OVERRULED:
THE LEGALISTIC AND MANAGERIAL MODELS OF
ADMINISTRATIVE ADJUDICATIONS

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ABSTRACT

Federal administrative agencies adjudicate a wide variety of disputes for a diverse set of entities. Although each agency has developed its own processes for adjudicating claims, the conventional wisdom is to divide all administrative adjudications into two broad categories: “formal” and “informal” adjudication. These categories obscure more than they clarify because they fail to account for critical process differences across administrative agencies. The lack of a coherent typology of administrative adjudications presents a significant obstacle to rigorous academic study of this subject.

This dissertation introduces the Legalistic model and the Managerial model of agency adjudications. The Legalistic model is defined by its three central features: process-oriented participation, juridical decisionmakers, and adjudicator independence. The Managerial model is defined by three competing features: result-oriented participation, expert decisionmakers, and adjudicator accountability. Because many federal agencies draw from both models when structuring their adjudications, this dissertation sets out the parameters for a spectrum of administrative adjudications and
identifies a methodology for giving each agency a “Judicialization Score” and placing the agency on the Legalistic/Managerial spectrum.

Empirical data on adjudications from two paired sets of federal agencies is used to test the conventional wisdom that Legalistic agencies will, all other things being equal, perform better than Managerial agencies. Three agency performance measures – the appeal measure, the affirmance measure and the processing measure – serve as a basis for the analysis.

This dissertation reaches three main conclusions. First, the Managerial model provides a principled and coherent alternative to the Legalistic model for structuring agency adjudications. Second, contrary to the conventional wisdom, Legalistic agencies do not always perform better than Managerial agencies. Third, the Managerial model is more appropriate for certain agencies, while the Legalistic model is more appropriate for others. These conclusions provide a foundation for future empirical study to refine the nature of the relationship between agency performance and the two basic models of administrative adjudication.
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INTRODUCTION

Over the last century, the United States has developed into a vast and complex administrative state. Each year federal agencies promulgate regulations and implement policies that affect millions of people. Some agencies, such as the Environmental Protection Agency and the Federal Energy Regulatory Commission, engage in regulatory activities and are responsible for formulating or implementing rules imposing obligations on individuals and corporations. Other agencies, such as the Social Security Administration and Department of Veterans Affairs, distribute wealth and medical benefits to individuals that society has deemed needy or deserving. Although there are several different types and categories of federal agencies (Lowi, 1985; Ripley and Franklin, 1987), they are all unified by a common trait: their rules, policies and actions often give rise to conflict.

In our tripartite system of government, most disputes arising out of a specific agency action are resolved in the first instance by the agency itself in what is called a federal agency “adjudication.” Federal agencies adjudicate a wide variety of issues for a diverse set of parties – ranging from nuclear energy allocation to labor-management relations compliance to health and social security benefit adjustments. To resolve these disputes, federal agencies within the executive branch have established their own administrative court system for adjudicating claims. These agency adjudications are similar to traditional federal court adjudications to the extent that decisionmakers make findings of fact and then apply those facts to principles set out in statutes, regulations, policy, or agency guidance. Unlike the federal district court system, however, there is
little uniformity in the processes that federal agencies use to conduct agency adjudications.

Even though agencies have been conducting administrative adjudications for more than a century, scholars and practitioners in the field of administrative law have yet to develop a coherent way of classifying different types of federal agency adjudications. The convention is to divide all administrative adjudications into two broad categories: formal adjudications and informal adjudications. “Formal adjudications” are formal because they are required by statute to be determined in accordance with the Administrative Procedure Act (“APA”); “informal adjudications” are informal because they need not satisfy APA requirements. In short, there is “formal adjudication” under the APA, and there is “everything else.” Unfortunately, these two categories have limited explanatory power and quickly break down under scrutiny. These two broad categories, which are defined by the application of the APA, do not account for important differences in the way different agencies conduct adjudications. Even a cursory review of agency procedures reveals that application of the APA is only one factor affecting the procedures and structure of agency adjudications.

As a fledgling student of administrative law, I was frustrated by the absence of a coherent system for understanding and classifying different types of administrative adjudications. “Administrative Law” is a class taught in every accredited law school in the country, yet administrative law textbooks do not address, much less explain, the significant differences that exist across agency adjudications. The Gellhorn and Byse administrative law textbook (Strauss et al., 1995), which is the standard text for law
schools around the country, is no exception. To their credit, the text’s authors did not fall back on the “formal” and “everything else” dichotomy for categorizing agency action. What appears instead is a morass of examples crammed into unhelpful and incomplete categories of agency action. Specifically, the textbook authors provide five “fundamental procedural categories of administrative action”: (1) “Formal Adjudication,” (2) “Informal Rulemaking,” (3) “The Possible Requirement of More Formal Rulemaking Procedures,” (4) “The Permissibility of Less Formal Adjudicatory Procedures” and (5) “The Permissibility of Yet-More Informal Rulemaking” (Strauss et al., 1995). These categories obscure more than they clarify. This flawed typology, which relies on the applicability of the APA, simply does not account for the differences between adjudicatory procedures across administrative agencies.

One explanation for this conceptual gap is that legal scholars and legal practitioners are comfortable with the notion that administrative adjudications should use a “legalistic” process to resolve disputes. Perhaps the single most dominant theme in post-World War II American academic legal thought is that there is a “morality” in the formal legal process. Law school curricula quickly indoctrinate future lawyers and legal scholars by emphasizing the legitimacy of formal legal processes. Many practitioners and members of the legal academy unquestionably accept the notion that adherence to adversarial trial-like processes will consistently yield impartial, reasoned, and accurate results. The hegemony of the formal legal process theory of adjudication has presented a huge obstacle to creating a coherent typology of administrative adjudications. Absent a positive alternative, with the intellectual power to stand on its
own as a unique approach to administrative process and procedure, there has been little
movement toward developing a coherent classification of administrative adjudications.

I learned from personal experience, however, that even a measured effort to
advance an alternative theory of adjudication cannot overcome the intense preference
for formality among scholars and practitioners of administrative law. In my third year
of law school I joined the Prettyman-Leventhal Administrative Law Inn of Court in
Washington, D.C. An “Inn of Court” is a professional association that meets to
encourage discussion on the contemporary legal issues of the day. I had the opportunity
to present a paper that explored alternatives to the “legalistic” nature of administrative
procedures to a group of Administrative Law Judges (“ALJs”), agency officials,
government attorneys, and private lawyers (Wertkin, 2002). It was not well received.
In their critiques, the Inn of Court members regarded the Legalistic approach as the
ideal institutional arrangement, and alternative arrangements in administrative
adjudications that did not live up to that ideal were regarded simply as shortcomings.
Most significantly, the group was skeptical that, all other things being equal, adopting
an alternative arrangement could yield fewer appeals and fewer reversals of initial
agency decisions.

My frustrations with the conceptual gaps in the field of administrative law led
me to approach this dissertation with three specific goals in mind: (1) to develop an
alternative model of administrative adjudications, rooted primarily in the works of
progressive legal scholars and new public management scholars, that can serve as a
counterpoint to the dominant “legalistic” model of agency adjudications; (2) to use
these models as the basis for a coherent system for classifying different types of agency adjudications; and (3) to use empirical data to challenge the conventional wisdom that Legalistic agencies will, all other things being equal, perform better than Managerial agencies.

Chapter 1 provides a historical overview that follows the transformation of administrative adjudications through four stages: pre-New Deal, New Deal transition, APA compromises and the age of proceduralism, and modern administrative adjudications and new critical thinking. This chapter begins by highlighting the ideological debate that raged as federal agencies began conducting their first adjudications. Drawing on a number of different sources, the remainder of Chapter 1 traces the development of the current prevailing norms of administrative adjudications and examines more recent scholarship that challenges the conventional wisdom.

Drawing from the historical overview, Chapter 2 extracts two overarching normative frameworks of agency adjudications: the Legalistic model and the Managerial model. The Legalistic model is defined by its three central features: process-oriented participation, juridical decisionmakers, and adjudicator independence. The Managerial model is defined by three competing features: result-oriented participation, expert decisionmakers, and adjudicator accountability. By comparing the central elements of each model, this Chapter achieves parallel construction and captures the basic theoretical divisions in the field of administrative adjudications.

Chapter 3 brings the Legalistic and Managerial models into focus by examining and classifying federal agencies. This Chapter will define the actual rules and processes
that characterize the Managerial and Legalistic models. Examples from specific federal agencies will be used to identify them as Legalistic or Managerial agencies. Because many federal agencies draw from both models when structuring their adjudications, this Chapter sets out the parameters for a “spectrum” of administrative adjudications and identifies a methodology for giving each agency a “Judicialization Score” and placing the agency on the Legalistic/Managerial spectrum.

Chapter 4 outlines an empirical study and identifies three performance measures – the appeal measure, the affirmance measure and the processing measure – to serve as the basis for the analysis. The appeal measure (the rate at which decisions are appealed to a higher agency authority) and the affirmance measure (the rate at which decisions are affirmed by a higher agency authority) were chosen because it is common for legal scholars and practitioners to evaluate the quality of a decisionmaker’s ruling by referring to the rate at which rulings are challenged and affirmed. The processing measure (the time and cost of an adjudication) was chosen because political scientists tend to measure performance in terms of costs and efficiency. This study tests the conventional wisdom that Legalistic agencies will, all other things being equal, perform better on each of these measures than Managerial agencies. These performance measures prompt three research questions:

1. Does an agency’s location on the Legalistic/Managerial spectrum affect the agency’s appeal rate?

2. Does an agency’s location on the Legalistic/Managerial spectrum affect the agency’s affirmance rate?
(3) Does the choice of administrative procedures affect the time it take for an agency to process an adjudication of the cost of an adjudication?

The last two chapters execute this comparison study by examining two sets of federal agencies. The agencies in each “pairing” are similar in terms of structure and function, yet are located on opposite ends of the Legalistic/Managerial spectrum. Chapter 5 pairs the Social Security Administration and the Department of Veterans Affairs, while Chapter 6 pairs the National Labor Relations Board and the Equal Employment Opportunity Commission. Both chapters begin with a detailed examination of the administrative and adjudicative processes of the paired agencies. Based on this examination, I will develop a number of null hypotheses and make predictions based on where the agency falls on the Legalistic/Managerial spectrum. Finally, data gathered from the agencies on appeals, affirmances, time, and cost will be presented and analyzed.

The results of the empirical study are mixed. On the one hand, the results provide some basis to challenge the conventional wisdom that Legalistic agencies will always perform better than Managerial agencies when comparing appeal, affirmation and processing measures. On the other hand, the results do not uniformly support the alternative theory’s prediction that Managerial agencies are more likely to maximize these performance measures than Legalistic agencies. By developing a strong theoretical alternative model of administrative adjudication, however, this dissertation contributes to the field in three important ways. First, the basic Legalistic/Managerial framework of agency adjudications provides a rich alternative model and a basis for
critiquing and challenging the dominant adjudicatory model. Second, the
Legalistic/Managerial spectrum provides a coherent system for categorizing the many
different types of agency adjudications. Finally, the data results challenge the
conventional wisdom that the Legalistic model will always perform better with respect
to performance measures, and instead indicate that the Managerial model is more
appropriate for certain agencies while the Legalistic model is more appropriate for
others. These conclusions provide the basis for new avenues of empirical study that can
explore and refine the nature of the relationship between agency performance measures
and the two basic models of administrative adjudication.
PART ONE: HISTORICAL OVERVIEW, LITERATURE REVIEW & THEORY

CHAPTER 1: THE TRANSFORMATION OF ADMINISTRATIVE ADJUDICATIONS

This chapter will trace the events and trends that have influenced federal agency adjudications in the context of administrative law. While much has been written about the development of the legal process and theories of adjudication in traditional federal courts and state courts, the focus here will be on adjudicatory decision-making in the administrative context. Therefore, this section will draw mostly on events, governmental entities, associations, and scholarship that relates to administrative adjudications, and refer to civil and criminal courts only when directly relevant. This section follows the transformation of administrative adjudications through four stages: (1) the common law era, (2) New Deal transition, (3) APA compromises and the age of proceduralism, and (4) modern administrative adjudications and new critical thinking.

This account is not meant to be a complete and exhaustive historical account of the period. Rather, the purpose is to provide the historical and conceptual roots for the overarching theoretical frameworks that will be developed in Chapter 2. Through a review of the landmark cases and scholarly works, this chapter will trace the conceptual debates and compromises that occurred during each of the four stages. A goal of this chapter is to explain the development of the current prevailing norms of administrative adjudication, and the development of the current criticisms of those norms. The following discussion thus provides both a backdrop for discussing adjudications in the
modern setting and helps form the basis for the theoretical framework in the following chapter.

**Stage I: The Common Law Era**

**A. Administrative Adjudications: a “Foreign” Idea**

The notion of a “common law” and a “constitutional law” are woven into the fabric of the American system of government. Common law practices were imported from the British tradition, and states relied on common law adjudications to settle disputes long before the ratification of the United States Constitution. After Congress was given the power to establish a system of federal courts in 1789, a “federal common law” – or what may be called constitutional law – developed in the federal courts. However, it was not until the late nineteenth century that the notion of uniquely “administrative adjudications” began to take shape. This section will discuss the development of administrative adjudications and its place alongside constitutional and common law adjudications.

In the late 18th and early 19th centuries, American courts relied primarily on a variation of the British common law system as a means to adjudicate disputes in society. Organized around the general categories of property, tort, and contract, common law litigation was generally understood as a process for resolving disputes among private parties that could not be privately settled (Cohen, 1933). Consistent with the prevailing view that the governmental powers should be limited, common law courts clarified the meaning of the law and then retreated so that parties could privately order their affairs.
The primary reliance on common law courts to govern society did not mean that there was no administrative activity. To be sure, within a decade of the effective date of the U.S. Constitution, Congress had created a robust administrative system (Mashaw, 2006). The First Congress established the Post Office, the Customs Service, and the first Bank of the United States, and enacted legislation on patents and copyrights. As Mashaw points out, these organic statutes were neither self-executing nor so detailed as to preclude significant administrative discretion. In fact, these statutes specified few procedures that the agency was obligated to follow.\footnote{For example, the first patent law allowed patents for “useful and important” inventions but did not define these terms and did not specify procedures that the Patent Office must use in making the determination. \textit{See} Act of April 10, 1790, 1 Stat. 109.} From the earliest days of the Republic, Congress delegated administrative authority, armed administrators with coercive powers, and established internal systems to promote managerial and bureaucratic accountability.

But disputes arising out of the administration of pension benefits, tax collection, and land patents were not resolved through administrative adjudications. Rather, these disputes were resolved within the traditional common law court system based on the application of common law principles. “Congress seemed to have presumed that officers could and would be sued in state courts in common law actions and that they would be pursued through \textit{qui tam} actions as well” (Mashaw, 2006: 1321). Thus, a party wishing to challenge an administrative action would file a common law claim (most likely based on common law remedies such as trover, detinue, assumpsit, or
replevin) against the offending government official sued in his capacity as a private person (Mashaw, 2006; Jaffe, 1964).

Even in those few circumstances where Congress determined that a dispute should be ultimately determined by an administrator, federal legislation typically required that a federal court preside over the fact-gathering portion of the adjudication. For example, a 1790 statute providing for the mitigation or remittance of tax penalties allowed persons seeking relief to petition the judge in the district where the fine had been levied. The judge held a hearing and created a record, but did not decide the case. Instead, the judge transmitted the record to the Secretary of the Treasury, who was given the power to mitigate or remit if “in his opinion the [fine] was incurred without willful negligence or any intention of fraud” (Mashaw, 2006: 1332). Rather than create a new corps of administrative hearing officers, Congress instead relied on common law courts to adjudicate administrative disputes. The dominating influence of the common law model in the 18th and early 19th centuries forestalled the creation of uniquely administrative adjudication to resolve disputes.

Contrary to the English and American systems, Continental European countries relied on a public law system in the administration of its duties. The French had developed a system of administrative law courts with their own processes that were independent of common law courts, and these courts provided a particularly stark foil for the Anglo-American system. Early scholars believed that administrative agencies

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2 An Act to Provide for Mitigating or Remitting the Forfeitures and Penalties Accruing Under the Revenue Laws, in Certain Cases Therein Mentioned, ch. 12, § 1, 1 Stat. 123, 123 (1790).
were foreign phenomena that ran contrary to the spirit of Anglo-American common law systems, and denied that administrative law had any place in English-speaking legal systems. Oxford University Professor A.V. Dicey argued that the spirit of England’s common law system was antithetical to the growth of administrative action that was occurring in France. In his book *Introduction to the study of the law of the Constitution* published in 1885, Dicey proudly pointed out that “*droit administratif*,” the French phrase for its administrative system, was an expression that did not have an equivalent in the English language (Dicey 1908). Dicey wrote that the words “administrative law” were “unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation.”

Dicey identified “the rule of law” as a central principle in the common law, and associated this principle with judicial supremacy in determining rights and responsibilities. Dicey posited an irreconcilable conflict between the traditional ideal of the rule of law and the emergence of a modern system of administrative regulation (Dicey, 1908; Horwitz, 1992). To preserve the rule of law, Dicey believed that citizens must be able to bring suit against officials in common law courts and he refused even to acknowledge the notion of an “administrative law.” Thus, one of the earliest pieces of legal scholarship on the concept of “administrative law” may be most accurately described as an exercise in denial. Ironically, even as Dicey was positing a gap between the common law and an administrative (or public) law, the United States Congress had already started creating agencies with the power to conduct administrative adjudications.

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3 Dicey added, “the want of a name arises at bottom from our nonrecognition of the thing itself.”
B. Toward Administrative Adjudications

After the Civil War and through the Reconstruction era, the United States had neither bureaucratic institutions nor a concentration of authority at the national center of government. Common law courts were increasingly called upon to fill the “void in governance” (Skowronek, 1982). In his study on the new American state, Skowronek explained that the expansion of the power of the judiciary in the late nineteenth century was a natural response to the demands for authority in the new economy of the industrial age (Skowronek, 1982: 41). With lawyers as power brokers, the judiciary articulated the principles that structured the relations between the state and society, and managed conflicts as they arose. But as society became more complex, it became increasingly clear that the judiciary was ill-suited to manage the new economy. The judiciary’s role began to give way to a patchwork of bureaucratic agencies and a new “administrative law.”

The Supreme Court helped to carve out a place for administrative decision-making when it declined to impose judicial procedures that would constrain the discretion of civil servants implementing federal statutes. The first Supreme Court case interpreting the federal due process clause, Murray’s Lessee v. Hoboken Land & Improvement Co.,\(^4\) was a suit in which the Solicitor of the Treasury issued a distress warrant to seize the property of a collector of customs. The Treasury Department had determined that the collector was more than $1.3 million in arrears, and seized the property without providing the collector an opportunity for a hearing. The collector

argued that due process required notice and a hearing before he was deprived of the property. The Court determined that the Treasury Department’s action was consistent with the statute and that Congress had the authority to permit this action without a prior judicial hearing. The Court held that this administrative action, undertaken without judicial intervention or the panoply of judicial procedures, did not violate the Due Process Clause.

In 1887 Congress created the Interstate Commerce Commission (“ICC”), which is widely considered to be the first “modern” administrative agency and which became a model for other regulatory agencies in the burgeoning administrative state. The Hepburn Act of 1906, the Valuation Act of 1913, the Federal Trade Commission Act of 1914, the Federal Water Power Act of 1920, the Shipping Act of 1916, and the Grain Futures Act of 1922 together dramatically increased the adjudicative functions of federal agencies in the thirty years after Dicey declared administrative law a foreign idea.

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5 In a series of articles, Mashaw attacked the “governing myth” that the creation of the Interstate Commerce Commission (“ICC”) in 1887 was the starting point for administrative law in the United States (Mashaw 2006, 2007, 2008). Mashaw “redisCOVERS” the first one hundred years of administrative law by broadening the definition of “administrative law.” Mashaw acknowledges, however, that “given (1) the lack of systemic procedures for either rulemaking or administrative adjudication, (2) the ambiguous nature of ‘bureaucracy’ in an administration often peopled by part-time officials who were paid by fees and commissions, and (3) the dominance of damage actions against these ‘officers’ as the modality of ‘judicial review,’ one might sensibly object to the use of ‘administrative law’ as a descriptor” (Mashaw, 2007: 1646). Mashaw persuasively makes the case that this early activity is properly within the domain of administrative law. However, the ICC may still be properly labeled the first “modern” administrative agency (Rabin, 1986; Stillman, 1987), and certainly the first agency to conduct administrative adjudications of the sort that will be examined later in this thesis.

6 Some statutes, such as the Hepburn Act and Valuation Act, authorized the use of ICC examiners. Other statutes, such as the Federal Water Power Act, provided that the Federal
Legal scholars bred in the bone of the common law had a strong negative reaction to the development of this new administrative law system. Opponents turned back to Dicey’s “rule of law” concept, and re-cast Dicey’s formulation as both an institutional principle and a procedural principle (Ernst, 2008). Under the institutional principle, an administrative agency action that affects the rights of an individual must be subject to de novo review by judges trained in the basics of common law. Under the procedural principle, which is the focus of this chapter, agencies had to adopt procedures that mimicked the ordinary legal manner of common-law courts.

Some skeptical lawyers of the era took this procedural Diceyism argument to its logical extreme. At the turn of the century, arguments against the legitimacy of agency adjudications rested upon a notion of “procedural tyranny” (Verkuil, 1978). Arguments based on procedural tyranny, according to Verkuil, were a response to the shift in decision control from the judiciary to administrative boards and commissions. The administrative structure itself became the target of this rhetorical attack on the grounds that it deprived individuals of their procedural and constitutional right to a hearing before a judicial tribunal (Verkuil, 1978).

Notwithstanding procedural Diceyism and procedural tyranny arguments, federal courts at the turn of the century began to explicitly recognize the legitimacy of agency adjudications. Federal courts promoted the integrity of the administrative process, in part, by embracing the notion that an individual could not seek relief in a

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Power Commission should use the same “procedure and practice in fixing and regulating the rates, charges, and practices” as used by the ICC.
common law court prior to the completion of administrative proceedings. This concept, which would later become known as “exhaustion of administrative remedies,” was applied to agency adjudications in a number of different contexts. In *Dundee Mortgage Trust Inv. Co. v. Charlton*, 7 for example, the Circuit Court for the District of Oregon declined to grant an injunction because the plaintiff had not taken an appeal from a tax assessor to a state board. In *United States v. Sing Tuck*, 8 a deportation case, the Supreme Court denied a petition for habeas corpus because the petitioner failed to appeal to the Secretary of Commerce and Labor as required under the statute. In *Standard Scale & Foundry Co. v. McDonald*, 9 a plaintiff sought to bypass the board of examiners in the Patent Office in favor of adjudication of a patent in federal court. The Circuit Court for the Western District of Missouri explained that if the plaintiff had filed an application with the Patent Office in the first instance, the matter would be referred to a designated board of directors “who, by reason of their learning and experience in such matters, are experts, presumably peculiarly qualified for determining whether the given device possesses the requisite qualities of an invention.” 10 Because the plaintiff never submitted his claim to the Patent Office, the court found that the suit was “premature.”

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7 *Dundee Mortgage Trust Inv. Co. v. Charlton*, 32 Fed. 192 (C.C.D. Ore. 1887)).
9 *Standard Scale & Foundry Co. v. McDonald*, 127 F. 709, 710 (C.C.W.D. Mo. 1904).
10 *Id.* at 710.
But it was not until *Chicago B. & Q. Ry v. Babcock*\(^\text{11}\) that the Supreme Court finally laid the procedural Diceyism and procedural tyranny arguments to rest by sanctioning the agencies’ adjudicatory powers. In that case the Court rejected a challenge by railroad plaintiffs to property tax assessments by the Nebraska Board of Equalization. Writing for the court, Justice Holmes reasoned that the Board in Nebraska was created for the purpose of using its judgment and functioned as the “ultimate guardian of certain rights.” Rather than “attack in another proceeding the judgment of a lay tribunal,” Justice Holmes suggested that the proper course was for the railroads to return to the Board and request action on the tax assessment. It was this decision by Justice Holmes that fortified the legislature’s power to convert common-law claims into administrative matters, and ultimately “dissolved the per se notion of administrative inadequacy” (Verkuil 1978: 263).

Although opponents of administrative adjudications had little choice but to accept the realities of a new method for allocating property and resolving disputes, there remained strong concern that administrative agencies were usurping the role of the courts by acting as fact-finders and decisionmakers. A movement developed to rein in the agencies and formulate proposals to place lawyers and legal procedures at the heart of the administrative process. It is possible to characterize the reaction of legal scholars as a mixture of two sentiments: a consensus that the development of an administrative process was inevitable, and a fear that the development of a uniquely administrative process would be problematic for the legal profession. In Elihu Root’s 1916

presidential address to the ABA, he recognized the manifest inevitability of administrative adjudications. Citing this inevitability, he called upon the members of the Bar to assist in the development of the administrative process “whether we approve theoretically or not” (Root, 1916: 358-369). However, Root also had a fear of an unstructured administrative process: “Yet the powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers, these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined” (Root, 1916: 368-69). Writing in 1917, A. A. Berle Jr. recognized that many were not comfortable with the idea of administrative agencies: “Already there has arisen the fear that public bodies, set to solve given problems, may develop into tyrannous institutions, amenable to no law and subject only to the doubtful safeguards of political action” (Berle, 1917: 438). Yet Berle argued for the systematic study of administrative agencies as unique institutions with their own process. He suggested that administrative law is not a supplement to constitutional law, but rather a “redivision of the various bodies of law which previously have been grouped under the head of constitutional law” (Berle, 1917: 438). Also signaling this mixture of inevitability and cautious apprehension, Rosenberry (1929) pragmatically described the development of administrative process: “Administrative tribunals, often spoken of as bureaus, boards, or commissions, did not come because anyone wanted them to come” (Rosenberry, 1929: 36). However, he acknowledged that “[i]n the end a much better result would be
attained if the inevitability of the process were frankly recognized and an intelligent
effort made to direct and wisely circumscribe the development of this branch of our
law” (Rosenberry, 1929: 36).

C. Developing the Notion of a Uniquely Administrative
Adjudication Process

As courts slowly created a space for administrative adjudications within the tri-
partite system of government, the concept of “administrative procedures” to govern the
administrative process began to take shape in the American legal landscape (Goodnow,
1905). In the 19th and early 20th centuries, most courts were divided into courts of
“equity” and courts of “law.” Historically, suits at equity had been marked by a variety
of factors including, but not limited to, informality, procedural flexibility, relaxation of
evidentiary rules, unity of fact-finder and law judge, a global perspective of the issues,
the accomplishment of justice, exercise of discretion, and creative remedies (Laycock,
1993). The administrative system borrowed from the principles of equitable decision-
making, and these attributes became hallmarks of administrative adjudications.

By 1920, two commissions were performing a significant number of
adjudications: the Interstate Commerce Commission (“ICC”) and the Federal Trade
Commission (“FTC”). At the time there were very few exogenous restrictions placed
on agencies. The Congressional statutes creating the ICC gave the agency broad
discretion regarding the scope of its inquiries and the process of its adjudications.
Regarding the ICC’s investigative activities, the Commission was given the authority to
obtain all information that the investigators believed “necessary to enable the
Commission to perform the duties and carry out the objects for which it was created.”12 In responding to a complaint that a carrier had violated the law, the ICC had the statutory authority to “investigate the matters complained of in such a manner and by such means as it shall deem proper.”13 The act of holding hearings and taking evidence was described in very general terms: “The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” Regarding the FTC’s investigative activities, FTC hearing examiners often received their assignments from the same official who directed the investigations (Musolf, 1953). In a number of formal proceedings before the FTC’s commissioners, agency counsel, rather than the examiner, wrote the factual report that was eventually submitted to the Commission.

Prominent thinkers began to defend departures from Dicey’s “rule of law” concept. During his tenure as ICC Chairman between 1887 and 1891, Thomas M. Cooley argued that courts should not intervene in administrative questions. Under Cooley’s direction, the ICC published its Fourth Annual Report of the Commission challenging the idea that “due process of law” meant judicial process (ICC, 1890). The Report asserted that courts were ill-equipped to decide complex issues relating to railroad rates and that these decisions were more appropriately made “in the exercise of reasonable discretion by the managing powers or by the public authorities in reviewing their action” (ICC, 1890: 19-20). The Report criticized courts for invoking the concepts

of “rule of law” and “judicial due process” as a vehicle for asserting jurisdiction on regulatory issues: “[t]his is an endeavor by the mere use of words to confer jurisdiction upon the courts where the substance is altogether wanting.”

More than ten years before he was to join the Supreme Court, Felix Frankfurter (1926-27) acknowledged the need for administrative adjudications and argued for a system of administrative law that differed from the traditional legal model. Contemplating the age-old debate between rule and discretion, Frankfurter noted how important this debate was in the administrative context. Since federal agencies apply malleable legal standards such as “unreasonable rates,” “unfair methods of competition,” and “undesirable residents,” there is necessarily an element of subjectivity and discretion in the application of administrative law. Frankfurter believed that such discretion by federal agencies could work with the appropriate safeguards. These safeguards, he wrote, “largely depend on a highly professionalized civil service, an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure (always remembering that ‘in the development of our liberty insistence upon procedural regularity has been a large factor’), easy access to public scrutiny, and a constant play of criticism by an informed and spirited bar” (Frankfurter, 1926-27: 618).

Similarly, William Robson, in his seminal study of the British administrative system in *Justice and Administrative Law*, stated:

I am convinced that administrative tribunals have accomplished, and are accomplishing, ends which are beyond the competence of our courts of law as at present constituted. Furthermore, those ends seem
to me socially desirable ones which compare favorably with the selfish individual claims based on absolute legal rights to which the formal courts are so often compelled to lend an ear….I believe that administrative justice may become as well founded and broad-based as any other kind of justice now known to us and embodied in human institutions (Robson, 1928: 324).

As Congress created new regulatory programs, and the jurisdiction and responsibilities of these administrative agencies grew, it became clear that the government needed competent and trained individuals to administer these programs and resolve disputes. In 1911, Frederick W. Taylor published the influential work “The Principles of Scientific Management” (Taylor, 1911). Taylor sought to create a body of scientific principles for business that would help managers and workers attain their organizational objectives in the best way possible. Taylor’s innovations became a central part of the progressive era and the movement to reform the burgeoning civil service. Taylor’s strong influence in the governmental sector could be seen in the widespread use of tests for hiring and promotion, position descriptions, and employee evaluations (Frederickson and Smith, 2003). Taylor’s idea of a “scientific management” fostered the notion that civil servants must have certain expertise and must be competent to make critical decisions and properly adjudicate issues as they came before the agency.

Commentators rejecting a lawyer-focused system were often optimistic about the civil service. John Dickinson\textsuperscript{14} questioned the wisdom of relying exclusively on lawyers and judges to make decisions in the emerging administrative state:

\textsuperscript{14} Dickinson was a Lecturer in the Department of Government at Harvard when he published \textit{Administrative Justice and the Supremacy of Law}. 

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It would be unfortunate, if it were possible, for men to commit all of their decisions to minds which run in legal grooves. The needs of the moment, the circumstances of the particular case, all that we mean and express by the word ‘policy,’ have an importance which professional lawyers do not always allow them (Dickinson, 1927: 150-1).

Dickinson argued that there are some regulatory matters that involve discretion and cannot be reduced to a set of hard and fast rules, and that a technical agency that combines legislative, executive, and judicial powers may be the most able to resolve these matters. “If…we…imply that the main purpose of the technical agency is to adjudicate according to rules, will we not have abandoned the characteristic and special advantages of a system of administrative justice, which consists in a union of legislative, executive, and judicial functions in the same body to secure promptness of action, and the freedom to arrive at decisions based on policy?” (Dickinson, 1927: 156).

These contributions show that by the 1920s, influential legal commentators in America and Britain had recognized the notion of a uniquely administrative adjudication process, outside the realm of the common law and necessary for the development of modern civil society.

**Stage II: Adjudications in the Modern Era**

Although the power of national administrative agencies did not originate in the New Deal (Skowronek, 1982), the New Deal was a critical turning point in the development of the American state and the administrative apparatus of government. The swift expansion of federal government power that accompanied the New Deal had a dual effect on the development of an administrative process for adjudications. First,
the escalation in the number and types of government adjudications heightened the sense of urgency regarding administrative reform. The subject of administrative process drew the attention of the finest legal scholars and social scientists. Second, the expansion of government activity in business areas raised the stakes of administrative reform and self-interested groups became major players in the debate. The heightened sense of urgency regarding administrative reform brought so many groups with agendas into the mix that any notion of consensus dissipated. In 1927 Felix Frankfurter observed, “Administrative Law is hardly yet given de jure recognition by the English-speaking bar” (Frankfurter, 1926-27: 615). Yet, by the mid-1930s, administrative law became the “major preoccupation of legislators, law teachers, bench, and bar” (Isenbergh, 1941).

What started in the late 19th century as a denial of administrative law in the common law era and then in the early 20th century developed into an effort to legitimate the development of administrative procedures eventually progressed into a struggle over control of the administrative process. On one side were partisan advocates of a largely new governmental form with its own set of mores and procedures. On the other side were those unwilling to expand the power of agencies they regarded as constitutional misfits and usurpers of the common law courts. In the battle over the administrative adjudications, five important players emerged: (1) the American Bar Association; (2) scholars in the Progressive tradition; (3) the United States Congress; (4) the Attorney General’s Committee on Administrative Procedure;
and (5) Wilsonians and the President’s Committee on Administrative Management. This section will examine the contributions of these players in turn.

A. The American Bar Association

Members of the American Bar Association were particularly hostile to the nontraditional administrative legal system rising up as a result of New Deal programs. The ABA’s “Special Committee on Administrative Law,” which was initially proposed by Louis Caldwell in 1932 to deal with problems arising out of his practice before various older agencies (Caldwell, 1945), became a platform for the ABA to voice its opposition to New Deal programs. The Committee’s stated mission was to “study the practical operation of the various types of administrative machinery…to the ends that generally-recognized defects may be remedied and avoided in the future and that generally-recognized principles may be given effect” (ABA, 1933: 411-12). If their mission statement did not betray their hostility toward the machinery of public administration, the reports of the committee certainly clarified the ABA position.

In its first formal report issued in 1934, the Committee recognized the “evils notoriously present in certain of the judicial type of such tribunals,” and went on to say that, “it is not too far to state that the judicial branch of the federal government is being rapidly and seriously undermined and, if the tendencies are permitted to develop unchecked, is in danger of meeting a measure of the fate of the Merovingian kings” (ABA, 1934: 549). This type of rhetoric appeared throughout the 1934 Report, which made it an easy target for those seeking to caricature the ABA position on administrative law (White, 2000). However, the Report did contain serious efforts to
restructure the administrative process. Specifically, the Report centered on the separation of powers issue and the ABA’s reforms demonstrated a desire to strictly divide the adjudicatory functions from the legislative and executive functions in the agency. The Committee advocated that the judicial functions of the agency be placed “(a) preferably in a federal administrative court with appropriate branches and divisions including an appellate division or, failing that, (b) in an appropriate number of independent tribunals” (ABA, 1934: 539).

The leaders of the Special Committee on Administrative Law strongly defended traditional adjudication in the courts against the new administrative tribunals (Ernst, 2002). Louis Caldwell, who served as the first chair of the Committee from May 1933 through July 1935, accepted the need for delegation to the new agencies, but considered practice before them a kind of “haphazard bedlam.” Colonel O.R. McGuire, the second chair from 1935 to 1937 (and again from July 1938 to 1941), invoked the virtues of the great English common lawyer Sir Edward Coke and warned that “the ethos or spirit of our people” was about to be “broken under the wheels of a vast bureaucratic Juggernaut.” In his report for the committee in 1938, Roscoe Pound launched an assault on what he called the danger of administrative absolutism (Pound 1941: 269). Under Pound’s leadership the ABA released a report comparing the runaway administrative state with the Soviet Union dictatorship:

Much of the case for administrative absolutism, a doctrine which has made great headway especially in American institutions of learning with which, therefore, the legal profession must sooner or later contend, rests upon a use of ‘administrative law’ in a sense quite repugnant to what ‘law’ had supposed to be. . . . Those who would
turn the administration of justice over to administrative absolutism regard this meaning as illusory. They expect law in this sense to disappear. This is a Marxian idea much in vogue now . . . . (ABA, 1938: 339-40).

In a later text, Pound continued to provide the ABA with the theoretical grounds for arguing that administrative agency adjudications should be conducted in the same manner as adjudications in federal courts. Pound contrasted administrative law, which he said subordinates individual to public interests, with the common law which coordinates individual interests by treating individuals as equal. In a stinging critique of administrative adjudications, Pound concluded: “The administrative tribunals are dispensing subordinating law which enables them to put a higher value on one side than on the other and so authorizes them to ignore the other or to give it a merely formal hearing” (Pound, 1941a: 137).

Finally, in his review of the era, Verkuil (1978) identified two more practical grounds upon which the ABA most likely opposed a uniquely administrative process. First, members of the Bar recognized that the adversary system – with its opportunity for jury trials and other procedural protections – meant that the lawyers external to the agency had a significant amount of control over any legal proceeding. In contrast, the burgeoning system of administrative tribunals offered the decisionmaker significantly more control over the process. Second, since the majority of the federal judiciary harbored antipathy toward government programs, federal courts provided a favorable environment for decisions.
Regardless of the motivation, the ABA’s theoretical and practical reasons coalesced and the group became a formidable lobbying group opposing the development of an alternative system for resolving administrative conflicts.

B. Progressive Legal Scholars

Legal scholars in the progressive tradition justified the existence of administrative agencies and their procedures by focusing on their “expertise.” In the period leading up to World War I, progressive intellectuals and reformers dominated public discourse in the United States. White observed that Progressives “sought to expand the public sector of government in order to substitute decision-making by an educated and efficient group of impartial administrators for decision-making by partisan representatives of special interest groups” (White, 1978: 103). Legal scholars drew from the progressive tradition in order to legitimize administrative law and procedure.

During his time as Dean of Harvard Law School, James Landis (1938) emerged as a staunch defender of a model of administrative process built on Progressive ideals. Landis resisted efforts to analogize federal agencies to judicial or legislative bodies, and instead argued that the agencies represented a unique amalgam of governmental powers that was needed to resolve the problems of a complex society. As the ABA launched its attack on the existing administrative process, Landis articulated perhaps the most persuasive defense of entrusting expert administrators with decision-making power. Landis argued that the expertise needed for competent regulation cannot come from judges or independent decisionmakers. Such expertise “springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after
year, to a particular problem” (Landis, 1938: 23). In his justification for a uniquely administrative process, Landis wrote, “The administrative process is, in essence, our generation’s answer to the inadequacy of the judicial and legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power.”

Landis compared the development of the administrative state in the twentieth century with the rise of the system of equity in the seventeenth century. In the seventeenth century, Landis argued, many people opposed the rise of equity courts because they seemed threatening to the pre-existing structures of law. Landis believed that people fear the rise of an administrative process for the same reason that they feared the rise of equity courts: they both place “alien hands upon the sacred ark of the covenant” (Landis, 1940: 731). By looking beyond the parochial prejudices of legal formalism, Landis argued, the rise in administrative law can be seen as a response to the popular desires of the citizenry for more “knowledge, wisdom and expertness” in the handling of claims.

Similarly, Columbia Professor Walter Gellhorn argued against the notion that “the capacity to govern justly lies only beneath the black robes of the judges, and that to them, the wise and good fathers, we must turn hopefully for true guidance through the mazes of the law” (Gellhorn, 1940: 23). Gellhorn argued that a fear of entrusting responsibilities to the administrative agencies not only produces poor government, but ultimately produces chaos and destroys faith in government itself. Like other scholars
in the Progressive tradition, Gellhorn was critical of the claim that only judges should make decisions and opposed attempts to decentralize agency decision-making.

Although Landis and Gellhorn embraced the progressive tradition, they were both lawyers who had received training in American law schools. It is likely that the expert administrator they had in mind was a lawyer – trained as a policy scientist and an expert at using other experts.

C. Legislators

By the mid 1930s, the debate over administrative reform between scholars and interest groups spilled over into Congress. Responding to pressure from the ABA, in 1936 Congressman Emanuel Celler (D-NY) and Senator Mills Logan (R-KY) introduced a bill embodying the spirit of the ABA position. The Celler-Logan Bill sought to create a separate administrative court by consolidating existing specialty courts. The Bill’s authors wanted to stem the trend of combining both policy-making powers and adjudicatory powers in a single institutional structure: “It is precisely this forbidden commingling of the essentially different powers of government in the same hands that is today the identifying badge of an administrative agency.”15 The Celler-Logan Bill also would have brought agency jurisdiction of licenses under the purview of an administrative court staffed by lawyers or judges with extensive legal backgrounds. In contrast to those in the Progressive tradition, the Bill’s authors strongly favored decisionmakers with legal backgrounds over decisionmakers with special knowledge or social science backgrounds.

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The Celler-Logan Bill died in committee in both the House and Senate. In his historical review of the period, Shepherd (1996) gives several explanations for why the Bill failed in both chambers. First, Congress and the public still supported Roosevelt and the New Deal and assaults of the administrative process were closely connected to assaults on the New Deal programs themselves. Second, administrative reform was not an issue on which representatives were willing to expend their scarce political capital. Finally, conservatives in Congress were too few to demand compromise from the strong liberal majority. Despite these failures, the Republicans and conservative Democrats did not give up on the issue. Rather, the issue remained on the back burner until the prevailing political winds changed and the right opportunity arose.

After Roosevelt’s court-packing scheme ended in embarrassment for the administration in 1937, and the American economy began to dip into recession in 1938, the overwhelming support for the Roosevelt administration and New Deal programs began to wane. Republicans and conservative Democrats in the late 1930s saw an opening and once again began to push for administrative reform. In 1939, Representative Francis Walter and Senator Mills Logan introduced similar bills in both chambers, which together became known as the Walter-Logan Bill.16 On May 17, 1939, the Senate Judiciary Committee issued a favorable report on the bill. The report, which was delivered by the bill’s sponsor Senator Mills Logan, indicated that the basic purpose of the bill was to reverse the “drift into totalitarianism” that occurs when

executive branch agencies are allowed to subsume the legislative and judicial branches of government.\(^{17}\)

Contemporary commentators (Verkuil, 1978; Shepherd, 1996) have called this bill the “high water mark of judicialization” and the result of an historical period during which enthusiasm for strict administrative procedural reform would peak.” The Walter-Logan Bill would have provided for the elimination of agencies’ informal powers and instead required adjudication that adopted many of the norms and procedures of the federal court system. The bill designated the U.S. Court of Appeals for the District of Columbia to review agency adjudications and rulemakings and establish “intradepartmental review boards” to regularize decision-making within the agencies themselves (Ernst, 2002).

