

HOW INTERAGENCY BORROWING OF ADMINISTRATIVE LAW JUDGES CIRCUMVENTS THE RULE OF LAW

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Abstract

More than 40 federal agencies enforce regulations via in-house tribunals, a practice called agency adjudication. Administrative law judges preside over these tribunals, adjudicating in a range of public policy subject areas and ultimately guiding the regulation of individuals and organizations. Although Americans may expect agencies to recruit administrative law judges transparently, in accordance with the Administrative Procedure Act, many agencies borrow and lend administrative law judges from one another, creating a secret system of personnel exchanges. This system obscures the identity of the agencies doing the borrowing and lending, as well as the sources of funding for administrative law judge compensation. This research report provides the first systematic analysis of interagency exchanges of administrative law judges and identifies points of possible incongruence with the Administrative Procedure Act. It also discusses potential conflicts between the president's power over inferior officers and Congress's power of the purse.

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Introduction

The federal system of agency adjudication is not what it appears to be. On the surface, many federal departments and agencies possess in-house tribunals. These tribunals house a host of administrative law judges (ALJs), who are executive officers within the president's chain of command.¹ The vast majority of these are housed in the Social Security Administration (SSA). Following SSA, the second-largest group of ALJs belongs to the Department of Health and Human Services (HHS), followed by the Department of Labor (DOL).

Unbeknownst to many, however, is that certain federal agencies employ ALJs who were outsourced or borrowed from another agency. Some agencies employ ALJs who “double dip,” adjudicating for two or more agencies at the same time. Others, such as the Department of Energy (DOE), employ ALJs who are dually commissioned as attorneys or attorney advisers for the department.² The DOE's ALJs essentially operate as both judges and prosecutors at the same time.

Many agencies, like the Internal Revenue Service (IRS), have grown accustomed to importing all their ALJs to process cases rather than hiring their own ALJs. This ad hoc process of borrowing ALJs flies under the radar and is often done without the foreknowledge or consent of the private party. These are officially referred to as ALJ “transfers” by the Office of Personnel Management (OPM) under the *Code of Federal Regulations*.³ For the purpose of this report, transfers will be classified differently, referring to ALJs who have left their prior judgeship to work for another agency.

Some ALJs are part of one of several special programs run by OPM that facilitate an interagency exchange of ALJs based on a specific governmental need,⁴ and some ALJ exchanges are a means of career advancement and executive leadership development.⁵ One form of ALJ borrowing is formal: agencies that lack a tribunal or office of judges hire ALJs from a separate agency based on a statutory structure. Another more frequent form of ALJ borrowing is informal: agencies loan ALJs on an ad hoc basis to other agencies that are ALJ deficient. This is often based on developing needs and availability. This informal exchange

1 US v. Arthrex, Inc., 594 U.S. No. 19–1434 (2021).

2 There appear to be several DOE ALJs who dually served as attorney advisers, according to various LinkedIn profiles, such as former DOE ALJ Greg Krauss. See “Greg Krauss,” LinkedIn, accessed September 17, 2025, <https://www.linkedin.com/in/greg-krauss-08433820>. Several other dually employed ALJs at the DOE include Shiwali Patel, Katie Ellen Quintana, and Brenda Balzon.

3 Office of Personnel Management, *Fact Sheet: Administrative Law Judge (ALJ) Positions*, August 8, 2019; 5 CFR § 930.204(h).

4 “Administrative Law Judges,” JUSTIA, accessed September 17, 2025, <https://www.justia.com/administrative-law/administrative-law-judges/>.

5 “Candidate Development Programs,” Office of Personnel Management, accessed September 17, 2025, <https://www.opm.gov/policy-data-oversight/senior-executive-service/candidate-development-programs/>.

represents one of several interagency agreements traditionally overseen by OPM. These are federal contracts between various agencies to lend and borrow ALJs for temporary periods of time.⁶ In addition to both forms of borrowing, long-term or permanent agency-to-agency transfers of ALJs also occur. These are independent career shifts pursued by the ALJ rather than temporary borrowing. This distinction will be explained in more detail in the following section.

This research report explores the two forms of borrowing to determine why ALJs are being exchanged, providing the first systematic analysis of ALJ borrowing throughout the federal government. This obscure process may violate the Administrative Procedure Act (APA) and the Appropriations Clause of the Constitution for agencies that informally borrow all their ALJs without possessing a tribunal. Additional concerns include certain government officials exceeding their authority to adjudicate and a widespread lack of transparency regarding interagency borrowing. The report also considers how the executive branch's adjudicatory system may be compromised by ALJ exchanges and concludes with a reflection on these concerns.

Transitory ALJs

Most federal agencies import a portion of their ALJs from other agencies on a case-by-case basis or as the need arises. ALJs who move from one agency to another can be broadly referred to as “transitory.” Transitory ALJs can be further divided into two categories: transfers (long term) and loans (short term).

ALJ Transfers (Long Term)

ALJ transfers are the most common type of ALJ transition. An agency permanently hires preexisting ALJs who leave their prior government employer. Some agencies may forgo certain hiring standards, such as OPM qualifications, to obtain ALJs.

Unlike agencies such as the Department of the Interior (DOI), the Merit Systems Protection Board (MSPB), and the Nuclear Regulatory Commission (NRC), which primarily appoint new ALJs, many agencies hire ALJs from peer agencies. This applies to both long-term ALJ transfers and short-term ALJ borrowing. Some agencies even hire ALJs who have adjudicated within four or five different agencies in the past, with the perception that the ALJ can merely transfer their experience to the next place of work.

This report will focus only on problems with short-term ALJ borrowing, not ALJ transfers, because the latter does not present any significant problems. While both methods are somewhat intertwined, ALJ borrowing is a process that bears

⁶ Office of Personnel Management, *Guidance on the ALJ Loan Program*, August 1, 2018. No formal webpage about federal interagency agreements appears to exist. Rather, this source provides basic guidance on the OPM-administered ALJ Loan Program.

constitutional conflicts with the executive's authority over inferior officers (ALJs). By contrast, ALJ transferring appears to have a stronger legal foundation.

ALJ Loans (Short Term)

ALJ loans are a less common type of ALJ transition in which an agency formally borrows an ALJ from a separate agency to meet a specific need. The borrowing agency typically does not possess any or enough ALJs to meet the existing demands of its docket. Many departments across the federal government use several official interagency exchange programs. One such program is conducted with the Securities and Exchange Commission (SEC), which lends its ALJs to a range of agencies in need.

The borrowing process begins when an agency in need files a request with OPM. OPM then asks the SEC for an appropriate ALJ to be borrowed. The SEC's chief ALJ selects an appropriate ALJ, who is then voted on by the five SEC commissioners. If approved by the commissioners, the ALJ then transitions to the requesting agency for six months or more, depending on the timeline of the case or cases assigned to them.⁷

In OPM's ALJ Loan Program, the transitory ALJ remains an incumbent of the lending agency.⁸ This suggests that the ALJ does not lose their position when being lent to another agency and that their original salary will remain in place even while they are adjudicating for another agency. According to OPM guidance, "[I]t is still the case that an ALJ loan is a reimbursable interagency detail, and that the ALJ remains an incumbent of the position from which he or she was detailed."⁹ The interagency loan confers a stipend to the transitory ALJ to be paid by the borrowing agency.

