REVIEWING THE COAST GUARD'S ADMINISTRATIVE LAW SYSTEM

(110–64)

HEARING

BEFORE THE

SUBCOMMITTEE ON
COAST GUARD AND MARITIME TRANSPORTATION

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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July 27, 2007

SUMMARY OF SUBJECT MATTER

TO: Members of the Committee on Transportation and Infrastructure

FROM: Subcommittee on Coast Guard and Maritime Transportation

SUBJECT: Hearing on Reviewing the Coast Guard's Administrative Law System

PURPOSE OF HEARING

The Subcommittee on Coast Guard and Maritime Transportation will meet on Tuesday, July 31 at 10:00 a.m. to receive testimony on the Coast Guard's administrative law system. The hearing has been called to consider whether the policies and procedures currently governing the adjudications conducted under the system are fair to all who appear before it.

BACKGROUND

Overview of Administrative Law

Administrative agencies of the executive branch of the United States federal government are assigned by Congress to conduct rulemakings and to enforce their agency regulations. The body of law that pertains to these activities is called administrative law. The judges who conduct trial type hearings in the rulemaking and adjudicatory processes are called administrative law judges (ALJ). These hearings are generally conducted in enforcement cases, entitlement cases, regulatory cases, and contract cases.

The rules governing evidentiary hearings in the administrative process are separate from the judicial processes followed by judges in the judicial branch and are governed by the Administrative Procedure Act (APA), which was enacted in 1946. Separately, those federal agencies which maintain administrative law systems have generally set forth their own unique procedural rules and regulations within the Code of Federal Regulations. While these rules and regulations can vary widely among executive agencies, all agency procedural rules and regulations must comport with the APA and provide all of the protections required in the APA. These protections include the right to receive notice of proceedings and of the issues

to be considered in proceedings, the right to be represented by counsel, and the right to confront and cross-examine witnesses.

Administrative adjudications are overseen by ALJs. Administrative adjudications do not involve juries – and therefore an ALJ is responsible both for making determinations of fact and for rendering legal decisions.

The appointment of ALJs is also governed by the APA. Unlike all other judges in the United States, ALJs are appointed solely on a merit basis through an assessment process conducted by the Office of Personnel Management. Under revised regulations that took effect on April 19, 2007, applicants for ALJ positions must be attorneys with a minimum of seven years of trial experience and/or administrative law experience involving formal administrative adjudicatory procedures. Based on assessments of experience and other qualifications, applicants are given a ranking and placed on a roster of individuals found to be qualified for ALJ positions. Agencies seeking to appoint an ALJ must then draw from the roster in an order specified by the OPM or seek applications from sitting ALJs working for other federal agencies.

Because ALJs are employees of the agencies on whose cases they rule, specific procedures and policies have been established by the APA to ensure that ALJs remain separate from the influence of other agency personnel. For example, ALJs may not be subjected to performance evaluations and they may not be supervised by any agency personnel involved in investigating or prosecuting the cases that come before the administrative law system. If misconduct is alleged against an ALJ, that charge must be considered by the Merit Systems Protection Board (MSPB).

Decisions rendered by an ALJ may be appealed. The first level of appeal is made to a board or authority within the agency that originated the case. Subsequent appeals may be made through the federal court system.

According to the OPM, as of January 9, 2006, there were approximately 1,400 individuals working as ALJs at 29 separate federal agencies. The single largest ALJ system exists within the Social Security Administration.

Operations of the Coast Guard's Administrative Law System

There are currently seven Coast Guard ALJs – including the Chief ALJ. They hear cases in Baltimore, MD; New Orleans, Louisiana; New York, New York; Norfolk, Virginia; Houston, Texas; Alameda, California; and Seattle, Washington.

The Chief ALJ reports directly to the Commandant of the Coast Guard and advises the Commandant on the administrative law system. According to job descriptions provided by the Coast Guard, the mission of the position is to "administer and coordinate all matters concerning suspension and revocation proceedings against the licenses and documents of seamen and motorboat operators in fulfillment of the Coast Guard's statutory mandate to promote, foster, and maintain public safety of life and property, in the interest of passengers, crews, cargoes, shipowners and the general public."

To that end, the Chief ALJ is responsible for the supervision and administration of the ALJ program. The Chief ALJ is also responsible for providing leadership in developing, implementing, and reviewing hearing program processes and procedures to monitor the overall effectiveness, efficiency, and productivity of the program; he/she also ensures that ALJs are provided with copies of laws, regulations, agency policy statements, and rules of practice that apply to the conduct of their hearing proceedings. The Chief ALJ's leadership responsibilities include reviewing the written decisions and orders of each ALJ to ensure their general compliance with agency rules and procedures and with the APA. The Chief ALJ also has the authority to investigate allegations of improper conduct on the part of administrative law system employees – including ALJs – who are suspected of violating laws, regulations, and agency operating regulations and procedures. Finally, the Chief ALJ also assigns cases and resolves differences among individual judges or other officials concerning the conduct of hearing program operations.

Under the supervision of the Chief ALJ, ALJs are responsible for conducting formal hearings and supervising the disposition of cases as assigned. In addition to hearing cases brought by the Coast Guard under Coast Guard administrative law, Coast Guard ALJs also hear cases from the National Oceanic and Atmospheric Administrative (NOAA), the Bureau of Industry and Security (BIS), and the Transportation Security Administration (TSA). Coast Guard ALJs will handle appeals related to applications for the Transportation Worker Identification Credential following that program's roll-out by TSA later this year.

According to data provided by the Coast Guard, since 1999, a total of 659 cases have been filed by NOAA under NOAA administrative law proceedings with the Coast Guard's docketing center, of which 570 were settled prior to the conduct of a hearing. Of the remaining cases, 3 were eventually withdrawn, 5 received summary decisions, orders denying hearing requests were issued in 3 cases, decisions were issued in 40 cases, and 38 cases are pending.

Similarly, according to data provided by the Coast Guard, since TSA was established, that agency has filed 409 cases in the Coast Guard's docketing center. Orders granting motions for decision (which are used in summary decisions or default cases) were issued in 55 cases, orders dismissing hearing requests were issued in 4 cases, and 200 cases did not proceed to a hearing either because TSA and the respondent reached a settlement or because the respondent requested an informal conference with TSA counsel rather than a hearing before an ALJ. Decisions and orders have been issued in 26 cases. A total of 124 cases remain pending.

Coast Guard Administrative Law Procedures

The Coast Guard brings two types of cases against mariners that are adjudicated by ALJs: suspension and revocation (S & R) cases and Class II civil offenses. S & R cases are those cases in which the Coast Guard alleges mariner misconduct or negligence and seeks either the temporary suspension or the permanent revocation of a mariner's professional credential. Class II civil offenses are those offenses for which civil penalties exceeding $25,000 may be assessed; according to Coast Guard records, only 8 Class II civil offense cases have been heard by Coast Guard ALJs since 1994.

The cases are investigated and prosecuted by investigating officers (IOs) under Coast Guard administrative law regulations. IOs are generally junior officers or warrant officers in the marine safety program but they are generally not lawyers. IOs may receive assistance from Coast Guard legal personnel if they are investigating or presenting a particularly complicated case.

The rules and regulations governing the Coast Guard's administrative law system are provided in 33 CFR Chapter 1 Part 20. The rules currently in force took effect in 1999 and made important modifications to the rules in effect prior to 1999. Prior to 1999, the procedures of Coast Guard administrative adjudications mirrored the Uniform Code of Military Justice and strongly echoed criminal proceedings. In 1999, the procedures were altered to more closely echo civil proceedings.

Among other changes, the 1999 rules set forth pre-hearing discovery rules when previously none were provided; altered the allegation from being known as a "charge sheet" to being identified as a "complaint;" required the respondent to file a written answer to the complaint within 20 days of the issuance of the complaint rather than requiring the ALJ to convene a hearing to receive the mariner's answer to what was then known as a charge; and required that a default motion be filed if a respondent failed to appear at a hearing rather than requiring the conduct of a hearing *in abstentia.*

Further, the 1999 rule changes gave the Coast Guard the right to appeal decisions; previously, that right had been reserved for respondents. Appeals of decisions rendered by Coast Guard ALJs made either by the respondent or by the Coast Guard go first to the Commandant of the Coast Guard for consideration. Either party may then appeal the Commandant's decision to the National Transportation Safety Board (NTSB). Subsequent appeals are lodged with the United States circuit court.

Figures on Administrative Law Cases Brought by the Coast Guard

Provided below are figures on the total number of cases brought before the Coast Guard's administrative law system and on case dispositions since the enactment of the new rules governing the service's administrative law system in 1999. Additional figures are provided on appeals made to the Commandant, the NTSB, and the federal court system. All of these figures are based on data provided by the Coast Guard.

Total Number of Allegations Filed Against Mariners

Between July 1999 and February 2007, the Coast Guard opened 5,684 dockets covering 6,321 allegations charged against mariners. A single docket may include more than one allegation.

Except where otherwise noted, all subsequent figures are based on the number of allegations filed rather than dockets opened. Table 1 below details the total number of allegations filed before the Coast Guard's administrative law system in each year between July 1999 and February 2007.

Table 1: Allegations Filed in the Coast Guard Administrative Law System
(July 1999 through February 2007)

Year	Total Number of Allegations	Alleged Use of Dangerous Drugs	Convictions for Drugs/ DUI/other offenses in other courts	Alleged Incompetence, Misconduct, or Negligence	Alleged Violation of Marine Safety Law
1999	496	319	6	136	35
2000	954	539	21	289	105
2001	926	530	22	270	104
2002	862	521	15	226	100
2003	796	444	19	257	76
2004	765	382	35	248	100
2005	744	336	87	238	83
2006	688	328	47	240	73
2007	90	42	5	32	11
TOTAL	6,321	3,441	257	1,936	687

Disposition of Allegations Filed Against Mariners

There are a number of possible dispositions for the allegations filed in the docketing center.

- **Withdrawn by Coast Guard:** If allegations are withdrawn by the agency, they are classified as withdrawals. If an allegation is withdrawn before answers are filed or if all parties agree to the withdrawal, an ALJ order is not required to affirm the withdrawal. If, however, the case is withdrawn after the respondent has filed a response, an ALJ must issue an order and the order will state whether the case is withdrawn with or without prejudice. Importantly, the majority of withdrawals arise when the respondent enters into a voluntary surrender or voluntary deposit agreement.

- **Administrative Withdrawal:** If an allegation cannot be served on a mariner (because he or she cannot be located), the case may be withdrawn on administrative grounds. These cases may be re-filed if the mariner is later found. Cases that are withdrawn on administrative grounds are never assigned to an ALJ.

- **Default:** If an allegation is served on a mariner but the mariner never files a response, the case is assigned as a default. Cases in default are assigned to ALJs, who must then issue the requested order if the allegation is found to be valid and the allegation was properly served.

- **Settlement:** If the agency and the respondent (mariner) enter a settlement agreement before the mariner enters a pleading, the ALJ reviews the agreement and will issue a consent order if he/she approves the settlement.

- **Admissions:** If the respondent admits to the allegations filed against him/her, the case is classified as an admission. If the ALJ finds the complaint to be valid and the sanction to be appropriate, the ALJ is required to issue an order.

- **Contested:** If the respondent denies an allegation or objects to the proposed sanction, a docket is assigned as a contested case. The disposition of contested cases is discussed in more detail below.

Information on the disposition of the 6,321 allegations identified in Table 1 above is provided in Table 2. Importantly, the dispositions shown in the table below are not one-to-one dispositions for the cases identified in each year in Table 1. Rather, the dispositions recorded in Table 2 are the dispositions achieved in each of the years shown – but they may be resolutions of cases that originated in prior years.

Table 2: Disposition of Allegations Filed in the Coast Guard Administrative Law System

YEAR	Withdrawals	Administrative Withdrawals	Defaults	Settlements	Admissions	Contested Cases	TOTAL
1999	39	53	98	171	49	81	491
2000	77	57	135	403	108	159	939
2001	60	77	131	457	77	119	921
2002	68	59	129	422	58	118	854
2003	46	54	120	374	77	116	787
2004	59	51	92	343	72	141	758
2005	45	81	101	337	58	108	730
2006	26	1	95	290	84	109	605
2007	2	0	0	44	12	6	64
TOTAL	422	433	901	2,841	595	957	6,149

In addition to the dispositions shown in Table 2, 119 allegations are pending an initial answer and are therefore not counted in the Table. Further, 53 allegations docketed by the Coast Guard from 1999 until 2007 involved the temporary suspension of a mariner's license. Such suspensions last for 45 days and do not involve an ALJ.

Regarding the withdrawn cases, the 422 allegations cited above were contained in 382 total dockets. Of those 382 dockets, according to the Coast Guard, 353 were withdrawn without an ALJ order – meaning that they were withdrawn before the mariner filed a response.

Disposition of Contested Cases

The 957 allegations that were contested were contained in 740 dockets. The disposition of these contested cases is detailed in Table 3 below.

Table 3: Disposition of Contested Cases

Action	Total Number of Dockets	Total Number of Allegations
Hearing was held and orders were issued	152	218
Case was settled	326	423
Case was dismissed	131	146
Case defaulted for failure of respondent to appear at hearing	24	26
Respondent admitted allegation prior to the completion of a hearing	11	11
Case still in progress	96	133
TOTAL	740	957

Among the 152 dockets regarding which a hearing was fully completed and an order was issued, the allegations were proven in 93 cases while only some charges on a docket were proven or contested sanctions were reduced in 31 cases. The allegations were not proven in 18 cases. Three cases were dismissed and other dispositions (including the remanding of cases) were reached in 7 cases.

Among the 131 dockets that were dismissed by the ALJ, 45 were dismissed after the mariner voluntarily surrendered his/her credential, 39 were dismissed due to issues with evidence, 13 were dismissed after the mariner accepted a letter of warning, 7 were dismissed because the respondent had no valid credential, and 4 were dismissed on procedural grounds. Other grounds for dismissal were cited in the remaining cases (including settlement agreements or death of the respondent etc.).

Appeals to the Commandant

Since 1999, the Coast Guard has appealed 6 cases to the Commandant following the issuance of an ALJ's ruling. In two cases, the original decisions rendered by the ALJs were affirmed. In one case, the ALJ's decision was affirmed but modified. In three cases, the original decisions of the ALJs were overruled and the cases were remanded back to the administrative law system for further consideration.

Mariners have appealed 37 cases to the Commandant, of which 28 (or 75.6%) were affirmed without modification. One was affirmed but later remanded to the NTSB. Five cases were remanded back to the Coast Guard's administrative law system for further consideration. In one case, the order of the ALJ was affirmed but the sanction was modified. In one case, part of the order was affirmed and part was dismissed. One case was dismissed entirely.

These appeals included 7 cases in which mariners appealed the decision of an ALJ alleging misconduct on the part of the ALJ. Regarding these allegations of misconduct, in one case, the Commandant found that the mariner party did not provide sufficient evidence

to establish bias or pre-judgment of the case on the basis of an alleged *ex parte* communication; the NTSB subsequently reversed the Commandant's decision and remanded the case, finding that even the appearance of bias was sufficient to require re-assignment of the case. In four cases, the Commandant rejected the appeals either because the mariners' arguments were unpersuasive or because ALJ findings were determined by the Commandant to be proper Two cases were remanded for further consideration on the basis of other procedural grounds (and bias allegations were not considered). Aside from the one case noted previously, the NTSB has never overturned a Commandant's decision in any appeal alleging ALJ misconduct.

Appeals to the NTSB

A total of 32 cases have been appealed to the NTSB (including appeals initiated by either the mariner party or the Coast Guard) since that agency was created in 1967. All of these appeals were originated by mariners; no appeals have ever been originated by the Coast Guard. The NTSB affirmed the decisions of the Commandant in 21 of the cases, affirmed the Commandant's decisions but modified the sanctions imposed against mariners in two cases, reversed the Commandant's decision in one case, remanded one case for further consideration, and dismissed 6 appeals either because the appeals were not filed in a timely fashion or because the NTSB felt it did not have jurisdiction over the matter being appealed. One appeal filed with the NTSB was subsequently withdrawn before the NTSB could act on the matter.

Appeals to the Federal Court System

Since 1999, a total of 7 cases have been appealed to federal court (including District Court and the Court of Appeals). One case was reversed and remanded back to the NTSB, which subsequently affirmed the Commandant's decision on the matter. Four cases were dismissed because the federal courts in which the appeals were filed determined that they lacked jurisdiction in the matters. In one case, the court denied the petition for review because the court found substantial evidence to support the ALJ's decision. In one case, while the appeal was pending, the Coast Guard and the mariner party reached a settlement encouraged by the court. The settlement included the return of the mariner's license. Part of the settlement also included an agreement that both parties would ask the federal judge to withdraw her decision finding that the federal court did have jurisdiction over the matter – but the judge refused to withdraw the opinion despite the request. The Coast Guard also provided $10,000 to the respondent in attorney's fees but the decision issued by the ALJ and confirmed by the Commandant was never vacated.

Issues to be Considered During the Hearing

This hearing will examine whether the policies and procedures that govern the Coast Guard's administrative law system comport with the requirements of the APA and ensure that all mariners accused in suspension and revocation cases receive fair hearings. The Subcommittee is aware of allegations of impropriety in the management of the administrative law system, including accusations of improper contact between members of the administrative law system and other Coast Guard personnel, accusations that the Chief ALJ pressured judges to rule in favor of the Coast Guard, and accusations that judges may

have been subjected to hostile work conditions. Additionally, the Subcommittee will examine the application of CFR Part 20, Section 601 pre-hearing discovery regulations during the conduct of administrative adjudications and will examine the impact that the changes in procedural rules made in 1999 have had on the conduct of adjudications.

PREVIOUS COMMITTEE ACTION

The Subcommittee on Coast Guard and Maritime Transportation has never previously convened a hearing on the Coast Guard's administrative law system.

WITNESSES

Rear Admiral Brian Salerno
Director of Inspection and Compliance
United States Coast Guard
Washington, DC

Captain Thomas Sparks
Commanding Officer, Marine Safety Unit
United States Coast Guard
Port Arthur, Texas

Judge Peter A. Fitzpatrick
Former Coast Guard ALJ

Judge Rosemary Denson
Former Coast Guard ALJ

Judge Jeffie Massey
Former Coast Guard ALJ

Professor Abraham Dash
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REVIEW OF THE COAST GUARDS ADMINISTRATIVE LAW SYSTEM

Tuesday, July 31, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2167, Rayburn House Office Building, Hon. Elijah E. Cummings [Chairman of the Subcommittee] presiding.

Mr. CUMMINGS. Ladies and gentlemen, we will call this hearing to order.

Today, the Subcommittee will examine the Coast Guard's administrative law system. This system adjudicates cases in which the Coast Guard personnel allege misconduct or negligence on the part of a mariner and seek the temporary suspension or permanent revocation of a mariner's professional credentials. The Coast Guard fairly emphasizes that these cases are brought against the credential and not against an individual mariner, and that the overriding purpose of these actions is to ensure safety in our Nation's maritime transportation profession.

Safety is a critical goal, and mariners who are unsafe or who use drugs should not be on our Nation's waterways. However, the suspension and revocation of a credential or a license is not a matter that is to be taken lightly in any professional industry. Without a credential, a mariner simply cannot work. Thus, in any administrative hearing, a mariner sees hanging in justice's balance not just a piece of paper, but the ability to support a family, to pay a mortgage and to get ahead in life.

Today's hearing will give our Subcommittee the opportunity to examine whether the policies and procedures governing the conduct of administrative adjudications in the Coast Guard's administrative law system guarantee the fairness of all proceedings to all parties who appear before the system.

A detailed analysis of the 6,321 allegations filed by the Coast Guard against mariners through the administrative law system since 1999 reveals that a total of 3,441, or more than half of the allegations, claim that a mariner had used an illegal drug substance. Just over 30 percent of the allegations claimed incompetence, misconduct, negligence on the part of the mariner, and the remaining cases involve either the alleged violation of a marine safety law or a conviction in another legal proceeding for drug use, a DUI or other offenses. According to the Coast Guard records, of

the 6,321 allegations filed against mariners since 1999, a total of 6,149 have now reached some type of disposition. Just over 46 percent of the allegations were settled between the mariner and the Coast Guard without proceeding to an adjudication. A total of 901 allegations ended in default because a mariner never responded to the allegations while 433 allegations were administratively withdrawn by the Coast Guard because a mariner could not be found to be served with an allegation, and 422 allegations were withdrawn by the Coast Guard either because the allegation did not proceed or, more often, because a mariner voluntarily agreed to surrender a credential.

Of the 6,149 allegations that have reached a disposition, of 957 allegations, only 740 dockets were contested either because a mariner denied an allegation or disputed a proposed sanction. I note that a single docket often contains more than one allegation. Of these 740 contested dockets, ALJs have missed 131, or nearly 18 percent of the cases. A total of 326 dockets, or 44 percent, reached settlement. 152 dockets proceeded to adjudication, and the remaining dockets reached some other disposition or are still in progress. Of the 152 dockets for which an adjudication proceeded to the issuance of an ALJ order, the charges against the mariner were found to be unproven in 18 cases.

Though, the Coast Guard's appeals of four of these cases resulted in three cases being remanded and the modification of one ALJ decision. Of the remaining dockets that proceeded through the adjudication, only some of the allegations on the docket were proven or a contested sanction was reduced in 131 cases while all allegations were proven on 93 dockets, or 61 percent of the cases that proceeded to adjudication.

Now, while these numbers are very interesting, we have to be very careful. Of course, while these numbers give us an overview of the disposition of allegations and dockets, they do not reveal a mariner's motivation in agreeing to a settlement or to explain why some allegations were found to be proven or unproven. Most importantly, these numbers reveal nothing about whether the policies and procedures governing either the management of the entire administrative law system or the conduct of individual adjudications are fair or whether they are fairly applied by the system's Administrative Law Judges. Further, if there are instances of unfairness and propriety, these numbers do not reveal whether they are isolated incidents or proof that an entire system tolerates or even encourages prejudice against one party or the other in the conduct of an adjudicative proceeding.

Unfortunately, allegations of unfairness and impropriety have come to the attention of this Subcommittee. Our hearing will explore the validity of these allegations. Our hearing will also examine whether the procedures in place in the Coast Guard's administrative law system meet the higher standard of preventing even the mere appearance of impropriety or unfairness. Such appearances in any legal system are simply intolerable because they destroy trust in the system, which must be the ultimate protector of individual rights. By the way, this still is the United States of America.

Administrative law is unique because it is a legal system within an executive branch agency, designed to oversee the application of

agency rules and regulations. Further, it is a system in which facts and decisions are concluded not by jury or by peers, but by a single Administrative Law Judge who also has wide latitude in directing the course of the proceedings.