The Walter-Logan Bill moved swiftly through Congress and was supported by a strong bipartisan coalition. However, as the bill was hostile to the Roosevelt’s New Deal vision, Roosevelt was accordingly hostile towards the bill. In vetoing the bill,\(^{18}\) Roosevelt wrote:

> a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the courts, in which lawyers play all the speaking parts, to the simple procedure of administrative hearings which a client can understand and even participate in. Many of the lawyers prefer that decision be influenced by a shrewd play upon technical rules of evidence in which the lawyers are the only experts, although they always disagree. Many of the lawyers still prefer to distinguish precedent and to juggle

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leading cases rather than to get down to the merits of the efforts in which their clients are engaged. For years, such lawyers have led a persistent fight against the administrative tribunal….The Bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation. . . .

D. The Attorney General’s Committee on Administrative Procedure

As the ABA became increasingly vocal about administrative reform, other actors took their place on the political stage to help shape the debate. In 1939, President Roosevelt asked his Attorney General Frank Murphy to appoint a Committee to investigate “the need for procedural reform” and to make a “thorough and comprehensive study” of then “existing practices and procedures, with a view to detecting any existing deficiencies and pointing the way to improvements” (AGCAP, 1941). The chairman of the Committee was the highly respected Dean Acheson and included law school deans, a federal judge and other scholars. One reason Roosevelt vetoed the Walter-Logan bill was because the Attorney General’s Committee on Administrative Procedure (“AGCAP”) had not yet released its report and he did not believe the matter should be determined before AGCAP’s work was completed.

Chapters IV and V of the report found that most of the controversy over administrative procedure centered on administrative adjudications. The report was notable because it was one of the first accounts of the different ways in which agencies conducted their formal adjudications. AGCAP found that most agencies conducted evidence gathering in front of a board of individuals or a single officer that agencies called either trial examiners, presiding officers, district engineers, deputy
commissioners, or registers, but that each agency had its own hearing methods, initial
decision methods, and internal procedural structure.

The AGCAP report’s most significant recommendation was to build on the
existence of trial examiners within each agency: “hearing commissioners should be a
separate unit in each agency’s organization. They should have no functions other than
those of presiding at hearings or pre-hearing negotiations and of initially deciding the
cases which fall within the agency’s jurisdiction” (AGCAP, 1941: 50). However, the
Committee went on to make specific suggestions about the type of decisionmakers that
each agency should employ. The Committee recommended that each agency establish a
system of hearing examiners, trained as lawyers, to handle all on-the-record
adjudications, and that these examiners be appointed for seven-year terms and receive a
high salary. The adjudication process should be led by an official “who shall command
public confidence both by his capacity to grasp the matter at issue and by his
impartiality in dealing with it . . . . these officials should be men of ability and prestige,
and should have a tenure and a salary which will give assurance of independence of
judgment” (AGCAP, 1941: 43, 46).

The Committee further asserted that hearings before administrative agencies
must constitute an “objective appraisal of facts and the furtherance of public duty”
(AGCAP, 1941: 43). Although the Committee opposed enacting an “elaborate code” of
procedural rules, the Committee argued that the opportunity of the parties to present
arguments must be safeguarded and standards of fair procedure must be followed.
E. Wilsonians and President Roosevelt’s Committee on Administrative Management

Political scientist Woodrow Wilson was among the first scholars to comment upon administration by government agencies. In “The Study of Administration,” Wilson (1941) put forward a theory of public administration based on a rigid dichotomy between the sphere of politics and the sphere of administration. Wilson’s theory grew out of the Constitution’s separation of legislative and executive powers, and he argued that politics should not meddle in administration, and administration should not meddle in politics. Wilson sought to develop a “science of administration” that could improve the structure and process of government agencies by focusing on the core values of effectiveness, efficiency, and economy. Wilson’s theories had a cascading influence on the debates over administrative law and adjudications. As described below, Wilson’s theory (1) provided the theoretical foundation for efforts to incorporate the principles of scientific management in politics, which in turn (2) led leading scholars to argue that scientific management principles, rather than law, should serve as the basis for administration, and finally culminated in (3) the articulation of a “strong executive” thesis of administration and a recommendation that independent appellate boards preside over adjudications challenging administrators’ decisions.

First, Wilson’s notion that there is a separation of the political sphere and the administrative sphere created room for Progressives to carve out a role for science in politics. Richard Stillman has explained that the dichotomy between politics and administration “became an important instrument for Progressive reforms, allowed room
for a new criterion for public action, based on the insertion of professionalism, expertise, and merit values into the active direction of government affairs” (Stillman, 1991: 107). As the scope and powers of the federal government increased, the core principles of the scientific management movement, which was originated in the business sector by Frederick Taylor, began to take root in politics. As political scientist Charles Merriam stated in 1923: “unless a higher degree of science can be brought into the operation of government, civilization is in the greatest peril from the caprice of ignorance and passion” (Merriam, 1923: 295).

Second, the political scientist Leonard White argued that administration is best carried out by political scientists and scientific experts within the executive branch drawing from principles of scientific management rather than from law. Unlike Dickinson, Landis, Gellhorn, and Frankfurter, who embraced the role of lawyers in carrying out the progressive tradition, the Wilsonians sought to marginalize as much as possible the role of lawyers in administration. In *Government Career Service*, White (1935) argued for an administrative corps consisting of technicians skilled in knowledge of the rules of the administrative game. Lawyers, White argued, were ill-suited for this position: “it must be said that the training of the lawyer, based on precedent, and looking backward rather than forward for guidance, is not a training which is suited to make the ideal administrator” (White, 1935: 46). To support his point, and perhaps to shelter his attack on the legal profession in the words of another, White quoted Professor Oliver P. Field of the University of Minnesota on the suitability of lawyers for administrative work:
Legal training is not a suitable educational background for applicants to the administrative class of civil service positions in the United States because law schools here are trade schools primarily, and this has affected not only the content of the courses but the methods of teaching and of study, and even the attitudes of both professors and students. Little or no attention is paid to statutes, or to administrative orders and the techniques, reports, and decisions of other judicial and semi-judicial bodies in government besides the courts are seldom studied. The cultural element and the cultural atmosphere both are almost entirely lacking (White, 1935: 46).

Finally, the dichotomy that Wilson discussed in 1887, and White’s writing on the role of scientific management in government, became the starting points for the report prepared by the President’s Committee on Administrative Management in 1937 (Brownlow, 1937). The committee’s Report, commonly referred to as the Brownlow Report after committee chair Louis Brownlow,\(^\text{19}\) made recommendations regarding the balance of power between the executive and the legislative branches of government and the reorganization of the executive branch. The Report began with the observation that the “Executive Branch of Government of the United States has . . . grown up without plan or design like the barns, shacks, silos, tool sheds, and garages of an old farm” (Brownlow, 1937: 32). From this starting point, the Committee harshly criticized the creation of independent regulatory commissions as constituting “a headless ‘fourth branch’ of government” that “do violence to the basic theory of the American Constitution that there should be three major branches of government and only three” (Brownlow, 1937: 39-40).

\(^{19}\) The members of this Committee were Louis Brownlow (Chair), Charles E. Merriam, and Luther Gulick.
The Report assailed “independent” agencies and argued that the science of administration demands that there be unity in the executive branch and that all administrative power be unified in the President. “Strong executive leadership is essential to democratic government today. Our choice is not between power and no power, but between responsible but capable popular government and irresponsible autocracy” (Brownlow, 1937: 47). In the view of the committee, a “managerial presidency” is “the essence of democratic government.” The Committee’s concept of “managerial presidency” translated into a proposal to transfer powers out of the independent regulatory commissions and into a unified executive branch. The Committee recommended that independent commissions be abolished, and that their administrative functions be incorporated into executive departments.

With regard to administrative adjudications, the Committee concluded that challenges to administrator decisions and the resulting adjudications were not part of the “administration sphere” of government. The committee recommended that the administrative and legislative functions of the ICC, FTC, Securities and Exchange Commission (“SEC”) and Federal Communications Commission (“FCC”) be separated away from the quasi-judicial functions of these agencies. Under this proposal, the administrative and legislative arms of these independent agencies would be transferred to an existing department in the executive branch, while the independent agencies would retain their judicial functions and continue operating as “quasi-courts.” Thus, rather than infuse administrative adjudications with the principles of scientific management, the Brownlow Report recommended taking scientific management
completely out of administrative adjudications by dividing the functions of independent
agencies. Ironically, by locating adjudications outside the “administration sphere” of
government, the Report’s proposal was very similar to the plan that the ABA’s Special
Committee proposed in its administrative court bill.

Stage III: APA Compromises and a Move Toward Formal Decision-making

A. APA Compromises Leaves the Mark of Formal Legal Decision-making.

The years of extensive political and ideological struggle between professional
members of the ABA, academic scholars, elected officials and appointed committees
culminated in a compromise that was eventually enacted by Congress as the
Administrative Procedure Act (“APA”) in 1946. For decades following the passage of
the APA, “mainstream narrators” characterized the APA as a victory by the Progressive
legal scholars who supported the New Deal procedural solutions over the ABA who
opposed the New Deal programs and their extra-constitutional agencies (White, 2000).20
However, more recent studies of the APA have set forth an alternative interpretation of
the passage of the APA and the emergence of administrative law. In The Constitution
and the New Deal, for example, G. Edward White challenges how some have
caricaturized the Walter-Logan Bill as an effort to transfer all decision-making powers
of agencies to the judiciary. Instead, White posits that the Walter-Logan Bill was the
source of many ideas that were later embodied in the APA (White, 2000: 126).

20 White cites to several examples of this mainstream account: Paul Verkuil’s 1978 article, the
Department of Justice’s 1947 Manual on the Administrative Procedure Act, and participant
histories of the formation of the APA by Walter Gellhorn (1986) and Kenneth Culp Davis
(1986).
Similarly, George Shepherd points out that conservative Carl McFarland – one of four conservatives on the AGCAP – did the most to ensure the passage of the APA (Shepherd, 1996: 1646). The ABA’s McCarran-Sumners Bill was revised and re-introduced as S. 7 and then ultimately enacted as the APA. The McCarran-Sumners Bill borrowed heavily from the minority AGCAP bill and established extensive rights for participants in formal adjudications (Shepherd, 1996: 1651-52). Both White and Shepherd showed that the conservative opinions voiced by the ABA, AGCAP and Congress were critical in shaping the APA and administrative law.

A review of the substantive conflicts resolved in the APA supports this alternative account of the APA. As we saw in stages 1 and 2, two substantive conflicts over the practicalities of adjudications emerged in the periods leading up to the enactment of the APA. The first conflict was over the decisionmakers themselves. On the one hand, progressive scholars and some AGCAP members favored scientists and experts under the umbrella of a centralized agency. On the other hand, the ABA and those legislators who adopted and adapted the ABA proposals favored judges or independent decisionmakers with a strict separation of judicial and enforcement powers. A second conflict was over the neutrality of the decisionmaker. Landis, Gellhorn and others argued to keep the “expert” decision-making model, with the addition of a lawyer who could review the case and maintain high level of coordination with agency officials to ensure that adjudicative outcomes match agency policy preferences. Alternatively, Wilsonian political scientists favored an impartial and independent adjudicator immune from agency oversight and uninfluenced by the political character of the agency. These
disagreements over the scope and configuration of administrative reform reflected an ideological conflict that crystallized in the APA. Horwitz (1992) called the APA “a prominent example of the dialectical relationship between expertise theory and proceduralism in the 20th century American legal thought.” Ultimately, when the dust cleared and the President signed the APA into law on June 11, 1946, those who favored proceduralism, or what we will call a “legalistic approach,” scored a decisive victory in the passage of the law.

The first way the legalists won a victory was through the creation of a special class of administrators called “hearing examiners.” The APA approach was to divide administrative decisions into “rules” and “orders.” Rules are “designed to implement, interpret, or prescribe law or policy,” while orders are “the whole or part of a final disposition…of an agency matter other than rulemaking but including licensing.” In this framework, agency experts make rules while a new set of hearing examiners issue orders. APA hearing examiners were clearly intended to mimic judges, and to be outside the circle of expert administrators comprising the agency. Like other federal employees, administration of the ALJ program was placed in the Civil Service Commission. However, Congress intended to make ALJs a “special class of semi-

\[21\text{ }5\text{ U.S.C. §551(4).}\]
\[22\text{ }5\text{ U.S.C. § 551(6).}\]

\[23\text{ In January 1978 the Civil Service Commission was renamed the Office of Personnel Management (“OPM”). The Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978 (43 Fed. Reg. 36037, 92) divided the functions of the old Civil Service Commission between OPM, the Merit Systems Protection Board, the Office of Special Counsel, and the EEOC.}\]
independent subordinate hearing officers” and vested control of their compensation, promotion and tenure in the Civil Service Commission “to a much greater extent than in the case of other federal employees.” In this way, the new ALJ program represented a move toward a more judicialized approach to agency adjudication.

The Legalists also included provisions in the APA that substantially decreased the scope of lawful interaction between agency experts and a hearing examiner. The APA affirmatively separated investigative and adjudicative responsibilities, stating that an “employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review….”

Finally, the APA gives district and federal courts direct control over administrative action. Unlike other countries such as Germany and France that have special centralized administrative courts, the United States system relies on local courts to oversee government regulators. The APA provides that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review,” and may be brought “in a court specified by statute or, in the absence or inadequacy thereof . . . in a court of competent jurisdiction.” Thus, courts in the federal system are empowered to review individual agency actions.

Although followers of the “legalistic approach” did win several victories, the APA does contain some important concessions to those who opposed the Legalist approach to agency adjudications. Relating to agency structure, the APA grants to the agency broad discretion to overrule the ALJ: “[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”

This means that an initial decision by an impartial hearing examiner has no authority or weight absent agency review and final agency action. Recognizing the need for flexibility, Congress did not extend the prohibition against the participation of agency members in both prosecuting and judging to cases involving licenses, rate-making, or for any case in which an agency member presides. Other sections of the APA contain exceptions to the constraints of formal adjudication by an ALJ. Section 554 exempts certain types of decisions from the constraints of a formal adjudication by an ALJ, supporting the principle of flexibility by giving agency heads some discretion in choosing who will decide a certain type of case.

Garvey (1993) called the APA the “full employment act for lawyers” because of the way it enmeshes agencies in legalism. Although the demand by the ABA for totally separate procedures was ignored, those who advocated a legalistic approach clearly left their mark on administrative adjudications: agency processes were to be considered

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28 These include the selection or tenure of an employee, determinations resting solely on inspections, tests or elections, and conduct relating to military and foreign affairs. See 5 U.S.C. §554(a)(2)-(4).
adjudications and governed by adjudication-style procedures, presided over by an independent hearing officer, and freely subject to relatively strict judicial review. The APA’s conception of the ALJ’s role thus involves a curious mixture of autonomy and subservience. ALJs act independently in all significant respects during the course of the decision process, but once their decisions are made, they are not granted the respect of finality. This compromise, and the one discussed in the next section, has helped create an uneasy existence for the ALJ.

B. Moving Toward More Formal Decision-making

This section discusses the ideological shift that occurred following the passage of the APA, efforts by courts and commentators to fill the gaps of the APA, and how due process concerns have further shaped procedures in administrative adjudications. The abandonment of the progressive ideals put forward in the 1930s by Landis and Gellhorn had a profound impact on the way in which the Supreme Court interpreted the requirements of the APA. In addition, the independence of the APA’s hearing examiners became more entrenched. Finally, the expansion of the traditional concept of due process brought a new set of “legalistic” requirements to administrative adjudications.

1. Ideological Shift

Not long after the APA was enacted into law, an important ideological shift away from Progressive values began to take place. Progressive legal scholars, who far outlasted the American Progressives of the early 20th century, no longer rigorously defended a model of administrative process built on professionalism and expertise.
This shift can be seen within the writings of three prominent Progressive scholars: Justice Frankfurter, Louis Jaffe, and James Landis.

In contrast to his previous support for administrative discretion, Felix Frankfurter, as a Justice of the Supreme Court, wrote the majority opinion in *Universal Camera Corp. v. Labor Bd.* Frankfurter wrote that the Supreme Court will defer to a federal agency’s findings of fact only when supported by “substantial evidence on the record considered as a whole.” This caused former student Louis Jaffe to write, “One remembers Mr. Justice Frankfurter’s respect for ‘expertise,’ his reluctance even to review the agencies, and his assertion that they as well as the courts must be trusted to observe the law. It is as if here he had become momentarily seized with the chilling thought that he had been coddling a monster” (Jaffe, 1949: 357).

Jaffe, who himself had been a harsh critic of the ABA Reports in the 1930s and had embraced the Landis model of administrative law, also did an about-face. In 1949 Jaffe wrote that judicial review “protects the agencies themselves against the temptation of absolutism.” Five years later, Jaffe wrote of his own disillusionment with the administrative state (Jaffe, 1954: 1105). Like other Progressives, Jaffe’s faith in rational decision-making based on expertise began to give way to theories of incremental decision-making based on “muddling through” or “groping along” (Lindblom, 1959; Behn, 1988).

Finally, even James Landis expressed some disillusionment with the optimistic view of administrative autonomy in his 1960 “Report on Regulatory Agencies to the

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President-Elect.” Contrary to the progressives’ clear-cut distinction between public administration and private management, Landis observed that (1) limited agency resources were forcing agencies to depend on outside sources of information, policy development, and political support; and (2) transaction costs were preventing the effective representation of unorganized interests before federal agencies. Landis found that these factors created industry bias in administrative agencies, and wrote that over-representation by organized interests had a “daily machine-gun like impact on both [an] agency and its staff” that tended to create an industry bias in the agency’s outlook. Landis’ observations helped set the stage for the development of bureaucratic theories regarding the “iron triangles,” “agency capture,” “adhocracies,” and “issue networks” that connected public agencies with private industries (Heclo, 1977; Mintzberg, 1983).

Horwitz (1992) identified two factors at the heart of this shift away from Progressive values. First, McCarthyism produced a general distrust among New Dealers and liberals of the purported expertise of administrative officials. Horwitz drew primarily from the writings of Walter Gellhorn to discuss the impact of McCarthyism:

“By and large liberals believed that administrators could be relied upon for wise and just decisions, and that, as a corollary, they should as far as possible be free from judicial supervision that might rigidify administrative procedures or supplant the informed administrative conclusions.” In the midst of McCarthyism, however, liberals “now feel that what were mainly imaginary dangers have become real – and frightening,” that is, a “real danger exists that an entirely fictitious expertness may limit the review of administrative rulings in

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a way that to all intents and purposes gives sanction to administrative fiat (Horwitz 1992: 241).

Second, accusations of agency “capture” in the Eisenhower administration caused further liberal backlash against the notion of an administrative rule of law. The theory of agency capture posits that a regulatory agency can become a “captive” of the industry it is supposed to regulate, causing the agency to systematically favor regulated industries while ignoring a larger public interest. Capture theory, espoused by political scientists Huntington (1952) and Bernstein (1955), and refined by the economist Stigler (1971), questioned the premises of Progressivism and independent expertise by showing how public agencies can act as tools for the advancement of private groups. In this way, capture theory delegitimized both expertise theory and the very notion of an administrative rule of law.

As the New Deal receded and the major issues of the time – urban race riots, poverty, the Vietnam war – further undermined the Progressives’ claims to expertise, a new focus on procedure emerged. According to Shapiro, the definition of ‘the good’ became procedural: “Whatever policy emerged from a decision-making process in which all relevant interests participated was good policy” (Shapiro, 1983: 1497). Because the New Deal had created the problem of discretion vested in experts, New Deal lawyers solved the problem by making administrative adjudication more judicial (Shapiro, 1979: 121-22).

2. The Expanding Notion of Due Process.

Perhaps the single most dominant theme in post-war American academic legal thought is an effort to find a “morality of process” independent of results (Horwitz, 1992). The search for process values expanded into administrative law and has had an important effect on the ground-rules of administrative adjudications. Specifically, the expanding notion of due process has heightened the formal procedures and legalistic approach for many different types of administrative adjudications.

The work that did the most to bridge the due process gap in the administrative context was Charles Reich’s article *The New Property* (1964). Reich drew on the principle of private property to articulate a further justification for a court-centered approach to administrative decision-making. Reich argued that the administrative state created various forms of wealth in the form of subsidies, contracts, licenses, benefits, and use of public resources. Since this “new” property created as many rights as traditional forms of property, Reich argued that government decisions affecting this new property should be decided by judges or judge-like adjudicators after full participation by the parties. Reich’s theory suggested that administrative adjudications be exported to the courts, or failing that, required administrative bodies to import the proceduralism of the legalistic framework.

Reich’s “new property” concept laid the groundwork for the Supreme Court’s expansion of procedural requirements in the context of administrative adjudications.\(^{32}\)

\(^{32}\) The Supreme Court repeatedly referred to Reich’s “new property” concept as the grounds for expanding due process protections. *See Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970);
The parameters of procedural due process analysis can be defined by looking at two Supreme Court cases: *Goldberg v. Kelly* and *Mathews v. Eldridge*. In *Goldberg*, the Court investigated which types of formal procedures were necessary before a government agency could terminate an individual’s welfare benefits. The Court fashioned a two-step approach to evaluate the procedures of an administrative agency. Under *Goldberg*, the court’s first inquiry is whether liberty or property interests are involved that would trigger the necessity of process. Once it has established that process is due, the next step for the court is to balance the interests of the individual against the interests of the government in order to determine whether procedures in use provide adequate protection of the individual’s interests. In *Goldberg*, the recipient’s interest in avoiding erroneous termination of benefits was held to outweigh the government’s interest in summary adjudication. Thus, the court held that due process required that formal procedures must be used before welfare benefits could be terminated.

The use of a balancing test also figured prominently in *Mathews v. Eldridge*, but in that case the Court slightly modified the test and decided that the costs of a pre-termination evidentiary hearing for disability benefits outweighed any probable improvement in accuracy. In *Mathews*, the court developed a three factor test, considering (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the

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probably value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. The Court reasoned that since most social security disability claims turn on “routine, standard, and unbiased medical reports by physician specialists,” there was less of a need for an oral hearing to assure accurate determination of eligibility.

In the context of administrative law, it became accepted that due process forbids termination of certain entitlements without a prior adjudicatory hearing before the agency. With the expansion of the governmental activity in “service” functions – the provision of goods and services and the administration of transfer payments and insurance schemes – it became less and less tolerable that government should wield the degree of potentially arbitrary power over the lives of individuals receiving these benefits (Stewart, 1975: 1717-18). Thus, due process protections were expanded beyond the termination of welfare payments at issue in Goldberg v. Kelley, and were applied to other relations with the government, such as tenancy in low income housing, possession of a driver’s license, or governmental employment. Procedural protections were also afforded as a matter of right to interests such as those

34 Id. at 322.
of students,\textsuperscript{38} parolees,\textsuperscript{39} and prisoners,\textsuperscript{40} which the courts had formerly remitted largely to the discretion of quasi-autonomous administrative bodies.

What was important about \textit{Goldberg, Mathews}, and their progeny was the Supreme Court’s willingness to apply traditional due process values in what was previously a non-legal setting. Agency actions in the past were influenced by legal notions of due process, but they were extralegal in the sense that policy concerns rather than legality were foremost in the decisionmakers’ mind. As influenced by Reich, and evidenced by \textit{Goldberg} and \textit{Mathews}, the notion of a formal due process had been clearly established in the administrative context. This new approach has forced agencies to adapt or enact heightened legalistic procedures for administrative adjudications.

3. \textbf{Filling the Gaps in the APA}

As a result of the gaps in specifics left by the APA’s broad language, federal courts and commentators have had much room to develop and interpret the baseline requirements that the APA imposes on agencies. The APA left so many gaps that Morrison (1986) has suggested the APA is more like a constitution than a statute, noting that its movements are more pendulum-like than linear. Shapiro (1986) took it a step further and argued that in a climate of distrust of bureaucracies in the sixties and

\textsuperscript{39} \textit{Morrissey v. Brewer}, 408 U.S. 471 (1972).
seventies, the courts, “assisted by Congress and cheered on by academic commentators,” made fundamental changes to the APA.\textsuperscript{41}

The Supreme Court has issued a number of important rulings construing the APA, including decisions relating to the appropriate standard of review for agency decision-making,\textsuperscript{42} agency procedures,\textsuperscript{43} and an agency’s authority to statutory language.\textsuperscript{44} Although there have been very few changes to the provisions of the APA that govern administrative adjudications,\textsuperscript{45} Congress did make an important amendment in 1976 to prohibit ex parte communications in formal rulemaking proceedings and in agency adjudications.\textsuperscript{46}

However, a significant gap in the APA still remains: lack of clear direction regarding the types of procedures required in the adjudicative setting. The Supreme Court has determined that the APA mandatory procedures only apply if the agency’s organic statute requires that the agency conduct a hearing “on the record.” This key

\textsuperscript{41} Shapiro’s article focuses mostly on the changes made to APA rulemaking procedure and review, but the sentiment is also applicable to adjudications.


\textsuperscript{45} Congress made a major change that was not directly related to administrative adjudications. In 1967 Congress enacted the Freedom of Information Act (“FOIA”), which amended Section 552 of the APA. The original APA obligated agency officials to make available all agency records for public inspection unless there was “good cause” for keeping such records confidential. FOIA provided for judicial review of these decisions and placed the burden of proof on the agency to justify a decision to withhold information. Subsequent amendments to Section 552 were enacted in 1974, 1976, and 1986.

\textsuperscript{46} Pub. L. No 94-409, §4(a), 90 Stat. 1246 (1976) (codified at 5 USC §557(d)).
phrase in a statute requires an agency to follow the baseline procedures mandated by the APA. For those organic statutes that do not require “on the record” hearings, the agency has substantial leeway in deciding the process and procedures from resolving administrative adjudications. For those organic statutes that do require hearings “on the record,” however, the agency may prescribe specific procedures on top of those mandated by the APA. The result, as this dissertation will explore, is agencies with very different administrative procedures for resolving adjudications.

While many federal agencies have adopted a legalistic procedure, others rely more extensively on informal procedures and agency expertise. If an organic statute does not require a hearing “on the record,” agencies that resolve conflicts are bound only by constitutional due process concerns as defined by the federal courts. Adjudications in this context vary along an even greater spectrum than those adjudications that must be held on the record. Thus, although the APA set a general framework for administrative processes, its broad language and vague requirements have left much room for courts, agencies, and scholars to interpret the APA and refashion even its basic principles.

**Stage IV: Moving Beyond Legalism in Administrative Adjudications**

There can be little argument that a “culture of legalism” has enveloped the realm of administrative law (Mashaw and Harfst, 1990). The shift away from Progressive values and toward legalism, discussed in Stage III above, continues to have a pervasive influence on the procedures used in the administrative context. Yet, more recent scholarship has recognized the limitations of the modern regulatory state to manage the
emerging social and economic problems and has explored new ways of thinking about administration and legal processes. Unfortunately, administrative adjudications have not received significant attention from the academic community and thus there is not a well-defined school of academic literature criticizing the legalistic approach to administrative adjudications. This stage reviews various new schools of thought to set the stage for the introduction of a new “Managerial” approach to administrative adjudications discussed in Chapter 2.

A. Administrative Conference of the United States

The Administrative Conference of the United States (“ACUS”) was established by statute as an independent agency of the federal government in 1964. Its purpose was to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions. To that end, the ACUS conducted research and issued reports concerning various aspects of the administrative process and made recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Notably, the majority of contributing members and editors at the ACUS have been academics, rather than private practitioners.

At its 1984 Plenary Session, the ACUS devoted part of its agenda to discussing the “judicialization of the administrative process.” The following year, the Chairman of the ACUS, Loren A. Smith, published a “deliberatively provocative essay” describing what he described the harms stemming from the level of “judicialization” and “over-
proceduralization” of the administrative process (Smith, 1985). Most discussions of “judicialization,” if they occurred at all, referred to the role of federal courts in reviewing agency action. Charting a new course, Smith focused on the expanding use of trial-like procedures for making decisions in agency rulemakings and agency adjudications.

Smith began his article by positing the view that modern administrative law had fallen victim to self-deception:

We have come to believe that public hearings, public disclosure of all documents relevant to a given issue, and trial-type methodologies for testing ideas will lead to “better” social and economic policies by government decisionmakers having power over large sections of the economic and social life of the nation (Smith, 1985: 439).

From this starting point, Smith questioned the “legal and judicial dogma” that fundamental fairness to participants in an administrative adjudication can only be achieved through the use of hearings with guaranteed procedural steps. Although he acknowledged the convincing historical moral argument for this view in a criminal case, Smith suggested that the proposition “is subject to serious question when grants of governmental benefits are involved” (Smith, 1985: 460). According to Smith, the movement toward more formal decision-making in administrative adjudications (described above in Stage III) has caused administrative structures to become “progressively less responsive to the needs which they were created to address.”

Smith did not offer any prescriptions for resolving the problem of over-proceduralization in his 1985 article, but the issue became an important issue for the ACUS. In 1992 the ACUS published the results of a study entitled “The Federal
Administrative Judiciary,” which included a report and recommendations regarding the procedures that govern administrative adjudications. The study was spearheaded by Paul Verkuil, a scholar with a history of looking critically at administrative procedure. Verkuil had previously identified three types of accusations typically leveled against the APA: (1) the APA is overjudicialized; (2) the APA is too rigid in its approach, and (3) the APA is irrelevant or incomplete in its solutions (Verkuil, 1978). The 1992 report study on the Administrative Judiciary adopted the skeptical eye of its principal author.

The authors of the ACUS report revitalized some ideas of the pre-APA Progressive legal scholars to the extent that the ACUS authors questioned the wisdom of making administrative adjudications look like federal court adjudications. First, the report urged Congress to “continue to be alert for opportunities to experiment with procedures and decider qualifications in the nonformal process.” Second, the report favored the traditional unified structure that places agency policymakers and semi-independent adjudicators under one roof. The report specifically recommended that Congress resist efforts to separate ALJs from the agencies and lodge them in an independent corps. Third, the report suggested that agency officials should be permitted to choose the ALJ that they hire from a list of eligibles rather than leave the decision to the Office of Personnel Management. The Fourth, and most radical, suggestion was for a new system of performance appraisal and discipline of ALJs. This report represented a break from more formal administrative adjudications.

The report and its proposals were heavily criticized by ALJs who strenuously objected to ACUS’s proposals regarding the selection of ALJs and the evaluation of
ALJ performance. One ALJ, Charles Rippey of the Office of Administrative Law Judges, disagreed with the substance and procedure used in developing the study and called for the abolition of the ACUS:

The ACUS recommendations for the federal administrative judiciary are unwise; unsupported by relevant research and careful analysis; and the product of a badly flawed process that did not allow adequate participation by informed persons and organizations, including bar associations. A government agency that behaves in this manner should be abolished or completely overhauled. In my judgment, overhaul is not practical in this instance . . . . (Rippey, 1993: 46).

Rippey’s sentiment to abolish the ACUS was echoed by a well-organized ALJ lobby (Musolf, 1998: 394).

In 1995, the ACUS lost its funding. Scholars and commentators agree that “no single factor can explain why the Conference was zero-funded” (Fine, 1998: 90). To be sure, the ACUS was an easy target for the House Republicans who were looking to slash the federal budget and claim a victory for government reform. However, the strenuous and vocal disapproval of the ACUS by the ALJ lobby also played a role in the decision to defund the ACUS (Edles, 1996; Musolf, 1998; Fine, 1998). Professor Fine conducted a thorough study of the legislative history of the ACUS’s demise and investigated the role of the ALJ lobby. Fine concluded that although the Republican Party’s desire to eliminate some agencies to save money was the “greatest contributing factor” to the defunding of the ACUS, the process “was set in motion by a small but

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47 Gary Edles, the General Counsel of the ACUS from 1987 to 1995, similarly concluded: “[a] confluence of factors contributed to the agency’s demise” (Edles, 1996).
outspoken group of disaffected administrative law judges” unhappy with ACUS’s recommendations (Fine, 1998: 113-14).

This dissertation builds upon the work of the ACUS and its 1992 study of the Federal Administrative Judiciary. Noting the variety of administrative adjudications and administrative judges, the ACUS study reviewed “the variety of decision-making models that implicate similar private interests but are decided with differing degrees of procedural and decider formality” (ACUS, 1992: 42). While that review was descriptive and did not use empirical data to measure the effect of these differences, this dissertation will build a theoretical framework in the next chapter, and in later chapters will draw upon empirical data to support its conclusions.

B. Critics of the Formal Adversarial Model

Criticism of adversarial procedure is extensive. Many of the general critiques that scholars have levied against formal legal decision-making are specifically applicable to administrative adjudications. First, scholars such as Gary Peller (1988) have argued that there is no neutral way to distinguish between substance and process. Peller denies this distinction because determining the procedural legitimacy of any particular institutional decision involves the very same substantive issues that the theory of procedural neutrality is supposed to avoid. Similarly, Duncan Kennedy (1997)

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48 Notably, on July 30, 2008, President George W. Bush signed the Regulatory Improvement Act of 2007, which reauthorized the ACUS through fiscal year 2011. The Act was the result of a broad bipartisan effort led by Rep. Chris Cannon (R-UT) in the House of Representatives, and by Sen. Patrick Leahy (D-VT) and Sen. Arlen Specter (R-PA) in the Senate. Public Law No. 110-290 authorizes appropriations of $3.2 million for three fiscal years, although Congress must still appropriate funding for the ACUS to reorganize and begin work. The ACUS was reauthorized once before – in the Federal Regulatory Improvement Act of 2004, Pub. L. No. 108-401 – but its authorization expired before it was ever appropriated funds.
outlines an “old” and “new” view of adjudication. Under the old view, adjudication “need not be political, because it involves questions of meaning and questions of fact that are independent of value judgments (objective). Since the determination of questions of right can be done objectively, rather than ideologically, it seems obvious that it should be” (Kennedy, 1997: 27). In contrast, the new view of adjudication “collapses the distinction between rule making and rule application by showing that rule application cannot be insulated from ‘subjective’ influence, including ideological influence” (Kennedy, 1997: 28). This critique is especially important in the administrative context because the procedural constraints on agencies have an important effect on the policy that underlies the administrative conflict. In other words, any change in the procedures an agency uses to resolve conflicts affects the substantive policy issue the agency regulates.

Second, a number of authors have focused on the disconnect between the substantive ideals invoked on behalf of “legality” in a liberal democracy (equality, justice, liberty) and the practical reality of the “legalization” or “judicialization” of adjudications. David Luban (2003) has argued that adversarial procedure places so much power in the hands of the parties (and thus in their lawyers) that it denies equal access to justice because many cannot afford lawyers. Christine Harrington (1982) focused exclusively on the resolution of “minor” disputes and addressed the ways in which procedural rules can undermine the substantive ideals of equality, justice, and liberty. For example, observing procedural rights in the adjudication of minor claims tends to be so expensive that it limits a party’s “administrative access to justice” and
frustrates the exercise of individual rights. Moreover, even if participants can overcome the barrier of cost, formality tends to limit a party’s “participatory access to justice” by allowing citizens to participate only indirectly in the proceedings. According to Harrington, delegalization reform efforts (those seeking a contraction of procedural rules governing the processing of disputes) in traditional courts retain their legitimacy because they are still grounded in procedure, even though these procedures are often characterized as “informal alternatives.” This point is equally applicable in the administrative law context, where adjustments to adjudication procedures retain legitimacy even if they are characterized as informal alternatives.

Third, Selznick and Nonet (1978) have argued that a formalist, rule-bound institution is ill-equipped to recognize what is really at stake in any given conflict: “It is likely to adapt opportunistically because it lacks criteria for rational reconstruction of outmoded or inappropriate policies…The idea of legality needs to be conceived more generally and to be cured of formalism” (Selznick and Nonet, 1978: 108). This general critique has two specific applications in the administrative context. To the extent that decisionmakers in administrative agencies are faced with a novel issue of first impression, it will be more difficult for a decisionmaker restrained by procedural rules to investigate how that issue fits into the general policy strategy of the agency. Also, to the extent that an administrative decisionmaker is faced with a multi-faceted or polycentric problem, formal legal procedure may force a decisionmaker to oversimplify or narrow those issues to fit the adjudicatory model rather than deal with the variegated problem in its entirety.
Fourth, Robert Kagan (2001) used the shorthand term “adversarial legalism” to describe governance and dispute resolution by means of lawyer-dominated litigation, which he distinguishes from other methods of dispute resolution such as bureaucratic administration, discretionary judgment by experts or political authorities, or judge-dominated litigation. Although Kagan identifies what he calls the “excesses” of adversarial legalism in the American system, he also explores the virtues of adversarial legalism in areas such as prison reform. For Kagan, adversarial litigation is “Janus-faced”\textsuperscript{49}: it can reduce arbitrariness in the administration of public policy, but it can also be “a peculiarly cumbersome, erratic, costly, and often ineffective method of policy implementation and dispute resolution” (Kagan, 2001: 164).

Finally, Gerald Frug (1984) has explained how the normative structure of administrative law serves to maintain an ideology of bureaucracy that both legitimates and masks coercion. Administrative procedure assures us of the objectivity of administration even as it subjects us to the discretionary dominion of administrators. In other words, the adoption of “objective” formal legal procedure in the administrative context only serves to obscure the policy that underlies every agency decision. Although many would cast procedural reform as an attack on private interests, the de-proceduralization of the administrative adjudication may have the dual effect of aiding the agency’s efforts to apply a coherent policy as well as protecting individuals’ long-term interests. Frug compared the “expertise model” of agency operation to that of corporate management: “[J]ust as shareholders can comfortably defer to management’s

\textsuperscript{49} In Roman mythology, Janus was depicted with two heads looking in opposite directions.
business judgment concerning the essential issues of corporate governance, citizens can legitimately accept the decisions of a particular government agency on matters within its expertise” (Frug, 1984: 1320).

C. Managerial Judges

Despite a trend in administrative adjudications toward a more independent and formal administrative judiciary, there has been a movement among Article III federal judges to become more “managerial.” In her influential article “Managerial Judges,” Judith Resnik (1982) coined the phrase and examined how federal judges have moved away from traditional notions of the judge’s role in an adjudication. Resnik argued that federal judges are beginning to adopt “a more active, managerial stance” by not only adjudicating the merits of issues presented to them by parties, but also meeting with parties in chambers and encouraging the settlement of disputes and supervising case preparation (Resnik, 1982: 377). Managerial judges are not “silent auditors of retrospective events retold by first-person storytellers. Instead, judges remove their blindfolds and become part of the sagas themselves” (Resnik, 1982: 408).

According to Resnik, “managerial” meetings are usually informal and contrast sharply with the highly stylized proceedings in the federal courtroom. The rigid structure of evidentiary rules which are designed to insulate judges from extraneous or impermissible information, is not applied to case management. The informal meeting allows judges to inquire about the dispute generally, and to learn information that may not otherwise come to light in a formal proceeding.
Proponents of managerial judging typically assume that management enhances efficiency in three ways: decreases delay, produces more decisions, and reduces litigation costs. In her article, however, Resnik is careful to note that available studies show little support for a firm conclusion that recent innovations in judicial management are responsible for gains in efficiency. In her discussions of managerial judges, Resnik does not discuss the administrative judiciary or administrative adjudications. Because she focused on federal judges, Resnik used the term “managerial” to refer to only those judge-litigant interactions occurring outside the courtroom. As discussed in the following chapter, the term “managerial” in the administrative adjudication context can have a far broader meaning.

D. Studies in Governance and “New” Public Management

One hundred years after Woodrow Wilson wrote his essay on what he considered a “new” field of public administration, political scientists continue to develop “new” schools of thought in this field. As Frederickson and Smith (2003) explain in *The Public Administration Theory Primer*, governments in the 1970s, 1980s, and 1990s became less hierarchical, more decentralized, and increasingly willing to cede their role as the dominant policy actor to the private sector. Political scientists have reacted to these changes in two important ways: (1) by providing descriptive analyses for understanding the changes in government and public organizations, and (2) by providing prescriptive analyses for continually improving and reforming government and public organizations. Since the early 1980s, scholars in the field have focused on themes of public management, governance, public administration, and bureaucracy.
Much of this work is geared toward the goal of reinventing, rethinking, and retooling administrative agencies, the federal system, and the delivery of public services.

Although scholarship on Governance and the “New” Public Management is applicable to administrative adjudications, these various contributions in the subfields of public administration do not directly address administrative adjudicators or adjudications in the administrative law context. To the extent they focus on the direct delivery of public services, and the replacement of the traditional bureaucracy by a new model based on markets, they have limited applicability to the resolution of disputes between parties in the administrative context. But the ways in which agencies resolve disputes and adjudicate claims clearly fall under the umbrella of public administration and public management. Although oftentimes at odds with legal notions of due process and judicial independence, the principles identified in the public administration scholarship (effective leadership, productivity, participation, organization, and service-orientation) are readily applicable in the context of administrative adjudications.

Some useful tools for analyzing administrative adjudications come from the New Public Management ("NPM") School. The NPM school is prescriptive, and has been described as a “global public management reform movement that has redefined the relationships between government and society” (Frederickson and Smith, 2003: 214). Sometimes referred to as the “new managerialism,” NPM is predicated on six core issues: productivity, marketization, service orientation, decentralization, policy, and accountability (Kettl, 2000: 1-2). NPM’s explanatory targets are efficiency and customer satisfaction, and its explicit aim is to usher in organizational and institutional
reform to increase the efficiency of providing public goods. Clearly influenced by the work of NPM scholars Osborne and Gaebler, the United States undertook a project to re-evaluate the processes employed by administrative agencies in the National Performance Review. The National Performance Review project, which was led by then-Vice President Al Gore, reflected some of the tenets of NPM.

One of the most important contributions to the critique of the “legalistic” approach to agency decision-making has come from Congress itself. In 1993, Congress enacted the Government Performance and Results Act (“GPRA”), which requires agencies to develop long-term Strategic Plans that define goals and objectives for their programs, and to develop Annual Performance Plans specifying measurable performance goals. For the purposes of this study, the passage of the GPRA is significant because it began to shift the focus of federal agencies from accountability for process to accountability for results. The movement to focus on performance rather than on processes has come to be called “results-oriented government.”

50 At its root, NPM is ideological – the core motivation of many NPM scholars is to bring about a “market-based cultural revolution” to the way in which public goods are supplied in our society. NPM scholarship nonetheless provides a set of tools for fundamentally altering the regulatory role of government.