While most agency tribunals possess a mixture of borrowed and permanent ALJs, one entity was created exclusively to adjudicate for financial agencies. Such an arrangement is one of only two formal or statutory-based ALJ borrowing, as referred to earlier. This presents a specialized ALJ loan arrangement that occurs

7 Consumer Product Safety Commission, *In the Matter of Brit Ax Child Safety, Inc.*, "Notice Regarding Appointment and Delegation of Administrative Law Judge to Serve as Presiding Officer," April 23, 2018, <https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/016--2018-04-23%20Notice%20Regarding%20Appointment%20and%20Delegation%20of%20ALJ%20to%20Serve%20as%20Presiding%20Officer.pdf>. Here, SEC ALJ Keith Ellison is rented out to the Consumer Product Safety Commission to manage the earlier cited case.

8 "Administrative Law Judges," Office of Personnel Management, accessed September 17, 2025, <https://www.opm.gov/services-for-agencies/administrative-law-judges/>.

9 Office of Personnel Management, *Fact Sheet: Administrative Law Judge Positions*, April 17, 2024, 4.

within the Office of Financial Institution Adjudication (OFIA).¹⁰ OFIA is statutorily permitted to lend its ALJs to adjudicate matters arising from four financial regulators: the Board of Governors of the Federal Reserve System (Fed Board), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA).

Whenever private challenges to agency enforcement actions arise from one of these financial regulators, OFIA's ALJs process them in a separate forum. In essence, these regulators borrow OFIA ALJs to adjudicate their disputes rather than borrow them through an informal interagency agreement.¹¹ If either party does not agree with the outcome, then the ALJ's decision can be appealed from OFIA back to the prosecuting agency, to be decided by the agency head(s).

Reasons for ALJ Loans

An agency often requires outside help to manage its docket of proceedings. While not too much is known about the administration of borrowed ALJs or how they are paid for, there are two general reasons why agencies borrow them. The first is burgeoning caseloads, and the second is lack of funding. Agencies with sufficient budgets generally hire additional ALJ transfers to reduce case backlogs and maintain balance long term. Those with insufficient budgets or no preexisting office of judges rely entirely on ALJ borrowing.

Some agencies possess more regulations, or more restrictive regulations, that generate a larger number of cases and controversies. This requires ample personnel to adjudicate in-house regulatory disputes. Most agencies appear to pursue a mixture of hiring their own ALJs internally, borrowing ALJs, and hiring transfer ALJs.

One of the most prominent and documented examples of ALJ borrowing can be seen with the National Labor Relations Board (NLRB), which in the 1970s and 1980s faced a notable lack of ALJs relative to the precipitous rise in labor relations cases being filed by the NLRB's general counsel. In response, the NLRB borrowed many ALJs ad hoc from other agencies to process their escalating

10 "About," Office of Financial Institution Adjudication, accessed September 17, 2025, <https://www.ofia.gov/who-we-are/about-us.html>. OFIA exclusively adjudicates legal disputes arising from the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the National Credit Union Administration. This is established by a formal memorandum of understanding between the agencies.

11 OFIA's ALJ lending is considered formal owing to its authorizing statute that establishes it as an adjudicatory agency. If the Fed Board, the FDIC, the OCC, or the NCUA seek to adjudicate a case, they cannot borrow an ALJ from just any other agency except OFIA. Likewise, OFIA cannot lend its ALJs on a temporary basis to any other agency except the ones just listed. By contrast, informal ALJ borrowing sees that any agency with a legal need can strike an agreement with any other agency possessing available ALJs to loan.

caseload.¹² NLRB administrators even called many of their former ALJs out of retirement just to manage the mounting wave of cases.

Another reason agencies borrow ALJs is lack of funding for adjudication. Borrowing agencies pay lending agencies at a mutually agreed-upon rate, which allows the borrowing agencies to bolster their ranks without permanently hiring ALJs on a fixed salary. Borrowing agencies assume full authority to pay the ALJ's stipend as they manage cases.¹³

The impetus for funding borrowed ALJs is questionable. Since Congress appropriated less than what the agency needed to get through its in-house adjudication docket, it is questionable whether the practice of borrowing ALJs can be funded by the agency without congressional authorization.¹⁴ This is particularly concerning for agencies without a defined adjudication budget or office of hearings and appeals. Such agencies may be outsourcing funds from other departments—perhaps unconstitutionally—that Congress intended to be used in accordance with the agency's budget proposal. (This issue will be revisited later).

This questionable approach to borrowing can be seen in agencies such as the Consumer Product Safety Commission (CPSC), which lacks a formal adjudication budget and relies entirely on outside agencies to loan ALJs through an interagency agreement. The only exception has been a single ALJ hired from within the agency, former Chief ALJ Paul Pfeiffer, who was himself a transfer ALJ.¹⁵ The IRS is another agency that routinely borrows ALJs without possessing any internally hired ALJs nor a budget for an internal adjudication department.

Lack of Transparency in ALJ Loans

OPM's ALJ Loan Program provides that the burden for paying the ALJ lies with the borrowing agency. However, there is not much detail provided about where the source of this funding comes from within the agency's budget. Some agencies appear to leverage sources of funding for borrowed ALJs via enforcement matters.

12 The NLRB's borrowing of ALJs began in 1960 and was facilitated through the now-defunct Civil Service Commission (CSC). The agency's borrowing corresponded to an uptick in NLRB cases. The CSC set the precedent that OPM used to establish institutional standards for agency hiring and borrowing of ALJs.

13 5 CFR § 930.208(d).

14 OPM oversees the process of the borrowing agency reimbursing the lending agency for the ALJ's services. There is no provision for Congress to oversee or approve of the source of this funding through appropriations. Administrative Law Judge Loan Program—Detail to Other Agencies, 5 CFR § 930.208 (2025).

15 Former chief judge Paul Pfeiffer transferred to CPSC from the Federal Maritime Commission in 1975. Consumer Product Safety Commission, "Paul Pfeiffer Assumes Duties as First CPSC Administrative Law Judge," news release, May 7, 1975, <https://www.cpsc.gov/Newsroom/News-Releases/1975/Paul-Pfeiffer-Assumes-Duties-As-First-CPSC-Administrative-Law-Judge>.

This can be seen with the National Oceanic and Atmospheric Administration (NOAA), an agency that struck a lending agreement for several borrowed ALJs. In 2010, an organization called Saving Seafood exposed a controversy involving NOAA ALJs borrowed from the Coast Guard, which used funds levied from fines and forfeitures to pay the ALJs' salaries.¹⁶ This came as a shock to the Coast Guard's director of judicial administration and office of ALJs, who assumed that NOAA was paying for the borrowed judges using congressionally appropriated money. This is problematic because Congress intended the proceeds from the NOAA's Asset Forfeiture Fund to reimburse the agency's enforcement efforts rather than their ad hoc adjudicatory matters.¹⁷ One could argue that NOAA should not be permitted to conflate its funding for enforcement and adjudication absent congressional authorization.

In the case of the Consumer Financial Protection Bureau (CFPB), the agency has not disclosed the source of funding for its borrowed ALJs. The CFPB likely paid for its borrowed SEC ALJs using its unique self-funding structure with the Federal Reserve, a process that circumvents congressional appropriations. In this way, the CFPB can get away with obscurity in how it funds various personnel and programs. However, as of 2016, it no longer relies on SEC ALJs to manage its adjudications,¹⁸ having hired a permanent ALJ.

