

GAO

Report to the Chairman, Committee on  
Energy and Natural Resources  
U.S. Senate

October 1992

# ADMINISTRATIVE LAW JUDGES

## Allegations of Interference by the Department of the Interior



147836

**RESTRICTED--Not to be released outside the  
General Accounting Office unless specifically  
approved by the Office of Congressional  
Relations.**

**RELEASE**

**555723**

\_\_\_\_\_

\_\_\_\_\_

**General Government Division**

B-249158

October 2, 1992

The Honorable J. Bennett Johnston  
Chairman, Committee on Energy  
and Natural Resources  
United States Senate

Dear Mr. Chairman:

This report responds to your request that we review allegations that the independence of 12 administrative law judges (ALJ) and the former chief ALJ had been compromised by the Department of the Interior (DOI). Specifically, as agreed with the Committee, our objectives were to determine (1) if evidence exists that DOI's management actions might have compromised the ALJs' decisional independence, (2) if evidence exists that DOI improperly influenced an Office of Personnel Management (OPM) decision to classify eight Indian probate ALJ positions at the GS-15 grade level, and (3) if reporting to officials below the agency head has created concerns among ALJs in other agencies regarding their decisional independence.<sup>1</sup> In addition, we agreed to obtain the ALJs' views on the establishment of a separate agency for ALJs.

---

**Results in Brief**

Seven of the eight Indian probate ALJs at DOI and the former chief ALJ believed that DOI took certain actions against them that improperly interfered with their decisional independence. One of these actions—the attempt to rate the performance of the Indian probate ALJs—was resolved by legislation. The remaining actions, including threatening to fire the ALJs, denying them a GS-16 grade level, and eliminating the chief ALJ's position, were the subject of litigation as of July 1992. Because these issues were in litigation, we have not expressed an opinion on them. One case was before the Merit Systems Protection Board (MSPB), and another was before the U.S. Court of Appeals for the Federal Circuit.

The Indian probate ALJs believed that DOI improperly influenced OPM's decision to classify their positions at the GS-15 level. The ALJs included improper influence as one of several alleged harassment actions in their claim to MSPB mentioned earlier. Because this was one of the issues in litigation, we have not expressed an opinion on the specific allegation of improper influence. However, we found that the information presented in OPM's classification reports and in a report prepared by one of the Indian

---

<sup>1</sup>Indian probate ALJs conduct formal hearings and render decisions involving the estates of Native Americans.

---

probate ALJs, which we did not verify, adequately supported the OPM decision to classify the ALJ positions at the GS-15 level. OPM, in making classification decisions concerning ALJ grade levels, normally reviews agencies' recommendations and supporting documentation and does not make on-site desk audits. In this case, however, OPM departed from its normal procedure and made desk audits because DOI (1) submitted conflicting data to support its recommendation that the Indian probate ALJs remain at the GS-15 grade level and (2) did not have resources to do on-site desk audits.

Forty-eight of the 56 ALJs (86 percent) we interviewed from 30 agencies other than DOI said that they had experienced no problems of interference by agency management and, therefore, had no problem with the level of reporting within their agencies. Seventeen of the 30 agencies were organized like DOI, that is, the ALJs reported to an official below the head of the agency. ALJs from 2 of these 17 agencies alleged that interference had occurred and that it was related to the level of reporting. Officials from these agencies, however, had opinions that differed from those of the ALJs as to whether the alleged activity was in fact interference, including the interpretations of specific comments that were made and in the facts regarding the alleged interference.

Regarding the establishment of a separate ALJ agency, 31 of the 56 ALJs (55 percent) favored this concept. The advantage they cited most frequently was that a separate agency would enhance ALJ independence.

---

## Background

By passing the Administrative Procedure Act of 1946, Congress sought to ensure greater independence of the administrative decisionmaker in formal agency proceedings. Before this act, tenure, classification, compensation, performance appraisals, and promotions of ALJs were based on evaluations by employing agencies. With the act, Congress attempted to make ALJs unique federal employees. Agencies appoint ALJs from registers established by OPM, and ALJs are not subject to a probationary period like other federal employees. Although ALJs remained agency employees generally subject to the civil service laws, the act exempted them from key portions of these laws to ensure the integrity of the decisionmaking process. For example, ALJ pay is determined by OPM independently of agency recommendations or ratings, and ALJs are not subject to statutory performance appraisal requirements.