51 The Gore Report set out to change the culture of American federal government through four key principles: (1) cutting red tape; (2) putting customers first; (3) empowering employees to get results; and (4) cutting back to basics and producing better government for less.

52 This commitment to results was later echoed by the Bush administration’s establishment of a Program Assessment Rating Tool (“PART”). OMB’s guidance contains this description of the PART: “The Program Assessment Rating Tool (PART) is a diagnostic tool used to assess the performance of Federal programs and to drive improvements in program performance. Once completed, PART reviews help inform budget decisions and identify actions to improve results. Agencies are held accountable for implementing PART follow-up actions, also known as improvement plans, for each of their programs” (OMB, 2007: 1).
This shift in focus applied not only to traditional government services, but also to administrative adjudications. Indeed, the performance measurement required by the GPRA is the most applicable tool of the NPM school to the study of administrative adjudications. It provides a means to judge the success of adjudication systems and to hold both decisionmakers and agency officials accountable for their performance. An emphasis on results – rather than process – shifts attention from adjudication processes to the consequences of the processes used to reach final decisions. Several agencies have published strategic plans pursuant under the GPRA that relate to agency adjudications. The Social Security Administration, for example, has adopted the strategic objective to reduce the average processing time for adjudication hearings and reduce the average processing time for hearing appeals (SSA, 2007: 49).

In addition to performance measures, which provide a practical tool for the study of administrative adjudications, scholarship out of the NPM school also provides a theoretical foundation for the construction of an alternative model of administrative adjudications. For example, NPM theorists who focus on the individual actor provide conceptual support for an alternative model that places more discretion in the hands of the decisionmaker. Ott et al. explain:

Public management focuses on public administration as a profession and on the public manager as a practitioner of that profession...Public management focuses on the managerial tools, techniques, knowledge, and skills that can be used to turn ideas and policy into programs of action (Ott et al. 1991: 1).

In addition, Cohen (1988) writes that the effective public manager must be an entrepreneur who is wiling to take risks and assume personal responsibility for the
consequences. Bozeman and Straussman direct their book, *Public Management Strategies*, to “all public managers” and provide “some ideas, some clues, some arguments.” The authors “leave it to the public manager to sort out these ideas and to use his or her experience to adapt those worth adapting” (Bozeman and Straussman, 1990: xiii).

Other work outside the NPM school has focused less on the practitioner, and more on the normative study of bureaucracy. Knott and Miller (1987) set out to demonstrate how the institutions by which we govern ourselves are a product of self-interested behavior by political actors. After analyzing the history of administrative reform in the United States, Knott and Miller conclude that “there is no structure whose neutrality, expertness or other characteristics can automatically legitimize the policy choices it makes . . . . An institution is justified by its outcomes, rather than the other way around” (Knott and Miller, 1987: 274).

One of the most important contributions to the field is the study of governance by Lynn, Hill, and Heinrich. Using governance as an analytical framework, the authors define governance as “regimes of laws, rules, judicial decisions, and administrative practices that constrain, prescribe, and enable the provision of publicly supported goods and services” through formal and informal relationships with agents in the public and private sectors (Lynn, et al., 2001: 7). This concept of governance appears to operate on three interconnected levels: the institutional, the organizational, and the technical (Frederickson and Smith, 2003: 210-211). The institutional level of governance is aimed at understanding the formation, adoption, and implementation of public policy.
The organizational levels of governance are the hierarchical bureaus, departments, commissions, and all the other executive agencies and various nongovernmental organizations. The technical level of governance represents the task environment, where public policy is carried out at the street level. By highlighting the multi-level nature of governance, Lynn et al. focus on the ways in which inputs at one level of the governance can have profound impacts on the outcomes at another level of governance. Ultimately, the authors argue that the basic question at the heart of all governance-related research is: “How can the public-sector regimes, agencies, programs and activities be organized and managed to achieve public purposes?” (Lynn, et al., 2000: 1).

A unifying concept in these various subfields is the notion that the basic theoretical pillar of public administration – the clear separation between those elected officials who give instructions and those bureaucrats who carry them out – is no longer adequate to describe the reality of government. The traditional model of public administration has been superceded. Although a new theory is not yet firmly entrenched in the literature, clearly there is now a greater focus on results than on process. The goal of Chapter Two will be to incorporate the lessons of the new public administration literature into an alternative model of administrative adjudications.

**Conclusion**

This chapter has charted the landscape of administrative adjudications since government agencies began hearing disputes. We have seen that ideas about administrative law reflect elements of denial, concern, cautious optimism, and sober
skepticism. We have also seen that views on the scope of administrative law have had a pendulum-like quality. The next chapter will build on this historical review and outline a general theoretical framework for approaching conflicts in the administrative setting.
CHAPTER 2: THE LEGALISTIC VERSUS MANAGERIAL MODELS IN ADMINISTRATIVE LAW.

While the history of the Administrative Judiciary has had many twists and turns, it is possible to extract two overarching normative frameworks from the numerous legal doctrines and scholarly works on the subject: the Legalistic Model and the Managerial Model. In the course of defining the components of the Legalistic and Managerial models, the following discussion will critically illuminate an interrelated set of administrative law themes introduced in the previous Chapter.

A federal administrative court has an uneasy existence. On the one hand, it is an apparatus of an executive branch agency under Article I of the U.S. Constitution subject to pressures to maintain bureaucratic integrity. On the other hand, because of its fact-finding and decision-making duties, it is also under constant pressure to adhere to the norms of an independent judicial branch court under Article III. Neither the traditional models of public administration developed to analyze Article I bureaucratic agencies, nor the traditional legal models developed to analyze Article III courts, are insufficient to explain the unique animal of administrative adjudications.

In the realm of bureaucratic theory, models such as the principal-agent theory, network theory and interest-group theory can collectively help to inform our understanding of the administrative judiciary, but none can account for the “legal” nature of these organizations. For example, the basic assumption of the principal-agent model is the existence of a relationship in which an agent ought to be subject to control
by principals. This model has become the basis for studies discussing the relationship between the bureaucracy and elected officials (Moe 1982, 1985; Wood & Waterman 1991, 1993). But the basic assumption of agency theory breaks down in the adjudication context. At their core, principal-agent models are grounded in economics and make assumptions that do not always neatly extrapolate to the problem of bureaucratic control (Waterman and Meier, 1998). As a result, political scientists and economists rely on the assumption of “shirking” in order to refine principal-agent theory and account for breakdowns in the model. But the principal-agent relationship and the concept of “shirking” have limited applicability when discussing administrative adjudications. Unlike officials in the Executive branch, there is not always an expectation that an adjudicatory decisionmaker is an agent who ought to be controlled. Thus, the explanatory power of the principal-agent model in this context is severely limited because administrative decisionmakers are often expected to carry out their fact-finding and decision-making duties as independent and autonomous actors. Indeed, in the Legalistic model, which will be discussed later in this chapter, agencies structure their adjudications to prevent any potential principals (agency officials, Congress, or individual parties) from controlling, monitoring, sanctioning or rewarding administrative decisionmakers.

Similarly, in the realm of legal theory, formalism, realism and transaction models of adjudication may be useful in helping to understand administrative adjudications, but cannot account for the “bureaucratic” or “managerial” nature of these organizations. For example, legal formalism consists of two connected components:
legal principles and mechanistic reasoning. In the formalism model, judges identify legal concepts or principles in the common law by surveying the case law and working out the subordinate principles of law in a particular area. Judges then “mechanically” apply these concepts as rules to the facts of a particular case. In a way, any system built around rules will require some level of formalism, because at its minimal level rule-formalism simply means following rules. But the formalist model cannot account for the fact that in the Managerial model, which will be discussed later in this chapter, there are no common law principles from which to derive rules. In addition, agencies structure their adjudication processes to maintain some control over their decisionmakers. The formalism model, with its focus on process rather than results, does not account for the fact that these are executive branch institutions and are subject to the norms of accountability, consistency and bureaucratic integrity.

The study of administrative adjudications has been hurt by the absence of a coherent model that can explain and be used to classify different types of administrative adjudications. The convention used by authors of administrative law texts and professors in law schools is to divide all administrative adjudications into two categories: “informal adjudications” and “formal adjudications” (Gellhorn and Byse, 1995; Asimow, 2003). According to these texts, “formal adjudications” are formal because they required are by statute to be determined in accordance with the APA; “informal adjudications” are informal because they need not satisfy APA requirements. There are several reasons why this convention is at best useless, and at worst misleading. First, the terms “formal” and “informal” in this context are not rich
descriptive terms, but instead used as proxies for “adjudication under the APA” and “everything else.” These two categories are overbroad and cannot account for important differences between agencies that adjudicate under the APA. Second, even if it was being used descriptively, “informal adjudication” implies the absence of process, norms, values, or structures typically associated with formal adjudications. This term is not broad enough to encompass the Progressive values and norms that are infused into certain types of agency adjudications. Finally, even a cursory review of agency procedure reveals that application of the APA is only one factor affecting the structure and design of agency adjudications. So-called “informal” agency hearings can look more “formal” than those hearings required to be held on the record under the APA.

Thus, a new effort to classify administrative adjudications must be developed to account for fundamental questions in administrative law. I hope to achieve two goals in this chapter. The first is to expand the discussion of administrative procedure in the hope of stimulating further empirical and theoretical investigation of this contemporary

53 Although Asimow uses the terms “formal” and “informal” to describe adjudications in his co-authored textbook (Asimow, Bonfield, Levin, 1998: 150), he uses the terms “Type A” and “Type B” adjudications in his more recent book on federal administrative law (Asimow 2003). According to Asimow, “Type A” are adjudications for which APA prescriptions apply, and “Type B” are adjudications for which the APA provides no procedural protections. By using APA applicability as a basis for characterizing agencies, however, Asimow’s dichotomous Type A/Type B categories suffer from the same flaws as the overbroad formal/informal categories.

54 Although they do not engage in theory-building, Asimow, Bonfield and Levin recognize a tension between what they call “judicial decision-making” and “institutional decision-making” (Asimow, Bonfield, Levin, 1998). To the extent they describe their “institutional” model, it falls well-short of a coherent approach to administrative adjudication: “At the opposite extreme, the president of a corporation, deciding whether to produce a new product, is perfectly free to gather evidence, make the case for one side, and to seek confidential advice from anybody in the firm – no holds barred. That is a pure institutional model” (Asimow, Bonfield, Levin, 1998: 118).
political issue. The second objective is to develop two categories in which there are competing and opposite poles of theoretical approaches to administrative adjudicatory process and procedure.

This chapter constructs two “ideal types” – the Managerial and Legalistic models. Social scientists use ideal types as analytical constructs to measure similarities and differences between concrete phenomena (Weber, 1968). Here, the concrete phenomena being studied are federal agencies in the United States government that have each developed their own set of unique adjudicatory procedures. Because the consequences of these differences range from significant to minute, this dissertation uses ideal-type models to capture the basic theoretical divisions in this area without getting lost in the details. While these models do not describe any existing agency’s procedure, this approach eschews positivism for the sake of theoretical clarity. As Weber wrote: “The more sharply and precisely the ideal type has been constructed, thus the more abstract and unrealistic in this sense it is, the better it is able to perform its functions in formulating terminology, classifications, and hypotheses” (Weber, 1968: 68).

To be sure, there are limits associated with using ideal types. Ideal types can be inconsistent, contain logical contradictions, and may not be precise enough to deal with various levels of social scientific analysis (Giddens, 1976: 23). Yet, the use of ideal types remains a key conceptual tool in social science research and especially in social science teaching. The approach of this dissertation reflects its purpose: to synthesize meaningful aspects of individual phenomena in order to explain the similarities and
differences between the adjudicative processes of the United States administrative agencies.

I. The Legalistic Model

A. Process-Oriented Participation

The first component of the Legalistic model addresses the ways in which individuals and parties participate in an administrative adjudication. Specifically, participants in the Legalistic model interact as adversaries and exercise control over the adjudicatory process within the boundaries of procedural rules. This component of the Legalistic model is what we will call “process-oriented participation.”

The theoretical foundations for process-oriented participation can be found in the writings of the ABA Special Committee, in the Walter-Logan bill, and in certain portions of the Brownlow report. Each of these three sources equated due process fairness with an adversarial approach to adjudication. According to Legalists, self-interested parties are in the best position to discover the truth and reach the correct answer because they have a vested interest in the discovery of proof and exposing the weaknesses of an opponent’s argument. Thus, process-oriented participation means that the participants, and not the decisionmakers, have a significant amount of responsibility for controlling and defining the dispute. The participants decide how much investigation is necessary, determine how many witnesses should be examined, choose the topics of the examination, and ultimately decide which issues should be presented to the decisionmaker. The decisionmaker’s role is to serve as a neutral umpire, deciding
only those questions of fact and law that are raised by the parties. Highly stylized rules of procedure exist to structure this party-controlled proceeding.

Importantly, a party-controlled adversarial proceeding is considered valuable whether or not it improves results. Legitimacy and dignity are important values of the process-oriented participation component. Process-oriented participation assumes that the parties’ participation in the investigation and the adjudication will enhance the legitimacy of the decisionmaker and confidence in his decisions (Tyler, 1990). This theory – referred to as “procedural justice” in the literature – holds that participants are more likely to find an institution’s decisions legitimate if the participant perceives that the procedures used to reach the decision are fair.\footnote{Indeed, there is some evidence that Americans have internalized the Legalistic idea that party-controlled adversarial adjudication is the most fair way to structure an adjudication. Thibaut et al. (1974) conducted a study to determine what form of dispute-settling mechanism would be chosen by lay subjects, including those who were unaware as well as those who were cognizant of their role in a particular dispute. A party-controlled adversarial mode, “in which the decisionmaker or judge is relatively passive and in which the proceedings are chiefly controlled by the disputants through advocates who represent them in an openly biased way” was strongly favored over a series of alternatives.} Saphire (1978) suggests that the most important consequence of governmental action is its impact upon the dignity of those individuals whom it adversely affects. “This is the sense of dignity that springs, not from the outcomes of governmental decision and conflict, but from the interactions between individuals and their government that occurs as part of the decision-making process” (Saphire, 1978: 120-121). Similarly, Summers (1974) concludes that “process features can be good solely for the sake of the process values they implement or serve” (Summers, 1974: 33). Tyler, Saphire and Summers would likely all agree that process-oriented participation focuses on individual rights and liberties, and conceives of
administrative adjudications as separate legal events outside the bureaucratic process, rather than an integrated component of a fluid administrative enterprise.

In summary, the Legalistic model is marked by individuals and parties who participate in the adjudication as adversaries and exercise control over the adjudicatory process within the boundaries of pre-existing procedural rules.

**B. Juridical Decisionmakers**

Another central tenet of the Legalistic model is the idea that adjudicative decisionmakers should be “juridical.” This term is defined by its two critical characteristics: (1) legal training and experience, and (2) a generalist perspective.

Under the Legalistic model, extensive legal training is necessary, in part, to competently impose the formal legal rules governing the process-oriented participation discussed above. Jasanoff (1995) has found legal training important because it is a useful resource in the deconstruction of expert authority. Specifically, legal training helps the decisionmaker “make transparent the values, biases and social assumptions that are embedded in many expert claims about physical and natural phenomena” (Jasanoff, 1995: 20). The assumption here is that legal training emphasizes the geometry of arguments, and that a careful study can dissect an argument into principles, preconceptions, assumptions, and facts with more acuity than a decisionmaker not trained in the law. Jasanoff concludes that “exposing these underlying subjective preconceptions is fully as important in a justice system as ‘getting the facts right’” (Jasanoff, 1995: 20).
Furthermore, the general perception among many lawyers and nonlawyers is that an individual undergoes a type of transformation upon completing law school and donning a judicial robe. As Duncan Kennedy (1997) observes, “[t]he figure of the Judge is important in American culture, carrying multiple resonating meanings and associations, under-and overtones of mystic power.” Indeed, our society reserves many tasks for persons with legal training even though no specialized legal knowledge is necessary for the successful completion of the task. This high regard for lawyers and judges reinforces the notion that administrative adjudications should be resolved by judges who have received legal training.

In addition to legal training, the Legalistic model prefers generalists over decisionmakers who have expertise in a particular regulated area so as to avoid the specific dangers of expertise. For the Legalist, the process value of expert decision-making is at odds with objectivity and impartiality. Legalists fear that the use of expert jargon and sophisticated technical analysis can obfuscate underlying assumptions and issues that are at the heart of a conflict. Unlike the expert decisionmaker who has adopted the assumptions and preconceptions of a particular field, generalists are in a better position to preside over an adjudication with a critical eye. Furthermore, a generalist reviewer forces the parties to boil the issues down into a language and a format that is transparent not only to the decisionmaker but also to the public.

C. Adjudicator Independence

The final component of the Legalistic model is the principle that administrative disputes must be decided by an independent adjudicator. To be clear, no system for
resolving disputes can survive in a democracy unless decisionmakers objectively appraise facts and fairly apply those facts to resolve a dispute.\textsuperscript{56} Thus, objectivity and fairness are central to both the Legalistic and the Managerial models of administrative adjudication. What distinguishes the Legalistic model, however, are the structures and limitations that an agency adopts to emphasizes those values. In the Legalistic model, objectivity and fairness are maximized by maintaining adjudicator independence, which is marked by: (1) the absence of a relationship between the decisionmaker; and (2) freedom from oversight and evaluation.

First, for the Legalist, any relationship between an agency and the decisionmaker undermines the legitimacy of the administrative system. As discussed in Chapter 1, the Attorney General’s Committee on Administrative Procedure advised that tenure and a high salary were necessary to “give assurance of independence of judgment.” The compromises embodied in the Administrative Procedure Act have been interpreted in a way that reinforces the Legalistic preference for severing the relationship between the agency and the decisionmaker. In one of the Supreme Court’s first decisions on the scope of the APA, for example, the Court explained that a “fundamental” purpose of the APA was “to curtail and change the practice of

\textsuperscript{56} I use the terms objectivity and impartiality broadly in this context – meaning that decisionmakers must not take bribes or make decisions based on the flip of a coin. It is worth noting that some scholars deny that any decisionmaker can ever truly be objective. For example, Duncan Kennedy describes how judges are constrained by the “felt objectivity” of “applying the relevant rules” and yet are pulled by the contingent experiences of arbitrariness in the process of selecting outcomes.
embodying in one person or agency the duties of prosecutor and judge.” Based on this reading of the APA, the Court in *Wong Yang Sung v. McGrath*, held that deportation hearings must be conducted by “examiners whose independence and tenure are so guarded by the Act as to give the assurances of neutrality which Congress thought would guarantee the impartiality of the administrative process.”

Second, the concept of adjudicator independence in the Legalistic model is inextricably linked to freedom from oversight and evaluation (Fennell & Young, 1997). Thus, the Legalistic model supports the promulgation of statutes and regulations that restrict the ability of administrative agencies to supervise or evaluate adjudicators. In the context of state administrative law courts, Jim Rossi (1999) argues that there is simply no need for a relationship between the agency and the decisionmaker. Specifically, adjudicator independence does not affect the agency’s ability to decide policy issues prior to the hearing and promulgate rules or regulations to guide the decisionmaker. Moreover, Rossi denies that agency officials have any special expertise to inject into the process. As Rossi puts it, “[i]nsofar as pure issues of fact are concerned, expertise may be nothing more than the credibility of competing agency and non-agency experts, and the ALJ will be able to contribute neutrality and efficiency to the resolution of such issues by evaluating evidence, witness demeanor, and cross-examination” (Rossi, 1999: 20).

58 *Id.* at 52.
The Supreme Court has embraced this component of the Legalistic model. In *Butz v. Economou*, the Supreme Court again interpreted the APA from a legalistic framework and found that freedom from oversight and evaluation ensure a “process of agency adjudication… structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.” The Second Circuit in *Nash v. Califano*, also found that these same provisions “confer a qualified right of decisional independence upon ALJs.” Over time, the Legalist position on independence has evolved into a consensus among the federal bench that “as their role has expanded, the ALJ’s functional comparability to judges has gained recognition.” Indeed, under the Legalistic model, administrative adjudicators enjoy the same freedom from oversight and evaluation as federal judges.

Later chapters will discuss how adjudicator independence sets the stage for potential conflict between an agency and its decisionmakers. Although agency decisionmakers such as ALJs work exclusively with one agency, are an integral part of

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60 The Court in *Butz* noted: “There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is ‘functionally comparable’ to that of a judge.” *Butz*, 438 U.S. at 513.


62 *Id.* at 15. The ninth circuit has observed that “administrative decisionmakers do not bear all the badges of independence that characterize an Article III judge, but they are held to the same standard of impartial decision-making.” *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987).
the functions of the agency, and often share office space with other agency employees, the agency does not have any managerial power over them as employees.

II. The Managerial Model

A. Result-oriented participation

The first component of the Managerial model addresses the ways in which individuals and parties can expect to participate in an administrative adjudication. Specifically, participants seek resolution through interactions with an inquisitorial decisionmaker. This component of the Managerial model is what we will call “result-oriented participation.”

The term “inquisitorial,” which is often used to describe the legal systems of modern-day Europe and Latin America, defines an approach in which decisionmakers have primary responsibility for and control over the definition of the dispute (Langbein, 1985; Resnik, 1982). In her article on Managerial Judging (discussed in Chapter 1), Judith Resnik explained that some federal judges have departed from the traditional model of adversarial litigation and adopted distinctly “inquisitorial” methods of managing cases (Resnik, 1982: 381-2). However, Resnik’s managerial judge was inquisitorial only in the pre-trial and post-trial stages of litigation. Result-oriented participation goes one step further because the decisionmaker also controls the hearing process in an administrative adjudication. In the Managerial model, the decisionmaker drives the process of identifying issues, gathering evidence, and presenting evidence.

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63 At FERC, the ALJ office is on the 8th floor and the Attorneys at FERC are on the 7th floor.
Unlike process-oriented participation, the individual participant does not determine the nature or extent of his or her participation in the hearing process.

Result-oriented participation imposes an affirmative obligation on the decisionmaker to structure the adjudication so that the agency’s substantive and procedural goals are met. Seeing adjudications as one component of an agency carrying out its mission, Managerialists structure participation so that the adjudications can be compatible with that mission. Co-opting the “new public management” school’s focus on results and applying it to the administrative law context, result-oriented participation elevates the values of efficiency, effectiveness and service quality above the value of participation for its own sake. Holmes and Shand, writing from the perspective of practitioners, explain that a “good managerial approach” requires “a more strategic or results-oriented (efficiency, effectiveness, and service quality) approach to decision-making” (Holmes and Shand, 1995: 555). For example, unlike the Legalistic model where an individual controls the process and is entitled to extensive party-controlled fact-finding and formal discovery, the Managerial approach recognizes that an agency may be able to more effectively and efficiently discover the facts underlying the dispute. The Managerial model recognizes that direct participation in fact-finding has intrinsic value in promoting individual dignity, but allows agencies to de-emphasize direct participation where such participation interferes with a countervailing agency policy goal or mission.

Result-oriented participation is a direct rejection of the Legalistic model’s conception of the administrative process as adversarial. Drawing on the general
critiques of the formal adversarial model (Selznick and Nonet, 1978; Frug, 1984), Managerialists believe that granting parties control over the process hinders fact-finding and deliberation. Instead, result-oriented participation embraces rules and procedures that foster deliberative decision-making. Specifically, inquisitorial decisionmakers are encouraged to ask direct questions of the witnesses in order to focus on critical issues, to allow the parties flexibility to introduce relevant evidence even if it cannot be authenticated or if it qualifies as “hearsay” under the Federal Rules of Civil Procedure, and to structure examinations to allow parties to address each other if appropriate. In this way, result-oriented participation maximizes democratic and fairness values. Seidenfeld (1992) argues that administrative agencies may be the only institutions capable of fulfilling the civic republican ideal of deliberative decision-making.64

Scholars in the Managerial camp reject Legalists notion that party-controlled adversarial proceedings are perceived to be more “fair” and therefore are more likely to enhance the legitimacy of the decisionmaker and confidence in his decisions. Gibson (1989) and Mondak (1993) argue that perceptions of procedural fairness do not contribute to the development of diffuse support since the public is not likely to be knowledgeable about the specific procedures used by these institutions. Rather, people are likely to infer perceptions of fairness based on whether they support the institution.

Finally, result-oriented participation draws from the writings of Critical Legal Scholars (“CLS”) who critique the Legalistic model’s tendency to equate fairness with

64 Although Seidenfeld’s focus was on rulemaking proceedings, agencies are also in a position to adopt adjudication procedures that emphasize a more deliberative, rather than trial-like, process.
party-controlled adversarial adjudication. CLS scholars in the informal tradition have pointed out that highly stylized rules of procedure may actually hurt rather than help individuals because they serve to mask substantive injustice. Mark Tushnet (1980) argues that the elaborate system of “fair hearings” that give individuals a chance for direct participation in the administrative process wrongly implies that justice can be achieved through the use of those hearings. Tushnet argues that the Supreme Court’s decision *Goldberg v. Kelly* actually diminished the forces of equality by “deflecting them into a fruitless struggle against a bureaucracy that readily swallowed the Court-prescribed dose of due process without any change in symptoms, and second by bolstering the idea that fairness was not far away in the American welfare state” (Tushnet, 1980: 709). To the extent CLS scholars such as Tushnet challenge the notion that legal processes are more democratic because they somehow neutralize the subjective or political aspects of decision-making, these scholars would also advocate the Managerial model.\(^65\)

In summary, result-oriented participation draws from a broad theoretical foundation and is marked by participants seeking resolution through deliberations presided over by an inquisitorial decisionmaker. Turning on its head the idea that party-controlled adversarial procedures are valuable for their own sake, the Managerial model critiques the Legalistic approach precisely because it elevates process over the agency’s

\(^65\) However, CLS scholars would likely take issue with the Managerial model’s modest goal of increasing the efficiency of administrative adjudications. Tushnet would likely argue that the Managerial model is subject to the same critique as the Legalistic model: they both perpetuate systems that benefit particular interest groups, social classes, and entrenched economic institutions.
goals, policies, and mission. Instead, result-oriented participation asks an inquisitorial
decisionmaker to efficiently structure adjudication so as to foster deliberation and
satisfy the substantive and procedural goals of the agency.

B. Expert/Scientific Decisionmakers

A bedrock principle of the Managerial model to administrative decision-making
is that experts, rather than generalists, should make decisions because they have
superior knowledge, wisdom, and expertise in any given area. Administrative courts
are created to deal with difficult and complicated questions that arise in the regulatory
context, and the decisionmaker’s main tasks are applying specialized knowledge and
weighing the intangibles in whatever substantive questions may arise. The Managerial
decisionmaker is someone with specialized knowledge and the ability to apply insight
gained through experience in the field of interest to the agency.

As discussed in Chapter 1, the first scholars to advance this kind of expertise
type were Progressive era thinkers that were part of the “scientific tradition.”
Historically, the expertise model focused on public officials as professionals able to
protect the public interest from large corporate interests through the exercise of expert
judgment (Landis, 1938). In the more modern public administration literature,
proponents of the expertise model suggest that public officials should not only
implement policies, but also use their own substantive expertise to figure out what
policies mean, how to best implement them, and what would be a good policy outcome
(Behn: 1998). In this vein, public officials are called upon to exercise “entrepreneurial”
or leadership expertise to attack problems and develop innovative solutions for the
effective delivery of public goods (Reich, 1988; Moore, 1995). The common thread between the historical and modern literature is that the public official is asked to exercise his or her professional expertise on behalf of the public. Expertise in this model includes the technical knowledge an official brings to the implementation process, the knowledge of the history and institutional legacy of an agency or program, and the applicable administrative process and rules (Wamsley et al., 1990).

Drawing from both the historical and modern public administration literature, the Managerial model to adjudication is highly skeptical of the competence of generalist decisionmakers to perform the important tasks of administration in an increasingly complex bureaucratic state. Instead of fearing bureaucratic discretion, the Managerial approach welcomes discretion because the decisionmakers are experts with the creativity and flexibility necessary for the effectiveness of agency administration. The Managerial perspective borrows from Frug’s description of the expertise model:

The expertise model can be summarized by envisioning it as the mirror image of the formalist model. The formalist model posits a “hard” inside (a machinelike, objective bureaucracy) controlled by a “soft” outside (the arbitrary, subjective desires of the bureaucracy’s constituents). The expertise model, by contrast, depicts a “soft” inside (the flexibility creation of an organizational purpose energized by a flexible, creative executive) controlled by a “hard” outside (the limits of professionalism, expertise, and competence that constraint organizational flexibility within appropriate bounds) (Frug, 1984: 1276).

Thus, in contrast to generalist decisionmakers who are bound to pre-existing rules, the Managerial approach grants decisionmakers the freedom to adapt existing rules to new situations. Generalized rules that limit the range of options available to decisionmakers
are eschewed in order to give agency experts the opportunity to solve problem through
tuition and reasoned decision-making.

Expert decision-making draws from political science literature demonstrating
that citizens can have generally positive experiences with bureaucracy and do not
necessarily believe that bureaucratic decisionmakers are inherently ineffective, unfair or
undemocratic (Goodsell, 1985). It is well-settled that the American public holds public
employees and public agencies in low regard. Yet, when citizens are asked to evaluate
their concrete experiences with public agencies and public employees, they do so in a
much more favorable light. Goodsell explained that a popular anti-government myth
deeply rooted in our country has fueled this inverse relationship between what
Americans believe about their government’s poor performance, and the satisfaction they
report in their day-to-day dealings with government. According to Goodsell:

A myth can be so grand only because it is somehow useful [to the
enemies of government] . . . American’s habitual suspicion of
government and corresponding commitment to capitalism make
public bureaucracy particularly exploitable: a bureaucratic America
stands as the antithesis of a self-reliant, free, and entrepreneurial
America. Unfortunate departures from this romantic vision can be
blamed on bureaucracy (Goodsell, 1983: 144-46).

The Managerial model rejects the anti-bureaucracy myth and embraces the notion that
expert decisionmakers lead to sound governance.

Granting expert decisionmakers the authority to make decisions can potentially
avoid what Bardach and Kagan (1982) call “regulatory unreasonableness.” The authors
document the tendency of social regulation “to expand excessively their coverage and
their stringency” or to produce too many “departures from common sense” (Bardach

89
and Kagan, 1982: xii, 6). The origin of regulatory unreasonableness is the desire to protect the public from discretionary acts by inspectors that might cause harm. The result is a regime of controls over the regulatory process that virtually guarantees regulatory unreasonableness: actions or non-actions that defy common sense.

In a chapter devoted to “managing the regulatory agency,” Bardach and Kagan argue that regulatory leaders can take steps to “encourage flexible enforcement.” The authors’ categories of action include managing inspectors so as to increase the likelihood that discretion will be used wisely, coping rationally with resource constraints, and performing a broad educational function with respect to both regulators and the regulated. As political managers, regulatory leaders should seek institutional arrangements that will activate and draw on the consciences of the regulated. Although the authors do not discuss administrative adjudicators directly, these lessons can be applied to justify the existence of decisionmakers with the discretion to exercise their expertise to ensure common sense outcomes.

Along with greater autonomy, scientific or expert decisionmakers look to create a collaborative and non-adversarial environment. This can include using conference tables and arranging the room so that the decisionmaker is on the same visual plane as everyone else in the room. A number of scholars have studied the relationship between political outcomes and physical environment. The basic argument is that every act is made in relation to a context, and that how a person perceives his or her context will influence the type of decision made (Canter, 1977). For example, if the façade of a building leads us to believe that we are entering a day care center, we are likely to enter
it in a different frame of mind and behave, at least initially, differently than if it looked like a Methodist Chapel (Canter, 1977: 1). Building on this essential idea, scholars have attempted to explain and describe the various ways that differences in environment can lead to differences in political behavior. In his article, “The Architecture of Parliaments: Legislative Houses and Political Culture,” Charles Goodsell (1988) argues that public buildings may be seen as a form of non-verbal communication. These buildings send messages which are decoded by the occupants with potentially powerful cueing effects. David Milne similarly conceptualized public buildings as political metaphors conveying messages of solidarity and durability.

Other scholars have discussed how the layout of a room can influence behavior. Harold Lasswell discusses how architectural decisions about public spaces often involve choosing a “strategy of awe,” a “strategy of admiration,” or a “strategy of fraternity” (Lasswell, 1979: 14-15). Recognizing that physical distance and position are likely to be internalized as psychic space, Lasswell theorized that an official who is remote and high indicates tyrannical or autocratic tendencies, while an official who meets the citizens on a common level indicates democratic tendencies. Patterson (1972) studied whether spatial relationships in legislative chambers may have important effects on the accentuation or crystallization of political parties or groups within the legislature. In the case of the courtroom, Greenberg (1976) wrote that “the architectural forms [of the courtroom] must be seen in terms of their symbolic content as a ‘sign system through which a society tries to communicate its idea model of a relationship between judges, prosecutors, juries and others involves in the judicial proceedings.’” Wolfe (1994) did a
study examining whether any difference in jury perception of the lawyer is dependent upon his location in the courtroom. Whereas a juridical decisionmaker emphasizes the procedural nature of the adjudication by creating an atmosphere that emphasizes the highly structured roles of the participants, a scientific/expert decisionmaker creates an environment that reflects the more fluid nature of the decision-making process. An expert decisionmaker who is also responsible for maintaining control over the proceedings must stop short of embracing a “strategy of fraternity.” Nevertheless, the hearing room in a Managerial agency is arranged so as to facilitate exchange and deliberation during the adjudication.

C. Adjudicator Accountability

Perhaps the most significant difference between the Legalistic and Managerial models turns on the accountability of the decisionmakers. Romzek and Dubnick identify four different types of bureaucratic accountability: hierarchical, professional, legal, and political. The first two types rely on “internal” sources of expectations and controls: hierarchical and professional accountability relationships are defined by internal sources such as quality assurance programs and internalized norms. By contrast, the second two types rely on “external” sources of expectations and controls: legal and political accountability relationships derive from external sources such as court reviews and stakeholder expectations. The Managerial model of adjudications incorporates Romzek and Dubnick’s “internal” sources of expectations and controls: (1) hierarchical accountability, and (2) professional accountability.
Hierarchical accountability is meant to ensure that decisionmakers are responsive to agency’s policy mission, and effective in carrying out their duties (Romzek & Dubnick 1987). Managerial agencies impose hierarchical accountability through formal performance measures and a hierarchy within the organization. In *Organizational Report Cards*, Gormley and Weimer (1999) argue that performance measures provide critical information to enhance policy control and accountability both from the top-down and the bottom-up. The authors suggest that performance measures are useful accountability mechanisms for dealing with information asymmetry that is endemic to decisionmakers in public administration. Applying this notion to administrative decision-making, performance measures can provide information that agency officials can use to make judgments about the effectiveness of a program or policy giving rise to these adjudications. This information enables effective oversight, which in turn leads to enhanced performance.

Professional accountability is imposed informally by the members of the organization itself, through their expertise and standards, which may be established by professional organizations or education and training. The ethics in the world of public administration are similar to the ethics of the legal process. Professional competence, rationality, fairness, impartiality, and probity are all benchmarks that federal agencies encourage and reward. Respecting the limits of one’s authority is as much a part of public administration as finding ways to work within budgetary constraints. Under the Managerial perspective, however, professional accountability reinforces these principles without imposing formal procedures and constraints on their decisionmakers.
Fuchs (1955) has explained how professional and hierarchical accountability can themselves serve as “automatic internal checks” that protect the participants with interests at stake in an agency adjudication. The safeguards in Fuchs’ “institutional method” of decision-making, which involves a cooperative effort of a number of officers with the agency head, lie in the “professional training and responsibility of the officers involved, in cross-checking among them, and in the responsibility of the agency heads who coordinate the entire operation, decide finally upon the result, and must answer for all that transpires” (Fuchs 1955: 289).

To be sure, the hierarchical accountability and professional accountability are not always compatible. But the Managerial model recognizes that decisionmakers may face simultaneous and conflicting expectations from two separate accountability relationships, and seeks to minimize these conflicts. For example, managerial adjudications utilize norms that encourage an individualized assessment of how a social goal can be furthered in a particular case. This discretion is exercised in the context of professional norms and understandings, developed within a community of experts, which help the adjudicator reach conclusions about the public interest (Katzmann, 1980). Ultimately, administrative decisionmakers are not asked to pretend that they are

66 Certainly there can be circumstances where bureaucratic officials issue instructions that are at odds with professional norms. A notable example is the case of Judge Advocate General Charles Swift, a military lawyer who was assigned to defend Guantánamo detainee Salim Hamdan under conditions were contrary to the professional norms and ethical standards shared by members of the bar. Swift defied his superiors by appealing Hamdan’s writ of habeas corpus petition to the Supreme Court. In Hamdan v. Rumsfeld, 548 U.S. 557 (2006), the Supreme Court held that the commission established to try Hamdan violated the Geneva Convention and the Uniform Code of Military Justice. Swift was passed over for promotion two weeks after the Supreme Court issued its decision.
right (as they would under a legalistic approach) but are simply asked to prudently exercise their discretion in executing a specific agency policy.

It is important to note that individual decisionmakers who have received extensive legal training are particularly hostile to the notion of hierarchical accountability. The professional norms of lawyers and judges, who typically act with a great amount of autonomy in the judicial setting, may sometimes be at odds with the implementation of performance indicators in the bureaucratic setting. As Gormley and Weimer (1999) point out, it is critical that the professional decisionmakers develop norms that are consistent with the desired direction of behavior in order to prevent dysfunctional responses such as goal displacement or deceit.
CHAPTER 3: THE SPECTRUM OF ADMINISTRATIVE ADJUDICATIONS

To flesh out the Legalistic perspective and the Managerial perspective, this chapter focuses on the different processes used by administrative agencies to conduct adjudications. Administrative law textbooks misleadingly suggest that all agencies adopt one of two standard procedural templates – formal and informal – to conduct their administrative adjudications (Lawson, 1993). In fact, different agencies employ vastly different approaches and rely on different types of decisionmakers. By placing the key categories of Managerial and Legalistic Perspectives against each other, it is possible to see how these theoretical perspectives play out in the context of actual rules and processes used by federal agency to conduct adjudications. Building on the perspectives discussed in Chapter 2, this chapter will first identify certain indicators that characterize the Legalistic and Managerial perspectives, and then use those indicators to place federal agencies along the Managerial/Legalistic spectrum. The goal of this chapter is to draw from illustrative examples to provide a clearer picture of where agency procedures fall on the Legalistic-Managerial spectrum of administrative adjudications, and to identify a system for classifying federal agencies along that spectrum.

To that end, Section I will draw from actual agency examples to compare and contrast the three fundamental principles of the Managerial and Legalistic models: (1) process-oriented participation versus result-oriented participation; (2) juridical decisionmakers versus expert decisionmakers; and (3) independence versus
accountability. Whereas the previous chapter focused on legal scholarship and commentary to provide an overarching theoretical framework for understanding administrative adjudication systems, this chapter will bring these frameworks into focus by examining and classifying federal agencies. After discussing these theoretical perspectives in context, Section II will identify a system for classifying federal agencies along a Legalistic/Managerial spectrum.

I. The Theoretical Perspectives In Context

Building on the theoretical models constructed in Chapter 2, this section will use illustrative examples of agency procedures to compare and contrast the Managerial and Legalistic models. Agency procedures are drawn from four sources of authority: the Administrative Procedure Act (“APA”), organic statutes, agency rules, and informal agency practice. First, as discussed in Chapter 1, the Supreme Court has determined that an agency must adopt the procedures outlined in the APA if the agency’s organic statute requires that the agency conduct a hearing “on the record.” The APA provides the “baseline” requirements of the administrative process. Second, in an organic statute Congress may require an agency to meet the basic requirements of the APA by requiring a hearing “on the record,” and may also impose additional procedural requirements on a case-by-case basis. Third, agencies are free to shape their own adjudicatory procedures by imposing additional burdens above what is required by the APA or its organic statute. Agencies typically adopt adjudication procedures and protocols at the individual agency level either by promulgating formal rules or issuing guidance documents. Finally, norms and practices develop informally in administrative
adjudications as a result of agency culture or common practice. This section will pull from all four sources of authority to classify agency procedures as either Legalistic or Managerial.

Although the examples will come from more than six agencies, this chapter will highlight the following six federal agencies in order to provide a foundation for the empirical analyses in Chapters 4-6: the Social Security Administration (“SSA”), the Department of Veterans Affairs (“VA”), the National Labor Relations Board (“NLRB”), the Equal Employment Opportunity Commission (“EEOC”), the Federal Energy Regulatory Commission (“FERC”) and the Nuclear Regulatory Commission (“NRC”). Based on this analysis, the next section will set out parameters for a “spectrum” of administrative adjudications, and suggests a methodology for placing agencies on the spectrum.

A. Process-Oriented v. Result-Oriented Participation

1. Decisional Setting

In the Legalistic model, the participants interact in an adversarial decisional setting. Because parties in an adversarial proceeding exercise a significant amount of control over the hearing, the Legalistic model requires intricate and highly stylized rules of procedure that account for virtually all circumstances and afford all parties the right to participate to the full extent allowed under the rules. The procedure and rules set out in the Federal Rules of Civil Procedure and the Federal Rules of Evidence serve as a useful starting point for agencies in the Legalistic model. If agencies do not apply these
federal rules wholesale, Legalistic agencies are expected to adopt and apply their own set of detailed procedural and evidentiary rules (Davis, 1964: 689).

A number of agencies adopt the same procedural rules used by federal courts. For example, in unfair labor proceedings before the National Labor Relations Board (“NLRB”), the same Federal Rules of Civil Procedure and Federal Rules of Evidence that are applicable in federal court are controlling.67 Neither the APA nor the Labor-Management Relations Act (the organic statute for the NLRB which consists of the National Labor Relations Act, the Taft-Hartley Act of 1947, and the Landrum-Griffin Act of 1959) requires NLRB to adopt these highly stylized rules of procedure. The choice to formalize NLRB proceedings was the subject of considerable intra-agency debate during the New Deal era. William M. Leiserson, an NLRB board member between 1939 and 1943, argued against the use of highly stylized rules of procedures to resolve complaints:

67 29 C.F.R. 101.10(a) (2006); 29 U.S.C. § 160(b). Current NLRB rules provide that “so far as practicable, [proceedings] be conducted in accordance with the rules of evidence applicable in district courts.” The phrase “so far as practicable” is included in the regulations because it is the NLRB’s official position that it is not required to apply the Federal Rules of Evidence. See International Business Systems, 258 NLRB 181, 181 fn. 5 (1981). However, federal courts have not always agreed, see NLRB v. United Sanitation Service, 737 F.2d 936, 940-41 (11th Cir. 1984), and so most ALJs strictly apply the Rules of Evidence in adjudications.
I do not believe that disputes in the highly complicated and specialized field of labor relations can be handled from a strictly legalistic point of view. The administration [of the Act] has been somewhat handicapped by legal policies which practically compel workers, unions and employers to turn their labor problems over to lawyers in order to get their business before the Board. I should prefer to consider the Board as a layman’s agency to which workingmen can come and tell their stories in their own way and before which employers can defend themselves in the same informal manner. The Act already provides for sufficient court review to take care of legal technicalities (Tomlins 1985: 207).