The Surface Transportation Board (STB) not only borrows all its ALJs from the other agencies but also fails to disclose from where the ALJ is being borrowed. This is apparent in the STB's ALJ opinions, which only list the name of the transitory judge followed by the phrase "by the board." To ascertain where the ALJ worked, one would need to methodically search on the internet. This presents a lack of transparency, as some litigants may be under the assumption that the listed ALJ works for the STB when, in reality, the ALJ is being borrowed from elsewhere. This is particularly confusing and potentially misleading when ALJs such as Thomas P. McCarthy are listed with the designation "Surface Transportation Board" underneath his title of ALJ rather than his own host

16 "NOAA Paid for Judges' Services from Forfeited Assets," Saving Seafood, accessed September 17, 2025, <https://www.savingseafood.org/fishing-industry-alerts/noaa-paid-for-judges-services-from-forfeited-assets/>.

17 NOAA Policy on Prohibited and Approved Uses of the Asset Forfeiture Fund, 76 Fed. Reg. 16386 (Mar. 23, 2011). Specifically, the following passage confirms that the fund was to be used only for the enforcement staff's work, not for borrowed ALJs adjudicating these controversies: "the Department believes, as did Congress in establishing the AFF and specifying the authorized uses, that it is appropriate to use the proceeds of NOAA's enforcement program to offset in part the costs of administering that program. Those who violate these laws should help offset the cost of protecting our marine resources in lieu of those costs being borne by taxpayers."

18 Consumer Financial Protection Bureau, *In the Matter of PHH Corporation*, "Order Assigning Administrative Law Judge," February 3, 2014, https://files.consumerfinance.gov/f/documents/2014-CFPB-0002_Document_020_02032014.pdf.

agency.¹⁹ Based on this research, most of the STB's transitory ALJs, including McCarthy, hail from the Federal Energy Regulatory Commission (FERC). The STB also borrowed several ALJs from the SEC and the Federal Mining Safety Health Review Commission (FMSHRC).

In addition to borrowing most of its ALJs from FERC, the STB also uses FERC's building to host many of its public hearings and conferences.²⁰ This suggests that some interagency agreements entail more than merely loaning personnel and can allow for an agency to lend its building space to another agency lacking a forum for its hearings. None of the details of this arrangement are explained on the STB's website or in its case documents. The only proof of the STB's ALJ lending is an obscure legal agreement referred to as a memorandum of understanding (MOU), a nonbinding agreement that determines the intent for two agencies to exchange ALJs for compensation. While the existence of MOUs is not easily discoverable, this research has uncovered an acknowledgment of (or reference to) one between FERC and the STB in a 2016 case.²¹ The agreement was established for the STB "to employ the services of FERC ALJs on a case-by-case basis to perform discrete Board-assigned functions such as adjudicating discovery disputes between parties in cases pending before the Board."²²

There is no acknowledgment by FERC on its MOU webpage of an agreement with the STB to lend its ALJs, reinforcing the obscurity in this arrangement.²³ When coupled with the fact that transitory ALJs borrowed by the STB have no reference to their parent agency (FERC) in the cases they adjudicate, this interagency borrowing is concerning. Additionally, the STB's MOU with FMSHRC ALJs is acknowledged in a 2021 case, which references an agreement for the loaned services of Judge Thomas McCarthy.²⁴ As with FERC, this document fails to

19 See, for example, *Navajo Transitional Energy Company, LLC v. BNSF Railway Company*, case ID no. 51899 (2023). In several places in the case decision, Judge McCarthy's designation is listed above the STB. There is no footnote or statement in the case decision that McCarthy was being borrowed from FERC, suggesting a lack of transparency.

20 See, for example, *Alloy Property Company, LLC—Adverse Abandonment—Chicago Terminal Railroad in Chicago, Ill.*, case ID no. AB_1258_0 (2017). The discovery status conference for the case was held at FERC's headquarters in Washington, DC.

21 Surface Transportation Board, "Order of Presiding Administrative Law Judge Terminating Discovery Proceedings," docket no. FD 36005, October 24, 2016, <https://dcms-external.s3.amazonaws.com/MPD/62491/9A0C21C95AF1712E85258056006C0CBE/45535.pdf>.

22 Surface Transportation Board, "Order of Presiding Administrative Law Judge Terminating Discovery Proceedings."

23 "Memoranda of Understanding (MOU)," Federal Energy Regulatory Commission, accessed September 17, 2025, <https://www.ferc.gov/memoranda-understanding-mou-0>. Among the listed MOUs, there is no mention of the STB borrowing nine FERC ALJs.

24 Canadian National Railway Company, Grand Trunk Corporation, and CN'S Rail Operating Subsidiaries—Control—Kansas City Southern, the Kansas City Southern Railway Company, Gateway Eastern Railway Company, and the Texas Mexican Railway Company, 86 Fed. Reg. 27499 (May 20, 2021).

provide specifics about the length of the interagency loan or the amount that the STB will provide as a stipend to the borrowed ALJ.

This lack of transparency resembles other interagency agreements, such as the March 1999 interagency agreement between the US Environmental Protection Agency (EPA) and the US Patent and Trademark Office (USPTO), a subagency of the US Department of Commerce.²⁵ As with the STB, the EPA does not actually provide public access to the agreement. Rather, the EPA and the USPTO merely cite the agreement in each of the patent cases overseen by a borrowed ALJ. For all these cited cases,²⁶ there appears to be a Freedom of Information Act (FOIA) URL, suggesting that these cases were perhaps not originally available to the public until obtained via a FOIA request.

The executive branch's obscure use of MOUs is also apparent at the US Postal Service (USPS). USPS lends several of its ALJs to the US Department of Veterans Affairs (VA) and the IRS as part of two MOUs with USPS's Judicial Officer Department. Like with the STB's MOUs, there appears to be no official acknowledgement of the specific terms of the interagency agreements aside from a brief footnote for each USPS case that entails a lent ALJ to the VA and the IRS.²⁷ The referenced cases for the VA and the IRS do not indicate any specific dates or payment of services for the borrowed ALJs. The interagency agreements direct USPS to adjudicate debt relief claims that arise under the Debt Collection Act of 1982, which also constitute the bulk of USPS's own cases. Although the 1982 act and the subsequent Debt Collection Improvement Act of 1996 empower agencies such as the VA and the IRS to collect debts from citizens, the law is silent about their ability to use another agency to adjudicate debt collection cases. Another peculiarity is that the VA and the IRS place their debt collection disputes entirely on USPS's docket, even though borrowing agencies usually post their legal disputes to their own dockets once the transitory ALJ renders a decision. This peculiarity suggests that the VA and the IRS may completely outsource their cases to USPS for handling, rather than simply borrowing their ALJs.

The NRC is one of the few entities that provides substantive details about the terms and pay of their interagency ALJ agreements. In 2009, it borrowed three ALJs from the DOE.²⁸ The NRC states its need for hearing officers (ALJs), outlines

25 US Patent and Trademark Office, *In the Matter of Michael David Rostoker*, proceeding no. D04-1, May 31, 2006, https://foiadocuments.uspto.gov/oed/0083_dis_2005-08-02.pdf.

26 US Patent and Trademark Office, *In the Matter of Ralph L. Marzocco*, proceeding no. D00-04, October 25, 2000, https://foiadocuments.uspto.gov/oed/0071_dis_2000-10-25.pdf.

27 US Postal Service, *Sarah D. Anaya v. U.S Department of Veterans Affairs*, P.S. Docket No. VA 17-145, March 20, 2018; US Postal Service, *Peter Janangelo v. Internal Revenue Service*, Docket No. IRS 23-530, July 9, 2024.

