.92 (1982) (OSHRC).

Licensing Appeal Board. The Board's decision is reviewable at the Commissioners' discretion and the grounds for review are limited in much the same manner as at the CAB, OSHRC, and the SEC.[340] Four cases were reviewed and affirmed by the Board.

11. Board Review of Right, No Agency Review

Department of Interior: A variety of cases involving permits to use public lands, conflicting claims to mineral rights, penalties for violation of the Endangered Species Act or of restrictions on land use make up the docket for Interior's 13 ALJs.[341] Appeals from ALJ's initial decisions, except for cases noted below in categories 12 and 20, are taken by right to one of four different appeals boards[342] (Board of Land Appeals, Board of Surface Mining Appeals, Board of Indian Appeals, and Teton Ad Hoc Appeals Board). These boards constitute the final review stage within the agency. More than 1,100 cases were decided in FY1978, and action by an appeals board was taken in more than 800 cases.

Department of Labor: Compensation claims pursuant to the Longshoremen's and Harbor Worker's Compensation Act and the Black Lung Benefit Reform Act are heard by ALJs at the Department of Labor. The ALJs' initial decisions are appealable within 30 days by right to the Department's Benefits Review Board, which provides the final agency review. More than 1,800 such claims were processed in FY1978. Approximately 1,000 initial decisions were issued, and nearly 300 cases were reviewed by the Benefits Review Board. Of these, more than 80 initial decisions were affirmed, 14 were reversed, and the remainder were modified or remanded.

Department of Commerce, Maritime Administration: The operation of this bureau of the Commerce Department has been described above in category 2. The regulations governing review of disputes other than contract appeals declare that review is to be by "the Administration."[343] A reading of the Administration's organization chart indicates that the reference most likely is to the Maritime Subsidy Board, which is chaired by the Maritime Administrator, who also is the Assitant Secretary of

340. 10 C.F.R. § 2.786 (1982); see provisions of other agencies cited at note 339, supra.

341. See, e.g., 16 U.S.C. §§ 668(b) (1976); 30 U.S.C. §§ 22, 29 (1976); 43 U.S.C. §§ 315, 1201 (1976).

342. See 43 C.F.R. §§ 4.1, 4.320, 4.452-9, 4.476, 4.1270 (1982); see also note 245, supra.

343. See 45 Fed. Reg. 80, 857 (Dec. 8, 1980).

Commerce for Maritime Affairs.[344] If the Administration is treated as a part of the Commerce Department, rather than an independent bureau, it would properly belong in this category.

12. Discretionary Board Review, No Agency Review

Department of Housing and Urban Development: In cases under the Interstate Land Sales Full Disclosure Act to assess the validity of HUD suspension of the registration of a land developer, the ALJ's initial decision is reviewable at the discretion of the appeals officer of the Interstate Land Sales Board on petition for appeal filed within 10 days. If the Appeals Officer denies review, there is no further action within the agency. If he grants the petition, review is before the Interstate Land Sales Appeals Board, which has been delegated full decisional authority by the Secretary. Of the 85 cases in FY1978, only five proceeded to the initial decision stage, and all five were reviewed and remanded by the Board.

Department of Interior: In civil penalty cases under the Surface Mining Control Act of 1977, the ALJs' decisions are appealable to the Board of Surface Mining Appeals. Review is discretionary with the Board, and Department regulations do not elaborate the grounds for granting or denying review, although petitioners are asked to "list the alleged errors of the administrative law judge."[345] This class of cases was new in FY1978, and although 16 were docketed, no decisions were issued.

Department of Labor: Disputes over the prevailing industry wage in an area for a given class of workers, which rate must under the Davis-Bacon Act be paid by government contractors, sometimes are heard by ALJs.[346] In such cases, the ALJ proposed a decision to the Administrator for the Wage and Hour Division, who considers exceptions and issues a decision. Appeal from this decision may be taken to the Wage Appeals Board, which has discretion to grant or deny review and constitutes the final forum for agency consideration. Five decisions were rendered in these cases in FY1978, and none was reviewed. Because of the interpostion of the Administrator between the ALJ and the Appeals Board, this procedure is also catalogued under category 16 below.

344. See 45 Fed. Reg. 80,857 (Dec. 8, 1980).

345. 43 C.F.R. § 4.1270(c) (1982).

346. Some related matters also may be heard by the Wage Appeals Board. See 29 C.F.R. § 7.1(b) (1982).

Social Security Administration: Benefits claims under the Social Security Act are adjudicated by ALJs at the Social Security Administration, an independent agency within the Department of Health and Human Services.[347] SSA has by far the most ALJs (nearly 700 in June 1980) and the heaviest ajudicatory caseload (over 200,000 cases in FY1978) of any federal agency. ALJ decisions are reviewed by the Appeals Council, which has discretion to deny review (on much the same grounds that, where they are spelled out, guide the exercise of discretion in other agencies)[348] or to review on its own motion. The Appeals Council decision is the final agency determination. Nearly 50,000 cases were ruled upon by the Council, which declined review in more than 95 percent of the cases. Of the decisions reviewed, more than four times as many were reversed as were affirmed (439 affirmances verus 1,859 reversals), indicating that the Council's screening of cases may resemble review in every case, with those likely to be reversed being formally reviewed.

C. Review by Individual Designate

13. Recommended Decision, Agency Review of Right

Bureau of Alcohol, Tobacco, and Firearms: Contests over applications for permits to import, sell, use, or distill alcohol or to import, manufacture, or deal in explosives, firearms, or ammunition are heard before an ALJ. The ALJ issues a recommended decision which then is acted upon by the Regional Regulatory Administrator. The Administrator's decision may be challenged directly in court or may first be appealed to the Director of the Bureau as a matter of right. Figures for FY1978 do not distinguish between these cases and those involving permit revocations, where, as discussed in category 2, the ALJ issues an initial decision that is appealable of right to the Director.

14. Designate Review of Right, Agency Review of Right

U.S. Coast Guard - National Transportation Safety Board: Moreover, the only "agency" that might fit into this category is a poor fit at best. As noted in category 2 above, the Coast Guard is an agency within the Department of Transportation, while NTSB is an agency independent of the Department. Review of ALJ licensing decisions is by the Commandant of the Coast Guard as a matter of right. His decisions are appealable to NTSB as a matter of right. Were these two bureaus viewed as, respectively,

347. See 5 C.F.R. § 737.31 (1983), and note 147, supra.

348. 20 C.F.R. § 404.970(a) (1982); see provisions of other agencies cited at note 339, supra.

subordinate and superior elements of one agency, the review process would be a two-stage, review-of-right process.

15. Discretionary Review by Designate, Further Review of Right

Department of Labor: In enforcement proceedings under the Walsh-Healy Public Contracts Act of 1936, the ALJs' decisions are reviewable by the Administrator of Workplace Standards who has discretion to grant or deny review. If the Administrator's action, in denying review or after reviewing the ALJ's decision, results in a determination that the Act has been violated, the Administrator recommends a sanction to the Secretary of Labor. The contractor has 20 days to apply to the Secretary for relief from the Act's sanction of ineligibility for future government contracts. Only one initial decision in such a case was rendered in FY1978, and that decision was not reviewed.

16. Recommended Decision, Disciplinary Further Review

Department of Labor: As described earlier in discussing category 12, in disputes under the Davis-Bacon Act, ALJs issue recommended decisions that are acted on by the Administrator of the Wage and Hour Division. Subsequent review is at the discretion of the Wage Appeals Board.

19. Recommended Decision, No Agency Review

Department of Justice, Drug Enforcement Administration: As discussed in category 1, DEA is a separate statutory agency within the Department of Justice.[349] If viewed as a component of that department rather than as a self-contained agency, the Administrator's final review of the ALJ's recommended decisions would be as designate of the Attorney General.

20. Designate Review of Right, No Agency Review

Department of Agriculture: The five ALJs at the Department of Agriculture hear and issue decisions in a variety of licensing and enforcment proceedings under no fewer than seventeen different statutes.[350] In most proceedings, the ALJs issue initial decisions appealable of right to a judicial officer designated by the Secretary of Agriculture. In these cases, the judicial officer has been delegated authority as the final arbiter of

349. See 5 C.F.R. § 737.31 (1983), and note 147, supra.

350. See authorities cited at notes 280-283, supra; see also ACUS STATISTICAL REPORT, supra note 1, at 34-61.

adjudicatory proceedings within the Department.[351] Over 200 cases were disposed of in FY1978, although initial decisions were issued in less than half that number. Approximately 20 decisions were reviewed and only 2 reversed.

Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms: The Bureau's adjudication and review processes are described above under category 2. If viewed not as an independent statutory agency, but instead as a part of the Treasury, the Director's review function would be that of a designate, reviewing ALJ decisions as a matter of right, and providing final agency review.

Environmental Protection Agency: In cases concerning enforcement of the Clean Air Act and the Federal Insecticide, Fungicide, and Rodenticide Act by civil penalty, the decisions of the ALJs are appealable as of right to the appropriate EPA Regional Administrator.[351a] The Regional Administrator's decision, which also may be on his own motion, is final. In FY1978, 90 cases in these categories were terminated by EPA; in 27, initial decisions were issued, but review data were not available. Also see discussion of the Agency's use of Judicial Officers in categories 2 and 3 above.

Department of Health and Human Services, Food and Drug Administration: Like the Bureau of Alcohol, Tobacco, and Firearms, treatment as part of its "umbrella" executive department would move FDA cases from category 2 to category 20.

Department of Interior: As described in category 11 and category 12, most ALJ decisions are reviewed by one of the Department's four appeals boards. Cases not within the jurisdiction of one of these appeals boards may be appealed as of right to the Office of Hearings and Appeals. In such cases the Director of the Office will review the decision. That review will be the final agency action.

Department of Labor: In enforcement actions under the Service Contracts Act involving service employees of federal contractors, upon timely petition by a party the ALJs' initial decisions will be reviewed by the Administrator of the Wage and Hour Division. His decision is the final step within the department. With respect to factual matters, his scope of review is limited to reversing clear errors.[352]

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351. See text at notes 258-308 supra.

351a. This procedure was changed in April 1980, so that appeals are now taken to the Administrator or his designee. 40 C.F.R. § 22.29 (1983).

352. 29 C.F.R. § 6.14 (1982).

U.S. Postal Service: The two ALJs at the Postal Service decide cases involving alleged use of the mail for material making false representations or of matter deemed nonmailable by a postmaster; they also adjudicate Postal Service denials of post office box privileges. After the ALJ decision, appeal may be taken to the agency's judicial officer, who has been delegated review authority by the Postmaster General.[353] There were 100 cases closed during FY1978, with 24 initial decisions issued. Review of 25 decisions[354] resulted in two remands and 23 affirmances.

21. Discretionary Review by Designate, No Agency Review

The Department of Housing and Urban Development uses this process for review of cases involving suspension of a land developer's registration. The discretionary review, performed by the appeals officer of the Interstate Land Sales Board, however, is only to decide whether an appeal should be allowed. If allowed, the appeal is heard and decided by the Board, not by the appeals officer. The process is discussed more fully under category 12.

D. No Review

22. Final ALJ Action

The Department of Labor's disposition of civil penalty cases involving use of child labor in contravention of the Fair Labor Standards Act is discussed in the text of Part III, supra. The ALJs' decisions in such matters are the final agency action. There were 29 civil penalty cases in FY1978, with decisions issued in 24 of them.

353. The pattern of review is complicated somewhat because the judicial officer may refer some cases to the Postmaster General or Deputy Postmaster General for final decision, see 39 C.F.R. §§ 953.6, 958.10 (1982), and may preside over other cases in the first instance in place of an ALJ, 39 C.F.R. § 952.24(b) (1982).

354. See note 31 supra.

FIRST-STAGE REVIEWED & SECOND STAGE REVIEW	REVIEW BY AGENCY HEAD	APPEALS BOARD: AGENCY REVIEW OF RIGHT	APPEALS BOARD: DISCRETIONARY AGENCY REVIEW	APPEALS BOARD: NO FURTHER REVIEW	DESIGNATE: AGENCY REVIEW OF RIGHT	DESIGNATE: DISCRETIONARY AGENCY REVIEW	DESIGNATE: NO FURTHER REVIEW	NO REVIEW
ALJ DECISION AND FIRST STAGE REVIEW								
RECOMMENDED DECISION	1. CAB* DEA ICC* MSPB* USITC	4.	7.	10.	13. BATF*	16. Labor**	19. (DEA)	
INITIAL DECISION REVIEWED OF RIGHT	2. BATF* Mari-time CFTC CPSC NLRB EPA+ NTSB FERC SEC* FLRA U.S. Coast FMC FTC Guard FDA Labor*	5.	8. FCC ICC* NRC	11. Interior* Labor* (Maritime)	14. (NTSB-U.S. Coast Guard)	17.	20. Agriculture (BATF) EPA* (FDA) Interior* Labor* USPS	
DISCRETIONARY REVIEW OF INITIAL DECISION	3. CAB* EPA+ FMSHRC HUD* MSPB* OSHRC SEC*	6.	9.	12. HUD** Interior* Labor** SSA	15. Labor*	18.	21. HUD **	
NO REVIEW	* - less than all of the agency's cases involve this review process ** - this class of cases is described in more than one category ( )- inclusion in this category depends on definition of agency + - see qualification in text						22. Labor*	

APPENDIX 2 TO PART III

REVIEW AND DECISION DATA

APPENDIX 2 to PART III

REVIEW AND DECISION DATA

1. By Agency
2. By Review Category
3. By Bureau Type
4. By Agency and Category

KEY

1. Name of Agency.
2. Program (if review process differs for different programs, or if time for review differs dramatically).
3. Review Category.
4. Rank in Number of ALJ's (Actual Number).
5. Rank in Number of Cases (Actual Number).
6. Rank in Number of Cases Completed (Actual Number)(i.e., not withdrawn or dismissed).
7. Rank in Number of Cases Reviewed (Actual Number).
8. Rank in Percent of Cases Reviewed (Percent).
9. Rank in Total Time (Time).
10. Rank in ALJ Time (Time).
11. Rank in Review Time (Time).
12. Rank in Number of Cases Reversed (Number).
13. Rank in Percent of Cases Reversed (Number).
14. Rank in ALJ Caseload (Number).

REVIEW CATEGORIES:

A. AGENCY HEAD
    1. Automatic Review
    2. Review of Right
    3. Discretionary Review
B. APPEALS BOARD
    8. Review of Right, Discretionary 2D Stage
    11. Review of Right, No 2D Stage
    12. Discretionary Review, No 2D Stage
C. DESIGNATE
    13. Automatic Review, 2D Stage of Right
    14. Review of Right, 2D Stage of Right (NTSB-USCG)
    15. Discretionary Review, 2D Stage of Right
    16. Automatic Review, 2D Stage Discretionary
    19. Automatic Review, No 2D Stage (DEA)
    20. Review of Right, No 2D Stage
    21. Discretionary Review, No 2D Stage
D. NO REVIEW
    22. No Reviews

1. DATA, BY AGENCY

BY AGENCY	3	4	5	6	7	8	9	10	11	12	13	14
U.S. Dept. of Agriculture	2,20	18(5)	8(705)	12(102)	14(55)	21 (7.8%)	13(677.5)	6(435.6)	14(180.7)	12(5)	7(9.1%)	7(47)
Bureau of Alcohol, Tobacco & Firearms	13,2 or 20	22(1)	13 (286)	14(80)	16(47)	19(16.4%)	10(802.1)	21 (143.0)	16(145.7)	16(4)	9(8.5%)	4(95.3)
Civil Aeronautics Board	1, 3	12(11)	16 (258)	9(222)	9(203)	5(78.7%)	8(1008.5)	9 (262.7)	12(271.8)	9(8)	18 (3.9%)	20(7.8)
Consumer Products Safety Commission	2	22(1)	21(30)	23(9)	22(9)	11(30%)	7(1128.2)	8 (271.7)	6(4014)	18(1)	5(11%)	17(10)
Drug Enforcement Administration	1 or 19	22(1)	18 (124)	19 (44)	17(45)	9(36.2%)	22(309.4)	11 (244.0)	23(44.5)	17(2)	16(4.4%)	8(41.3)
Environmental Protection Agency	2 & 3	14(7)	12(381)	16(69)	23(8)	24(2.1%)	14(541.1)	13 (221.7)	21(76.1)	20 (0)	20 (0%)	12(18.1)
Federal Communications Commission (1976 Only)	8	9(13)	17 (132)[1]	17 (66)	18(38)	12(28.8%)	4(1384.9)	4 (479.4)	3(480.2)	11(6)[2]	4(15.8%)	16(10.2)
Federal Energy Regulatory Comm.	2	6(22)	10(567)	8(259)	7(248)	8(43.7%)	9(963.7)	5 (453.3)	9(306.7)	7(13)	13(5.2%)	18(8.6)
Federal Maritime Commission	2	14(7)	15 (265)	11(152)	8(227)	3(85.7%)	15(539.1)	10 (260.2)	17 (1406)	7(13)	11(5.7%)	14 (12.6)
Federal Trade Commission	2	11(12)	19 (121)	18 (47)	13(56)	7(46.3%)	2(1741.0)	1 (720.3)	7(355.7)	12(5)	8(8.9%)	23 (3.4)
Food and Drug Administration	2 or 20	22(1)	23(5)	24(4)	24(4)	4(80%)	1(1950.4)	19 (166.5)	1 (611.8)	20 (0)	20 (0%)	24 (1.7)
Dept. of Housing & Urban Development	3,12 & 21	22(1)	9(638)	15(76)	11(123)	15(19.3%)	21(313.3)	20 (161.6)	22 (52.7)	20 (0)	20 (0%)	2(212.7)
Interstate Commerce Commission	1 & 8	4(55)	4(4594)	6(1522)	4(847)	16(18.4%)	12 (736.0)	18 (179.7)	10 (297.5)	2(256)	2(30.2%)	11(27.8)
Department of Labor	2,11,12, 16,20,22	3(66)	3(6172)	4(2925)	3(979)	20(15.9%)	11 (764.3)	15 (200.4)	13 (262.4)	4(38)	18 (3.9%)	10(31.2)

1-FCC would rank 12th in caseload computed on same 3-year basis as other agencies.
2-FCC would rank 7th in reversals computed on same 3-year basis as other agencies.