We will hear today from three individuals who have borne the responsibility of adjudicating administrative proceedings in the United States' Coast Guard's administrative law system. We will also hear from a witness who brings years of experience in representing mariners before the Coast Guard administrative law system. Another witness is Professor Abraham Dash, Professor of Law, Emeritus, of the University of Maryland School of Law, from which I proudly graduated. Although he did not teach me, I wish he had. He brings decades of experience, studying and teaching law to generations of students. The Coast Guard has sent two senior officers to discuss the management of its administrative law system, and we also look forward to hearing from them.

Ladies and gentlemen, the very foundation of the entire American system of justice is the right to a fair hearing and to due process in any manner involving the law. These rights are sacred in this Nation. As a lawyer and as an officer of the court, I share the duty of those sworn to uphold these rights. More importantly, as Members of Congress, the Members of our Subcommittee share the duty of ensuring that all executive branch agencies treat all citizens fairly and impose sanctions against any individual only when an administrative proceeding has been fairly conducted, provides due process and all evidence has been heard.

I emphasize that we will not be examining individual cases, whether opened or closed, in today's hearing. The adjudication of administrative cases is properly left to the administrative law proceedings, and we honor that principle today. Rather, our task today is to ensure that the scales of Coast Guard justice can be trusted to fairly balance the legitimate safety concerns of the Coast Guard with the rights of mariners.

With that, I look forward to the testimony of all of our witnesses. I thank all of you for being here today.

Now we will hear from our distinguished Ranking Member, Mr. LaTourette, and on the record as I recognize you, Mr. LaTourette, I want to, again, thank you for working so closely with me on these matters but, just as importantly, the vote that we will take today with regard to Deep Water. I want to thank you again for your cooperation, and I really appreciate it.

Mr. LaTourette.

Mr. LATOURETTE. Thank you for yielding, Mr. Chairman. I want to respond in kind to your remarks.

I apologize for being so brief last night on the floor, but we had some people who were pretty antsy to vote, but clearly, your leadership on the Deep Water bill and the Coast Guard reauthorization were done in a truly bipartisan way, and it is a pleasure to serve as your Ranking Member on this Subcommittee.

I want to thank you, Mr. Chairman, for holding this hearing today, and I also want to thank you for what I consider to be a very measured opening statement, because what brings us here today—I have to tell you just a little bit of background. I began my career as a public defender, and I stopped being a public defender be-

cause, when you are a public defender, the judges do not like you; the prosecutor does not like you, and your clients do not like you. So I then switched, and I became the prosecuting attorney in my town before my election to Congress, so I have seen the justice system from both sides, and I am concerned that the allegations that I expect to be raised today are going to suggest that the ALJ system within the Coast Guard is somehow fixed in favor of the Coast Guard and against those who seek redress, and that is troubling to me as a lawyer and as an officer of the court, as I am sure it is troubling to you.

When we had a hearing a couple of weeks ago, I listened to you talk about a Baltimore Sun story, and I did not know what it was because I do not subscribe to the Baltimore Sun because, quite frankly, I am from Cleveland, and I am still mad about their stealing the Cleveland Browns.

But I did read the story, and the story is alarming, and it is alarming because it claims in its opening salvo that, out of 6,300 cases, in only 14 cases did the mariners prevail. Now, that is a startling number, and I will tell you, as a prosecuting attorney, when I indicted somebody, they were most likely guilty, and so, when we would go to trial, it does not surprise me, when the article talks about the DOJ system, where 9 to 1 is the conviction rate. I get that, and I think that that is reasonable and that it is probably uniform across the system.

The problem with the Baltimore Sun article is that it does not appear to be true, and I think the Chairman, in his opening statement, pretty well laid that out. Of the 6,321 cases, only 957 were contested, and I will get down to the bottom there. 45 percent were settled. In 9 percent, the mariner admitted the misconduct. 7 percent were withdrawn, and in 7 percent, they were unable to find the person, and so they did not serve the documents. It is my understanding from reviewing the documents that only 218 of these 6,321 actually got to in Administrative Law Judge's desk, and of those, 124 were proven. That is 82 percent, which is below the 90 percent that you would find at the Department of Justice.

The other thing that concerns me is that there are allegations in the article from former Administrative Law Judges about ex parte communications and hearings that took place, but I do not find anybody on today's witness list who was at those meetings, and so I would like to submit and ask unanimous consent to submit for the record a memorandum prepared on 7 March 2005 that details the meeting in New Orleans. Just as a pertinent part, before the meeting started, according to this document, I understand there might be somebody named Jordan in the audience, and I understand he was at the meeting, and so, if we are going to get into this meeting, perhaps we could ask Mr. Jordan to tell us what really happened at the meeting because he was there. It specifically says that they laid ground rules that they were going to be prohibited from having any ex parte communications.

Now, you know, Mr. Chairman, ex parte communications are horrible, and they are cause for recusal and dismissal and everything else, but if that did not take place, I hope that we are not going to hear from witnesses who claim that it did.

Then, secondly, as to a meeting that took place in Baltimore on a memorandum prepared on 11 April 2005, I would ask unanimous consent that those be submitted for the record.

Mr. CUMMINGS. Without objection, so ordered.

Mr. LATOURETTE. Then also laced in the article is this whole business about hemp oil and marijuana. The Chairman correctly points out that most of these cases deal with substance abuse, and I would hope that someone could explain to me why—and I think there is an allegation and some testimony that this Chief Judge Ingolia, who is not going to be here today, circulated some secret memo about you are not going to take in evidence on hemp oil. Well, I have the CFR, 49 CFR 40.293, that says the DOT regulations specifically directs that you may not take into consideration in any way statements by the employee that attempt to mitigate the seriousness of the violation related to the use of hemp oil, medical marijuana, contact positives, poppy seed ingestion or job stress.

So, again, if you read the Baltimore Sun article, it is like this chief judge circulated some secret memo to deny a defense when, I think, the Code of Federal Regulations instructs the DOT operations to not consider it. I can remember it was a big thing for guys who got DUIs, when I was the prosecutor, that they would like drink Listerine and then pop some stuff or say they were diabetics, and so I do not know whether that is going on with hemp oil or not, but the allegation in the article is that this chief judge was denying people their rights because of the use of hemp oil when, in fact, DOT regulations say that you cannot consider it.

So I would hope, depending upon what comes up at this hearing, that the Chairman would consider having an additional hearing where former ALJ Lawson, who is the only person quoted in the Baltimore Sun article that appears to say anything nice about the ALJ system—and Brudzinsky, Ingolia and McKenna, together with Mr. Jordan and others, who were participants at the meeting down in New Orleans—so we can get a truly accurate picture. I will tell you that, if this system is slanted against mariners, I will join the Chairman to fix it, but I do have some questions as to how this article was generated, and I have some questions about the allegations contained in it.

I thank the Chairman for the hearing, and I look forward to it.

Mr. CUMMINGS. I want to thank the gentleman for his opening statement. Let me be very abundantly clear.

I think that you were very kind, and you were very accurate when you talked about my measured opening statement. I am not so much concerned about the numbers. I am concerned more about the allegations, and I think that we have to—whenever these kinds of situations arise, I think, preliminarily, we have to look into them.

Let me say to Mr. LaTourette that there has been no issue that we have dealt with—and we have dealt with many on this Committee in the last 7 months—that has gotten more of a response than this one from the mariner community.

Again, as you well know, I approach these hearings from a very balanced standpoint, and we go where the facts lead. As far as the February 2005 meeting, we asked the Coast Guard to send us some folks who could address those issues. We would have loved to have

had them, but they did not do that. So, with regard to follow-up, you know I do not mind holding hearings. As I have said many times, when it comes to the Coast Guard, I will have a hearing every day to make sure that it is the very best organization that it can be.

So one of the other problems that we face is that there is an ongoing DOJ—there are ongoing cases, and so there were some issues, I think, where they did not want—that maybe the Coast Guard did not want to send certain people, and certain people were just—it would just interfere with those cases, and so we were trying to strike a balance, but I assure you that I will work very closely to bring anybody before this Subcommittee and the Committee who can shed light on this situation because, in the end—I think the last thing you said is the thing that is one of the main reasons why I have so much respect for you, and that is that you said that if you find that there is unfairness that you, too, want to stamp it out. If there is none, then we are fine. We will just move on. So that is why we hold the hearing today.

With that, we are very pleased to have with us Representative Walter Jones, who has asked to address the Subcommittee for 5 minutes, and I want to thank Representative Jones for being here. He is a Member of the Full Committee, and he is someone who I have just a tremendous amount of respect for, and I want to thank you for being with us. I was thinking about Armed Services. He and I sit on Armed Services together, and I know that he is a man of just tremendous integrity, and I am very, very interested to and I know our Committee is very interested to hear what you have to say.

Thank you very much.

Mr. JONES. Mr. Chairman, first, thank you for those very kind remarks. To you and to the Ranking Member—Mr. LaTourette—and to the Committee Members who are here today, I thank you for holding this hearing and for allowing me to make a very brief statement, and I want to start by quoting Thomas Jefferson, and this is his quote:

"The most sacred of the duties of a government is to do equal and impartial justice to all citizens."

Sadly, a recent Baltimore Sun investigation helped to reveal that the U.S. Government and specifically the Coast Guard's Administrative Law Judge system is denying mariners and fishermen the justice they deserve. The Sun's investigation confirmed what watermen in my eastern North Carolina district already know; standing up for your innocence in the Coast Guard court system is all but useless because the deck is so hopelessly stacked against you.

The Sun found that the Coast Guard prosecutors have a 40-to-1 success rate. Faced with the near certain odds of a guilty verdict and a steep penalty, innocent mariners still have no choice but to settle with the Coast Guard even if settling would do great damage to their reputations, to their careers, and to their ability to provide for their families.

The Sun also uncovered other alleged improprieties and procedural inequities that, if true, help explain why mariners are so unsuccessful in Coast Guard courts. These allegations include the

Chief Administrative Law Judge pressuring judges to rule in favor of the Coast Guard—these are allegations, I admit, but thank you for holding this hearing—improper contact between members of the Coast Guard's ALJ system and Coast Guard personnel regarding open cases, rulings being predetermined by judicial policies, circulated privately by the chief justice and the Coast Guard's Administrative Law Judge's repeated denials of defendants' requests for evidence against them.

They are allegations, but as you said, Mr. Chairman, your comment was allegations need to be disproven if they are not true. Mr. Chairman, I cannot tell you how pleased I am that this Subcommittee is holding this hearing today. You have a symbol, a distinguished panel of witnesses, and I look forward to their testimony. But with your indulgence, I believe the Subcommittee would also benefit from hearing from some of those most affected by the Coast Guard court system, the watermen themselves.

To that end, I would ask unanimous consent to include in the record a statement from Sean McKeon, President of the North Carolina Fisherman's Association. Mr. McKeon outlines the experiences that many North Carolina commercial fisherman have had with the Coast Guard courts, experiences which are disturbingly similar to those revealed by the Baltimore Sun.

With that, Mr. Chairman, I ask that I might submit that for unanimous consent.

Mr. CUMMINGS. Without objection, so ordered.

Mr. JONES. Mr. Chairman, with that, I want to thank you again for giving me these few minutes to make this presentation and to thank you and this Committee because, when it all comes down, it is exactly what Thomas Jefferson said, ″equal under the law for all.″

So, with that, I yield back the balance of my time.

Mr. CUMMINGS. Representative Jones, let me just say this—and I will make our Subcommittee Ranking Member aware of this also.

First of all, thank you for the statement. Is it Mr. McKeon?

Mr. JONES. Yes, sir.

Mr. CUMMINGS. One of the things that we found in our efforts to pull together this hearing is that there were people in the mariner community who were basically afraid to testify.

Mr. JONES. I understand.

Mr. CUMMINGS. Afraid. That is very, very alarming to you as a Member, to all of us as Members of Congress. They were fearful of retaliation in some kind of way, and I am going to—and we have got another hearing coming up on Thursday with regard to marine safety, and we had some issues with the same kind of problem. So we appreciate Mr. McKeon's statement, and we appreciate you.

Do you have any questions?

Mr. LATOURETTE. I do not have any questions. I just want to make an observation.

Congressman Jones is my classmate from 1994, and over these last 13 years, I have the greatest admiration and respect for Congressman Jones and some very principled positions he has taken during his career.

I would just say to my friend that one of the things that concerns me, as I attempted in my opening remarks to go through, is the

fact that the Sun article is not correct when it comes to the 40 to 1, but the other thing that concerns me, again from my background as a prosecuting attorney, is that I am familiar with people being sort of whipsawed or forced to take pleas or to reach settlements that they do not normally want to do, and I think that that can be just as pernicious and obnoxious as a trial or a proceeding that is not fair.

I, again, went to the Code of Federal Regulations, and I just want the gentleman to know that at least 45 percent of the cases that are settled require the person who has the charges filed against him to make an admission of all jurisdictional facts, so they have to say that the charges are true before they can enter into a settlement with the Coast Guard for presentation to a judge.

Now, I am also familiar—we used to have something called an ″Alford plea″ where the defendant comes in, and he says, ″I did not do this,″ but it is the difference between 5 years and 10 years, and so I will take the 5. If that is what is going on, I will tell you, Mr. Jones and the Chairman, that that is wrong, too, but I do hope that this hearing and our additional investigation gets into this notion that 45 percent of the cases are settled, but in those settlements, the person has to admit the facts brought against him or her by the Coast Guard.

I thank the Chair and I yield back.

Mr. JONES. Mr. Chairman, again, I close by saying thank you to you and to Mr. LaTourette. I think this is a very, very important hearing, and I thank you very much for the opportunity to speak.

Mr. CUMMINGS. Representative Jones, we thank you. Thank you very much.

We will now bring forth our first panel of witnesses. We will have two panels of witnesses. The first panel will be Judge Peter Fitzpatrick, a former Coast Guard Administrative Law Judge; Judge Rosemary Denson, a former Coast Guard Administrative Law Judge; Judge Jeffie Massey, a former Coast Guard Administrative Law Judge; Professor Abraham Dash, Professor Emeritus at the University of Maryland School of Law; and Mr. William Hewig, Attorney At Law and Principal with the firm of Kopelman and Paige, P.C. in Boston, Massachusetts.

TESTIMONIES OF JUDGE PETER FITZPATRICK, FORMER COAST GUARD ADMINISTRATIVE LAW JUDGE; JUDGE ROSEMARY DENSON, FORMER COAST GUARD ADMINISTRATIVE LAW JUDGE; JUDGE JEFFIE MASSEY, FORMER COAST GUARD ADMINISTRATIVE LAW JUDGE; PROFESSOR ABRAHAM DASH, PROFESSOR EMERITUS, UNIVERSITY OF MARYLAND SCHOOL OF LAW; AND WILLIAM HEWIG, ATTORNEY AT LAW AND PRINCIPAL, KOPELMAN AND PAIGE, P.C. BOSTON, MASSACHUSETTS

Mr. CUMMINGS. I want to again thank all of you for being here today. We will ask you to make 5-minute statements. Keep in mind that we have your written testimony, and you can basically summarize your statements, if you will, and then we will go into the questioning. We will hear from you in the order that you are sitting.

So, therefore, Mr. Fitzpatrick, please.

Judge FITZPATRICK. Thank you, Mr. Chairman.

My name is Peter Fitzpatrick, and I retired as a Coast Guard Administrative Law Judge, after 27 years of service, on January 3rd of this year.

I want to say at the outset that, during the 27 years as a Coast Guard Administrative Law Judge in Norfolk, Virginia, no one, no chief judge—the present chief judge or the former chief judge—ever directed, pressured or ordered me to decide any case for either side. In addition to that, no district commander, no investigating officer and no captain of the port has ever told me how to decide a case. That allegation in the Baltimore Sun is absolutely erroneous as far as it goes for me in Norfolk. I am a very independent person, and so are the other Coast Guard judges. I cannot imagine someone like Judge Boggs, after 50 years of service in New Orleans, ever being told by anybody to do anything. That is the first point I want to make.

Secondly, I found that article in the Baltimore Sun to be yellow journalism at its worst. I have never seen such an attempt to tear down the reputation of the chief judge of the Coast Guard, who I find to be a man of the highest integrity, a war hero who fought in the Second World War and in the Korean War. He is a man of the utmost and highest integrity and one who I respect as much as anyone I know. Never would he ever—in fact, at every meeting we ever had he was adamant in making sure that none of his judges had ex parte communications—that was a big issue, and it was a constant one—but more than that, as to the way in which he supervises and fills out his role as Administrative Law Judge, I had very little contact with the chief judge on a weekly basis.

In fact, I would not hear from Washington for 3 or 4 months at a time. I would contact the staff attorneys who might be working for me as we were doing cases, but there was very little contact with the chief judge's office. In fact, at one point, it was rather frustrating to me, and I asked him. ″listen, would you mind if I put together a monthly meeting in which the judges could talk about issues of their mutual interest.″ he said, ″Yes,″ and we did that for a while, but it was really sporadic, and it did not go any place.

I submit to you that there is a big difference between 1980, when I began, and 1991—in that 11-year period under the former chief judge—and the present period between 1991 and the present. This chief judge has done a great job with that program, and the last thing on earth we have been encouraged to do or even—we would be criticized severely if we denied the rights of a respondent in a hearing.

In every hearing I have I am fully aware of exactly how much this means to the individual. The most difficult and painful cases we have had are the drug cases because you can have someone who is a competent mariner who goes awry with the use of dangerous drugs, and we do not have much choice when it comes to one of those cases. If, in fact, it is proved with a testing process that he is the user of dangerous drugs, we must revoke unless under the statute it can be showed he is cured. When I started this job, the Coast Guard had a zero tolerance policy with respect to drugs. Myself, Judge Boggs and Judge Hanrahan in Jacksonville had a lot to do with developing the cure exception that is in the statute, and

we would send our mariners to rehabilitation programs and stuff like that so that they could then show that they were cured and get back their licenses.

The Coast Guard started out with a zero tolerance policy. So, as a result of our efforts as judges in the field, that changed, and today, of those settlements that you hear about, almost every case of drug testing is generally a settlement. It is a settlement where the individual goes through a rehabilitation program, takes unannounced drug testing during the period of time and takes courses, and then if he can show he has distanced himself for a year, he can go back to sea one time. If he does it again, then in my estimation, he should not go back to sea, but it is Congress that put that directive to us as judges. They put it to the Coast Guard. The Coast Guard, in its regulations, declares that, if an individual is shown to be the user of dangerous drugs, his document must be revoked.

Mr. CUMMINGS. Thank you very much, Mr. Fitzpatrick.

Ms. Denson.

Judge DENSON. Good morning, Mr. Chairman and Members of the Committee. My time period with the Coast Guard as an Administrative Law Judge was from the period of 1982 to 1996. I can speak for that period of time. I know there have been changes made since then that I might not be aware of, but I did have some experiences in the Coast Guard that I thought were less than appropriate that should not be existing in a program like the Administrative Law Judge program that is supposed to provide fair and impartial hearings to our Merchant Mariners. Part of that existed with the internal workings of the program.

I had experiences—there were three chief judges that I served under, one of them Judge Chatterton, the second Judge Boggs, Archie Boggs, and Judge Joseph Ingolia. My comments are not made in regard to Judge Boggs because I never had experiences with Judge Boggs that I thought were inappropriate and in an inappropriate environment for a judge to be operating under.

With the first chief judge, I found that there was intimidation and isolation if you did not go along with the program. As far as my deciding a case one way or another, I was not influenced by this type of intimidation that I received, but nevertheless—and I can say that more towards Judge Chatterton than Judge Ingolia—there were letters written to embarrass me about a case that I might have been handling that he had never reviewed or who was never even present during the hearing, who was telling me to comport myself in a certain way because a disgruntled attorney had sent a letter, and the chief judge never called me; he never spoke to me; he just wrote a letter. This letter I received after a year when I was, really, in literal isolation from him because of some clerical leave that I had given my legal assistant. I was put on a bad list, I guess you could say, and there was no communication. It was this type of behavior.

Then the most significant was not assigning me cases to hear, and that does not bode well for the following of the APA and the administering of justice in the rotational assignments of cases. The objective I found out later from Admiral Nelson of the Coast Guard at the time and Admiral Lust, who was the Chief of Staff—they

told me that they were in the process of shrinking my caseload because of the desire of the then-chief judge to eliminate my position with the Coast Guard. That happened back in the 1980s. Then subsequent to that time after Judge Ingolia came on board, there was another process that gradually grew where there was a shrinking of my caseload and, eventually, a recommendation that my office be closed and that I be eliminated. This type of behavior, to me, was a setup to get rid of me on two separate occasions. I do not know what was not attractive about having me there, but it was done improperly.

The final thing that was done was a RIF, and a ″RIF″ is a Reduction in Force in the government. The Coast Guard Administrative Law Judge Program happens to be a headquarters unit, and the Commandant instructions provides how a RIF should be done with the headquarters unit, and that was not followed by Chief Judge Ingolia at the time because, if it is a headquarters unit, your RIF competitive area is nationwide. That means I would have been in competition with all of the other judges. However, it was decided by Judge Ingolia that my competitive area was St. Louis where I served as a judge in the surrounding areas, and there were no other Coast Guard ALJs that I had competition with, and I was, therefore, eliminated. This is commonly known as a designer RIF, and it is used against veterans.

So, if veterans are in a particular area of competition with no one to compete against, you can get rid of a veteran, and that was done to me at that time when they got rid of me in 1996, but this just led up, I mean, there were many things that led up to this type of behavior, to this conclusion, I should say.

As I said, my caseload was shrunk, and even when I asked for cases, they were not given to me. Cases were given to judges who were like 800 or 900 miles away when I was 300 miles away. When I was in St. Louis, a Chicago case up came up, and it was not provided me to hear that to keep my caseload going. I did sense what I was doing, and when I had that situation and that feeling that I am insecure in my position, that does not bode well for my sitting and being able to concentrate on my work in deciding the cases. However, I felt I worked very hard on my cases, and I did not show favor towards either side, and I thought I wrote a well-crafted decision and order.

I also asked for assistance, for law clerks to assist me, which were provided to the other judges and were never provided to me. I do not have answers to why those questions happened. I am sure the Coast Guard chief judge has answers for that, but I was in a work environment that was not healthy, and I also retired under a medical disability because life is more important than putting up with that kind of behavior.

So, as far as the seamen's getting a fair hearing, I did my very best in every single case to give them a fair hearing. However, there were outside influences that tried to direct against me to work in an environment where I do not think I worked up to my capabilities but where I could have, not that they did not get fair hearings.