28 Nuclear Regulatory Commission, *Award of Interagency Agreement*, March 16, 2009, <https://www.nrc.gov/docs/mL0907/ML090761178.pdf>. The DOE was selected as the exclusive servicing agency to provide three of its ALJs to adjudicate NRC cases. It appears that each ALJ was paid a commission of \$35,520 for his or her work.

the rate of pay for each borrowed ALJ, and provides the specific range of time (one month) that the agreement would last. The NRC's agreement also provides other substantive details that are clearly lacking in beforementioned agency MOUs. This includes a brief historical component, mentioning that, since 1975, the agency's lack of formal adjudications or "personnel security hearings" stemmed from a lack of available judges.²⁹

Which Agencies Lend and Why

Whereas the aforementioned agencies such as the CFPB, CPSC, the IRS, and NOAA borrow most or all their ALJs, a separate set of agencies such as the Coast Guard, the SEC, and the EPA primarily lend their ALJs. There are two likely reasons why these agencies lend their ALJs.

First, the lending agencies possess an ample number of judges relative to their adjudicatory docket. These are usually agencies with established, adequately funded hearing offices. Sending out a few ALJs to peer agencies does not undermine their ability to manage their own cases. Second, agencies can lend out ALJs to diversify their federal government experiences, making them more attractive for future promotion opportunities. Presumably, transitory ALJs develop new legal expertise the more they are borrowed from outside agencies. It can be a way for the lending agency to test how well the transitory ALJ performs when managing unfamiliar cases.

Many agencies are matched based on availability, needs, and in some cases public policy relevance. Nearly every lent Coast Guard ALJ has managed cases for the IRS based on a consistent demand. Additionally, the ALJs who NOAA borrows are exclusively from the EPA, owing to their environmental policy connection.³⁰ Furthermore, HHS has borrowed many SSA ALJs in large part because SSA originally operated as a subdepartment of the HHS until 1995.³¹

The DOE has lent its ALJs to the NRC over a shared focus on domestic energy policy and the DOE's Office of Nuclear Energy. This is reflected in their 2010 interagency agreement extension, alluding to the first MOU between the DOE and

29 Nuclear Regulatory Commission, *Award of Interagency Agreement*, 3.

30 "NOAA to Use EPA Administrative Law Judges for Newly Docketed Enforcement Cases," National Oceanic and Atmospheric Administration, September 12, 2011, <https://research.noaa.gov/noaa-to-use-epa-administrative-law-judges-for-newly-docketed-enforcement-cases/>.

31 This occurred through the Social Security Independence and Program Improvements Act of 1994, establishing SSA as an independent agency. SSA retained the right to adjudicate Medicare hearings until October 2005, with the full transfer of these matters to HHS. See Secretary of Health and Human Services and Commissioner of Social Security, *Plan for the Transfer of Responsibility for Medicare Appeals*, March 2004, https://www.ssa.gov/legislation/medicare/medicare_appeal_transfer.pdf.

the NRC in 1999.³² This original MOU “addresses broad policy matters between the two agencies and provides that additional agreements shall be established to further its purposes.”³³ Unlike the beforementioned 2009 DOE-NRC agreement for ALJ sharing, the subsequent 2010 agreement does not specify how many ALJs are being lent by the NRC and who those persons are. It merely provides that the DOE officials will work at the NRC for two years.

The greatest variety of agencies lend their ALJs to the IRS to compensate for its own lack of judges. The constant need for the IRS to borrow ALJs arises from the agency’s ongoing disciplinary hearings involving its enrolled agents and disbarments of tax professionals. On the other hand, the Small Business Administration (SBA) borrows many ALJs from several agencies to match its consistently large annual caseload.³⁴ SBA, like most agencies, borrows ALJs to bolster its own in-house team of judges.

The inverse of the IRS’s widespread borrowing of judges is the SEC lending to the greatest variety of agencies (six). Additionally, HHS holds the distinction of lending the greatest number of ALJs to other agencies, with nearly all HHS ALJs having been borrowed by SSA.

Last, the MSPB reserves the ability to borrow ALJs to adjudicate outside agency cases that are presented to it. This is conducted through a formal statutory framework that is somewhat similar to OFIA, as the MSPB is a unique interagency body. While the MSPB possesses a sizable number of in-house ALJs, it can also borrow ALJs from elsewhere to adjudicate other agencies’ claims on its behalf. This occurred when the MSPB selected an ALJ from the Coast Guard to conduct a two-day public hearing on a dispute arising from DOL.³⁵ Most of the MSPB’s borrowed judges come from the Federal Trade Commission (FTC) and the Coast Guard, reimbursed through interagency agreements.³⁶

Data

The original dataset for this research report samples 960 ALJs from 42 different agencies during 1935–2024 (89 years). Due to the limited availability of older data,

32 Nuclear Regulatory Commission, *Award of Interagency Agreement*, October 2, 2012, <https://www.nrc.gov/docs/ML1228/ML12286A141.pdf>. Interestingly, the agreement refers to the transitory ALJs as “attorneys” several times rather than as judges. This wording may indicate the double-dipping mentioned in the introduction of this research report, which includes many instances of DOE ALJs serving in adjudicatory and prosecutorial roles in the department.

33 Nuclear Regulatory Commission, *Award of Interagency Agreement*, October 2, 2012, 3.

34 SBA’s caseload automatically populates exactly 100 cases every year. Though strange, this practice indicates a substantial number of adjudications relative to other agencies that borrow most of their ALJs.

35 *Berlin v. Department of Labor*, 772 F.3d 890, 5 (2014).

36 “Organization,” Merit Systems Protection Board, accessed September 17, 2025, <https://www.mspb.gov/about/organization.htm>.

most of the sampled ALJs were taken from the past 50 years. The data are drawn from every known federal agency that has the power of executive APA adjudication and that features an online profile of its ALJs. In total, 267 ALJs, or roughly 28 percent, adjudicated for more than one agency (transitory ALJs), whereas 691 ALJs adjudicated for only one agency.³⁷

Owing to time constraints, the sample does not include every judge at every agency. For example, SSA averages around 1,600 judges per year, and the NLRB began hiring hundreds of ALJs in the early 1930s before the APA was ratified. To rectify this, a representative sample was taken of NLRB and SSA ALJs to not exceed 150 judges (roughly 10 percent of SSA's total number of judges), which is proportional to the number of ALJs sampled from several other large agencies. The sample is considered representative because it reflects characteristics of the broader ALJ population and includes randomly drawn ALJs from large agencies such as SSA and the NLRB. The foundational characteristics used include ALJs who served at least one full year at their hiring agency, adjudicated for agencies using APA requirements,³⁸ and possessed some profile or record of their federal career. For most small- or mid-sized agencies (ALJs, $n < 50$), the sample captured every searchable ALJ who spent time working there.

Data were gathered using certain keyword searches of ALJs on agency LinkedIn accounts as well as keyword searches of adjudicatory staff in the Open Payroll database, For Open Payroll. These searches included phrases such as “administrative law judge,” “administrative judge,” or simply “judge” to observe the total number of personnel in the database, as well as the internet for many administrative press releases that denoted newly appointed ALJs.

The specific years and capacities in which the judges worked at the agency are noted. This information is cross-referenced with other data sources such as online agency profiles, LinkedIn accounts, and the agency's organizational charts. For entities with multiple types of judges, the searches were tailored to accommodate any “supervisory administrative law judge” for HHS, “associate chief administrative law judge” for DOL, and “administrative judge” for the Equal Employment Opportunity Commission (EEOC).