By Agency (page 2)	3	4	5	6	7	8	9	10	11	12	13	14
Maritime Administration	2 or 11	20 (3)	20(36)	22(17)	21(13)	10(36.1%)	6(1266.2)	2(656.8)	8(326.5)	12(5)	1(38.5%)	21(4)
NLRB	2	2(115)	5(3820)	3(3820)	2(2686)	6(70.3%)	20(386.8)	22(103.8)	18 (123.5)	3 (125)	14(4.7%)	15(11.1)
National Transportation Board	2 & 14	16(6)	6(1991)	7(848)	6(352)	18(17.7%)	19(389.2)	17 (185.4)	15 (152.6)	5(23)	10(6.5%)	3(110.6)
Nuclear Regulatory Commission	8	22(1)	21(30)	20(28)	19(28)	2(93.3%)	3(1482.2)	7 (375.7)	2 (526.7)	20(0)	20 (0%)	17 (10)
Occupational Safety & Health Rev. Comm. (1977-1978)	3	5(48)	2(7642)	2(6762)	5(423)	23(5.5%)	N/A	12(222.5)	4(422)	N/A	N/A	6(79.6)
Securities & Exchange Comm.	2&3	14(7)	14(275)	13(87)	15(49)	17(17.8%)	5 (1352.5)	3(484)	5(409.1)	12(5)	6(10.2%)	13(13.1)
Social Security	12	1(698)	1(631, 626)	1 (631,626)	1(166, 312)	13(26.3%)	23 (249.2)	23 (99.8)	24 (40.8)	1 (7276)	16 (4.4%)	1(301.6)
U.S. Coast Guard	2	8(16)	7(1937)	5(1672)	12(114)	22(5.9%)	18 (391, 8)	24(60.2)	11 (287.1)	6(21)	3 (18.4%)	9(40.4)
U.S. International Trade Comm.	1	21(2)	22(22)	21(22)	20(22)	1(100%)	17 (447.8)	15 (203.5)	20(76.7)	18(1)	15(4.5%)	22(3.7)
U.S. Postal Service	20	21(2)	11(566)	10(195)	10(125)	14(22.1%)	16 (453.8)	14 (209.9)	19(102.3)	10(7)	12(5.6%)	5(94.3)
TOTALS		(1101)	(662,223)	(650,654)	(173,013)	(26.1%)	(262.2)	(101.7)	(47.7)	(7814)	(4.5%)	(200.5)
W/O S.S.A.		(403)	(30,597)	(19,028)	(6701)	(21.9%)	(625.4)	(165.2)	(250.6)	(538)	(8.0%)	(76.6)
SSA/TOTAL		(64%)	(95%)	(97.1%)	(96.1%)					(93.1%)		

2. DATA, BY REVIEW CATEGORY

BY REVIEW CATEGORY * Information Incomplete

Cat. #	5	6	7	8	9	10	11	12	13
1	8 (239)	7 (152)	7 (149)	1 (62.3%)	7 (390.9)	9 (180.2)	6 (149.6)	8 (3)	7 (2.0%)
2	2 (9333)	3 (6964)	2 (3764)	2 (40.3%)	6 (480.6)	11 (125.7)	4 (152.0)	2 (212)	4 (5.6%)
3	3 (8164)	2(6988)	4 (645)	10(7.9%)	4 (625.6)*	4 (225.2)	2 (345.6)	6 (8)*	8 (1.3%)*
8*	9 (162)	8 (94)	8 (66)	3 (40.1%)	1 (1402.9)	1 (448.5)	1 (499.9)	7 (6)	1 (9.1%)
11*	4 (5282)	4 (2448)	3 (659)	8 (12.5%)	2 (818.1)	5 (203.4)	3 (318.7)	3 (39)	3 (5.9%)
12	1 (632,052)	1 (631,655)	1 (166,241)	5 (26.3%)	12 (249.3)	12 (99.8)	11 (40.8)	1 (7276)	6 (4.4%)
13	UNABLE TO DISTINGUISH BETWEEN CASE TYPES								
14	5 (1991)	5 (848)	5 (352)	6 (17.7%)	8 (389.2)	8 (185.4)	4 (152.6)	4 (23)	2 (6.5%)
15	NO SIGNIFICANT CASELOAD								
16	12 (37)	10 (30)	11 (4)	9 (10.8%)	3 (689.5)	6 (198.7)	8 (125.2)	10 (0)	9 (0%)
19	10 (124)	9 (44)	9 (45)	4 (36.2%)	10 (309.4)	3 (244.0)	10 (44.5)	9 (2)	6 (4.4%)
20	6 (1443)	6 (399)	6 (200)	7 (13.9%)	5 (617.3)	2 (267.4)	7 (141.1)	5 (11)	5 (5.5%)
21	7 (421)	12 (24)	10 (29)	11 (6.9%)	9 (350.1)	10 (160.8)	9 (91.0)	10 (0)	9 (0%)
22	11 (101)	11 (25)	(--)	(--)	11 (305.4)	7 (187.4)	(--)	(--)	(--)

REVIEW CATEGORY #1

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Civil Aeronautics Board--FAA Foreign Permits	(93)	(86)	(82)	(88.1%)	(486.2)	(141.6)	(226.8)	(0)	(0%)
Drug Enforcement Administration	(124)	(44)	(45)	(36.2%)	(309.4)	(244.0)	(44.5)	(2)	(4.4%)
Interstate Commerce Commission (incomplete data)	UNABLE TO DISTINGUISH BETWEEN CASE TYPES								
United States Int'l Trade Commission	(22)	(22)	(22)	(100%)	(447.8)	(203.5)	(76.7)	(1)	(4.5%)
TOTALS FOR CATEGORY #1	(239)	(152)	(149)	(62.3%)	(390.9)	(180.2)	(149.6)	(3)	(2.0%)

REVIEW CATEGORY #2

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Totals for U.S. Dept. of Agriculture	(26)	(13)	(13)	(50%)	(551.6)	(490.4)	(145.8)	(1)	(7.7%)
Bureau of Alcohol, Tobacco &Firearms	(30)	(7)	(4)	(13.3%)	(828.0)	(157.9)	(161.5)	(0)	(0%)
Consumer Products Safety Commission	(30)	(9)	(9)	(30%)	(1128.2)	(271.7)	(401.4)	(1)	(11%)
Environmental Protection Agency	(297)	(61)	(8)	(2.7%)	(541.1)	(201.2)	(76.1)	(0)	(0%)
Federal Energy Regulatory Comm.	(567)	(259)	(248)	(43.7%)	(963.7)	(453.3)	(306.1)	(13)	(5.2%)
Federal Maritime Commission	(265)	(52)	(227)	(85.7%)	(539.1)	(260.2)	(140.6)	(13)	(5.7%)
Federal Trade Commission	(121)	(47)	(56)	(46.3%)	(1741.0)	(720.3)	(355.7)	(5)	(8.9%)
Food and Drug Administration	(5)	(4)	(4)	(80%)	(1950.4)	(166.5)	(611.8)	(0)	(0%)
Department of Labor (CETA)	(20)	(10)	(1)	(5%)	(179.5)	(143.7)	(223.0)	(0)	(0%)
Maritime Administration (For. Trade Sub)	(5)	(5)	(--)	(--)	(251.6)	(153.0)	(--)	(--)	(--)
National Labor Relations Board	(3820)	(3820)	(2686)	(70.3%)	(386.8)	(103.8)	(123.5)	(125)	(4.7%)
National Transportation Safety Board	(1991)	(848)	(352)	(17.7%)	(389.2)	(185.4)	(152.6)	(23)	(6.5%)
Securities & Exchange Commission	(219)	(57)	(42)	(19.2%)	(1415.1)	(543.5)	(383.0)	(5)	(11.9%)
United States Coast Guard	(1937)	(1672)	(114)	(5.9%)	(391.8)	(60.2)	(287.1)	(21)	(18.4%)
TOTALS FOR CATEGORY #2	(9333)	(6964)	(3764)	(40.3%)	(477.4)	(125.7)	(152.0)	(212)	(5.6%)

REVIEW CATEGORY #3

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Civil Aeronautics Board	(165)	(136)	(121)	(73.3%)	(966.7)	(339.2)	(302.4)	(8)	(6.6%)
Environ. Prot. Agy. --Pollution Permits	(84)	(8)	(N/A)	(N/A)	(N/A)	(471.3)	(N/A)	(N/A)	(N/A)
Dept. of Housing & Urban Development	(217)	(52)	(94)	(43.3%)	(241.8)	(162.0)	(37.6)	(0)	(0%)
Occupational Safety & Health Rev. Comm. (77-78)	(7642)	(6762)	(423)	(5.5%)	(N/A)	(222.5)	(422)	(N/A)	(N/A)
Securities and Exchange Commission	(56)	(30)	(7)	(12.5%)	(1107.6)	(371.3)	(565.7)	(0)	(0%)
TOTALS FOR CATEGORY #3	(8164)	(6988)	(645)	(7.9%)	(625.6)	(225.2)	(45.6)	(8)	(1.3%)

NO AGENCIES FIT INTO CATEGORIES 4, 5, 6 OR 7

REVIEW CATEGORY #8

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Federal Communications Commission (1976 only)	(132)	(66)	(38)	(28.8%)	(1384.9)	(479.4)	(480.2)	(6)	(15.8%)
Interstate Commerce Commission	UNABLE TO DISTINGUISH BETWEEN CASE TYPES								
Nuclear Regulatory Commission	(30)	(28)	(28)	(93.3%)	(1482.2)	(375.7)	(526.7)	(0)	(0%)
TOTALS FOR CATEGORY #8	(162)	(94)	(66)	(40.1%)	(1402.9)	(448.5)	(499.9)	(6)	(9.1%)

NO AGENCIES FIT INTO CATEGORIES 9 OR 10

REVIEW CATEGORY #11

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Department of Interior	INSUFFICIENT DATA								
Department of Labor	(5251)	(2436)	(646)	(12.3%)	(805.8)	(200.1)	(318.5)	(34)	(5.3%)
Maritime Administration	(31)	(12)	(13)	(42.9%)	(1429.8)	(866.7)	(326.5)	(5)	(38.5%)
TOTALS FOR CATEGORY #11	(5282)	(2448)	(659)	(12.5%)	(818.1)	(203.4)	(318.7)	(39)	(5.9%)

REVIEW CATEGORY #12

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
HUD-Interstate Land Sales Full Disclosure Act--Chall. to Reg.St.	(421)	(24)	(29)	(6.9%)	(350.1)	(160.8)	(91.0)	(0)	(0%)
Dept. of Labor -- Public Contacts	(5)	(5)	(0)	(0%)	(616.0)	(255.4)	(--)	(--)	(--)
Social Security Administration	(631,626)	(--)	(166,212)	(26.3%)	(249.2)	(99.8)	(40.8)	(7276)	(4.4%)
TOTALS FOR CATEGORY #12	(632,052)	(631,655)	(166,241)	(26.3%)	(249.3)	(99.8)	(40.8)	(7276)	(4.4%)
W/O SSA	(426)	(29)	(29)	(6.8%)	(353.2)	(177.1)	(91.0)	(0%)	(0%)

REVIEW CATEGORY # 13

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Bureau of Alcohol, Tobacco & Firearms	UNABLE TO DISTINGUISH BETWEEN CASE TYPES								
TOTALS FOR CATEGORY #13									

REVIEW CATEGORY #14

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
National Transportation Safety Board	(1991)	(848)	(352)	(17.7%)	(389.2)	(185.4)	(152.6)	(23)	(6.5%)
TOTALS FOR CATEGORY #14	(1991)	(848)	(352)	(17.7%)	(389.2)	(185.4)	(152.6)	(23)	(6.5%)

SEE TEXT OF PART IV FOR DISCUSSION OF CATEGORY #15.

REVIEW CATEGORY #16

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Department of Labor--Wage Disputes	(32)	(25)	(4)	(12.5%)	(701.0)	(187.4)	(125.2)	(0)	(0%)
Public Contracts	(5)	(5)	(0)	(0%)	(616.0)	(255.4)	(--)	(--)	(--)
TOTALS FOR CATEGORY #16	(37)	(30)	(4)	(10.8%)	(689.5)	(198.7)	(125.2)	(0)	(0%)

THERE ARE NO AGENCIES IN CATEGORIES #17 & #18

REVIEW CATEGORY #19

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Drug Enforcement Administration	(124)	(44)	(45)	(36.2%)	(309.4)	(244.6)	(44.5)	(2)	(4.4%)
TOTAL FOR CATEGORY #19	(124)	(44)	(45)	(36.2%)	(309.4)	(244.6)	(44.5)	(2)	(4.4%)

REVIEW CATEGORY #20

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Dept. of Agriculture	(679)	(89)	(42)	(6.2%)	(682.3)	(427.6)	(191.5)	(4)	(9.5%)
Bureau of Alcohol, Tobacco & Firearms	(30)	(7)	(4)	(13.3%)	(828.0)	(157.9)	(161.5)	(0)	(0%)
Dept. of Labor--Service Contracts & Contract Compliance Enforcement	(168)	(108)	(29)	(17.3%)	(867.7)	(236.2)	(232.6)	(0)	(0%)
U.S. Postal Service	(566)	(195)	(125)	(22.1%)	(453.8)	(209.9)	(102.3)	(7)	(5.6%)
TOTAL FOR CATEGORY #20	(1443)	(399)	(200)	(13.9%)	(617.3)	(264.7)	(141.1)	(11)	(5.5%)

REVIEW CATEGORY #21

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
HUD--Interstate Land Sales Full Disclosure Act--Challenges to Reg. Statements	(421)	(24)	(29)	(6.9%)	(350.1)	(160.8)	(91.0)	(0)	(0%)
TOTAL FOR CATEGORY #21	(421)	(24)	(29)	(6.9%)	(350.1)	(160.8)	(91.0)	(0)	(0%)

REVIEW CATEGORY #22

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Dept. of Labor--Trade Certification/Child Labor Disputes	(101)	(25)	(--)	(--)	(305.4)	(187.4)	(--)	(--)	(--)
TOTALS FOR CATEGORY #22	(101)	(25)	(--)	(--)	(305.4)	(187.4)	(--)	(--)	(--)