Leiserson was unable to convince his fellow NLRB members, and the agency ultimately adopted rules instructing decisionmakers to conduct hearings in the same manner as they are conducted in federal district courts.

Other agencies, such as the Federal Energy Regulatory Commission (“FERC”), do not incorporate the federal rules of procedure and evidence, and instead have developed their own set of highly stylized rules of procedure that are applicable to all adjudications before the agency. FERC currently has eleven separate rules governing the exchange of information between parties (discovery), and ten separate rules regarding the presentation of evidence at the hearing. FERC is not required by statute to engage in “on the record” adjudications, and therefore the provisions of the APA do not apply to FERC proceedings. Despite this freedom, FERC has adopted highly stylized rules of procedures that go beyond what is required by the APA. Interestingly,

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FERC has also developed an alternative set of procedures, which are simplified and less formal, that are available to parties for complaints involving smaller controversies.71

In the Managerial model, by contrast, the parties seek resolution through interactions with an inquisitorial decisionmakers. Unlike agencies such as the NLRB and FERC, agency adjudications before both the Social Security Administration ("SSA") and the Board of Veterans Appeals ("BVA") within the Department of Veterans Affairs are described in the regulations as “non-adversarial.” Mashaw (1996) has observed that both the SSA and the VA “have decided that they are unable to function effectively without the active-adjudicator investigation, informal rules of evidence and procedure, and presiding officer control of issue definition and development that characterize an inquisitorial or examinational approach.” SSA’s regulations give the decisionmaker wide latitude to control the proceedings, requiring only that the administrative law judge “conduct the proceedings in an orderly and efficient manner.”72 The SSA ALJ does not limit evidence based on hearsay, relevance or authentication rules. Rather, the ALJ accepts all evidence relating to the claim that is submitted at least five days prior to the hearing.73 Similarly, proceedings before the BVA are “ex parte in nature,” and it is the express obligation of the agency to assist a

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73 20 C.F.R. 405.320(a), 405.331 (2006).
claimant in developing facts pertinent to the claim.\textsuperscript{74} Every piece of evidence, in any form, offered by a VA claimant in support of a claim must be included in the record.\textsuperscript{75}

Managerial agencies also seek to foster a deliberative decisional setting, which can allow for creative ways for a decisionmaker to hear relevant information. For example, the Nuclear Regulatory Commission (“NRC”) does not employ the federal rules of evidence or rely on other formal procedures when conducting licensure hearings. One example of innovative cross-examination occurred in a NRC hearing concerning the Virgil C. Summer Nuclear Station.\textsuperscript{76} The licensing board combined rebuttal and surrebuttal testimony by putting opposing expert witnesses on the stand at the same time, thus enabling each witness to comment immediately on an opposing witness’s answer to a question.\textsuperscript{77} Such an arrangement would not be possible in structured settings with defined rules regarding presentation of evidence, cross-examination, and rebuttal.

Some agencies do not describe their proceedings as “non-adversarial” but nevertheless incorporate inquisitorial traits into their adjudications. For example, the Equal Employment Opportunity Commission (“EEOC”) does not describe its proceedings as “non-adversarial” but also does not rely on the Federal Rules of Civil

\begin{footnotesize}
\textsuperscript{74} 38 C.F.R. 3.103(a) (2006).
\textsuperscript{75} 38 C.F.R. 3.103(d) (2006).
\textsuperscript{76} Hearing on the application by South Carolina Elec. and Gas Co. for an operating license for Unit 1 of the Virgil C. Summer Nuclear Station, No. 50-295 OL; taken from B. Paul Cotter, Jr. (former ASLBP chief AJ), “Nuclear Licensing: Innovation Through Evolution in Administrative Hearings” 34 Administrative L. Rev 497, 519 (1982).
\textsuperscript{77} See transcript at 4685-93, 5060, 5070-77. See also Statement of Policy on Conduct of Licensing Proceedings, 13 NRC 452, 457 (1981).
\end{footnotesize}
Procedure, the Federal Rules of Evidence, or its own set of highly stylized rules of procedure.\footnote{29 C.F.R. 1614.109(e) (2006).} An EEOC Administrative Judge has significant control over the hearing: only witnesses approved by the AJ are permitted to appear at the hearing, and the AJ may allow hearsay testimony if it is deemed to be relevant, material and not repetitious.\footnote{U.S. Equal Employment Opportunity Commission, Federal Sector Complaints Processing Manual, “EEO Management Directive MD-110” [hereinafter MD-110], Chapter 6 (Nov. 1999).}

Similarly, Immigration hearings are not described as “non-adversarial,” but Immigration Judges in the Department of Justice do not require parties to follow formal rules of evidence or other rules of procedure during a hearing. Immigration judges have flexibility to accept testimony and structure the hearings in a manner that would be objectionable under the adversarial rules used in federal court.\footnote{It is worth noting, however, that immigration courts appear designed to have an air of formality. Each local immigration court is required to begin every removal proceeding in an identical manner (advising respondent of certain rights, placing respondent under oath, and reading allegations) and has discretion to impose its own stylized rules of procedure – which can be as specific as requiring all documents to be “two-hole punched at the top of the page with holes 2 ¾” apart.” See 18 C.F.R. 1240.10 (2006); Procedure 5, Local Operating Procedures, Office of the Immigration Judge, Arlington Virginia.}

Drawing from this discussion, Figure 3.1 below classifies each of the six featured agencies within the Legalistic and Managerial models according to the rules of procedure that govern each agency’s adjudications.
2. Fact-Gathering/Discovery

The right of participants to control and dictate the fact-gathering process is an important component of the Legalistic model. “Discovery” is a catch-all label for the procedures used by parties to gather facts and obtain information before a hearing. Discovery can include depositions, interrogatories, document requests, or requests for admissions, and are sent to the adverse party in an attempt to “discover” relevant information.

Process-oriented participants have a presumptive right to take as much discovery as they feel necessary to develop relevant evidence. Agencies that adopt this approach allow participants to control the fact-finding process, and what the legal fact-finders “know” is a function of information gathered by the parties. Because the APA does not mention discovery, agencies have flexibility to promulgate its own rules governing discovery. FERC is an example of an agency that has, over time, adopted a Legalistic approach toward discovery. Prior to 1987, participants in a FERC proceeding did not have the right to conduct discovery. The most common form of discovery employed was the informal “data request.” Under the old system, depositions could only be taken upon application to the presiding officer. On March 2, 1987, FERC completed a rulemaking and issued Order No. 466 adopting rules of discovery for adjudicatory
proceedings. The new rules, which closely track the Federal Rules of Civil Procedure, allow participants significant freedom to take depositions and obtain discovery of any non-privileged matter that is “relevant” to the subject matter of the proceeding.

The EEOC provides an interesting example of how the process-oriented approach to participation can overtake an agency’s initial preference for result-oriented participation. EEOC regulations, most recently updated in 1992, require parties to seek authorization from the administrative judge prior to commencing discovery. In practice, however, parties rarely request prior authorization before filing discovery requests. Rather, the parties take control of the fact-gathering process and initiate discovery on their own. This practice has become so prevalent that EEOC issued a guidance document providing that, in contravention of the agency’s regulations, parties may begin discovery upon receiving confirmation from the AJ that the case has been docketed. One possible reason for this disconnect is that attorneys unfamiliar with the EEOC rules tend to assume that the charging party has the right to seek discovery, and that it had become common practice to file discovery without seeking prior authorization. According to the current EEOC management directive, AJs should not

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82 52 Fed Reg 6960 (1987); 18 C.F.R. 385.402, 485.403 (2006). Under the existing FERC rules, it is not ground for objection that the information sought will be inadmissible in the proceeding, as long as the information appears reasonably calculated to lead to the discovery of admissible evidence.
83 29 C.F.R. 1614.109(d) (2006). The regulations state that although both parties are entitled to reasonable development of evidence, “the administrative judge may limit the quantity and timing of discovery.”
84 EEO MD-110, Chapter 7.
play a significant role in discovery, except to encourage the parties to cooperate.\textsuperscript{85} In the event one party objects to the certain discovery requests, the AJ rules on motions to compel and protective orders after considering EEOC policy and precedent established in federal caselaw. Thus, without amending its regulations, EEOC adopted the Legalistic model by ceding control of the fact-gathering/discovery process to the parties.

Managerial agencies conduct fact-gathering on their own, and cede control of the fact-gathering process to the participants only in rare circumstances. The key notion is that the decisionmaker, and not the participant, retains control over the discovery process. In some cases, this means that agencies have restricted the ability to take discovery. For example, in license proceedings before the NRC, a party may not seek discovery from any other party or the NRC or its personnel except in limited circumstances.\textsuperscript{86} Rather, the NRC staff is responsible for maintaining and updating a “hearing file” which is available to the public and is also published on the agency’s website.\textsuperscript{87}

Neither the SSA nor the VA regulations allow the claimants to file discovery requests. In the case of the VA, a veteran has a statutory right to the assistance of the VA to uncover information that will assist the presentation of the case, and so formal

\textsuperscript{85} Id.
\textsuperscript{86} 10 C.F.R. 2.1203 (2006).
\textsuperscript{87} Id.
discovery rules are unnecessary.\footnote{\textit{38 U.S.C. § 5107(a).}} The SSA does not allow depositions, and will only issue subpoenas for the production of relevant documents following a written request to the ALJ.\footnote{\textit{42 C.F.R. 405.332 (2006).}}

The NLRB provides an interesting example of an agency that has adopted a result-oriented approach by disallowing discovery, even though most other NLRB procedures are consistent with the Legalistic model. In order to mitigate the risk of employers or unions intimidating witnesses prior to the adjudication process, the NLRB does not allow parties to conduct discovery. In the 1960s and 1970s, a number of participants challenged this policy in federal court seeking to invalidate NLRB’s rule limiting discovery in its adjudications.\footnote{\textit{See, e.g., NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402 (7th Cir. 1961); Electronic Design & Development Co. v. NLRB, 409 F. 2d 631, 635 (9th Cir. 1969); D’Youville Manor, Lowell, Mass., Inc. v. NLRB, 526 F.2d 3, 7 (1st Cir. 1975); NLRB v. Valley Mold Co., 530 F.2d 693, 695 (6th Cir. 1976).}} The matter was eventually taken up by the Supreme Court in \textit{NLRB v. Robbins Tire & Rubber Co.}\footnote{\textit{NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).}} Adopting a distinctly Managerial perspective, the Supreme Court upheld NLRB’s rule.\footnote{On January 25, 2007, I interviewed Deputy General Counsel for the NLRB John E. Higgins Jr. in the NLRB Headquarters in Washington DC. He defended the NLRB’s policy on discovery by explaining that ULP cases are typically “he said, she said” cases for which discovery would not assist either party.} In balancing the participation rights of the parties, the court recited the NLRB’s rationale for limiting discovery:

\begin{quote}

On January 25, 2007, I interviewed Deputy General Counsel for the NLRB John E. Higgins Jr. in the NLRB Headquarters in Washington DC. He defended the NLRB’s policy on discovery by explaining that ULP cases are typically “he said, she said” cases for which discovery would not assist either party.
\end{quote}
• “employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all.”

• “employees and nonemployees may be reluctant to give statements to NLRB investigators at all, absent assurances that unless called to testify in a hearing, their statements will be exempt from disclosure until the unfair labor practice charge has been adjudicated.”

• “even without intimidation or harassment a suspected violator with advance access to the Board’s case could ‘construct defenses which would permit violations to go unremedied.’”

Figure 3.2 below repeats the information in Figure 3.1, and completes the picture by addressing discovery and providing a full summary of process-oriented v. result-oriented agencies. Of particular note, the table indicates that the NLRB (highlighted) has adopted a process-oriented approach to participation with respect to rules of procedure but has also adopted a result-oriented approach to participation with respect to pre-hearing discovery. The EEOC (also highlighted) has adopted a result-oriented approach to participation with respect to its decision setting, but a process-oriented approach with respect to fact-gathering. Thus, the EEOC and NLRB are examples of agencies that have drawn simultaneously from the ideal-type Legalistic and Managerial models of adjudication.
B. Juridical v. Expert Decisionmakers

1. Appointment Process

The Legalistic model relies on a highly structured process for appointing juridical decisionmakers. A key component of this model is an “arms-length” appointment process, whereby the agency has limited ability to vet their decisionmakers or otherwise choose among a pool of applicants. The Office of Personnel Management (“OPM”) regulates the appointment of ALJs. Applicants who meet certain minimum education/experience requirements submit to an examination in order to obtain a “final rating.” The examination process includes: (1) a written demonstration, (2) a panel interview, and (3) a personal reference inquiry. Importantly, this examination is not focused on any one area of law, but instead attempts to measure general legal aptitude. At the end of the process, OPM assigns a final numerical rating on a scale of 70-100 based on the results of both the qualifications score and exam. Applicants who receive

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eligible ratings then have their names placed on the competitive inventory, or “register of eligibles,” for referral to agencies for consideration for appointment to vacant positions.

Agencies such as the NLRB and SSA, which are required by the APA to select ALJs off OPM’s register of eligibles, can be sure that the decisionmaker has gone through this extensive examination and appointment process. Thus, each ALJ in the federal administrative judiciary qualifies as a juridical decisionmaker, with the appropriate legal training and general analytical skills. In addition, there are some decision-making bodies, such as FERC and the Boards of Contract Appeals, which are not required to appoint ALJs active on OPM’s register, but nonetheless follow the same appointments process.  

By contrast, agencies that follow the Managerial model do not hire decisionmakers from the list compiled by the Office of Personnel Management, but hire the decisionmakers directly. For example, the Merit Systems Protection Board (“MSPB”), which employs Administrative Judges who hear and decide federal employee appeals, does not rely on OPM and instead fills position in accordance with their general Schedule A authority. The MSPB uses methods for selecting applicants

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94 The Boards of Contract Appeals, which were created by the Contract Disputes Act of 1978, are not required to rely on OPM to hire their decisionmakers, but they follow an identical appointments process. The Contract Disputes Act requires that each board member “be selected and appointed to serve in the same manner” as ALJs appointed pursuant to the APA. 41 U.S.C. § 607(b).

95 Schedule A is part of the “excepted service.” Schedule A authority grants agencies the authority to hire individuals when it is impractical to use standard qualification requirements and to rate applicants using traditional competitive procedures. Typically, the Schedule A authority is used to hire attorneys because, by law, OPM cannot develop qualification standards
for AJ positions that include recruitment from a Vacancy Announcement, college recruitment, reassignment of in-house attorneys and inquiries from unsolicited outside applicants (ACUS, 1992:114). Similarly, EEOC and VA officers are selected from competitive candidates outside the OPM process.

Although outside the scope of this dissertation, the evolution of the selection process for Immigration Judges at the Department of Justice would provide an interesting case study. Immigration Judges work directly for the executive branch and are managed by the Justice Department's Executive Office of Immigration Review. Historically, Immigration Judges at the Department of Justice were hired after an informal process that included posting an advertisement for the position and interviews. In the late 1990s, there was a shift in the method for hiring immigration judges away from public advertising and competitive selection. The Executive Office of Immigration Review began conducting its own interview process and forwarding recommendations for new hires to the Office of the Deputy Attorney General. Sometimes this process took place without public advertisements for the posts and

or examinations for attorney jobs. Agencies also use exceptions for other special jobs, including chaplain, law clerk trainee, medical doctor, dentist, certain interpreters, experts for consultation purposes, and some others. Agencies routinely use their Schedule A authority to hire employees on a “trial” basis. After 2 years of successful performance, an agency may then noncompetitively convert them to a permanent appointment in the competitive service or they may remain on the excepted service appointment.

96 A typical advertisement stated that IJ applicants must be bar members with 6.5 years of legal experience. Applicants were expected to submit the normal federal civil service application form and a current resume. A computerized “Immigration Judge Applicant File” created a pool of applicants, and generated a report that listed available applicants when a vacancy arose in a given location. Except for the experience requirement and the selective placement factors, this process was very similar to the process used for hiring Schedule A lawyers elsewhere in the federal government (ACUS 1992: 114).
without competing candidates. Then, in the early 2000s, the process became inverted, and appointments for Immigration Judge vacancies started coming directly from the Attorney General’s office.\textsuperscript{97} Even though the process changed over time, in each case the Department of Justice used the Managerial model when choosing decisionmakers.

Figure 3.3 below classifies each of the six featured agencies within the Legalistic and Managerial models according to the appointments process used for the agency’s decisionmakers.

\textbf{Figure 3.3 Legalistic/Managerial Agencies By “Education/Experience” Indicator}

<table>
<thead>
<tr>
<th>Appointment Process</th>
<th>Juridical (Legalistic)</th>
<th>Expert (Managerial)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FERC</td>
<td>NRC</td>
</tr>
<tr>
<td></td>
<td>SSA</td>
<td>VA</td>
</tr>
<tr>
<td></td>
<td>NLRB</td>
<td>EEOC</td>
</tr>
</tbody>
</table>

2. \textbf{Education/Experience Requirements}

A juridical decisionmaker in the Legalistic model is someone with generalist legal training, a member in good standing of the bar in at least one jurisdiction, and extensive experience as a practicing attorney. The preference for juridical decisionmakers is embodied in the APA, which requires agencies to appoint “Administrative Law Judges” to conduct proceedings under sections 556 and 557 of the

\textsuperscript{97} In congressional testimony before the House Judiciary Committee on May 23, 2007, former Justice Department attorney Monica Goodling testified that she improperly considered political affiliations when selecting immigration judges. Goodling testified that her superior, Kyle Sampson, told her that the Office of Legal Counsel within the Justice Department had concluded that immigration judges were not covered by civil service rules. The Justice Department released a statement after Goodling’s testimony that it had “located no record” of an Office of Legal Counsel opinion that reached that conclusion. This scandal highlights one of the potential weaknesses of the Managerial model: its susceptibility to corrupting forces within the bureaucracy. However, the questionable actions of the Justice Department attorneys and officials were clearly outside the scope of what constitutes permissible actions under the Managerial model. As a result of this scandal, it is likely that the Justice Department will revert back its pre-2000 process for the hiring of Immigration Judges.
Administrative Procedure Act. As mentioned in the previous section, OPM regulates the appointment of ALJs. To meet OPM’s minimum qualification requirements, applicants must demonstrate in their application that they are attorneys licensed to practice law. They must have at least 7 years experience as an attorney participating in litigation at the federal, state or local level. ALJ applicants who meet the minimum education/experience requirements are then evaluated based on their accomplishments in the legal field. The OPM will examine the accomplishments of an applicant to determine knowledge of administrative procedures, rules of evidence, and trial practices. Accomplishments are also used as a basis to rate analytical ability, decision-making ability, oral communications ability and judicial temperament, writing ability, and organizational skills. Federal agency required to conduct proceedings “on the record” pursuant to the APA, such as the NLRB and SSA, must use ALJ decisionmakers chosen through the OPM process.

Some agencies, such as FERC, hire decisionmakers from the OPM register even though they are not required to do so. Although FERC is not required by statute to use ALJs, FERC has embraced the Legalistic model and seeks out juridical decisionmakers to preside over the agency’s adjudications. Because FERC seeks decisionmakers with legal training, substantial legal experience, and substantive knowledge of legal

procedure, FERC utilizes OPM’s appointments process and draws from the OPM register to hire its juridical decisionmakers.

Agencies such as the EEOC and VA are not required to use ALJs and do not hire from the OPM register, but nonetheless have adopted the Legalistic approach to the extent that they require their AJs to have generalist legal training. Neither the EEOC nor the VA requires its decisionmakers to have any specialized training in the field of health care or personnel management.

The Managerial model, by contrast, does not focus on a decisionmaker’s legal training, but rather on their expertise and substantive knowledge of a field. Agencies that do not rely on ALJs for their adjudications use decisionmakers usually called Administrative Judges (“AJs”), Hearing Officers, Presiding Officers, or have specialized titles such as Immigration Judges. Rather than use OPM’s uniform system which rates applicants based on general aptitude in the field of law, an agency following the Managerial model will require that their decisionmakers possess a certain degree of skills or experience in the regulated area. The Atomic Safety and Licensing Board Panel (“ASLBP”), which is the independent trial-level adjudicatory body of the NRC, seeks administrative judges who have a minimum of 7 to 10 years work experience in a field related to the work of the ASLBP.\(^{101}\) Preferred candidates typically have 7 to 10 years of specialized experience beyond the Ph.D. in one of the following fields: nuclear engineering, criticality, physics, geophysics, environmental science, engineering, or a number of other fields.

\(^{101}\) NRC Job Announcement number ASLBP-2006-0004 (posted on July 24, 2006).
Figure 3.4 below repeats the information in Figure 3.3, and completes the picture by addressing the education/experience indicator.

**Figure 3.4 Legalistic/Managerial Agencies By “Education/Experience” and “Appointment Process” Indicators**

<table>
<thead>
<tr>
<th>Juridical (Legalistic)</th>
<th>Expert (Managerial)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointment Process</td>
<td></td>
</tr>
<tr>
<td>FERC</td>
<td>NRC</td>
</tr>
<tr>
<td>SSA</td>
<td>VA</td>
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<tr>
<td>NLRB</td>
<td>EEOC</td>
</tr>
<tr>
<td>Education/Experience</td>
<td></td>
</tr>
<tr>
<td>FERC</td>
<td>NRC</td>
</tr>
<tr>
<td>SSA</td>
<td></td>
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<tr>
<td>NLRB</td>
<td></td>
</tr>
<tr>
<td>VA</td>
<td></td>
</tr>
<tr>
<td>EEOC</td>
<td></td>
</tr>
</tbody>
</table>

**C. Adjudicator Independence v. Adjudicator Accountability**

1. **Quality Control Mechanisms**

Proponents of the Legalistic model emphasize adjudicator independence and argue that decisionmakers should have a level of independence on par with federal court judges. The OPM, which administers the ALJ program, has promulgated regulations that exhibit these Legalistic principles. OPM is the only agency permitted to make appointments of ALJs, and only OPM may remove, suspend, reduce in grade and pay, increase in grade or pay, or discipline an ALJ. Not only does OPM control hiring and firing, but the regulations go a step further to preclude federal agencies from rating the performance of their decisionmakers. The OPM regulations governing ALJs command that “an agency shall not rate the performance of an administrative law judge.” The regulations also state that agencies cannot reward competent work: “an agency may not grant a monetary and honorary award...for superior accomplishment by an

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102 5 C.F.R. 7521(b) (2006)
administrative law judge in the performance of adjudicatory functions.” As such, agencies that conduct adjudications pursuant to the APA, such as NLRB and SSA, may not implement quality control mechanisms.

Within the SSA, the strongest advocates for the Legalistic model are the ALJs themselves. In the late 1970s, the SSA implemented a program to increase ALJ productivity and reduce reversal rates that included the following measures: (1) setting a minimum number of cases to be decided each month; (2) removing individual ALJ control of support staff through a pooling of administrative and clerical personnel; and (3) denying attendance at professional meetings of low producers or ALJs with high reversal rates (Cofer: 1985). In response, five ALJs brought suit in federal district court arguing that these policies violated the statutory right of ALJs to decisional independence. The case was settled in 1979 and the program was abandoned.

Undeterred, agency managers within the SSA made several other attempts to implement control mechanisms in order to reduce variation in ALJ reversal rates of disability awards (Pierce, 1990). Again, SSA ALJs took it upon themselves to fight any attempt by an agency to impose even the most basic mechanisms to keep track of ALJ adjudications. In *Nash v. Bowen*, and *Chocallo v. Bureau of Hearings and Appeals*, SSA, for example, SSA ALJs objected to the mere tabulation of data on ALJ

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104 *Nash v. Bowen*, 869 F.2d 675 (2d Cir. 1989).
adjudications. In both cases, the federal courts held that the SSA attempts to control ALJs through the use of “management science” were unlawful (Pierce, 1985).

Certain agencies are not statutorily required to use ALJs but nevertheless embrace the Legalistic model and take steps to protect adjudicator independence. For example, NRC AJs are not protected by the statutory safeguards of independence that apply to ALJs, but NRC voluntarily refrains from any effort to evaluate the performance of its AJs. The NRC does not utilize quality control mechanisms and thus its AJs are as “independent” as typical ALJs.

The foil for the Legalistic model’s protection of ALJ independence is the Managerial model’s emphasis on quality control mechanisms. The Managerial model rejects the Legalistic preoccupation with independence, and instead encourages performance evaluations for administrative decisionmakers. There are no statutory or regulatory restrictions against performance evaluations by agencies that employ AJ (or other non-ALJ) decisionmakers. As such, AJs regularly undergo such appraisals by the agencies for which they work.

The Merit System Protections Board (“MSPB”), for example, has 11 regional offices and employs approximately sixty-five administrative judges. An MSPB adjudication is Legalistic to the extent that AJs preside over an adversarial, trial-type proceeding. However, the MSPB adopts the Managerial model and subjects its AJs to

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106 According to Pierce, the rejection of these agency initiatives is an indication that judges are “abysmally ignorant of the techniques involved in bureaucratic decision-making, scientific decision-making, management science, quality control, and statistics.”

107 MSPB considers their “office title” to be “Attorney-Examiner” and their working title to be “Administrative Judge.”
performance review. The Regional Director (Chief Administrative Judge) completes an annual performance appraisal for each AJ. As part of the review, each AJ is required to adjudicate a minimum number of appeals per year. The Regional Director also is responsible for ensuring that all decisions undergo a quality review prior to issuance. At least one federal court has upheld the legitimacy of the Board’s quality review program in the face of a challenge by an MSPB AJ who had been terminated due to unacceptable performance.108 The VA and the EEOC implement similar quality review programs.

There is some evidence that federal agency managers prefer the Managerial model’s focus on accountability over the Legalistic model’s emphasis on independence. Lubbers (1996) used empirical data to chart the “drift away from ALJs” that has occurred at the federal level. Relying on Office of Personnel Management data, Lubbers charts the decline of the government-wide use of ALJs, finding that the number of ALJs in the federal government has leveled off in the past decade and has actually decreased outside of the Social Security Administration. Lubbers identified three reasons why many government agencies are running away from the ALJ program: cost, restrictions on selection, and their effective immunity from performance management. “Agency managers obviously have great incentive to opt for using hearing officers who can be selected strategically, who are easier to manage, and who can be procured at bargain rates” (Lubbers, 1996: 73-74). Thus, despite the commitment to the Legalistic

108 Fuller v. United States, Civil Action No. 84-1699 (D.D.C., December 19, 1985) (“Quality review subjected plaintiff’s work to close analysis, disclosing serious deficiencies, particularly her lack of analytical ability and her inconsistencies in applying facts to precedents”).
perspective in the original APA, agencies have found various ways to subvert the statutory scheme in the name of improving the bureaucratic process.

Figure 3.5 below classifies each of the six featured agencies within the Legalistic and Managerial models according to the educational/experience requirements set for the agency’s decisionmakers.

**Figure 3.5 –Legalistic/Managerial Agencies By “Quality Control Mechanisms” Indicator**

<table>
<thead>
<tr>
<th>Quality Control Mechanisms</th>
<th>Independent Adjudicator (Legalistic)</th>
<th>Accountability (Managerial)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FERC</td>
<td>SSA</td>
</tr>
<tr>
<td></td>
<td>SSA</td>
<td>NLRB</td>
</tr>
<tr>
<td></td>
<td>NRC</td>
<td></td>
</tr>
</tbody>
</table>

2. **Ex Parte Communications**

An ex parte communication is an oral or written communication made to or by a decisionmaker without notice to the participants, which is not on the record but is directed to the merits of an on-the-record proceeding.\(^{109}\) This dissertation focuses on ex parte communications between a decisionmaker and other agency officials because, as discussed below, the benefit of such communications arises out of the agency’s expertise.

There has been significant debate over the permissibility of ex parte communications in certain types of administrative proceedings. As Stone (1960) explained: “No one will quarrel with the position that *improper* ex parte communications...”\(^{109}\)

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109 The APA defines ex parte communications as “oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not give….” 5 U.S.C. § 551(14). The Government in the Sunshine Act narrowed this definition to include only those ex parte communications that are “relevant to the merits.” 5 U.S.C. § 557(d).
communications should be prohibited. But no one will contend that all ex parte communications are improper. So the real question is . . . where to draw the line” (Stone, 1960: 141).

In the Legalistic model, it is fundamentally unfair for a decisionmaker to have an ex parte communication relating to a pending adjudication. Prohibition of ex parte contacts under the Legalistic model is based on the idea that all parties should have an equal opportunity to present argument and evidence and that there should be a separation of powers concerning agency investigators, prosecutors, and decisionmakers. The APA prohibits ex parte contacts during any “on-the-record” adjudication proceeding; thus agencies such as SSA and NLRB that conduct adjudicatory proceedings governed by section 554 of the APA may not engage in ex parte contacts.

In the Managerial model, it is proper for decisionmakers to receive input from the agency head and other parties with expertise on policy matters as they arise in an adjudication. In this model, agency decisionmakers are extensions of agencies responsible for implementing policy, and therefore should have the flexibility to confer with agency personnel regarding policy matters. As Rossi points out:

on many issues, such as those issues of environmental science, judgments about competing policy or technical models often must be made. The agency head is in a better position than the ALJ to determine whether an individualized policy or technical judgment fits with the agency’s broader policy agenda (Rossi, 1999: 3).

Granting decisionmakers the flexibility to consult with agency heads on matters of law and policy enhances two of an agency’s core responsibilities: interpreting the reach of
the powers delegated to them by Congress and providing explanations for its policy choices.

Congress has not specifically prohibited ex parte communications in off-the-record agency proceedings. Yet, some agencies whose adjudications are not governed by the APA have nonetheless adopted the Legalistic approach and developed their own rules prohibiting off-the-record communications. FERC Rule 2201, for example, prohibits ex parte communications in “any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue….”110 Similarly, the FCC also draws strict distinctions between decision-making and non-decision-making staff and prohibits contacts between the two categories of employees on matters subject to formal hearing requirements.111

Under the Managerial model, as long as the agency staff consulted by a decisionmaker is not directly or indirectly interested in the outcome of the proceeding at hand, any concerns about the combination of adjudicative and investigatory roles are minimized. Thus, the EEOC has rules preventing the respondent agency from sending communications or otherwise pressuring the AJ to reach a certain decision,112 but there is no rule prohibiting the EEOC itself from exerting pressing on the AJ to reach certain findings on matters of law or fact. The protection afforded to the AJ is narrow but adequate under the Managerial Model.

As a general rule, the NRC has promulgated a regulation prohibiting ex parte contacts between interested persons outside the agency and an adjudicatory employee. Consistent with Managerial model, however, the agency has carved out a number of important exceptions. Specifically, the prohibitions against ex parte contacts do not apply to “[c]ommunications regarding generic issues involving public health and safety….” The NRC also grants decisionmakers discretion to communicate with other agency officials on public health and safety policy questions that may arise in a specific adjudication.

Although not as common at the federal level, state agencies have adopted the Managerial model and promulgated liberal rules regarding ex parte contacts for administrative law judges. In New York State, for example, an agency cannot direct the ALJ to reach a certain result in a pending case, but an agency supervisor can give “advice or guidance” to the ALJ if the supervisor believes such advice is necessary to “assure quality standards of an agency or to promote consistency in agency decisions.”

Figure 3.6 below repeats the information in Figure 3.5, and completes the picture by addressing ex parte contacts and providing a full summary of independent v. accountable agencies. The table shows that the NRC (highlighted) favors adjudicator independence with respect to quality control mechanisms, but promotes accountability

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114 Id.
115 9 NYCRR § 3.131.
by giving decisionmakers the flexibility to discuss generic policy issues with other agency officials.

**Figure 3.6 Legalistic/Managerial Agencies By “Quality Control Mechanisms” and “Ex Parte Communications” Indicators**

<table>
<thead>
<tr>
<th>Quality Control Mechanisms</th>
<th>Adjudicator Independence (Legalistic)</th>
<th>Adjudicator Accountability (Managerial)</th>
</tr>
</thead>
<tbody>
<tr>
<td>FERC</td>
<td></td>
<td>VA</td>
</tr>
<tr>
<td>SSA</td>
<td></td>
<td>EEOC</td>
</tr>
<tr>
<td>NLRB</td>
<td>NRC</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Ex Parte Communications</th>
<th>FERC</th>
<th>NRC</th>
</tr>
</thead>
<tbody>
<tr>
<td>SSA</td>
<td></td>
<td>VA</td>
</tr>
<tr>
<td>NLRB</td>
<td></td>
<td>EEOC</td>
</tr>
</tbody>
</table>

**II. The Legalistic/Managerial Spectrum**

The Legalistic and Managerial models outlined in Chapter 2 provide two ideal-type models for characterizing and understanding administrative adjudications.

Drawing from the indicators identified in this Chapter, we can confidently reject the conventional dichotomous distinction of “formal” and “informal” adjudications in favor of a spectrum of adjudicatory processes and procedures ranging from highly Legalistic to the highly Managerial. Defining this Legalistic/Managerial spectrum, and providing a systematic way to identify agencies along this spectrum, is a critical step in the systematic study of administrative adjudications.

At one end of the spectrum is the Managerial model, characterized by result-oriented procedures, expert decisionmakers, and adjudicator accountability. At the other end of the spectrum is the Legalistic model, characterized by process-oriented procedures, juridical decisionmakers, and adjudicator independence.
Figure 3.7 Managerial/Legalistic Spectrum

As discussed in Section I above, however, not all agencies fit neatly into either of the Legalistic or Managerial Models. Thus, this section develops a system for identifying cross-over or hybrid agencies along the spectrum.

Using the indicators and the classifications from Section I, it is possible to give each federal agency a “Judicialization Score” that will assist in placing each agency along the spectrum. Figure 3.8 below incorporates all of the information presented in Figures 3.1 through 3.7 above, and identifies with an “L” if the agency adopted a Legalistic approach or with a “M” if the agency adopted a Managerial approach.
Figure 3.8 Judicialization Score of Six Federal Agencies

<table>
<thead>
<tr>
<th>Indicators</th>
<th>Agency</th>
<th>NRC</th>
<th>VA</th>
<th>EEOC</th>
<th>SSA</th>
<th>NLRB</th>
<th>FERC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Result-Oriented v. Process-Oriented Participation</td>
<td>Decisional Setting</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>L</td>
<td>L</td>
</tr>
<tr>
<td></td>
<td>Fact-Gathering/Discovery</td>
<td>M</td>
<td>M</td>
<td>L</td>
<td>M</td>
<td>M</td>
<td>L</td>
</tr>
<tr>
<td>Juridical v. Expert Decisionmakers</td>
<td>Education/Experience</td>
<td>M</td>
<td>L</td>
<td>L</td>
<td>L</td>
<td>L</td>
<td>L</td>
</tr>
<tr>
<td></td>
<td>Appointments Process</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>L</td>
<td>L</td>
<td>L</td>
</tr>
<tr>
<td>Adjudicator Independence v. Adjudicator Accountability</td>
<td>Quality Control Mechanisms</td>
<td>L</td>
<td>M</td>
<td>M</td>
<td>L</td>
<td>L</td>
<td>L</td>
</tr>
<tr>
<td></td>
<td>Ex Parte Communications</td>
<td>M</td>
<td>M</td>
<td>M</td>
<td>L</td>
<td>L</td>
<td>L</td>
</tr>
<tr>
<td>Totals</td>
<td></td>
<td>-4</td>
<td>-4</td>
<td>-2</td>
<td>+2</td>
<td>+4</td>
<td>+6</td>
</tr>
</tbody>
</table>

+ = Legalistic  
- = Managerial

Treating each “L” as an integer with a value of +1, and each “M” as an integer with a value of -1, the final row in Figure 3.8 sums the integers in each column to provide the agency with a Judicialization Score. Where an agency has fully adopted a Legalistic approach, its Judicialization Score will be +6. Where an agency has fully adopted a Managerial approach, its Judicialization Score will be -6. In “cross-over” or “hybrid” cases, an agency’s score will adjust along the Managerial/Legalistic spectrum.

By way of example, the NLRB has a Judicialization Score of +4. NLRB’s organic statutes require NLRB to conduct adjudications in accordance with Section 554 of the APA, and thus its adjudications are conducted by a juridical decisionmaker (+2) who enjoys significant independence from the agency (+2). Although the NLRB relies on the Rules of Evidence and Rules of Civil procedure (+1), the NLRB departs from the process-oriented model by restricting the right of participants to engage in any type of discovery (-1). Totaling the integers for NLRB results in a +4 score.
Using the totals in the final row of Figure 3.8, we can then use the Judicialization Scores to place the agencies along the Managerial/Legalistic spectrum. Figure 3.9 represents the location of each of the six featured agencies from this chapter on the Managerial/Legalistic Spectrum.

**Figure 3.9** Six Agencies on Managerial/Legalistic Spectrum by Judicialization Score

<table>
<thead>
<tr>
<th>MANAGERIAL</th>
<th>-----I--------I-----------I---------I--------I---</th>
<th>LEGALISTIC</th>
</tr>
</thead>
<tbody>
<tr>
<td>NRC</td>
<td>EEOC</td>
<td>SSA</td>
</tr>
<tr>
<td>VA</td>
<td>NLRB</td>
<td>FERC</td>
</tr>
</tbody>
</table>

Having set out an overarching theoretical framework, discussed the ways in which these models play out in terms of specific administrative procedure, and identified a systematic way to classify agencies along a spectrum, the next step in this analysis is an empirical comparative analysis of agencies that exist on opposite ends of the Managerial/Legalistic Spectrum.
PART TWO – HYPOTHESES, DATA AND ANALYSES

CHAPTER 4: FRAMING THE RESEARCH, DEVELOPING HYPOTHESES, IDENTIFYING EXPECTATIONS AND DESCRIBING A TESTING METHODOLOGY

This Chapter has three goals: (1) identify three agency performance measures – the appeal measure, the affirmance measure, and the process measure – and describe the rationale for choosing these measures; (2) develop research questions based on these measures; and (3) describe a methodology for empirical testing. The measures, hypotheses, and methodology identified in this Chapter will become the building blocks for the empirical analyses comparing two sets of federal agencies in Chapters 5 and 6.

I. Three Performance Measures of Administrative Agencies

A. Appeal Measure

A federal agency’s Appeal Measure is the average rate at which participants in adjudications appeal the decisions of a decisionmaker (ALJ or AJ) to a higher level within the agency (an appeals council, commission, or board). For the purposes of calculating the appeal rate, the universe of adjudications includes only those cases in which an agency decisionmaker has issued a decision on the merits. Within this universe, the appeal rate can be expressed as a fraction: the numerator is the number of appeals received by the agency (an appeals council, commission, or board) in a given year, and the denominator is the number of decisions issued by decisionmakers (ALJ or
Scholars writing in the context of civil litigation have identified two prevailing models for explaining why a litigant chooses to appeal a lower court decision to an appeals court: the outcome-determinative model and the process-determinative model (Atkins, 1990; Barclay 1999). Although written in the context of civil litigation, these models are described from the point of view of the individual litigant, and thus have explanatory power in the context of administrative adjudications. The outcome-determinative model assumes that people are rational actors, and that the decision to appeal is a rational one made by individuals or lawyers after weighing the costs and benefits of appealing (Atkins, 1990). In this model, litigants can only meet their desired goal by winning, and will appeal if they believe that an appeal will maximize a benefit or minimize a loss. The process-determinative model, on the other hand, rejects the notion that every losing litigant is the potential initiator of an appeal (Barclay, 1999). Outcomes are treated as a neutral part of the process, and the process approach considers each litigant as motivated by the desire to be treated fairly. In this model, litigants meet their goals by having someone in authority consider their arguments in

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116 A participant is typically required to file an appeal within 30 to 60 days of the initial decision. See, e.g., 29 C.F.R. 1614.402(a) (2006) (30 days to file appeal of AJ decision with EEOC); 8 C.F.R. 1003.38 (2006) (30 days to file appeal of Immigration Judge with Board of Immigration Appeals); 20 C.F.R. 404.968 (2006) (60 days to file under SSA regulations). Given the relatively short filing deadlines for appeals, it is appropriate to compare the number of decisions in year x with the number of appeals received by the agency in the same year.
order to resolve the issue fairly, and will appeal until they are satisfied with the process. Because it is beyond the scope of this dissertation to test whether participants in administrative adjudications test tend to use an outcome-determinative or process-determinative approach when deciding to appeal, I have constructed the appeal measure broadly enough to encompass both approaches. Thus, for the purposes of this empirical analysis, it does not matter whether participants tend to file appeals based on a rational weighing of the costs and benefits, or to achieve satisfaction that their arguments were fairly heard. The relevant research question that will be discussed in the next section is whether more appeals are likely in a Legalistic or Managerial model.

From the agency perspective, it is clear that budget-conscious agencies seek to limit the number of appeals that are filed within the agency. In fact, the appeals measure was adapted from measures that appear in the GPRA strategic plans of several different agencies.\footnote{Recall from Chapter 1 that the GPRA (Government Performance and Results Act) required agencies to develop result-oriented long-term Strategic Plans that defined goals and objectives for their programs, and to develop Annual Performance Plans specifying measurable performance goals.} For example, the Department of Veterans Affairs has repeatedly identified the appeal rate as a “Major Management Challenge,” noting in its 2007 Performance and Accountability report that the appeal rate has increased from just under 7 percent in 2000 to over 11 percent in 2007 (VA, 2007). In summary, individual participants are motivated to appeal a decision to obtain a favorable outcome or achieve satisfaction from the process, and federal agencies seek to limit the number of appeals that are filed.
B. Affirmance Measure

The Affirmance Measure is the average rate at which a higher agency authority (an appeals council, commission, board, or other Article I entity) affirms the decisions of a decisionmaker (ALJ or AJ) on appeal. For the purposes of calculating the affirmance rate, the universe of adjudications is limited to only those cases where a participant has appealed a merits decision by an ALJ or AJ within the agency. The affirmance rate can be expressed as a fraction: the numerator is the number of decisions that are affirmed in a given year, and the denominator is the number of decisions considered on appeal in the same year.\footnote{Generally speaking, a decision is either affirmed on appeal or reversed/remanded on appeal. Sometimes the affirmance rate is also called the “reversal” rate, which changes the numerator but is another way of saying the same thing (100\% - affirmance rate = reversal rate).}

The affirmance rate provides a useful performance measure because both initial decisionmakers and agencies prefer high affirmance rates. With regard to the initial decisionmakers, this statement is not controversial when applied to AJs who are employed by the agency and may be subject to performance reviews. For ALJs who are insulated from performance reviews, however, this statement requires some additional discussion. A number of scholars have examined this issue from the perspective of tenured federal judges, which can be applied in this case to independent ALJs. Although there is some evidence that lower court judges will willingly engage in evasive or even defiant behavior (Peltason, 1961), there is considerably more evidence that judges generally seek to issue opinions that will be affirmed on appeal (Johnson 1987; Songer, Segal, and Cameron, 1994). The literature addresses many reasons why
an appointed-for-life Article III judge seeks to avoid reversals. First, federal judges want to write opinions that will be affirmed because a high reversal rate reflects poorly on the skills of the judge and harms their reputation among other judges and attorneys (Caminker, 1994; Canon and Johnson, 1999). Just as on the federal bench, a low affirmance rate may reduce professional recognition and advancement for ALJs in the legal profession. Second, federal judges tend to have a respect for the authority of the higher courts (Pacelle and Baum, 1992). Like appellate courts, federal agencies possess some inherent characteristics that entitle it to obedience. Third, federal judges see avoiding reversals as an essential element of their job (Woodford, 1981).