Results

Table 1 shows the number of ALJ transitions (combining both transfers and loans) by agency, divided into imports and exports to illustrate the direction of movement and ranked by total transitions. SSA, HHS, DOL, the NLRB, and the

37 Readers may contact the author directly or Pacific Legal Foundation for access to the sampled ALJ data used in the quantitative analysis portion of the report.

38 The sample includes several agencies that adjudicate cases outside of the APA's requirements, including the Equal Employment Opportunity Commission and the USPTO, because they do not violate these foundational characteristics—namely, they borrow ALJs who come from APA-regulated agencies.

IRS (in descending order) accounted for the greatest number of ALJ transitions in the sample, with the top four agencies also possessing the largest number of in-house ALJs. The IRS appears in the top five solely because it borrowed ALJs more frequently than other agencies that had internally hired, transferred, and borrowed ALJs; it did not export or lend any ALJs of its own because it lacked a tribunal or internal office of judges.

Table 1. ALJ Transitions by Agency, 1935–2024

Agency	Imported ALJs	Exported ALJs	Total Imports + Exports	Rank (Imports + Exports)
Social Security Administration	57	166	223	1
Health and Human Services	46	45	91	2
Department of Labor	22	21	43	3
National Labor Relations Board	28	12	40	4
Internal Revenue Service	31	0	31	5
Federal Energy Regulatory Commission	13	9	22	6
Federal Mine Safety and Health Review Commission	8	5	13	T-7
Occupational Safety and Health Review Commission	12	1	13	T-7
International Trade Commission	10	2	12	8
National Oceanic and Atmospheric Administration	11	0	11	T-9
US Coast Guard	6	5	11	T-9
US Postal Service	2	9	11	T-9
Surface Transportation Board	11	0	11	T-9
Department of Agriculture	5	5	10	T-10
Small Business Administration	10	0	10	T-10
Equal Employment Opportunity Commission	0	9	9	11
Department of the Interior	3	5	8	T-12
National Transportation Safety Board	7	1	8	T-12
Environmental Protection Agency	3	4	7	T-13

Agency	Imported ALJs	Exported ALJs	Total Imports + Exports	Rank (Imports + Exports)
Federal Labor Relations Authority	5	2	7	T-13
US Securities and Exchange Commission	1	6	7	T-13
Executive Office of Immigration Review	5	1	6	T-14
Department of Transportation	3	3	6	T-14
Consumer Financial Protection Bureau	6	0	6	T-14
Department of Housing and Urban Development	1	4	5	T-15
Drug Enforcement Administration	3	2	5	T-15
Federal Maritime Commission	3	2	5	T-15
Office of Financial Institution Adjudication	0	5	5	T-15
Federal Deposit Insurance Corporation	2	2	4	T-16
Consumer Product Safety Commission	4	0	4	T-16
Department of Energy	1	3	4	T-16
Nuclear Regulatory Commission	3	1	4	T-16
Patent and Trademark Office	3	1	4	T-16
Merit System Protection Board	0	3	3	17
Department of Education	1	1	2	18
Commodity Futures Trading Commission	1	0	1	T-19
Federal Aviation Administration	0	1	1	T-19
Federal Communication Commission	1	0	1	T-19
Federal Trade Commission	1	0	1	T-19
Department of Justice	1	0	1	T-19
Transportation Security Administration	1	0	1	T-19

Source: Author's calculations.

Tables 2 and 3 show agencies' borrowing and lending of ALJs, excluding transfers. SSA and HHS are the only two agencies appearing among both the top five importers and exporters. The Coast Guard ranks as the second-largest exporter despite not occupying a tribunal comparable in size to those of SSA and HHS. Over the past 35 years, it has employed no more than 10 ALJs at one time, meaning it exports far more of its judges per capita (80 percent) than much larger agencies.

Table 2. ALJ Lending by Agency

Rank by Number of Loaned ALJs	Lending Agency	Number of Lent ALJs	Importing Agency
1	HHS	28	DOL (1); SBA (1); SSA (26)
2	CG	13	CFPB (1); NOAA (5); IRS (4); SBA (3)
3	FERC	10	STB (9); SSA (1)
T-4	DOL	9	SSA (9)
T-4	NLRB	9	IRS (8); DOJ (1)
T-5	SSA	8	HHS (6); NLRB (1); IRS (1)
T-5	USPS	8	VA (5); IRS (3)
6	SEC	7	SBA (2); CFPB (1); CPSC (1); CG (1); NOAA (1); STB (1)
T-7	HUD	6	TSA (1); SBA (2); IRS (2); SSA (1)
T-7	EPA	6	NOAA (4); IRS (1); USPTO (1)
T-7	FMSHRC	6	CFPB (1); IRS (2); EOIR (1); SSA (1); STB (1)
8	*OFIA	5	*FDIC (5); *Fed Board (5); *OCC (5); *NCUA (5)
T-9	DOE	3	NRC (3)
T-9	DOI	3	IRS (1); SSA (2)
T-10	ED	2	SSA (2)
T-10	EEOC	2	SSA (1); DOE (1)
T-10	FLRA	2	IRS (2)
T-10	OSHRC	2	NTSB (1); SSA (1)
T-11	USDA	1	SSA (1)
T-11	DOT	1	SSA (1)

Source: Author's calculations. Note: OFIA ALJs are formally lent to several financial regulators on an as-needed basis, and no other agency is statutorily permitted to borrow from OFIA. As a result

of this unique subsystem, its ALJs are counted equally across each borrowing entity based on the opportunity cost to borrow. The agencies capable of borrowing OFIA ALJs are ranked collectively under imports to designate this special subsystem.

Table 3. ALJ Borrowing by Agency

Rank by Number of Borrowed ALJs	Borrowing Agency	Number of Borrowed ALJs	Exporting Agency
1	SSA	45	HHS (26); DOL (9); HUD (1); FMSHRC (1); DOI (2); ED (2); EEOC (1); OSHRC (1); DOT (1); USDA (1)
2	IRS	24	NLRB (8); CG (4); USPS (3); HUD (2); FMSHRC (2); FLRA (2); DOI (1); EPA (1); SSA (1)
3	STB	11	FERC (9); SEC (1); FMSHRC (1)
4	NOAA	10	CG (5); EPA (4); SEC (1)
5	SBA	8	CG (3); SEC (2); HHS (1); HUD (2)
6	HHS	6	SSA (6)
T-7	*FDIC; *Fed Board; *OCC; *NCUA	5	OFIA (5)
T-7	VA	5	USPS (5)
8	NRC	3	DOE (3)
9	CFPB	2	CG (1); FMSHRC (1)
T-10	DOJ	1	NLRB (1)
T-10	CG	1	SEC (1)
T-10	CPSC	1	SEC (1)
T-10	DOE	1	EEOC (1)
T-10	EOIR	1	FMSHRC (1)
T-10	DOL	1	HHS (1)
T-10	TSA	1	HUD (1)
T-10	NLRB	1	SSA (1)
T-10	NTSB	1	OSHRC (1)
T-10	USPTO	1	EPA (1)

Source: Author's calculations.

As the data show, the largest agencies tend to lend the greatest number of ALJs. This is not true for borrowing agencies, where the top agencies are of varying sizes, such as SSA (large), SBA (medium), and the STB (small). It would appear then that ALJ borrowing is not motivated by merely staff shortages but may be due to multiple factors, such as the agency lacking its own tribunal, the varying number of cases on its docket, and the time needed to adjudicate each case per ALJ.