3. DATA, BY BUREAU TYPE

1. EXECUTIVE DEPARTMENTS

DEPARTMENT	3	4	5	6	7	8	9	10	11	12	13	14
Agriculture	2, 20	18 (5)	8 (705)	12 (102)	14 (55)	21 (7.8%)	13 (677.5)	6 (435.6)	14 (180.7)	12 (5)	7 (9.1%)	7 (47)
HUD	3,12 &21	22 (1)	9 (638)	15 (76)	11 (123)	15 (19.3%)	21 (313.3)	20 (161.6)	22 (52.7)	20 (0)	20 (0)	2 (212.7)
Interior	L A C K O F I N F O R M A T I O N											
Labor	2, 11, 12, 16,20,22	3 (66)	3 (6172)	4 (2925)	3 (979)	20 (15.9%)	11 (764.3)	15 (200.4)	13 (262.4)	4 (38)	18 (3.9%)	10 (31.2)
Postal Service	(20)	2 (2)	11 (566)	10 (195)	10 (125)	14 (22.1%)	16 (453.8)	14 (209.9)	19 (102.3)	10 (7)	12 (5.6%)	5 (94.3)
TOTALS		(74)	(8081)	(3298)	(1282)	(15.9%)	(699.4)	(207.3)	(223.2)	(50)	(3.9%)	36.4

II. BUREAUS OF EXECUTIVE DEPARTMENTS

BUREAU/DEPARTMENT	3	4	5	6	7	8	9	10	11	12	13	14
Bureau of Alcohol, Tobacco & Firearms (Treasury Dept.)	13,2or20	22(1)	13(286)	14 (80)	16(47)	19(16.4%)	10(802.1)	21 (143.6)	16 (145.7)	16 (4)	9 (8.5%)	4(95.3)
Food & Drug Admin. (H.H.S.)	2 or 20	22(1)	23(5)	24 (4)	24 (4)	4 (80%)	1(1950.4)	19 (166.5)	1 (611.8)	20(0)	20(0%)	24(1.7)
Maritime Administration (Commerce Dept.)	2 or 11	20 (3)	20 (36)	22 (17)	21 (13)	10 (36.1%)	6(1266.2)	2 (656.8)	8 (326.5)	12 (5)	1(38.5%)	21(4)
Drug Enforcement Administration (Justice Dept.)	1 or 19	22 (1)	18(124)	19 (44)	17 (45)	9(36.2%)	22 (309.4)	11 (244.0)	23 (44.5)	17(2)	16(4.4%)	8(41.3)
Social Security Administration (H.H.S.)	12	1 (698)	1 (631,626)	(same)	1(166,212)	13 (26.3%)	23 (249.2)	23 (99.8)	24 (40.8)	1(7276)	16 (4.4%)	1(301.6)
US. Coast Guard (Transportation Dept.)	2	8 (16)	7 (1937)	5 (1672)	12 (114)	22 (5.9%)	18 (391.8)	24 (60.2)	11 (287.1)	6 (21)	3(18.4%)	9(40.4)
TOTALS		(720)	(634,014)	(633,443)	(166,435)	(26.2%)	(250.0)	(99.7)	(41.2)	(7308)	(4.4%)	(293.5)
TOTALS W/O SSA		(22)	(2388)	(1817)	(223)	(9.3%)	(461.6)	(44.6)	(339.3)	(32)	(14.3%)	(36.2)

III. INDEPENDENT REGULATORY AGENCIES

AGENCY	3	4	5	6	7	8	9	10	11	12	13	14
CAB	1, 3	12(11)	16(258)	9(222)	9(203)	5(78.7%)	8(1008.5)	9(262.7)	12 (271.8)	9 (8)	18 (3.9%)	20(7.8)
Consumer Products Safety Commission	2	(1/0)[1]	21(30)	23(9)	22(9)	11(30%)	7(1128.2)	8 (271.7)	6(401.4)	18(1)	5 (11%)	17(0)
EPA	2 & 3	14(7)	12(381)	16(69)	23(8)	24(2.1)%	14(541.1)	13(221.7)	21 (76.1)	20(0)	20 (0%)	12(18.1)
FCC *(1976 only)	8	9(13)	17(132)*	17(66)*	18(38)*	12(28.8%)*	4(1384.9)*	4 (479.4)*	3 (480.2)*	11(6)*	4 (15.8%)	16 (10.2)*
Federal Energy Regulatory Comm.	2	6(22)	10 (567)	8 (259)	7(248)	8 (43.7%)	9(963.7)	5 (453.3)	9 (306.7)	7 (13)	13 (5.2%)	19 (8.6)
Federal Maritime Commission	2	14 (7)	15 (265)	11 (152)	8(227)	3 (85.7%)	15 (539.1)	10 (260.2)	17 (140.6)	7 (13)	11 (5.7%)	14(12.6)
FTC	2	11 (12)	19 (121)	18(47)	13 (56)	7(46.3%)	2 (1741.0)	1 (720.3)	7 (355.7)	12 (5)	8(8.9%)	23 (3.4)
ICC	128	4(55)	4(4594)	6(1522)	4 (847)	16 (18.4%)	12 (736.0)	18 (179.7)	10 (297.5)	2(256)	2(30.%)	11(27.8)
NLRB	2	2(115)	5(3820)	3(3820)	2(2686)	6(70.3%)	20 (386.8)	22 (103.8)	18 (123.5)	3(125)	14 (4.7%)	15 (11.1)
National Trans. Safety Board	2 & 14	16 (6)	6 (1991)	7 (848)	6(352)	18 (17.7%)	19 (389.2)	17 (185.4)	15 (152.6)	5(23)	10 (6.5%)	3(110.6)
NRC	8	22 (1)	21(30)	20 (28)	19(28)	2(93.3%)	3 (1482.2)	7 (375.7)	2(526.7)	20 (0)	20 (0%)	17(10)
SEC	2 & 3	14 (7)	14 (275)	13 (87)	15 (49)	17(17.8%)	5 (1352.5)	3 (484)	5(409.1)	12 (5)	6 (10.2%)	13 (13.1)
U.S. Int'l. Trade Commission	1	21 (2)	22(22)	21(22)	20(22)	1(100%)	(447.8) 17	15 (203.5)	20(76.7)	18(1)	15 (4.5%)	22(3.7)
TOTALS		(259)	(12,486)	(7151)	(4873)	(39%)	(613.8)	(165.4)	(191.3)	(456)	(9.4%)	(16.4)

1-Temporarily Vacant

IV. SEPARATE ADJUDICATIVE AGENCY

	3	4	5	6	7	8	9	10	11	12	13	14
Federal Mine Safety & Health Review Commission	INSUFFICIENT DATA											
Occupational Safety and Health Review Commission	3	5(48)	2(7642)	6(6762)	5(423)	23 (5.5%)	N/A	12 (222.5)	4(422)	N/A	N/A	6(79.6)
TOTALS		(48)	(7642)	(6762)	(423)	(5.5%)	N/A	(222.5)	(422)	N/A	N/A	(79.6)

4. DATA: BY AGENCY AND REVIEW CATEGORY

1 & 2	3	4	5	6	7	8	9	10	11	12	13
[1] U.S. DEPT. OF AGRICULTURE											
[2] Packers & Stockyards/Disciplinary Hearings	20		(421)	47	(27)	(6.4%)	(733.5)	(438.0)	(196.9)	(2)	(7.4%)
Perishable Commodities Disciplinary Hearings	20		(98)	14	(7)	(7.1%)	(743.7)	(377.1)	(230.4)	(1)	(14.3%)
Lab Animal Welfare Cases	20		(60)	9	(1)	(7.7%)	(421.0)	(473.9)	(169.0)	(0)	(0%)
Horse Protection Act	20		(42)	15	(5)	(11.9%)	(725.4)	(457.2)	(131.2)	(0)	(0%)
Grain Licensing	20		(7)	N/A	(0)	(0%)	(188.6)	N/A	(--)	(0)	(0%)
Veterinarian Accreditation	20		(1)	N/A	(0)	(0%)	(215.0)	N/A	(--)	(0)	(0%)
Inspection and Grading	20		(35)	4	(2)	(5.7%)	(532.5)	(266.5)	(144.5)	(1)	(50%)
Meat Inspection	20		(15)	(--)	(0)	(0%)	(381.8)	N/A	(--)	(0)	(0%)
TOTALS FOR THIS TYPE OF REVIEW			(679)	89	(42)	(6.2%)	(682.3)	(427.6)	(191.5)	(4)	(9.5%)

1 & 2	3	4	5	6	7	8	9	10	11	12	13
[1] U.S. DEPT. OF AGRICULTURE											
[2] Relief from Marketing Orders	2		(19)	13	(13)	(68.4%)	(696.5)	(490.4)	(145.8)	(1)	(7.7%)
Warehouse Licenses	2		(3)	N/A	(0)	(0%)	(94.7)	N/A	(--)	(0)	(0%)
Civil Rights Violations	2		(4)	N/A	(0)	(0%)	(206.3)	N/A	(--)	(0)	(0%)
TOTALS FOR THIS TYPE OF REVIEW	2		(26)	(13)	(13)	(50%)	(551.6)	(490.4)	(145.8)	(1)	(7.7%)
TOTALS FOR U.S.D.A.	2,20	18(5)	8(705)	12 (102)	14(55)	21(7.8%)	(677.5)	(435.6)	(180.7)	(5)	(9.1%)
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS	2,13(20)	22(1)	13(286)	14(80)	16(47)	19(16.4%)	10 (802.1)	21 (143.0)	16 (145.7)	16(4)	9(8.5%)
[1] CIVIL AERONAUTICS BOARD											
[2]FAA Foreign Permits	1		(93)	(86)	(82)	(88.1%)	(486.2)	(141.6)	(226.8)	(0)	(0%)
[2] All Others	3		(165)	(136)	(121)	(73.3%)	(966.7)	(339.2)	(302.4)	(8)	(6.6%)
TOTALS FOR C.A.B.	1,3	12(11)	16(258)	9(222)	9(203)	5(78.7%)	8 (1008.5)	9 (262.7)	12 (271.8)	9(8)	18 (3.9%)
CONSUMER PRODUCTS SAFETY COMMISSION	2	22(1/0)	20(30)	23(9)	22(9)	11(30%)	7 (1128.2)	(271.7) 8	6(401.4)	18(1)	5(11%)

1 & 2	3	4	5	6	7	8	9	10	11	12	13
DRUG ENFORCEMENT ADMINISTRATION	1 or 19	22(1)	18(124)	19(44)	17(45)	9(36.2%)	22 (309.4)	11 (244.0)	23 (44.5)	17(2)	16(4.4%)
[1] ENVIRONMENTAL PROTECTION AGENCY											
[2] Pollution Permits	3		(84)	(8)	(0)	(0%)	--	(471.3)	--	--	(0%)
[2] Fed. Insecticide, Fungicide & Rodenticide Act--Civil Penalties & Reg. (1976 only)	2		(241)	(36)	(8)	(3.3%)	(541.1)	(211.7)	(76.1)	(0)	(0%)
[2] Other Cases	2		(56)	(25)	(0)	(0%)	--	(156.2)	--	--	(0%)
EPA TOTALS	2 & 3	14(7)	12(381)	16(69)	23(8)	24(2.1%)	14 (541.1)	13(221.7)	21 (76.1)	20 (0)	20 (0%)
FEDERAL COMMUNICATIONS COMMISSION *(1976 Data Only)	8	9(13)	17 (132)*	17 (66)*	18(38)*	13(28.8%)*	4 (1384.9)*	4 (479.4)*	3 (480.2)*	11 (6)*	4 (15.8%)*
FEDERAL ENERGY REGULATORY COMMISSION	2	6(22)	10(567)	8(259)	7(248)	8(43.7%)	9(963.7)	5 (453.3)	9(306.7)	7 (13)	13 (5.2%)
FEDERAL MARITIME COMMISSION	2	14(7)	15 (265)	11 (152)	8(227)	3(85.7%)	15 (539.1)	10 (260.2)	17 (140.6)	7 (13)	11 (5.7%)
FEDERAL TRADE COMMISSION	2	11(12)	19 (121)	18(47)	13(56)	7(46.3%)	2 (1741.0)	1 (720.3)	7 (355.7)	12 (5)	8 (8.9%)
FOOD AND DRUG ADMINISTRATION	2 or 20	22(1)	23(5)	24 (4)	24(4)	4(80%)	1 (1950.4)	19 (166.5)	1 (611.8)	20 (0)	20 (0%)

1 & 2	3	4	5	6	7	8	9	10	11	12	13
[1] DEPT. OF HOUSING & URBAN DEVELOPMENT											
[2] Interstate Land Sales Full Disclosure Act--Challenges to Registration Statements	12 & 21		(421)	(24)	(29)	(6.9%)	(350.1)	160.8	(91.0)	(0)	(0%)
[2] All Others	3		(217)	(52)	(94)	(43.3%)	(241.8)	162.0	(37.6)	(0)	(0%)
TOTALS FOR HUD	3, 12& 21	22(1)	9(638)	15 (76)	11(123)	15(19.3%)	21 (313.3)	20 (161.6)	22 (52.7)	20 (0)	20 (0%)
INTERSTATE COMMERCE COMMISSION	1&8	4(55)	4(4594)	6 (1522)	4(847)	16(18.4%)	12 (736.0)	18 (179.7)	10 (297.5)	2 (256)	2 (30.2%)
[1] DEPARTMENT OF LABOR											
[2] Compensation Claims Longshoremen's & Harbor Worker's Compensation Act	11		(3348)	(1586)	(505)	(15.1%)	(966.2)	(206.3)	(314.8)	(32)	(6.3%)
[2] Black Lung Benefits Reform Act	11		(1903)	(850)	(141)	(7.4%)	(523.7)	(188.6)	(331.7)	(2)	(1.4%)
[2] Federal Labor Disputes	19		(595)	(305)	(299)	(50.3%)	(503.1)	(218.0)	(1460)	(4)	(13.4%)
[2] Service Contracts	20		(145)	(97)	(28)	(19.3%)	(873.8)	(224.9)	(238.6)	(0)	(0%)
[2] Wage Disputes	16		(32)	(25)	(4)	(12.5%)	(701.0)	(187.4)	(125.2)	(0)	(0%)
[2] Contracts Compliance Enforcement	20		(23)	(11)	(1)	(4.3%)	(829.0)	(336.0)	(65.0)	(0)	(0%)

1 & 2	3	4	5	6	7	8	9	10	11	12	13
[1] DEPARTMENT OF LABOR											
[2] Comprehensive Employment and Training Act (CETA) Disputes	2		(20)	(10)	(1)	(5%)	(179.5)	(143.7)	(223.0)	(0)	(0%)
[2] Public Contracts	12&16		(5)	(5)	(0)	(0%)	(616.0)	(255.4)	(--)	(--)	(--)
[2] Trade Certification	22		(16)	(11)	(--)	(--)	(232.4)	(133.5)	(--)	(--)	(--)
[2] Child Labor Disputes	22		(85)	(25)	(--)	(--)	(319.1)	(187.4)	(--)	(--)	(--)
TOTALS FOR DEPARTMENT OF LABOR	2,11,12, 16,20,22	3(66)	3(6172)	4 (2925)	3(979)	20(15.9%)	11 (764.3)	15 (200.4)	13 (262.4)	4 (38)	18 (3.9%)
[1] MARITIME ADMINISTRATION											
[2] Foreign Trade Subsidies	2		(5)	(5)	(--)	(--)	(251.6)	(153.0)	(--)	(--)	(--)
[2] All Others	11		(31)	(12)	(13)	(42.9%)	(1429.8)	(866.7)	(326.5)	(5)	(38.5%)
TOTALS FOR MARITIME ADMINISTRATION	2 & 11	20(3)	20(36)	22 (17)	21(13)	10(36.1%)	6 (1266.2)	2 (656.8)	8 (326.5)	12 (5)	1 (38.5%)
NATIONAL LABOR RELATIONS BOARD	2	2(115)	5(3820)	3(3820)	2(2686)	6(70.3%)	20 (386.8)	22 (103.8)	18 (123.5)	3 (125)	14 (4.7%)
NATIONAL TRANSPORTATION SAFETY BOARD	2 & 14	16(6)	6(1991)	7 (848)	6(352)	18(17.7%)	19 (389.2)	17 (185.4)	15 (152.6)	5 (23)	10 (6.5%)

1 & 2	3	4	5	6	7	8	9	10	11	12	13
NUCLEAR REGULATORY COMMISSION	8	22(1)	21(30)	20 (28)	19(28)	2(93.3%)	3 (1482.2)	7 (375.7)	2(526.7)	20(0)	20(0%)
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION (1977-1978)	3	5(48)	2(7642)	2 (6762)	5(423)	23(5.5%)	*	12 (222.5)	4 (422)	*	*
[1]SECURITIES AND EXCHANGE COMM. [2] --Stop Orders, Broker/ Dealer, Registration Suspension/ Suspension of Practitioners	2		(219)	(57)	(42)	(19.2%)	(1415.1)	(543.5)	(383.0)	(5)	(11.9%)
[2] REG A & REG B Suspensions, Notices/Exemptions, Reg. Exempt., Investment Co. Exemptions	3		(56)	(30)	(7)	(12.5%)	(1107.6)	(371.3)	(565.7)	(0)	(0%)
TOTALS FOR SECURITIES AND EXCHANGE COMMISSION	2 & 3	14(7)	14(275)	13 (87)	15(49)	17(17.8%)	(51352.5)	3 (484)	5 (409.1)	12 (5)	6 (10.2%)
SOCIAL SECURITY ADMINISTRATION	12	1(698)	1(631,626)	SAME	1 (166,212)	12(26.3%)	23 (249.2)	23 (99.8)	24 (40.8)	1(7276)	16 (4.4%)
U.S. COAST GUARD	2	8(16)	7(1937)	5 (1672)	12(114)	22(5.9%)	18 (391.8)	24 (60.2)	11 (287.1)	6(21)	3 (18.4%)
U.S. INTERNATIONAL TRADE COMMISSION	1	21(2)	22(22)	21 (22)	20(22)	1(100%)	17(447.8)	15 (203.5)	20 (76.7)	18 (1)	15 (4.5%)
U.S. POSTAL SERVICE	20	21(2)	11(566)	10 (195)	10(125)	14(22.1%)	16 (453.8)	14 (209.9)	19 (102.3)	10 (7)	12 (5.6%)

*No information

IV. Assessing Agency Review

Simply describing the current review practices at federal agencies makes two points. First, there obviously is great variety in the subjects adjudicated by ALJs and in the structures used to review ALJ decisions. Second, the success of review is not closely connected with process variables under present agency review practices. The less easily analyzed situation variables -- factors extrinsic to the process -- are critical to the success of agency decision and review. This Part attempts to identify the variables most important to successful review, and suggests relations between certain review practices and particular variables.