From the perspective of the agency, there can be no doubt that federal agencies prefer high affirmance rates. When an agency reverses an initial decisionmaker, it is acknowledging a mistake in the initial process or outcome (or both). Moreover, to the extent the agency accrues a benefit by reversing an initial decision (such as ensuring that the decision is consistent with its policies), this benefit could have been accrued if the initial decisionmaker had issued the same decision as the agency in the first instance. Maintaining high affirmance rates is especially important for both the VA and the SSA because many of their reversals include a remand to the decisionmaker for further development of the record, which increases the agency’s workload and strains its limited resources. In summary, both AJ and ALJs are motivated by internal and external pressures to issue opinions that will be affirmed on appeal. Agencies also clearly prefer to minimize the number of times they reverse an initial decision.
C. Processing Measure

The Processing Measure encompasses two different metrics. The first metric is the average number of days it takes to resolve an adjudication, measured from the date of filing (application, charge, or other matter) to the date that a decisionmaker issues a decision on the merits (denial notice, award, or other outcome). The second metric is average cost per case.

With regard to the first metric, almost all federal agencies have adopted the goal of increasing the timeliness of its initial decisions and appeals. Agency initiatives to improve timeliness are typically based on the notion that timely decisions are a critical element of providing quality citizen-centered service. The SSA’s GPRA strategic plan, for example, frames the issue in terms of service: “One of the Social Security Administration’s highest priorities is to improve service to individuals filing disability claims and appeals. The time it takes now to process these actions is unacceptable” (SSA, 2006: 7). Similarly, the NLRB’s GPRA plan sets time targets for initial decisions and appeals to improve “timeliness,” which the agency has “consistently emphasized, believing that ‘justice delayed is justice denied.’” (NLRB, 2000: 8).

This study relies on the agency’s own reporting of its “cost per case,” which is an approximation that federal agencies make for budgeting purposes. Most federal agencies determine their cost per case by tabulating the costs associated with its adjudication processing units and dividing by the number of final decisions issued. Although this study assumes that the agency’s own reporting is accurate, it must be
acknowledged that this number is an approximation by the agency and does not reflect the actual cost of any single case.

Most federal agencies discuss limiting or reducing the cost of adjudications in the context of improving “efficiency.” For budget-conscious agencies such as the VA, for example, reducing adjudication costs is discussed in the context of improving efficiency of the disability claims process. The VA’s plan for improving efficiency does not include changes to its adjudication procedures, but rather focuses on additional training and management of decisionmakers (VA, 2007: 266-291). Similarly, although SSA does not explicitly tie its result-oriented goals to reducing overall costs, SSA does go through an elaborate and extensive process to tie performance to budgeting. SSA’s budgeting goals are set “based on available resources and the need to balance overall performance within those resource limits” (SSA, 2005).

II. Research Questions

As seen in Chapter 3, each agency can be placed along the Managerial/Legalistic spectrum based on a review of the agency’s adjudicatory process. Using the performance measures outlined above, this section formulates three research questions designed to examine whether, and to what extent, an agency’s placement on the spectrum impacts these measures. After framing the questions, this section will examine the expectations of those who advocate a Legalistic model of adjudications (the conventional wisdom) and expectations of those who advocate a Managerial model (alternative theory).
As a general matter, federal agencies prefer a low appeal rate of their adjudication decisions. Lower appeal rates suggest that participants are either satisfied with the outcome or with the process, and enable the agency to conserve resources that would otherwise be expended on resolving appeals. Given this preference, the first research question examines whether an agency’s procedures for resolving disputes affect the agency’s appeal rates.

**Research Question 1**: Does an agency’s location on the Legalistic/Managerial spectrum affect the agency’s appeal rate?

The Legalistic model, which has been the dominant model for administrative adjudications since the mid-20th century, predicts that agencies with a high Judicialization score will have statistically significant fewer appeals than agencies with a low Judicialization score. This prediction is based on the expected benefits of (1) process-oriented participation, (2) juridical decisionmakers, and (3) adjudicator independence. These benefits were discussed at length in Chapter 2, but will summarized again here. First, under the conventional wisdom, a process with extensive and clearly defined procedural rules will be more likely to find the “correct answer” (Summers 1974) and also allow the participant to feel he/she has participated in a process that is democratic and legitimate (Saphire, 1978; Fuller, 1978). Second, the conventional wisdom holds that a juridical decisionmaker is in a better position to boil down the issues into a language and a format that is transparent to the individual.

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119 Indeed, at least one empirical study has used questionnaires to demonstrate that adversary, party-controlled dispute resolution mechanisms were perceived as more fair than inquisitorial, judge-controlled dispute resolution mechanisms (Walker, Lind & Thibaut, 1979).
participants (Radin 1935; Jasanoff, 1995). Finally, the conventional wisdom holds that a participant might feel that the decision is more likely to be unbiased and accurate if it is made by a decisionmaker who is largely independent from the agency (Rossi, 1999; Timony 1993/4; Brown, 1988).

The alternative Managerial model predicts the inverse relationship: agencies with a low Judicialization Score will have statistically significant fewer appeals than agencies with a high Judicialization score. This prediction challenges the traditional benefits of the Legalistic model, and suggests that they are outweighed by the benefits of the Managerial model: (1) result-oriented outcome; (2) expert decisionmakers, and (3) adjudicator accountability. First, the Managerial model rejects the notion that formal legal processes are necessary for participants to feel as though the decision was made fairly and democratically (Goodsell, 1985). To the contrary, the Managerial approach suggests that less structured interactions with decisionmakers reward participants by providing an opportunity to engage in the deliberative decision-making (Seidenfeld, 1992). Second, the Managerial model predicts that expert decisionmakers, with specialized knowledge the field (Wamsely, 1990; Frug, 1984), will produce better decisions that will be more likely to be accepted by the participants. Finally, the alternative model predicts that decisionmaker accountability, with its focus on consistency (Romzek and Dubnick, 1987), will comfort participants that the initial decision will be upheld by the agency. For these reasons, the Managerial model predicts that a lower Judicialization score will yield a lower appeal rate.
Research Question 2: Does an agency’s location on the Legalistic/Managerial spectrum affect the agency’s affirmance rate?

As a general matter, federal agencies prefer a high affirmance measure. A high affirmance measure suggests that the initial decisionmaker reached the correct outcome and there will be no further need to expend agency resources to resolve the dispute. In light of this preference, it is useful to examine whether an agency’s procedures for adjudications have an affect on the agency’s affirmance rates.

The Legalistic model predicts that agencies with a high Judicialization score will have a higher affirmance rate than agencies with a low Judicialization score. First, the Legalistic model holds that a process with extensive and clearly defined procedural rules will be based on sound reasoning and thus will be less susceptible to reversal on appeal. Second, the Legalistic model highlights a juridical decisionmaker’s special legal training in applying general principles to individual facts (Jasanoff, 1995), and thus predicts he/she will be more likely to properly implement the will of the agency in each individual case. Finally, the Legalistic model holds that juridical decisionmakers are as capable as an agency head of making technical judgments on expert matters (Rossi, 1999), and so the risk of reversal is, at worst, the same for juridical and expert decisionmakers.

The alternative Managerial model again predicts the inverse relationship: the affirmance rate will be statistically significantly higher for agencies with a low Judicialization score than for agencies with a high Judicialization score. This prediction challenges the traditional benefits of the Legalistic model, and suggests that they are
outweighed by the benefits of the Managerial model. First, the Managerial model rejects the notion that formal adversarial procedures are more likely to yield a “correct outcome.” Highly stylized rules actually prevent deliberation and impair the decisionmaker’s ability to find common ground and apply agency principles to resolve disputes. Alternatively, the Managerial model suggests that expert decisionmakers, with superior knowledge, wisdom and expertise in any given area, will be more likely to resolve substantive issues consistent with agency norms and avoid reversals. Second, the Managerial model predicts that decisionmaker accountability, by providing a feedback loop between the decisionmakers and the agency, will increase the agency’s affirmance rate. For these reasons, the Managerial model predicts that a lower Judicialization score will yield a higher affirmance rate.

**Research Question 3:** Does the choice of administrative procedures affect the time it takes for an agency to process an adjudication or the cost of the adjudication?

Not all federal agencies would sacrifice certain procedural mechanisms in order to shorten processing times and costs. Specifically, advocates of the Legalistic model argue that the advantages of a formal legal process are worth the additional investment of time and resources. But if the advantages of a formal legal process are shown to be illusory, then it becomes useful to investigate the extent of any additional investment of time and resources in adjudications.

The Legalistic model allows that agencies with a high Judicialization score may take longer to process adjudications, and expend more resources, than agencies with a low Judicialization score. This is based on the acknowledgment that allowing
participants to control the process, as well as mandating formal interactions, can be time-consuming and costly. Indeed, the legalistic model can be “relatively extravagant in the time it is willing to invest in letting interested persons state, be tested on, and restate their positions” (Sax, 1971: 221). The Legalistic model justifies these transaction costs by referring to the ancillary benefits that result from process-oriented participation, juridical decisionmakers, and adjudicator independence.

In contrast, the alternative Managerial model shifts attention from adjudication processes used to reach final decision and moves toward “results-oriented government” (Lynn, et al., 2001). Indeed, the focus of many new public management scholars is to usher in organizational and institutional reform to increase efficiency and customer satisfaction. (Kettl, 2000). Advocates of the Managerial model predict that the processing time and costs of Managerial adjudications will be substantially less than the Legalistic adjudications.

III. Methodology

To examine the research questions identified above, this section outlines the methodology for a comparison study of two sets of federal agencies. The federal agencies in each “pairing” are similar in terms of structure and function, yet are located on opposite ends of the Legalistic/Managerial spectrum.

Chapter 5 will pair the Social Security Administration and the Department of Veterans Affairs. Both the SSA (+2) and the VA (-4) administer social insurance programs in which individual claimants submit applications for disability benefits and supplemental income benefits. In both the SSA and the VA, agency employees in
decentralized offices make initial eligibility determinations. The agencies conduct adjudications when claimants challenge these eligibility determinations.

Chapter 6 will pair the National Labor Relations Board and the Equal Employment Opportunity Commission. Both the NLRB (+4) and the EEOC (-2) administrate programs that regulate interactions in the American workplace. In both the NLRB and EEOC, individuals or groups of claimants file grievances based on claims of discrimination or unfair labor practices in the workplace. Adjudications arise when these grievances cannot be resolved between the parties, and decisionmakers in both agencies must make factual determinations that turn mainly on evaluations of witness credibility.

The first step in the comparison study will be to engage in a detailed examination of the administrative and adjudicatory processes of both agencies. In carrying out this design in subsequent chapters, I will gather information from agency regulations, guidance documents, and background investigation to highlight the similarities and differences that exist between the paired agencies.

The second stage of the comparison study will be to compare the agencies using the three empirical measures in a standardized way. Null hypotheses will be developed, and data will be collected from each agency on key indicators to test these hypotheses. Much of this data used in this study was gathered through quarterly and annual agency reports, although in some cases, as with the NLRB, it was necessary to review individual decisions and code them.
Results of the comparison will be presented primarily through descriptive statistics. Difference of means tests will also be performed to test the null hypotheses and measure the statistical significance of the differences between the empirical metrics. Because the two samples are unrelated, an independent t-test will be used to compare percentages drawn from the two independent samples. I will use a two-tailed probability because my null hypotheses do not state the direction of the difference.

IV. Summary

This chapter has defined three performance measures for federal agency adjudications, identified three research questions and hypotheses, and outlined a methodology for testing the null hypotheses. Figure 4.1 below summarizes the approach for the remaining two chapters of this dissertation.

Figure 4.1: Summary of Research Questions and Methodology

<table>
<thead>
<tr>
<th>Research Questions</th>
<th>Measuring Variables</th>
<th>Quantitative Sources</th>
</tr>
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<tbody>
<tr>
<td>Does the choice of administrative procedures affect whether or not a participant</td>
<td>Appeal rate</td>
<td>Agency Annual Reports; Quarterly Reports</td>
</tr>
<tr>
<td>decides to appeal a decision by an agency decisionmaker?</td>
<td>• Appeals per merit decisions</td>
<td></td>
</tr>
<tr>
<td>Does the choice of administrative procedures affect whether the initial decision is</td>
<td>Affirmance Rate</td>
<td>Annual Reports; Quarterly reports; Record Abstraction</td>
</tr>
<tr>
<td>adopted by the agency as a final agency action?</td>
<td>• Affirmances per appeals</td>
<td>Forms; Review of individual decisions and coding/tabulating results</td>
</tr>
<tr>
<td>Does the choice of administrative procedures affect the cost or time it takes for</td>
<td>Processing Rate</td>
<td>Agency Annual Reports and Quarterly Reports</td>
</tr>
<tr>
<td>an agency to issue a final agency action?</td>
<td>• Number of days</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Cost</td>
<td></td>
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</tbody>
</table>
CHAPTER 5 – AN EMPIRICAL COMPARISON OF THE SSA AND VA IN LIGHT OF THE APPEAL, AFFIRMANCE, AND PROCESSING MEASURES

This chapter includes a careful examination of the SSA and VA claims programs and the processes the two agencies use to resolve adjudications, as well as an examination of empirical data on SSA and VA adjudications. As the following discussion will demonstrate, the types of issues adjudicated by the agencies are very similar but each agency has adopted different components of the Legalistic and Managerial models to conduct the adjudications. The key differences that will be explored in the first section become variables that will be empirically measured in the second section. Descriptive and analytical data will be used to examine whether different administrative law processes and procedures have a measurable affect on the agency’s appeal rate, affirmance rate, and processing rate.

I. The Social Security Administration and the Department of Veterans Affairs Administer Similar Social Insurance Programs

A. SSA Programs: Disability Insurance and Supplemental Security Income

Congress enacted the Social Security Act of 1935 to eliminate economic insecurity among the elderly and blind. The modern-day SSA administers two cash benefit programs that involve large numbers of adjudications before the agency: (1) the Supplemental Security Income (“SSI”); the (2) Retirement, Survivors and Disability Insurance (“RSDI”). The first program, SSI, operates as a welfare program for the elderly and disabled, providing benefits to individuals who meet the income

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requirement and exhibit a disability. SSI benefits eligibility is not based on prior work, but rather eligibility is based on limited income and resources. Thus, the criteria for benefits eligibility are: (1) individuals must have limited means and resources as defined by the program; and (2) individuals must meet the definition of “disability.” Approximately half of all adjudications before SSA in any given year arise out of the SSI program.

The second program, RSDI, is an insurance program that protects workers against the loss of earning ability due to death, retirement, or disability.\textsuperscript{121} The RSDI program is made up of two separate components. The first component is the Retirement and Survivors Insurance (“RSI”) program. Only a tiny percentage of adjudications before the SSA involve the RSI program, typically less than 1 percent,\textsuperscript{122} and so adjudications arising out of this program will not be included in this study. This Chapter will instead focus on the second component of the RSDI program – Disability Insurance. The DI program has two criteria for benefit eligibility: (1) workers must be fully insured and meet a test of substantial recent covered work; and (2) workers must meet the definition of “disability.” Approximately half of all adjudications before the SSA involve the DI program.

\textsuperscript{121} RSDI is sometimes called OASDI – Old Age, Survivors and Disability Insurance because Title II of the Social Security Act is still officially called “Old Age, Survivors and Disability Insurance.” SSA refers to the program as RSDI, and thus this thesis will use RSDI. However, OASDI and RSDI can be used interchangeably and both refer to Title II Social Security Benefits. See 42 U.S.C. § 401 et seq.

\textsuperscript{122} In fiscal year 2001, only 3,091 out of 477,100 (0.64\%) receipts related to RSI.
Between the SSI and the DI programs, the Social Security Administration processes over 4 million claims each year. The appeals process under the DI and SSI programs are identical. The SSA uses the same medical standards to determined disability under both the DI and SSI programs. In addition, the SSA utilizes the same appeals process, and the same corps of decisionmakers, to adjudicate all claims arising out of claims submitted under the DI and SSI programs.

B. Veterans Affairs Programs: Compensation

In 1933 the Veterans Administration officially became the government agency responsible for administering all veterans’ programs and benefits. Under the new system, all questions of entitlement were settled by the Administrator of Veterans Affairs. President Roosevelt created the Board of Veterans Appeals and gave the Board the authority to render final decisions on appeal on behalf of the administrator. The Board reviewed claims of dissatisfied veterans seeking benefits.

The current Department of Veterans Affairs (VA) was established on March 15, 1989, succeeding the Veterans Administration. The VA currently administers a veterans’ benefits program with several different components. By far the largest percentage of adjudications before the VA arises out of the compensation program for service-connected disabilities. To receive benefits out of the compensation program, the veteran must demonstrate that he/she was disabled by an injury or disease that was incurred or aggravated during active military service. The veteran bears the burden of

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123 Executive Order 6090, effective March 31, 1933, Veterans Regulation No. 2, Part II; Executive Order 6230, Veterans Regulation No. 2(a).
demonstrating that the disability is “service-connected” and that he/she meets the low income threshold. More than 95% of the adjudications by the VA in a given year arise out of the compensation program.\textsuperscript{124}

The appeals process under the compensation program, medical program, pension program, and other VA programs are identical. The VA utilizes the appeals process and the same corps of decisionmakers to adjudicate all claims related to these programs.

\section*{II. Five Stages of the SSA and VA Processes}

In submitting a claim for benefits, applicants before the SSA (“claimants”), and applicants before the VA (“veterans”), bear the initial burden of demonstrating that they meet the requirements for obtaining benefits under the relevant regulations. As indicated in Figure 5.1, both agencies use a five-step claims process with three separate layers of appeals before an Administrator issues a final agency action. This process will be discussed in detail below.

\textsuperscript{124} For example, in Fiscal Year 2006, 95.4\% of the dispositions related to the compensation program. The remainder arise out of the VA medical program providing health care services, a pension program, and several other smaller programs.
Figure 5.1 – Comparison of Claims Processes for SSA and VA

<table>
<thead>
<tr>
<th>SSA</th>
<th>VA</th>
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<tbody>
<tr>
<td>Application for Benefits at Local SSA Office</td>
<td>Application for Benefits at Local VA Office</td>
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<tr>
<td>↓</td>
<td>↓</td>
</tr>
<tr>
<td>Initial Decision by DDS</td>
<td>Initial Decision by Ratings Board</td>
</tr>
<tr>
<td>↓</td>
<td>↓</td>
</tr>
<tr>
<td>Reconsideration by DDS</td>
<td>Reconsideration by Ratings Board</td>
</tr>
<tr>
<td>↓</td>
<td>↓</td>
</tr>
<tr>
<td>Appeal to ALJ</td>
<td>Appeal to AJ</td>
</tr>
<tr>
<td>↓</td>
<td>↓</td>
</tr>
<tr>
<td>Appeal to Appeals Council</td>
<td>Appeal to VA Court of Appeals</td>
</tr>
</tbody>
</table>

Stage 1 & 2: Application for Benefits and Initial Determination

1. Initial Determinations for Benefits Under SSA Programs

Applications for benefits under the SSA programs may be submitted online, by phone, by mail, or in person at any Social Security Office. The application and related forms ask for a description of the claimant’s impairments, treatment sources, and other information that relates to the alleged disability. The SSA field office is responsible for verifying non-medical eligibility requirements, which may include age, employment, marital status or other information. The field office then sends the case to a state agency – usually called Disability Determination Services (“DDS”) – for evaluation of disability.

Each state maintains its own DDS agency which is fully funded by the federal government. DDS is responsible for compiling available medical evidence from the applicant’s source and rendering the determination on whether or not an applicant is disabled under the law. Each state has slightly different processes for completing its
task to evaluate disability. The ultimate disability determination is made by a DDS employee who has received SSA training, and a medical physician and/or psychological consultant.

Upon receiving an application for benefits, the DDS reviews the medical records from the claimant’s own medical sources. If DDS believes that more evidence is needed to make a determination, the DDS will arrange for a consultative examination (C/E) appointment to obtain additional information. The applicant’s treating source is the preferred source for the C/E, but the DDS may obtain the C/E from an independent source.

2. Initial Determinations for Benefits under the VA Program

Applications to the VA disability program may also be submitted online, or at one of the fifty-seven VA regional offices located throughout the country. Similar to the SSA program, initial VA determinations are made at one of several decentralized local offices. An application is evaluated by a ratings board, made up of two VA employees and a physician and/or psychological consultant.

Within each regional office, the veterans service center (VSC) processes disability compensation claims. Prior to 2002, each regional office had its own organizational structure and, like the different offices of DDS within SSA, each region had slightly different processes for completing its task to evaluate disability. Since 2002, however, each regional office has employed the claims process improvement
(CPI) model, which was recommended in by the Claims Processing Task Force appointed by the VA secretary to address the growing backlog of claims.  

Upon receipt of an application, the VA will assist the veteran in developing the evidence necessary to support a claim. Relevant records typically include the veteran’s service medical records and VA records of examination or treatment. The VA may accept a medical report from a private physician, but will typically order a new compensation and pension examination (“CPE”). Like the C/E under the SSA claims process, the CPE is used to obtain current medical information and fill in any gaps left by the applicant’s treating physician.

**Stage 3: Initial Reconsideration**

1. SSA Regulations Require that the claimant seek reconsideration at the local office

   If the DDS finds that an SSA claimant is disabled, SSA completes any outstanding non-disability development, computes the benefit amount, and begins paying benefits. However, if the applicant is not found to meet the eligibility requirements, the claimant may file a request for reconsideration. At that point, a different DDS team from the one that handled the case originally makes the disability determination. All the evidence submitted when the original decision was made is reexamined. The state agency reviews the disability claims *de novo* when a claimant

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125 Currently, each VSC uses six separate teams that handle different steps in the compensation claims progress: (1) the public contact team; (2) the triage team; (3) the predetermination team; (4) the rating team; (5) the postdetermination team; and (6) the appeals team.
requests reconsideration.\footnote{20 C.F.R. § 404.913 (2006). Black’s Law Dictionary defines a de novo appeal as one “in which the appellate court uses the trial court’s record but reviews the evidence and law without deference to the trial court’s rulings.” In other words, the second DDS team reviews the case as if there had been no prior decision.} SSA regulations require that the DDS consider new evidence submitted between the time of the initial determination and the reconsideration.

2. **VA Regulations Require that the Veteran Submit a Notice of Disagreement with the Regional Office**

If the VA finds that a veteran’s application does not meet the eligibility requirements, the veteran may challenge the rating board’s decision by filing a notice of disagreement (“NOD”) with the regional office. After receiving an NOD, the regional office will either reconsider the claim or uphold the original adverse determination and issue a “statement of the case.” The statement of the case, which summarizes the decision, is the final action of the regional office.

Under most circumstances, when a veteran files an NOD, the review process is conducted by the ratings team in the local office. This process mirrors the SSA process where a different DDS adjudicative team handles the review. However, the veteran also has the option of requesting that the file be reviewed by a Decision Review Officer (DRO). DROs provide a second level of review of a claimants’ entire file, and they can request additional information and meet with the veteran regarding his or her claim. DROs are authorized to grant the contested benefits based on the same case record that the local office used to make the initial decision.
After completing any additional development or proceedings, either the ratings board or the DRO (depending on the procedure followed) will send the veteran either a favorable decision on all issues, or a “statement of the case” explaining the reasons for the decision to deny the appeal.

Stage 4: Appealing the Initial Determination and the Beginning of the Adjudication Process

1. Appeal to an SSA ALJ

If an applicant disagrees with the reconsideration decision, the next step in the appeals process is to submit a “request for a formal hearing” before an ALJ. The Office of Hearings and Appeals administers the hearings and appeals program for the SSA. A request for a hearing may be submitted on SSA Form HA-501, or may be requested by letter. The form or letter must state why the claimant disagrees with the reconsideration determination.

An SSA claimant files an appeal by submitting a “request for a formal hearing.” Upon receipt of the “request for a hearing,” the case is assigned to an ALJ and a hearing date is set. The SSA schedules hearings in 100 percent of their adjudications. If the claimant does not want to appear at the hearing, however, the claimant may sign a “Waiver of Your Right to Personal Appearance Before an Administrative Law Judge.” In circumstances where a hearing is scheduled and the claimant does not appear, the ALJ will briefly go through the formalities of a hearing even when there is no claimant present. Figure 5.2 below shows the percentage of hearings held per hearings scheduled for SSA ALJ. Between 1993 and 2006 the mean number of hearings held per hearings scheduled was 71.0%.
At the hearing stage, the ALJ functions as a judge, an investigator and an attorney for each side. The SSA has adopted the Managerial model to the extent these proceedings are non-adversarial and there is no counsel representing SSA. Indeed, the SSA does not use any formal rules of civil procedure or evidence for these hearings. The claimant has a right to be represented by an attorney, but this right to counsel can be waived.\(^{127}\) Even where a claimant is represented by counsel at the hearing, the attorney typically does not ask questions, but rather it is the ALJ who typically conducts

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\(^{127}\) Waiver of counsel can only occur after the ALJ informs the claimant of the right to counsel, the manner in which counsel can provide assistance, and the associated fee limitations.
questioning of the claimant and all witnesses. However, the claimant or the claimant’s attorney may also ask questions of the witnesses.

ALJs not only conduct the hearings and issue decisions, but also perform an active investigatory role. Under the SSA organic statute, the ALJ has a statutory obligation to obtain evidence from the claimant’s doctors and other treatment sources.\textsuperscript{128} If the claimant’s doctor provides an inadequate or ambiguous report, the ALJ must request clarification or supplementation from the treating physician.\textsuperscript{129}

Following the Managerial model, the SSA does not provide an unqualified right to take discovery. The SSA does not allow depositions and will only issue subpoenas for the production of relevant documents following a written request to the ALJ.\textsuperscript{130}

The SSA uses juridical decisionmakers. All ALJs in the SSA have satisfied the rigorous testing requirements set by OPM, including seven years of experience as a practicing attorney, with at least 2 of the 7 years in the field of administrative law or in the actual preparation and trial of cases before state or federal courts.

The ALJ reviews the claimant’s application for disability benefits \textit{de novo}.\textsuperscript{131} The issues before the ALJ include all issues not decided in favor of the claimant and any other issues, including new issues, that either the ALJ or the claimant raise at the

\textsuperscript{130} 20 C.F.R. 405.332 (2006).
\textsuperscript{131} 42 U.S.C. § 405(b); 20 C.F.R. 404.967 to 404.983 (2006).
hearing. The ALJ thus identifies and narrows the issues for resolution, and ultimately makes an objective benefits determination.\textsuperscript{132}

Adopting the Legalistic model, the SSA does not have a formal internal quality assurance processes in place for ALJ decisions. Indeed, as discussed in Chapter 3, past efforts by SSA to reduce variation in ALJ reversal rates using quality control management procedures have been fought by ALJs.\textsuperscript{133} Several federal courts have opined that quality assurance programs could infringe on the independence of ALJs, and the SSA has not made any recent efforts to impose management controls on its ALJs.

2. Appeal to the Board of Veterans Appeals (“Board” or “BVA”).

In the case of an unfavorable ruling, the veteran’s local office will provide a copy of VA Form 9, which is the substantive appeal form that the veteran may use to ask BVA to review the decision. Similar to SSA Form HA-501, VA Form 9 must state the veteran’s desired benefit, explain perceived mistakes in the statement of the case, and comment on anything with which the veteran disagrees. If the veteran submits new information or evidence with the substantive appeal, the VA local office prepares a supplemental statement of the case, which is similar to the statement of the case, but addresses the new information or evidence submitted.


A veteran has a statutory right to the assistance of the VA to uncover information that will assist in the presentation of the case.\textsuperscript{134} Because the VA is obligated to assist in fact-gathering, the agency adopts the Managerial model and restricts the availability of formal discovery. Claimants are not permitted to depose witnesses, doctors, or medical support staff.

Like the SSA, the VA adopts the result-oriented participation approach of the Managerial model. The VA’s adjudicative process is non-adversarial and the Board often resolves claims without the need for a hearing. Although veterans have the right to request a hearing, the Board does not automatically schedule a hearing. Veterans who request a hearing have three choices: (1) they may travel to Washington DC to have the hearing in the Veterans Administration Central Office; (2) they may request a field hearing at one of the 58 regional offices which is conducted by the “Travel Board”; or (3) they may request a video hearing. The BVA’s roving “Travel Board” is based in Washington DC and travels around the country visiting regional offices. Since the VA does not reimburse veterans for the cost of traveling to Washington DC for a hearing, and because it can take over a year for the travel board to reach a particular regional office, many veterans do not request an in-person hearing. As Figure 5.3 indicates, since 1993, hearings occur in an average of 17 percent of the cases decided by BVA.

\textsuperscript{134} 38 U.S.C. § 5107(a).
Figure 5.3 – Percentage of BVA Hearings Per Decision Issued 1993-2006

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Hearings</th>
<th>Decisions</th>
<th>Percentage of Hearings Held Per Decisions Issued by Fiscal Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>4,705</td>
<td>26,400</td>
<td>17.82%</td>
</tr>
<tr>
<td>1994</td>
<td>2,685</td>
<td>22,045</td>
<td>12.18%</td>
</tr>
<tr>
<td>1995</td>
<td>748</td>
<td>28,195</td>
<td>2.65%</td>
</tr>
<tr>
<td>1996</td>
<td>2,924</td>
<td>33,944</td>
<td>8.61%</td>
</tr>
<tr>
<td>1997</td>
<td>6,094</td>
<td>43,347</td>
<td>14.06%</td>
</tr>
<tr>
<td>1998</td>
<td>4,875</td>
<td>38,886</td>
<td>12.54%</td>
</tr>
<tr>
<td>1999</td>
<td>5,711</td>
<td>37,373</td>
<td>15.28%</td>
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<tr>
<td>2000</td>
<td>4,489</td>
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<tr>
<td>2001</td>
<td>5,560</td>
<td>31,557</td>
<td>17.62%</td>
</tr>
<tr>
<td>2002</td>
<td>4,501</td>
<td>17,231</td>
<td>26.12%</td>
</tr>
<tr>
<td>2003</td>
<td>6,046</td>
<td>31,397</td>
<td>19.26%</td>
</tr>
<tr>
<td>2004</td>
<td>7,259</td>
<td>38,371</td>
<td>18.92%</td>
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<tr>
<td>2005</td>
<td>8,576</td>
<td>34,175</td>
<td>25.09%</td>
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<tr>
<td>2006</td>
<td>9,158</td>
<td>39,076</td>
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</tr>
<tr>
<td><strong>Mode</strong></td>
<td></td>
<td>5,238</td>
<td>32,573</td>
</tr>
<tr>
<td><strong>Adj. Mode</strong></td>
<td></td>
<td>5,583</td>
<td>32,910</td>
</tr>
</tbody>
</table>

* As the result of backlog, the BVA suspended hearings for part of FY 1995 in order to allow the Board to “catch-up” and conduct hearings at a time proximate to when an appeal was actually considered by the Board.

** The Adjusted Mode does not consider the data from FY 1995.

Figure 5.3 shows that the percentage of cases that involve hearings has slowly risen over time. One explanation for this rise is the fact that VA began offering video hearings in 1994. As seen in Figure 5.4 below, the number of video hearings has steadily increased since the program was introduced. With advances in video and telecommunications technology, it is very likely that the number of video conferences will continue to increase.
If the veteran requests a hearing, the hearing will be held before a member of the Board. The Board member will discuss the issues in the case, ask questions of the veteran, and provide the veteran an opportunity to explain the case. As in the case of an SSA ALJ, there are no formal rules of procedure and there is no counsel representing the VA. Just as the SSA ALJ is required to obtain evidence from the claimant’s doctors and other treatment sources, the Board member also has as an affirmative duty to assist the veteran in compiling the record of the case. The Board decides cases *de novo*.

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135 See 38 U.S.C. §5107 (establishing that the Secretary “shall assist” the claimant in developing the facts of his or her case).
which means that they make an entirely new decision rather than reviewing the prior decision. The Board gives no deference to the decision by the regional office.

Prior to 1994, the Board was required by law to adopt the Managerial model and use expert panels to adjudicate claims. The BVA decisions were made by a three-member board section – two attorneys and a licensed physician. The medical judgment of the physician “often controlled the outcome of an appeal” (VA, 1996). In 1994, however, Congress passed the Board of Veterans’ Appeals Administrative Procedures Improvement Act of 1994, which gave BVA the discretion to assign a proceeding either to a panel or to an individual Board member.136 In separate legislation enacted later in 1994, Congress required that all Board members be lawyers.137 Although the House or Senate did not submit a report with the either of these two pieces of 1994 legislation, the nature of the changes indicate Congress’ strong preference that the VA shift from the Managerial model and adopt components of the Legalistic framework. Thus, since 1994, BVA has stopped functioning as a panel of experts and instead uses generalist decisionmakers who hold very similar credentials and have received similar training as SSA ALJs.

Following this policy change, the Board converted some of its physicians from Board members to “advisors” who provided expert medical opinions on the record when needed to adjudicate a case. They provided informal advice to staff attorneys and

136 Pub. L. 103-271 amended 38 U.S.C. § 7102 to allow for either a three-person panel or an individual member of the Board.

137 Pub. L. 103-446; 38 U.S.C. § 7101A(b) (“Each member of the Board shall be a member in good standing of the bar of a State.”).
Board members, held educational lectures on medical topics, and responded to requests for outside medical advisory opinions. However, over the next two years, the CAVC barred Board physicians from providing expert opinions in a Board adjudication.\(^{138}\) According to the CAVC, the use of such expert decisions in a VA adjudication violated the “fair process principle” because such opinions might not be procured by the agency in a “neutral” manner and thus “cannot be sustained as fair.”\(^{139}\) The decision to bar BVA from relying on opinions from its own medical advisors (and, in many cases, former Board members) demonstrates that by the mid-1990s the VA had fully adopted the Legalistic model’s preference for generalist decisionmakers.

Currently, BVA consists of a chairman, vice chairman, senior deputy vice chairman, and 56 Board members.\(^{140}\) Members of the Board are appointed by the Secretary of the VA, and serve at the pleasure of the Secretary. They are supported by 248 staff counsel and other administrative and clerical staff. The Board is comprised of four Decision Teams with jurisdiction over appeals arising from Regional Offices in four separate geographical regions. Each Board member has five or six staff attorneys assigned to him or her as a “mini-team.” In performing this function, an attorney will review the claims file, research the applicable law, and prepare a comprehensive draft decision or “remand document” that details the relevant law and evidence.


\(^{139}\) Id.

\(^{140}\) Internal VA documents occasionally refer to Board members as Veterans Law Judges, but this Chapter will refer to them as simply administrative judges or AJs.
Adopting the managerial model, the VA has developed a process to promote the decisionmaker accountability. The BVA has always had the authority to conduct quality assurance review of its Board members. In the 1980s and early 1990s, such reviews were part of the “Total Quality Initiative” in the Department. Congress codified this authority in 1994 and required the Board chairman to establish “standards for the performance of the job of a member of the Board” and to convene a panel to review the performance of members of the Board.\textsuperscript{141}

Since 1994 the Board has maintained an Office of Quality Review, which is headed by the senior deputy vice chairman. The BVA’s quantitative formal quality review program reviews every 20th original Board member’s decision, and every 10th decision on cases remanded by the CAVC to BVA. The review evaluates decisions in five areas: (1) identification of issues; (2) findings of fact; (3) conclusions of law; (4) reasons and bases for decisions; and (5) due process. A deficiency or error in any of the five areas constitutes a “failure” (VA, 2006). The results of the quality review program are referred back to the originated Board member for consideration and review. In addition, the results are the basis for detailed monthly Quality Review statistics for managers, and a variety of team-level mentoring and training programs. Except for the Chairman, members of the Board may be removed due to poor job performance.\textsuperscript{142}

\textsuperscript{141} 38 U.S.C. § 7101A.
\textsuperscript{142} 38 U.S.C. § 7107A(e).
Stage 5: Agency Review of the Decision on Appeal

1. Decisions of an ALJ SSA Are Reviewed by the SSA Appeals Council.

If the claimant disagrees with the ALJ’s decision, the next step in the appeals process is to request review by the SSA Appeals Council. The claimant has sixty days from the time of the ALJ’s decision to request a review. A request for Appeals Council review must be submitted on SSA Form HA-520, which is a one-page form that requests claimants to explain in a three-line space the grounds for requesting an appeal.143 The Appeals Council does not review the case de novo, but rather based on the record available to the ALJ. The Appeals Council has a “closed record” policy and will consider additional evidence only if it related to the period on or before the date of the ALJ’s decision.144 There is no opportunity for a hearing before the SSA Appeals Council.

The Appeals Council issues four different types of rulings: (1) dismissals; (2) denials; (3) reversals; and (4) remands. A dismissal occurs when the Council examines a request for review, but denies the request on procedural grounds.145 If the Appeals Council decides that the case is properly before the Council, it will review the ALJ’s

143 The form is available online at www.ssa.gov/online/ha-520.pdf.
144 20 C.F.R. 404.976(b), 416.1476(b) (2006).
145 The Appeals Council may dismiss a request for review if (1) the party’s request is not filed timely; (2) the party or parties to the hearing decision file a written request for dismissal; (3) the party to the decision dies and the record clearly shows that dismissal will not adversely affect another person who wishes to continue the action and, for Title XVI benefits, there is no interim assistance reimbursement authorization in effect; or (4) the individual who filed the request is not a proper party or does not otherwise have a right to request review. 20 C.F.R. 410.667 (2005).
holding and issue either a reversal or a denial of the appeal. Finally, the Appeals
Council can also decide to return the case to an administrative law judge – what the
agency refers to as a “remand.” A claimant cannot end up in a worse position by
appealing the ALJ’s decision. The Appeals Council considers appeals from hearing
decisions and acts as the final level of administrative review for the SSA.

2. BVA Decisions are Reviewable in the Court of Appeals for Veterans Claims

If the BVA issues an unfavorable appeals decision, the veteran may appeal to
the United States Court of Appeals for Veterans Claims (“CAVC”). Unlike the SSA
appeals process which allows sixty days to appeal, the VA regulations allow veterans
120 days after Board mailed its decision to appeal. The extra sixty days that VA allows
for an appeal is more consistent with the Legalistic model to the extent that it extends
the processing time for claims to allow the individual veteran additional time to seek
representation and prepare his/her appeal. Similar to the SSA Appeals Council, CAVC
does not receive new evidence. In making its final determination, CAVC will consider
the Board decision, any briefs submitted by the veteran and VA, oral arguments, and the
case record prepared by the Board. Like the SSA Appeals Council, CAVC does not
review the case de novo, but accepts the findings of fact made by the Board.

Notably, between 1933 and 1988, veterans were not able to appeal individual
benefits decisions issued by the BVA within the agency or in federal court. The same
year Congress created the BVA to review challenges to initial eligibility determinations,
it added a statutory provision prohibiting court review of individual benefits decisions:
All decisions rendered by the Administrator…or regulations issued shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review.\textsuperscript{146}

In response to complaints from veterans groups, Congress enacted the Veterans’ Judicial Review Act (“VJRA”) of 1988\textsuperscript{147} in order to provide veterans with the opportunity to appeal the BVA’s decisions. The VJRA created the United States Court of Veterans Appeals (later renamed United States Court of Appeals for Veterans Claims “CAVC”) to review denials by BVA of individual benefits claims. Because decisions of the CAVC are binding on the entire VA, not just the particular case, the CAVC often goes beyond the facts and circumstances of an individual case and requires changes in VA regulations, policies, and procedures for all similar cases. Similar to the Appeals Council, CAVC also issues four types of rulings: (1) dismissals; (2) denials; (3) reversals; and (4) remands. A dismissal occurs when the Council examines a request for review but denies the request on procedural grounds.\textsuperscript{148} CAVC may also issue decisions that affirm or reverse the BVA decisions, or may decide to return the case to BVA or the Regional Office for further development. Like the SSA, a veteran cannot end up in a worse position by appealing to the CAVC.

Prior to the VJRA, a BVA decision was neither detailed nor highly technical, and the BVA generally refrained from commenting on “sensitive” matters such as the

\textsuperscript{146} 48 Stat. 9 (1933); 38 U.S.C. § 705 (1986).

\textsuperscript{147} Pub. L. 100-687.

\textsuperscript{148} Cases before CAVC are either dismissed for lack of jurisdiction, for default, or are dismissed voluntarily.
credibility (or lack thereof) of testimony received in support of a claim (Cragin, 1994). The BVA was required by statute to include only “findings of fact and conclusions of law separately stated” in its decisions. The VJRA, for the first time, required the BVA to include “the reasons or bases for its findings and conclusion.” As a result, BVA decisions tended to be more lengthy and complex.

III. Comparing Agencies: The Appeals Measure, the Performance Measure, and the Processing Measure

A. Similarities, Differences, and the SSA and VA’s Judicialization Score.

The 1992 ACUS Report noted that “[p]erhaps the most compelling comparison between two systems performing virtually identical functions involves disability determinations by the Social Security Administration and the Veterans Administration” (ACUS, 1992: 42). The SSA and the VA administer the two largest federal disability programs in the United States. Both agencies use medical documentation in order to make judgments regarding physical impairments, mental limitations and ability to work full-time jobs. Initial eligibility determinations on benefits claims are made in decentralized offices, while adverse determinations are adjudicated by centralized agency decisionmakers.