Case Study: ALJ Imports and Exports by SSA

Nearly every ALJ who adjudicated for another agency had worked for SSA at some point; around 213 SSA ALJs, or 80 percent of the 267 transitory ALJs sampled, had such experience. By far, SSA has the largest tribunal in the federal government, employing an average of 1,500 ALJs to adjudicate around 500,000 cases a year. Despite this capacity, it has long struggled with backlogs when processing disability claims, reaching a record 5.2 million pending actions in February 2024.³⁹ To address this, SSA built the most comprehensive informal exchange of ALJs. Yet even with its unparalleled importation of ALJs, the agency has failed to reduce its backlog meaningfully.⁴⁰ Consistent stagnation in pending benefits cases and delays with hearing decisions may also influence the widespread tendency for SSA ALJs to transfer to other agencies rather than remain at SSA for their entire careers.

Beyond the quantity of cases processed, there also appears to be a major issue with the quality of SSA decisions. Former SSA ALJ and current Department of Transportation (DOT) Judge J. E. Sullivan testified before Congress in 2013 that “SSA management is failing in its adjudication stewardship. That failure is costing all of us American citizens millions of dollars in the issuance of poorly considered and rushed decisions granting disability benefits. It also creates terrible individual consequences because of poorly considered and rushed decisions denying disability benefits.”⁴¹

Sullivan criticized how SSA appears to enforce a high volume of case decisions per ALJ and “speedy production goals.” She argued that these expectations come at the expense of meaningful or substantively reliable adjudicatory outcomes: “SSA management’s high volume and speedy production goals result in the

39 Social Security Administration, “Record-Breaking Backlog Increases Improper Payments by Over \$1B,” press release, August 8, 2024, <https://oig.ssa.gov/news-releases/2024-08-08-record-breaking-backlog-increases-improper-payments-by-over-1b/>.

40 Social Security Administration, “Reduce the Disability Hearings Pending,” Performance.gov, accessed September 17, 2025, <https://obamaadministration.archives.performance.gov/content/reduce-disability-hearings-pending.html>. This fiscal year (FY) 2016–2017 goal was intended to reduce the delay in hearing decisions as pursued under President Barack Obama’s SSA administrator. This problem persists in 2025, with some sources suggesting that an average of 300,000 Americans are waiting for their hearing decision. These decisions often take more than a year to issue.

41 *Oversight of Rising Social Security Disability Claims and the Role of Administrative Law Judges: Hearing Before the Subcomm. on Energy Pol’y, Healthcare, and Entitlements of the H. Comm. on Oversight*, 113th Cong. 1–2 (statement of J. E. Sullivan, administrative law judge).

‘production’ of a large number of disability decisions that have not been properly reviewed, analyzed, and decided.”⁴² These hastily rendered decisions were said to cost billions in taxpayer expense, which was taken from the SSA Trust Fund to award benefits claims.

Case Study: ALJ Imports and Exports by HHS

The HHS also faces a similar problem in failing to adjudicate cases in a timely manner. Despite housing the third-largest cadre of ALJs (after DOL) and performing the second-most-frequent imports and exports of ALJs (after SSA), it grapples with persistent backlog problems. At least since fiscal year 2011, HHS has faced a mounting tide of Medicare appeals that have increasingly surpassed the average rate of adjudication conducted by its ALJs.

Under federal law, HHS is required to adjudicate Medicare appeals within a 60-day window. In 2018, the agency’s “backlog of 426,000 appeals has so clogged the system that it now takes three to four years for a healthcare provider whom the government asserts it has overpaid, to have his or her appeal heard by an Administrative Law Judge (ALJ),” according to senior healthcare attorney Kevin West.⁴³ This led to a federal trial court ordering HHS to reduce its backlog by 2022 (in four years), which prompted Congress to award the agency \$182 million (a 70 percent increase in its budget) to meet this goal.⁴⁴

This problem was mitigated in 2022 when Chief ALJ McArthur Allen led a team of ALJs and HHS attorneys to eliminate one million backlogged appeals, allowing HHS to return “to its statutory mandate of timely adjudication of Medicare appeals for the first time in nearly a decade.”⁴⁵ Thus, around 2021–2022, HHS officially began adjudicating cases in a timely manner for the first time since 2011. While HHS fails to mention how this reversal occurred,⁴⁶ it raises the question

42 Statement of J. E. Sullivan, 3.

43 J. Kevin West, “Court Orders HHS to Eliminate the Huge Backlog of Appeals,” Parsons Behle & Latimer, November 20, 2018, <https://parsonsbehle.com/insights/court-orders-hhs-to-eliminate-the-huge-backlog-of-appeals>.

44 Steven Porter, “Medicare to Eliminate Appeals Backlog within 4 Years, HHS Tells Judge,” *Healthleaders*, August 7, 2018.

45 See the following LinkedIn post by HHS recognizing Judge McArthur Allen’s service during Black History Month: US Department of Health and Human Services, 2024, “Judge McArthur Allen currently serves . . .,” February 5, 2024, https://www.linkedin.com/posts/hhsgov_blackhistory-blackhistorymonth-activity-7160310822940909568-SH8S.

46 The earlier cited LinkedIn post does not explain how HHS eliminated its 2022 backlogs, and HHS’s FY 2024 budget does not provide any explanation (additionally, the FY 2022 and 2023 budgets are unavailable online), merely stating that “CMS [Center for Medicare Services] actively supports the Department’s efforts to improve the Medicare appeals process at all levels of appeal. Past efforts helped reduce the backlog of pending third-level appeals and resulted in lower administrative costs for HHS and taxpayers.” See US Department of Health and Human Services, *Fiscal Year 2024 Budget in Brief*, n.d., 114.

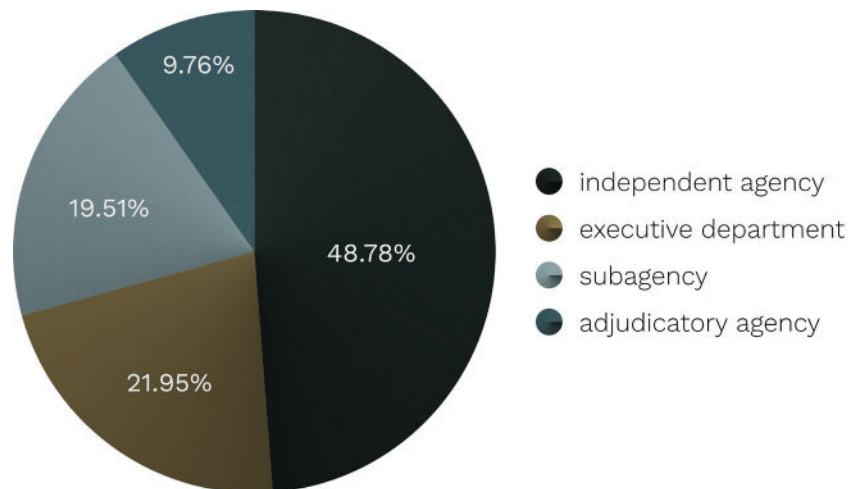
of whether importing a substantial number of ALJs contributed to reducing its backlog, an issue that a future study may explore.

It appears that when importing a consistent number of ALJs during this period and receiving a major boost in funding, HHS was able to finally reduce its Medicare appeals. Beginning in 2017, the department also took drastic measures to reduce its backlog, when its Office of Hearings began rerouting a large portion of cases to be resolved through alternate dispute resolutions and negotiated settlements rather than by public hearings. While this emergency strategy reduced the backlog by 55 percent, it underscored a fundamental flaw in the exchange of ALJs: importing more ALJs does not automatically lead to fewer caseloads.