A. Process Variables: Impact on Review

Neither the statistical evidence nor inferences readily drawn from the descriptions of current practices reveals a clear link between the process presently used for review and success under the evaluative criteria discussed in Part III (efficiency, accuracy, and acceptability). In looking at the statistical data, neither the level of review nor the declared degree of deference to prior decisionmakers is closely correlated with swift, useful, and acceptable review, although there is some evidence that agency head review as a general matter may be slightly less desirable than review by delegates at least so far as efficiency is concerned. Agency heads not only are the officials who are most highly paid,[355] but, more important, they are the ones for whose time conflicting demands are most numerous. Since, absent fallow periods in their work schedules, review must displace other activities,[356] insofar as these officers actually engage in review, it is the most expensive review per reviewer per day. Review by agency head also involves somewhat more time than other review relative to the length of AJL proceedings. If AJL time reflects the difficulty or importance of cases, agency head review adds to the length of decision time more than its proportionate to these factors. At least at the most general level, agency head review thus seems relatively inefficient. Agency head review also

355. See 5 U.S.C. §§ 5312-5315 (1976); Exec. Ord. 12,330, 46 Fed. Reg. 50,921 (1981).

356. See Freedman Report, supra note 93, at 136 (discussing the FCC's conclusions regarding the benefit of its review board in saving time of Commissioners for other activities); see also Robinson, supra note 7, at 216-17 (noting, inter alia, the amount of information presented to an agency, and the difficulty of sorting out the relevant from the irrelevant material, in relation to agency members' dependence on staff).

provides somewhat less to decisional accuracy than review at other levels within the agency as measured by the rate for reversal of ALJ decisions. The acceptability of agency head review may be somewhat greater than that of review by other officials if parties value the rank of the reviewer more than the degree to which they have a claim on his attention. A comparison of categories in which review is at the instance of nongovernment parties reveals substantially higher review rates where agency head review is available than where it is not. More than 40 percent of the cases for which agency head review is available of right are reviewed, while review of right without agency head involvement results in only a 15 percent rate of review.[357] On the other hand, the improbability of agency heads giving extensive consideration to most cases has prompted some commentary and litigation as well.[358] The data on review rates give some succor to the notion that the interest of agency heads in reviewing ALJ decisions is substantially less than the interest of nongovernment parties in obtaining agency head review. In those instances in which review may be declined, less than eight percent of the agencies' caseload is reviewed.[359]

Statistically, alternative review levels seem in some respects marginally preferable to agency head review. On a composite basis (that is, aggregating all programs that utilize a given review level), review by appeals board or by other designate of the agency head involves a lower review rate, a more speedy review time relative to ALJ decision time, and higher reversal rates of ALJ decisions. The actual monetary cost of review cannot be ascertained with confidence. While review is less expensive per man-hour at the appeals board or individual designate level, the salaries of these reviewers are not far below those paid to members of regulatory commissions, and the appeals boards involve several reviewers. Moreover, the agency head has a larger staff at his disposal and is more likely

357. Agency head review of right following ALJ decision is category 2. Agency head review of right after an intermediate agency review is provided in categories 8, 13, 14, and 15. Review of right without agency head involvement is found in categories 11 and 20. If one looks at the review rate for completed ALJ decisions, not for total cases, the figures are 70% for category 8, 54.4% for category 2, and 41.5% for category 14. Completed decisions in categories 11 and 20 are reviewed at a 36.3% rate. See Review Data, Appendix 2.2, supra.

358. See, e.g., Freedman Report, supra note 93, at 132-34, and note 144 supra.

359. See figures for category 3, in Review Data, Appendix 2.2, supra.

to shift the actual review burden substantially onto the shoulders of officials who are less highly paid than formally designated reviewers.

If the true hourly expense is difficult to calculate, one can conclude that agency head and delegate review differ in the time taken. Appeal boards do slightly better than agency heads in the relation of review time to ALJ decision time, while individual designates do a great deal better. The lower opportunity cost of delegate review in combination with the shorter review time gives it a plausible advantage in efficiency over agency head review. It can be questioned whether the figures on review time relative to ALJ decisions time might not be skewed by inclusion within the categories subject to agency head review of a greater number of cases with considerable policy implications but less significant factual complexities. Those cases could, perhaps, be more easily resolved at the ALJ stage than on review by officials chiefly concerned with policy. The proportion of such cases in each category, however, cannot readily be ascertained.

Drawing conclusions about the accuracy of different processes is even more difficult than in the case of efficiency. Both delegate review processes do produce reversal rates higher than agency head review, and the relatively lengthier appeals board review produces higher reversal rates than individual designate review. Drawing accuracy conclusions from this fact, however, is not easy. The higher reversal rates, at least as an initial proposition, seem likely to spring from more extensive consideration by designates, although an alternative hypothesis is that the views of designates (collegial or individual) and ALJs diverge more than do those of agency heads and ALJs. Still, absent adjustment for degree of attention, the agency head is in a better position than his designate to review decisions for conformity to agency (as well as congressional and executive) policy. Agency head review at least gives greater assurance that the highest official within the agency approves of the decision since he either puts his imprimatur on it or confides each review determination effectively to someone in whose judgment on the particular issue the agency head has confidence.

Yet, the degree to which the designates' decisions are inferior to agency heads' as guarantors of accuracy is an open question. The more responsive to the agency head designates are and the more freely replaced, the closer the fit between agency head and designate views. If designates are assumed to be more responsive to agency heads than are ALJs (who are less controllable by the agency head), even if each review decision by a designate could be made more accurate were it scrutinized by the agency head, the higher refusal rate taken as an indication that accuracy is in fact advanced more by designate review. On the other hand, the officials to whom review is committed formally

often are insulated from policymaking personnel in much the same way as ALJs. Even though they are more likely than ALJs to be veterans of the employing agency (thus, presumably attuned to its policies), reviewers generally are appointed for an indefinite term and are not subject to reassignment if their views and policymakers' views diverge.

Conclusions respecting the relative acceptability of different review levels are even more problematic. Acceptability arguably is less for both designate review processes (board or individual) than for agency head review, although the higher reversal rates and sense of more careful scrutiny by the nominal reviewers, who generally are civil servants of extremely high rank, may offset the preference for higher level review. The lower review figures for delegate review could indicate greater acceptance of the ALJ determinations at issue rather than less acceptance of the review available. Indeed, situation variables discussed below make this explanation quite plausible, given the nature of the decisions for which agency head review is most likely.

The impact of the other principal process variable, the type of review, is perhaps more ambiguous than the effect of the review level, although a few generalizations can be offered. The most obvious difference separating automatic review of initial ALJ decisions, review of right, and discretionary review of initial ALJ decisions is the review rate. Automatic review generally yields the highest review rate, followed in order by review of right and discretionary review. Little useful information, however, can be derived from these differences, since they are the natural corollaries of these review types. The one reasonable conclusion from these data is that discretionary review should rate lower on acceptability to nongovernmental parties than the other review types and higher on acceptability to government officials involved with review. The acceptability differential nonetheless may be quite slight in light of the fact that the ability to secure review (or, conversely, the requirement to grant review), does not mandate any specific quality of review. Discretionary review may involve as searching a scrutiny of cases as the other types of review, including cases that as a formal matter are denied review. Moreover, the review rates for different agencies and programs vary substantially within review types. Discretionary review is granted by the CAB in nearly 75% of the relevant cases as compared to 5.5% of OSHRC's caseload, while review of right ranges from less than 3% for EPA and the 5% to 6% level in the Department of Labor and the Coast Guard to 80% or more in the FDA and FMC.

The contribution of each review type to accuracy may shed more light on the intensity of review. By and large, review of right seems to produce higher reversal rates than other review types, ranging from 9.1% for category 8 (review of right by appeals

board, further review discretionary) to 5.5% for category 20 (review of right by designate, no further review). Automatic review produces reversal rates between 4.4% for category 19 (final review by designate) and 0 for category 16 (designate review, discretionary further review), and discretionary review reversal rates also run from 4.4% (category 12, final review by appeals board) to 0 (category 21, final designate review). The individual variation within each review type is substantial, but no agency using discretionary or automatic review produces a reversal rate above 7% while eight agencies using review of right have higher reversal rates, five of them above 10%, three above 15%, and the Maritime Administration's rate reaching nearly 40%.

None of the review types has a clear advantage in efficiency. The review time for review of recommended decisions invariably falls below the median time for agency review of ALJ decisions, but the agencies' efficiency relativel to ALJ decision time is less plain. Two agencies (DEA and USITC) do extremely well relative to ALJ decision time, one (Labor) tolerably well, and one (CAB) extremely poorly. Review of right and discretionary review seem evenly matched on efficiency grounds. Each runs the gamut from among the most time consuming agency review process to the least, and each is used by some agencies for which review time is quite small relative to ALJ decision time as well as by others for which the relation of review to decision time is reversed. Given the relative frequency of reversal by agencies providing review as a matter of right, it may be that review time is a better investment for those agencies than for agencies employing discretionary review, but the higher proportion of cases that must be reviewed formally increases the total investment for review of right. On balance, the figures do not provide a basis for finding one type of review generally preferable to the others.

B. Situation Variables: Looking for Relevant Factors

If process variables do not correlate strongly with successful review, what factors do? The simplest place to start may be examination o the agencies that appear to do especially well or poorly on the statistical measures of review's success. There are six instances in which the present review process seems to work unusually well. All six involve review by agency head or individual designate and all six involve either automatic review or review of right. The six include review at the Department of Agriculture, the Drug Enforcement Administration, U.S. International Trade Commission, U.S. Postal Service, and the Federal Trade Commission. In each case review is relatively efficient, makes an appreciable contribution to accuracy, and also rates high on acceptability. The agency review time at each is

less than half the ALJ decision time,[360] review is provided in a significant percentage of cases (from almost half the formal ALJ decisions to all of them), and reversal rates range between 4.4% and 9.5%. The FTC is distinct from the other agencies in that its cases take much longer at both the decision and review stages. The average case at the FTC takes two years at the ALJ level and almost an additional year for review.[361] Decision time in the other agencies noted here averages between 7 and 16 months with review time of one and a half to six months.[362]

Only one of these agencies (Agriculture) is now a cabinet-level, executive department, and, along with the Postal Service, the Agriculture department uses a Judicial Officer to hear appeals from ALJ decisions.[363] In both agencies, the Judicial Officer has a very high civil service (or equivalent) rank and has had extensive experience with that agency's adjudicatory process.[364] The Drug Enforcement Agency is a bureau of the Department of Justice, while U.S.I.T.C. and F.T.C. are independent agencies. None of the review, thus, is performed by cabinet officers, although among the reviewers are the agency heads in one single-head departmental bureau and two collegial, independent commissions. The adjudicatory caseload at each agency is relatively small, with only Agriculture and the Postal Service (the agencies employing Judicial Officers) rising appreciably above 40 cases a year. The adjudications at all of the agencies consist principally of enforcement actions.

At the opposite extreme are agencies like the Food and Drug Administration and the Nuclear Regulatory Commission where review seems costly and of questionable value. At FDA, cases take a bit more than five months at the ALJ stage but more than four timnes as long for review. Moreover, the FDA's adjudications spend a total of about three years along the route to disposition beyond the two years spent in decision and review. Every formal ALJ

360. See Review Data, Appendix 2.4, supra; See also Appendix to Part IV, correlations in Graphs 13-14, infra. Review time at the Drug Enforcement Administration is less than one-fifth the agency's average ALJ decision time.

361. See Review Data, Appendix 2.1, 2.4, supra.

362. Id.

363. See 7 C.F.R. § 2.35 (1982); 39 C.F.R. §§ 954.15, 954.20 (1981). See also note 304, supra.

364. Information from Letter, supra note 287, and conversation with James A. Cohen, Judicial Officer, U.S. Postal Service (memorandum on file with author).

decision and all but one case disposition were reviewed by the Administrator in the three-year period FY1976-FY1978, with no reversals but with remands in every case. At NRC, the disparity between ALJ time and review time is less, though still bad, but the result of review seems less useful. The ALJ decision takes over a year on average to which review adds almost another year and a hald, and an additional two years is spend in preliminaries and waiting. All formal decisions and all but two case dispositions were reviewed in the period studied but none was reversed. Review in both agencies is of right, and the decisions at both involve the grant, revocation, or modification of valuable licenses.

Several other agencies duplicate some, but not all, of the problems of decision and review at the FDA and NRC. Review by the Commandant of the Coast Guard takes more than four times as long as does ALJ decision. That review, however, which though available of right is used in less than six percent of the cases disposed of by the agency, results in reversal of the ALJ decision almost one time in five. The CAB must review all decisions involving foreign air carrier permits and the Board's decision is only recommendatory, subject to Presidential action. Thus, it is no surprise that nearly 90% of these cases disposed of in any fashion (including within the base figures cases terminated by withdrawal of the carrier's application) find their way to Board review. It is, however, striking that review took half again as long as ALJ decision and produced no reversals in the 82 cases reviewed in FY1976-FY1978. The Consumer Products Safety Commission's review of right also takes substantially longer than ALJ decision (also about half again as long), but produces a significant (11%) reversal rate.

Unfortunately, these examples, while confirming the lack of correlation with process variables, on their face reveal little about the circumstances that may be congenial or uncongenial to any specific review process. The examples of review that on statistical bases does poorly on at least one of the criteria cut across review levels, different lengths of ALJ decision, and large and small adjudicatory caseloads. Both FDA and NRC have relatively small caseloads and great investments of time prior to the commencement of the ALJ decision process. Most of the agencies where review works well, however, also have relatively small caseloads, excepting only the Department of Agriculture and Postal Service which use judicial officers. Most of the better and the worse review alike is provided automatically or of right. Enforcement decisions are represented in both good and bad columns, while licensing cases seem to be found disproportionately in the latter group. Both groups include mainly agencies that are independent or are bureaus of executive departments, but most agencies that employ ALJs are independent agencies or distinct bureaus.