---

The act provided additional safeguards to further ensure the fairness of the decisionmaking process. For example, ALJs are required to hold hearings and make decisions in an impartial manner. Cases must be assigned, whenever possible, in rotation, and ALJs may not perform duties inconsistent with their ALJ duties and responsibilities. ALJs may not communicate with anyone inside or outside the agency about the facts of a particular case unless the relevant parties are present, nor may they be involved in the investigation or prosecution of the cases they adjudicate.

In sum, the act has provisions to help ensure the decisional independence of ALJs and prohibit substantive review and supervision of their performance. However, ALJ independence is not unlimited. For example, they are subject to agency rules and regulations and must apply even those rules with which they disagree. A number of bills have been introduced in recent years to establish a separate agency for ALJs to further enhance their independence. None of the bills have been enacted to date.

As of June 24, 1992, OPM reported 1,167 ALJs employed in 32 agencies. The Social Security Administration employed the most (849), while 5 agencies (the Department of Commerce, the Food and Drug Administration, MSPB, the Nuclear Regulatory Commission, and the Small Business Administration) employed 1 ALJ each. The number of ALJs in the other 26 agencies ranged from 2 to 83. (See app. I.)

At DOI, 12 ALJs were employed as of June 24, 1992. Of that number, four presided over public lands and surface mining cases, and eight presided over Indian probate cases. The ALJs were located in the Office of Hearings and Appeals (OHA), which consists of a Hearings Division, three Boards of Appeals, and an Administration Division. The ALJs are located in the Hearings Division.

---

## Objectives, Scope, and Methodology

Our first objective was to determine if evidence exists that DOI took any actions that might have compromised the decisional independence of its ALJs. In order to understand the concept of independence as it applied to ALJs, we reviewed the Administrative Procedure Act of 1946, OPM's regulations on ALJs, and OPM's Administrative Law Judge Program Handbook. We interviewed the head of OPM's ALJ office to determine his role in ensuring that ALJs remain independent. To learn how OHA operates, we reviewed DOI's August 1990 Final Report On The Organization, Management, And Operation Of The Office Of Hearings And Appeals. To review the allegations of interference against ALJs at DOI, we interviewed

ALJs, including the former chief ALJ, in the Hearings Division and reviewed case documents they filed with the Office of Special Counsel (OSC) and MSPB. We also reviewed a hearing examiner's report on long-standing complaints of ALJs against DOI. To see if a similar situation existed in the three Boards of Appeals, we interviewed the chief administrative judge from each of the three Boards. We also interviewed the OHA Director and the head of OHA's Administration Division. Finally, we reviewed DOI's most recent reports on internal control reviews made at OHA's various components and the recently completed DOI Inspector General reports to see if problems dealing with ALJ interference had been reported. Because the allegations of interference were under appeal as of July 1992, we did not express any opinions on them.

Our second objective was to determine if evidence existed that DOI improperly influenced an OPM decision to classify eight DOI Indian probate ALJ positions at the GS-15 grade level. To accomplish this, we interviewed OPM and DOI officials and reviewed correspondence sent between OPM and DOI. We also reviewed correspondence sent internally within OPM regarding the classification action. Because this allegation of improper DOI influence was also under appeal as of July 1992, we did not express any opinion on the specifics of the allegation. However, we did make an independent review of the information contained in classification reports for the Indian probate ALJ position prepared by DOI in 1980 and OPM in 1990 and in a report prepared by one of the Indian probate ALJs. We did this review to determine if the information in the reports supported OPM's decision that the ALJs should remain at the GS-15 grade level. We did express an opinion concerning the adequacy of OPM's supporting documentation.

Our third objective was to determine if there was any indication that reporting to officials below the agency head could be associated with concerns among ALJs in other agencies regarding their decisional independence. The alleged interference at DOI resulted, in part, from a reorganization under which OHA now reports to the Assistant Secretary for Policy, Management, and Budget rather than directly to the Secretary.