There are also important similarities between the populations that participate in SSA and VA proceedings. First, as discussed above, SSA and VA claimants must meet a statutory or regulatory test of disability and have income and assets that fall below

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149 As mentioned in Chapter 1, this dissertation builds on the 1992 ACUS Report which identified and briefly reviewed agencies that implicate similar private interests but use different processes and procedures.
levels set by program guidelines. Thus, as a general matter participants in SSA and VA adjudications have minimal resources to devote to an agency adjudication. Second, the majority of SSA claimants and VA veterans are assisted by counsel or non-attorney representatives. Chart 5.5 shows that between fiscal years 2000 and 2006 VA and SSA claimants both have high representation rates. The representation rates for DI and SSI claimants appear separately in Chart 5.5 because SSA does not provide data on cumulative rates. Although this descriptive data shows basic similarities between the populations, future researchers may wish to investigate the direct link between representation and appeal, affirmance, and processing measures.

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150 The SSA allows a claimant to appoint a representative to represent him or her in doing business with Social Security. According to the SSA website: “Representatives are usually attorneys, but need not be.” See www.ssa.gov/online/ssa-1696.html (last visited October 20, 2008).

151 One explanation for the counter-intuitive finding that participants with low resources have high representation rates is the number of organizations that provide free legal services to these populations. These organizations are very active and conduct outreach activities with private law firms on a regular basis. I have personally represented a VA claimant and an SSA claimant on a pro bono basis after being contacted by the Whitman-Walker Clinic (SSA) and the DC Bar Pro Bono Program (VA).
In addition to carrying out similar functions for similar populations, the two agencies use similar processes to do so. First, both agencies adopt the Managerial model to the extent they establish a “non-adversarial” adjudicatory process for appealing adverse determinations that do not utilize stylized rules of procedure. Second, consistent with the Managerial model, both agencies restrict the ability of participants to take discovery. Third, consistent with the Legalistic model, both agencies use generalist decisionmakers with legal training, rather than expert decisionmakers, to adjudicate challenges to initial eligibility determinations.

However, there are also key differences between SSA and VA adjudications. First, the agencies use different types of decisionmakers. Adjudications within the SSA
are presided over by independent ALJs who must undergo a rigorous appointments process through the OPM and are not employed by the agency. By contrast, adjudications within the VA are made to the BVA which maintains its own hiring criteria and whose employees report to the Secretary of the VA. Second, whereas SSA hearing offices have no formal internal quality assurance processes in place for ALJ decisions, the VA’s Office of Quality Review implements a rigorous review program and VA decisionmakers are held accountable for their performance. Finally, whereas SSA ALJs are prohibited from engaging in ex parte contacts during any “on-the-record” adjudication proceeding, there is no similar prohibition in the regulations governing the Board of Veterans Appeals.

**Figure 5.6 – Judicialization Score: VA and SSA**

<table>
<thead>
<tr>
<th>Indicators</th>
<th>Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>SSA</td>
</tr>
<tr>
<td>Result-Oriented v. Process-Oriented Participation</td>
<td>Decisional Setting</td>
</tr>
<tr>
<td></td>
<td>Fact-gathering</td>
</tr>
<tr>
<td>Juridical v. Expert Decisionmakers</td>
<td>Education/Experience</td>
</tr>
<tr>
<td></td>
<td>Appointments Process</td>
</tr>
<tr>
<td>Adjudicator Independence v. Adjudicator Accountability</td>
<td>Quality Control Mechanisms</td>
</tr>
<tr>
<td></td>
<td>Ex Parte Communications</td>
</tr>
<tr>
<td>Totals</td>
<td>+2</td>
</tr>
</tbody>
</table>

L = Legalistic (+1)
M = Managerial (-1)

Figure 5.6 above summarizes these key similarities and differences between the SSA and the VA. While both agencies have adopted a “result-oriented participation” approach, the SSA’s use of juridical decisionmakers and emphasis on adjudicator
independence gives the agency a Judicialization Score of (+2), while the VA’s use of AJs and emphasis on adjudicator accountability gives the agency a Judicialization Score of (-4).

Although the VA and SSA administer similar disability programs based on similar criteria, the two agencies are on different ends of the Judicialization spectrum. The remainder of this chapter seeks to determine whether the location of the VA and SSA on the judicialization spectrum affects three empirical performance measures.

**B. The Appeals Measure**

As discussed in Chapter 4, the appeals measure shows the rate at which participants appeal initial decisions. The conventional wisdom among legal scholars and professionals is that the appeal rate of SSA ALJ decisions would be lower than appeal rates of BVA decisions. Although both agencies adopt a result-oriented participation approach, SSA adjudications are presided over by independent ALJs whereas VA adjudications are reviewed by agency employees without the protections afforded by the APA. Legalists argue that the SSA ALJ appeals rates are likely to be lower because a process appears more “fair” when the decisionmaker is not employed by the agency that is a party to the adjudication (Hoffman and Chilar, 1995). An SSA claimant would be more likely to accept an unfavorable decision from an “arms-length” ALJ employed by OPM than an unfavorable decision from a Board member who may be “beholden” to the agency that is involved in the dispute.

Advocates of the Managerial model challenge this conventional wisdom. Managerialists reject the notion that participants will assume that the BVA
decisionmakers are somehow “beholden” to the agency and unable to fairly review the facts and apply the agency’s policy and regulations. To the contrary, the Managerial model emphasizes the extent to which agency employees who are accountable for their decisions are more likely to make decisions that are consistent with the agency’s policies and goals.

**Null Hypothesis 1**: There is no statistically significant difference in the appeal rate from SSA ALJ decisions when compared to the appeal rate from VA AJ decisions.

To test this hypothesis against the appeals measure, I collected data on the number of SSA and VA decisions, and on the appeals received at the Appeals Council and CAVC. Figure 5.7 below displays data obtained from SSA. The SSA ALJs averaged 469,431 decisions per year between 1992 and 2006. On average, only 26.6% of the decisions were unfavorable to the claimants, meaning that a significant majority of claimants obtained favorable rulings before SSA ALJs. Of the total number of cases that came before an ALJ, 19.39% of cases were eventually appealed to the Appeals Council.
Figure 5.7 – SSA Appeals Per Total Dispositions 1992-2006

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>SSA Total Dispositions</th>
<th>Unfavorable* Dispositions</th>
<th>% Unfavorable Dispositions</th>
<th>Total Appeals Received</th>
<th>Appeals/ Total Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>335,590</td>
<td>108,631</td>
<td>22.56%</td>
<td>62674</td>
<td>18.68%</td>
</tr>
<tr>
<td>1993</td>
<td>355,030</td>
<td>116,936</td>
<td>23.01%</td>
<td>70742</td>
<td>19.93%</td>
</tr>
<tr>
<td>1994</td>
<td>396,442</td>
<td>130,666</td>
<td>22.30%</td>
<td>76187</td>
<td>19.22%</td>
</tr>
<tr>
<td>1995</td>
<td>470,116</td>
<td>142,702</td>
<td>23.10%</td>
<td>77561</td>
<td>16.50%</td>
</tr>
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<td>1996</td>
<td>548,544</td>
<td>225,278</td>
<td>29.62%</td>
<td>99735</td>
<td>18.18%</td>
</tr>
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<td>1997</td>
<td>526,749</td>
<td>233,019</td>
<td>29.83%</td>
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</tr>
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<td>1998</td>
<td>561,325</td>
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<td>19.62%</td>
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<td>160,051</td>
<td>26.64%</td>
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<td>20.44%</td>
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<tr>
<td>2003</td>
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<td>192,279</td>
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<td>92047</td>
<td>18.64%</td>
</tr>
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<td>2004</td>
<td>497,379</td>
<td>190,269</td>
<td>25.33%</td>
<td>92540</td>
<td>18.61%</td>
</tr>
<tr>
<td>2005</td>
<td>519,359</td>
<td>196,579</td>
<td>24.11%</td>
<td>89430</td>
<td>17.22%</td>
</tr>
<tr>
<td>2006</td>
<td>558,978</td>
<td>214,173</td>
<td>24.25%</td>
<td>94755</td>
<td>16.95%</td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td><strong>469,431</strong></td>
<td><strong>184,245</strong></td>
<td><strong>26.62%</strong></td>
<td><strong>90,784</strong></td>
<td><strong>19.39%</strong></td>
</tr>
</tbody>
</table>

* To tabulate unfavorable decisions, I included both denials and dismissals. Favorable decisions included remands and reversals.


Figure 5.8 displays appeal data from VA AJ decisions. The BVA averaged approximately 33,426 dispositions per year between 1991 and 2006, which means that the BVA issued fewer decisions than SSA ALJs. On average, 41.77% of the decisions were unfavorable to the claimants, meaning that about half of all veterans obtained favorable rulings before BVA. Of the total number of cases that came before the Board, on average only 7.26% were appealed to CAVC.
Figure 5.8 – VA Appeals Per Total Dispositions 1991-2006

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>VA Total Dispositions</th>
<th>Unfavorable Dispositions</th>
<th>% Unfavorable Dispositions</th>
<th>Total Appeals Received</th>
<th>Appeals/Total Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>33,483</td>
<td>16917</td>
<td>50.52%</td>
<td>2,071</td>
<td>4.38%</td>
</tr>
<tr>
<td>1993</td>
<td>26,400</td>
<td>11614</td>
<td>43.99%</td>
<td>1,946</td>
<td>6.19%</td>
</tr>
<tr>
<td>1994</td>
<td>22,045</td>
<td>10642</td>
<td>48.27%</td>
<td>1,988</td>
<td>7.37%</td>
</tr>
<tr>
<td>1995</td>
<td>28,195</td>
<td>13402</td>
<td>47.53%</td>
<td>1,775</td>
<td>9.02%</td>
</tr>
<tr>
<td>1996</td>
<td>33,944</td>
<td>14821</td>
<td>43.66%</td>
<td>1,620</td>
<td>6.30%</td>
</tr>
<tr>
<td>1997</td>
<td>43,347</td>
<td>19592</td>
<td>45.20%</td>
<td>2,229</td>
<td>4.77%</td>
</tr>
<tr>
<td>1998</td>
<td>38,886</td>
<td>16024</td>
<td>41.21%</td>
<td>2,371</td>
<td>5.14%</td>
</tr>
<tr>
<td>1999</td>
<td>37,373</td>
<td>13560</td>
<td>36.28%</td>
<td>2,397</td>
<td>6.10%</td>
</tr>
<tr>
<td>2000</td>
<td>34,028</td>
<td>10173</td>
<td>29.90%</td>
<td>2,442</td>
<td>6.41%</td>
</tr>
<tr>
<td>2001</td>
<td>31,557</td>
<td>15406</td>
<td>48.82%</td>
<td>2,296</td>
<td>7.18%</td>
</tr>
<tr>
<td>2002</td>
<td>17,231</td>
<td>8606</td>
<td>49.94%</td>
<td>2,150</td>
<td>7.28%</td>
</tr>
<tr>
<td>2003</td>
<td>31,397</td>
<td>10228</td>
<td>32.58%</td>
<td>2,532</td>
<td>12.48%</td>
</tr>
<tr>
<td>2004</td>
<td>38,371</td>
<td>9300</td>
<td>24.24%</td>
<td>2,234</td>
<td>8.06%</td>
</tr>
<tr>
<td>2005</td>
<td>34,175</td>
<td>13032</td>
<td>38.13%</td>
<td>3,466</td>
<td>5.82%</td>
</tr>
<tr>
<td>2006</td>
<td>39,076</td>
<td>18107</td>
<td>46.34%</td>
<td>3,729</td>
<td>10.14%</td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td><strong>33,426</strong></td>
<td><strong>13,428</strong></td>
<td><strong>41.77%</strong></td>
<td><strong>2,327</strong></td>
<td><strong>7.26%</strong></td>
</tr>
</tbody>
</table>

* Unfavorable decisions constitute denials. Favorable decisions included allowances, remands, and adjustments.

SOURCE: Reference Library at the Board of Veterans Appeals, Washington D.C.

Using the data in Figures 5.7 and 5.8, the next step is to directly compare the appeal rates of the SSA and VA. Although Appeals per Total Dispositions provides a useful comparison, a better comparison can be derived from comparing the number of appeals against the total number of unfavorable decisions. Unfavorable decisions provide a better comparison because, in contrast to typical litigation where appeals can come from either side of the adjudication, only applicants for benefits can appeal decisions by an ALJ or BVA. Thus, a more accurate picture of the appeal measure can be gained by isolating the unfavorable decisions and comparing the mean values.

Figure 5.9 presents a direct comparison between the number of Appeals Council
Appeals/ALJ Unfavorable decision and the number of CAVC Appeals/Unfavorable BVA decision.

**Figure 5.9 – VA and SSA Appeal Rates**

Recall the null hypothesis for this comparison is that there would be no significant difference between the appeal rate of VA claimants and SSA claimants.

Figure 5.10 presents the results of a two-sample t-test between unpaired proportions. This test was performed to determine whether there was significant difference between VA claimants and SSA claimants with respect to the percentage that appeal unfavorable rulings. A comparison was made between the populations for each year between 1992 and 2006, and a t-statistic was calculated over all fourteen years. In every case, the t-statistic was significant at the .001 alpha level.
### Figure 5.10 – Two-Tailed Probability Test For SSA and VA Appeal Rates

<table>
<thead>
<tr>
<th>Year</th>
<th>SSA Appeals/Unfavorable Decisions</th>
<th>VA Appeals/Unfavorable Decisions</th>
<th>t-statistic</th>
<th>Df</th>
<th>Two-tailed probability (α)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>57.69%</td>
<td>12.24%</td>
<td>106.896</td>
<td>92616</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>1993</td>
<td>60.50%</td>
<td>16.76%</td>
<td>88.668</td>
<td>93307</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>1994</td>
<td>58.31%</td>
<td>18.68%</td>
<td>77.502</td>
<td>99037</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>1995</td>
<td>54.35%</td>
<td>13.24%</td>
<td>89.803</td>
<td>121974</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>1996</td>
<td>44.27%</td>
<td>10.93%</td>
<td>78.863</td>
<td>177290</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>1997</td>
<td>48.29%</td>
<td>11.38%</td>
<td>98.093</td>
<td>176697</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>1998</td>
<td>41.59%</td>
<td>14.80%</td>
<td>66.540</td>
<td>199003</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>1999</td>
<td>48.20%</td>
<td>17.68%</td>
<td>68.597</td>
<td>181138</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>2000</td>
<td>55.54%</td>
<td>24.00%</td>
<td>61.488</td>
<td>145026</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>2001</td>
<td>49.95%</td>
<td>14.90%</td>
<td>81.790</td>
<td>125161</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>2002</td>
<td>51.90%</td>
<td>24.98%</td>
<td>48.072</td>
<td>116863</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>2003</td>
<td>47.87%</td>
<td>24.76%</td>
<td>45.141</td>
<td>140448</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>2004</td>
<td>48.64%</td>
<td>24.02%</td>
<td>45.910</td>
<td>135273</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>2005</td>
<td>45.49%</td>
<td>26.60%</td>
<td>41.375</td>
<td>138253</td>
<td>≤0.0001</td>
</tr>
<tr>
<td>2006</td>
<td>44.24%</td>
<td>20.59%</td>
<td>60.671</td>
<td>153656</td>
<td>≤0.0001</td>
</tr>
</tbody>
</table>

A two sample t-test was also performed to determine whether there was a significant difference between VA and SSA claimants using the range of values gathered between 1992 and 2006. The results are presented in Figure 5.11.

### Figure 5.11 – Two Sample t-test for range of SSA and VA Appeal Rates, 1992-2006

<table>
<thead>
<tr>
<th></th>
<th>SSA Claimants</th>
<th>VA Veterans</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>t-Test: Two-Sample Assuming Equal Variances</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td>0.5045555845</td>
<td>0.183707865</td>
</tr>
<tr>
<td>Variance</td>
<td>0.003272416</td>
<td>0.002977492</td>
</tr>
<tr>
<td>Observations</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>Pooled Variance</td>
<td>0.003124954</td>
<td></td>
</tr>
<tr>
<td>Hypothesized Mean Difference</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Df</td>
<td>28</td>
<td></td>
</tr>
<tr>
<td>T Stat</td>
<td>15.71839179</td>
<td></td>
</tr>
<tr>
<td>P(T≤t) one-tail</td>
<td>0.0000000000000000100738</td>
<td></td>
</tr>
<tr>
<td>T Critical one-tail</td>
<td>1.701130908</td>
<td></td>
</tr>
<tr>
<td>P(T≤t) two-tail</td>
<td>0.00000000000000201477</td>
<td></td>
</tr>
<tr>
<td>T Critical two-tail</td>
<td>2.048407115</td>
<td></td>
</tr>
</tbody>
</table>

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Based on these results, I reject the null hypothesis and conclude that the difference between the appeal rate of BVA decisions and the appeal rate of SSA ALJ decisions are statistically significant. Although SSA has a higher Judicialization score, the data demonstrates that participants are more likely to appeal decisions from SSA ALJs than from VA AJs.

C. The Affirmance Measure

The affirmance measure is the rate at which an initial AJ or ALJ decision is adopted by the agency as the final agency action. The conventional wisdom predicts that agencies with a high Judicialization score will have a higher affirmance rate than agencies with a low Judicialization score. Managerialists counter that result-oriented participation, expert decisionmakers, and a focus on accountability makes it more likely that a Managerial agency will enjoy a higher affirmance rate.

In this case, both the SSA and the VA have adopted a result-oriented participation approach and both agencies use generalist decisionmakers. Thus, this section will seek to measure whether the accountability or independence affects the affirmance measure. The Managerial model predicts that the VA would likely have a higher affirmance measure as a result of the quality assurance mechanisms the agency has put in place. The accountability program used by VA described above serves a dual purpose: it constrains BVA members to make decision consistent with agency policy, and it provides a constant feedback loop between the Board and the agency to ensure that BVA decisionmakers stay current with changes to the law or policy. By contrast,
according to Managerialists, independent SSA ALJs may be more likely to break with established agency policy.

**Null Hypothesis 2**: There is no statistically significant difference in affirmance rates for SSA ALJs and VA AJs.

To test this null hypothesis, I collected data from the SSA and VA regarding the disposition of cases before the Appeals Council and CAVC. Figure 5.12 below displays data obtained from SSA. Between 1996 and 2006, the Appeals Council affirmed the ALJ decision close to 70% of the time. The Appeals Council rarely reversed the ALJ outright, but did remand approximately 20% of the cases back to the ALJ for further development.

**Figure 5.12 – SSA Affirmances and Remands 1996-2006**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>SSA Appeals Decided</th>
<th>Dismissals*</th>
<th>Affirmances**</th>
<th>Reversals</th>
<th>Remands</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>59376</td>
<td>1757</td>
<td>44777</td>
<td>1679</td>
<td>11162</td>
</tr>
<tr>
<td>1997</td>
<td>91457</td>
<td>2521</td>
<td>69962</td>
<td>2124</td>
<td>16849</td>
</tr>
<tr>
<td>1998</td>
<td>103554</td>
<td>2901</td>
<td>79585</td>
<td>2147</td>
<td>18920</td>
</tr>
<tr>
<td>1999</td>
<td>93546</td>
<td>2794</td>
<td>66658</td>
<td>2079</td>
<td>22014</td>
</tr>
<tr>
<td>2000</td>
<td>127872</td>
<td>3257</td>
<td>94291</td>
<td>2102</td>
<td>25821</td>
</tr>
<tr>
<td>2001</td>
<td>112818</td>
<td>2720</td>
<td>80771</td>
<td>2214</td>
<td>27112</td>
</tr>
<tr>
<td>2002</td>
<td>117791</td>
<td>3066</td>
<td>82419</td>
<td>2763</td>
<td>29542</td>
</tr>
<tr>
<td>2003</td>
<td>102863</td>
<td>2526</td>
<td>71554</td>
<td>2295</td>
<td>26487</td>
</tr>
<tr>
<td>2004</td>
<td>99920</td>
<td>2362</td>
<td>68745</td>
<td>2196</td>
<td>25616</td>
</tr>
<tr>
<td>2005</td>
<td>96564</td>
<td>2357</td>
<td>67106</td>
<td>2495</td>
<td>24605</td>
</tr>
<tr>
<td>2006</td>
<td>95705</td>
<td>2117</td>
<td>66605</td>
<td>2195</td>
<td>24787</td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td><strong>100133</strong></td>
<td><strong>2580</strong></td>
<td><strong>72043</strong></td>
<td><strong>2208</strong></td>
<td><strong>23301</strong></td>
</tr>
</tbody>
</table>

* Includes procedural decisions
** Includes both denials of requests for review and opinion upholding ALJ decision

Figure 5.13 displays data from VA. The data demonstrates that CAVC did not affirm the decisions of the BVA nearly as often as SSA ALJs were affirmed. On average the CAVC affirmed the Board 27.12% of the time.

**Figure 5.13 – VA Affirmances and Remands, 1996-2006**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>VA Appeals Decided</th>
<th>Dismissals</th>
<th>Affirmances</th>
<th>Reversals</th>
<th>Remands</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>1252</td>
<td>413</td>
<td>474</td>
<td>365</td>
<td>0</td>
</tr>
<tr>
<td>1997</td>
<td>1611</td>
<td>493</td>
<td>679</td>
<td>439</td>
<td>0</td>
</tr>
<tr>
<td>1998</td>
<td>2158</td>
<td>762</td>
<td>833</td>
<td>563</td>
<td>0</td>
</tr>
<tr>
<td>1999</td>
<td>2848</td>
<td>592</td>
<td>1239</td>
<td>1017</td>
<td>0</td>
</tr>
<tr>
<td>2000</td>
<td>2164</td>
<td>545</td>
<td>914</td>
<td>705</td>
<td>0</td>
</tr>
<tr>
<td>2001</td>
<td>3336</td>
<td>483</td>
<td>167</td>
<td>962</td>
<td>1724</td>
</tr>
<tr>
<td>2002</td>
<td>1451</td>
<td>479</td>
<td>287</td>
<td>209</td>
<td>476</td>
</tr>
<tr>
<td>2003</td>
<td>2638</td>
<td>486</td>
<td>213</td>
<td>412</td>
<td>1527</td>
</tr>
<tr>
<td>2004</td>
<td>1780</td>
<td>443</td>
<td>249</td>
<td>313</td>
<td>774</td>
</tr>
<tr>
<td>2005</td>
<td>1905</td>
<td>624</td>
<td>382</td>
<td>257</td>
<td>641</td>
</tr>
<tr>
<td>2006</td>
<td>2842</td>
<td>707</td>
<td>770</td>
<td>518</td>
<td>847</td>
</tr>
<tr>
<td>Mean</td>
<td>2180</td>
<td>548</td>
<td>564</td>
<td>524</td>
<td>544</td>
</tr>
</tbody>
</table>

Source: Reference Library at the Board of Veterans Appeals, Washington D.C.

Notably, the affirmance rate varied widely from a high of 43.50% in 1999 to a low of 8.03% in 2003. The right-hand columns in Figure 5.13 further show that VA remands jumped from 0% between 1996 and 2000, to 51% in 2001. The explanation for this huge change relates to a change in agency policy in 2000. The VA has always interpreted its organic statute to require the agency to adopt a non-adversarial approach and to cooperate with veterans seeking to develop their claims. Prior to 2000, however, the VA did not believe it had an affirmative duty to assist veterans in developing their claims unless they were “well-grounded.” In response to concerns expressed by
veterans and veterans service organizations, Congress enacted the Veterans Claims Assistance Act (VCAA) in November 2000.\textsuperscript{152} The new law imposed on VA the affirmative duty to assist in the development of all claims, regardless of whether the agency believed they were “well-grounded.” As a consequence of the new statutory language, the CAVC decided to remand every pending appeal so that the agency could comply with its new “duty to assist” mandate. Thus, the number of remands went from 0 to 1,724 in a single year, and the percentage of affirmances fell from 42.24\% to 5.01\% over the same time period.

The data indicates that CAVC rarely reverses the BVA’s decisional outcome. It is far more common for CVAC to remand cases for more rigorous compliance with the statutory “duty to assist” or “reasons and bases” requirements. Thus, as a practical matter, the procedures followed in reaching the decision become as important as the decision itself.

Although the enactment of the VCAA violates the assumption of equal variance in the data, a year-by-year comparison reveals that the difference in affirmation rates between the SSA and VA was statistically significant even before the change in 2000. In the rates displayed in Figure 5.14 below, only appeals where the Council or the CAVC considered the merits of the opinion are included, because cases dismissed on procedural grounds (such as failure to timely file the appeal) does not provide an accurate basis for evaluating an AJ or ALJ decision on the merits.

Figure 5.14 – Year-By-Year Comparison of SSA and VA Affirmance Rates

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Affirmances</th>
<th>Reversals</th>
<th>Remands</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>SSA</td>
<td>VA</td>
<td>(α)</td>
</tr>
<tr>
<td>1996</td>
<td>77.71%</td>
<td>56.50%</td>
<td>≤.001</td>
</tr>
<tr>
<td>1997</td>
<td>78.67%</td>
<td>60.73%</td>
<td>≤.001</td>
</tr>
<tr>
<td>1998</td>
<td>79.07%</td>
<td>59.67%</td>
<td>≤.001</td>
</tr>
<tr>
<td>1999</td>
<td>73.45%</td>
<td>54.92%</td>
<td>≤.001</td>
</tr>
<tr>
<td>2000</td>
<td>75.67%</td>
<td>56.45%</td>
<td>≤.001</td>
</tr>
<tr>
<td>2001</td>
<td>73.36%</td>
<td>5.85%</td>
<td>≤.001</td>
</tr>
<tr>
<td>2002</td>
<td>71.84%</td>
<td>29.53%</td>
<td>≤.001</td>
</tr>
<tr>
<td>2003</td>
<td>71.31%</td>
<td>9.90%</td>
<td>≤.001</td>
</tr>
<tr>
<td>2004</td>
<td>70.47%</td>
<td>18.62%</td>
<td>≤.001</td>
</tr>
<tr>
<td>2005</td>
<td>71.23%</td>
<td>29.82%</td>
<td>≤.001</td>
</tr>
<tr>
<td>2006</td>
<td>71.17%</td>
<td>36.07%</td>
<td>≤.001</td>
</tr>
<tr>
<td>Mean</td>
<td>74.0%</td>
<td>38.01%</td>
<td>2.31%</td>
</tr>
</tbody>
</table>

In addition to providing descriptive statistics on affirmance rates, Figure 5.14 also shows the results of a difference of means test between percentages of affirmances from the SSA and VA. In light of the results of this significance test, I reject the null hypothesis and conclude that the difference between the affirmance rate of BVA decisions and the affirmance rate of SSA ALJ decisions is statistically significant. This data supports the predictions of the Legalistic model since the results indicate that it was far more likely for the SSA Appeals Council to affirm an SSA ALJs decision than for the CAVC to affirm a BVA decision.

**D. The Processing Measure**

As discussed in Chapter 4, the processing measure is made up of (1) the cost of a decision; and (2) the time it takes for an agency to issue a final agency action.

Advocates of both the Legalistic and Managerial models would agree that adjudications
in agencies with high Judicialization scores will likely take longer and cost more than adjudications in agencies with low Judicialization scores. However, in this case neither the SSA nor the VA allow the parties to control the process by taking discovery, which is often the most time-consuming part of any adjudication. Thus, it is unlikely that there will be a statistically significant different in the number of days it takes each agency to process a claim.

To test these models against the processing measure, I gathered data from the VA and SSA on time to decision concerning three metrics: time to decision, time to affirmance/reverse, and cost per case. The first analysis involves the number of days that it takes an SSA ALJ and a VA AJ to process a disability claim. The processing time for resolving a claim is measured from the date the benefits claim is filed to the date that the SSA ALJ or BVA AJ issues a decision on the merits. This analysis includes only those cases where an ALJ or AJ decision was actually issued.

**Null Hypothesis 3:** There is no statistically significant difference in the number of days it takes the SSA to process an adjudication compared to the number of days it takes VA to process an adjudication.

Figure 5.15 below shows that between 1992 and 1998, the VA took longer to process benefits claims, but from 1998 to 2006, it took the SSA longer to process claims.

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153 As mentioned in Chapter 4, “cost per case” is an average approximated by the agency and does not necessarily reflect the actual cost of any single adjudication.
There is no obvious reason for the spike in VA processing time between 1991 and 1997. One possible explanation is that the VJRA, passed in 1988, for the first time required BVA to include “the reasons or bases for its findings and conclusion,” and the agency took time to adjust to its new obligations. Another possible explanation is that Operation Desert Storm and its aftermath caused an unexpected increase in the number of disability claims, and that the VA was not prepared to handle the additional workload.

Using the average processing times from the period 1991 through 2006, Figure 5.16 presents the results of a two-sample t-test between unpaired proportions.
The results indicate that the t-statistic was not significant at the .05 critical alpha level. Therefore, I conclude that the difference in number of days to cycle through an appeal was not significant, and cannot reject the null hypothesis.

The next analysis is a comparison of the cost per adjudication for the SSA and VA. The cost per case is a figure that appears in the annual reports of both federal agencies.

**Null Hypothesis 4:** There is no statistically significant difference in the average cost per SSA adjudication compared to the average cost per VA adjudications.

Figure 5.17 below charts the cost per case from each agency between 1991 and 2006.
The spike in the cost per case between 2001 and 2003 is most likely the result of the Veterans Claims Assistance Act (VCAA) in November 2000, which VA implemented by remanding many of the cases that had already worked their way through the system.

Figure 5.18 presents the results of a two-sample t-test between unpaired proportions.
Comparing the average costs of the SSA and VA, Figure 5.18 demonstrates that both the one-tail and two-tail t-statistic was significant at the .05 critical alpha level. I can therefore reject the null hypothesis and conclude that the VA’s cost per case is lower, to a statistically significant level, than the SSA’s cost per case.

IV. Conclusions

This examination of the three performance measures yields very interesting results. With regard to the appeal measure, the key differences between the agencies are: (1) the appointments process for ALJs versus AJs, and (2) SSA’s emphasis on Adjudicator Independence versus the VA’s emphasis on Adjudicator Accountability. The conventional wisdom suggested that participants would be less likely to appeal the decision of a decisionmaker that is employed by the very agency involved in the dispute. Yet, a two-tailed t-test led to the rejection of the null hypothesis and the conclusion that the VA’s appeal rate was lower, to a statistically significant degree, than
the SSA’s appeal rate. This can be interpreted as a rejection of the conventional wisdom that participants are more likely to accept a judgment if it comes from an independent, juridical adjudicator. As discussed in Chapter 3, there has been a “drift away from ALJs” as some federal agency managers clearly prefer the Managerial model’s focus on accountability over the Legalistic model’s emphasis on independence (Lubbers, 1996). The results presented here provide some ammunition for agency managers seeking to defend this “drift” against Legalistic critiques that it will undermine legitimacy and burden the system with additional appeals.

While these conclusions regarding the appeal measure provide support for the Managerial model, it is important to note that additional research is necessary. Specifically, this empirical study assumes that a participant’s decision to forego an appeal represents acceptance of the initial decision as fair or legitimate. Other factors could include inherent differences in the populations of VA and SSA participants, including their financial situation and the availability of not-for-profit groups to assist with the appeal. One avenue for future study is a broad survey of participants in each process to probe their views on the legitimacy and fairness of the process and identify other reasons for choosing not to appeal.

With regard to the affirmance measure, again the key differences are: (1) the appointments process for ALJs verses AJs, and (2) SSA’s emphasis on Adjudicator Independence versus the VA’s emphasis on Adjudicator Accountability. The Legalistic model predicted that SSA ALJs would have a lower affirmance rate, while the Managerial model predicted that the VA’s accountability program provides a much
stronger incentive for their decisionmakers to make decisions that reflects the agency’s institutional principles. The data supports the Legalistic model: it was far more likely for the SSA Appeals Council to affirm an SSA ALJs decision than for the CAVC to affirm a BVA decision.

This result can be read as a confirmation of the conventional wisdom that the OPM process for testing and selecting ALJs is more likely to yield more qualified decisionmakers who issue better decisions. However, an alternative explanation for this finding stems from the fact that the Court of Appeals for Veterans Claims is relatively new. SSA ALJs have been operating under the Appeals Council for decades, and thus the principles of social security benefits cases are reasonably well-settled. By contrast, between 1933 and 1988, BVA decisions were unreviewable. Bureaucratic norms are sometimes slow to change, and it may take some time before the VA AJs and the CAVC reach equilibrium.

With regard to the processing measure, the similarities between the two agencies suggested there would be an insignificant difference. Both the VA and SSA use a five-step process for adjudicating claims, and both have adopted a result-oriented participation approach. For the timeliness metric of the processing measure, the data confirmed this prediction. Although recent trends indicate that it takes fewer days for the BVA to cycle through a case than a SSA ALJ, the difference is not statistically significant.

The data on cost per case showed that the SSA spent more per case than the VA. The most likely explanation for this increased cost is that claimants must “opt-out” of a
hearing before the SSA, whereas veterans must “opt-in” for a hearing to be scheduled in a VA adjudication. As a result, as indicated in Figure 5.4, hearings are held in only 17 percent of VA adjudications. By contrast, the SSA schedules hearings in 100 percent of its adjudications and, as indicated in Figure 5.2, hearings are held in 71 percent of SSA adjudications. In light of this result, SSA may be able to significantly reduce their costs by changing from an “opt-out” to an “opt-in” system for hearings before the ALJ.

V. Looking Ahead: Changes to the SSA?

Over the past two decades there is a long record of failed efforts to reform the SSA disability adjudication process. These include a quality control program in the late 1970s; a pilot project in the 1980s in which the SSA was represented by government attorneys at disability hearings; and recommendations from the ACUS regarding the right to submit new evidence to the SSA Appeals Council.

Recently, on March 31, 2006, the SSA promulgated regulations implementing a new pilot program for adjudicating disability claims that is being applied in Boston, Massachusetts, and its surrounding region. One key element of the pilot program was the creation of a Medical and Vocational Expert System (“MVES”) in order to improve the quality and availability of medical and vocational expertise throughout the administrative process. Although the details of the reform were not developed in the regulation, SSA commissioned the Institute of Medicine to undertake a study to recommend how these experts could be used to help ALJs in adjudications. This reform signaled a strong move toward the Managerial model’s preference for expert decisionmakers.
Unfortunately, before the Institute of Medicine issued its final report, SSA decided to amend the regulations and abandon the MVES program. SSA explained that its decision to eliminate MVES from the disability process was related to the costs of the program: “administrative costs associated with [the MVES] program is greater over the foreseeable future than originally anticipated.”

Another key element of the Boston pilot program was the replacement of the Appeals Council with a new Decision Review Board (“DRB”). The SSA rule did not detail the DRB’s structure or internal procedures, but it did make a significant change regarding claimants’ appeal rights. Under the pilot program, a claimant had no right to ask the DRB to review the ALJ decision in his or her case. Rather, the DRB would select decisions to review, with an emphasis on claims where there is an increased likelihood of error or that involve the application of new policies, rules or procedures. This reform signaled another move toward the Managerial model’s preference for accountability, providing the DRB with an effective mechanism for quality control.

On October 29, 2007, the SSA published a new set of proposed rules that undermines the DRB’s ability to act as a de facto quality control system. Although the SSA is still calling for the replacement of the Appeals Council with the DRB, the agency now proposes to give any party who receives an unfavorable ALJ decision the right to appeal that decision to the DRB. It remains unclear how the DRB will differ from the Appeals Council.

The October 29, 2007, proposed rules are based on the agency’s experience in the Boston pilot program and would implement nationwide changes to the SSA disability process. SSA required that all comments on the proposed nationwide rules be submitted by December 28, 2007. As of October 27, 2008, SSA has not published a final rule. It will be very interesting to see whether these new reforms will move SSA’s position on the Managerial/Legalistic spectrum, and whether that movement will have any concomitant effect on the agency’s performance measures over time.

There are no similar changes under consideration in the VA, but perhaps the results of new experiments at the SSA may spur changes at the VA.
CHAPTER 6 – AN EMPIRICAL COMPARISON OF THE EEOC AND NLRB USING THE APPEAL, PROCESSING, AND AFFIRMANCE MEASURES

This chapter examines empirical data collected from the Equal Employment Opportunity Commission (“EEOC”) and the National Labor Relations Board (“NLRB”). The first section of this chapter includes a careful examination of the EEOC and NLRB programs and the adjudicatory processes the two agencies use to resolve disputes. As the following discussion will demonstrate, the enforcement programs are similar, but each agency has adopted different components of the Legalistic and Managerial models to conduct the adjudications. As in Chapter 5, the key differences that will be explored in the first section become variables that will be empirically measured in the second section. The three different measures (appeals, affirmance, and process) will be used to examine the impact of different administrative law processes and procedures.

I. The EEOC and NLRBAdminister Similar Workplace Fairness Programs

A. EEOC Programs: Federal Sector Complaints

Congress created the EEOC when it passed Title VII of the Civil Rights Act of 1964. The EEOC was delegated broad authority in order to become “the primary federal agency responsible for eliminating discriminatory employment practices in the United States.”\(^{156}\) Initially, the EEOC had no jurisdiction over federal employees. Rather, the Civil Service Commission was responsible for implementing the Equal Opportunity Act of 1972, which prohibited discrimination in the federal sector. From

1972 through 1978, the Civil Service Commission (and not the EEOC) had responsibility for adjudicating discrimination complaints from federal employees.

In 1978, President Carter submitted a Reorganization Plan to Congress in an attempt to consolidate a wide range of federal equal employment opportunity activities in the EEOC. The plan was accepted by the House and the Senate, and in 1979, the Civil Service Commission was dissolved. In forwarding the Reorganization Plan, the President noted a number of deficiencies in the federal program as administered by the Civil Service Commission that he believed could be remedied by transferring functions to the EEOC, an agency with “considerable expertise” in the field.\textsuperscript{157} The EEOC was given statutory authority to enforce private sector claims of discrimination, and to adjudicate federal sector claims of discrimination.

When a private sector employee asserts a claim of discrimination, the EEOC acts as an investigator, conciliator, and eventually a prosecutor in federal district court. Complaints of discrimination arising from private sector employees are resolved by a federal judge in district court litigation. The EEOC has no role in adjudicating private sector complaints. By contrast, complaints of discrimination brought by federal sector employees are adjudicated by EEOC AJs.

This chapter will focus on the EEOC’s role in conducting adjudications for federal sector employees. As an adjudicator, the EEOC resolves disputes brought by federal sector employees who believe they have been the victims of discrimination.

EEOC has jurisdiction over five different areas of employment law: (1) Title VII of the Civil Rights Act of 1964, which makes it illegal to discriminate in employment based on race, color, religion, sex or national origin; (2) section 501 of the Rehabilitation Act of 1973, which makes it illegal to discriminate against federal employees and applicants based on disability; (3) the Equal Pay Act, which prohibits employers from discriminating on the basis of sex in the payment of wages; (4) the Age Discrimination in Employment Act, which protects people 40 years of age and older by prohibiting age discrimination; and (5) retaliation or reprisal against any employee who files a complaint or participates in an investigation of a complaint.

The EEOC’s process for adjudicating federal sector complaints of discrimination applies to the following: (1) all executive agencies as that term is defined in 5 U.S.C. § 105; (2) military departments as defined in 5 U.S.C. § 102; (3) the Government Printing Office; (4) the Postal Rate Commission; (5) the United States Postal Service; (6) the Tennessee Valley Authority; (7) the National Oceanic and Atmospheric Administration Commissioned Corps; (8) the Smithsonian Institution; and (9) all units of the judicial branch of the federal government having positions in the competitive service.

158 5 U.S.C. § 105 defines “executive agency” as “an Executive Department, a Government corporation, and an independent establishment. The Executive Office of the President, which consists of a number of offices including the Office of Management and Budget and the Council on Environmental Quality, is an executive department for the purposes of 5 U.S.C. § 105 and must comply with EEOC rules and regulations.
B. The NLRB: Unfair Labor Practices

During the Great Depression, a series of nationwide strikes against employers who denied workers the right to organize and bargain collectively led Congress to pass in 1935 the National Labor Relations Act (“NLRA,” also referred to as the “Wagner Act”) to govern relations between unions and employers in the private sector. Congress delegated authority to the NLRB to enact regulations and enforce the right of employees to organize and to bargain collectively with their employers.

The current Labor-Management Relations Act (which consists of the NLRA, the Taft Hartley Act of 1947, and the Landrum-Griffin Act of 1959) grants employees the right to organize, to join unions, to engage in collective bargaining through freely chosen representatives and to participate in any other activities that lead to the protection of workers. An unfair labor practice occurs when an employer interferes with the exercise of any of these rights, or when a union interferes with employees who choose to exercise these rights. Thus, NLRB has two principal functions: (1) to respond to petitions for representation and oversee union elections; and (2) to investigate, prosecute, and adjudicate unfair labor practice cases. NLRB refers to the first function as “representation” cases. In a representation case, NLRB responds to a petition for a union election, and an NLRB agent will hold a secret ballot election. Representation cases do not involve adjudications and they are not discussed in this chapter.

With respect to the second function, NLRB has statutory authority to prevent and remedy unlawful acts, called “unfair labor practices,” by either employers or unions. Government unions, such as the American Federal of State, County and
Municipal Employees (“AFSCME”) are not exempt from NLRB complaints. NLRB does not proactively seek out unfair labor practice violations, but rather responds and processes only to those charges of unfair labor practices filed with the NLRB at one of its 51 regional, subregional, or resident offices. This chapter discusses the adjudication process that begins with the filing of a charge and concludes with a final administrative decision by the NLRB.

II. Six-Stage Adjudication Process

Both the NLRB and the EEOC were created, in part, to adjudicate “fairness” claims brought by workers in the American workplace. But each agency uses a different combination of administrative processes to adjudicate these claims. As indicated in Figure 6.1, the process in both agencies begins when an initial charge is brought by an employee or a group of employees in the American workforce. The NLRB and the EEOC both use investigators to gather facts and conduct investigations regarding the initial charge – although in an NLRB proceeding the investigation occurs prior to the filing of a formal complaint, while in an EEOC proceeding the investigation occurs after the filing of a formal complaint. In both agencies, a decisionmaker holds a hearing and issues a decision based on the facts and evidence presented in the hearing. Unlike the SSA and VA adjudications discussed in Chapter 5, in which only the complainant can file an appeal, either party in an EEOC or a NLRB proceeding may appeal an AJ or ALJ decision. These stages will be more fully explored below.
**Stage 1: Filing a Charge**

1. **Filing a discrimination charge with an EEO Counselor**

   A federal sector employee has forty-five days from the date of an alleged act of discrimination to contact an equal employment opportunity counselor with a complaint. The period begins on the date of the discriminatory conduct. This limit may be extended by the agency against whom the charge is filed (i.e. the “Respondent Agency”) or the EEOC for good cause.