More information can be had from an examination of the patterns of review and reversal, but here, too, the lessons to be drawn are small. Two strong and three weaker but still significant correlations of situation variables with review's length or output appear to obtain. First, ALJ caseload has an inverse correlation with the rate of review of ALJ decisions. The more cases heard by an ALJ each year the lower the percentage of decisions that will be reviewed. Of the eleven agencies with ALJ caseloads below thirteen cases per year, none had less than a 25% review rate, only one had a rate below 30%, and six reviewed 70% or more of the adjudicatory cases disposed of in any fashion, including settlement or withdrawal. Of the 13 agencies with ALJ caseloads of 13 or more, only one had a review rate above 30%, and only two were above 25%, while four reviewed less than 10% and three less than 6% of the agency's adjudicatory caseload. Two related, but less strongly correlated, determinants of review rate are the time taken for ALJ decisions and the size of the agency's total adjudicatory caseload. Generally, longer average decision time at the ALJ level increases the likelihood of review. Of the thirteen agencies at which the ALJ level takes less than 225 days, the review rate exceeds 25% in only four. For the remaining eleven agencies, the review rate falls below 25% in only two instances. The six agencies with exceptionally high review rates, however, divide evenly between these camps. None of the nine agencies that disposed of less than 275 adjudicatory cases in FY1976-FY1978 had a review rate below 30%, and this group includes five of the six agencies that reviewed 70% or more. Only two of the remaining fifteen agencies with caseloads of 275 or more reviewed more than 30% of those cases.

Two of the factors related to review rates also relate to reversal rates. At six agencies, the average time for ALJ decision exceeds 400 days. Reversal rates at those agencies range from 5% to nearly 40%, with five of the agencies reversing roughly 9% or more of the decisions reviewed and three more than 10%. For the five agencies at which ALJ decisions average between 225 and 400 days, reversal rates for three are in about the 4% to 6% range, with one at zero, and the remaining agency at 11%. Nine of the remaining twelve agencies (with average ALJ decision time under 225 days) have reversal rates below 7%, eight of those below 6%, seven below 5%, and three of them at zero. Reversal rates, thus, generally rise as ALJ decision time increases. The opposite relation exists between reversal rates and ALJ caseload, reversal rates falling as ALJ caseloads rise. All of the agencies with reversal rates above 10% (six agencies) have adjudicatory caseloads of less than 45 cases per ALJ per year. Without weighting by number of cases, the five agencies with the highest average caseload per ALJ (more than 50 cases annually) in combination have an average reversal rate of only 5%; the nine agencies with heaviest ALJ caseloads (more than 30) have a combined reversal rate of 6.8%; and the agencies with ALJ caseloads below 30 have a combined rate of 9.9%. All of the agencies together have a reversal rate of 8.7%.

These figures support the belief that current rates of agency review and reversal of ALJ decisions are determined much more by the nature of the matter adjudicated than by the review process used or the identity of the reviewers. Where ALJs dispose of many cases of short duration, review and reversal will be less frequent than where ALJs decide few cases of long duration. Since the smaller docket-longer case paradigm probably indicates that ALJs are deciding more difficult and more important cases -- perhaps because the fact pattern is harder to unravel, the parties to the case are more numerous, the policy implications are more pronounced, or the policy at issue is less clear -- it is reasonable to expect higher rates both of review and of reversal in those instances.

A second inference from these figures confirms the intuition, embodied among other places in ACUS Recommendation 68-6, that more deference to subordinate decisionmakers generally is appropriate where large numbers of decisions are involved. The decrease in review rates with increasing agency adjudicatory dockets (as distinct from caseload per ALJ) may reflect agency reaction to an increased the imposition on the reviewer. Absent an increase in the number of reviewers commensurate to the increase in agency caseload, a constant review rate would impose a greater burden on the reviewer. The burden could be lessened by alternatives to a lower review rate, such as by a decrease in the reviewer's other (non-review) responsibilities or, of course, by an increase in the number of reviewers. Some agencies have attempted to reduce review burdens both by spreading the review function and by reducing reviewers' non-review functions. At the NLRB, for example, which lacks authority formally to decline to entertain appeals, review in most cases effectively is by one of the five Board members (and, in fact, a goodly share of the review burden is borne by the member's staff), and the Board members engage in little activity other than case review.[365]

365. See Bernstein, The NLRB's Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act, 79 YALE L.J. 571 (1970); Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 YALE L.J. 729 (1961). The NLRB's aversion to rulemaking was the subject of controversy before the Supreme Court in National Labor Relations Bd. v. Wyman-Gordon C., 394 U.S. 759 (1969), and National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267 (1974). Of course, it cnnot be ascertained whether the lack of non-adjudicatory activity (such as rulemaking) accounts for the greater incidence of review or vice versa.

C. Policy and Process

While the legislative and administrative judgments embodied in current practice seem generally in accord that more difficult cases should be reviewed more frequently and more extensively, and some efforts such as suggested by ACUS 68-6 to improve efficiency have been made to shift and spread the review burden, the most important element in the review equation may be one that cannot without inordinate effort be lifted out of the statistical information. The difficulty of a case, as observed earlier,[366] can derive from many sources, including the complexity of factual issues, the number of factual issues, the importance of the case, and the opacity or clarity of the policy determinations that might govern it. Any of these factors might be correlated with length of ALJ decision time, but especially with respect to the last two factors there is no reason to expect a particularly close relation. Insofar as administrative law judges and policymaking officials have different incentives to respond to certain persons, groups, and interests, the value of particular cases to those two classes of official decisionmakers probably will diverge. They may differ as to the nature of the policy followed by the agency in similar cases, the impact of particular circumstances on the disposition of the specific matter at hand,[367] or the relative importance of investing time and care in this case as opposed to other cases.[368]

The likelihood of differences over these policy matters is not the only reason agencies may provide for review of ALJ decisions. Belief that a second evaluation of factual decisions provides a useful check on the accuracy of ALJs determinations could support review.[369] So, too, could the parties' interest in security

366. See discussion in text, at Part III.A, following note 142 supra.

367. This is in large measure the argument of those who favor greater ALJ independence. See, e.g., Davis, supra note 13, at 402-408; Gladstone, supra note 42, at 242-45; Segal, supra note 42, at 1428. See also Marzloff, Delay in Review of Initial Decisions: The Case for Giving More Finality to the Findings of Fact of the Administrative Law Judge, 35 WASH, & LEE L. REV. 393 (1978). These persons see more politically responsive government officials as improperly influenced by congressmen, industry representatives, or others.

368. See, e.g., COMPTROLLER GENERAL, supra note 70.

369. See Chassman & Rolston, supra note 81; Corber, A Practitioner Looks at the Effectiveness of the Agency Review Process, 26 AD. L. Rev. 67 (1974).

against the arbitrary decision of a single official; even apart from the result produced, parties may value the opportunity for a second opinion.[370] Review premised on these grounds, however, probably issues. Among other things, the reviewer and the sort of review appropriate to these concerns -- factual accuracy and process values -- differ from those apposite to concerns over policy. The reviewer for factual accuracy need not have any connection with or special knowledge of agency policymaking, and the review probably should be deferential. There is little reason to believe that ALJs are more prone to factual inaccuracy than the reviewer, at least absent some third-level decisionmaker who has an advantage in evaluating factual information, who monitors the initial reviewer's decisions, and who gives him better incentives than ALJs have to concentrate on the factfinding task.[371] For review designed to meet process concerns, there likewise is no need for a reviewer with policy expertise, and indeed to the extent that policy expertise goes hand-in-hand with incentives adverse to the outside parties' interests, policy expertise may be a negative factor.[372] Process-based review, however, could entail any degree of deference to the ALJ depending on how the process values (which favor no deference) are balanced against efficiency values (which favor deference except in extreme cases).

The review practices at many agencies seem largely designed in keeping with these fact and process concerns. The judicial model is built on these considerations, and many agency decision and review practices follow that model fairly closely. The functioning of intermediate review boards at the FCC and NPC and the review by Judicial Officer at Agriculture, for example, are patterned on the judicial model. In each instance the reviewers have no other duties within the agency, are segregated from the agency's policymakers, share with ALJs the absence of real promotion, pay, and assignment job controls, and can engage in review de novo of matters brought before them.[373]

The different success of review at these agencies -- in speed, in effect of review, and in acceptance by those who deal with the agencies -- suggests that the judicial model may be more suited to some agency decisions than to others. The review processes at the FCC and Agriculture work well because, inter alia, the matters committed to the ALJs and to the judicial reviewers are largely

370. Cf. Mashaw, supra note 23.

371. See Marzloff, supra note 367, see also discussion, text at notes 70-79.

372. See authorities cited at note 367, supra.

373. See text at notes 173-85, 204-220, and 285-90, supra.

factual; policy matters as to which substantial ex ante guidance has not been given are decided by the agency heads rather than by policy-insulated personnel. Beyond that, the FCC, which while successful has been less so than the Department of Agriculture at reducing the policy component of adjudications, retains the right to review the cases where policy considerations are strongly implicated.[374] The FCC has structured this right so that deference to ALJ and Review Board decisions is the rule and Commission review can be and often is denied at low cost.[375] Yet, at the same time, the Commissioners can review any decision they think important (even if no party appeals), and their review can be de novo, reaching the factual findings that have policy significance as well as the more general policy judgments.[376] In contrast are agencies such as the NLRB, which has cast relatively little of its policy in rule form, making most policy decisions in the course of adjudications.[377] Its more political review process (requiring all reviews to be by the Board and not allowing delegation of that authority), while in one sense probably quite inefficient, at least is consistent with its approach to decisionmaking -- if policy is made in adjudications, the policymakers stand read in all cases to serve as the final adjudicators.[378]

A less happy match of process to policy content is perhaps the NRC, which suffers not only from having left much of its policy free-form but also from interposing a judicial tribunal between the ALJ and the policymaking officials. The result is that while non-policymaking personnel cannot realistically be expected simply to find facts and apply the Commission's applicable rules, those are precisely the officers charged with review. The fact that in practice there appears to be a heavy presumption against reversal of the initial decision may indicate on the one hand that the intial decisionmakers are in accord with policymakers, or on the

374. See 47 C.F.R. § § 1.115, 1.117 (1982); see also text at notes 237-243 supra.

375. See 47 C.F.R. § 1.115(g) (1982).

376. See, e.g., Cowles Florida Broadcasting, Inc., 60 F.C.C.2d 372 (1976) (full cite at note 242, supra).

377. See generally Bernstein, supra note 365; Kahn, The NLRB and Higher Education: The failure of Policymaking Through Adjudication, 21 U.C.L.A. L. REV. 63 (1973); Peck, supra note 365.

378. See Memorandum to Task Force on NLRB, Deciding Cases at the NLRB, Jan. 6, 1976 (on file with author). See also Diver, supra note 102, at 401-407.

other hand that policymakers are so unsure what policies they should follow that even if they might have disagreed with the initial decision they will not overturn it. In neither case is extensive review justified. A different explanation for the NRC's two-level review might be that it advances process values, and indeed that has been the stated rationale.[379] It is, however, difficult to separate the "fair play" value of this very lengthy review process from the political benefit that agency policymakers might reap from delaying controversial decisions. If one group generally opposes the outcome that another, more influential group favors, one plausible decisionmaking strategy would be to decide the merits of cases in the second group's favor while delaying each decision's effect in order to gain some measure of acquiescence by the first group. Of course, it may be questioned in all events whether the efficiency cost of the NRC's process is excessive, whichever values it serves.

The difference in review success among agencies employing similar review procedures and the number of different review processes used caution against simple solutions to perceived problems of lengthy agency adjudications procuding incoherent policy. The change in NRC processes, using an intermediate review board as suggested by ACUS 68-6, does not seem to have eliminated the difficulties that prompted adoption of that recommendation. One explanation is that although concern over policy coherence in part motivated the Conference's proposed change in procedure, the major impediments to policy coherence are not addressed by it. Administrators who are relieved of review responsibilities may have more time to formulate policies, and removal of adjudicatory decisionmaking to others -- especially to officials not subject to relatively direct control by the policymaking administrators -- encourages greater specificity in spelling out agency policies. Nonetheless, the real barriers to clear formulation and enunciation of agency policy lie elsewhere, notably in the absence of consensus on goals and in boundaries on the information officials possess and their capacity to base decisions on it.[380] Overcoming these obstacles entails costs, political as well as financial, and evaluation of the desirability of investing in takling these issues itself will turn on political judgments.

Whatever the magnitude of these impediments to coherent policy, there is only the slightest probability that agency decisionmaking will change in response to the marginal decrease in the cost of the agency head's time (from the decrease in duties allocated directly to him) and increase in incentives to spell out

379. See Tourtellotte, supra note 190, at 369-70; cf. Stewart supra note 187.

380. See authorities cited at notes 73, 99 and 100, supra.

policies in advance (a corollary of the delegation of authority) that altered review practices can provide. In addition, the actual impact on an agency head's time of formally assigning review to subordinates is not likely to be nearly so great as at first appears since the agency heads already rely extensively on subordinates.[381] Moreover, the less significant the case, the more likely that agency heads' involvement will be minimized, whether review authority is formally retained at the top of the agency or assigned to an intermediate reviewer.[382] Decisions of substantial impact are apt to be reviewed by policymaking officials if they have discretion to do so; these are not cases policymakers are likely to release control over. The FCC's exercise of authority to review a group of cases involving matters such as the rates charged by AT&T along with that Commission's long-time exclusion of comparative hearings for broadcast licenses from Review Board jurisdiction[383] is illustrative.

The structuring of review in some cases in line with the judicial model and in others with the political model does not reflect a cyclic majority sometimes favoring one model of agency action, sometimes another. Rather, the political consensus on how specific decisions should be made differs from issue to issue; hence, not only the polar alternatives of political or judicial-type review but also the spectrum of differing review practices including judicialized review with a political override,[384] judicial review with political input,[385] and the various particular reviewers and combinations of review discussed in Part III and its appendices. The influence of political judgments on process choices does not mean that suggestions cannot be advanced to rationalize decisional processes in keeping with the evaluative criteria discussed in Part III nor does it mean that such suggestions inevitably will be ineffectual. It does mean that these suggestions should be cognizant of the degree to which policy judgments and decisions of descriptive fact can--or, obviously, cannot--be segregated in particular classes of dispute and should attempt to match the different determinations with appropriate decisionmakers. It also means that any decisional

381. See, e.g., Gladstone, supra note 42, at 238-40.

382. Cf. Cleary, Some Aspects of Agency Review of Initial Decisions of Administrative Law Judges, 31 LABOR L.J. 531, 535-38 (1980).

383. See text at notes 236-243 supra.

384. See discussion of FCC, text at notes 204-243 supra.

385. See discussion of Interior Department Board of Land Appeals, text at notes 244-279 supra.

process will be subject to criticism for being overly judicial or insufficiently judicial, depending on the critic's specific policy views.

Thus, the operation of the Interior department's Board of Land Appeals, for example, may be disparaged as committing too much policymaking power to officials outside the control of those formally charged with making departmental policy;[386] or the Board might be reproved for allowing policymaking officials to influence the disposition of cases.[387] Yet absent better mechanisms for wholly separating policy issues from those cases or greater reason to fear the intercourse between officials, the IBLA procedures seem eminently defensible as a rational allocation of decisional authority -- cases in which issues of descriptive fact as a rule predominate are decided by and reviewed by officials whose comparative advantage lies in that effort, but when policy questions arise, policymakers are consulted.[388]

The allocation of decisionmaking responsibilities at Interior avoids difficulties attendant to processes that involve policymakers in descriptive factfinding or that involve policy decisions by persons who, in order to make them better factfinders, are insulated from policymakers. An example of the difficulties of this latter situation arose at the Environmental Protection Agency, which sometimes uses a Judicial Officer to review initial adjudicatory decisions in place of the Administrator.[389] At recent decision of the Judicial Officer held an entire EPA enforcement program invalid as contrary to the governing statute.[390] Neither the ALJ nor the Judicial Officer was persuaded by the argument put forward by the staff that this issue was beyond the adjudicating officers' jurisdiction, having been determined for the agency by the Administrator in adopting the rules under which the proceeding was brought.[391] Neither the ALJ nor the Judicial Officer is involved in the creation of enforcement programs. Even the most ardent proponent of the

386. See Strauss, supra note 251; cf. Scalia, supra note 19.

387. Cf. Davis, supra note 13.

388. See text at notes 278-279 supra.

389. See 40 C.F.R. § 22.04(b) (1982).

390. In reTransportation, Inc., Docket No. CAA (211)-27, Decision on Interlocutory Appeal, February 25, 1982.

391. See id., and Order Denying Motion to Dismiss Complaint, June 25, 1981.

judicial model would be hard put to explain the advantages of allowing major policy decisions -- not individual penalty determinations that might arguably be subject to non-merits considerations -- to be made by such officials rather than by officers directly answerable to the President and the Congress. However one reads the relevant statute, whether supporting the Administrator's interpretation or the Judicial Officer's, that judgment is one appropriately made by the political actors subject to the checking power of judicial review.