To determine if this concern about interference was present in other agencies or unique to DOI, we gathered data about the reporting relationships in 30 other agencies with ALJs. We included all other agencies with ALJs as reported by OPM, except for the Office of Thrift Supervision, where the ALJ office had been recently created in August 1991. We interviewed the 30 chief or lead ALJs at these agencies and 26 lower level ALJs (no more than 1 in each agency) to see if perceptions of interference

---

existed among these ALJs. We systematically selected the lower level ALJs from the middle of an alphabetical listing of ALJs in each agency. If there was an odd number of ALJs, we selected the one in the middle of the listing. If there was an even number of ALJs, we divided the total number in half and selected the one in that position on the alphabetical listing. We held follow-up interviews with the ALJs' supervisors and/or agency officials in order to substantiate reported instances of alleged interference. Because concerns had been expressed about ALJ independence and because a series of bills establishing a separate ALJ agency had been introduced, we obtained the 56 ALJs' views on the concept of a separate agency as a way of more firmly establishing their independence.

We obtained written comments on the information contained in this report from DOI and OPM officials. We also obtained oral comments from the president of The Federal Administrative Law Judges Conference. We did our work at OPM's Office of Administrative Law Judges in Washington, D.C.; DOI's Office of Hearings and Appeals in Arlington, Virginia; and DOI ALJ offices in Knoxville, Tennessee, and Twin Cities, Minnesota, between June 1991 and July 1992 in accordance with generally accepted government auditing standards.

---

## ALJs at DOI Have Alleged Interference With Their Decisional Independence

Seven of the eight DOI Indian probate ALJs and the former chief ALJ believed that DOI had taken certain actions against them that improperly interfered with their decisional independence. One of these actions was the attempt to rate the Indian probate ALJs.

---

## DOI Had Attempted to Rate Indian Probate ALJs

The Indian probate ALJs had been hired under an exemption to the appointment requirements of the Administrative Procedure Act. The exemption, however, did not specify whether the ALJs had full Administrative Procedure Act status, including exemption from performance appraisal.

We found that since 1980, DOI, on several occasions, had attempted to rate the performance of the Indian probate ALJs. DOI's position was that Indian probate ALJs were not exempt from performance appraisal under the Administrative Procedure Act. In late 1988, six Indian probate ALJs asked DOI to appoint a grievance examiner to review DOI's attempts to rate their performance. The ALJs believed that even though they had been hired

---

under a statutory exemption to the appointment requirements of the act, they had full ALJ status, including exemption from performance appraisals.

On April 18, 1990, the examiner concluded that DOI improperly harassed and threatened the Indian probate ALJs and that efforts by DOI to subject them to performance appraisals could interfere with their decisional independence. He recommended that without a legislative solution to this problem, DOI should seek OPM's exemption for Indian probate ALJs from performance appraisal.

The statutory exemption to the appointment requirements of the Administrative Procedure Act for the Indian probate ALJs was repealed with the passage of Public Law 101-301 enacted May 24, 1990. Thus, it became clear that the Indian probate judges were ALJs for all purposes and that DOI was precluded from rating their performance. As a result of this action, the Under Secretary of the Interior concluded that he did not have to act on the examiner's report.

---

### ALJs Have Filed a Complaint With MSPB

On June 20, 1991, seven Indian probate ALJs filed a complaint for corrective action with OSC. The complaint asked OSC to investigate and resolve allegations of serious and persistent prohibited personnel practices by DOI including

- retaliatory threats to fire the ALJs;
- illegal termination of the chief ALJ to retaliate against the ALJs;
- retaliatory reclassification and denial of a GS-16 grade level;
- unequal treatment; and
- harassment, intimidation, and concealment of evidence.

On July 25, 1991, OSC responded to the ALJs' complaint by finding insufficient evidence of any prohibited personnel practices or other violations warranting further inquiry by OSC. OSC told the ALJs that they may have a right to seek corrective action from MSPB.

On September 27, 1991, the ALJs filed a complaint with MSPB. It included, along with the five allegations previously identified, three others including

- interfering with judicial independence,
- perjury, and
- persuading others to commit perjury.