Mr. CUMMINGS. Thank you very much.

Ms. Massey.

Judge MASSEY. Mr. Chairman, Mr. LaTourette and Members of the Committee, thank you for the opportunity to contribute information to your investigation.

For a moment, let me ask you to imagine that you are a mariner living in Southern Mississippi. You are a high school graduate, and you have worked as a crewman on a vessel that takes supplies to oil rigs in the Gulf of Mexico. You have been employed by various companies in the last 10 years, but you have never done any other type of work, and you have no training to do any other type of work. It is 1:00 p.m. in the afternoon, and you are sitting in the upstairs hall of a regional Coast Guard facility, the same facility where the investigating officer you met with 6 months ago has his office.

It was then that he served you with a copy of a complaint that alleged you had been intoxicated on board the vessel you last worked on, and while intoxicated, you assaulted another crew member. When your vessel docked after this incident, you were informed by the company's Regional Employee Relations Specialist that you were being fired because of the allegations, and they had to report the alleged incident to the U.S. Coast Guard. When you met with the investigating officer, he took your mariner's credentials from you. You have been out of work for 6 months. Although the investigating officer explained to you that you had the right to an attorney to represent you at a hearing, you cannot afford an attorney. You feel, if you just tell your side of the story, any reasonable person will know that the charges are not true. You believe that the Coast Guard will have several crew members present to testify because you know the Coast Guard took statements from them. They all know what really happened. When you received a witness list from the Coast Guard just 2 weeks before your hearing, you see that the names of all of the crew members they interviewed are not on there. You do not understand that this means that the Coast Guard does not intend to call these men as witnesses. There are all sorts of uniform Coast Guard employees milling about. After about 15 minutes, a man comes up the stairs, accompanied by the I.O. you met with and two other uniformed U.S. Coast Guard employees. They are laughing and talking and paying no attention to you. They all go into a room down the hall, a room you are summoned into in a few minutes.

To your surprise, sitting on the bench is the man who is just laughing and talking with the Coast Guard employees. None of the crew members who you know witnessed the incident are present. The only people there are your former employer's Regional Employee Relations Specialist and the crew member you had the fight with. The hearing is over in less than 30 minutes. The crew member who you had the fight with testified that you were intoxicated and that you attacked him for no reason. The employee specialist testifies that he received a report of the incident, took you off the boat because that was company policy and informed you that you were fired. You testify that you were not intoxicated, that the other crew member had been drinking, and he attacked you. You were only defending yourself. You also testify that this crew member had it in for you because a former girlfriend of his had started dating you. You know but do not say that this guy is also a cousin of

someone's who is an executive in the company you worked for. You do not mention it because you do not know it is important, and no one asks you.

You tell the judge that there were other witnesses to the incident, but he tells you that, if you did not get them to the hearing, then he was not going to hear their testimony today because today was your hearing date and your only chance to present your evidence. Before you really understand what is happening to you, the judge says your license is suspended for 6 months.

I hope that this scenario does not sound incredible or unlikely to the Committee Members because, based on my experience of the Coast Guard, this scenario is representative of past hearings, the type of hearings that have gone on for years at the Coast Guard. I also hope that the Committee Members understand that I am here today only because I believe the suspension and revocation hearing process at the Coast Guard is in violation of its own regulations and of all the basic tenets of due process.

Despite the personal attacks and disrespectful environment I was subjected to while at the Coast Guard, my appearance here today has nothing to do with me, personally. What has been happening to the mariners who have been forced to face us in our proceedings without the protections guaranteed by law is the only thing that matters.

I welcome the questions of the Committee Members.

Mr. CUMMINGS. Thank you very much.

Professor Dash.

Mr. DASH. Thank you, Mr. Chairman.

My name is Abraham Alan Dash. I am an Emeritus Professor of Law at the University of Maryland School of Law where I have taught admin law for the past 30 years. I am present today because the law school wanted to extend all courtesies to this Committee, particularly to its Chairman, one of our former graduates. I am here myself because there were two of us who teach admin law who were available this summer, and I lost the toss, so I hope that establishes the fact that I am completely objective here at this hearing.

Now, much of what I will say in my statement I am pretty sure all of you are familiar with, but for the record, the Federal APA was passed in 1946, and this statute was an attempt to correct the due process problems of that time. There were no standard procedures of agencies. Each agency, more or less, did what they wanted for an adjudication or for a rulemaking.

Now, the adjudication sections of the APA are, obviously, the most relevant here. I would note the adjudications under the APA are reserved only for those agencies whose statutes require a hearing on the record. Now, the reason I note it is because, when an APA hearing is triggered, it is because Congress intended to have the full panoply of due process rights for that particular adjudication.

Now, the APA hearings, of course, go way beyond any requirements of the fifth amendment of due process. They are loaded. Sometimes they are compared to a Federal District Court non jury trial.

I notice that it is apparent that there were three areas of procedural due process of the APA that are relevant to this hearing. One is the independence and impartiality of the factfinder, or the, i.e., Administrative Law Judge; ex parte contacts with the factfinder, again the Administrative Law Judge; and the discovery for respondents in Coast Guard adjudications.

Now, on independence and impartiality, in the 1970s, there was a complaint that the then hearing examiners at the time were not as objective or independent as they should be. Congress held hearings, and there were issues coming up of perhaps having an Administrative Law Judge corps or even a U.S. administrative court. The compromise in Congress was to change the name of the hearing examiner to Administrative Law Judges, and it was not any simple change in title. It was the clear intent of Congress to maintain their independence. I will also note that the pay of ALJs is set by the Office of Personnel Management, and the discipline of ALJs is entrusted to the Merit Systems Protection Board and, of course, not to the individual agencies.

As to ex parte contacts with ALJs, I do not think I would waste the time of the Committee. It is so obvious that ex parte contacts with a fact finder in a pending case is definitely a denial of due process.

Discovery. The APA says very little about discovery in agency proceedings. Agencies are authorized to issue subpoenas, of course, by the parties on request. They are also authorized to permit depositions be taken. Now, the Attorney General's manual, when they first interpreted the APA in 1947, did stress that the party should be given the same access to discovery as the agency, which, in all fairness, is difficult to do because agencies have a lot of vesicatory powers before they ever bring a charge. However, agencies do differ in the types of discovery permitted.

There are some who use the liberal discovery rules of the Federal Rules of Civil Procedure. Others are more limited. Of course, there is discretion left with the Administrative Law Judge because each case is separate, and discovery can very much be dependent on the nature of the parties and on the intricacies and the problems, obviously, of the case, itself. There is also, of course, a basic due process requirement for discovery so respondents can defend themselves.

I would also note, before I close, that I have a great respect for Administrative Law Judges. I have had the honor of lecturing at the National Judicial College in Reno to ALJs. I have also lectured to some of the agencies and to their ALJs. I would note to the Committee—I am pretty sure you are aware of it—in some agencies, for an ALJ, the requirements are more strict than to be a Federal District Court judge. So they deserve all respect that could be given to them.

In conclusion, of course, I am available here for any assistance I may give the Committee, and will answer any questions that I can.

Thank you, sir.

Mr. CUMMINGS. Thank you very much.

Mr.— would you pronounce your name for me.

Mr. HEWIG. It is ″Hue-wig,″ Mr. Chairman.

Mr. CUMMINGS. ″Hue-wig.″ I just wanted to make sure I got it right.

Mr. Hewig.

Mr. HEWIG. Thank you, Mr. Chairman, the Ranking Member and Members of the Subcommittee. My name is William Hewig from the Boston, Massachusetts law firm of Kopelman and Paige.

My written statement discusses two cases from my recent experience, and I will not review the details of those cases here with you now other than to say that they illustrate very well two of the main themes in Judge Massey's memoranda—apparent bias on the part of some ALJs in favor of the Coast Guard and the disregard of regulations that would permit discovery. The lessons from these cases present three policy implications that I would respectfully put before you now.

First, ALJs for license, suspension and revocation of Coast Guard actions must be independent, truly independent. Judge Massey's information detailed what appeared to be possibly extensive networks of ex parte communications between the Coast Guard and the ALJs. If such an arrangement is, in fact, true, it should not be surprising when apparent improper influence and interference become inevitable features of the system, itself.

I urge the Subcommittee to reform the procedures for adjudicating maritime license and document actions along the lines employed by the FAA, the Federal Aviation Administration. There, when the FAA makes a civil penalty or a licensing decision, the adjudication is referred outside the agency to an ALJ and to the National Transportation Safety Board. Such a reform would serve the important public policy benefit of benefiting not only mariners, but also the Coast Guard and the ALJs, themselves, by reaffirming the integrity of a system currently subject to widespread disrespect and skepticism.

Secondly, some limited discovery should be granted as of right. Judge Massey's information essentially showed that the 1998 rule amendments made to permit discovery were, instead, being promoted by the Coast Guard as a way to deny discovery. Judge Massey correctly recognized the connection between discovery and judicial economy. In my experience, discovery is the catalyst of settlement, and settlements serve the important public policy of judicial economy. I urge the Subcommittee to consider amending the regulations to provide some form of limited discovery in S&R proceedings as of right.

Third, in science and medicine, there are no absolutes. Judge Massey's information contained recurring references to a prevailing attitude within the agency that the Coast Guard is always right. We saw, in the first case I discussed with you in my written statement, the McDonald case that the Coast Guard was wrong about their science. That was a mistake that cost the taxpayers as well as the respondent thousands and thousands of dollars. If the Supreme Court can recognize that scientific conclusions are subject to perpetual revision, then I would respectfully submit that the Coast Guard must do the same.

Where a legal outcome is, by regulation, determined by scientific or medical information or measurement, the evidence or measurement should never be absolute. It should always be made a rebut-

table presumption to allow a case-by-case determination. Had that been the case in the McDonald matter, thousands of dollars and 3, 4, 5 years of time might well have been saved. This would serve the important public policy goal of fairness to mariners as the McDonald case clearly showed.

In conclusion, our mariners, as American citizens, have the right to expect that the public officials who preside over their affairs and, in so doing, govern their livelihoods will do so with honesty, integrity and respect for the laws and for the constitution of their land and our land, and that, above all, is the most important public policy goal that Judge Massey's experience, as well as my own, have to respectfully commend to your care.

Members of the Committee, thank you for hearing me.

Mr. CUMMINGS. Thank you very much.

Let me thank all of you for your testimony, and let me say from the outset that, as I was sitting here, listening to the testimony, particularly that of Ms. Denson and of Ms. Massey, I realize that so often when we sit in these hearings there is a presumption that somebody has a personal gripe, and I think we have to be very careful with that because, as I was saying to Mr. LaTourette a little bit earlier, we have got to look at all of these allegations and try to separate them and get to the bottom line because the bottom line is justice. If something is systemic, if something is an aberration, you know, we have got to look at those kinds of things, and so I am going to.

For my first round of questions, I want to go to you, Professor Dash.

Mr. DASH. Yes, sir.

Mr. CUMMINGS. Assuming you have reviewed CFR 33, part 20 and the guidelines for discovery requests that were issued in March 2005 by Chief Judge Ingolia, do you believe that the guidelines present what might be termed a ″valid″ or″accurate″ interpretation of CFR 33, part 20?

Mr. DASH. Well, let me be very measured, Mr. Chairman, in my answer. There is no question that a chief judge can set policy guidelines usually on administrative matters. In reading his guidelines on interpreting discovery under the part 20 rules, the 600 series, it seems to me that it is a message—if I were an ALJ, it is a message to sort of limit discovery as much as possible.

There is another thing in it that causes me some question, and here, I defer to some of the better experts on their regs, but if you look at 20.103 of the regulations, it ends ″absent a specific provision in this part, the Federal Rules of Civil Procedure control.″ now, in the guidelines that were given, the chief judge, in the guidelines, says to ignore the Federal Rules of Civil Procedure, the discovery rules there, which are liberal.

Now, obviously, I would say most agencies do not follow the Federal Rules of Civil Procedure, which are very liberal discovery, but my reading of these—unless there is a specific provision somewhere that says that the Federal rules are not available, if I am right in my reading, he is using this memo to change the regulations, which, of course, you cannot do that. You have to put it out for notice, et cetera, et cetera and public comment before you change it.

Mr. CUMMINGS. Let me just get to—I am sorry to interrupt. I want to get to this.

Based upon what you just said, what you just said, how would that affect the scales of justice? In other words, if discovery were limited, more limited than, say, they are supposed to be, what happens then as far as the scales of justice, that is, Coast Guard/mariner scales?

Mr. DASH. I would say it would create a problem for an Administrative Law Judge who thinks in a given case they should grant a little more discovery to a respondent, that if their belief is that the policy of the agency is not to give too much discovery, I think that inhibits it. Because let me see if I can explain that a little bit more, and I would defer to the Administrative Law Judges. A lot of this is so discretionary. An ALJ or a fact finder in granting discovery keeps in mind who is the respondent. Is he represented by a lawyer? Is he on his own? How complex is the particular facts here? How much has the government given to the respondent? And as I say, it is a very subjective determination. And as you can see, these kinds of determinations can be effective if the pressure is not to give too much discovery. And that concerned me. But it also concerned me that, in this particular memo or guideline, it seems to me changing the regulation, which of course you can't do in a policy memo, and if I am correct, that basically the Coast Guard may very well be able to use the Federal Rules of Civil Procedure discovery to say in the guidelines to ignore it would be a change I think in the regs. But as I said, I'm not sure if somewhere in the regulations there is a specific proposal that says the Coast Guard in their hearings are not under the Federal Rules of Civil Procedure.

Mr. CUMMINGS. Ms. Massey, do you want to comment on that? And one of the things that you said, and I want you to listen to this, Professor Dash and Mr. Hewig, one of the things, if I recall in your testimony, Ms. Massey, you said when you were a judge that sometimes there would be situations where you would order discovery and the Coast Guard just disregarded it or they would not present discovery and basically said, go take a hike. I mean—you go ahead. Those are my words. But that seems to be what you were trying to say.

Judge MASSEY. Yes, sir.

Mr. CUMMINGS. Which I think is incredible.

Judge MASSEY. I thought it was pretty incredible myself, sir. There were two specific cases. I won't mention the names; one where the respondent requested that I issue a subpoena. I believe the grounds for issuing the subpoena were reasonable and necessary, so I issued the subpoena. Time passed for the Coast Guard to comply with the subpoena, and they had not filed a motion to quash, which is in the regulations. They had done nothing. So I initiated a telephone conference. And during that conference, one of the investigating officers said, Well, Judge Massey, we are not going to comply with your subpoena; we are just not going to do it, because we don't think it is right.

There was another case where the respondent's attorney requested permission to send interrogatories to the Coast Guard. And this was a fairly factually complex case. And after consideration, I granted the issuance of the interrogatories and issued an order

that they be served upon the Coast Guard and that the Coast Guard file their objections by a date certain. And if they were going to file answers, then that would have followed, say, a week later. I don't remember the exact timing. The deadline passed for the filing of objections. They filed nothing. And then by the time the deadline came for the filing of the substantive answers, they filed objections. The respondent made a motion that I order them to make substantive responses, and I issued that order. And once again, they basically filed a document that was nonsubstantive and later told me, We are just—we don't think you can do that, so we are just not going to answer those questions.

Mr. CUMMINGS. And so what—I mean, very briefly, what happened after that?

Judge MASSEY. Well, there was, in both of those cases, there was a motion for sanctions made by the respondent. And I ended up granting the motion for sanctions, and the complaints were dismissed.

Mr. CUMMINGS. I see.

Professor Dash, let me come back to you. Do you believe that the general purpose of rule changes made in the Coast Guard's administrative laws since 1999 and included in 33 C.F.R., Part 20, was to limit discovery as the chief judge's outline would seem to indicate or to expand them or leave them the same?

Mr. DASH. Well, actually, in the guidelines, and I want to be fair with the chief judge, it seems to be a little inconsistent. He starts out in the guidelines indicating that there were limits to the discovery and that the regulation on the 600 part was intended to standardize and provide for discovery. When I looked through the rules, the rules to me have the standard boilerplate that you don't waste time; you wish to have an expeditious hearing.

But at the same time, I think it emphasizes that ALJs should have the discretion to grant discovery when they think it is necessary. For example, he, in the in the guidelines, he seems to want to ignore 20.103(b) which says, except to the extent that a waiver would be contrary to the law, the Commandant, the chief ALJ or the presiding ALJ may, after notice, waive any of the rules in this part either to prevent undue hardship, et cetera, et cetera.

In other words, you have a rule here which recognizes that there should be a lot of discretion left to the ALJ in discovery as well as, obviously, in all procedures of the hearing. And in the guidelines, there seems to be an attempt to say, ALJs, well, don't really—sort of ignore it in a way. And to me, it is an attempt to indicate that the scurry should be as limited as possible. Now, I don't know what the problem was. I don't know whether the chief ALJ had found that there was too much discovery and a waste of time in these hearings. And if so, I would probably have suggested or recommended that he modify the rules and put them out for comment to indicate that there should be more limitations.

Mr. CUMMINGS. Is that the way that would normally be done if there was a necessity for a change in the rules, the way you just stated?

Mr. DASH. Oh, yes. If you are going to change the rules, and I go back, again, to what I said initially, that under the regulations, it seems to say that the ALJs can use the Federal Rules of Civil

Procedure, the liberal discovery. And in the guidelines, he is saying, you can ignore the Federal Rules of Civil Procedure. That is a change in the regulations. And that has to be done under the APA by notice, comment, you know the standard procedure for rule making.

Mr. CUMMINGS. Documents in possession of the Subcommittee indicate that some Coast Guard personnel were concerned about Judge Massey's conduct at administrative hearings. If concerns are raised about a judge's demeanor in a courtroom or about the judge's application of precedent or regulations to the conduct of a hearing, how should those concerns be raised, and how should a chief ALJ properly examine and address such concerns? Would it be appropriate, for example, as apparently occurred in the Coast Guard, for staff members from various Coast Guard units, including both the units that investigate cases, went before the ALJ system, as well as staff of the ALJ system and the Commandant to hold a meeting to discuss the management of suspension and revocation cases, even if the cases are not named in a general discussion of issues that are known to be pending in open cases appropriate; is that appropriate in such a meeting among such parties?

Now, Mr. LaTourette talked about a meeting back in 2005, and the memo coming out of it and certain language at the beginning of the meeting. It says, at the onset of the meeting, guidelines were provided to the meeting attendees as information concerning active cases that could result in prohibited ex parte communications should not be discussed. Issues could and were discussed without any reference to a particular case. No member of the ALJ program staff is assigned to any D8 related cases.

Even if you have put those guidelines out, meaning you state that at the beginning of a meeting with those parties coming together, you talked about when you have these ex parte communications in your statement, your opening statement, you said there is a denial of due process. And I think Mr. Hewig alluded to that, too. Is that a problem? I mean, you can say—I mean, you can say anything you want to say at the beginning of a meeting, say, we are not going to do this. Is the meeting in and of itself with certain parties a problem?

Mr. DASH. I find two problems with the meeting. The first problem is, and, again, the record should correct me, my understanding is one of the people who was present would be handling the appellate aspects of these hearings. If that is true, even though they were not referred to any specific case, obviously the complaints that would indicate that X occurred at a hearing, or whatever it was, would come up in that record, because my understanding was, at the time, there was still a case or two that was in the appellate process. If I am wrong on that analysis, my apologies. But that is my understanding, that that was part of it.

The other thing that bothers me about this is that when prosecutors conferring with those who have a certain authority over a judge, like an administrative judge, let's say in our circuit courts in Maryland, that is not the way to do it. Under the APA it specifically states that if an agency has a legitimate grievance against an ALJ that they think whatever they are doing is, as in that memo there was some rather serious criticism of the ALJ, if they believe

that, they can file charges with the Merit Protection Board, which will then, of course, notify the ALJ, and they hold an APA hearing to see what, if any, discipline should be given.

I sort of think there is a problem with the independence of the ALJ if you can have meetings of prosecutors with those who have certain control over the ALJ where they can protest and complain about their actions. The complaints might be legitimate; I don't know. The ALJ in fact might have been doing things that they have a legitimate argument against them. But they should be filed I think with the Merit Protection Board if it is serious enough to raise. If it isn't serious enough to raise, then there shouldn't be a meeting.

Mr. CUMMINGS. But is that considered a serious violation? I mean, would you consider it a serious violation, that is an ex parte communication?

Mr. DASH. If one of the members of that meeting in fact was going to be handling an appeal of one of the cases which had already been decided by the ALJ but was on appeal, if he was at that meeting, yes, I would consider that very serious. Because the whole idea of the appeal is for the appellate judges or the agency appellate system gets a fair reading of what happened at that hearing below. And if he is participating at a meeting where he hears X and Y and Z occurred, even though they don't name the case, obviously those facts will come up.

Mr. CUMMINGS. And what if these folks were staff people as opposed to the actual person, say, hearing the appeal?

Mr. DASH. Well, if there is——

Mr. CUMMINGS. Does it extend to them, your same comments?

Mr. DASH. Yeah. If there is a meeting of let us say the prosecutorial staff, the IOs or whatnot, I see no problem. If they want to sit around and say, there is an ALJ here, you got to watch out; they are no good, or whatever they want to say, they can, or recommend, after their meeting, recommend to the agency itself to file charges against the ALJ to the Merit Protection Board. So that would be different.

My concern with this meeting was, again, whether there was someone involved in the appellate process participating in the meeting. If these were just pure staff, part of the executive section or the prosecutorial section, well, certainly they are free to have meetings to discuss, just as prosecutors discuss judges. But there is a difference when you are discussing these kinds of things with someone who is going to be part of the decision-making in the appellate system.

And also there is a problem if that kind of complaint is sent to anyone who has authority over the ALJ. So let us assume that the memo ended up in the hands of the chief ALJ, that, to me, would be a problem.

Mr. CUMMINGS. Mr. Hewig, did you have a comment on that?

Mr. HEWIG. Mr. Chairman, I would add to that that any ex parte contact between the agency and its judiciary that is designed to affect the outcome of cases, whether currently before them or not, ought to be objectionable as well.

Mr. CUMMINGS. Mr. LaTourette.

Mr. LATOURETTE. I agree with that statement.

And Professor Dash, just so I am clear, because, again, ex parte communications on pending matters that have the ability to affect the manner, appeal or anything else are obnoxious and shouldn't occur.

It is my understanding, however, and if the record, and that is why I wish we had somebody who was actually at the meeting talking about the meeting today, because it is my understanding that what was being discussed at the meeting wasn't cases; they were objections that the prosecuting officials had with the conduct of a particular ALJ. And they were complaining about that she was abusive, that she was derogatory in her remarks, things of that nature. Do you have the same kind of objections to that kind of meeting?