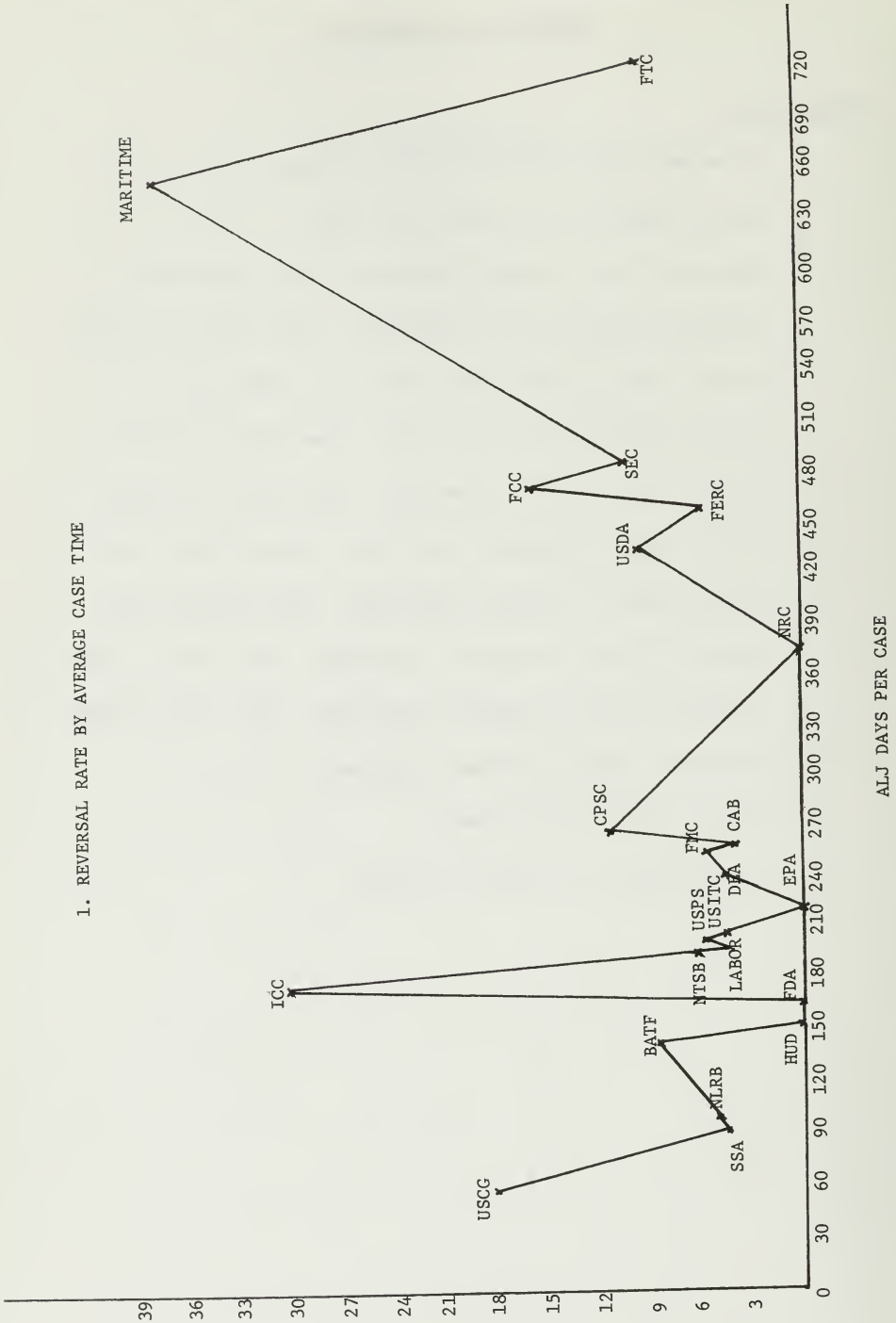
APPENDIX TO PART IV

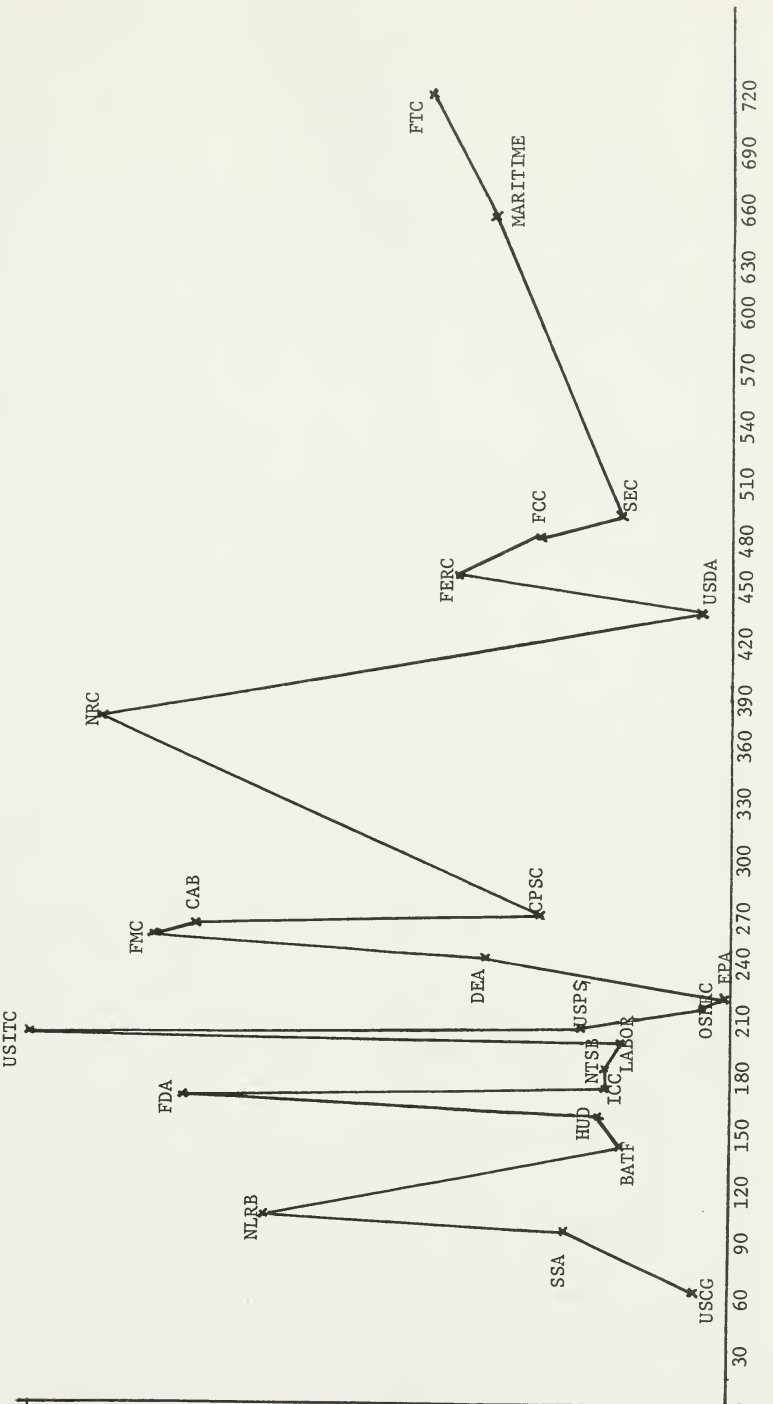
CORRELATIONS

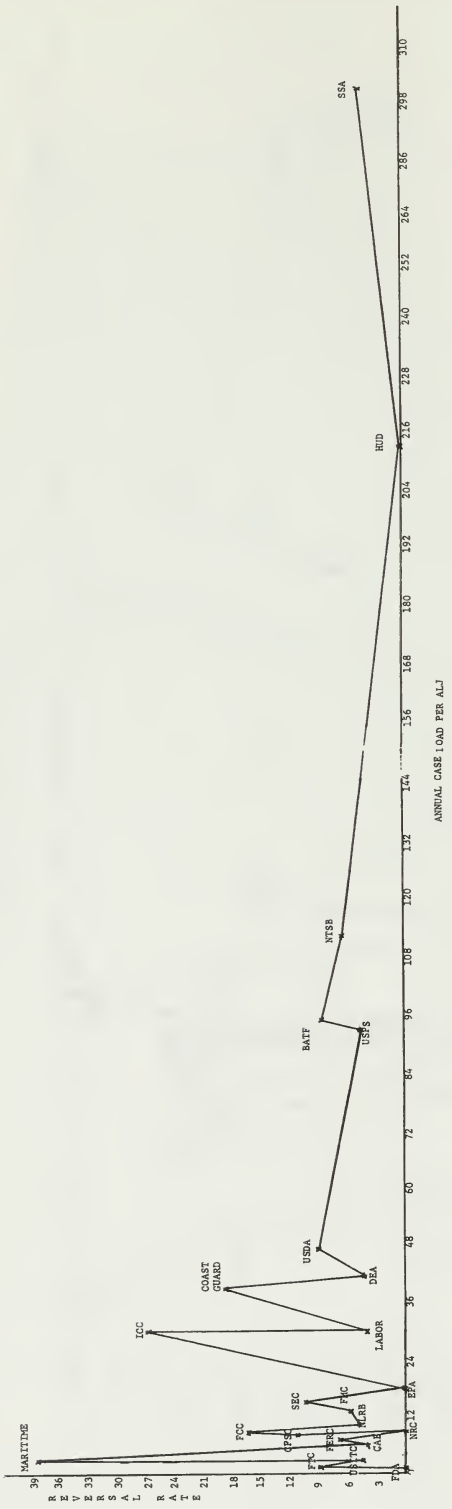
APPENDIX TO PART IV:

CORRELATIONS

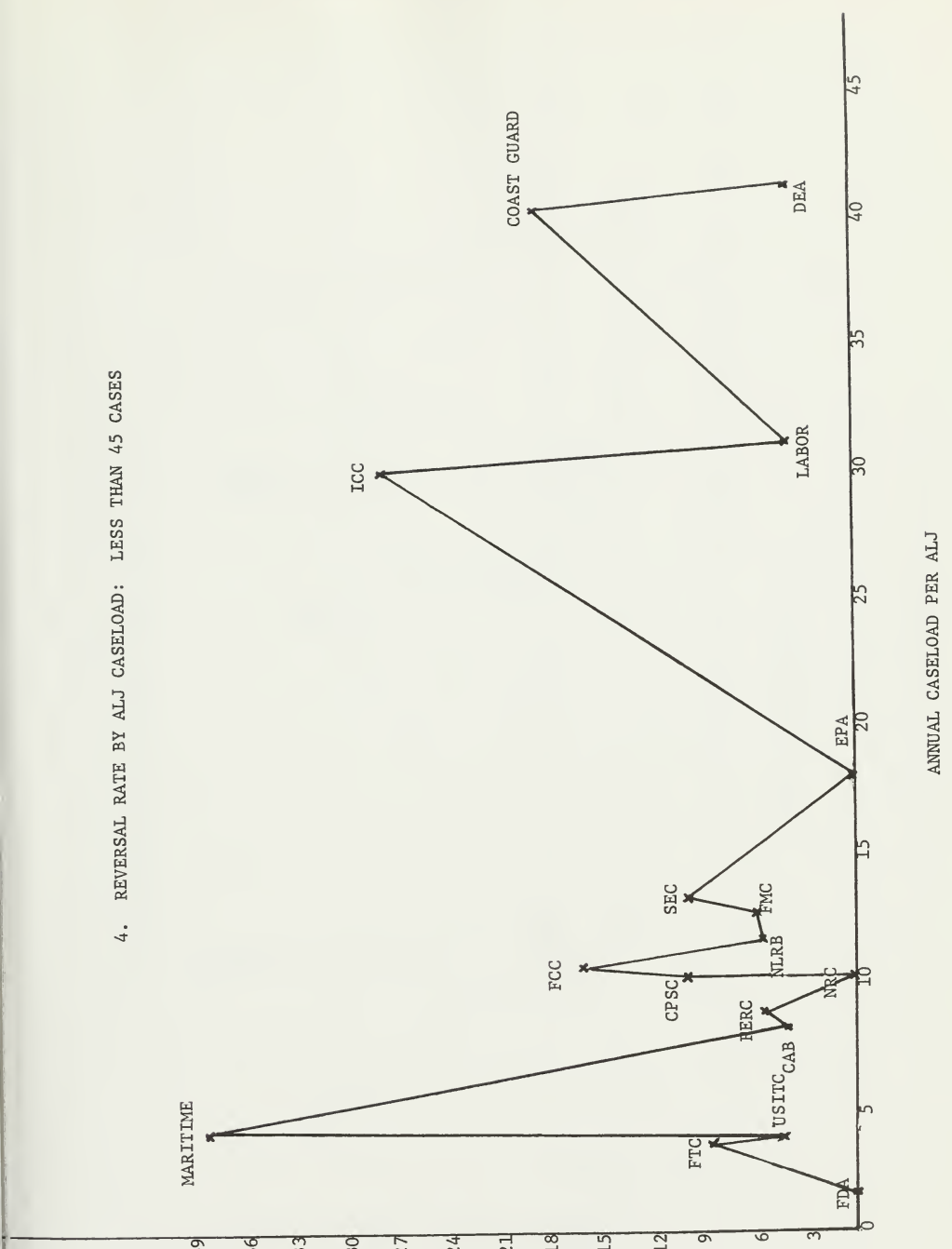
1. Reversal Rate by Average Case Time
2. Review Rate by Average Case Time
3. Reversal Rate by ALJ Caseload: All Agencies
4. Reversal Rate by ALJ Caseload: Less Than 45 Cases
5. Review Rate by ALJ Caseload: All Agencies
6. Review Rate by ALJ Caseload: Less Than 15 Cases
7. Review Rate by ALJ Caseload: More Than 13 Cases
8. Review Rate by Agency Caseload: Less Than 1,000
9. Review Rate by Agency Caseload: More Than 1,000
10. Reversal Rate by Agency Caseload: Less Than 1,000
11. Reversal Rate by Agency Caseload: More Than 1,000
12. Reversal Rate by Review Caseload
13. Review Time, by Reviewer
14. Review Time, by Kind of Review

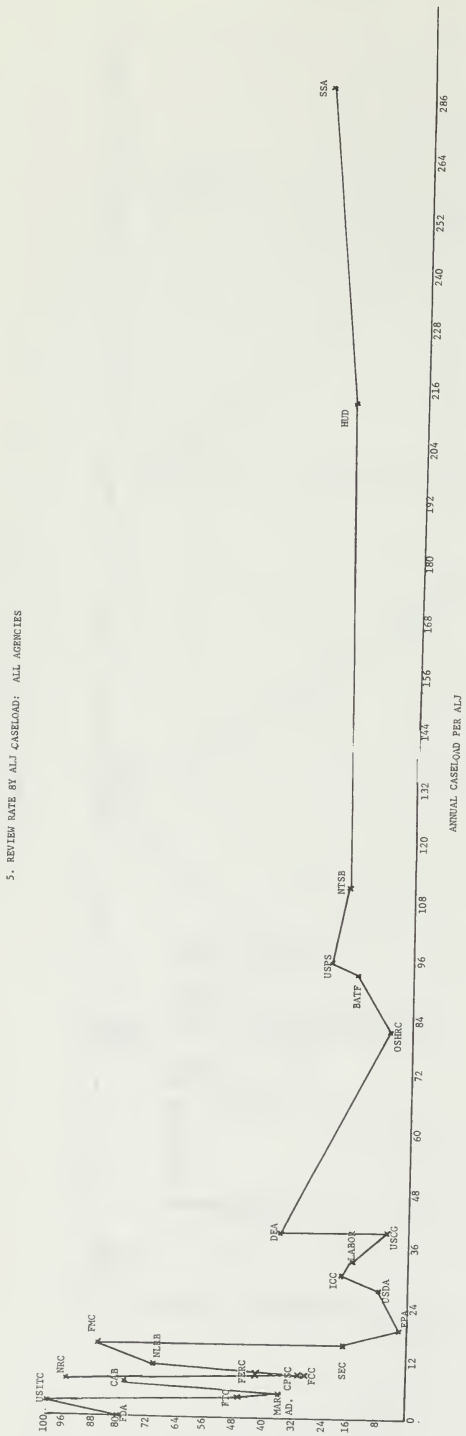

1. REVERSAL RATE BY AVERAGE CASE TIME
REVERSAL RATE
39
36
33
30
27
24
21
18
15
12
9
6
3
0
30
60
90
120
150
180
210
240
270
300
330
360
390
420
450
480
510
540
570
600
630
660
690
720
ALJ DAYS PER CASE
MARITIME
FTC
FCC
SEC
USDA
FERC
NRC
CPSC
FMC
CAB
DEA
EPA
USPS
USITC
NTSB
LABOR
ICC
FDA
HUD
BATF
NLRB
SSA
USCG