Case Study: ALJ Imports by Agency Type

Figure 1 shows ALJ imports by agency type. Distinguishing ALJ imports by agency type is important because it illustrates whether agencies that are closer or further away from the president's control tend to borrow ALJs. Independent agencies, which are government entities with a degree of statutory insulation from the president's removal power, constitute the large majority of ALJ exchanges (nearly half of the sample). This is largely due to their higher number of ALJs per capita (especially SSA) and their overrepresentation in the sample relative to the other three categories. Independent agencies include bodies such as the SEC, SSA, the FTC, and the CFPB. Executive departments, those in the president's cabinet, come in a distant second place. These include entities like the US Department of Justice (DOJ), the DOI, DOL, HHS, and the US Department of Housing and Urban Development (HUD). Meanwhile, subagencies, or agencies housed within executive departments, come in a close third. These include the Executive Office for Immigration Review (EOIR), Drug Enforcement Administration (DEA), NOAA, and the IRS.

Figure 1. ALJ Movement by Agency Type

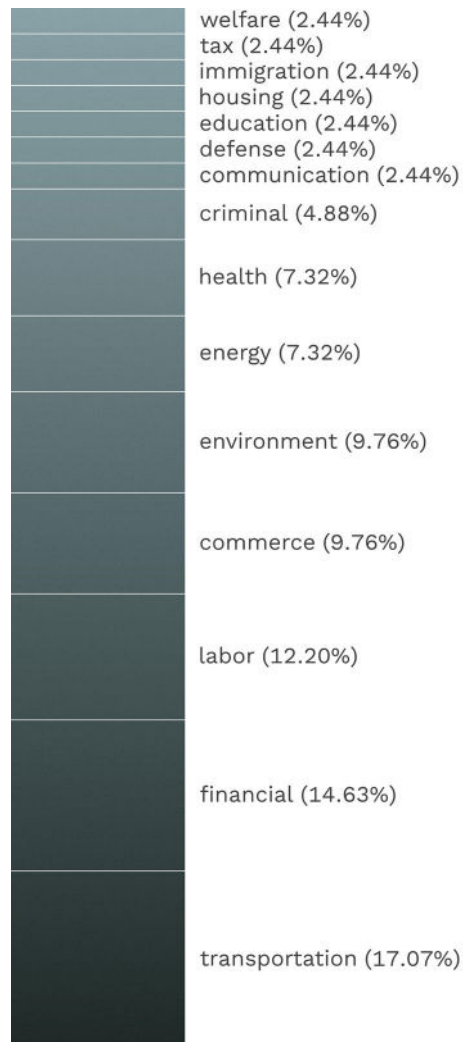


Source: Author's calculations. Chart generated using SPSS Statistics.

Several agencies are listed as “adjudicatory agencies,” rare entities created for the sole purpose of conducting executive adjudication. The Occupational Safety and Health Review Commission (OSHRC), for example, hears cases for the Occupational Safety and Health Administration. Similarly, FMSHRC adjudicates labor-related healthcare cases for DOL, with DOL’s Benefits Review Board sharing responsibility for black lung benefits cases. Another example is OFIA, created through the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 to independently adjudicate cases for several financial regulators.

Next are ALJ transitions based on policy area. This classification helps reveal which issue domains transitory ALJs most frequently address and separates participating agencies based on the types of issues being adjudicated. Figure 2 depicts the proportion of ALJ borrowing by the policy domain of the agency; the sampled agencies adjudicate cases across 15 areas of policy. Transportation agencies occupied the largest portion of entities that collectively borrowed ALJs, followed by financial regulators and labor agencies.

Figure 2. Proportion of ALJ Borrowing by Policy Area



Source: Author's calculations. Chart generated through SPSS Statistics.

Trends in ALJ Borrowing

Two factors contribute to agency borrowing of ALJs: a spike in administrative proceedings and an urgency to decrease caseload backlogs. As explored earlier with HHS and SSA, large agencies often have the capacity to import a substantial number of ALJs from other agencies as the need arises. They use borrowed ALJs

to reinforce the efforts of their internal judges. Yet, simply importing extra help does not translate into a decreased backlog.

The NLRB, another major importer of ALJs, seemed to experience an inverse trend: an increase in backlog or pending cases and a decrease in available ALJs. In fact, in fiscal year (FY) 2017, the NLRB slashed its requested congressional funding in half, after losing 51 of its 90 judges. This led to an increase in pending cases and a substantial drop (44 percent) in overall case decisions between 2011 and 2022.⁴⁷ Over the past 20 years, the NLRB has been struggling with staff shortages and alleged underfunding.⁴⁸ This likely spurred the agency's frequent importation of ALJs (28), which was more than double the ALJs it exported (12).

The NLRB has been importing ALJs since at least the 1970s, when Howard Grossman was borrowed from SSA to help alleviate the NLRB's earlier caseload burden.⁴⁹ To this point, an NLRB historical report reveals that the agency went through a period of desperation when borrowing judges to manage its burgeoning caseload. According to the report, "this limited practice [of ALJ borrowing] appears to have been employed at times during the 1970s and into the 1980s, years when the trial docket facing the Division of Judges was especially heavy."⁵⁰ They went so far as to call select NLRB judges out of retirement to alleviate some of this burden.⁵¹

DOL has maintained a steady level of funding for its ALJs over the last 12 years. Yet, in 2014, it faced delays in adjudicating cases, spurring concerns

47 Refer to NLRB annual budget requests. In FY 2011, NLRB judges rendered 230 decisions, with 43 pending. In FY 2022, they decided only 102 cases, with many more pending. In October 2024, the NLRB's backlog was 288 pending cases, marking a 46 percent increase over 2023 levels. See also National Labor Relations Board, "Union Petitions Filed with NLRB Double Since FY 2021, Up 27% Since FY 2023," news release, October 2024, <https://www.nlr.gov/news-outreach/news-story/union-petitions-filed-with-nlr-double-since-fy-2021-up-27-since-fy-2023>.

48 National Labor Relations Board, "Union Petitions Filed with NLRB Double." According to the news release, "the increased workload on both sides of the Agency comes as the NLRB continues to deal with funding and staffing shortages. In the past two decades, staffing in field offices has shrunk by 50%."

49 Richard J. Linton, *A History of the NLRB Judges Division with Special Emphasis on the Early Years* (Washington, DC: National Labor Relations Board, 2004), 154.

50 Linton, *A History of the NLRB Judges Division*, 144.

51 According to one report, "all indications are that these other judges were 'borrowed' from other Federal agencies, through the Civil Service Commission, at times (generally, after 1960) when the Division was very busy." Linton, *A History of the NLRB Judges Division*, 155.

from Congress and departmental requests for more ALJs.⁵² According to a 2014 letter to the Obama administration, members of Congress called for “action to address budget and staffing cuts in DOL’s Office of Administrative Law Judges (OALJ), which is resulting in untenable delays in adjudicating claims, such as claims under the Black Lung Benefits Act and alleged violations of employment law.”⁵³ The department has more recently requested higher levels of funding (\$70 million-plus in FY 2022) to more quickly process the benefits claims for black lung matters.⁵⁴ This suggests that DOL has long struggled with case backlogs relative to funding demands, reinforcing its efforts to import many of its ALJs from elsewhere. Borrowing transitory ALJs for temporary periods can help alleviate the backlog while allowing the department to issue stipends that are more cost-effective than paying full-time ALJ salaries annually. This may further suggest that an agency’s act of importing ALJs allows it to circumvent congressional underfunding of its administrative law court. In fact, each of the top five agencies bearing the greatest number of transitory ALJs appears to have struggled with notable caseload backlogs.⁵⁵

Another agency that imported ALJs to address case backlogs was the Federal Maritime Commission (FMC). All three of the FMC’s ALJs are transitory, with the two most recently imported judges coming in the years following a major rise in cases before the agency.⁵⁶ Part of this was because the FMC has been short-staffed since the mid-2000s due to a rise in retirements and a flat budget. According to researcher Hannah Story Brown, “like many federal agencies, the number of Commission employees has been waning when it should be waxing.