Mr. DASH. Again, if it is among the staff. In other words, there is nothing wrong with the IOs getting together or prosecutors getting together to talk about their problems with judges. My problem is that if you have anyone who is going to be part of the decision-making, and again I am uncertain, but my information is there was someone in the appellate section, he can, from these complaints, when he later gets the record of the case that he is going to handle on appeal, I don't say it is definite, but I could perceive or even say, hey, is this what they were talking about as he looks at the record?

Mr. LATOURETTE. And I think I understand your concern. And again, I would hope we could have someone who was actually at the meeting.

Judge Fitzpatrick, you were in the Baltimore Sun article; you know that, right?

Judge FITZPATRICK. Yes, sir, I read it.

Mr. LATOURETTE. And given the fact that you called it yellow journalism, I think in the your opening statement, did you particularly read the part about that?

Judge FITZPATRICK. Yes, sir, I did.

Mr. LATOURETTE. And I think that that observation, let me find it real fast, is sort of, they basically said you weren't fair in that case. And then you have the great journalistic technique of somehow saying you wouldn't comment to them, so I guess because you wouldn't talk, you must be a bad guy. Would you care to talk about that particular discovery issue that you had before you without talking—whatever you feel comfortable about. But basically they are saying that the rules of discovery weren't followed, that the Coast Guard wanted to have some kind of trial by surprise, and you were not right in the way that you ruled on the discovery matter.

Judge FITZPATRICK. The irony of it all, Mr. LaTourette, is there was a reporter in the hearing the entire time from the local Savannah paper who wrote the article and said—the headline of the article was, ″The Judge Was Firm But Fair.″ that was the man that was in the hearing the whole time. What happened in that case was that it began about April, I think, and the complaint was filed, and 20 days later, an answer. And then we had a prehearing conference on the basis of motions filed by counsel. The depositions, some were granted. I can't remember all of them. But I granted various depositions, one which was for a docking master, who was

the principal tugboat operator there, is usually tugboat operator, and he was on the vessel that was at the dock.

But I should mention, this was a very serious case. This was a—the charge in the case, there were two charges of misconduct and two charges of negligence. I dismissed one charge of, one of each of the charges and found proof of one of each of the charges. Essentially the case involved a large tanker over 600 feet going at 14.1 knots down a narrow channel of the Savannah River past the LNG unloading facility where a tanker was actually unloading liquid natural gas. All of the testimony in the case was no one goes by that facility at less than—at more than their steerage way. It is a very, very serious possibility of danger.

Mr. LATOURETTE. I think the wake caused the gangways to collapse.

Judge FITZPATRICK. It is lucky no one got killed. Not only did the gangway collapse, but all the lines were severed. The vessel broke all its lines and was then recovered as it was moving away from the dock. The case began in April. As I said, we had a prehearing conference when motions were filed for discovery. And I granted some of them and denied some of them. I think I granted those ones. And then the case proceeded in a normal fashion. And then, under the regulations, everybody is required to exchange the identity of witnesses and send in all the exhibits 15 days before the hearing. So 15 days before the hearing, the Coast Guard did that, and so did counsel for the respondent. Eight days before the hearing, another series of depositions was required. Eight days before a hearing, including weekends, provides no opportunity for anybody to get together, transcribe the depositions and everything else. In addition to that, the rules require 10 days for a response by the other party. I would never grant depositions 8 days before a hearing. It would have delayed the hearing. So I indicated it was unduly burdensome. And also the focus of the case was on the pilot. And the charges were negligence and misconduct. As I said, half the case was found proved. Importantly, the part of the case that was found proved was that he was negligent in the speed with which he went past that facility. I suspended his license outright for 8 months. The Coast Guard was seeking permanent revocation.

I went down there again after I issued my—I came back, had the hearing, came back and issued my decision. But I wasn't sure what to do with him because he was kind of an outsider a little in the community. The State pilots seemed to be lining up against him. So I went down, and I had a hearing on the sanction. And he testified, and he convinced me that this was oneinstance, but the other instance wasn't bad. So I felt that because of the seriousness of the event and that I suspended him outright for 8 months, I thought it was a very fair result.

Mr. CUMMINGS. Judge Massey, I just want to go back to you for a second.

And Mr. LaTourette, we will go as long as we have to go to get to the bottom of this.

I wanted to be clear on what you are saying, because I don't want it to just be passed over one way or the other. But I want you to at least get out what you are trying to say. There was a meeting that Mr. LaTourette referred to on the, I guess it took

place in February 2005. And then, lo and behold, the guideline memorandum comes from the chief judge about a month later; is that right? Is that accurate?

Judge MASSEY. The guideline memorandum was issued on, I believe, March 7, and the meeting took place on February 24.

Mr. CUMMINGS. Now, tell us what your concerns are? Because in your written testimony, you imply that the meeting that took place on the 24th may have been more, not just about your conduct, but about a little bit more than that. And then, lo and behold, this policy letter suddenly appears addressing a number of the issues that were apparently discussed in the meeting; is that right?

Judge MASSEY. Yes, sir. May I give you just a little more background?

Mr. CUMMINGS. Please.

Judge MASSEY. In December of 2004, I became aware by speaking with Ken Wilson, who was at that time an attorney working out of the Baltimore office, that the MSOs at Morgan City and Mobile had put together a list of complaints about the way I conducted my hearings. They didn't like the way I looked at the IOs. They didn't like me leaning back in my chair during testimony. They thought I was just across the board biased in favor of respondents, a whole litany of things. In total, I think there were seven pages of complaints. Mr. Wilson sent me a copy of those complaints. And he and I had a number of telephone conversations about what to do to resolve this conflict that had arisen between myself and the personnel at Morgan City and Mobile.

I offered to meet with the person who supervised all the investigating officers in Washington to try and iron some of this out. Mr. Wilson didn't think that that was a good idea. It seemed to me we needed to get some sort of dialogue going because my opinion was that they were upset with me because I was, on occasion, not in every case but on occasion, ruling in favor of respondents. And that had—I heard my first cases in August of 2004. And by the end of December, I don't know, I had heard three, four or five cases, I don't remember. And the discovery conflicts were just beginning, I believe late December, early January of 2005.

So when Mr. Wilson called to tell me that this meeting had been set up in New Orleans, he said it has been agreed that the IOs are going to come to this meeting, and they are going to air their grievances about you, your demeanor in the courtroom. And I am going to be there, George Jordan is going to be there, and Megan Allison is going to be there. Mr. Jordan is the director of judicial administration.

Mr. CUMMINGS. What was the purpose of Mr. Wilson telling you all this?

Judge MASSEY. Well, he was—I mean, I can't speak for him, but the chief judge had told me back in November, when he had first caught wind of the complaints, that he wanted me to talk to Ken about all of the stuff, because Ken was just a reasonable person. And the chief said that he didn't really want to be in the loop. So Ken tells me this meeting is going to take place, that he is going to be there; George Jordan is going to be there; Megan Allison is going to be there. And I was out of town on a case. There was never any question about my attendance.

Well, Mr. Wilson called me and he told me, he said, I'll call you after the meeting and let you know how it went. So on February 28, he calls me. And he says, well, we were really surprised when we got there because, first off, we were surprised by who was attending. And second off, we were surprised because, and these are his words, and I quote, discovery was the paramount issue. And Mr. Wilson told me that they did, in fact, discuss by name three of the contentious discovery cases, or I should say cases where discovery was contentious, that I had ongoing at that time. And he said they specifically complained, among other things, that I granted too many depositions and interrogatories. And they made some other complaints about saying that I rode roughshod over the IOs and that I humiliated them.

Mr. CUMMINGS. Let me say this, but I am looking at the memo which was introduced by my friend Mr. LaTourette, and I am just quoting from page 2. And it verifies what you just said. It says here in part in paragraph 7, at the end of paragraph 7, it says, The judge will raise issues and lead the respondent in filing discovery, interrogatories, depositions and subpoenas. In addition, the judge—talking about you—allowed further discovery before the completion of initial discovery as provided in the regulations. It goes on to say in the next paragraph, it was expressed that subpoenas do not have to be complied with unless they are relevant to the case, and it goes on. So, go ahead. I just wanted to let you know that the memo that was introduced by Mr. LaTourette is verifying; although we don't have a witness from the meeting, we do have the memorandum. And so a lot of the things that you just said with regard to discovery, what Mr. Wilson told you was discussed, are verified in this document.

Judge MASSEY. And you are looking at a document that I have not seen.

Mr. CUMMINGS. Okay. Fine.

Judge MASSEY. Just so you know.

Mr. CUMMINGS. This makes it even more credible. Go ahead, since you haven't seen it.

Judge MASSEY. I'm sorry, you want me to go on with?

Mr. CUMMINGS. I want you to tell me—you made some pretty strong allegations, Judge Massey. And I want to get to the bottom of them. You have—in your written testimony, basically what you have said is that a meeting took place in February, and a lot of things were discussed, including discovery, the way you conducted discovery. You have said that you felt that you were—there were efforts being made to limit your ability to be independent and pursue due process as you felt that it was your duty to do. And then you said that then when the judge's guidelines came out, it sounded as if the very guidelines that he put out, that Professor Dash just talked about, came directly out of that meeting. Because it was just so much in sync with what you had—it was your understanding what happened in that meeting. So I am just trying to get to the bottom of it. I want you to be brief. But I want you to just tell us what you—you have come a long way from San Antonio, Texas, with a sprained angle, and we thank you for that, but we want you to get out what you want to say. Because I don't want

it left here—you leave here in a situation where you have not been able to tell your story. I don't want it to be just passed over.

Judge MASSEY. All right. One point, sir, that I think is important for the Committee to examine. There was a person present at this meeting, a Lieutenant Commander Keane, I think his name is K-E-A-N-E. He was a member of the District 8 legal staff. Lieutenant Commander Keane had been assisting the Morgan City investigating officers by drafting pleadings in at least two of these cases that were under scrutiny, the responsive pleadings; in other words, the response to interrogatories, that type thing. He was making the legal arguments about why it was improper for me to grant interrogatories or depositions or issue a subpoena or whatever. If you look at the language that are in those pleadings and you look at the memo that issued out of the chief judge's office on March 7, the theories about how the discovery regulations should be interpreted, and even some of the language, is the same.

So, in other words, we have a document coming out of the chief judge's office on March 7 that tracks incredibly, too much for it to be a coincidence, with pleadings that were filed in cases pending before me 1, 2 months earlier. And Mr. Wilson told me that Lieutenant Commander Keane, quote, seems to be driving a lot of this stuff. Now, this is the same young man who, when I had an on-the-record conference in a case on March 22 and I was questioning him about some ongoing discovery issues in that case—this is the third case of the trilogy—it came out during that conference that he did not know that mariners had a right to due process at S&R hearings; he didn't know that. And it clicked then in my head, well, now I understand why he is making all of these ridiculous arguments in these pleadings, because they never made any sense to me. And when he finally admitted to me under questioning that, no, due process is not applicable to these proceedings, then I went, oh, that is the problem. He doesn't know that. And then I spoke to his commanding officer the next day, who dropped in on me, Commander Simons, who, once again, was trying to get me to talk about how I viewed discovery. And I refused to do so because I thought it would be an ex parte conversation. He tries to stick up for this guy saying, oh, well, you know, he misunderstood. And I said, oh, no, no, no, he didn't misunderstand; he just flat doesn't know that due process applies to these hearings. And I was just stunned.

Mr. CUMMINGS. I got you.

Professor Dash, assuming what Ms. Massey said is accurate, you have a meeting with the parties that we have already described, the next thing you know you have got a memo that comes out seeming to be right in line with cases that are—I guess they were still pending, Judge Massey?

Judge MASSEY. Yes, sir, that's correct.

Mr. CUMMINGS. Does that concern you?

Mr. DASH. Yes it does. I will admit I am not objective on this. I am a little prejudiced. Back in the 1970s, when I participated in some of the hearings on independence of ALJs, the big fight was to take away from the agencies any authority to discipline ALJs. And it even went so far that pay was again given to the OPM, even to the extent that the pay scale of a specific ALJ, recommendations

of the agency would be ignored by the OPM. That was in the law. Congress took that out in 1999. It is long-winded, but what I am getting at is that the ALJ's independence is very much dependent on the fact that the agency does not have any real discipline authority over them; that if they have a problem, the place they go is to the Merit Protection Board claiming this ALJ is not doing their job.

From what I see here, if true, and I have got to stress if this is really occurring, an ALJ feels under the pressure that the agency can control their future and their destiny, depending on how they act as an ALJ. And, yes, that troubles me a great deal, because this can impact on their career, their pay and possibly even their job. And that is very dismaying because that goes against the whole idea of an APA hearing or what the ALJ stands for.

Mr. CUMMINGS. Did you have a comment, Mr. Hewig?

Mr. HEWIG. I would only add, Mr. Chairman, that as a practitioner before those ALJs, I would be very troubled if I were to conclude that that type of interference or influence were extant.

Mr. CUMMINGS. All right. We are going to break now. We have got three votes. We should be back here in about 20, I guess 20 minutes.

[Recess.]

Mr. CUMMINGS. The gentleman will resume the hearing. Everyone will be seated, please.

Mr. LaTourette.

Mr. LATOURETTE. Thank you very much, Mr. Chairman.

And thanks to our witnesses for your patience while we conducted business on the floor.

I want to explore two areas that I talked about in my opening remarks. And the first is this whole issue of settlement. And I heard what you said, Judge Fitzpatrick, about how you dealt with the case that was in the newspaper article. But the allegation has been made that we have mariners who are copping pleas, if you will, because they are so afraid of the system, and they are thereby being forced into settlements. And I quoted part of the Federal regulations. It indicates that, in making a settlement, the mariner must make an admission of all of the pertinent facts in the complaint against him to reach that settlement. And so I guess, first, I would ask the three former Administrative Law Judges, am I correct in that, that in order to enter into a settlement with the government, the mariner needs to make an admission of the facts in the complaint against him?

Judge FITZPATRICK. Yes.

Mr. LATOURETTE. And do you have a different answer, Judge Massey or Judge Denson?

Judge DENSON. I didn't have experience under that rule.

Mr. LATOURETTE. Okay.

And Judge Massey.

Judge MASSEY. You are correct. May I add a comment?

Mr. LATOURETTE. Sure you can say whatever you want.

Judge MASSEY. You were a public defender.

Mr. LATOURETTE. I was.

Judge MASSEY. I was a public defender. We all know that people sometimes say things are true that are not just to get out of the mess that they are in.

Mr. LATOURETTE. Sure. And I think I brought that up with the Alfred pleas.

Mr. Hewig, did you have something you wanted to say about that?

Mr. HEWIG. I did, Mr. LaTourette. I have worked from settlement agreements that the Coast Guard prepares, not from the actual regulation. They make citations to the regulation. But my practice and experience has been, and I have so advised my clients, that the only admission they are obligated to make is to the jurisdiction of the Coast Guard over the license. And beyond that, I have specifically advised them, and it has been my practice, that in settling a case with the Coast Guard, you are not admitting to the truth of the specific allegations in the complaint.

Mr. LATOURETTE. I appreciate that very much. To the three former Administrative Law Judges I would pose the question—because this is a serious allegation in this newspaper article; it is a serious allegation in other venues as well—was it your experience, Judge Fitzpatrick, that mariners were being—entering into these agreements because they were afraid that the system was stacked against them?

Judge FITZPATRICK. No.

Mr. LATOURETTE. Judge Denson.

Judge DENSON. When people agreed to the complaint, I never sensed that there was a reason behind, that they were afraid or they were being forced into it. I think they were just trying to avoid further, I don't want to say litigation, but further processing.

Mr. LATOURETTE. And Judge Massey, your observations on that.

Judge MASSEY. I would say that, some of the time, they were agreeing to it because they thought it was a fair settlement. But I did have cases where there was an intimation that the person was afraid to go forward with a hearing because they were either intimidated by the process or they had been told by an investigating officer that, if you will settle this case, I'll give you X. If you take this case to hearing, we are going to ask for revocation.

Mr. LATOURETTE. And then that, to me, is a plea bargain. But the question I would have to each of you is, I would think as a judge, I mean, when we would do Alfred pleas, and I don't have experience like you have experience, but when we would do Alfred pleas, if the judge began to get squeamish and thought that there was something funny going on, don't you have the right to reject that settlement agreement?

Judge MASSEY. No. Under the regulations, if the settlement agreement complied with the language required by the regulations, we did not have the authority to go beyond, or excuse me, behind that and look into the allegations themselves. We had no authority to do that.

Mr. LATOURETTE. Judge Fitzpatrick, if you as an ALJ reached a conclusion or had a suspicion that the person had entered into a settlement agreement for some illegal purpose, they have been bribed or made payment of money, you didn't have the authority to reject that settlement agreement?

Judge FITZPATRICK. You have the authority to reject the settlement agreement. You have that distance in broad discretion. It is not true you don't have the authority.

Mr. LATOURETTE. Let me talk about the hemp oil business, because it is my understanding that the brother of the reporter for the Baltimore Sun who became the unhappy mariner who then went to another reporter at the Baltimore Sun to produce the justice capsized article, the defense in that case had to do with this hemp oil business. And again, in my opening remarks, I talked about the fact that, in the Code of Federal Regulations, because the allegation is that somehow the chief judge has gone on a lark and has made up a standard relative to hemp oil being a defense for a positive test for marijuana by a mariner, based upon your knowledge to all three of you, is my understanding correct that the Department of Transportation has included in the Code of Federal Regulations a specific admonition that you can't use hemp oil as a defense for a positive marijuana test?

Judge FITZPATRICK. I think, as you indicated, Mr. Representative, yes.

Mr. LATOURETTE. How about Judge Denson?

Judge DENSON. I have not much understanding of that. But my understanding is that applies to a medical review officer and not necessarily to an Administrative Law Judge at a hearing.

Mr. LATOURETTE. Well, Mr. Chairman, I would ask unanimous consent that that portion of the Federal regulations be admitted into the record.

[Information follows:]

TITLE 49--TRANSPORTATION Subtitle A--Office of the Secretary of Transportation
PART 40_PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS
Subpart O - Substance Abuse Professionals and the Return-to-Duty Process

Sec. 40.293 What is the SAP's function in conducting the initial evaluation of an employee? As a SAP, for every employee who comes to you following a DOT drug and alcohol regulation violation, you must accomplish the following:
(a) Provide a comprehensive face-to-face assessment and clinical evaluation.
(b) Recommend a course of education and/or treatment with which the employee must demonstrate successful compliance prior to returning to DOT safety-sensitive duty.
(1) You must make such a recommendation for every individual who has violated a DOT drug and alcohol regulation.
(2) You must make a recommendation for education and/or treatment that will, to the greatest extent possible, protect public safety in the event that the employee returns to the performance of safety-sensitive functions.
(c) Appropriate education may include, but is not limited to, self- help groups (e.g., Alcoholics Anonymous) and community lectures, where attendance can be independently verified, and bona fide drug and alcohol education courses.
(d) Appropriate treatment may include, but is not limited to, in- patient hospitalization, partial in-patient treatment, out-patient counseling programs, and aftercare.
(e) You must provide a written report directly to the DER highlighting your specific recommendations for assistance (see Sec. 40.311(c)).
(f) For purposes of your role in the evaluation process, you must assume that a verified positive test result has conclusively established that the employee committed a DOT drug and alcohol regulation violation. You must not take into consideration in any way, as a factor in determining what your recommendation will be, any of the following:
(1) A claim by the employee that the test was unjustified or inaccurate;
(2) Statements by the employee that attempt to mitigate the seriousness of a violation of a DOT drug or alcohol regulation (e.g., related to assertions of use of hemp oil, ``medical marijuana'' use, ``contact positives,'' poppy seed ingestion, job stress); or
(3) Personal opinions you may have about the justification or rationale for drug and alcohol testing.
(g) In the course of gathering information for purposes of your evaluation in the case of a drug-related violation, you may consult with the MRO. As the MRO, you are required to cooperate with the SAP and provide available information the SAP requests. It is not necessary to obtain the consent of the employee to provide this information.

Mr. CUMMINGS. So ordered.

Mr. LATOURETTE. And then, Judge Massey, to you, do you have a different understanding?

Judge MASSEY. My recollection is that, when I went to an initial training session, actually the month before I officially became a Coast Guard employee, a case with that defense had just been remanded by the NTSB to the Coast Guard. And there was some discussion about the hemp oil memo at the conference. And my recollection is that there was a lag time between the date that the chief judge issued the hemp oil memo, which I believe was in 2001, and the date that the Department of Transportation amended its regulations. I can't swear to the specifics of that, but I think there was a lag time.

Mr. LATOURETTE. Okay. Lag time notwithstanding, does anybody not believe today that the code of regulations in Title 49, according to the DOT, indicates a more direct view as an Administrative Law Judge that you can't consider the hemp oil defense on a drug test?

Judge FITZPATRICK. No question.

Judge MASSEY. The problem with that, sir, is that if the C.F.R. Was amended in 2003 and you have a case before you that the act occurred in 2002, you can't retroactively apply that law.

Mr. LATOURETTE. I am not going to quibble with you on that. I am saying today if a mariner has a positive marijuana test, does anybody dispute the fact that you can't use the hemp oil defense?

Mr. Chairman, I would also ask unanimous consent to put into the record the National Transportation Safety Board judgment or opinion of June 11, 2003 in the case of Thomas H. Collins v. Christopher Dresser if that is all right with you.

Mr. CUMMINGS. Can we get a copy?

Mr. LATOURETTE. I will be happy to give you a copy.

Mr. CUMMINGS. All right.

[Information follows:]

SERVED: June 11, 2003

NTSB Order No. EM-195

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of June, 2003

THOMAS H. COLLINS, Commandant, United States Coast Guard, v. CHRISTOPHER J. DRESSER, Appellant.	Docket ME-173

OPINION AND ORDER

The appellant, by counsel, challenges a decision of the (now) Commandant (Appeal No. 2626, dated February 19, 2002) affirming a decision entered by Administrative Law Judge Archie R. Boggs on February 4, 1999, following an evidentiary hearing.[1] The law judge sustained a charge of use of a dangerous drug on a specification alleging that the appellant had tested positive for

[1]Copies of the decisions of the then Vice Commandant and the law judge are attached. The Coast Guard filed a reply opposing the appeal.

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marijuana during a pre-employment drug test. He accordingly ordered the revocation of appellant's merchant mariner's document and license.