2. REVIEW RATE BY AVERAGE CASE TIME
REVIEW RATE
100
99
96
88
80
72
64
56
48
40
32
24
16
8
0 30 60 90 120 150 180 210 240 270 300 330 360 390 420 450 480 510 540 570 600 630 660 690 720
ALJ DAYS PER CASE
USITC
NRC
FTC
MARITIME
FMC
CAB
CPSC
FERC
FCC
SEC
DEA
USDA
FDA
USPS
OSHRC
FPA
NTSB
ICC
LABOR
HUD
NLRB
BATF
SSA
USCG

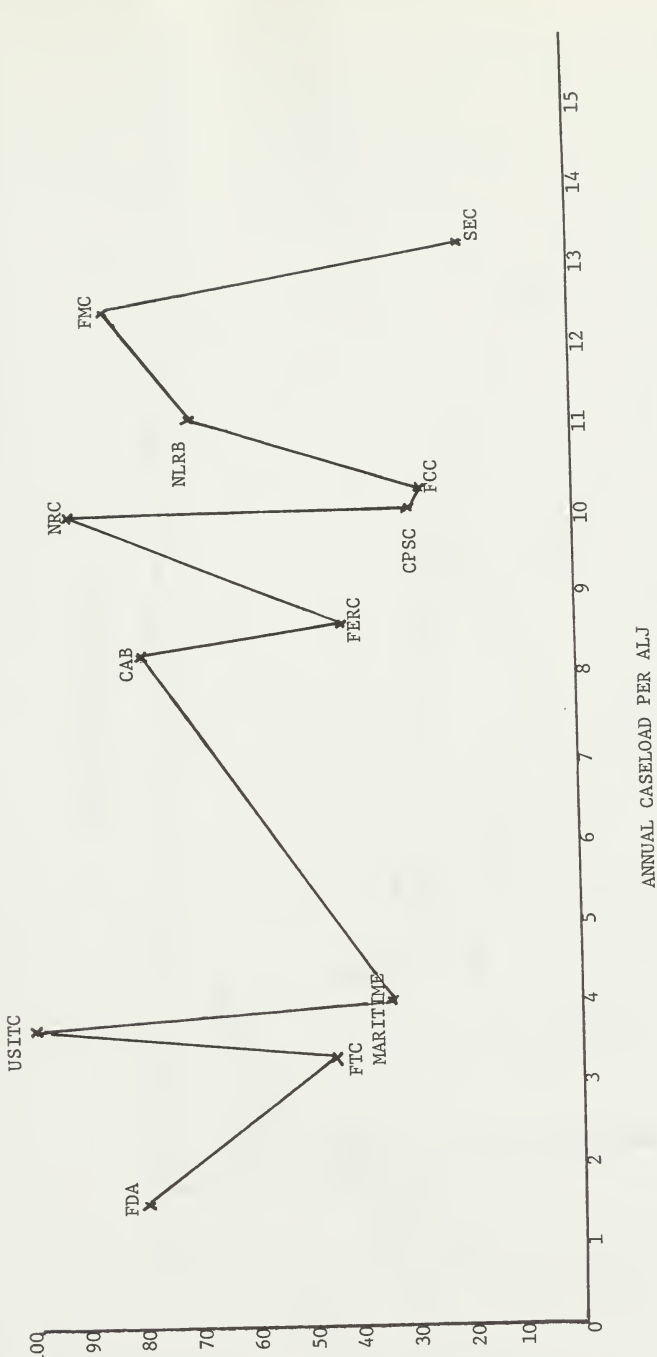

3. REVERSAL RATE BY ALJ CASELOAD: ALL AGENCIES
REVERSAL RATE
39
36
33
30
27
24
21
18
15
12
9
6
3
0
ANNUAL CASE LOAD PER ALJ
12
24
36
48
60
72
84
96
108
120
132
144
156
168
180
192
204
216
228
240
252
264
286
298
310
MARITIME
FCC
CPSC
FMC
PERC
SEC
FMC
MSPB
OSHRC
CAB
NRC
EPA
ICC
LABOR
COAST GUARD
DEA
USDA
BATF
USSS
NTSB
HUD
SSA

4. REVERSAL RATE BY ALJ CASELOAD: LESS THAN 45 CASES

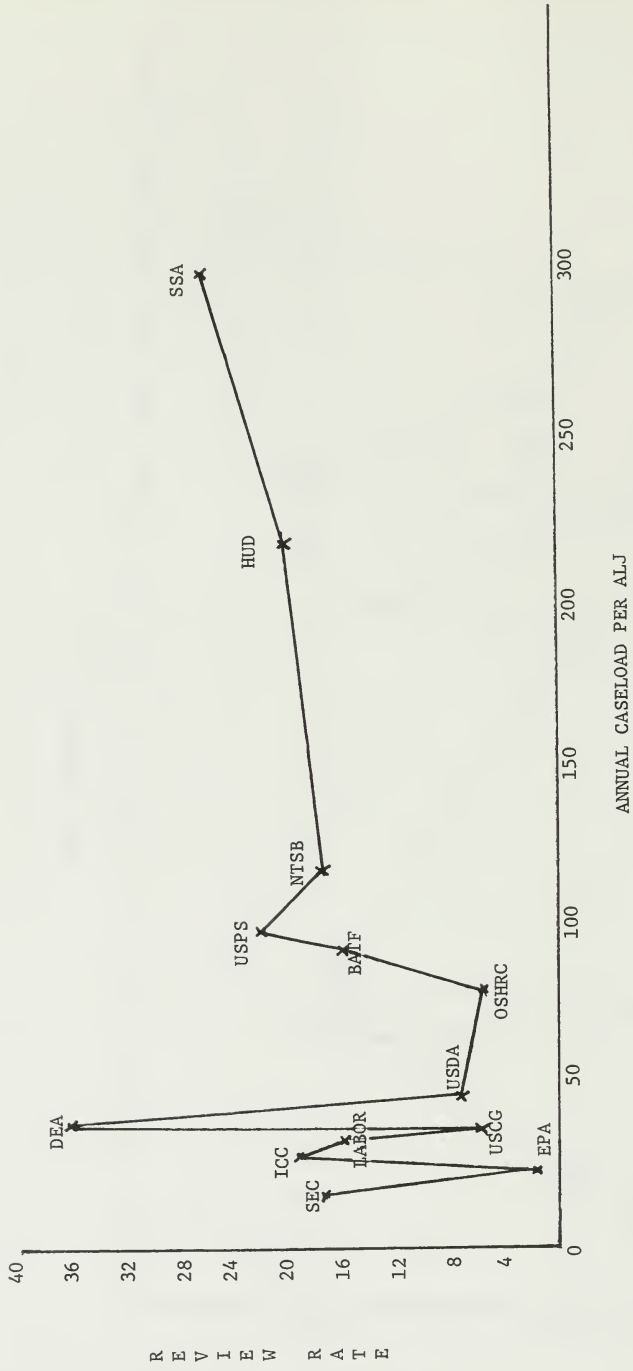



5. REVIEW RATE BY ALJ CASELOAD: ALL AGENCIES
REVIEW RATE
100
96
88
80
72
64
56
48
40
32
24
16
8
0
USITC
NRC
CAB
FAA
FMC
NLRB
MARAD
FTC
CFTC
FCC
SEC
FERC
EPA
ICC
USDA
LABOR
USCG
DEA
OSHRC
BATF
USPS
NTSB
HUD
SSA
12
24
36
48
60
72
84
96
108
120
132
144
156
168
180
192
204
216
228
240
252
264
286
ANNUAL CASELOAD PER ALJ

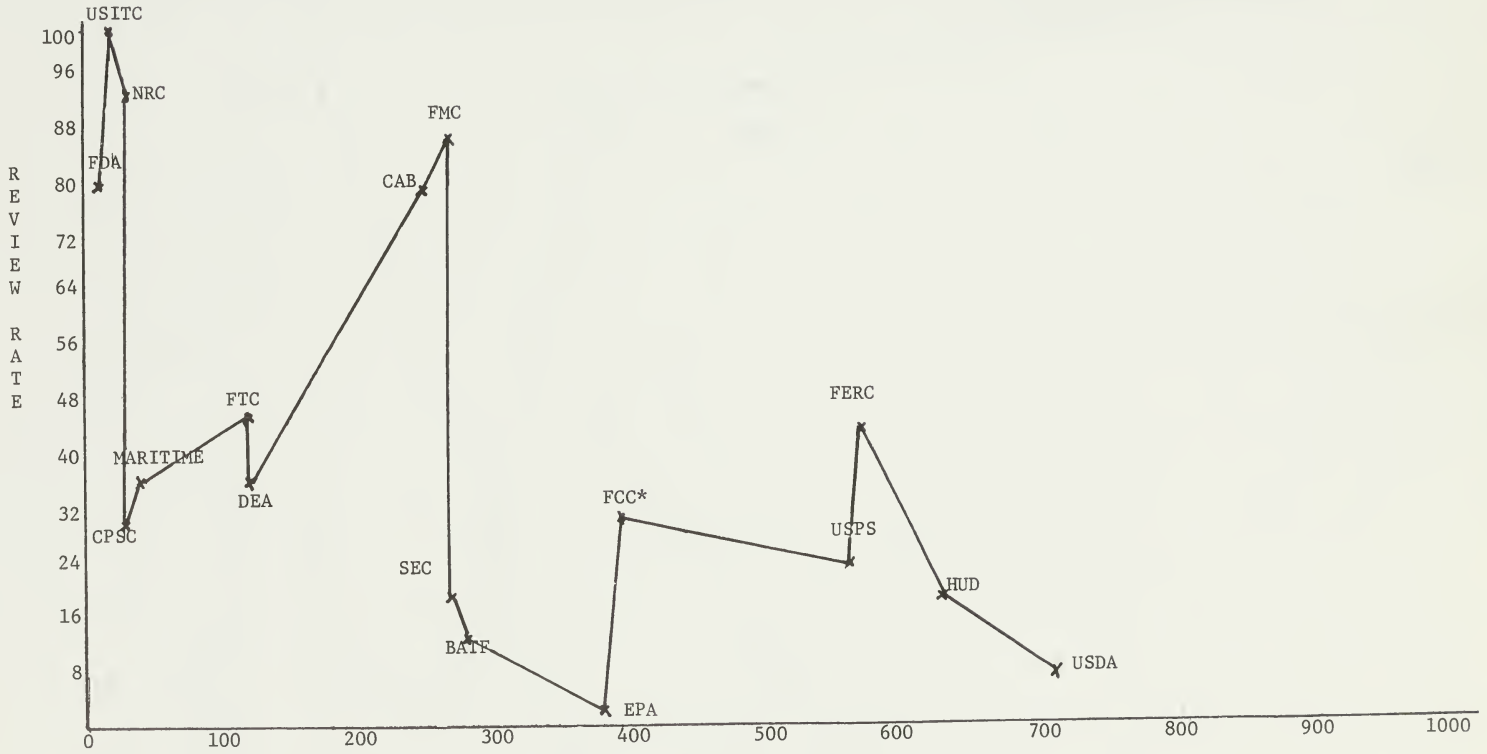
6. REVIEW RATE BY ALJ CASELOAD: LESS THAN 15 CASES