52 Jim Morris, “White House Seeks to Chip Away at Severe Labor Department Judge Shortage, Case Backlog,” Center for Public Integrity, March 6, 2014, <https://publicintegrity.org/environment/white-house-seeks-to-chip-away-at-severe-labor-department-judge-shortage-case-backlog/>. A key passage reads, “the lawmakers said a total of 11,325 cases were pending in the OALJ in fiscal 2013—nearly double the number from 10 years earlier. They cited an April 2013 memorandum, made public by the Center, from Chief Judge Stephen Purcell to then-Acting Labor Secretary Seth Harris. Purcell wrote that ‘we are fast reaching a point where the productivity of this Office will sustain a significant downturn from which we will not likely recover for years to come.’”

53 *Coal Miners’ Struggle for Justice: How Unethical Legal and Medical Practices Stack the Deck against Black Lung Claimants: Hearing Before the Subcomm. on Emp. and Workplace Safety of the Comm. on Health, Educ., Lab., and Pensions*, 113th Cong. 55–56 (letter to President Barack Obama from Sen. Robert P. Casey, Jr., Sen. John D. Rockefeller IV, Sen. Joe Manchin, Rep. George Miller, Rep. Bobby Scott, and Rep. Joe Courtney).

54 “OALJ requests resources to reduce the timeline for Black Lung decisions from 23 months to 13 months, with corresponding resources in the BRB to support this increase in production.” US Department of Labor, *FY 2022 Department of Labor Budget in Brief*, n.d., 48.

55 These are SSA, HHS, DOL, the NLRB, and the IRS. The IRS is the only agency among the five that imports all its ALJs ad hoc and renders specialized adjudication over an IRS agent’s suitability for employment. Though it is unclear if the IRS faced backlogs in these suitability cases, the agency notably faces backlogs in tax-related processing, which likely factors into a portion of the suitability cases pertaining to an agent’s ability to perform his or her duties.

56 Gary Howard, “FMC Hires New Judge as Caseload Balloons,” *Seatrade Maritime News*, September 27, 2022.

In 1998, the Federal Maritime Commission had 139 full-time employees. By 2006, the Commission had 121 full-time employees, and by 2020, only 111. Likewise, accounting for inflation, its budget has essentially remained flat over the past decade, rising nominally from \$24 million in 2012 to \$27.4 million in 2020.”⁵⁷

Additionally, much of what contributed to the FMC’s recent caseload backup were pandemic-related supply chain issues that made it difficult for US companies to export goods.⁵⁸

Trends in ALJ Lending

One likelihood for agencies exporting ALJs is that the lending agency can help reinforce the ALJ’s professional record. This is to say, ALJs who are loaned to other agencies to obtain a unique set of legal experiences that stationary ALJs lack. This ad hoc experience can be useful for the many ALJs transferred to other agencies, as they can point to experiences adjudicating in separate areas of administrative law.

Regarding the NLRB, the agency’s historical report reveals that ALJ lending was directly motivated by a drop in the annual caseload. The NLRB experienced ebbs and flows of high and low caseloads, with leadership deciding to retain staff when cases were low by lending them to peer agencies. When there were increases in cases, the NLRB borrowed more heavily from other agencies; when the number of cases decreased, they lent more to other agencies. According to the report, “By contrast, in the late 1980s and early 1990s, when the Division’s case load dropped, some of the Division’s judges were loaned to other Federal agencies to help them with their trial dockets while, at the same time, permitting the Division to avoid having to lay off any judges.”⁵⁹

Conclusion

ALJ borrowing represents an important yet overlooked element of agency adjudication, and this research report is the first to systematically track ALJ movement across the federal government. The analysis focuses on interagency exchange—where one agency lends an ALJ to another for a short period of

57 Hannah Story Brown, “Amidst a Record Supply Chain Crisis, What Is the Federal Maritime Commission’s Capacity?,” *Revolving Door Project* (Blog), January 4, 2022, <https://therevolvingdoorproject.org/amidst-a-record-supply-chain-crisis-what-is-the-federal-maritime-commissions-capacity/>.

58 “The pandemic and resulting supply chain congestion in the US has brought a great deal of activity at the FMC over the past two years. Rising detention and demurrage charges, congestion surcharges and freight rates brought allegations of profiteering against container lines as prices for users spiked as service levels plummeted.” Howard, “FMC Hires New Judge as Caseload Balloons.”

59 Linton, *A History of the NLRB Judges Division*, 144.

time—that are often conducted in obscurity and without clear explanation, unreported in the agencies’ budget reports or mentioned on their websites. Such hidden practices lend support to critics of agency adjudication, most notably DOT Judge J. E. Sullivan, who described it as “the hidden judiciary,” one where “ALJs often toil in the shadows of the executive branch agencies for which they preside.”⁶⁰ This first-of-its-kind examination highlights ALJ borrowing across the federal government and underscores notable concerns about its legitimacy in the absence of congressional authorization and presidential authority.

This report estimates that about 28 percent of sampled ALJs move from agency to agency to conduct adjudication. This figure is based on a representative sample of 960 ALJs across 42 agencies that collectively oversee more than 2,000 ALJs. The data show that the agencies possessing the largest tribunals tend to borrow and lend the most ALJs.

ALJ borrowing poses several constitutional concerns that merit further study. First, borrowed ALJs occupy a legal gray area that may insulate them from proper accountability to the president and the heads of their originating agencies. An agency may attempt to protect its transitory ALJs from presidential removal if it relies on the ALJ’s time adjudicating for other agencies as justification. Neither the president nor the appointing agency head, nor the borrowing agency head, can properly control an ALJ if the ALJ temporarily works for a borrowing agency.

Second, certain agencies, such as the IRS, the STB, and NOAA, lack congressionally funded tribunals and any authority to adjudicate using other agencies’ officials. These agencies provide no paper trail for how borrowed ALJs are compensated or from which budgetary item they draw funding. Essentially, they finance borrowed judges in complete obscurity. This undermines Congress’s Article I authority to appropriate funds for specific, stated purposes in annual budgetary requests. This report did not discover any justification in these agencies’ budgets for how transitory ALJs are paid.

Third, the APA does not permit one agency to outsource its quasi-judicial power to another agency through interagency agreements. Such activity risks violating the Constitution’s nondelegation doctrine and the separation of powers. Further research can clarify how ALJ borrowing and lending may be considered unconstitutional. At present, no scholarly publication even briefly discusses ALJ transitions.

60 Jason Schlosberg, “Hon. J. E. Sullivan Administrative Law Judge, US Department of Transportation,” *Federal Lawyer*, July 2015, 46–48. Such criticism in the lack of transparency with agency adjudication comes from DOT ALJ J. E. Sullivan. Sullivan has also sharply criticized her former employer, SSA, for poorly issued administrative decisions.