On appeal to the Board, appellant raises essentially the same substantive and procedural objections he presented, to no avail, to the Vice Commandant. Because we conclude, for the reasons discussed below, that the Vice Commandant's decision did not apply the appropriate legal standard in reviewing appellant's contention that the law judge should have recused himself following an ex parte communication, we reverse the Coast Guard's decisions and remand the proceeding for a new hearing before a different law judge.[2]

The appellant defended against the Coast Guard's drug charge by contending that the positive test result on which it was based was not attributable to an unlawful use of marijuana, but, rather, by his lawful ingestion of liquid hemp seed oil, a legal dietary supplement, that can also cause metabolites of marijuana to show up in a hemp seed oil user's urine.[3] The law judge was not persuaded by the contention. Instead, based on his review of the evidence, the law judge concluded that the appellant's "attempted exculpatory defense [should be] rejected as a latter-day fabrication." See Decision and Order at page 46.

At some point after the evidentiary hearing had been held,

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[2]In light of this disposition, we have no occasion to comment on any of the appellant's other assignments of error.

[3]In view of the impact of this potential consequence on the Coast Guard's random drug testing program, the Commandant, during the pendency of this case, adopted a policy that forbids Coast

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but before a written decision and order had been served, the law judge, during a dinner at his home with his son, learned that his son, an attorney, was counsel for the defendant in a civil lawsuit that the appellant had initiated against the manufacturer of the hemp seed oil he claimed to have been taking for a period of time before the drug test that led to this revocation action. The law judge subsequently indicated, in seeking advice from others within the Coast Guard as to whether he was obligated to disqualify himself, that the discovery of his son's participation in the product liability case in which appellant was a party effectively terminated any further discussion of the matter and that the merits of the case had not been discussed. Appellant's recusal motion followed the law judge's self-reporting of the occurrence.

The Commandant essentially determined that the law judge was not required to remove himself as the hearing officer because the appellant had not proved that he had "a personal bias in this matter or prejudged the case based on his alleged *ex parte* communications with his son and the Coast Guard" (Decision at 13). We share the appellant's view that this was not the appropriate standard to apply. The issue was not simply whether actual bias or prejudgment had been demonstrated, but also whether the circumstances presented an unacceptable appearance concerning the law judge's impartiality. A conclusion that such an appearance existed here seems inescapable to us, both in light of generally accepted ethical principles on conflicts and the

(..continued)
Guard personnel from using hemp seed oil.

Coast Guard's own written policies on the subject.

The Coast Guard's administrative law judges, in the suspension/revocation proceedings over which they preside, are expected "to strive to avoid even an appearance [of partiality] to the position of either party to a proceeding" and "are held to the same standards regarding bias, prejudice and interest as are all members of the federal judiciary" (see Commandant's Administrative Law Judges Internal Practices and Procedures No. 16722.13 (1987)). Under 28 U.S.C. § 455, which sets forth the relevant standards for the federal judiciary, a judge must disqualify himself whenever "his impartiality might reasonably be questioned" and whenever, among other times, he "or a person within the third degree of relationship to" him "is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding" (28 U.S.C. §§ 455(a) and (b)(5)(iii)). We think the circumstances confronting the law judge in this case fell well within the intent of these provisions.

We note at the outset that nothing in the record before us suggests that the law judge's decision was based on anything but the evidence adduced at the hearing, and we commend him both for disclosing the communication with his son and seeking advice on the propriety of continuing to preside over the case. Nevertheless, several circumstances over which the law judge had no control, but which should have been recognized as warranting his recusal, created an appearance of conflict that would support a finding that "his impartiality might reasonably be questioned"

(*id.*). Although the particulars of the appellant's lawsuit are not in the record, it appears reasonable to assume, in the context of a product liability action, that the appellant seeks to hold the manufacturer of the hemp seed oil liable for damages caused by the positive drug test result that led to this proceeding. Because the law judge's son is representing the manufacturer, it should have been apparent that a decision finding that the positive drug test was not the result of hemp seed oil ingestion would directly benefit the manufacturer and, therefore, his son as well.[4] A process dedicated to fairness in practice and appearance cannot tolerate the potential for partiality created by the propinquity of the players in the inter-related cases. In our view, since there was no way to objectively evaluate the possible impact of the law judge's son's connection to this matter on the law judge's decision-making, the resolution of the appellant's fate in the adjudication should have been re-assigned by the Coast Guard to a law judge who could not be said to have, or appear to have, a personal interest in the outcome of either proceeding.

ACCORDINGLY, IT IS ORDERED THAT:

The docket is remanded to the Commandant for further proceedings consistent with this Opinion and Order.

ENGLEMAN, Chairman, ROSENKER, Vice Chairman, and GOGLIA, CARMODY, and HEALING, Members of the Board, concurred in the above opinion and order.

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[4]In fact, it appears that the parties to the civil litigation agreed to give the law judge's determination on this issue dispositive weight in that action.

Mr. LATOURETTE. And then pending my unanimous consent request I would just indicate that, I don't know if this is the case that you were talking about or not that was the subject of discussion, but in this particular matter, my understanding is it was remanded by NTSB back to the Commandant, because, in that case, the judge, Judge Archie Boggs, indicated that, at dinner after he had heard the case, he found out that his son, who is a lawyer, actually represented the hemp oil company who was involved in a lawsuit. And there was some internal discussion about whether or not he should have recused himself. The conclusion was reached that he shouldn't have. And NTSB then remanded it saying, do you know what? You probably shouldn't have sat on that case, and then it went to another judge who was mentioned in the Sun article. So if the allegation is that somehow the system is stacked and fixed against mariners, I think that this guy was treated—I mean, it is working out for him in that regard. And that is why, subject to you getting a copy of it, Mr. Chairman, I would like to have it admitted into the record.

Mr. CUMMINGS. So ordered.

Mr. LATOURETTE. And then the last question, I would ask you all if you are familiar with a former Administrative Law Judge by the name of Lawson?

Judge FITZPATRICK. Yes.

Mr. LATOURETTE. Good guy? Bad guy?

Judge FITZPATRICK. Judge Lawson's position was misstated earlier in this proceeding. Judge Lawson, he was a retired judge who was taken on by the program for 1 year under the 1 year contract. He didn't know hardly anything about the program, quite frankly.

Mr. LATOURETTE. Judge Denson, did you serve with Judge Lawson?

Judge DENSON. No, I did not.

Mr. LATOURETTE. Judge Massey?

Judge MASSEY. I met Judge Lawson at that June 2004 training session I just mentioned, and then I never saw him again.

Mr. LATOURETTE. And Judge Massey, you mentioned in your, I assumed it was a hypothetical case, that you talked about where the merchant mariner was in the headquarters and so forth. And I made a note that you said that the Coast Guard official suspended his license, took his license away from him prior to an adjudicatory hearing. Did you say that?

Judge MASSEY. No, sir, I did not. I said that the hearing took about 30 minutes, and at the end of the hearing, the judge announced a suspension for 6 months.

Mr. LATOURETTE. I must have misunderstood you. Because I thought you said, prior to the hearing, that the officer took his credentials away.

Judge MASSEY. In my scenario, that is true. On cases the IOs do take the mariner's credentials upon the filing of a complaint, that does happen.

Mr. LATOURETTE. Again, I am trying to learn here. It is my understanding that the credentials were not suspended during the proceedings.

Judge FITZPATRICK. There is a—in the normal case, that is correct; they are not suspended. But there is a specific provision in the

regulations which is called an expedited requirement for an expedited hearing, and it is authorized under 7702, where the Coast Guard can, because of safety reasons, somebody being under the influence of drugs or alcohol, can go aboard a vessel and take that individual's license or document. If they do that, then they must immediately contact the docketing center, and the hearing must be held within 30 days. So it is an expedited procedure, and it is to protect safety of life and property at sea.

Mr. LATOURETTE. And then the last question I would have, the reason I asked you about Judge Lawson, he is quoted in the Baltimore Sun story about the memorandum issued by the chief judge. And his observation, quoting directly from the article, Massey's experience contrasts with that described by former Judge Lawson who said he suspects that what his former colleague perceived as pressure was actually Ingolia's attempts—perhaps awkward or heavy-handed—to counsel a judge that he might have viewed as a rogue. My experience with Judge Ingolia was that he left me alone to do what I needed to do.

Do you think that the chief judge considered you to be a rogue.

Judge MASSEY. He never used the word rogue with me, sir. He told me I was a problem.

Mr. LATOURETTE. Mr. Chairman, thank you. I think, based upon Judge Massey's extensive observations about this meeting that she didn't attend, it really would be nice if we could have Mr. Jordan and Mr. Wilson at a subsequent event.

Mr. CUMMINGS. Thank you very much.

I want to make sure that we maintain the very balance that we said that we wanted the ALJs to maintain. And I want to make sure it is maintained in this hearing.

And therefore, I want to go back for a moment. And Judge Massey, just tell us briefly about your credentials.

Judge MASSEY. I graduated from undergraduate SMU in Dallas in 1974; law school, 1977, at SMU. Opened my own law office initially; did that for a few years. Associated myself with another lawyer who did State defense work. Went back out on my own. Worked with the Department of Energy in the special counsel's office for 6 and 1/2 years. Was a State prosecutor for 4 years. Went back out on my own. Associated myself for 20 months or so with a lawyer who did exclusively Federal white collar criminal defense work. Went back out on my own. Became a public defender for 2 years. That was the first 20 years of my licensing.

And then, in September of 1997, I was picked up as an ALJ for Social Security. Worked for them until September of 2001 when I became employed as an ALJ for the Federal Energy Regulatory Commission here in Washington. Left that job to take the Coast Guard job in July of 2004.

Mr. CUMMINGS. I just wanted to have some background there. And I am going to ask you some questions in a moment. I want to go back to some of the things that you have said.

But right now, I want to address some questions to Professor Dash, and perhaps Mr. Hewig. I am looking at a—in a few minutes, we are going to have testimony from the Coast Guard. And one of the things that they are going to say, Rear Admiral Salerno is going to say, is that, and this is from his written testimony, is

that there is a certain level of independence. And he basically said this, Mr. Dash; that these ALJs are supposed to have—let me just quote a piece of his testimony, because I want you to comment on this. He says, in 1999—now this is the Coast Guard. You will probably be gone since you have overstayed, I am sure, your allotted time. But he said, the procedure rules for handling Coast Guard ALJ cases were updated to reflect the best practices in administrative law. These new rules were based on the model rules of administrative procedure proposed by the administrative conference of the United States and new procedural rules developed by the Department of Transportation.

Now, this is what I just want you to comment on. The Rear Admiral says the intent of this update was to provide additional due process protections and transparent and consistent procedures to both the mariner and the suspension and revocation process. For example, the new rules provided for modern motions practice, expanded discovery and detailed procedures for handling evidence and conducting hearings, end of quote. When you look at the—and then I want to go briefly to the letter, I guess memo, memorandum dated March 7 from the chief judge to the other judges. And it says, an ALJ should not rely on Federal Rules of Civil Procedure for discovery matters. You are familiar with that memo, are you not?

Mr. DASH. Yes, sir.

Mr. CUMMINGS. I don't want to take anything completely out of context, but you know the context I am sure.

Mr. DASH. It is his guidelines; I believe it is.

Mr. CUMMINGS. Yes, yes. It seems to me that—first of all, is Rear Admiral Salerno correct in his statement? Do you agree with that statement?

Mr. DASH. To the extent that he is indicating that they want to give more due process and that they want to give good discovery, yes, I have no objection to it.

Mr. CUMMINGS. And then, when you go to the guidelines for discovery request written by the chief judge, and that portion that talks about not relying on Federal Rules of Civil Procedure, it seems like there is a—they don't seem to go hand in hand. Because I assume that the Federal rules are broader with regard to discovery. The chief judge is saying, you know, basically they don't apply, I guess, to these cases. Am I missing something.

Mr. DASH. No, you are right. He does say that the ALJ should ignore the Federal Rules of Civil Procedure. As I indicated before, I was puzzled by that because the regulations seemed to imply that they can use the Federal Rules of Civil Procedure. And as you indicated, Mr. Chairman, the Federal Rules of Civil Procedure discovery are pretty vast and very liberal. In fact, I would not even recommend that agencies should comply with them. They go perhaps too far, depending on what the agencies need and want to do. But the indications from which you just read to me is that the purpose of the regulations and their new rules was to expand discovery and expand the procedural due process for the mariners.

The memorandum or guideline, and that is what bothered me a bit about it, seems to be saying that the regulations were designed to limit in the area of discovery particularly. To limit discovery, or

at least he was saying that should be the interpretation, I think, if so, that should be done by frankly doing it in the regulations. I might add, there is nothing wrong; in other words, if the Coast Guard wishes to limit discovery to some of the more basic things, they can do it by regulation as long as they don't interfere with the procedure of due process.

Mr. CUMMINGS. Let me ask you this, Professor Dash. Does any agency allow its officers to refuse to comply with a subpoena?

Mr. DASH. I was shown during our break a memo, or I guess it is a report, which does surprise me, in which, apparently, the Coast Guard was saying they were not going to comply with a subpoena. That does surprise me a great deal. Normally, of course, you would file a motion to quash a subpoena. I understand that, in the Coast Guard, there is no interlocutory appeals, meaning that they can't appeal if they lose with the ALJ immediately to the Commandant. But it would seem to me that you just don't refuse to comply with a subpoena.

Let me explain that a little bit more, because, way back in my distant past, I have handled hearings for the government. And even when you think that a subpoena by the ALJ really is not relevant, you comply unless, unless it is really onerous, that they want a room full of—in other words, that you have an extraordinary circumstance. But normally, you just comply with the subpoena. To me, to say to an ALJ, I am not going to comply, is, I think, demeaning and undercuts, of course, what an ALJ stands for. So unless there was some really good reason, such as it would be almost impossible to comply with it, for them to say to the ALJ, we refuse to comply is bothersome.

Now, there are sanctions in the rules as to what the ALJ can do, such as taking the negative imprints or proving what was attempted to be proved by the discovery. But if that doesn't work, because I don't even know what the evidence is that is being asked for, they can, in the interest of justice, actually dismiss. Now, that is not in the sanctions part of discovery. But you will find, in 103, it does say that the ALJs, as well as the Commandant, can, unless it is against the law, more or less waive the rules and take whatever action that they deem necessary. So, to me, the ALJ, if I was in an ALJ's position and the government refused to comply with a subpoena without having really a fairly good reason, certainly dismissal would be the answer. And of course, then the government can appeal that up to the Commandant, as I understand it. Now, it is long-winded, but I never have frankly heard of the government refusing to comply with a subpoena of an ALJ unless, again, you have extraordinary circumstances.

Mr. CUMMINGS. Professor Dash, Mr. Hewig, I always tell my office, tell me what, so what and now what. And Mr. Hewig talked about what, so what and the now what. And he made some suggestions. Do you remember what he said about his suggestions? Does he have to repeat them? Because I wanted to get your comments on his suggestions as to how to remedy some of these situations, if appropriate.

Mr. DASH. I would feel more comfortable if I could hear them again.

Mr. CUMMINGS. Why don't you briefly, Mr. Hewig, just run down your recommendations? By the way, we do appreciate you making recommendations. But go ahead.

Mr. HEWIG. Thank you, Mr. Chairman. My recommendations are three-fold: first, that ALJs must be independent, and I referred to the FAA model under which decisions made for license or civil penalty matters by the FAA, the Federal Aviation Administration, are adjudicated by Administrative Law Judges that are outside the employment of the agency. In the case of the FAA, it is the NTSB.

Mr. CUMMINGS. All right. Stop there.

Your opinion, Mr. Dash.

Mr. DASH. Again, I would have to preface it by saying, I am prejudiced. I have always been for the position that Administrative Law Judges making decisions impacting on agencies should be outside of the agency. Years ago, it was for actually an ALJ corps. But I certainly like the idea that you would use ALJs who are not part of the agency itself. And as you know, this is a very big debatable thing in advent law. But yes, I would like that recommendation very much.

Mr. CUMMINGS. All right. Number two, Mr. Hewig.

Mr. HEWIG. Number two was that some limited discovery should be granted as of right. And by that, I mean, that it should not be within the discretion of the Administrative Law Judge. The guidelines, or I should say the regulatory prescription for discovery that were amended and enacted in 1999 have in fact, by both Judge Massey's information and also my experience, been used to stifle discovery rather than to encourage it. I think that something such as, for example, 10 or 15 interrogatories as of right and 5 to 10 document requests as of right would go greatly to accelerate the pace of the hearing and perhaps also serve as a catalyst to settlement.

Mr. CUMMINGS. Professor Dash.

Mr. DASH. I would go along with the recommendation if you want to set a minimum of documents. I would be a little constrained about having any requirement for so many interrogatories or depositions taken out of the discretion of the ALJ. The reason I say that is, there were some obvious hearings where the ALJ is one who is best to determine whether or not you need actual depositions or interrogatories. To make it a mandatory type thing, I question that; I question that, where you say there must be a minimum, if requested, so many interrogatories. That gives a certain control to the respondents, and it takes it away from the ALJ. The whole point of administrative hearings is that you want to expedite them; you want to make them fair but also reasonable; and that the Administrative Law Judge should be given that discretion. If they feel there is a need for 5 or 25 interrogatories, that they can order them. But if they don't feel there is a need for it in this case, I think that should be left to them.

Mr. CUMMINGS. Mr. Hewig, the last one.

Mr. HEWIG. The final one related to evidence and findings relating to science and medicine.

Mr. HEWIG. In those instances, in those matters where a legal outcome is determined by a regulation involving scientific or medical evidence or measurement—and here I specifically refer to the first case in my written statement in which a mariner was found

to have, quote, ″substituted″ his urine specimen because the creatinine count in his urine sample was below a cutoff—I say ″arbitrary″ and it was—of 5 mg per DL. Because he came in at 3 mg per DL, the regulations compelled a finding of substitution and then compelled a suspension of the license. That decision occurred in 2000.

In 2001, the Coast Guard and the Department of Transportation undertook a review, and in fact, they reversed themselves. Their science was quite simply wrong, and the subsequent regulation amendment amended that 5 mg per DL creatinine lower-level cutoff down to 2.

So the point here is that science is an ever-changing field, and those absolutes do not work to justice, and my recommendation here is that where you have got regulations that relate to the submission and rely upon scientific evidence or medical evidence, that you ought to make it not absolute but a rebuttable presumption so that evidence can be brought in to show, if it exists, that a particular mariner's test results are outside the normal pool of probability for good cause shown. It should not be absolute. It should be a rebuttable presumption on a case-by-case basis.

Mr. CUMMINGS. Got it.

Professor Dash.

Mr. DASH. I would have a problem with that recommendation because the purpose of rules and regulations is to, more or less, give definitive answers to certain things. What I am getting at is that, if in the process of coming out with regulation, they have the support and the evidence—the substantial evidence—to say that 3.2 or whatever it is is no good, that should be permitted, and that should control the hearing because, otherwise, you are going to be having some hearings that can go on and on and on in which you have got to have experts coming in, testifying. It is a problem because many hearings, as I understand, do not even have lawyers. It is the respondent who is representing himself.

I just think it complicates it, because there is an answer. The answer is that if there is evidence that the standard in the reg is a problem, well, then you can always recommend that the regulation be amended, and this can be done, frankly, by lawyers from the outside if they wish.

Anyway, it is long-winded again, but I am bothered by that kind of a mandatory thing that you must hold a hearing to decide whether it is 3.2 or 5.2.

Mr. CUMMINGS. Mr. LaTourette.

Mr. LATOURETTE. Thank you very much, Mr. Chairman. I just want to sort of close my thoughts on this panel.

One of the things that propelled us here was an article that made as its premise that there were 6,300 cases filed, and the mariners only won 14 times. I think everybody would agree that if those were the true facts, that something really is wrong.

What I discovered today, at least from your testimony, Judge Fitzpatrick, was as you described the case, as was referenced in that article, you had an LNG potential accident where someone could have been killed. And despite the fact that the government was seeking revocation of the credentials, you went the extra step

and made it 8 months rather than permanent revocation. I do not find anything fixed about that case.

Judge Massey, I certainly never meant to cast any aspersions about your career. I think it has been distinguished, and as a matter of fact, your testimony indicates to me that you were a very thoughtful judge. And as to the case that you described—and I assume the document that the Chairman was questioning—something about the subpoena, if I understood your testimony right, when the government did not produce documents or have additional discovery that you had ordered, you dismissed the case.

Isn't that what you told us?

Judge MASSEY. That is correct, sir.

Mr. LATOURETTE. Yes, that is exactly what you are supposed to do.

Professor Dash, just from my experience, people did not comply with discovery all the time, and there was a remedy. I mean, you got rid of the charge; you sanctioned them; you fined them; you put them in jail—whatever the rules permitted you to do—and I think Judge Massey did the exact right thing. So I am not leaving this panel with the belief that somehow this system is fixed against the mariner. I am leaving it with the sense of perhaps what Judge Lawson said in the article, that the chief judge was a little heavy-handed in how he interpreted the regulations. I think maybe we should look at that.

I think Mr. Hewig's observation and Professor Dash's observation about having the finder-of-fact outside the agency is a good one. I think I can be supportive of that, and that makes sense to me, but I am not finding that this is somehow, as was suggested in print, a system that is fixed against the mariner.

I think I know your answer, Judge Fitzpatrick, but do you disagree with that?

Judge FITZPATRICK. Oh, no. I mean it is definitely not fixed against the mariner.

Mr. LATOURETTE. Judge Denson, do you think that it is fixed against the mariner?

Judge DENSON. I think to the degree that it can be a bad influence for the mariner the way the regulations are applied and where the regulations are—what they are, I think, can be looked at as a negative towards the merchant mariner.

Mr. LATOURETTE. But you, as an Administrative Law Judge, didn't you always treat your cases and the litigants fairly?

Judge DENSON. I can say, in all honesty, I did; and in fact, on two occasions, I think I bent over back too far with some Yemen men who appeared in front of me because I think I had some prejudice there, and they were buying documents up in Washington State, Seattle, to get an endorsement on it. And I really should have revoked their licenses, and I tried to be—I think I ended up—I should have been more severe in my order against them. But those are the only two times I can think of. Other than that, I think I do the very best I can with the facts and with the information that is given before I give the sanction.

Mr. LATOURETTE. Then, Judge Massey, I assume from your testimony you always gave everybody a fair shake in your courtroom, did you not?

Judge MASSEY. Yes, sir, I did, and I paid a price for it.

Mr. LATOURETTE. I understand your testimony perfectly, but again, this notion—I think there are two separate issues here. One, is the chief judge's interpretation of the regulations heavy-handed or is it, as the professor suggested, perhaps not the way that it should be? We have the issue that Mr. Hewig brought up that perhaps the ALJ should be outside the umbrella of the Coast Guard itself.