   A federal sector employee who wishes to file a discrimination charge begins the process in the agency where the employee works. For example, an employee in the Department of Transportation (“DOT”) wishing to file a complaint must begin the process by contacting DOT’s “EEO counselor.” The EEO counselor is not an EEOC employee, but rather is a DOT employee designated by the agency to provide information to the aggrieved individual concerning how the federal sector EEO process works. The EEO counselor works with the individual and attempts to resolve the matter.
informally. If a counselor believes that the circumstances suggest discriminatory conduct, the counselor advises the individual of the right to file a formal charge. Conversely, if a counselor believes that discrimination may not be present, the counselor will attempt to resolve the matter informally or through counseling. The employee cannot initiate an adjudication by filing a complaint or otherwise move forward with the charge until the counselor has had an opportunity to review the charge and informally resolve the matter. Counseling must be completed within 30 days of the date the aggrieved person contacted the agency’s EEO office.

If the matter is not resolved within the 30 day period, the counselor must inform the individual in writing of the right to file a discrimination complaint. This notice – which is called a “Notice of Final Interview” – informs the individual that a complaint must be filed within 15 days of receipt of the notice.

2. Filing an unfair labor practice charge at the NLRB

An individual or a union representative who wishes to file a charge of an unfair labor practice begins the process in one of NLRB’s 51 regional, sub-regional, or resident offices. Individuals may visit, telephone, or write to a regional office and communicate with NLRB agents who are available to answer inquiries and assist members of the public. NLRB provides assistance to individuals seeking to file an allegation through its Information Officer program.

Like the EEOC counselors, NLRB agents in the Information Officer program become involved in the case before a complaint is filed and the adjudication process is initiated. Unlike EEOC counselors who are employed by the agency that has allegedly
conducted the discrimination, NLRB agents are employees of the NLRB and have no ties to the employer. Although NLRB agents may not give legal advice, they may assist the individual by identifying the sections of the Act involved and the basic theory of the allegations, providing a basic form that may be used to submit a charging document, providing reasonable clerical assistance, and even drafting the language of the charge itself.\textsuperscript{159} If an agent believes that the circumstances suggest a violation of the Act, the NLRB agent advises the individual of the right to file a charge and assists in the preparation of any charge to the extent necessary.\textsuperscript{160} Conversely, if an individual describes a circumstance that is clearly not covered by the Act, the NLRB agent discourages the filing of a charge.

Like the EEOC, an employee or union cannot initiate an adjudication by filing a complaint or otherwise move forward with the charge until the NLRB has had an opportunity to review the charge.

**Stages 2 & 3: The Investigation and Complaint Stages**

1. **Filing of a Formal EEOC Complaint and Agency Investigation.**

Once the EEO Counselor issues a Notice of Final Interview, the employee has fifteen days to file a complaint.\textsuperscript{161} The complaint is filed directly with the agency that the employee has alleged the discrimination, and not with the EEOC. There are not many requirements regarding what must be included in a complaint. At a minimum, the

\textsuperscript{159} NLRB Unfair Labor Practices Casehandling Manual (hereinafter “CM”) § 10012.2 (June 2007).
\textsuperscript{160} NLRB CM § 10012.1.
\textsuperscript{161} 29 C.F.R. 1614.106(b).
complaint must be signed by the employee (or the employee’s attorney), be sufficiently
precise to identify the employee and the agency, and describe generally the action or
practice which forms the basis of the complaint.\textsuperscript{162} Once the agency receives the
complaint, it must send a written acknowledgment to the federal agency and notify the
complainant of the address of the EEOC office where a request for a hearing should be
sent.

Consistent with the Managerial model for administrative adjudications, the
federal agency that is the subject of the action is responsible for conducting an
“impartial and appropriate” investigation. The EEOC does not get involved at this
investigation stage. Rather, the agency that is the subject of the charge controls the
entire investigatory process. Thus, the EEOC has no fact-finding responsibilities prior
to the hearing stage of an adjudication. Proponents of the Legalistic model have
repeatedly expressed dissatisfaction with EEOC’s delegation of investigatory authority
to the same federal agency that will be a respondent in the adjudication. In every
Congress since 1990, legislation has been introduced to “take agencies out of the
business of judging themselves.”\textsuperscript{163}

Each agency has promulgated its own procedures for conducting investigations.
However, EEOC has issued a Management Directive that proscribes the EEOC’s
standards for impartiality and appropriateness in factual findings on formal complaints
of discrimination. These standards have been uniformly adopted by all federal

\textsuperscript{162} 29 C.F.R. § 1614.106(c).

agencies. Although investigators are employees (or contractors) of the agency being charged, the EEOC standards require that the investigative process be non-adversarial. In other words, the investigator is obligated to collect evidence regardless of the parties’ positions with respect to the items of evidence. According to the EEOC, the purpose of the investigation is: (1) to gather facts upon which a reasonable fact finder may draw conclusions as to whether an agency subject to coverage under the statutes that the EEOC enforces in the federal sector has violated a provision of any of those statutes; and (2) if a violation is found, to have a sufficient factual basis from which to fashion an appropriate remedy.

The investigator also has the responsibility to be “thorough,” meaning that the investigator must identify and obtain all relevant evidence from all sources. EEOC instructs that an investigator should not try to balance the amount of evidence supporting each side of the dispute, but rather need only exhaust those sources that may have information relating to the case. The agency has a legal obligation to develop an impartial factual record from which a reasonable fact finder could determine whether discrimination occurred.\textsuperscript{164} An investigation can include interviews, fact-finding conferences with multiple individuals, interrogatories, affidavits, or an exchange of letters and memoranda. Investigators are employees of the agency and are authorized to administer oaths. The EEOC officials in the Office of Federal Operations, as well as EEOC AJs assigned at the hearing phase, have the authority to issue sanctions against

\textsuperscript{164} 29 C.F.R. 1614.08(b) (2006).
an agency for its failure to develop an impartial and appropriate factual record in appropriate circumstances.165

Within 180 days from the time the complainant files a complaint, the agency must complete its investigation and provide the complainant with a copy of the investigative file.166 Although the precise process may differ from agency to agency, most federal agencies will draft a factual record and issue a report of investigation. When transmitting the investigative file (and/or the agency report of the investigation), the agency provides notification that the complainant has 30 days after receiving the investigative file to file a request for a hearing.167 Thus, once the complainant receives the investigative file, the complainant has 30 days to review the file and choose one of four options: (1) drop the complaint; (2) explore settlement options; (3) request a final decision from the agency without a hearing; or (4) request a hearing with an EEOC AJ.

Interestingly, it is more common for a complainant to seek a final agency decision from the respondent agency (i.e., without an EEOC AJ) than for a complainant to seek a final agency action with an AJ. Figure 6.2 shows that between 2002-2006,

165 See McDuffie v. Department of the Navy, EEOC Request No. 05880134 (1988) (adverse inference can be drawn from agency’s failure to include relevant statistical information in the file); Wasser v. Department of Labor, EEOC Request No. 05940058 (1995) (Administrative Judge appropriately imposed an adverse inference where the agency failed to provide requested documents); Stull v. Department of Justice, EEOC Appeal No. 01941582 (1995) (a complainant may be awarded interim attorney’s fees as a sanction for failure to produce records requested during discovery even where s/he is unsuccessful on the ultimate issue of discrimination); Comer v. FDIC, EEOC Request No. 05940649 (May 31, 1996) (Administrative Judge has the authority to order the agency to reimburse appellant for costs resulting from the agency's bad faith conduct in failing to appear for properly scheduled depositions).


more complainants chose to forgo a hearing before an AJ and instead requested that the agency issue a decision based on the file compiled by the agency’s investigators. Contrary to the Legalistic notion that participants prefer an opportunity to control the fact-gathering process and participate in an adversarial proceeding, this result suggests a general satisfaction with the respondent agency’s own investigators and institutional decision-making processes.

**Figure 6.2 – EEOC Complaints, Settlements, and Merit Decisions**

Up until this point in the EEOC adjudicative process, the process is controlled by the individual complainant. Consistent with the Legalistic model of administrative adjudications discussed in Chapter 4, the EEOC allows the complainant to decide whether or not to pursue the claim and proceed through the adjudicatory process. Once the EEOC investigator completes the investigative file, the individual then has full
discretion as to whether to request a decision by the agency, request a hearing by an AJ, or withdraw the claim. EEOC has no opportunity to vet or otherwise control the types of cases for which it will eventually hold hearings. One result of granting complainants’ control over the process is that a significant majority of the cases result in a finding of no discrimination.

**Figure 6.3 – EEOC Merits Decision and Discrimination Data**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Complaint Closures</th>
<th>Merit Decisions</th>
<th>Findings of Discrimination</th>
<th>Merit Decisions/Findings of Discrimination</th>
<th>Favorable Outcomes/Complaint Closures</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>22,889</td>
<td>9,308</td>
<td>248</td>
<td>2.7%</td>
<td>25.58%</td>
</tr>
<tr>
<td>2003</td>
<td>19,772</td>
<td>9,180</td>
<td>264</td>
<td>2.9%</td>
<td>29.52%</td>
</tr>
<tr>
<td>2004</td>
<td>23,153</td>
<td>10,915</td>
<td>321</td>
<td>2.9%</td>
<td>20.69%</td>
</tr>
<tr>
<td>2005</td>
<td>22,974</td>
<td>11,213</td>
<td>345</td>
<td>3.1%</td>
<td>20.05%</td>
</tr>
<tr>
<td>2006</td>
<td>19,119</td>
<td>9,140</td>
<td>224</td>
<td>2.5%</td>
<td>19.43%</td>
</tr>
</tbody>
</table>

As shown in the “Merits Decisions/Findings of Discrimination” column in Figure 6.3 above, the overwhelming majority of EEOC complaints that result in merits decisions are found to be without merit. This result can be explained by the fact that EEOC strongly encourages settlements between federal sector employees and agencies. Indeed, in 2002 and 2003 there were more settlements reached than there were EEOC AJ merit decisions issued. The percentage of merits decisions resulting in findings of discrimination is deflated because the meritorious cases that settle never reach the “merits decision” stage. To provide a more complete picture, the right-most column of Figure 6.3 calculates “favorable outcomes” as a combination of settlements and findings of discrimination, and divides that by the total number of complaint closures per year. Thus, although a very small percentage of federal sector cases (between 2 and 3
percent) result in a finding of discrimination, a much higher percentage of cases
(between 19 and 29 percent) result in a favorable outcome for the EEOC complainant.

2. An NLRB Investigation and the Filing of a Formal Complaint

Unlike the EEOC process in which an investigation follows the filing of a formal complaint, an NLRB investigation precedes the filing of a formal complaint. Following a meeting with the NLRB agent, the party alleging an unfair labor practice completes the charging documents and files the charge at the field office in the region where the unfair labor practices are alleged to have occurred. The case is then docketed and the employee serves a copy of the charge on the charged party.

After an unfair labor practices case has been docketed, it is assigned to a NLRB agent for investigation. The purpose of the investigation is to identify the theory of the case, prepare and execute a strategy to obtain evidence relevant to the case, apply the relevant facts to the law, and make recommendations to the Regional Director as to the disposition of each element of the case. The investigator has discretion to utilize any number of approaches to gain information, including telephone contact, questionnaires, interviews, and affidavits.

The NLRB agent begins the investigation process by sending initial letters to both the employee and the charged party. This initial letter provides notice and acknowledgment of the filing and also requests certain information regarding the facts and circumstances from the charging party. The charging party is responsible for providing a complete written account of all facts and circumstances on which the charge is based, copies of all relevant documents, and the names and addresses of witnesses.
The NLRB investigating agent contacts both the charging party and the charged party by telephone. These are ex parte communications because they are not on the record and the content of these conversations are not shared with the other parties to the case. Following initial contact with the parties, the NLRB agent develops a strategy for the investigation. Because this investigation serves as the basis for all action eventually taken in a case, the investigator pursues every lead in an attempt to shed light on the entire situation. The investigation typically focuses on interviews with the charging party and with witnesses offered by the charging party. Typically, sworn affidavits are secured to support all statements made during the investigation. Indeed, the face-to-face affidavit taken by an NLRB agent is the “keystone” of the investigation and is the preferred method of taking evidence from witnesses.¹⁶⁸

Similar to the EEOC, the NLRB adopts a Managerial approach to fact-gathering. Although an initial EEOC investigation is conducted by the respondent agency (agency is in a defensive posture), while the initial NLRB investigation is conducted by the NLRB itself (in an offensive posture), both approaches reflect the Managerial model. This is because EEOC and NLRB investigations are conducted by agency investigators who have no personal stake in the outcome and who are charged by the agency with conducting a fair and neutral investigation. It is the responsibility of the NLRB agent to take steps necessary to ascertain the truth of allegations of a charge and all promising leads must be followed. The NLRB agent is charged with exhausting all lines of

¹⁶⁸ NLRB CM § 10060.
pertinent inquiry, whether or not they are within the control of, or suggested by, the charging party.

Following completion of the affidavits and receipt of the evidence and positions of all parties and witnesses, the NLRB agent carefully reviews the investigative file to identify any gaps or conflicts in the evidence in light of applicable legal precedent. The NLRB agent then works to resolve any material issues, including credibility by re-interviewing parties or witnesses for additional testimony and/or documents.

At the conclusion of the investigation cases are presented to the Regional Office through either a written or oral report to the Regional Director. The Regional Director has the final authority and responsibility to make all case-handling decisions within the Regional Office. The Regional Director can make one of three determinations: (1) the charge is a meritorious charge; (2) the charge is a non-meritorious charge; or (3) the charge should be a deferral. Figure 6.4 below measures the number of charges filed (blue line) against the number of cases settled pre-complaint (red line) and the number of complaints actually issued (white line).
If the charge is found to be non-meritorious, the Regional Director will choose not to issue a complaint. Following such a determination, the Regional Director will dismiss the charge, which may be appealed to the General Counsel in Washington D.C. The General Counsel is independent from the Board members and has ultimate authority for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases. If the general counsel grants the appeal, the Regional Office will issue the complaint or take other appropriate action. If the appeal is denied, an unfair labor practice charge will not be filed.
Figure 6.5 – NLRB Data

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>% of Charges Settled Pre-Complaint</th>
<th>% of Charges Resulting in Complaints</th>
<th>Findings of Non-meritorious Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>21.6%</td>
<td>13.4%</td>
<td>65.00%</td>
</tr>
<tr>
<td>1995</td>
<td>22.8%</td>
<td>14.7%</td>
<td>62.50%</td>
</tr>
<tr>
<td>1996</td>
<td>25.4%</td>
<td>14.2%</td>
<td>60.40%</td>
</tr>
<tr>
<td>1997</td>
<td>27.0%</td>
<td>12.5%</td>
<td>60.50%</td>
</tr>
<tr>
<td>1998</td>
<td>25.0%</td>
<td>11.3%</td>
<td>63.70%</td>
</tr>
<tr>
<td>1999</td>
<td>29.0%</td>
<td>9.3%</td>
<td>61.70%</td>
</tr>
<tr>
<td>2000</td>
<td>27.0%</td>
<td>12.9%</td>
<td>60.10%</td>
</tr>
<tr>
<td>2001</td>
<td>28.2%</td>
<td>12.2%</td>
<td>59.60%</td>
</tr>
<tr>
<td>2002</td>
<td>27.7%</td>
<td>12.2%</td>
<td>60.10%</td>
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<tr>
<td>2003</td>
<td>29.9%</td>
<td>7.2%</td>
<td>62.90%</td>
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<td>2004</td>
<td>29.00%</td>
<td>10.10%</td>
<td>60.90%</td>
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<td>2005</td>
<td>30.20%</td>
<td>8.30%</td>
<td>61.50%</td>
</tr>
<tr>
<td>2006</td>
<td>35.20%</td>
<td>7.80%</td>
<td>57.00%</td>
</tr>
<tr>
<td>Mean</td>
<td><strong>27.54%</strong></td>
<td><strong>11.24%</strong></td>
<td><strong>61.22%</strong></td>
</tr>
</tbody>
</table>

Figure 6.5 demonstrates that a substantial number of charges brought by American workers never result in the filing of a complaint or an adjudication before an ALJ at the NLRB. Over the last twelve years, the mean number of “unmeritorious” cases is 61.22%, with a range of only 6.7 percentage points over the entire period. Accounting for those cases that settle pre-complaint, figure 6.5 also shows that it is very rare for charges filed at the NLRB to result in complaints. Between 1994 and 2006, an average of only 11.24% charges resulting in the filing of a complaint by the NLRB regional director.

The Complaint is a formal document issued for the General Counsel by the Regional Director. Ultimately, if the complaint is found to be meritorious, NLRB issues the formal complaint and the case is set for a hearing before an NLRB ALJ. The issuance of a complaint can potentially be a source of bias for the ALJ at the hearing
stage because the ALJ may conclude that the mere fact that the General Counsel has issued a complaint signals that agency officials believe the claim has sufficient merit to expend limited agency time and resources.

**Stage 4: Hearing**

1. **Hearings before an EEOC AJ**

   After receiving a copy of the agency’s investigative file, the federal employee has 30 days to file a request for a hearing at the local EEOC office. Within 15 days of receiving the request, the local EEOC office assigns the case to an Administrative Judge (“AJ”). Upon receiving the case, the AJ sends an “Acknowledgment and Order” to the parties identifying the presiding AJ and outlining the requirements for the hearing.

   The AJ is an EEOC employee appointed to conduct a hearing in accordance with the EEOC rules and regulations. EEOC does not maintain a publicly available list of AJs or their qualifications. This is typical of Managerial agencies (the VA also does not maintain a publicly available list of BVA decisionmakers), but atypical of Legalistic agencies such as the NLRB and FERC that post biographies of their decisionmakers. According to the response to a Freedom of Information Act request submitted in March 2007, all of the AJs employed at the EEOC are attorneys who are licensed to practice law in at least one state in the United States.

   Upon appointment, the AJ takes complete control of the case, assuming full responsibility for both the adjudication of the complaint and the development of the record. The AJ’s responsibilities include, but are not limited to (1) issuing decisions

on complaints; (2) administering oaths; (3) regulating the conduct of hearings; (4) limiting the number of witnesses so as to exclude irrelevant and repetitious evidence; (5) ordering discovery or the production of documents; (6) issuing protective orders; (7) excluding any person who is disruptive from the hearing or who is a witness so that he/she cannot hear the testimony of other witnesses; (8) issuing decisions without a hearing if there are no material facts in issue; (9) limiting the hearing to the issues in dispute; and (10) imposing appropriate sanctions on parties who fail to comply with orders or requests.\textsuperscript{170}

EEOC adopts a process-oriented approach to discovery. As discussed in Chapter 3, EEOC regulations require the parties to seek prior authorization from the administrative judge prior to commencing discovery. In practice, however, the parties have complete control of the discovery process and conduct discovery without seeking prior approval from the AJ. This practice has become so prevalent that EEOC issued a guidance document providing that, in contravention of the agency’s regulations, parties may begin discovery upon receipt of the AJ’s acknowledgment order.\textsuperscript{171} According to the current EEOC management directive, AJs do not play a significant role in discovery, except to encourage the parties to cooperate.\textsuperscript{172}

The AJ has discretion to determine the site of the hearing. The hearings are typically conducted in the EEOC district office, EEOC field office, at the agency where

\textsuperscript{170} 29 C.F.R. 1614.109 (2006).
\textsuperscript{171} EEO MD-110, Chapter 7.
\textsuperscript{172} Id.
the complaint arose, or any other location. If either party objects to the venue, the party may file a request for a change in venue. For approved witnesses or are also employees at the respondent agency, the agency is responsible for making travel arrangements and ensuring the appearance of the witnesses at the hearing. Hearings are closed to the public and the record of the hearing is restricted.\textsuperscript{173}

The agency adopts the Managerial model’s preference for an informal hearing. Neither the EEOC’s regulations nor EEO MD-110 follow the Federal Rules of Civil Procedure. AJs have discretion to allow hearsay testimony if it is deemed to be relevant, material and not repetitious, but the AJ may accord it diminished evidentiary weight because it is hearsay.\textsuperscript{174} However, when a procedural issue is not answered by the EEOC’s regulations, guidance, or federal sector decisions, the AJ may use the Federal Rules as a guide in determining the proper course of action. A hearing before an AJ is an adversarial proceeding. The AJ is responsible for maintaining control of the hearing and has discretion to expel a party or disqualify a representative from the hearing.\textsuperscript{175}

2. Hearing before an NLRB ALJ

If the NLRB General Counsel issues a complaint, the matter is assigned to an NLRB ALJ. All adjudicators in the NLRB are chosen from a list of qualified ALJs maintained by the Office of Personnel Management. In order to be listed as an ALJ by

\textsuperscript{173} 29 C.F.R. 1614.109(e) (2006).

\textsuperscript{174} EEO MD-110, Chapter 6.

\textsuperscript{175} EEO MD-110, Chapter 7.
the Office of Personnel Management, each ALJ must have practiced as an attorney for at least seven years, with at least 2 of the 7 years in the field of administrative law or in the actual preparation and trial of cases before courts of original and unlimited jurisdiction.¹⁷⁶

Unlike the EEOC proceeding, there is no discovery permitted in NLRB cases absent extraordinary circumstances. Not only is there no discovery allowed, but the employer (or union) who is facing the ULP charge is not permitted to review the investigation file prior to the hearing. NLRB’s decision to limit discovery has been heavily litigated in federal court.

The NLRB’s decision to limit discovery represents a clear example of a result-oriented approach to procedure that is central to the Managerial model of administrative procedure. NLRB has long argued that Section 6 of the NLRA, which provides that the NLRB may “make such rules and regulations as may be necessary to carry out the provisions of this Act,” provided the agency with the authority to prohibit pre-hearing discovery. NLRB’s rule has been harshly criticized by commentators who endorse the Legalistic model of adjudications. Citing due process and basic concerns arising out of

¹⁷⁶ In some cases, a case may be submitted directly to an NLRB ALJ without a hearing. The ALJ assigned to the case makes the final judgment on the basis of the investigative record and without live testimony by witnesses or argument by the parties. This typically occurs where there are no facts in dispute and the parties want an expedited decision on what they perceive to be purely legal issues. Less than 2% of ALJ merit decisions per year are decided on the record.
the lack of adequate discovery, NLRB adjudications have been described as “trial by ambush.”\textsuperscript{177}

Unlike an EEOC AJ who chooses the site of the hearing, the NLRB has very specific requirements for what constitutes a proper hearing space. The ULP case manual is extraordinarily detailed, requiring that all hearing rooms be equipped with: (1) Judge’s bench and chair; (2) U.S. flag; (3) NLRB seal; and (4) container with water and paper cups.\textsuperscript{178} When hearings are held outside the Regional Office, it is NLRB policy to hold them in federal, state or municipal courtrooms.

Also unlike the EEOC proceeding, the trial attorney conducting the case on behalf of the NLRB does not represent the charging party. Rather, the NLRB attorney represents the public’s interests by “presenting evidence and argument in support of the complaint with honesty and integrity.”\textsuperscript{179} The charging party may enter an appearance in the case and, on its own behalf, examine witnesses, introduce additional evidence, and argue for additional remedies. However, the trial attorney is instructed to oppose anything that he/she deems will jeopardize the prosecution of the complaint or be unnecessarily repetitive. Thus, the attorney for NLRB and the attorney for the charging party can potentially be at odds.

Trial attorneys are instructed to address the ALJ using terms of respect, such as “the Court” and “Your Honor.” The formal Rules of Evidence apply in hearings before

\textsuperscript{177} New England Medical Center Hospital v. N.L.R.B., 548 F.2d 377, 387 (1st Cir. 1977); Capital Cities Communications, Inc. v. N.L.R.B., 409 F. Supp. 971, 977 (N.D.Cal.1976).

\textsuperscript{178} NLRB CM at 10256.

\textsuperscript{179} NLRB CM at 10380.
the NLRB. Unlike EEOC hearings, hearsay is not permitted and NLRB trial attorneys are encouraged to object to hearsay evidence.

**Stage 5: Adjudicator Decision and Final Agency Action**

1. **EEOC AJ Decision and Final Agency Action**

   If the complainant chooses to request a final decision from the respondent agency without involving an EEOC AJ, the agency has sixty days to make a decision. In such cases the agency does not hold a hearing and instead bases its decision on the agency’s internal investigation.

   If the complainant files a request for a hearing, the ALJ must issue a decision within 180 days of receiving the agency file. The decision is sent to the agency together with the entire record of the case, including the transcript of the hearing. The decision by the AJ is a “recommended” decision which is then reviewed by the agency that was charged with discrimination. The agency has forty days to review the AJ’s recommended decision and issue a final order. Where the AJ makes a finding of “no discrimination,” the agency will typically immediately issue a final order implementing the AJ’s decision. Where the AJ makes a finding of discrimination, however, the agency then has forty days to decide whether they will accept the decision and issue a

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180 Section 10(b) of the NLRA provides that Board hearings shall, “so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . . .”

181 NLRB CM at 10394.5.


184 Failure to issue a final order within forty days by an agency results in the AJ’s decision automatically becoming the final action of the agency. 29 C.F.R. 1614.109(i) (2006).
final order implementing the decision, or issue a final order not fully implementing the
decision and appeal the AJ’s decision.\textsuperscript{185} If the AJ had ordered that the agency
retroactively restore the employee’s job, the agency must comply with the decision to
the extent of the temporary or conditional restoration, pending the outcome of the
agency appeal.

2. **NRLB ALJ Final Decision**

An NRLB ALJ may dispense with post-hearing briefs and issue bench decisions,
which means that the ALJ may issue an oral decision at the conclusion of the hearing.
Typically, however, an NRLB ALJ will require that post-hearing briefs be submitted on
the issues. The ALJ’s decision on the merits will set forth the findings of fact, legal
conclusions, and recommended remedial action. Once the ALJ files an opinion, the
matter is transferred to the NRLB and the ALJ is divested of all jurisdiction.\textsuperscript{186}

**Stage 6: Appeals**

1. **Appeals and Reconsiderations in the EEOC**

If the complainant decided to proceed without the involvement of an EEOC AJ,
the complainant still may appeal the decision of the agency to the EEOC’s Office of
Federal Operations (“OFO”). The agency has the right to appeal its own decision to the
OFO, although such a practice is extremely rare and is usually done in order to seek a
clarification from the EEOC of a rule or regulation.

\textsuperscript{185} 29 C.F.R. 1614.110(a) (2006); 29 C.F.R. 1614.505 (2006).
\textsuperscript{186} 29 C.F.R. 102.45 (2006).
If the complainant filed a request for a hearing and received a decision from an AJ, then either a complainant or an agency may appeal the AJ’s decision to the EEOC. The appeals are initially handled by the EEOC’s OFO. Complainants must file their appeal within 30 days of the receipt of the dismissal or final action or decision. An agency must file an appeal within 40 days of receipt of the hearing file and decision. The complainant or the agency files the appeal with the Director of the Office of Federal Operations, which is located in Washington D.C.

If a complainant wishes to submit a statement or brief in support of the appeal, he/she must do so within 30 days after filing the notice of appeal. If an agency wishes to file such a statement or brief, it must be submitted within 20 days of filing the notice of appeal. Any such statement cannot exceed 10 pages. Any reply or response to such a statement must be filed within 30 days of the statement or brief.

The OFO adjudicates the appeal on behalf of the EEOC. The OFO will review the complaint file and all written statements and briefs from either party. The OFO can decide to supplement the record by any procedure it deems appropriate. The OFO, on behalf of the EEOC, then issues a written decision on appeal and sets forth the reasons for its decision on appeal. The decision on an appeal is based on a “de novo” review, except that the review of the factual findings in a decision by an AJ is based on a “substantial evidence” standard of review.

If a party disagrees with the OFO’s decision, it may seek reconsideration with the EEOC. The EEOC has discretion to grant reconsideration if the party demonstrates (1) the appellate decision involved a clearly erroneous interpretation of material fact or
law; or (2) the decision will have a substantial effect on the policies, practices or operations of the agency.\textsuperscript{187} Absent reconsideration by the EEOC, a decision issued by the OFO is a “final agency action.”

2. Exceptions and Appeals at the NLRB

Within 28 days from the date of the service of the order transferring the case to the NLRB, any party may file “exceptions” to the ALJ’s decision to the NLRB in Washington D.C. Unlike the EEOC where only two parties have an opportunity to appeal an AJ decision (the charging party or the respondent agency), any one of three parties can appeal in an NLRB adjudication. Exceptions may be filed with the NLRB board of appeals by either (1) the NLRB general counsel who tried the case; (2) the respondent organization; or (3) the charging party. If only one party files an exception, any party may, within the same time period, file a brief in support of the exceptions. The regulations provide 14 days for filing an answer brief, and then another 14 days for a reply.\textsuperscript{188} Either party may request an oral argument before the NLRB on the exceptions, although this request is not always granted. The NLRB delegates each appeal to a three-member panel. The panel issues the final agency action that is adopted by the Board and becomes the final agency action on the matter.

\textsuperscript{187} 29 C.F.R. 1614.405(b) (2006).
\textsuperscript{188} 28 C.F.R. 102.46 (2006).
III. Comparing The EEOC and NLRB: The Appeals Measure, the Performance Measure, and the Processing Measure

A. Similarities, Differences, and the Judicialization Score

It is interesting to compare the EEOC procedure involving alleged discrimination in federal employment with the NLRB procedure involving alleged unfair labor practices under the National Labor Relations Act (ACUS, 1992: 43). Both agencies administer programs designed to protect workers against discrimination or unfair treatment in the workplace. Unfortunately there are some differences exist between the population of EEOC complainants and the population NLRB complainants that cannot be controlled for in this study. For example, EEOC complainants are individuals while NLRB parties are either organized unions or corporations. However, although the parties differ, the nature of EEOC and NLRB disputes are very similar. Both the NLRB and the EEOC receive complaints from aggrieved parties regarding the actions of a third-party, and presiding officers must make factual determinations based on evaluations of witness credibility. It is extremely rare for participants who appear for a hearing before NLRB ALJs and EEOC AJs to be unrepresented by counsel.

The NLRB and EEOC are hybrid agencies – they draw from the Legalistic model as well as the Managerial model. The one similarity between the agencies is that they both use generalist decisionmakers with legal training rather than using experts in the field of human resources or labor relations. There are a number of important differences. First, the NLRB has adopted the Legalistic model to the extent its adjudications are highly stylized proceedings presided over by independent ALJs. But the NLRB has also adopted the Managerial model by limiting the ability of the parties
to control the proceedings and conduct discovery. The EEOC is exactly the inverse. The EEOC has adopted a Managerial model to the extent it relies on informal proceedings presided over by AJs who are EEOC employees. But the EEOC has also adopted the Legalistic model by permitting the parties to control the process and conduct discovery.

Second, the agencies differ on the appointments process used to select decisionmakers. The NLRB uses an “arms-length” appointment process whereby the agency selects decisionmakers from a list of ALJs prepared by OPM. By contrast, the EEOC hires decisionmakers directly and they are considered employees of the EEOC.

Finally, the agencies differ on the issue of accountability versus independence. EEOC complaints are adjudicated by EEOC employees, whereas NLRB adjudications are decided by independent ALJs. Whereas NLRB ALJs are not subject to formal internal quality assurance processes, the EEOC implements a program that holds their decisionmakers accountable for their performance. Finally, although the EEOC has rules preventing the respondent agency from sending communications or otherwise pressuring the AJ to reach a certain decision, there is no rule against the EEOC itself from exerting pressure on the AJ to reach certain findings on matters of law or fact.
Figure 6.8  Judicialization Score of NLRB and EEOC

<table>
<thead>
<tr>
<th>Indicators</th>
<th>NLRB</th>
<th>EEOC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Result-Oriented v. Process-Oriented Participation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Decisional Setting</td>
<td>L</td>
<td>M</td>
</tr>
<tr>
<td>Fact-gathering</td>
<td>M</td>
<td>L</td>
</tr>
<tr>
<td>Juridical v. Expert Decisionmakers</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Education/Experience</td>
<td>L</td>
<td>L</td>
</tr>
<tr>
<td>Appointments Process</td>
<td>L</td>
<td>M</td>
</tr>
<tr>
<td>Adjudicator Independence v. Adjudicator Accountability</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Quality Control Mechanisms</td>
<td>L</td>
<td>M</td>
</tr>
<tr>
<td>Ex Parte Communications</td>
<td>L</td>
<td>M</td>
</tr>
<tr>
<td>Totals</td>
<td>+4</td>
<td>-2</td>
</tr>
</tbody>
</table>

L = Legalistic (+1)  
M = Managerial (-1)

Figure 6.8 highlights the four important differences between the EEOC and NLRB adjudication process: (1) the NLRB process does not allow the parties to take discovery (Managerial model), whereas there is party-controlled discovery in the EEOC process (Legalistic model); (2) EEOC hearings are informal proceedings (Managerial model) whereas the NLRB process is a stylized and formal proceeding (Legalistic model); (3) EEOC AJs are agency employees (Managerial model) whereas NLRB ALJs are OPM employees selected by the NLRB at an “arms-length”; and (4) AJs are EEOC employees subject to performance evaluation (Managerial model), whereas ALJs are independent from NLRB oversight and supervision (Legalistic model).

As discussed in Chapter 3, federal agencies can be placed along the Judicialization spectrum. In this case, the EEOC’s emphasis on adjudicator accountability makes it a Managerial agency with a -2 Judicialization Score. The NLRB’s emphasis on adjudicator independence and juridical decisionmakers makes the
NLRB a Legalistic agency with a +4 Judicialization Score. The next section will examine the impact of these differences on the appeal measure, performance measure, and processing measure.

**B. The Appeals Measure**

As discussed in Chapter 4, the appeals measure shows the rate at which participants appeal decisions by agency decisionmakers. The conventional wisdom holds that a Legalistic agency will likely yield fewer appeals because (1) a process with extensive and clearly defined procedural rules will allow the participant to achieve a sense of dignity by controlling the process; (2) an opportunity for discovery will allow the participant the opportunity to exhaust his/her search for relevant facts; and (3) a participant will be more likely to accept a decision from an decisionmaker who was not selected and employed by the same agency who is a respondent in the dispute. This section will investigate whether the EEOC, an agency at the Managerial end of the spectrum, will have statistically significant fewer appeals than the NLRB, an agency at the Legalistic end of the spectrum.

At first glance, the NLRB appears to have adopted the Legalistic model for its adjudications. The NLRB requires its decisionmakers to re-create, as closely as possible, the setting that exists in most state and federal courthouses around the country. Moreover, the NLRB adjudications are conducted by an ALJ that is not a member of the agency bringing the complaint. But the NLRB has departed from the Legalistic model in an important and significant way: the parties are not permitted to take discovery. Rather than allow discovery, the responsibility to gather facts falls on the expert agency.
Although NLRB is a Legalistic agency, this important departure would likely cause advocates of the Legalistic model to reconsider whether the NLRB would have a lower appeal rate than the EEOC. Legalistic federal judges have harshly criticized NLRB’s embrace of the result-oriented procedures for discovery as “trial by ambush,” and overtly suggested that the departure undermines the participants’ confidence in the formal procedures that otherwise characterize the NLRB adjudication process. Stressing fairness, advocates of the Legalistic model argue that a process appears more “fair” when the claimant or the respondent is give the opportunity to conduct extensive discovery and adequately develop his/her case.

The EEOC appears to have adopted a Managerial model: adjudications are conducted in an informal setting and the formal rules of evidence and procedures do not apply. With regard to discovery, however, the EEOC has shifted to a Legalistic approach in which the parties have complete control of the discovery process and conduct discovery without seeking prior approval from the AJ. Moreover, although the decision is made by an EEOC employee, the EEOC is not itself a party to the suit and the agency does not have a stake in the outcome. Thus, advocates of the Managerial model would likely predict no significant difference between the appeal rate of the NLRB and the EEOC. They would dispute the conventional wisdom that formal processes somehow legitimate the result, and the fact that EEOC permits discovery would not factor into the calculus.

Null Hypothesis 1: There is no statistically significant difference in the appeal rate from NLRB ALJ decisions when compared to the appeal rate from EEOC AJ decisions.

To test this hypothesis against the appeals measure, I collected data from the AJ and ALJ decisions, and on the appeals received at the NLRB and EEOC. Figure 6.6 below shows data gathered from NLRB ALJ decisions between fiscal years 2002 and 2006. The second column lists the total number of ALJ decisions reached in each fiscal year. The third column is split into three subcategories: the number of exceptions filed by the agency or charging party, the number of exceptions filed by the respondent, and the total number of exceptions filed by any party. The last column provides the percentages of exceptions filed based on a calculation between the second and third columns.

Figure 6.6 – NLRB (Exceptions Filed Per ALJ Decisions)

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total ALJ Decisions</th>
<th>Exceptions Filed</th>
<th>Percentage of Exceptions Per Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Agency or Charging Party</td>
<td>Respondent</td>
</tr>
<tr>
<td>2002</td>
<td>368</td>
<td>36</td>
<td>150</td>
</tr>
<tr>
<td>2003</td>
<td>388</td>
<td>43</td>
<td>156</td>
</tr>
<tr>
<td>2004</td>
<td>345</td>
<td>17</td>
<td>161</td>
</tr>
<tr>
<td>2005</td>
<td>270</td>
<td>10</td>
<td>146</td>
</tr>
<tr>
<td>2006</td>
<td>269</td>
<td>23</td>
<td>141</td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td><strong>397.54</strong></td>
<td><strong>25.80</strong></td>
<td><strong>150.80</strong></td>
</tr>
</tbody>
</table>

The data indicates that Respondents (those parties who were defending against ULP charges) were more likely than the charging parties to file exceptions. On average, the parties filed exceptions in 54.51% of the ULP cases decided by NLRB ALJs.
Figure 6.7 shows data gathered from EEOC AJ decisions between fiscal years 2002 and 2006. The second column lists the total number of AJ decisions reached in the fiscal year. As in Figure 6.6, the third column is split into three subcategories: the number of appeals filed by the agency, the number of appeals filed by the complainant, and the total number of appeals filed by any party.\textsuperscript{190}

**Figure 6.7 – EEOC (Appeals Filed Per AJ Disposition)**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total AJ Decisions</th>
<th>Appeals Filed</th>
<th>Percentage of Appeals Per Disposition</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Agency</td>
<td>Complainant</td>
</tr>
<tr>
<td>2002</td>
<td>3,947</td>
<td>106</td>
<td>2,255</td>
</tr>
<tr>
<td>2003</td>
<td>3,893</td>
<td>95</td>
<td>2,355</td>
</tr>
<tr>
<td>2004</td>
<td>4,748</td>
<td>109</td>
<td>2,710</td>
</tr>
<tr>
<td>2005</td>
<td>4,832</td>
<td>83</td>
<td>2,965</td>
</tr>
<tr>
<td>2006</td>
<td>4,283</td>
<td>86</td>
<td>2,630</td>
</tr>
<tr>
<td>Mean</td>
<td>4,341</td>
<td>95.8</td>
<td>2,583</td>
</tr>
</tbody>
</table>

The EEOC data in Figure 6.7 shows that an overwhelming number of appeals came from one party (the complainants) rather than the other party (the respondent agency). On average, the parties filed appeals in 61.72\% of the discrimination cases decided by an EEOC AJ. This number is slightly higher than the average number of exceptions filed in ULP cases decided by an NLRB ALJ.

Using the data in Figures 6.6 and 6.7 as a reference, the next figure directly compares the data from the NLRB and EEOC using the appeal measure. Under the null hypothesis, we would not expect there to be a statistically significant difference in the percentage of appeals that challenge EEOC and NLRB decisions. Figure 6.8 presents the results of a two-sample t-test between unpaired proportions.

\textsuperscript{190} Although NLRB uses the term “exceptions,” and EEOC uses the term “appeals,” they both refer to the same action of objecting to the decision by either the ALJ or AJ.
Using the range of values gathered between 2002 and 2006, this test sought to determine whether there is a significant difference between EEOC and NLRB complainants with respect to the percentage of participants who appealed initial decisions. Based on this result, it appears that the t-statistic is significant at the .01 alpha level. I can thus reject the null hypotheses and conclude that the difference between the appeal rate of NLRB and EEOC decisions are significant. The data suggests that significantly fewer appeals arise out of NLRB decisions by ALJs than EEOC decisions by AJs.

Because a significant number of EEOC participants elect to go forward without an AJ hearing, it is possible to reformulate the null hypothesis and compare EEOC complainants against each other. As discussed above, an EEOC complainant can pursue a claim in two ways: (1) by requesting a final decision from the respondent agency without AJ involvement, or (2) by requesting a hearing with an EEOC AJ.
Recall that if an EEOC complainant chooses to forego a hearing, then the respondent agency issues the decision.

Advocates of the Legalistic model would predict that a complainant would derive a sense of dignity from participating in a hearing and therefore would be less likely to appeal a decision following such a hearing. Advocates of the Managerial model would counter that individuals who choose to forego hearings would be more likely to rely on the expertise and professionalism of the agency and therefore would be less likely to appeal an adverse decision.

**Null Hypothesis 2**: There is no statistically significant difference in the appeal rate from EEOC complainants who request an AJ adjudication when compared EEOC complainants who forego an AJ adjudication.

Figure 6.9 compares the percentage of appeals when the complainant requests an AJ decision against the percentage of appeals when the complainant does not request an AJ decision.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total Agency Dispositions</th>
<th>Total AJ Decisions</th>
<th>Percentage of Appeals Per Agency Dispositions</th>
<th>Percentage of Appeals Per AJ Dispositions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>5,467</td>
<td>3,947</td>
<td>70.51%</td>
<td>59.82%</td>
</tr>
<tr>
<td>2003</td>
<td>5,287</td>
<td>3,893</td>
<td>70.59%</td>
<td>62.93%</td>
</tr>
<tr>
<td>2004</td>
<td>6,167</td>
<td>4,748</td>
<td>65.02%</td>
<td>59.37%</td>
</tr>
<tr>
<td>2005</td>
<td>6,381</td>
<td>4,832</td>
<td>67.81%</td>
<td>63.08%</td>
</tr>
<tr>
<td>2006</td>
<td>4,857</td>
<td>4,283</td>
<td>66.85%</td>
<td>63.41%</td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td><strong>5,632</strong></td>
<td><strong>4,341</strong></td>
<td><strong>68.16%</strong></td>
<td><strong>61.72%</strong></td>
</tr>
</tbody>
</table>

The mean appeal rate for agency decisions is higher than the mean appeal rate for AJ decisions by only 6.44%. Figure 6.10 below shows the results of a two sample t-
test between unpaired proportions to determine whether this difference is statistically significant.