7. REVIEW RATE BY ALJ CASELOAD: MORE THAN 13 CASES

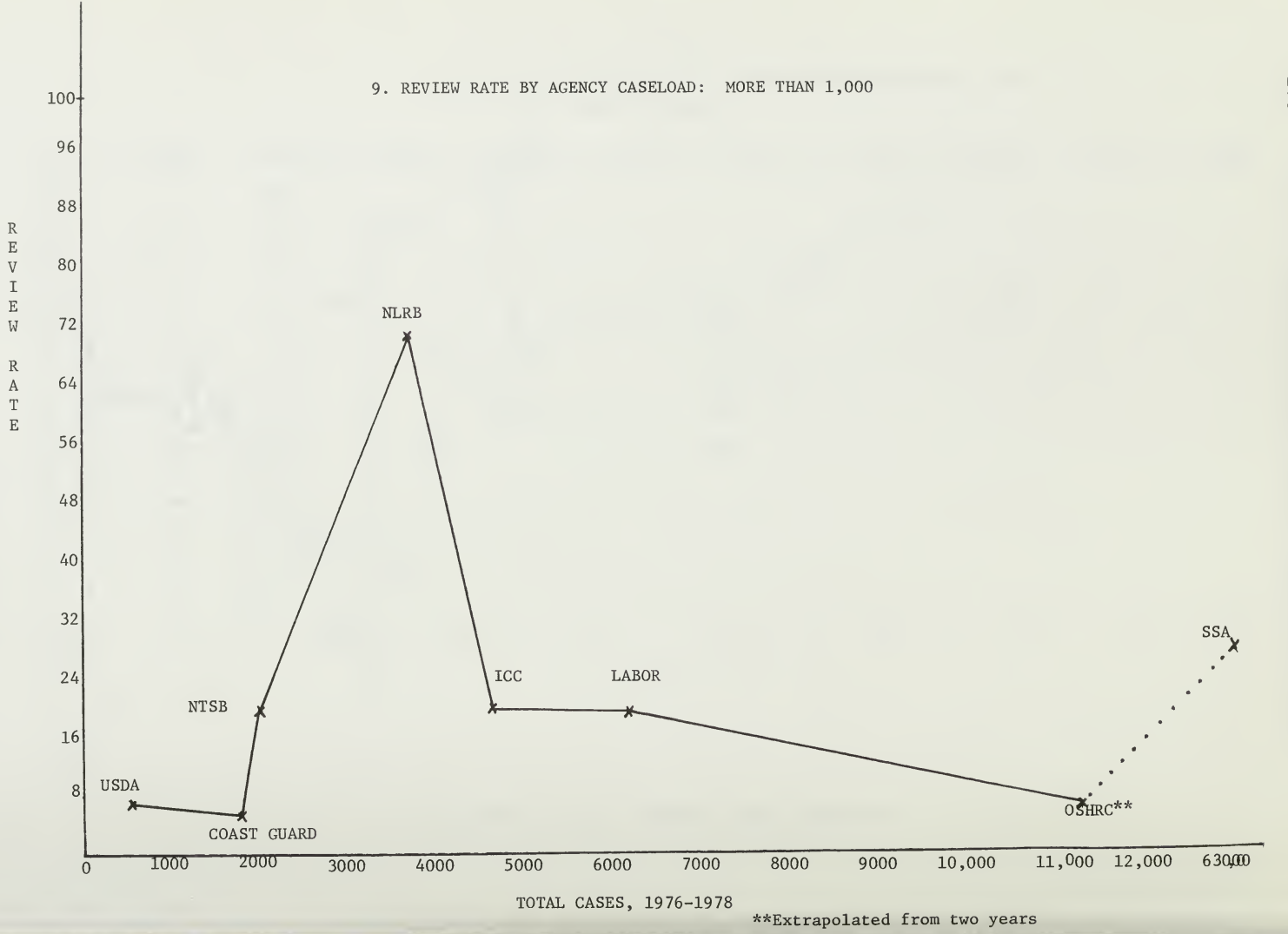


8. REVIEW RATE BY AGENCY CASELOAD: LESS THAN 1,000

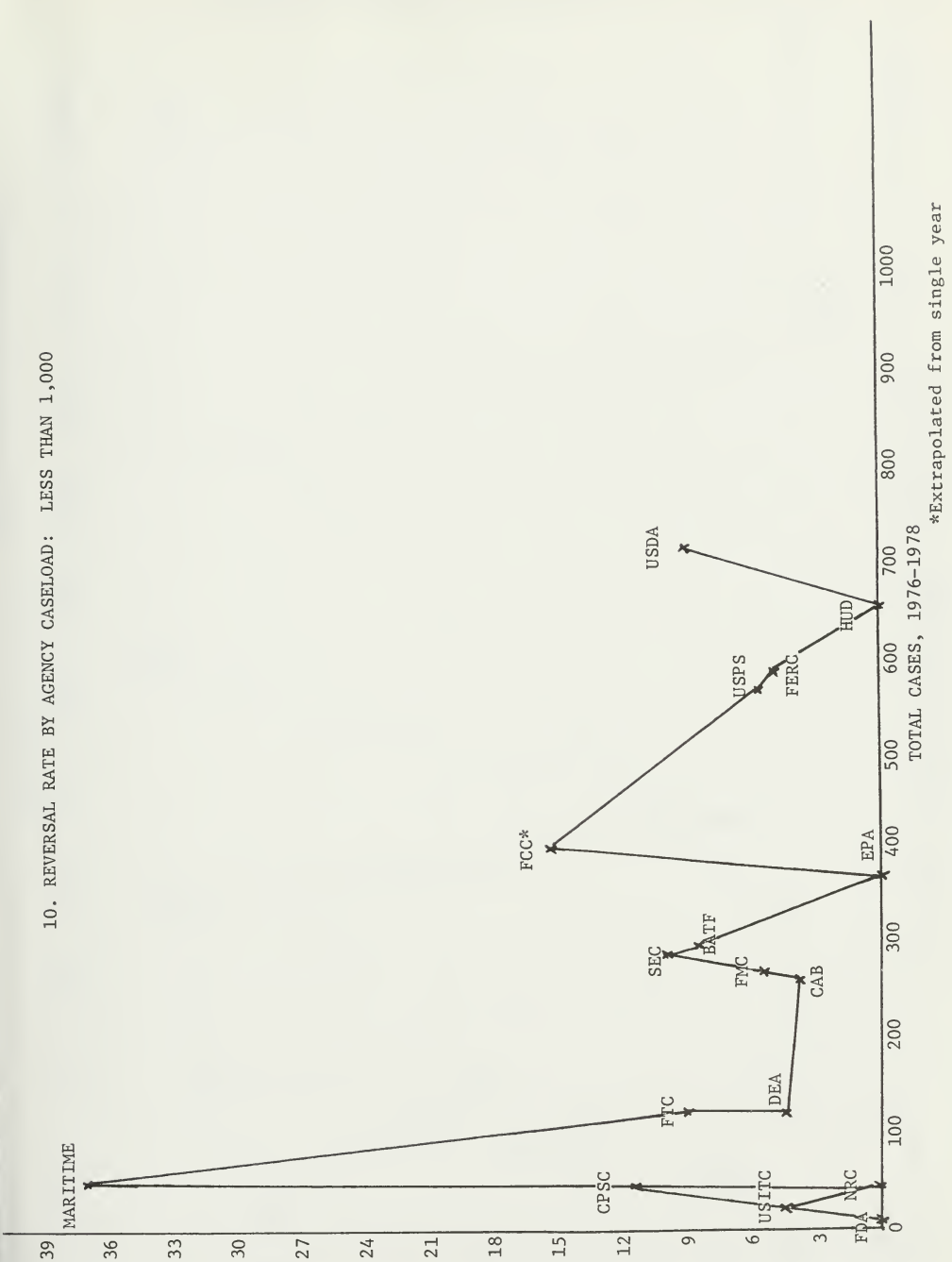


*Extrapolated from single year

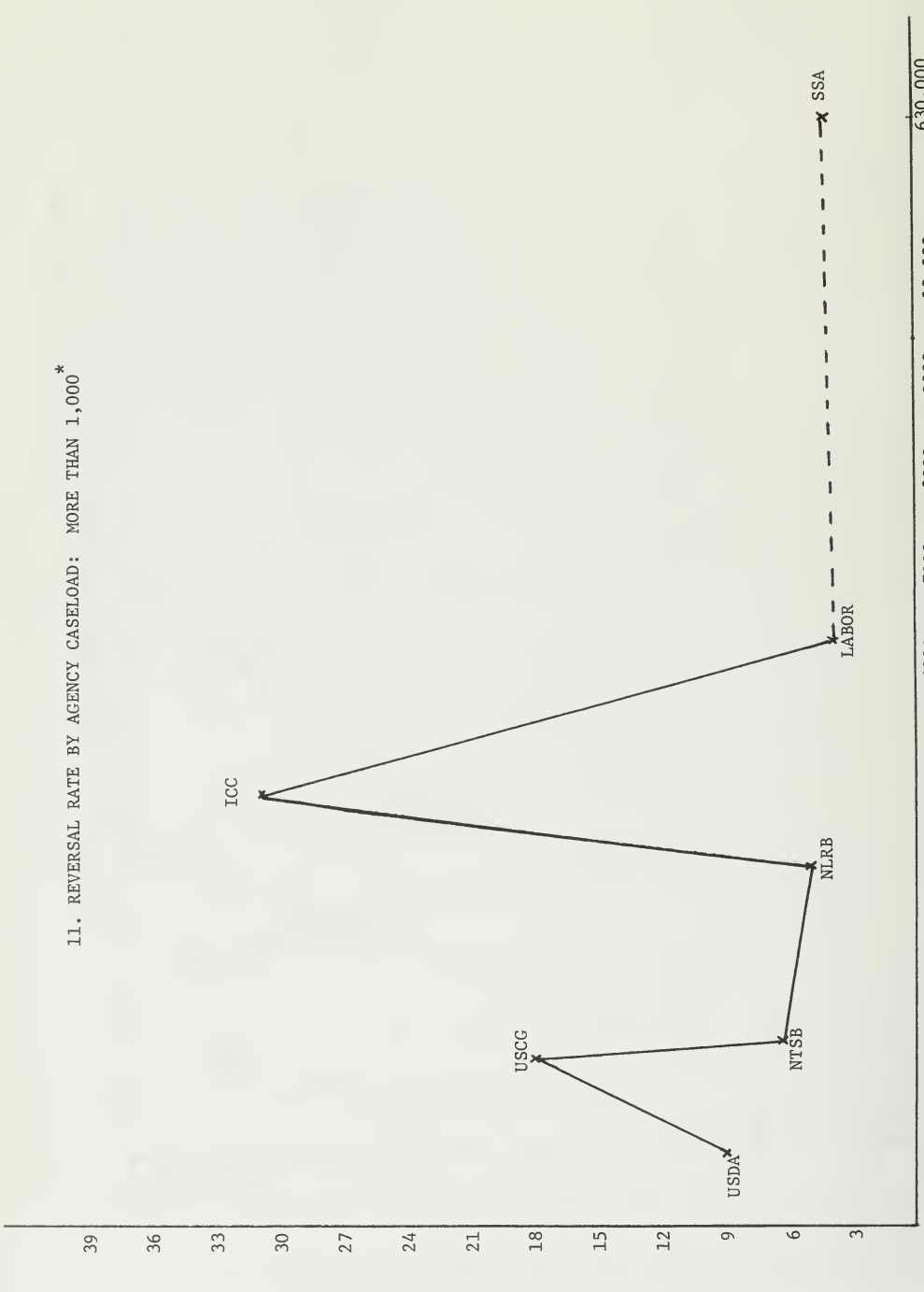
9. REVIEW RATE BY AGENCY CASELOAD: MORE THAN 1,000



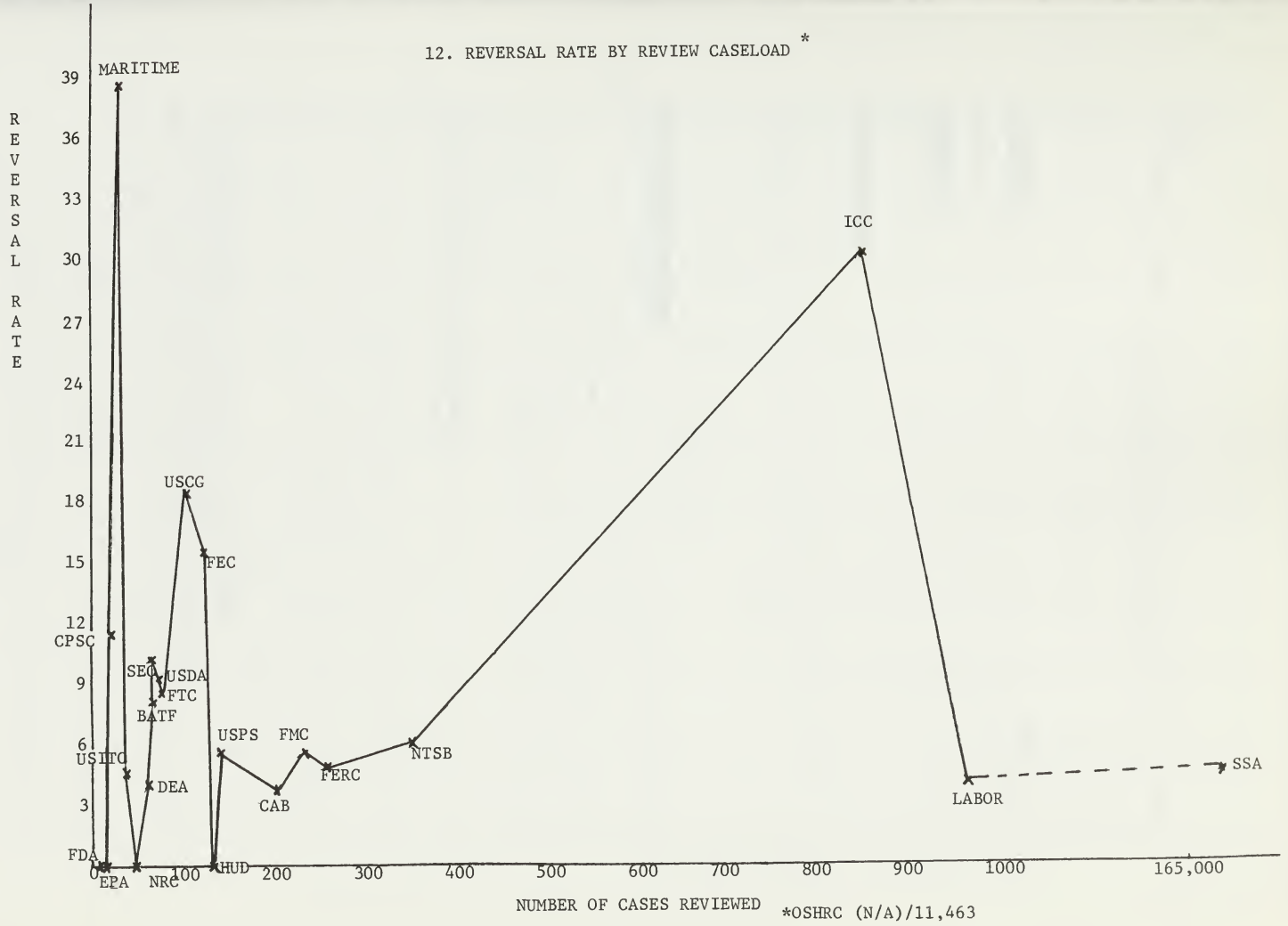
**Extrapolated from two years

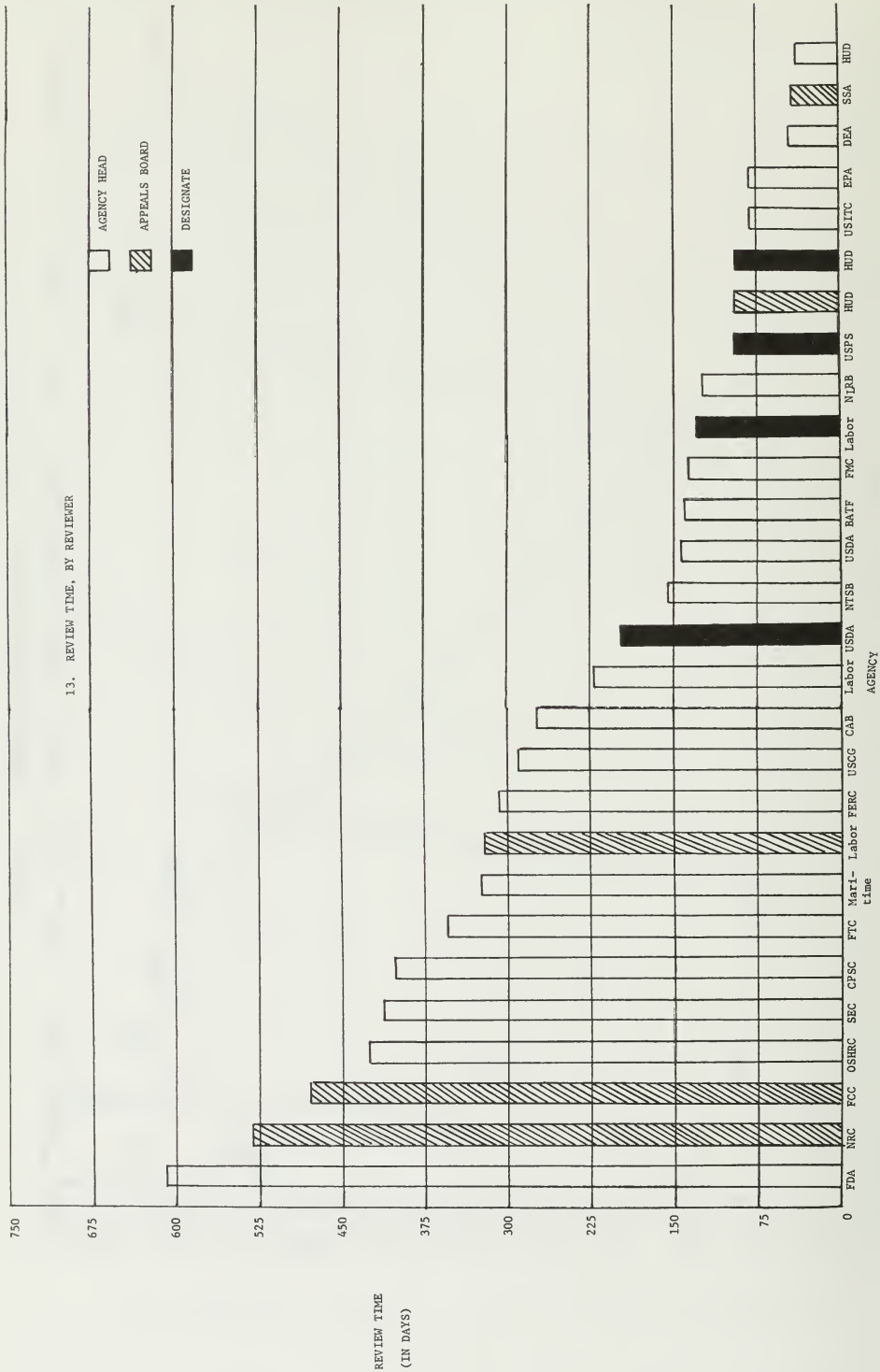

10. REVERSAL RATE BY AGENCY CASELOAD: LESS THAN 1,000
REVERSAL RATE
39
36
33
30
27
24
21
18
15
12
9
6
3
0
MARITIME
CPSC
FTC
DEA
USITC
NRC
FDA
SEC
EATF
FMC
CAB
FCC*
EPA
USDA
USPS
FERC
HUD
0
100
200
300
400
500
600
700
800
900
1000
TOTAL CASES, 1976-1978
*Extrapolated from single year

11. REVERSAL RATE BY AGENCY CASELOAD: MORE THAN 1,000*



*OSHRC Reversal Rate Unavailable


12. REVERSAL RATE BY REVIEW CASELOAD *
REVERSAL RATE
39
36
33
30
27
24
21
18
15
12
9
6
3
0
MARITIME
ICC
USCG
FEC
CPSC
SEC
USDA
FTC
BATF
USITC
USPS
FMC
NTSB
DEA
CAB
FERC
LABOR
SSA
FDA
EPA
NRC
HUD
100
200
300
400
500
600
700
800
900
1000
165,000
NUMBER OF CASES REVIEWED
*OSHRC (N/A)/11,463


13. REVIEW TIME, BY REVIEWER
AGENCY HEAD
APPEALS BOARD
DESIGNATE
REVIEW TIME
(IN DAYS)
0
75
150
225
300
375
450
525
600
675
750
FDA
NRC
FCC
OSHRC
SEC
CPSC
FTC
Mari-
time
Labor
FERC
USCG
CAB
Labor
USDA
NTSB
USDA
BATF
FMC
Labor
NLRB
USPS
HUD
HUD
USITC
EPA
DEA
SSA
HUD
AGENCY