The second issue is—and what are there, seven Administrative Law Judges and one chief? Is that what it is? Does anybody suggest that any of these men and women—with all of the experience that you have talked about, Judge Massey, and I assume all of the experience that both of you have, that they are not treating mariners fairly in this country?

Judge FITZPATRICK. I think they are being treated fairly.

Mr. LATOURETTE. Judge Denson.

Judge DENSON. I have knowledge of some where they have not been treated fairly. But on the whole, I think they are well-intentioned ALJs who are trying to do their jobs.

Mr. LATOURETTE. Judge Massey.

Judge MASSEY. I have specific knowledge of at least one case where a mariner was not treated fairly by another judge, and that is in the documents I submitted.

Mr. LATOURETTE. Okay. Was it a discovery issue?

Judge MASSEY. No. It was a case where the chief judge, or someone on his behalf, had communicated to the sitting judge how the case was going to come out.

Mr. LATOURETTE. Is that the fellow you had lunch with?

Judge MASSEY. Yes, sir, it was that instance.

Mr. LATOURETTE. Okay. That was alarming to me because I read that you were a spectator in his courtroom, that you had lunch with him and that he made some observations. I think that was a pretty serious allegation, and I think that was Judge Brudzinsky. Is that his name?

Judge MASSEY. That is correct.

Mr. LATOURETTE. I think we should have him together with Wilson and Jordan here, and let us get to the bottom of this.

Thank you all for your excellent testimony. I enjoyed it.

Mr. DASH. Excuse me, sir. Could I respond to one thing that you had mentioned?

My problem with the saying ″we will not comply with the subpoena″—and you had indicated that the judge went ahead and dismissed the case. I would recommend the interlocutory appeals.

Why do I say that? As you well know, if you fail to comply with a subpoena in a Federal court, aside from the possible contempt, and you have the case dismissed, that is going to be supported by the appellate court. The problem here is that when it goes to appeal to the Commandant, he can overturn the dismissal, which undermines, of course, the ALJ.

It would be better if they had an interlocutory appeal where, if the government felt that the discovery request or subpoena were wrong, and filed a motion to suppress that was denied, that they could take it then to the Commandant, rather than having the

Commandant overturn the dismissal. That, to me, hurts an ALJ's status.

Mr. LATOURETTE. I heard you say that. You know, the thing I love about working with the Chairman is that he is always looking at how can we make things better. So we asked you and Mr. Hewig those questions.

So, on that list of things to do, would it be your recommendation that we look to modify that regulation that would provide for that interlocutory appeal if the government felt that an ALJ's order of discovery were not appropriate?

Mr. DASH. Yes. So you do not have this absurd position where the government is saying to an ALJ, ″No, I will not comply.″ then, of course, you have a dismissal, and then of course, the ALJ loses at the Commandant level.

Yes, I would certainly recommend that they have an interlocutory appeal.

Mr. LATOURETTE. I think that is a great suggestion.

Judge FITZPATRICK. Mr. Chairman, may I make one comment with respect to what Mr. Hewig said?

The scientific evidence that he is talking about has nothing to do with the Coast Guard. That whole determination with respect to the pH level and the creatinine level is done by the Department of Transportation in its scientific and in its drug section, and they have produced whatever the regulations or the memorandums are that govern the scientific testimony throughout the Department of Transportation, not only the Coast Guard but every other agency. So that when the Coast Guard is looking at that evidence, it is looking at the DOT determination with respect to the scientific evidence, not its own.

Mr. CUMMINGS. I want to thank all of you.

Just to wrap this up, I think that we have a situation where I truly believe that the judges do everything in their power to do things fairly. That is not the issue.

The issue seems to be, to me—and I am just listening to all of this—the heavy-handedness of a chief judge and to what degree that heavy-handedness crosses the line of the degree that an ALJ should have the right and privilege to be independent. It seems to me that is part of the problem. It is one thing to dispense justice. It is another thing to dispense justice when you feel like you have got to go over 50 million hurdles to do it. And that seems to me to be what Ms. Denson and Ms. Massey are saying.

So, just to close this out, Ms. Massey—and I want to just finish this, your piece—on April 8, 2005, did you have a meeting with Chief Judge Ingolia in Baltimore?

Judge MASSEY. I did.

Mr. CUMMINGS. I want you to be brief because we are going to have to wrap this up. Who else was present at that meeting?

Judge MASSEY. Initially, it was myself, Judge Ingolia, Judge Jordan, Megan Allison, and Ken Wilson.

Mr. CUMMINGS. Did the chief judge discuss his views on what types of prehearing discovery were appropriate?

Judge MASSEY. Yes, sir, he did.

Mr. CUMMINGS. During your meeting with the chief judge, were any of the issues that were previously discussed—during the meet-

ing of staff, of the District 8 Legal Department, of the Marine safety officers, of the chief ALJ's office, and the Commandant's legal office already mentioned—brought up and discussed when you then met with the chief judge.

Judge MASSEY. Yes, sir.

Mr. CUMMINGS. Can you tell us about that briefly?

Judge MASSEY. In a nutshell, sir, he told me that I needed to stop allowing discovery in S&R cases; that I was never to require the Coast Guard to do one minute's more work than I wanted them to do; that I was never to rule against the Coast Guard unless there was absolutely, positively, no way I could get out of it; and that I should never follow a regulation if the Coast Guard were not in agreement with that regulation.

Mr. CUMMINGS. Now, Professor Dash, you will remember I just talked a little bit, a moment ago, about heavy-handedness and where the line is supposed to be drawn. And the reason why I am saying the things that I am saying is that, having practiced law for many years, I can tell you there were three cases in probably the 2,000 or 3,000 cases that I tried that stick out in my head, and all three of them were cases where I felt that my client was not treated fairly. I will go to my grave remembering those cases.

They were not big cases, but I remember them, and I am just wondering. We talk about the appearance, not just whether injustice or fairness is there, but whether there is the appearance, and I am just wondering—and I do believe that in order for any justice system to survive, the parties must believe—now, I am not saying they are going to always be happy about decisions, but at least that they were treated fairly and that they had a shot when they walked into the courtroom.

If what was just said were true by Ms. Massey, is that in any way in your opinion stepping across the line?

Mr. DASH. I am stunned. And of course, I would love to hear what the Coast Guard has to say. But if, in fact, an ALJ were told that, I am stunned.

For example, it is so much against the law. The government in these cases has the burden of establishing by a preponderance of the evidence, since they are the ones who are bringing the charge, to establish that in fact the mariner did something wrong.

To say that you always rule for the government, unless it is something extraordinary, violates, frankly, the APA, and it violates their own statute. So I am not assuming, by the way, that this was said, and I am not assuming that is what was just said. It is just that if this is true, this is a violation of many, many statutes as well as, obviously, going against the whole spirit of what the APA is all about.

Mr. CUMMINGS. Last question.

Out of everything that has been said—see, they can dismiss the chief judge. The chief judge can leave, but that does not necessarily solve the problem. What I am sure Mr. LaTourette was alluding to is, if we are to do anything here, we want to make sure that we put in place those things that will even—as best we can, help to avoid even the appearance of injustice. And so you all have talked about a number of things that we might be able to do that will, hopefully, last when we are dancing with the angels.

So are there any other things that you all can think of, any of you, that we might do to—and I understand, Mr. Fitzpatrick, you have had wonderful experiences, and it has worked out fine for you. But clearly, there are some things going on here, and if we held this hearing until the middle of next year, we probably would not be able to get to the bottom of it, but there are some things.

You have got the Coast Guard sitting here. You have got us sitting here, and all we want to do is to try to make a system of justice the very best that it can be. We cannot guarantee anything, but we can try to put those pieces in place that help to keep it on the straight and narrow as possible.

Do you have anything else, Professor Dash?

Mr. DASH. Yes. I think the one perfect idea is the one that has already been approached. If you take the ALJ Corps for the Coast Guard out of the Coast Guard, if the chief ALJ were not down the hall from the agency head, the Commandant, I think that would solve everything. It really would. It would solve, certainly, the appearance of impropriety, because I am a big believer that the bigger the separation you have from the fact-finder—from the prosecutor or the from the agency—the better the system is; and if they could, just take the ALJs out of the Coast Guard and have them decide their cases from some other entity.

A good example, for example, is looking at the National Labor Relations Board and how they operate, how they separate their ALJ group completely from the General Counsel's Office that does the prosecution. There are other agencies that are very similar, that do the same thing. What I detect in looking at this is not any bad faith or any evil, but if there is an appearance of impropriety, it is because the ALJs, the judges, are too closely connected to the prosecutors and to the agency itself, and they should be separated.

Mr. CUMMINGS. All right. Mr. LaTourette.

Mr. LATOURETTE. Just one last observation, Mr. Chairman.

I think what Judge Massey said is an unbelievable statement. As to Judge Ingolia, I will repeat I think he has been accused of criminal conduct and, if not criminal conduct, unprofessional conduct of the highest order. My belief is that he should have the opportunity to explain himself, and if he made those observations in that meeting to Judge Massey that occurred in Baltimore, Maryland, I think we should do something about it. But if he did not, I think he should have the opportunity to come and explain himself, because at the beginning of this hearing, I introduced the memorandum that came out of that meeting of April 8, 2005. This is a serious matter. This is the United States Congress. This is a public forum, and this man, in my opinion, whom I do not know, has been accused of pretty serious stuff.

Mr. CUMMINGS. Mr. LaTourette, let me be very clear.

I agree with every syllable you just said. I think you know me well enough to know that when witnesses have appeared in any hearing, and if I feel that they have been not treated properly by Members of Congress, I make it clear that I have a problem with them. As a matter of fact, I have actually apologized to witnesses for the conduct—of the way they were treated by other Members of Congress. And the same goes for someone who is not here, par-

ticularly somebody of that stature. I would imagine, you know, those comments will be repeated in some periodicals and whatever.

Let me say this: that we did ask for anybody who was in the system, the ALJ system, to just come forward, and we were not able to get the folks who we wanted. I promise you I will work with you to make sure—because I think you are absolutely, unequivocally correct. I think that anyone should have an opportunity—since we are here talking about fairness, that folks should have an opportunity to make sure that they give the other side of the story. And I promise and I commit to working with you to get not only the chief judge but the other two people who you also mentioned before us, too.

In the meantime—did you have something, Ms. Denson? I thought you were raising your hand.

Judge DENSON. I wanted to make one last comment if I may.

Mr. CUMMINGS. Sure.

Judge DENSON. We are talking about all of us judges assuring you that we want to provide fair hearings and that we do our very best to do a good job. But the seamen still have a sense that they are not getting a fair shake; and we have to look at maybe other things, other than the ALJs' doing their job, to look at what is giving them the appearance that they might not be getting a fair hearing.

I had some instances, I think I put in the paper, that said when we judges are asked to train IOs to put on cases in front of us, I believe I was the only one who refused, and I explained why. If I could provide the same opportunity to the respondents and their attorneys who are putting on cases, I would be glad to do that. But as to training the IOs to put on cases in front of us, we are the Coast Guard judge. They have got a one-upmanship over the respondents and their attorneys, and I thought that was an appearance of impropriety. See, I love to teach, but that is the only reason I would refuse to do that.

Another thing is when a seaman walks into—no. I left in 1996, but when a seaman walks into a Marine Safety Office building to have his case heard and the whole place is filled with the Coast Guard, and there you have your judge, sitting with the Coast Guard, and he comes in for his hearing, he is going to get a fair hearing in my book and, I am sure, in Peter's and in Judge Massey's.

What is the appearance to that person and his attorney? He is surrounded by the Coast Guard, and that is an appearance of impropriety. They might be getting a good hearing, I can assure you with some of the judges I know they would be getting a fair hearing, but the appearance is not there, and they still are going to have that feeling.

Mr. CUMMINGS. Well, I want to thank you, and I want to go back to, of course, what Professor Dash said and, Mr. Hewig, that suggestion that the separation would be a good one, because I think that would cure—I think you are right, Professor Dash—it would cure a lot of this, even the appearance, because I do believe that the appearance—I mean, you know, one, people can say it does not matter how the respondent may feel or even how the Coast Guard may feel. But I just think that it is just so basic and so important

and so American that folks believe, when they are walking into a courtroom or a hearing room, that they have a fair shot, if they just do what they are supposed to do, that they have a fair shot.

I can tell you that in my practices—my practice over the years, even when clients lost, if they felt that they had had a fair shot—they may have been upset for a little while, but they never came back to me and said, ″You know what? I really think that the deck was stacked against me before I got,″ except in the three cases that I mentioned.

So, with that—if you all, by the way, have any other suggestions after, you know, you think about this a little bit, please get them to us. We are going to try to—I will tell you. This has been some very, very valuable testimony. We really do appreciate all of you. We know that we have inconvenienced you. We know that you are hungry, and so we are going to let you go. Thank you very much.

The second panel come forward, please. Rear Admiral Brian Salerno and Captain Thomas Sparks.

Both of you are going to testify, or just you?

Rear Admiral, are both of you testifying?

Admiral SALERNO. Yes, sir. Both of us are going to testify.

Mr. CUMMINGS. Okay. Fine. I just wanted to know.

Rear Admiral, thank you very much for being with us again, and again, we would like to have your comments—I do not know. I cannot tell you what to say, but it might be helpful during your opening, if you want to—if you want to. Let me just save you some time. You might want to comment on what you have just heard. You all asked to be separate, so you had your chance to hear what was being alleged, and so we will hear from you now. But I do note after reading your testimony that there was not one syllable—and I read it three times—that went to—there was a lot of information about the numbers but none that went to some of these allegations. And maybe that was intentional, I do not know—but you have 5 minutes.

STATEMENTS OF REAR ADMIRAL BRIAN SALERNO, DIRECTOR OF INSPECTION AND COMPLIANCE, UNITED STATES COAST GUARD, WASHINGTON, D.C; AND CAPTAIN THOMAS SPARKS, COMMANDING OFFICER, MARINE SAFETY UNIT, UNITED STATES COAST GUARD, PORT ARTHUR, TEXAS

Admiral SALERNO. Good morning, Mr. Chairman, Ranking Member LaTourette, Members of the Subcommittee. Thank you for this opportunity to speak with you this morning on the Coast Guard's Administrative Law Judge, or ALJ, system. The intent of the Coast Guard's ALJ system and the marine investigative process through which mariners encounter the system is to ensure the safety of marine transportation and the public. Credentialed mariners are entrusted with enormous responsibility, often involving the safety of their passengers, their fellow crewmen, and the safe transportation of dangerous cargo, often through densely populated areas.

The consequences of a safety failure involving the human element extend beyond the individual mariner, and for this reason, the Coast Guard and the marine industry expect a very high standard of performance. The vast majority of mariners faithfully carry out their duties in conformity with these standards. At the same

time, the process we use to impose a sanction against a mariner's credentials, in those rare circumstances where it is necessary, is remedial in nature, not criminal.

I want to assure the Committee from the outset that it is of paramount importance to the Coast Guard that the ALJ process in our field investigative procedures reflect fair treatment of the mariner. Of equal importance is that our procedures provide the required independence for the ALJs. It was to improve due process and to ensure fairness that our ALJ procedures were updated in 1999 so as to reflect the best practices in administrative law.

Currently, the Coast Guard administers credentials for over 200,000 U.S. merchant mariners. Each year, we take administrative action against a very small percentage of those mariners, less than 1 percent. Coast Guard investigating officers may initiate a complaint against a mariner's credential when there is evidence of misconduct, negligence, incompetence. Or a violation of law or regulation while serving under the authority of their Coast Guard-issued credential.

The use of dangerous drugs by a credentialed mariner, or impairment while on duty, due to alcohol consumption, accounts for the majority of all actions taken by the Coast Guard against a mariner's credentials. The importance of keeping mariners drug- and alcohol-free while performing their duties cannot be overstated.

The 2003 Staten Island Ferry accident which killed 11 passengers and seriously injured 70 others and the Exxon Valdez grounding with its subsequent massive oil spill serve as prominent examples of why it is imperative that we impose proper sanctions, when needed, to minimize risk in the marine transportation system.

Coast Guard investigators recommend sanctions based on the severity of the offense in accordance with the guidelines provided in Federal regulations. These guidelines ensure fair and consistent application of the suspension and revocation actions sought by the Coast Guard. The vast majority of cases where a sanction is imposed result from a settlement agreement between the mariner and the investigating officer.

The ALJ's role in the settlement process includes the review of each complaint to ensure legal adequacy of the allegations and of the sanction. Cases that are not settled are referred to the ALJ.

Since June of 1999 when the new procedural rules went into place, there have only been 152 ALJ decisions and orders issued after fully contested hearings; 21 of these resulted in full relief for the respondent; 31 of these cases resulted in partial relief or in a sanction less than that sought by the Coast Guard.

Throughout the process, the Coast Guard is very mindful of the fact that mariners' livelihoods are at stake when we seek sanctions against their credentials. For that reason, we train our investigators to exercise good judgment and objectivity and to reserve suspension and revocation action for the most egregious cases. In fact, over one quarter of administrative actions taken against mariners were resolved with a letter of warning. In cases that warrant action beyond a warning, investigators are encouraged to help address the problem through the recommended sanction.

For example, mariners who test positive for dangerous drugs are offered the option of undergoing a rehabilitation program. About 50 percent of the mariners who have their credentials suspended for drug use and who elect to undergo treatment eventually are rehabilitated and have their licenses or documents returned.

The ALJ system and the investigative process are ultimately oriented towards public safety. Like all systems, there are always ways to improve. The Coast Guard is interested in working with stakeholders to improve the transparency of the process and to better serve the needs of mariners in the maritime community.

Sir, I am out of time, but if you would like me to comment on your question on the proposal to remove the ALJ process from the Coast Guard——

Mr. CUMMINGS. That was going to be the first question I was going to ask you. Why don't we just wait and let Captain Sparks say what he has to say, and then, you know, you will need to be—I assume you are raring and ready to go, and that question will give you a few more minutes to think about it.

Captain Sparks.

Captain SPARKS. Good afternoon, Mr. Chairman and Mr. LaTourette. I am Captain Thomas Sparks, Commanding Officer of Marine Safety Unit, Port Arthur, Texas. I have been in the service for going on 25 years now, and while I am a senior judge advocate, I have also had significant field experience in many other Coast Guard missions, principally marine safety and marine security. I am currently in what we refer to as an ″out of specialty assignment″—that is a nonlegal assignment—at Marine Safety Unit Port Arthur, which is a subordinate command to Sector Houston-Galveston.

At Marine Safety Unit Port Arthur, I supervise approximately 275 dedicated Coast Guard personnel—Active Duty, so-called ″full time″ Title X reservists recalled to Active duty, civilian employees, and drilling reservists. We are home to the Nation's number one military outload port in support of our troops in Iraq and Afghanistan, and we provide waterborne security for all military outload vessel transits. We are also the Nation's number one port for the importation of crude oil, and we have one existing LNG terminal in my area of responsibility.

I will note, with respect to this hearing, I have had significant experience with the Coast Guard's S&R process throughout my career, as I had been an investigating officer myself prior to attending law school and, in fact, have presented cases before Judge Fitzpatrick, who you just heard from today. This was previous to the 1999 regulation changes.

Additionally, in subsequent assignments, I had increased responsibility and authority. I directly supervised and oversaw the work of investigating officers who presented cases before Administrative Law Judges after the regulation changes in 1999. In fact, I am in just such an assignment right now.

I am here today primarily in my role as a judge advocate, representing the Judge Advocate General of the Coast Guard, to assist Rear Admiral Salerno in answering technical legal questions that you may have concerning the Coast Guard's administrative law system, how it functions and how it affords due process.

And that is where I was planning to end my statement, but I thought I would take you up on your offer and speak to some of the issues that had been raised by previous witnesses if it is still okay.

Mr. CUMMINGS. That is fine.

Captain SPARKS. Yes, sir.

The first point I want to make is that Professor Dash referred to a sentence in the memo at issue, the guideline memo at issue, basically stating that the Federal Rules of Civil Procedure should not be considered when it comes to a discovery matter. I would like to clarify that whole issue by reading the entire provision that is in part 20, 33 CFR.

It reads, ″Absent a specific provision in this part the Federal Rules of Civil Procedure control.″

Now, there are several-pages' worth of specific provisions on discovery in part 20, and I will suggest to you that seeing through that lens, it is not a controversial proposition. In fact, it is a very straightforward proposition that, therefore, the Federal Rules of Civil Procedure do not apply with respect to discovery.

Next, there was mention by a previous witness—I believe it was Mr. Hewig—recommending that some basic or limited level of discovery be provided for in the regulations, and he said that as that should be a change.

I would suggest to you that there is already a basic limited provision on discovery in the regulations as they exist right now, and essentially, it is almost an automatic exchange of witness lists and exhibit lists, including summaries of expected testimony from the witnesses.

The third point I wanted to make is that Professor Dash talked about a waiver provision, that is in part 20, which allows the Administrative Law Judge to deviate or to waive any of the rules contained within that part. And I just would like to read the entire provision just to put it in context.

It says, ″Except to the extent that a waiver would be contrary to law, the Commandant, the chief ALJ or a presiding ALJ may, after notice, waive any of the rules in this part either to prevent undue hardship or to manifest injustice or to secure a just, speedy and inexpensive determination,″ end quote.

I will just say that the phrase a ″just, speedy and inexpensive determination″ is repeated in the paragraph just above the paragraph I read. They are watch words that I think convey the overall intent of the drafters of this regulation.

So I would just point out that there are extraordinary circumstances that would permit an Administrative Law Judge to waive one of the rules, but they should not be taken carte blanche. Basically, we are talking about preventing manifest injustice or undue hardship, and those are very high thresholds.

Thank you.

Mr. CUMMINGS. Thank you both very much.

I want to go to you, Captain Sparks, and to some of the things you just said, at least one of them.

As I recall Professor Dash's testimony—well, he said a lot, but one of the questions that I asked him was about these guidelines that were set out by the chief judge, and I quoted from those guide-

lines. And it says these words, quote, ″And the ALJ should not rely on Federal Rules of Civil Procedure for discovery matters.″

I guess what I was trying to get to—and it seems like you are, in part, verifying my understanding—is that there is certain discovery, as you said a moment ago, that is already there. I mean it is pretty much there. It is rather significant discovery. The question went to when the chief judge says that the ALJ should not rely on the Federal rules, whether he is then limiting discovery more than, say, the Federal rules would.

Are you following what I am saying? I know all of those provisions that you talked about. There are quite a few—you are absolutely right—but if the chief judge is basically saying that, okay, we do not want you to deal with—now, this is the chief judge. I am talking about what the chief judge says. You know, forget about the Federal rules. We have got our rules and know our rules pretty much. We want to make sure that they are not things that are going the opposite of one another. I know that there are things that are already stated with regard to the ALJs. I have got that.