---

On December 9, 1991, an administrative judge at MSPB dismissed the complaint for lack of jurisdiction. The ALJs, on January 13, 1992, petitioned MSPB to review the administrative judge's decision to dismiss the complaint. On July 27, 1992, MSPB granted the ALJs' petition, vacated the initial decision, and remanded the appeals for further adjudication before an ALJ.

---

### Former Chief ALJ Has Appealed His Separation

The chief ALJ at DOI was separated through a reduction-in-force action effective March 9, 1991. On March 26, 1991, he appealed his separation to MSPB, claiming that the action was in retaliation for disclosures he made testifying at the Indian probate ALJ grievance hearing and in a formal petition to Congress to establish an office of ALJs reporting directly to the Office of the Secretary. He maintained that the disclosures were protected under the Whistleblower Protection Act of 1989.

On November 6, 1991, the initial decision of MSPB found that DOI invoked reduction-in-force regulations properly based on management considerations or agency discretion and suitably adhered to applicable regulations and procedures. MSPB also found that no reason had been demonstrated to invalidate the reduction-in-force. The chief ALJ petitioned for review before the MSPB on December 20, 1991. MSPB denied the chief ALJ's petition for review on June 23, 1992. On July 17, 1992, the chief ALJ requested the U.S. Court of Appeals for the Federal Circuit to review MSPB's decision.

In sum, the concerns that the Indian probate ALJs and the former chief ALJ had about DOI interference with their decisional independence have either been resolved by legislation or are in litigation. Because these issues were in litigation, we have not expressed an opinion on them.

---

### OPM's Classification Reports Support a GS-15 Grade Level

The Indian probate ALJs believed that DOI improperly influenced OPM to keep them at the GS-15 grade level. DOI recommended that OPM establish the ALJs' position at the GS-15 grade level and, in so doing, provided OPM with conflicting data. OPM independently reviewed the position and determined that it should be classified at the GS-15 grade level.

---

### Indian Probate ALJs' Allegations

The Indian probate ALJs believed that OPM and DOI colluded to classify their positions at the GS-15 grade level. The ALJs thought that OPM should have

---

followed its usual practice of adding one extra grade to the GS-15 grade level to recognize their new unique, independent decisionmaking responsibilities under the Administrative Procedure Act. They maintained that DOI and OPM officials had reached agreement on a GS-16 grade level for the ALJs and that OHA had initiated the paperwork to reflect that agreement. The ALJs believed DOI then changed the paperwork to reflect a GS-15 grade level, without consulting with OHA, and forwarded it to OPM. They added that the only reason OPM undertook a new classification review was to keep them at the GS-15 grade level. The ALJs included this allegation in their September 27, 1991, complaint with MSPB. The complaint was pending as of July 1992. Therefore, we did not express any opinions concerning their allegation.

---

## OPM's Classification Decision

Normally, for its classification decisions, OPM reviews recommendations and supporting documentation of agencies and does not make on-site desk audits. In this case, however, OPM departed from its normal procedure and did such audits because DOI submitted conflicting data to support its recommended grade level and said it did not have resources to make on-site desk audits.

On July 6, 1990, the Office of the Secretary submitted a request to OPM to approve eight Indian probate ALJ positions at the GS-15 grade level. DOI justified the GS-15 grade level on the basis of a 1980 DOI classification report covering Indian probate work, which it said was still in effect and which already substantially recognized the Indian probate ALJs' unique, independent decisionmaking responsibilities. DOI concluded, therefore, that it might not be appropriate to add one extra grade to the existing grade level.<sup>2</sup> DOI's request also included two position descriptions. One combined the duties for Indian probate, surface mining, and public lands cases; the other was limited to Indian probate work.

OPM, on July 30, 1990, responded to DOI and pointed out two inconsistencies with DOI's request. The first dealt with the two position descriptions that DOI submitted; it was unclear to OPM which one reflected the duties the ALJs were expected to perform. The second inconsistency dealt with DOI's use of its 1980 classification report to support a GS-15 grade level for the new ALJ positions. OPM said the classification report showed that the nature of the Indian probate cases was at the highest level, or "most difficult." OPM converts "most difficult" type cases to a

---

<sup>2</sup>We reviewed the 1980 classification report and found no indication that DOI had recognized the Indian probate ALJs' unique, independent decisionmaking responsibilities in the report.