<table>
<thead>
<tr>
<th>Figure 6.10: t-Test: Two-Sample Assuming Equal Variances</th>
</tr>
</thead>
<tbody>
<tr>
<td>No-AJ Hearing</td>
</tr>
<tr>
<td>----------------</td>
</tr>
<tr>
<td>Mean</td>
</tr>
<tr>
<td>Variance</td>
</tr>
<tr>
<td>Observations</td>
</tr>
<tr>
<td>Pooled Variance</td>
</tr>
<tr>
<td>Hypothesized Mean Difference</td>
</tr>
<tr>
<td>Df</td>
</tr>
<tr>
<td>t Stat</td>
</tr>
<tr>
<td>P(T&lt;=t) one-tail</td>
</tr>
<tr>
<td>t Critical one-tail</td>
</tr>
<tr>
<td>P(T&lt;=t) two-tail</td>
</tr>
<tr>
<td>t Critical two-tail</td>
</tr>
</tbody>
</table>

Based on these results, I reject the null hypothesis and conclude that the difference in appeal rates, even within the same EEOC population, is statistically significant. The data demonstrates that the issuance of an AJ decision in an EEOC adjudication reduces the likelihood that a complainant will bring an administrative appeal.

**C. The Affirmance Measure**

As discussed in Chapter 4, the Affirmance Measure is the rate at which an initial AJ or ALJ is adopted by the agency as the final agency action. Advocates of the Legalistic model would predict that the NLRB would have a higher affirmance rate than the EEOC. A central tenet of the Legalistic model is that a process with extensive and
clearly defined procedural rules will be more likely to draw out the “correct answer” and thus will be less susceptible to reversal on appeal.

Advocates of the Managerial model, on the other hand, would argue that the EEOC is more likely to have a higher affirmance measure as a result of the quality assurance mechanisms the agency has put in place. AJs are employees of the EEOC and are subject to performance reviews and other quality control mechanisms operated by the EEOC’s Office of Federal Operations (“OFO”). The OFO compiles quarterly data on each AJ including productivity, efficiency, and reversal rate, and the results of this review are the basis for annual reports to the Board. AJs may be removed due to poor performance. This system of oversight provides incentives to AJs to make decisions that are consistent with agency policy.

**Null Hypothesis 3**: There is no statistically significant difference in the affirmance rate of NLRB ALJ decisions when compared to the affirmance rate of EEOC AJ decisions.

To test the null hypothesis I collected data from the EEOC AJ and NLRB ALJ decisions that were challenged on appeal and reviewed at the agency level. Figure 6.11 compares the affirmation rate from EEOC AJs decisions when they are reviewed by the appeals counsel at the EEOC to the affirmation rate from NLRB ALJs decision when they are reviewed by either a three-member panel or the entire NLRB. For the purpose of tabulating affirmation rates, only those decisions in which the AJ or ALJs decision was affirmed in full were included.
A quick examination of the data shows that the EEOC has a significantly higher affirmation rate of AJ decisions than NLRB’s affirmation rate of ALJ decisions. But this cannot be the end of the inquiry because this comparison aggregates all AJ and ALJ decisions without taking into account the identity of the party that filed the request for appeal. It is important to recognize that an appeal filed by the General Counsel of NLRB, or by the General Counsel of a Respondent Federal Agency, may be reviewed differently than an appeal filed by a small company or an individual complaining of discrimination. As such, the next series of figures divides the data by the source of the appeal.

### Figure 6.11: Affirmances

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>% of NLRB ALJ Decisions Affirmed on Appeal to the Board</th>
<th>% of EEOC AJ Decisions Affirmed on Appeal to the Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>63.33%</td>
<td>89.08%</td>
</tr>
<tr>
<td>2003</td>
<td>64.02%</td>
<td>96.11%</td>
</tr>
<tr>
<td>2004</td>
<td>69.89%</td>
<td>95.24%</td>
</tr>
<tr>
<td>2005</td>
<td>63.22%</td>
<td>94.39%</td>
</tr>
<tr>
<td>2006</td>
<td>68.48%</td>
<td>94.31%</td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td><strong>65.79%</strong></td>
<td><strong>93.83%</strong></td>
</tr>
</tbody>
</table>

*These include only those Board decisions on initial appeal from an NLRB ALJ.
**Excludes those decisions affirmed in part and rejected in part.
Figure 6.12 shows the affirmance rates of NLRB ALJs when exceptions are
filed by the NLRB General Counsel. Although exceptions filed by the General Counsel
are relatively rare, this chart demonstrates that between 2002 and 2006 ALJs were
affirmed only 37.04% of the time when their decisions were challenged by the General
Counsel on appeal. Thus, when the NLRB General Counsel decides to file exceptions
in an NLRB adjudication, the General Counsel successfully reverses an ALJ decision
(either in part or in full) an average of 63 percent of the time. This suggests that the
Office of the General Counsel at NLRB has considerable expertise at interpreting the
legal and policy preferences of the NLRB and recognizing when an ALJ decision does
not reflect those preferences.

The next figure (Figure 6.13) shows the affirmance rates of ALJs when
exceptions are filed by a Respondent in an NLRB proceeding. The last column
indicates that NLRB ALJs averaged an affirmance rate of 71.69% between 2002 and
2006. Thus, in contrast to affirmance rates following an NLRB General Counsel
appeal, the Respondents to an adjudication are far less successful in challenging an ALJ
decision.
Figure 6.13 – NLRB Affirmation Rates on Appeal from Respondent

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>ALJ Decisions Heard* on Exceptions by Respondent</th>
<th>ALJ Decisions Affirmed** on Appeal from Respondent</th>
<th>% of ALJ Decisions Affirmed on Appeal from Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>155</td>
<td>104</td>
<td>67.10%</td>
</tr>
<tr>
<td>2003</td>
<td>134</td>
<td>97</td>
<td>72.39%</td>
</tr>
<tr>
<td>2004</td>
<td>152</td>
<td>114</td>
<td>75.00%</td>
</tr>
<tr>
<td>2005</td>
<td>140</td>
<td>99</td>
<td>70.71%</td>
</tr>
<tr>
<td>2006</td>
<td>142</td>
<td>104</td>
<td>73.24%</td>
</tr>
<tr>
<td>Mean</td>
<td>144.6</td>
<td>103.6</td>
<td>71.69%</td>
</tr>
</tbody>
</table>

*These include only those Board decisions on initial appeal from an NLRB ALJ.
** Excludes those decisions affirmed in part and rejected in part.

Just as the source of NLRB appeals were considered separately, the next two figures also separates affirmation rates of EEOC AJs according to the source of the appeal. Figure 6.14 shows that the average affirmation rate for AJ decisions appealed by another federal agency are is 72.66% for the period 2002 through 2006.

Figure 6.14 - Affirmation Rate of AJ Decision on Appeal from Agency

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>AJ Decisions Heard* on Appeal by Agency</th>
<th>AJ Decisions Affirmed on Appeal from agency</th>
<th>% of AJ Decisions Affirmed on Appeal from Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>57</td>
<td>37</td>
<td>64.9%</td>
</tr>
<tr>
<td>2003</td>
<td>123</td>
<td>87</td>
<td>70.7%</td>
</tr>
<tr>
<td>2004</td>
<td>152</td>
<td>107</td>
<td>70.4%</td>
</tr>
<tr>
<td>2005</td>
<td>93</td>
<td>71</td>
<td>76.3%</td>
</tr>
<tr>
<td>2006</td>
<td>58</td>
<td>47</td>
<td>81.0%</td>
</tr>
<tr>
<td>Mean</td>
<td>96.6</td>
<td>349</td>
<td>72.66%</td>
</tr>
</tbody>
</table>

* The numbers for “AJ Decisions Heard on Appeal” does not parallel “AJ Decisions Appealed by Agency” in Figure 6.7 because the appellate division may not rule on an appeal in the same fiscal year as the appeal was filed, or the parties may settle a complaint after the Administrative Judge has made a decision.

By contrast, as seen in Figure 6.15, EEOC AJs average a very high 95.14% affirmation rate of decisions that were appealed by a complainant between 2002 and 2006.
**Figure 6.15 - Affirmation Rate of AJ Decision on Appeal from Complainant**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>AJ Decisions Heard on Appeal by Complainant</th>
<th>AJ Decisions Affirmed on Appeal from Complainant</th>
<th>% of AJ Decisions Affirmed on Appeal from Complainant</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>1,976</td>
<td>1,774</td>
<td>89.8%</td>
</tr>
<tr>
<td>2003</td>
<td>1,649</td>
<td>1,616</td>
<td>98.0%</td>
</tr>
<tr>
<td>2004</td>
<td>1,676</td>
<td>1,634</td>
<td>97.5%</td>
</tr>
<tr>
<td>2005</td>
<td>1,619</td>
<td>1,545</td>
<td>95.4%</td>
</tr>
<tr>
<td>2006</td>
<td>1,384</td>
<td>1,313</td>
<td>95.0%</td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td><strong>1660.8</strong></td>
<td><strong>1576.4</strong></td>
<td><strong>95.14%</strong></td>
</tr>
</tbody>
</table>

After breaking down the data by the source of the appeal in the four figures above, Figure 6.16 combines the data in order to directly compare the affirmance rates of the two agencies.

**Figure 6.16 – Affirmance Rates for NLRB and EEOC by Source of Appeal**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>NLRB – GC Appeal</th>
<th>EEOC – Agency Appeal</th>
<th>NRLB – Respondent Appeal</th>
<th>EEOC – Complainant Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>40.00%</td>
<td>64.9%</td>
<td>67.10%</td>
<td>89.8%</td>
</tr>
<tr>
<td>2003</td>
<td>26.67%</td>
<td>70.7%</td>
<td>72.39%</td>
<td>98.0%</td>
</tr>
<tr>
<td>2004</td>
<td>47.06%</td>
<td>70.4%</td>
<td>75.00%</td>
<td>97.5%</td>
</tr>
<tr>
<td>2005</td>
<td>32.35%</td>
<td>76.3%</td>
<td>70.71%</td>
<td>95.4%</td>
</tr>
<tr>
<td>2006</td>
<td>39.13%</td>
<td>81.0%</td>
<td>73.24%</td>
<td>95.0%</td>
</tr>
<tr>
<td><strong>Mean</strong></td>
<td><strong>37.04%</strong></td>
<td><strong>72.66%</strong></td>
<td><strong>71.69%</strong></td>
<td><strong>95.14%</strong></td>
</tr>
</tbody>
</table>

Using the data in Figures 6.16 as a reference, the next figure tests the affirmance measures for statistical significance. Recall, the null hypothesis is that there is no statistically significant difference in the affirmance rate of EEOC and NLRB decisions grouped by source.

The first two variables to be compared are the affirmance rates from appeals brought by the NLRB General Counsel and the affirmance rates from appeals brought by Respondent Federal Agencies. These variables are grouped because I would expect that any special deference accorded to appeals from the NLRB General Counsel would...
also be accorded to appeals from the General Counsel of other federal agencies. Figure 6.17 presents the results of a two-sample t-test between unpaired proportions.

<table>
<thead>
<tr>
<th></th>
<th>NLRB Appeal from General Counsel</th>
<th>EEOC Appeal from Respondent Federal Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>0.37042</td>
<td>0.7266</td>
</tr>
<tr>
<td>Variance</td>
<td>0.006077</td>
<td>0.003799</td>
</tr>
<tr>
<td>Observations</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Pooled Variance</td>
<td>0.004938</td>
<td></td>
</tr>
<tr>
<td>Hypothesized Mean Difference</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Df</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>T Stat</td>
<td>-8.01432</td>
<td></td>
</tr>
<tr>
<td>P(T&lt;=t) one-tail</td>
<td>2.16E-05</td>
<td></td>
</tr>
<tr>
<td>T Critical one-tail</td>
<td>1.859548</td>
<td></td>
</tr>
<tr>
<td>P(T&lt;=t) two-tail</td>
<td>.0000431</td>
<td></td>
</tr>
<tr>
<td>T Critical two-tail</td>
<td>2.306004</td>
<td></td>
</tr>
</tbody>
</table>

Because the t-statistic is significant at ≤.001 alpha level, I can reject the null hypotheses and conclude that the difference between the affirmance rates is significant. The EEOC’s adoption of the Managerial model, and its decision to use of AJs to adjudicate disputes, appears to significantly increase the affirmance rate of its decisionmakers decision when compared with NLRB ALJs.

The next two variables to be compared are the affirmance rates from appeals brought by NLRB charged parties and the affirmance rates from appeals brought by EEOC complainants. These variables are grouped because these appeals are brought either by individuals, unions, or companies that were parties to an NLRB adjudication. Figure 6.18 presents the results of a two-sample t-test between unpaired proportions.
Because the t-statistic is significant at \( \leq 0.001 \) alpha level, I reject the null hypotheses and conclude that the difference between the affirmance rates is significant.

Again, the EEOC’s use of AJs to adjudicate disputes appears to significantly increase the affirmance rate when compared with NLRB ALJs.

**D. The Processing Measure**

As discussed in Chapter 4, the processing measure is made up of two metrics: the time it takes to issue a decision, and the cost of the decision. Neither the EEOC nor the NLRB gathers data on the cost of the decision, so this analysis will focus exclusively on the first metric of the processing measure. Advocates of both the Legalistic and Managerial models would likely agree that the processes and procedures of the Legalistic model is often more time consuming, and claims will take longer as they go through the process.
In this case, however, predictions are difficult because the NLRB and EEOC draw from both the Managerial and Legalistic models. The process of conducting discovery is often the most time-consuming aspect of any adjudication inside or outside the administrative court system. Because the EEOC adopts the Legalistic model’s preference for litigant-driven discovery, whereas the NLRB adopts the Managerial model’s preference for maintaining control of the litigation and limiting discovery, we might expect that it will take less time for the NLRB to reach an initial decision measured from the time a complaint is filed. On the other hand, because the EEOC uses AJs that are controlled by the agency, whereas the NLRB uses independent ALJs, we might expect that it will take longer for NLRB to review an ALJ decision on appeal and issue a final agency action.

**Null Hypothesis 4:** There is no statistically significant difference in the processing measure for NLRB ALJ decisions when compared to EEOC AJ decisions.

Figure 6.19 and 6.20 below present the average processing times for the EEOC and NLRB.
The figures above demonstrate that the average APD for EEOC cases (from complaint to AJ decision) is 733 days, whereas the average APD for NLRB cases (from complaint to ALJ decision) is 311.6 days. Thus, an individual or union filing a unfair labor practice charge with the NLRB will, on average, receive an initial decision more than a year sooner than an individual filing a discrimination complaint with the EEOC.

Also consistent with the model, the figures above demonstrate that the average APD for EEOC appeals (from notice of appeal to final EEOC decision) is 274.6 days, whereas the average APD for NLRB appeals (from filing of exceptions to final NLRB decision) is 428.8 days. Comparing these data using a two tailed t-test shows that differences between NLRB and EEOC are statistically significant.
It should be noted that NLRB ALJs handle substantially fewer cases than EEOC AJs. EEOC AJs handled 4,283 in fiscal year 2006 whereas only 1,272 ULP complaints were filed the same year. On one hand, these differing caseloads point to the fact that other factors – such as the relative levels of EEOC’s and NLRB’s federal funding – may influence outcome of any comparison based on the processing measure. On the other hand, EEOC AJs should be able to bear a numerically heavier workload than NLRB ALJs because they operate in a result-oriented participation environment in which participants do not have the same opportunity to cross-examine, make motions, submit briefs and engage in other time-consuming behavior as they do in NLRB proceedings (ACUS, 1992: 45). Future researchers may wish to investigate the relationship between the processing measure, levels of federal funding, and the adoption of the result-oriented approach to participation.

The fact that some EEOC complainants choose to move forward without an AJ hearing provides an interesting basis for comparison. Adherents to both the Legalistic model and the Managerial model would predict that eliminating a hearing from the EEOC adjudication process should significantly reduce the processing time. Indeed, as shown in the second column of Figure 6.19, the elimination of an AJ hearing will reduce the APD for EEOC adjudications by 217 days. In a break from the expectations of the Legalistic and Managerial models, however, it takes longer for a Respondent Federal Agency to issue its initial decision in an EEOC adjudication without a hearing (515 days) than it does for an NLRB ALJ to issue an initial decision in an ULP adjudication (311 days). Advocates of the managerial model would likely view a 515
APD for an initial EEOC ruling to be an administrative failure on the part of the Respondent Federal Agency.

IV. Conclusions

The fact that the NLRB and EEOC differ on almost every key indicator of the Legalistic/Managerial spectrum provided for an interesting analysis. With regard to the appeal measure, the key differences between the agencies included (1) the NLRB stresses a adversarial decisional setting whereas the EEOC adopts an inquisitorial setting; (2) the NLRB provides no opportunity for discovery whereas the EEOC allows party-controlled discovery; and (3) the NLRB uses ALJs from the OPM list, whereas the EEOC hires its own decisionmakers. The conventional wisdom suggested that the lack of any discovery in an NLRB proceeding was “trial by ambush” and that the NLRB’s embrace of this result-oriented participation approach would undermine the confidence in the formal procedures that otherwise characterize the NLRB adjudication process. A two-tailed t-test led to the rejection of the null hypothesis and the conclusion that the NLRB’s appeal rate was lower, to a statistically significant degree, than the EEOC’s appeal rate. This can be interpreted as a rejection of the conventional wisdom that participants are more likely to view as “unfair” an adjudicatory process where one party has no opportunity to take discovery.

Noting differences in the EEOC and NLRB populations, however, the null hypothesis was reformulated to compare the appeal rate for EEOC claimants who requested an EEOC AJ decision and EEOC claimants who opted for the respondent agency to issue a final decision. The conventional wisdom suggested that participants
who took the opportunity to participate in a hearing before a decisionmaker who was not employed by the respondent agency would result in a lower appeal rate. A two-tailed t-test led to the rejection of the null hypothesis. Although the mean difference was only 6.44%, this difference was statistically significant. While this conclusion provides some support for the Legalistic model, it is important to note that additional research is necessary. One avenue for future study is to expand on the analysis in this section and focus exclusively on these two similar populations within the EEOC.

With regard to the affirmance measure, the key differences between the agencies are the NLRB’s emphasis on an adversarial setting, and the EEOC’s emphasis on adjudicator independence. The Legalistic model predicted that the NLRB’s “legal process” would be more likely to yield the correct answer, whereas the Managerial model predicted that the EEOC’s accountability program provides a much stronger incentive for their decisionmakers to make decisions that reflects the agency’s institutional principles.

At first, all appeals were considered in the aggregate, and it was very clear that the EEOC AJs have a significantly higher affirmance rate than NLRB ALJs. Appeal rates were then broken down to account for the identity of the party filing the appeal. This was done to account for the fact that an appeal filed by the General Counsel of NLRB, or by the General Counsel of a Respondent Federal Agency, may be reviewed differently than an appeal filed by a small company or an individual complaining of discrimination. After breaking down the data by the source of the appeal, two-sample t-test were run to determine statistical significance. In each case, the null hypothesis was
rejected and I concluded that the difference between the affirmance rates was significant. The EEOC’s adoption of the Managerial model, and its decision to use of AJs to adjudicate disputes, appears to significantly increase the affirmance rate of its decisionmakers decision when compared with NLRB ALJs. This conclusion runs counter to the conventional wisdom that agencies that have adopted a party-controlled adversarial decisional setting will have higher affirmance rates.

With regard to the processing measure, it was very difficult to make predictions because the NLRB and EEOC draw from both the Managerial and Legalistic models. The data suggests that the EEOC’s decision to cede control of the proceedings to the litigants and allow discovery increases the time it takes for an EEOC adjudication to be processed. This result was tempered, however, by the fact that the processing time for a Respondent Federal Agency to issue its initial decision without a hearing was longer than for an NLRB ALJ to issue an initial decision in a ULP adjudication with a hearing, which suggests administrative failures on the part of federal agencies resolving EEOC disputes. In addition, the data demonstrated that it takes significantly longer for the NLRB to process an ALJ decision on appeal than it takes for the EEOC to process an AJ decision on appeal.
CONCLUSION

I. Overcoming the Legalistic Hegemony in Administrative Adjudications

In the field of administrative law, ideas about administrative adjudications have fluctuated between Legalistic and Managerial principles. Legal scholars in the 19th century disclaimed the existence of an “administrative law” and argued that all disputes arising out of federal regulatory statutes should be resolved by common law courts. This was the ultimate Legalistic argument: only the processes and procedures of a common law courts satisfy democratic ideals and maintain the “rule of law.”

The rise of the modern regulatory state at the turn of the century established the foundation for Managerial principles. Congress enacted statutes that dramatically increased the functions of federal agencies without placing many restrictions on how the agencies made determinations and resolved conflicts. The Managerial model began to take shape as administrative agencies developed their own unique procedures and methods for adjudicating disputes. Federal courts promoted the integrity of the administrative process, in part, by embracing the notion that an individual could not seek relief in a common law court prior to the completion of administrative proceedings. Progressive scholars of the period advocated for the Managerial model by arguing that a technical agency that combines legislative, executive, and judicial powers may be the most capable to resolve administrative disputes.

The pendulum began to swing back in the other direction in the New Deal era. The American Bar Association and some members of Congress championed legalistic principles as they sought to structure administrative adjudications to resemble common
law courts. Although these legalistic influences were tempered by Progressives, these calls for reform led Congress to enact the APA. The compromises contained in the APA marked a clear victory for legalists.

In the decades following the passage of the APA, an ideological shift away from progressivism, an expanding notion of due process, and subsequent legal interpretations of APA provisions pushed new and existing federal agencies to incorporate components of the Legalistic model. Since this landmark legislation in 1946, federal agency adjudications in many agencies have slowly but consistently moved across the Judicialization spectrum toward the Legalistic model.

In light of the history of administrative adjudications, one might reasonably expect that new ideas and developments in the fields of law and political science would take hold and push agencies back across the Judicialization spectrum toward the Managerial model. Since the late 1970s both legal scholars and political scientists have been exploring new ways of thinking about legal processes and public administration. Legal scholars have attacked adversarial procedure and rule-bound institutions and observed how federal judges have taken on an increasingly “managerial” stance. Political scientists, especially those in the subfield of public administration, have written extensively to promote “results-oriented government” and observed how the GPRA and Regulatory Improvement Act have forced agencies to adapt to new service-oriented goals.

It is someone surprising, then, that the Legalistic model continues to be the dominant model in administrative law. There has been no visible effort by scholars to
incorporate into the field of administrative law the critiques of the formal adversarial model, the movement toward managerial federal judges, or the ideas of new public management scholars. Administrative law textbooks used in law schools throughout the country continue to divide administrative adjudications into just two categories: “formal adjudication” under the APA and “everything else.” The hegemony of the Legalistic model is pervasive and, as we saw in Chapters 3-6, the Legalistic model is becoming more entrenched.

To explain this phenomenon it is helpful to ask two questions: (1) What is the explanation for the continued dominance of the Legalistic model in administrative adjudications? (2) Can the case be made for a shift back towards the Managerial Model? This conclusion will attempt to answer these questions by drawing on the discussion in Parts One and Two of this dissertation.

A. Why has the Legalistic Model remained dominant?

At least three inter-related factors help explain the dominance of the Legalistic model over the last three decades: (1) highly organized ALJs and practitioners are the only active voices on the subject; (2) courts have asserted themselves as the ultimate arbiter of what process is “due”; and (3) public confidence in institutions has diminished. Each of these factors will be discussed in turn.

1. Highly Organized ALJ and Practitioners Strongly Advocate for the Legalistic Model While the Subject Receives Scant Attention from the Academy

Administrative Law Judges are highly organized and they have formed several organizations dedicated to promoting the Legalistic model of administrative
adjudications. The federal organizations of ALJs include: the National Association of Administrative Law Judiciary (“NAALJ”), the Association of Administrative Law Judges (“AALJ”), the Federal Administrative Law Judges Conference (“FALJC”), and the National Conference of Administrative Law Judges (“NCALJ”). One of the largest organizations, the NAALJ, makes clear its strong preference for the Legalistic model in its founding document:

WHEREAS this field involves many important functions, judicial in character, including among others: The establishment of tribunals to afford fair procedure and hearings to interested and contesting parties; the conduct of impartial hearings; the control of the introduction of evidence; the maintenance of judicial decorum; and the preparation and issuance of written decisions, judicial in character . . . . NOW THEREFORE, we, who are members of the profession charged with the duties and responsibilities of exercising these judicial functions, do hereby join together and associate ourselves for the purpose of: Maintaining the highest professional standards and advocating improvements in the field of administrative law.\(^{191}\)

Similarly, the mission statement of the FALJC explicitly provides for its support for decisional independence and a greater focus on “due process” in administrative adjudications:

Over the years, the Conference has taken leadership roles in preserving the decisional independence of Administrative Law Judges, supporting measures enhancing due process of law in administrative judicial proceedings, and in supporting improvements in the administrative judicial process . . . . There can be no due process of law for the litigants, both private citizens and the United States Government, without the reality of fairness, and the system

will not function effectively and efficiently without the public
perception of fairness.\textsuperscript{192}

The terms used in the NAALJ and FALJC founding documents demonstrate
their strong preference for the Legalistic model. “Procedural due process,” “fair
procedure and hearings,” and the “judicial process” are proxies for process-oriented
participation; “judicial decorum” and “professional standards” are proxies for juridical
decisionmakers; and “impartial” and “decisional independence” are proxies for
independent adjudicators. Both the NAALJ and the FALJC advocate for these
components of the Legalistic model in seminars, conferences, newsletters, and in a
scholarly journal published by the NAALJ out of Pepperdine University School of Law.

These groups appear to be motivated by the concept that presiding over a Legalistic
adjudication is more prestigious than presiding over a Managerial adjudication.

While these professional groups devote significant energy to this topic,
administrative adjudication is not a popular subject among contemporary academics and
legal scholars. One explanation is that the subject falls into an academic no-man’s-land.
Legal scholars tend to discuss agency adjudications only in the context of studying the
federal courts and judicial review of agency action. Political scientists tend to avoid the
nuances of adjudication rules of procedure in favor of other topics such as bureaucratic
accountability to political actors, policymaking through rulemaking, and improving the
delivery of public services. As a result, there is not a community of academics critically
examining the application of the Legalistic model to administrative adjudications and

\textsuperscript{192} \url{www.faljc.org} (last visited October 6, 2008) (emphasis added).
exploring alternative models that could be embraced by agency officials, legislators, or federal courts opining on due process fairness. Thus, to the extent that administrative adjudications have received consistent attention in the last fifteen years, this attention has come largely from ALJs and practitioners who argue that the legalistic model is the only way to organize administrative adjudications. The lack of attention from the academic community has led to the entrenchment of the status quo.

Prior to losing its funding in 1994, the Administrative Conference of the United States (“ACUS”) was a strong voice favoring a re-examination of the Legalistic model. The ACUS conducted research and issued reports concerning various aspects of the administrative process and made recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. In its 1992 Report, the ACUS adopted a number of Managerial principles as the basis for recommendations to improve the efficiency, adequacy, and fairness of adjudications. Unfortunately the academic community has not filled the void left by the ACUS.

2. **Although Congress Creates Substantive Rights and Obligations, Federal Courts Identify Legalistic Procedures as the Standard for What Process is Due**

When Congress creates an administrative agency, it specifies certain substantive rights or obligations and delegates to the agency the power to administer those rights or obligations. Although federal judges give Congress great deference in specifying the particulars of a substantive right or obligation, federal courts retain for themselves the privilege of determining what procedures must be used to decide claims arising under
the substantive rule. In short, Congress creates the substantive right, but federal courts determine what process is “due” when the governmental action affects a liberty or property interest.\textsuperscript{193}

Frank Easterbrook (1982) has pointed out that this is a “peculiar” arrangement “not only because there is no immediate apparent warrant for the distinction [between substance and procedure] in the structure or history of the Constitution, but also because substance and process are two aspects of the same phenomenon” (Easterbrook, 1982: 85).\textsuperscript{194} Moreover, this peculiar arrangement serves to undermine the legislative coalition that created the entitlement in the first place. McCubbin, Noll and Weingast (1987) have argued that the coalition that forms to create an agency or a substantive entitlement – the committee that drafted the legislation, the chamber majorities that approved it, and the president who signed it into law – all “seek to ensure that the bargain struck among the members of the coalition does not unravel once the coalition disbands” (McCubbins, Noll and Weingast, 1987: 255). By asserting its supremacy to determine the procedural aspects of agency decisionmaking, the Supreme Court (or a federal court) could potentially undermine the legislative coalition’s efforts to “stack the deck” to preserve the coalition’s intent.

Although it may be contradictory for federal courts to respect Congress’ legislative power to define substantive entitlements yet at the same time deny Congress


\textsuperscript{194} Easterbrook wrote this article while he was a Professor at the University of Chicago Law School prior to being appointed to U.S. Court of Appeals for the Seventh Circuit.
the legislative power to define the process for resolving disputes over those entitlements, neither the Supreme Court nor federal courts have been willing to voluntarily give up its role as defining what process is “due.” In fact, by expanding the scope of what constitutes a liberty or property interest, the Supreme Court has greatly increased its role in defining the appropriate limits of administrative procedure.

There are some historical examples where federal courts have held that administrative procedure need not track judicial procedure precisely to provide due process. Justice Frankfurter famously explained that the differences in the origin and function of administrative adjudications “preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.” However, one reason the Legalistic model has remained the dominant model of administrative adjudications over the last half-century is because federal courts equate adversarial trial-like procedures with due process fairness. Indeed, the Supreme Court has unequivocally identified the formal adversarial trial as the standard for due process fairness. In *Mathews v. Eldridge*, for example, the Supreme Court started from the premise that a formal adversarial trial is ideal for due process fairness, and then sought to determine how far the Social Security Administration could depart from that standard and still remain constitutional. Over the last 25 years federal courts have adopted the *Mathews* approach and reinforced the dominance of the Legalistic model.

195 *Murray’s Lessee* (U.S. 1856); Brandeis’s dissent in *St. Joseph Stock Yards* (1936); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

3. Confidence in Public Institutions Has Waned

Political scientists have studied changes in public views of confidence in government since the 1960s. Public opinion data indicates that trust in government has declined dramatically over the last thirty years and that the American public holds public employees and public agencies in low regard (Rosenstone and Hansen, 1993; Craig, 1993). Scholars have attributed responsibility for this drop in public confidence in government to a number of causal factors, including economic, social-cultural, and political factors (Nye, 1997).

But the public does not assess all institutions in the same way. Even as support for other political and nonpolitical institutions has dropped precipitously, support for the Supreme Court has remained relatively high (Calderia and Gibson, 1992). The high public confidence in the institution of the Supreme Court has been the subject of extensive scholarly study. Some scholars have argued that the Supreme Court has maintained the public’s trust because people perceive that its procedures are fair (Tyler, 1990; Tyler and Rasinski, 1991). Another explanation for the dominance of the Legalistic model is that agency officials and members of Congress believe that adopting some of the characteristics of federal courts will enhance public perception of the agency.
B. Can a case be made for a shift back towards the Managerial Model?

1. Focusing Academic Attention on Administrative Adjudications, Locating Managerial fairness, and Creating Confidence in the Managerial Model

The influence of ALJ organizations, Supreme Court precedent equating adversarial trial-like procedures with due process fairness, and the public’s low opinion in public institutions, have had such a profound impact that it seems self-evident to many of today’s administrative lawyers, legislators and federal judges that the best method to resolve conflicts before an administrative agency is to “judicialize” agency decision-making processes. The power of the Legalistic model has been matched by an inability among administrators and legal scholars to make a convincing case that the fairness required by the U.S. Constitution can be achieved through the Managerial model.

In an effort to combat this Legalistic hegemony, Part One of this dissertation engaged in a long-overdue academic inquiry into alternative ways to understand and structure administrative adjudications. Drawing from the historical practices of the original administrative agencies, progressive ideals of the 1920s through 1940s, and new scholarship on public administration, this dissertation developed a Managerial model to provide a strong counterpoint to the dominant Legalistic model of agency adjudications. The Managerial model – built on the foundation of result-oriented participation, expert decisionmakers, and accountability – is a positive alternative with the intellectual strength to stand on its own as a unique approach to administrative process and procedure.
In addition to theory-building, empirical study is also necessary to make the case for an alternative to the Legalistic model. A significant impediment to rigorous academic study of this subject has been the lack of a coherent framework for classifying agency adjudication. After defining the alternative model for administrative adjudications, Chapter 3 attempted to address this problem by developing a Legalistic/Managerial spectrum. Using the six indicators from the competing models, a federal agency can be assigned a Judicialization score and placed on the spectrum in a way that can account for the different types of procedures used by different federal agencies. Chapter 3 located agencies at the Managerial end of the spectrum (Veterans Affairs) and agencies at the Legalistic end of the spectrum (Federal Energy Regulatory Commission). “Hybrid” agencies that draw simultaneously from both the Legalistic and Managerial models were placed along the spectrum according to their Judicialization score. The development of a framework for classifying agency adjudications is a critical step for the empirical analysis of how the Legalistic and Managerial models affect agency performance.

To challenge the conventional wisdom and create confidence in the Managerial model, Part Two of this dissertation sought to measure whether an agency’s placement on the Legalistic/Managerial spectrum had an impact on certain performance measures. Specifically, Chapter 4 identified three performance measures and designed a study to examine whether an agency’s placement on the Legalistic/Managerial spectrum has a measurable effect on agency performance. This empirical test examined two sets of agencies that performed similar functions in a similar manner, yet adopted different
processes for their adjudications. The conventional wisdom held that, everything else being equal, a Legalistic agency will yield better decisions, and hence fewer appeals and more affirmances. The results provided some basis to challenge the conventional wisdom. In comparing the VA and the SSA, fewer participants appealed the decisions from the Managerial agency than from the Legalistic agency. Similarly, when comparing the NLRB and the EEOC, decisionmakers in the Managerial agency enjoyed a higher affirmance rate than the decisionmakers in the Legalistic agency. These results call into question the conventional wisdom that Legalistic adjudications will always result in fewer appeals and more affirmances than Managerial adjudications.

Future empirical study is necessary to further explore and test the relationship between agency performance and the models of administrative adjudication. As agencies look for ways to meet their strategic goals, however, these modest results provide a basis for the conclusion that movement across the spectrum from the Legalistic to the Managerial can have a positive affect on an agency’s performance measures.

2. Locating an Agency on the Judicialization Spectrum: Accounting For Resources and Confidence

Although the empirical data presented in Chapter 5 and 6 led us to reject the conventional wisdom that the Legalistic model is always superior to the Managerial model, the results did not uniformly support the alternative hypothesis that the Managerial model is always superior to the Legalistic model. The Managerial model predicted that the VA’s accountability program would provides a much stronger
incentive for their decisionmakers to make decisions that reflects the agency’s institutional principles. But the results demonstrated that the Legalistic SSA had a significantly higher affirmance rate. Similarly, when comparing the NLRB and EEOC, the more Legalistic agency had a lower appeal rate, to a statistically significant degree, than the Managerial agency. In short, the data did not uniformly support the case for a shift back toward the Managerial model. This leads us to consider another possibility: the Managerial model is more appropriate for certain agencies, while the Legalistic model is more appropriate for others.

The previous section highlighted two central tensions between the Legalistic and the Managerial models. First, a tension exists between the two models regarding claims of “fairness.” The Legalistic model has maintained its dominance, in part, because ALJ organizations and federal courts have equated fairness with adversarial trial-like proceedings and imposed components of the Legalistic model on federal agencies. Yet there is ample reason to question whether process-oriented participation always improves fact-finding, deliberation and fairness in all cases. The Managerial model draws from critics who have persuasively argued that the adversarial procedure places so much power in the hands of the parties (and thus in their lawyers) that it denies equal access to justice because many cannot afford lawyers. In addition, the Managerial model emphasizes principles of effectiveness, efficiency, and service-orientation that can be undermined by the Legalistic model’s juridical and independent decisionmakers.

A second tension between the two models centers on claims regarding “legitimacy.” The case for the Legalistic model has been bolstered by waning public
confidence in government. Regardless of whether Legalistic procedures actually obtain a better result, the conventional wisdom is that government institutions cannot be trusted and therefore administrative adjudications can gain legitimacy if they are presided over by generalists and decided by independent decisionmakers. Again, there is ample reason to question whether participants in agency adjudications share the public’s diffuse mistrust of government. The Managerial model draws from literature that suggests an inverse relationship between how the public views government institutions and how individual citizens evaluate their concrete experiences with public agencies and public employees. As in the Progressive era, a Managerial adjudication is legitimate if the participants perceive that the decision is the product of specialized knowledge gained through experience in the field and consistent with the policies of an expert agency.

In determining where an agency should be located along the Judicialization spectrum, it may be possible to resolve these tensions between the models by considering two factors: (1) the resources that are typically available to the participants in an administrative adjudication; and (2) the confidence in the agency.

With regard to resources, the ability of a participant to pay for professional representation, to finance an appeal, and to wait years for a decision, should be considered when resolving “fairness” tensions between the models. On the one hand, participants with low resources prefer an adjudicatory setting where it is not necessary to hire legal representation or be familiar with the nuances of legal procedure. Result-oriented participation enables meaningful participation under these circumstances by
utilizing an inquisitorial decisionmaker to gather facts, focus the examination, and guide the participants through the process. On the other hand, participants with high resources have sufficient resources to strenuously advocate on their own behalf, to gather facts, and to seek expert advice regarding the most effective evidence to use in their case. These participants are in a position to accept the risk that an adversarial, party-controlled process can be costly and cumbersome in order to gain control of the proceedings.

With regard to confidence, the capacity of agency employees to handle a matter efficiently, expertly and in accordance with the agency’s principles, should be considered when resolving “legitimacy” tensions between the models. Although a comprehensive definition of public trust and confidence (and how it can be measured) is beyond the scope of this dissertation, in this context public confidence refers to belief among those who deal with the agency that the agency has both the expertise and the organizational capacity to resolve disputes accurately and consistently. On the one hand, if an agency enjoys high public confidence in its expertise and organizational capacity, then the circumstances are ripe for expert decisionmakers who are accountable for accurately and consistently applying agency policy. On the other hand, if public confidence in an agency is low, then the circumstances call for a juridical and independent decisionmaker.

Table 7.1 develops a typology for placing agencies at certain points along the Judicialization spectrum based on the resources of participants and confidence in the agency. The top-left quadrant includes adjudications in which both participants have
high resources but confidence in the agency is low. The top-right quadrant includes adjudications in which both participants have high resources and confidence in the agency is high. The bottom-left quadrant includes adjudications in which one or both participants have low resources and the confidence in the agency is low. The bottom-right quadrant includes adjudications in which one or both participants have low resources and the confidence in the agency is high.
### TABLE 7.1: A Judicialization Typology

<table>
<thead>
<tr>
<th>RESOURCES</th>
<th>CONFIDENCE</th>
<th>Low</th>
<th>High</th>
</tr>
</thead>
<tbody>
<tr>
<td>High</td>
<td>Legalistic</td>
<td>-</td>
<td>Hybrid</td>
</tr>
<tr>
<td></td>
<td>- Process-oriented participation</td>
<td>- Juridical Decisionmaker</td>
<td>- Expert Decisionmaker</td>
</tr>
<tr>
<td></td>
<td>- Independent</td>
<td></td>
<td>- Accountable/Independent</td>
</tr>
<tr>
<td>Low</td>
<td>Hybrid</td>
<td>- Result-oriented participation</td>
<td>- Juridical Decisionmaker</td>
</tr>
<tr>
<td></td>
<td>- Accountable/Independent</td>
<td></td>
<td>- Expert Decisionmaker</td>
</tr>
</tbody>
</table>

**II. Items for Future Study**

**A. Empirical Analysis of a Single Agency Over Time**

Chapters 3, 5 and 6 provided a number of examples of federal agencies making changes to their adjudication process that shifted the agency across the Judicialization spectrum. These examples included a 1987 FERC rulemaking in which the promulgated comprehensive “discovery” rules that tracked the Federal Rules of Civil
Procedure;\textsuperscript{197} and a 1994 policy change in which VA eliminated the use of expert panels and adopted a policy of assigning cases to one Board member licensed to practice law. 

Adopting the Legalistic and Managerial frameworks, future studies may wish to measure the impact on agencies that shift across the spectrum by altering one or more of the components of the Legalistic or Managerial models.

**B. The Role and Influence of Federal Court Review**

An administrative adjudication process begins when an affected party brings a disputed issue before the agency and ends with a final agency action resolving the dispute. However, participants typically have the option of appealing the final agency action in federal court. A cursory review suggests that federal courts have very different standards of review of agency adjudications, and that these differing standards do not correlate to the Legalistic and Managerial models:

- SSA decisions can be appealed to any federal district court. Federal courts review SSA decisions under a “substantial evidence” standard, which the Supreme Court has defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”\textsuperscript{198}

- VA AJ decisions must be appealed to the Court of Appeals for the Federal Circuit in Washington DC. A claimant seeking judicial review may not challenge any factual determination or challenge the application of any law to the specific facts of the case.\textsuperscript{199} The Federal Circuit will only hear constitutional or statutory challenges to the VA’s interpretation of a law.

- NLRB determinations can be appealed in the U.S. Court of Appeals for the District of Columbia Circuit or any other Circuit Court where the ULP

\textsuperscript{197} 52 Fed Reg. 6957 (1987).

\textsuperscript{198} 42 U.S.C. 405(g); Richardson v. Perales, 402 U.S. 389, 401 (1971).

\textsuperscript{199} 38 U.S.C. § 7292(d)(2).
practice allegedly arose. NLRB determinations are reviewed under the substantial evidence standard, which federal courts have found is satisfied if the findings are based on “such relevant evidence as a reasonable mind might accept as adequate to support [the NLRB’s] conclusion.”

- Federal employees who are dissatisfied with an EEOC AJ’s decision will file a civil action in federal district court and proceed as if the administrative process did not occur. Although the AJ’s findings may be admitted as evidence, but federal district courts will not defer to an administrative determination in which the agency found no discrimination.

Future studies may wish to explore the role and influence of federal courts on administrative adjudications. This dissertation provides a theoretical framework and typology that can be used to investigate the relationship influence and role of the federal courts on the performance of agencies under the Managerial and Legalistic models of administrative adjudication.

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See, e.g., NLRB v. Hotel Employees & Rest. Employees Int’l Union Local 26, 446 F.3d 200, 206 (1st Cir.2006).
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