What I am saying is there may be more rights under the Federal rules that are not spoken to with regard to the ALJ. Are you following what I am saying? Does that make sense? Are you there?

Captain SPARKS. I think so.

Mr. CUMMINGS. Okay. I am just wondering. It seems to me that there was an effort—and I think this is what Professor Dash was saying—to perhaps limit the discovery with regard to the ALJs.

Captain SPARKS. Well, sir, I have never talked to the chief judge, and I cannot be inside his mind, but my read of this memorandum is that, first of all, it is a set of guidelines. The word ″guideline″ appears at least three times. It is in the subject line. It is in the first paragraph, and it is in the last paragraph.

I look at it as a clarification more than anything else. Virtually every word is cut and pasted verbatim either from the regulations themselves, or from the preamble to the Federal rulemaking just prior to the regulations coming into effect.

So I think the rules themselves on discovery do, in fact, limit discovery because they explicitly create very high hurdles to get beyond the so-called ″mandatory discovery″ that is initially provided for and is almost automatic. Those hurdles are to get to further discovery that it will not unreasonably delay the proceeding, that the information sought is not otherwise obtainable, that the information sought has significant probative value, that the information sought is neither cumulative nor repetitious, and that the method or that the scope of the discovery is not unduly burdensome and, in fact, is the least burdensome method available.

Now, on top of that, when you talk about specific discovery mechanisms such as interrogatories or depositions, there are additional requirements that overlay those.

Mr. CUMMINGS. Again, I think it would be good to hear from the judge because I think, when you put a statement in guidelines and say—and I mean this is the sentence, ″The ALJ should not rely on the Federal Rules of Civil Procedure for discovery matters,″ period. I mean that is a problem, and it sort of goes against some of what you just said, I think. But let us move on from there.

Rear Admiral Salerno, tell me what your opinion is with regard to what Professor Dash has said with regard to taking these cases from under the Coast Guard.

Admiral SALERNO. Well, sir, our view is that there is a great deal of value in retaining the Administrative Law Judge program within the Coast Guard.

Mr. CUMMINGS. Why?

Admiral SALERNO. Well, this allows the judges to become very acquainted with all of the maritime regulations to which mariners are held. They understand the mission focus of the Coast Guard and how their role serves the marine safety purposes of the program.

We also recognize the imperative that this process be independent, and we believe that we actually have the procedures in place to preserve that independence. At the same time, we will objectively consider any recommendations that are made by the Committee that would offer alternatives to that current process.

Mr. CUMMINGS. Do you think it is important, Rear Admiral, that the mariners and the Coast Guard feel, when they walk into a hearing, that they are going to be treated fairly? Do you think just to know that or to feel that or to believe that is important?

Admiral SALERNO. Absolutely. Yes, sir.

Mr. CUMMINGS. Does it concern you that there are folks in the mariner community—and I can tell you—I do not know if you heard what I said from the very beginning. There is nothing that we have done—and we have done quite a bit in this Committee over the last 7 months—that has drawn more attention than this. There are comments from mariners, e-mails, things of that nature. They are just very concerned about it. Does that concern you? Would that concern you?

Admiral SALERNO. Yes, sir, it does concern me.

Mr. CUMMINGS. So Mr. LaTourette was saying—and I am sure he said it on the record, I think he did—that this removal—he and I agree on this, and perhaps pulling them out from under the Coast Guard might be helpful in the sense that it could cure—whether you want to believe there are problems or not is a perception—that it could cure some of these perception problems.

I am sure you would agree with me that we would hope that those problems do not exist, but the fact is that a lot of folks apparently feel that way, and I am putting aside— while Mr. LaTourette has referred quite a bit to the Sun paper article, I put that aside to try to get down to some other things, you know, conduct-type things that I have heard about; trying to get to those because I can tell you—and Mr. LaTourette alluded to this—some of the charges were very, very serious and are the types of things that in most jurisdictions could get a judge in a lot of trouble.

So I just think that maybe we need to take a look at that. And I know the Coast Guard is a very strong and a great organization, but I think sometimes, I think, we have to do everything. And I am just asking you, if you can.

Other than the things you have just stated, what issues would you have or would the Coast Guard have with regard to separating and having these cases tried outside of the Coast Guard?

Admiral SALERNO. Well, sir, in addition to what I just mentioned, I would like to point out that there are two levels of administrative review in the current system. Certainly, there is a review to the Commandant, and then a respondent, if they are not satisfied with that level of review, can take the case to the NTSB. So it does go outside of the organization in an administrative proceeding.

Beyond that, there is recourse to the Federal court system so that a respondent does, in fact, have avenues outside of the Coast Guard to further hear a case and to evaluate a case on the merits.

Mr. CUMMINGS. Let me ask you this.

Going to what the Rear Admiral just said, Captain Sparks, if a mariner comes in and he goes before Judge Massey or before Judge Denson and his license is taken away, his privilege to do his livelihood, what happens during an appeal? Is that judgment then suspended while they go through appeal? How does that work? Do you follow what I am saying? In other words, the license is suspended—I mean not suspended, but revoked. What happens then?

Captain SPARKS. Well, there are two avenues, at least two avenues open to the respondent at that point. They can apply for a temporary license if their license has been suspended. If it has been revoked, there is also a process called ″administrative clemency,″ and then the respondent can also ask that the case be reopened again and looked at like Judge Fitzpatrick referred to when he, I think on his own initiative there, reduced the sanction in the case of the pilot who almost caused the horrific accident with the LNG vessel.

Just like Admiral Salerno says, there is also an avenue of appeal directly to Commandant and then beyond the Commandant—and the Coast Guard is unique in this—to an outside independent agency, the National Transportation Safety Review Board. Then even beyond that, it goes to a judicial circuit court.

Mr. CUMMINGS. I guess what I am trying to get to—and I am not a mariner, but I guess what I am trying to get to is, when we have got someone whose livelihood depends upon being able to do the things that mariners do, and they lose the opportunity to do that, the only question I am trying to get to is—you know, sometimes—let me go back.

I used to represent lawyers, and if a lawyer got in trouble, a lot of times what would happen is, if he were, say, put out of business or suspended for 6 months, that was like being disbarred for 10 years, because he lost all of his business; his reputation was destroyed; and just getting back would be very, very difficult.

I guess what I am trying to figure out is that when we talk about these appeal processes, what happens in the meantime? In other words, you lose your license, but you said you can get a temporary license. You can get—what else?

Captain SPARKS. You can apply to get your license back, even after it has been revoked, through a process called ″administrative clemency.″

Mr. CUMMINGS. Yes, but during that clemency, you do not have your license—right?—until you get it back?

Captain SPARKS. Correct.

Mr. CUMMINGS. So, in other words, you can go to a hearing, and at that moment, like they do it in Baltimore at least, the judge can say, ″Give me your license.″

Is that what they do there, too?

Captain SPARKS. Yes, sir.

Mr. CUMMINGS. Oh, okay.

So you do not have a license. That is a problem.

I guess what I am trying to get to, Rear Admiral, is that I just think that, when you are talking about something as serious as taking away somebody's livelihood, we need to take all of these things into consideration. Not that the same thing would not happen even if it were separated, but at least, hopefully, we would be able to cure some of these perceptions other than fairness—do you follow me—in very serious cases.

Admiral SALERNO. Yes, sir, I understand your concern there. I would like to point out, sir, that in the investigative process that takes place at the field level, our investigators are trained to use a great deal of objectivity and judgment and even bring in a case before an ALJ. In many cases that deal with minor infractions, our investigators may just issue a verbal warning. There is no record to this.

An example might be, you know, a pilot on a vessel hits a navigational aid. Technically, you can bring somebody to a hearing for that, but in many cases they may just give a verbal warning or, in more serious cases, a letter of warning. Then it does become a matter of record. But they try to resolve cases at the lowest possible level. The default position is not necessarily to bring people to a hearing. That is reserved for the more serious cases or the drug cases as we mentioned before.

Mr. CUMMINGS. I have got you, but let us go back. You were talking about investigating officers. Then I will turn it over to Mr. LaTourette.

Judge Denson mentioned that she was asked to train investigative officers, and I was just wondering, is that a normal practice, do you know?

Admiral SALERNO. It is not normal practice. Certainly, since the rules went into effect in 1999, the separation is much more of a bright line issue. There is one exception to that, and that is, at our training facility in Yorktown where we train our investigating officers on the procedures for conducting hearings, usually towards the end of this multiweek course, we may invite an ALJ to come in and perform in his normal role as a judge at a mock hearing.

In the way that training is conducted, the judge does not provide any instruction to the IOs. He does not critique their performance. That is left to the course instructors. His role is simply to——

Mr. CUMMINGS. Or hers, what her role is.

Admiral SALERNO. —or her—and just play out their normal role, and then they leave. But as far as any other training, I understand that may have occurred in some instances in the past before the 1999 rules, but that is not occurring today.

Mr. CUMMINGS. The last question.

Rear Admiral Salerno and Captain Sparks, if an ALJ in an adjudication issues a subpoena or a discovery order, does the Coast Guard choose which subpoenas or discovery orders it will comply

with and which it will not comply with? What is the policy with regard to such orders, if there is one?

Admiral SALERNO. If a judge issues a subpoena, our expectation is it will be followed.

Captain SPARKS. I agree. I do not know that we have got a specific policy. I think it is just generally understood we do what the Administrative Law Judge directs.

Mr. CUMMINGS. So did it surprise you when you heard the testimony—I think it was from Judge Massey—that folks just said that they were not going to comply, that the Coast Guard said they were not going to comply? Did that surprise you at all?

Captain SPARKS. Very much. I was similarly surprised with her recitation of her meeting with Chief Ingolia. It is almost incredible.

Admiral SALERNO. I concur, sir. That would be contrary to the way we train our investigating officers. The expectation is when the judge issues an order, we follow it.

Mr. CUMMINGS. So, in listening to the testimony of Judge Massey, would you say that you all were surprised by particularly my last line of questioning when I asked about when she talked about the chief judge and what she alleged was said to her? You all were surprised by that?

Captain SPARKS. Very much so, yes, sir.

Mr. CUMMINGS. All right.

Admiral SALERNO. Yes, sir.

Mr. CUMMINGS. So what you are trying to tell me is that you would agree that if that were true, if what she were saying were true, that would not be inappropriate; is that right?

Captain SPARKS. I would prefer to look at it this way.

In my nearly 25 years in the Coast Guard, Administrative Law Judges have been treated—we have a culture where they are, essentially, revered. They are respected. Ex parte communications are verboten. And I just cannot imagine something like Judge Massey described as happening.

Mr. CUMMINGS. All right.

Mr. LaTourette.

Mr. LATOURETTE. Thank you very much, Mr. Chairman.

Captain Sparks, I know that judge advocates in this instance are not prosecutors per se, because these are not criminal proceedings, and the level of proof is a preponderance of the evidence. But I guess, because you are dealing with the potential revocation of someone's license and therefore livelihood, they are semi-quasi criminal.

When I was the prosecutor, I always felt that the prosecutor had a great obligation. And I think the thing that is really disturbing me about this newspaper article—and I am sorry for bringing it up again—is that somehow wins, not just on the belt, are more important than doing justice. And to the folks who I worked with in the prosecutors' office, yes, it was embarrassing if you lost a case. Nobody likes to have brought an indictment or a charge to find out not to be right. But during the course of dealing with a case, if you discover you have got the wrong person or you have got the wrong charge or the facts are not there, I mean, is it your observation or experience that the judge advocates also are there to do justice, not just to win cases?

Captain SPARKS. Most assuredly so. Before they ever get to the case stage, these investigations are thoroughly vetted at the unit level before a decision is ever made to go forward with an S&R case. And we do realize the devastating impact it can have on a mariner and his or her ability to, you know, have a livelihood. It is not something we take very lightly. To the contrary, there is also a certain level of nervousness or anxiety in going before an Administrative Law Judge.

So, if for no other reason but a selfish motivation, we want to be absolutely, positively sure that, you know, there has been, you know, an act of misconduct or of negligence or so forth has been committed and the evidence is overwhelming.

Mr. LATOURETTE. I appreciate that very much. And I would make this observation. I have read the chief judge's memo relative to, don't follow the rules of civil procedure the way that you did. And that is, if the regulations are silent, if they speak to the issue, the discovery issue, then you don't use the Rules of Civil Procedure. If the regulations are silent, then you should turn. And I didn't view the chief judge's memo—I guess I would disagree with the professor's observation and I guess the Chairman's, too. But I would say this; that based upon Judge Massey's observation about the chief judge, that if he actually said the things that she alleged that he said, then I guess I won't give him the benefit of the doubt on the memo.

And so my question to you, Admiral Salerno, is, the Chairman has indicated that the staff reached out to try and get people who were in this meeting in Baltimore, and we also had two other judges sort of had their reputations, I think, pretty severely attacked during the course of this hearing, are you aware of anything from the Coast Guard then that would prevent Mr. Jordan, Mr. Wilson, Chief Judge Ingolia and Judge Brudzinsky—I know that there are some lawsuits flying around and so forth and so on. But if I was Judge Ingolia, Judge Massey accused him, and I think it is a crime to say that no matter what the facts are, no matter what you think, you have to rule for the Coast Guard. And if he actually said that, the guy shouldn't be in his current job; he should be in jail. But if he didn't, I think he should have the opportunity to come here and set the record straight. So is there any impediment that you guys not want these folks to come and talk to us about this?

Admiral SALERNO. Sir, the impediment is the lawsuit. There are three of them. Judge Ingolia has been named in his official capacity and in his personal capacity in those lawsuits. In our discussions with the Department of Justice, it is recommended that he and several others not appear at this stage because of that pending lawsuit.

Mr. LATOURETTE. How about the people that were in the meeting? Jordan and this Wilson guy play a pretty prominent role in our observations.

Admiral SALERNO. I believe Mr. Jordan is also named in the lawsuit. I am not sure about Mr. Wilson. I would have to confirm that for you, sir.

Mr. LATOURETTE. Could you look at that, because those are the names the Chairman may have? And Judge Brudzinsky, has he been sued, too. He is the guy that went to lunch.

Admiral SALERNO. I am getting confirmation from the back row, sir. Yes, on all of those.

Mr. LATOURETTE. Wilson, too, is in the lawsuit?

Admiral SALERNO. Yes, sir.

Mr. LATOURETTE. I would just hope that you or someone else at the Coast Guard could come have a meeting with the Chairman and try to figure out how we collect this information. Because it bothers me on a lot of levels, the allegations that were leveled here today. And then for the reasons that I—I don't want to beat a dead horse, but I think I have explained why they bother me. And I think a guy that has been accused of what he has been accused of should have the opportunity to clear his name. And I understand what those impediments are. But if you can work with the Chairman and try to figure out how we can gain access to the observations in a way that doesn't prejudice either side in that lawsuit, I really think that would be helpful.

Admiral SALERNO. Sir, if I may, I would also like to state that the Coast Guard categorically denies the allegations that have been made in this lawsuit and, working through the Department of Justice, has filed a motion to dismiss.

Mr. LATOURETTE. And that doesn't surprise me at all. I will tell you, where I come from, and I guess I will disagree with you, Admiral, in talking with the Chairman, I think that, because it is my understanding that after the ALJ rules, you do lose your license, and the next step is the Commandant and then the NTSB. I do think that there is something to be said on this whole appearance of impropriety. And I don't think this hearing has shown that there is any impropriety of the Coast Guard or the ALJ system at all. But I do think that it has demonstrated that you can have that appearance. It is a little bit like Congress, to tell you the truth. When we were in the majority, I used to love to preside over the House. And my friends in the Democratic party would come up afterwards and say, we like the way you did it because we know we are in the minority, but we feel we were treated fairly.

And I think that the Chairman is right on point with that. Some people don't understand losing at all. But most people, if you treat them fairly, understand that the facts weren't on their side and they move on their day. And that is why I think that this moving the ALJs out of the Coast Guard, and I understand your opposition, has some attractiveness, and I would hope we could talk about that, because you do run the risk of these accusations. I assume you read the Sun story. It is horrible. And I haven't come away from this hearing that anything in that story relative to numbers, you may be a great reporter, but you are not good at math, and it is not right.

But people deserve to be treated fairly. And to the extent that they are not—and so if an ALJ that is in the Coast Guard building rules against a mariner, it then has to go to the Commandant, and the Chairman is exactly right, he doesn't have his license. And even in the case, they put into the record where the NTSB ruled with the guy and said, we should take a look at this again; we are

going to remand it. I assume he was without his license for whatever period of time that took. And that I think speaks that maybe we need to look at where the ALJs sit. So I thank you both for your testimony.

I thank you, Mr. Chairman.

Mr. CUMMINGS. Thank you very much.

Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Chairman, I apologize to you and the Ranking Member. We had a Judiciary hearing that occurred simultaneously with this hearing, and that is why I am belated getting here.

Captain Sparks, this has nothing to do with today's hearing, but a half century ago, there was a boatswain's mate 1st whose sir name was Sparks pushing booths through Cape May. Any relation to you?

Captain SPARKS. No, sir, I don't believe so.

Mr. COBLE. He was a grisly boatswain's mate, but a very competent one.

You mentioned the administrative clemency program, Captain. What would be the average duration, if I had my license revoked and I applied through the administrative clemency process, when would that likely be restored?

Captain SPARKS. I think it is a number of years.

Mr. COBLE. A long time?

Captain SPARKS. It is a fairly long time.

Mr. COBLE. Well, as the Chairman pointed out, I don't think we need to play loosely with people's livelihoods. That is very crucial. But at the same time, I don't think we need to be lucid and reckless with safety and security.

Captain SPARKS. Exactly.

Mr. COBLE. And compromising safety and security, on the one hand, as opposed to retaining a license, that has to be weighed very equitably I think and very fairly.

Admiral, or, Captain Sparks, either of you, if you will, I am told there has been a lot of talk at the hearing regarding due process in the ALJ system with the Coast Guard. How about briefly walking me through the appeals process that is available to both parties, that is the mariners or the accused and the Coast Guard? How extensive is this process? And how far up the chain of command within the Coast Guard does it advance? And what opportunities are available outside or beyond the Coast Guard ALJ system?

Captain SPARKS. Sir, let me tell you what I know, and then if you need more information, if you give us an opportunity, we will get back to you with more details. But there are a couple other avenues even before you talk about appeals. Administrative clemency is one of them. And I was just provided with the exact answer to your question. For a drug offense, it is a minimum of 3 years. For a nondrug offense, it is 1 year minimum for the administrative clemency process. If we are talking about a suspension as opposed to a revocation, there is an opportunity for a mariner to receive a temporary license. My understanding is that is a fairly liberally granted procedure by the Administrative Law Judge.

Now, when you talk about appeals per se, there is a right of appeal to a Commandant. And that appeal can be based on whether

a finding of fact is supported by substantial evidence, whether each conclusion of law accords with applicable law precedent and public policy, whether the Administrative Law Judge abused his or her discretion. Or if we are talking about a case where there had been a motion to disqualify an ALJ that was denied by him or her, that can be a basis, the failure to grant a motion to disqualify. That appeal goes to a Commandant. If a Commandant rules against the respondent, then the respondent has a further avenue of appeal outside of the Coast Guard to the NTSB. And I think the grounds are the same or roughly the same. And, again, if a mariner fails to get relief with NTSB, that mariner can go to the judicial circuit court which has jurisdiction.

Mr. COBLE. Admiral, will you add anything to that?

Admiral SALERNO. No, sir. I think Captain Sparks laid it out quite adequately.

Mr. COBLE. I have no further questions Mr. Chairman.

Mr. CUMMINGS. Thank you, Mr. Coble. Again, we want to thank you all for being here. I know it has been a long morning and afternoon. We will be getting back to you with a few other questions. I realize that there are some questions that you all probably are not even in a position to answer. But there is one I must ask. If a Coast Guard unit has a concern about a particular judge, should they go to the staff of the chief ALJ or the Merit System Protection Board. Captain Sparks.

Captain SPARKS. I don't believe—and we can get back to you with a definitive answer—there is a prescribed method to communicate or voice a concern about an Administrative Law Judge other than appealing his or her decision after the fact. That said, the Chief Administrative Law Judge does have a duty to investigate allegations that come to his or her attention regarding misconduct. And if the chief then decides that these allegations are founded or serious enough, then the chief can kick the case over to the MSPB. That is about the best I can answer your question, sir.

Mr. CUMMINGS. All right. Thank you all very much.

And, again, we will try to follow up on Mr. LaTourette's request to get at least the three people that he mentioned before us as soon as possible. And so, anyway, we thank all of you for being here. And this closes the hearing.

[Whereupon, at 2:00 p.m., the Subcommittee was adjourned.]

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July 31, 2007

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SUBCOMMITTEE ON COAST GUARD & MARITIME TRANSPORTATION

"Overview of the Administrative Law System"

July 31, 2007 - 10:00 a.m.
Room 2167, Rayburn House Office Building

Statement of Chairman Elijah E. Cummings

Today, the Subcommittee will examine the Coast Guard's administrative law system. This system adjudicates cases in which Coast Guard personnel allege misconduct or negligence on the part of a mariner and seek the temporary suspension or permanent revocation of a mariner's professional credential.

The Coast Guard fairly emphasizes that these cases are brought against a credential and not against an individual mariner – and that the overriding purpose of these actions is to ensure safety in our nation's maritime transportation profession.

Safety is a critical goal and mariners who are negligent or unsafe or who use drugs should not be on our nation's waterways.

However, the suspension and revocation of a credential or license is not a matter that is to be taken lightly in any professional industry.

Without a credential, a mariner cannot work. Thus, in any administrative hearing, a mariner sees hanging in Justice's balance not just a piece of paper but the ability to support a family, to pay a mortgage, and to get ahead in life.

Today's hearing will give our Subcommittee the opportunity to examine whether the policies and procedures governing the conduct of administrative adjudications in the Coast Guard's administrative law system guarantee the fairness of all proceedings to all parties who appear before the system.

A detailed analysis of the 6,321 allegations filed by the Coast Guard against mariners through the administrative law system since 1999 reveals that a total of 3,441 -- or more than half the allegations – claimed that a mariner had used an illegal drug.

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Just over 30% of the allegations claimed incompetence, misconduct, or negligence on the part of the mariner – and the remaining cases involved either the alleged violation of a marine safety law or a conviction in another legal proceeding for drug use, DUI, or other offense.

According to the Coast Guard's records, of the 6,321 allegations filed against mariners since 1999, a total of 6,149 have now reached some type of disposition.