GS-15 grade level and adds one additional grade to recognize the ALJS' unique, independent decisionmaking responsibilities. OPM told DOI that if DOI proposed that the ALJ positions were to be classified at the GS-15 grade level, DOI would have to demonstrate, in a new classification study, that the nature of the Indian probate cases was "difficult"—one category below the highest level. OPM would convert "difficult" type cases to a GS-14 grade level and add one additional grade to bring the position up to a GS-15 grade level.

On October 1, 1990, DOI notified OPM that the Indian probate ALJS would continue to do probate work exclusively and that the ALJS' major duties and responsibilities, as evaluated in DOI's 1980 classification report, were current and accurate. DOI also said that it did not have resources to make a new classification review of the Indian probate ALJS' work. DOI, however, did not address OPM's comment that it would have to demonstrate that the position was properly graded at the GS-14 level.

## OPM's Classification Review

On October 12, 1990, OPM asked its Chicago and Dallas Regional Offices to do classification reviews of the duties performed by three DOI Indian probate ALJS. The reviews concluded that the nature of the Indian probate cases was at the "difficult" level. OPM converted this to a GS-14 grade level and added one additional grade to recognize the ALJS' unique, independent decisionmaking responsibilities. On December 21, 1990, OPM reported the results of its classification review to DOI. OPM concluded that based on (1) DOI's recommendation, (2) two independent on-site desk audits, and (3) an independent review of all available information, a GS-15 grade level was appropriate for the new ALJ positions.

Recognizing that the classification process is somewhat subjective, we reviewed information included in OPM's two classification reports and in a report provided by one of the Indian probate ALJS. We concluded that the information was sufficient to support a GS-15 grade level for the Indian probate ALJS. Our review, however, did not attempt to verify the accuracy of the information contained in the reports nor did it attempt to independently classify the positions based on the information in the reports.

## Level of Reporting Is Not a Concern for Most ALJs

Forty-eight of the 56 ALJS (86 percent) we interviewed from the other 30 agencies said that they had experienced no problems of interference by agency management and, therefore, had no problem with the level of reporting within their agencies. The ALJS also said that 17 of the 30

---

agencies had an organizational arrangement similar to DOI's for ALJs (i.e., the ALJs reported to someone other than the agency head). ALJs in some of these 17 agencies alleged interference.

---

### ALJs Alleged Interference at Six Agencies Organized Like DOI

The ALJs we interviewed in 11 of the 17 agencies said that their agencies had not made any attempt to interfere with their independence. However, ALJs (seven in total) in the other six agencies alleged management had attempted to compromise their independence.<sup>3</sup>

ALJs attributed the alleged interference to reporting relationships in only two of the six agencies. In both agencies, as was the case at DOI, the alleged interference came from outside the ALJ office and from someone in the line-of-reporting below the agency head. Neither ALJ believed that these agency actions were successful in compromising their independence. Agency officials, however, differed from the ALJs in their opinion as to whether the alleged activity was in fact interference, including their interpretations of specific comments that were made and in the facts regarding the alleged interference, as indicated in the following information.

- In one case, the ALJ said that his supervisor—who was not part of the ALJ office—when discussing a case to be decided by the ALJ, said the agency was out to fire him. The ALJ interpreted this remark to mean that he should decide the case in favor of the agency and that if he did not start producing promanagement decisions, he was going to be fired. The supervisor said that he viewed the discussion as a caution to the ALJ to be careful in deciding the case. He also said that he did not tell the ALJ that the agency was out to fire him. The supervisor said that at the time of the discussion their office was in its first year of operation and that the discussion was aimed at conveying his concern about agency scrutiny of their office. The supervisor also said that he wanted to convey to the ALJ the fact that the agency was watching their office and for the ALJ to make sure that whatever decision he made was supportable.
- In the other case, the ALJ said that his supervisor's handling of the budget resulted in the allocation of fewer funds than requested for the ALJ office. The ALJ alleged that this reduced allocation amounted to interference because it impaired his ability to reduce his case backlog. The ALJ's supervisor, who was not part of the ALJ office, denied that the budget for the ALJ office had been cut. To support his point, he provided data showing

---

<sup>3</sup>Interference also was alleged by 1 ALJ in 1 of the 13 agencies that was not organized like DOI.

---

that the budget increased each year since 1989 and at a time when the number of cases received was going down.

For the other four agencies, the ALJs in three said reporting relationships were not the cause of the alleged interference, and the ALJ in the fourth agency declined to provide any information about the cause of the alleged interference. The ALJs believed that these agency actions were unsuccessful in compromising their independence.

On the basis of information provided by the three ALJs and a review of the agencies' organizational charts, we agree that the alleged interference was not related to the line-of-reporting. As illustrated in the following example, one agency's Office of General Counsel offered help to an ALJ, and he believed this was an attempt to compromise his independence. The ALJ said that the Office of General Counsel, which was outside the line-of-reporting, provided an attorney to help him at a time when his secretary was on extended leave and when he was writing a decision on a case. The ALJ said he viewed this action as interference. The ALJ's supervisor said he agreed to the offer of assistance because he thought that the intent represented a sincere offer to provide assistance at a time when it was needed. He said that while the offer was unusual, it was not improper and that he did not consider it as an attempt to interfere with the ALJ.

---

### ALJs' Views on a Separate ALJ Agency

Regarding the establishment of a separate ALJ agency, 31 of the 56 ALJs (55 percent) we interviewed supported this concept. Of the remaining 25 ALJs, 19 did not approve of a separate agency, and 6 were undecided. Most of the ALJs reporting to someone below the agency head were in favor of a separate agency for ALJs, whereas most of the ALJs reporting to the head of an agency did not want a separate agency for ALJs. (See app. II.) In addition, of the eight ALJs who alleged that their agencies attempted to interfere with their independence, seven supported a separate agency for ALJs, and one was undecided.

The ALJs cited a number of advantages and disadvantages of a separate agency for ALJs. (See app. III.) The most frequently cited advantage was that a separate agency would enhance their independence. The most frequently cited disadvantage was that it would reduce their expertise because they would preside over a wide variety of cases instead of specializing in one area of administrative law as is now the case.

---

## Agency Comments and Our Evaluation

OPM and DOI provided written comments on a draft of this report (see apps. IV and V). In addition, the president of The Federal Administrative Law Judges Conference provided oral comments on the draft report. All three respondents generally agreed with the overall message of the report.

The Acting Director, OPM, raised two concerns, one dealing with the fact that before May 1990 Indian probate ALJs were not exempt from performance appraisals and the other, with the fact that there were no agencies in which ALJs reported to or through the Office of the General Counsel. Accordingly, we revised the report to address these concerns. In addition, the Acting Director pointed out that the issues in the report were under review by MSPB. Although the issue dealing with the Indian probate ALJs is with MSPB, the issue dealing with the former chief ALJ was decided by MSPB on June 23, 1992, and is with the U.S. Court of Appeals for the Federal Circuit.

The Assistant Secretary for Policy, Management and Budget, DOI, strongly objected to our characterization of the grievance examiner's findings and the Under Secretary's disposition of the case. We do not believe that we have mischaracterized these issues.

Regarding the grievance examiner's findings, DOI said that the examiner concluded that he had no authority to order any of the relief requested by the Indian probate ALJs on the issue of performance ratings. We do not believe the examiner's authority is in question. In his report, the grievance examiner recommended that without a legislative solution to this issue, DOI should seek an exemption from performance appraisal from OPM. Because the examiner made a recommendation and not a ruling, we believe that he was aware that he did not have the authority to order corrective action on behalf of the ALJs. DOI also said that the grievance examiner addressed other issues that were outside his authority. While this may be true, our concern was only with the issue of rating the ALJs' performance.

As for the Under Secretary's disposition of the grievance examiner's recommended decision, DOI said that the Under Secretary concluded that he did not have to act only after the Indian probate ALJs suggested that enactment of Public Law 101-301 would render the grievance moot. We do not see the relevance of DOI's concern. The fact remains that the Under Secretary found that he no longer had to make a substantive decision.

---

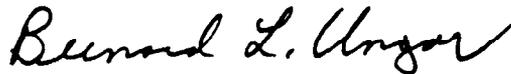
DOI also raised concerns about our characterization of MSPB's decisions regarding the Indian probate ALJs and the former chief ALJ. DOI said that we misstated the current status of the Indian probate ALJs' appeal and omitted some facts in the former chief ALJ's case. We agree and have revised the wording of the report to better reflect MSPB's decisions.

---

As arranged with the Committee, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from its issue date. At that time, we will provide copies of this report to DOI and OPM and to others upon request.

The major contributors to this report are listed in Appendix VI. If you have any questions, please telephone me on (202) 275-5074.

Sincerely yours,



Bernard L. Ungar  
Director, Federal Human Resource  
Management Issues

# Number of Administrative Law Judges in 32 Departments and Agencies as of June 24, 1992

<b>Agency</b>	<b>Total</b>
Department of Agriculture	5
Department of Commerce	1
Commodity Futures Trading Commission	3
Department of Education	3
Environmental Protection Agency	7
Federal Communications Commission	9
Federal Energy Regulatory Commission	22
Federal Labor Relations Authority	9
Federal Maritime Commission	3
Federal Mine Safety & Health Review Commission	11
Federal Trade Commission	2
Department of Health and Human Services	853
Department of Housing and Urban Development	5
Department of the Interior	12
Interstate Commerce Commission	2
Department of Justice	6
Department of Labor	83
Merit Systems Protection Board	1
National Labor Relations Board	81
National Transportation Safety Board	6
Nuclear Regulatory Commission	1
Occupational Safety and Health Review Commission	16
Office of Thrift Supervision	2
Securities and Exchange Commission	4
Small Business Administration	1
Department of Transportation	14
International Trade Commission	3
Postal Service	2
<b>Total</b>	<b>1,167</b>

Note: This appendix includes ALJs employed by separate components within HHS (3), Justice (2), and DOT (2).

Source: OPM data.

---

# ALJs' Views Toward a Separate Agency, According to the Reporting Relationship Between the ALJ Office and the Agency Head

---

<b>ALJ viewpoint</b>	<b>Does not report to agency head</b>	<b>Reports to agency head</b>	<b>Total</b>
For	22	9	31
Against	5	14	19
Undecided	4	2	6
<b>Total</b>	<b>31</b>	<b>25</b>	<b>56</b>

# Advantages and Disadvantages Cited by ALJs Regarding a Separate Agency

	Number of ALJs citing advantages and disadvantages
<b>Advantages</b>	
Enhanced independence <sup>a</sup>	37
Equalized workload	21
More uniformity	8
Broadens expertise <sup>b</sup>	7
More cost efficient	5
More efficient travel	5
<b>Disadvantages</b>	
Reduced expertise <sup>b</sup>	26
Reduced independence <sup>a</sup>	17
More costly	14
Results in fewer cases	7
Creates a bureaucracy	5

<sup>a</sup>Some ALJs thought that a separate agency would enhance independence by removing them from the control of individual agencies. However, other ALJs believed a separate agency could reduce independence by placing too much control in the hands of a chief ALJ who would head the separate agency.

<sup>b</sup>Some ALJs said that a separate agency would broaden expertise because they would preside over a wide variety of cases covering more than one agency. On the other hand, some ALJs said a separate agency would reduce expertise because they would no longer specialize in one area of administrative law.

# Comments From the Office of Personnel Management



UNITED STATES  
OFFICE OF PERSONNEL MANAGEMENT

WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

SEP 11 1992

Mr. Richard L. Fogel  
Assistant Comptroller General  
U.S. General Accounting Office  
Washington, DC 20548

Dear Mr. Fogel:

Thank you for the opportunity to comment on the draft report entitled, Administrative Law Judges: Allegations of Interference by the Department of the Interior (Code 966474).

We see no problem with the overall tenor of the report. However, the following are a few brief comments:

- The report repeatedly refers to pre-1990 Indian Probate Administrative Law Judges (ALJs). Prior to May 1990, these judges technically were not ALJs and, as such, they were not immune to performance appraisals.
- To the best of our knowledge, there are no agencies wherein ALJs report to or through the Office of the General Counsel, as ALJs are supposed to be independent of agency investigative and prosecutorial functions.
- As of the date of this letter, the issues under review in the draft report remain the subject of litigation before the Merit Systems Protection Board.

I hope these comments are helpful in finalizing your report.

Sincerely,

Douglas A. Brook  
Acting Director

See p. 6.

See p. 11.

# Comments From the Department of the Interior



United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, D.C. 20240



SEP 14 1992

Mr. Richard L. Fogel  
Assistant Comptroller General  
General Government Division  
United States General Accounting  
Office  
Washington, D.C. 20548

Dear Mr. Fogel:

This is in response to your request for comments on the proposed report entitled Administrative Law Judges: Allegations of Interference by the Department of the Interior (Job Code 966474).

I believe that the General Accounting Office has followed a correct and prudent approach by refusing to comment on many of the allegations that have been made in the two pending appeals mentioned in the report. However, I must strongly object to the characterization of several legal conclusions and rulings that have been made in this matter.

I am concerned that the recommended findings of the grievance examiner mentioned on page 10 of the draft report are mischaracterized. The discussion does not reveal that the examiner concluded that he had no authority to order any of the relief requested by the appellants on the issue of performance rating of the judges. As to other issues that the grievance examiner addressed in his recommended decision, they were clearly outside his authority, as he specifically recognized. Because these issues were outside the examiner's authority, the Department submitted no evidence on these questions at the grievance hearing.

Additionally, the final disposition of this case is not accurately reflected in the draft. The Under Secretary concluded that he did not have to act on the grievance examiner's recommended decision only after the appellants suggested that enactment of Public Law 101-301 would render the grievance moot.

Another misstatement on page 11 of the draft is the current status of the appeal filed by several judges pending before the U.S. Merit Systems Protection Board (MSPB). The draft states that MSPB reversed the initial decision and remanded the appeal for further hearing before an Administrative Judge when, in fact, the Board upheld the part of the initial decision that contained a detailed analysis of the appellants' allegations. The Board remanded for further consideration the balance of the allegations that were only briefly discussed by the initial decision, but did not require a hearing on those allegations.

Now on p. 6.

Now on pp. 6-7.

See pp. 6-7.

**Appendix V  
Comments From the Department of the  
Interior**

Page 2  
Mr. Richard L. Fogel

Now on p. 7.

See p. 7.

On page 12 of the draft, the report omits the fact that the MSPB found, in the initial decision in the case of McKenna v. DOI that the Department used the correct procedures and that there had been no evidence of retaliation as alleged by the appellant.

The balance of the report concerns the classification of a few of the judges that was performed by the Office of Personnel Management. To the degree that the draft concludes that the classification was performed accurately, I agree.

I appreciate the opportunity to comment on the draft report.

Sincerely,

*for*   
JOHN E. SCHROTE  
Assistant Secretary  
Policy, Management and Budget

---

# Major Contributors to This Report

---

General Government  
Division, Washington,  
D.C.

James T. Campbell, Assistant Director, Federal Human Resource  
Management Issues

James J. Grace, Evaluator-in-Charge

Gerard S. Burke, Evaluator

William R. Chatlos, Senior Social Science Analyst

Don D. Allison, Personnel Specialist

---

Office of the General  
Counsel, Washington,  
D. C.

Jill Poses Sayre, Attorney-Adviser

---

---

**Ordering Information**

**The first copy of each GAO report and testimony is free. Additional copies are \$2 each. Orders should be sent to the following address, accompanied by a check or money order made out to the Superintendent of Documents, when necessary. Orders for 100 or more copies to be mailed to a single address are discounted 25 percent.**

**U.S. General Accounting Office  
P.O. Box 6015  
Gaithersburg, MD 20877**

**Orders may also be placed by calling (202) 275-6241.**

---

**United States  
General Accounting Office  
Washington, D.C. 20548**

**Official Business  
Penalty for Private Use \$300**

<p><b>First-Class Mail Postage &amp; Fees Paid GAO Permit No. G100</b></p>
--