Just over 46% of the allegations were settled between the mariner and the Coast Guard without proceeding to an adjudication.

A total of 901 allegations ended in default because a mariner never responded to the allegations, while 433 allegations were administratively withdrawn by the Coast Guard because the mariner could not be found to be served with an allegation, and 422 allegations were withdrawn by the Coast Guard either because the allegation could not proceed or, more often, because the mariner voluntarily agreed to surrender a credential.

Of the 6,149 allegations that have reached a disposition, 957 allegations on 740 dockets were contested – either because a mariner denied an allegation or disputed a proposed sanction. I note that a single docket often contains more than one allegation.

Of these 740 contested dockets, ALJs dismissed 131– or nearly 18% – of these cases. A total of 326 dockets – or 44% – reached a settlement. 152 dockets proceeded to an adjudication – and the remaining dockets reached some other disposition or are still in progress.

Of the 152 dockets for which an adjudication proceeded to the issuance by an ALJ of an order, the charges against the mariner were found to be unproven in 18 cases – though Coast Guard appeals of four of these cases resulted in three cases being remanded and the modification of one ALJ decision.

Of the remaining dockets that proceeded through adjudication, only some of the allegations on a docket were proven – or a contested sanction was reduced – in 31 cases, while all allegations were proven on 93 dockets – or 61% of cases that proceeded through adjudication.

Of course, while these numbers give us an overview of the disposition of allegations and dockets, they do not reveal a mariner's motivation in agreeing to a settlement or explain why some allegations were found to be proven or unproven.

Most importantly, these numbers reveal nothing about whether the policies and procedures governing either the management of the entire administrative law system or the conduct of individual adjudications are fair – or whether they are fairly applied by the system's administrative law judges.

Further, IF there are instances of unfairness or impropriety, these numbers do not reveal whether they are isolated incidents or proof that an entire system tolerates or even encourages prejudice against one party or the other in the conduct of adjudicative proceedings.

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And, unfortunately, allegations of unfairness and impropriety have come to the attention of the Subcommittee. Our hearing will explore the validity of these allegations.

Our hearing will also examine whether the procedures in place in the Coast Guard's administrative law system meet the higher standard of preventing even the mere appearance of impropriety and unfairness.

Such appearances in any legal system are intolerable because they destroy trust in the system which must be the ultimate protector of individual rights.

Administrative law is unique – because it is a legal system within an executive branch agency designed to oversee the application of agency rules and regulations. Further, it is a system in which facts and decisions are concluded not by a jury of peers but by a single administrative law judge – who also has wide latitude in directing the course of proceedings.

We will hear today from three individuals who have borne the responsibility of adjudicating administrative proceedings in the United States Coast Guard's administrative law system.

We will also hear from a witness who brings years of experience representing mariners before the Coast Guard administrative law system.

Another witness, Professor Abraham Dash – a professor Emeritus at the University of Maryland School of Law, from which I graduated – bring decades of experience studying and teaching law to generations of students.

The Coast Guard has sent two senior officers to discuss the management of its administrative law system and we also look forward to hearing from them.

The very foundation of the entire American system of justice is the right to a fair hearing and to due process in any matter involving the law. These rights are sacred in this nation – and as a lawyer and an officer of the court, I share the duty of those sworn to uphold these rights.

More importantly, as Members of Congress, the Members of our Subcommittee share the duty of ensuring that all executive branch agencies treat all citizens fairly and impose sanctions against any individual only when an administrative proceeding has been fairly conducted and all evidence has been heard.

I emphasize that we will not be examining individual cases – whether open or closed – in today's hearing. The adjudication of administrative cases is properly left to administrative law proceedings – and we honor that principle today.

Rather, our task today is to ensure that the scales of Coast Guard justice can be trusted to fairly balance the legitimate safety concerns of the Coast Guard with the rights of mariners.

Statement of Rep. Walter B. Jones (NC-3)
House Subcommittee on Coast Guard & Maritime Transportation
Hearing to Review the Coast Guard's Administrative Law System
July 31, 2007

Chairman Cummings, Ranking Member LaTourette and Members of the Subcommittee – thank you for holding this important hearing today and for allowing me the opportunity to make a brief statement.

Thomas Jefferson once wrote that "the most sacred of the duties of a government [is] to do equal and impartial justice to all citizens." Sadly, a recent Baltimore Sun investigation helped reveal that the U.S. government, and specifically the Coast Guard's Administrative Law Judge system, is denying mariners and fishermen the justice they deserve.

The Sun's investigation confirmed what watermen in my Eastern North Carolina district already know: standing up for your innocence in the Coast Guard court system is all but useless because the deck is so hopelessly stacked against you. The Sun found that Coast Guard prosecutors have a 40-to-1 success rate. Faced with the near certain odds of a guilty verdict and a steep penalty, innocent mariners feel like they have no choice but to settle with the Coast Guard, even if settling will do great damage to their reputation, their career and their ability to provide for their family.

The Sun also uncovered a host of other alleged improprieties and procedural inequities that, if true, may go a long way in explaining why mariners are so unsuccessful in the Coast Guard court system. These allegations include:

- The Chief ALJ pressuring judges to rule in favor of the Coast Guard;
- Improper contact between members of the Coast Guard ALJ system and Coast Guard personnel regarding open cases;
- Rulings being predetermined by specific judicial policies circulated privately amongst ALJs by the Chief ALJ; and
- Coast Guard ALJ's repeated denials of defendant's requests for evidence against them.

Mr. Chairman, I can't tell you how pleased I am that the Subcommittee is holding this hearing today. You have assembled a distinguished panel of witnesses, and I look forward to their testimony. But with your indulgence, I believe the Subcommittee would also benefit from hearing from some of those most affected by the ALJ system: the watermen themselves. To that end, I'd like to ask unanimous consent to include in the record a statement from Sean McKeon, President of the North Carolina Fisheries Association. Mr. McKeon outlines the experiences many of North Carolina's commercial fishermen have had with the ALJ system, experiences which are disturbingly similar to those revealed by the Baltimore Sun.

Thank you again for the courtesy of allowing me to appear today.

Walter B. Jones

STATEMENT OF PROFESSOR ABRAHAM A. DASH[1]

My name is Abraham A. Dash. I am an Emeritus Professor of Law at the University of Maryland School of Law where I have taught Administrative Law for over 30 years. Prior to teaching at the Law School, I was Deputy Chief Counsel and Director of Litigation for the Comptroller of the Currency (Administrator of National Banks) where I was involved in adjudications not covered by the Federal APA, but was required to comply with Due Process under the Fifth Amendment as interpreted by the U.S. Supreme Court. Prior to this position, I was a Trial Attorney with the Criminal Division of the U.S. Department of Justice.

It is my understanding that I have been invited to attend this hearing; as I may be of some assistance to the Committee regarding issues of Due Process that may exist in adjudications conducted by the United States Coast Guard.

Procedure Due Process is defined in two related areas of law — The Federal Administrative Procedure Act (5 USC 551 et. seq.) and the Fifth and Fourteenth Amendments (Due Process Clauses), of the United States Constitution. A multitude of Supreme Court cases deal with Due Process in state administrative adjudications under the Fourteenth Amendment (i.e., *Goldberg v Kelly,* 397 U.S. 254 (1970).

A further line of cases deal with Federal adjudications (not under the APA) where Due Process under the Fifth Amendment will apply — (i.e., *Wong Yang Sung v McGrath,* 339 U.S. 33, (1950) and *Ins v Doherty,* 502 U.S. 314, (1992).

[1] "This statement has used the following sources: Administrative Law – Schwartz and Corradu; Understanding Administrative Law – William F. Fox, Jr.; and Administrative Law – Gellhorn and Byse."

The Federal Administrative Procedure Act was enacted shortly after the World War in 1946. This statute was an attempt to correct Due Process problems that arose from the growth of new regulatory agencies during the new deal. There were no standard procedures for rule making or adjudications; each agency had its own way of operating regarding rule making and adjudication. Today, with some limited exceptions, all Federal agencies are under the APA.

Sections 554-559 of the APA regulate adjudications and more than satisfy the Due Process requirements of the Fifth Amendment. However, this section only applies when the statute of the agency requires that its adjudications be determined by a "hearing" on the record. It is my understanding that the adjudications of the United States Coast Guard are under Section 551 et. seq. of the APA.

It is apparent that the three areas of procedural Due Process of the APA more relevant to this hearing are as follows:

1. Independence and impartiality of the fact finder (i.e., Administrative Law judges).
2. Ex parte contacts with the fact finder (i.e., Administrative Law judges).
3. Discovery for respondents in Coast Guard adjudications.

1. Independence and Impartiality

Congressional intent to insure the independence and impartiality of fact finders under the APA is clearly expressed when Congress changed the name of "Hearing Examiners" to "Administrative Law Judges."

> "In 1978, Congress confirmed the change in title by a statute providing that "hearing examiners" in the relevant APA sections should be changed to "administrative law judge." This change has elevated the status of hearing officers more than any other step could have done. And the judicial apotheosis has been achieved at no cost –simply by a change of name that was as painless as it was beneficial. See *Butz v Economou*, 438 U.S. 478 (1978)."

See also *Ramspect v Federal Trial Examiners Conference*, 345 U.S. 128 (1953).

2. Ex parte Contacts with the ALJ

> "The drafters of the APA took this issue quite seriously. The Act contains a number of express provisions on ex parte. First, § 554(d) prohibits an ALJ from consulting "a person or party on a fact in issue, unless on notice and opportunity for all parties to participate . . . ." Second, § 557(d)(1) sets out ex parte contact rules applicable to all agency employees who participate in the decision.
>
> Ex parte contacts go both ways: parties are prohibited from contacting the agency deciders, and the agency deciders are prohibited from contacting the parties."

The Federal Courts are, of course, equally concerned with ex parte contacts and have often expressed their disapproval when it comes up in a case. (i.e., *See Home Box Office Inc. v F.C.C.*, 434 U.S. 829 (1977), and *Wong Yang Sung v McGrath,* 389 U.S. 33, (1950).

3. Discovery

The APA says very little about discovery in agency proceedings. Agencies, under Section 555 (d), are authorized to issue subpoenas to parties on request. Section 556 (c) authorizes ALJs to take depositions or have depositions taken. The Attorney General's manual on the APA, 67 (1947) states that parties should be given the same access to discovery as the agency's staff.

However, agencies differ in the types of discovery permitted. Despite the fact that the administrative conference in 1981 (recommendation 70-4, 1 CSR Section 305. 70-4) strongly recommended that agencies spell out a comprehensive discovery system; few have done so.

There is, of course, some discretion with the ALJ to authorize discovery in a given case, but the regulations and policy of the agency will control. There is a Due Process requirement for basic information that respondents would need to defend themselves, (See *Hess and Clark v*

FDA, 495 F2 975 (D.C. Cir. 1974). But, other than that, discovery is discretionary with the agencies.

Conclusion

It is clear that any attempt by agency personnel to make ex parte contacts with an administrative law judge, on a pending case, is a violation of the Administrative Procedure Act and the Fifth Amendment to the United States Constitution.

It is clear that any attempt to pressure an administrative law judge by a superior or the agency to rule favorably for the agency is a violation of the Administrative Procedure Act and the Fifth Amendment.

It is also clear that if discovery by a respondent in an APA adjudication is so limited that it inhibits the ability of the respondents to present their case that would violate the Fifth Amendment of the United State Constitution. This would probably violate the intent of the adjudication sections of the Administrative Procedure Act.

I will be happy to answer any question the committee may have.

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July 31, 2007

Elijah E. Cummings, Chair
and Committee Members
Subcommittee on Coast Guard and Maritime Transportation
House of Representatives
Room 2167
2165 Rayburn House Office Building
Washington, DC 20515

Re: Hearing – Review of the Coast Guard's Administrative Law System

Good morning Mr. Chairmen and Members of this Committee:

Thank you for your invitation to speak about my experiences as an Administrative Law Judge (ALJ) with the U.S. Coast Guard (CG) from 1982 to 1996. Based on my experience with three Chief Administrative Law Judges (CALJ), I firmly believe the program requires critical changes to the power and role of the CALJ to accomplish the goal of the Administrative Procedures Act (APA) to ensure fair and impartial hearings by truly independent jurists. In a word, the CALJ needs to function *either* as one of a number of independent ALJs, deciding cases, *or*, simply as an administrator. With the exception of CALJ Archie Boggs, they sought to superimpose their role as CALJ into multiple roles that intruded on my ability to handle cases, independently and without unwarranted intrusion by them. The CALJ's ability to control the number of cases I handled; to express opinions on my decisions; and to harbor attitudes and beliefs towards me that increasingly sought to interfere with both my status and my neutrality---all of this was detrimental to me physically and mentally and a threat to my independence as a judge.

A. *Experience*

Prior to my appointment as a CG ALJ, I served as Trial Attorney at the Department of Justice from 1974 to 1982 in the Admiralty and Shipping Section of the Civil Division. I tried maritime cases in federal district and appellate courts throughout the U.S. and our Territories. In my capacity as Trial Attorney appearing before numerous federal judges, I developed a keen understanding of the important role our judges play in ensuring that our courts are seen as fair. In particular, for purposes of today's hearing, most federal courts randomly assign cases, chief district court judges do not oversee or opine on the work or decisions of the trial judges, and the judges, for the most part, rendered decisions that accorded with the facts and the law. Of course, that our federal judges serve for life is designed and generally always works to keep judges free from the undue influences of both private parties and the government.

In 1982 when Secretary of Transportation, Elizabeth Dole, appointed me to serve as an ALJ for the CG, I was assigned to the then Second Coast Guard District, covering twenty-two mid-western states. I may have presided over as many as 500 license suspension and revocation cases brought by the CG against merchant mariners alleging offenses of negligence, incompetence, misconduct, including criminal acts, oil pollution and drug and alcohol violations.

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Coming from a maritime background built up during my eight years of experience in the admiralty and shipping section at Justice, I continued to broaden my experience by attending the Tankerman School in Helena, AR. They load and unload the red flag barges that carry oil and other hazardous products. I rode the towboats downbound on both the upper and lower Mississippi River, during high water, which is the most dangerous time for them. After a day on the boat, the crew forgot about my position and treated me like any of the other crewmembers. I talked with the operators, captains, mates, engineers, cooks, lockmen, deckhands and pilots to learn what they experience in their work on the rivers and Great Lakes. The most time for the operators is setting up to go through bridges downbound in high water. I also went out with some Investigating Officers of the CG to see what their jobs were like. I could never have done my work properly without the extensive knowledge I gained from these experiences. In my cases, I deliberated carefully and wrote, what I believe, were well-crafted opinions and rulings.

In December 1996, due in large measure, in my opinion, to the personal actions and animus of the CALJ, I lost my position in the CG. I felt my caseload was manipulated and that the CALJ did not follow the Commandant's Instruction 12351.2A on the definition of "competitive area" for a Reduction in Force (RIF). The ALJ Program is a Headquarters Unit and as such the "competitive area" should have been nationwide. All of the CG ALJ's should have been in competition with each other. However, the CALJ did not want to lose a favored ALJ who would have been RIF'd, if he had followed that Instruction. Instead he designated St. Louis as my "competitive area" and RIF'd me, since there were no other judges in this so-called "competitive area" to compete against. The practice is negatively referred to as a "designer RIF," which has been used in the past to get rid of veterans.

B. *Issues that the Subcommittee Needs to Address*

In order to function properly in my role, shortly after my appointment, I undertook to review applicable rules and regulations as well as marine customs and practices. Whenever possible, I sought to attend seminars in which judges received training on how to improve performance. However, commencing in or around 1985 and 1986, while Fred Chatterton served as CALJ, and resuming again in the late 1991, while Joe Ingolia began serving as CALJ, I began encountering unfair and unwarranted intrusion and politically insensitive interference with my efforts to render opinions and decisions independently and without outside influence. Whether out of personal attitudes those CALJ's harbored towards me or, equally likely, a desire to reward their favored ALJ's, case assignment policies changed resulting in a reduction in my caseload and an increase in those ALJ's favored by the CALJ. While I continued to insist on getting a fair and equal share of the caseload, the CALJ took personal charge of who got cases that were near my District and assigned them to judges hundreds of miles further away and also gave cases to the favored ones to attractive locations like Hawaii and Guam as "perks."

On some occasions, when I requested reimbursement for attending judicial seminars, those requests were denied or even ignored and discriminated against, such as the National Association of Women Judges Conference; information was circulated to the other judges, while excluding me; and minor issues about such matters as clerical time off, that I normally controlled, surfaced as criticism. From these experiences, I concluded that we need to make sure of the following:

1. Policies and practices of the CALJ must ensure that an ALJ is in fact independent and not subject to the whims or personal preferences of a CALJ.

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2. An ALJ must have the freedom to decide cases free from concerns that an unpopular decision will result in isolation, loss of status or promotion, and ultimately discrimination in job tenure, assignments, or training as happened to me.

3. The Subcommittee should clearly define the role and function of the CALJ. In my view, assignment of cases can be readily and neutrally handled by administrative clerks to (a) make sure that all ALJs, including the CALJ, share roughly an equal case load; (b) judges are not chosen based on the bias, views or attitudes of the CALJ about either the subject matter or the quality of the ALJ; and (c) for the most part, cases should be assigned administratively like in the federal and state courts to each ALJ on a rotating basis.

4. The CALJ "administrative function" should be subject to fair and impartial scrutiny to avoid the CALJ's ability to influence outcomes or to "penalize" judges who make rulings that either the CG or the industry view as improper. The appellate process does not require an active CALJ's interference, as the CALJ generally has not heard or reviewed the evidence or even understood how a particular ALJ has interpreted the facts and the law to reach what are often correct decisions.

5. The CALJ's role needs clarification and perhaps regulation. During my term as an ALJ, the CALJ provided unsolicited and often improper or wrong comments about the ALJ's decisions. The CALJ sometimes viewed himself as a higher level of ALJ authority, rather than as a manager charged with helping CG ALJ's better perform their jobs.

6. The CALJ should have no power, influence or standing to weigh in on a RIF. While the OPM may make inquiry of the CALJ, and for that matter, other CG ALJs, decision making relating to this role should not vest the CALJ with unwarranted authority over ALJs, who then become dependent on "earning" points from the CALJ in order to keep their positions or obtain the assistance of law clerks.

7. The CG ALJ Program is a Headquarters Unit and the CG has very specific rules in a RIF action as to what is the "competitive area" for a Headquarters Unit. The competitive area is nationwide and is comprised of the entire Unit as a whole, as stated in the Commandant's Instruction (COMDTINST) 12351.2.A. Ultimately, that means that all of the USCG ALJs are included in the competitive area, regardless of where they are assigned. However, in my situation, the CALJ used his personal case assignment powers to undercut my caseload; changed the definition of the "competitive area" to where I lived; ultimately eliminated me, because there were no other CG ALJ's in my area and was able to keep his favored ALJ.

These actions by the CALJ were arbitrary and violated policies and rules. This was clearly an abuse of power and position. This practice is negatively referred to as a "designer RIF," where someone is set up to be eliminated. This practice has caused the elimination of other veterans in a RIF situation.

The CALJ's power to assign cases provides the CALJ with inordinate and unwarranted power that can be readily abused and manipulated to the detriment of one judge and to the benefit of another. Since size of

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caseload has typically been viewed as a basis for eliminating an ALJ position, vesting this enormous power in the CALJ encourages judges to conform to behaviors and demands by the CALJ that can be inappropriate and contrary to the goal of the fair administration of justice. I certainly understood that, my exhibiting independence and fairness in reaching decisions would not protect my job. I directly understood that if I did not follow the CALJ's directives, desires or mandates, the CALJ would and did take measures that personally affected my tenure and, in some cases, undercut my authority to render independent judgments. (On one occasion one of our more favored ALJ's suggested I be more "sweetsy" toward the CALJ and that I "use my feminine wiles" to get on his good side.)

C. *Suggestions for Change*

My testimony may provide you with an insight into the long-standing insidious and vindictive culture that exists in the CALJ Office. That being done, hopefully I may give some information that would assist in some way in the reconstruction my desire is to influence in some way the reconstruction of a program centered on the ideals and objectives of the Administrative Procedures Act (APA), justice and good will---not on the petty egos of small minds, threatened by those around them.

I hope that my testimony provides you insight into the long-standing insidious and vindictive culture that has existed within the CALJ Office. I strongly recommend action be taken to ensure the reconstruction of a program centered on the correct implementation of the just objectives of the Administrative Procedures Act (APA). I recommend you consider taking the following actions:

- Remove the CALJ as member of the "admirals club."
- Eliminate any appearance of bias, impropriety or favoritism. The judges are already perceived very negatively by the marine industry. The industry sees us as "in the back pocket of the CG", and the CALJ needs to cease actions that tend to create impressions that ALJs are merely rubber stamps for the USCG. (When I refused to train IO's, I was looked down upon by the CALJ for not doing the right thing. However, I saw this practice as improper. It made the ALJ's look like they were showing favoritism. There were many fine senior IO's who could do the training. In fact, I offered to bring in a former IO, now a lawyer, who was willing to come to the 2nd District to do the training. The District did not take me up on my offer.
- Make sure to continuing training occures in judicial ethics and diversity as well as on legal and maritime matters.
- Remove the CALJ Office entirely from the appeals process, if this has not already been done.
- Provide definitive instructions pertaining to *ex parte* communications for judges, attorneys, respondents and CG Investigating Officers.

Respectfully,

Rosemary A. Denson

Proposed Questions For
Elijah E. Cummings, Chair and Committee Members
Subcommittee on Coast Guard and Maritime Transportation

Submitted by
Rosemary Denson
July 31, 2007

Did you ever refuse to train the CG Investigating Officers in presenting cases before you?

Did you ever feel a sense of exclusion or isolation during your time as an ALJ?

Were you ever threatened by the CALJ not to challenge the RIF?

What support staff did you have to assist you?

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LONG-STANDING INSIDIOUS AND VINDICTIVE CULTURE OF THE CALJ OFFICE, WHICH HAS RESULTED IN THE CONTINUOUS VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

Good morning ladies and gentlemen. Thank you for your invitation to speak before you about my experiences as an Administrative Law Judge (ALJ) with the U.S. Coast Guard (CG).

By this sharing, I hope to provide information for you to determine whether the CG ALJ Program may need some gutting and reconstruction to get back on an even keel to accomplish the goals of the Administrative Procedures Act (APA). Providing fair and impartial hearings by truly independent triers of fact is the ultimate goal.

My legal expertise was developed while serving as Trial Attorney at the Department of Justice for eight years in the Admiralty and Shipping Section of the Civil Division from 1974 to 1982. I tried maritime cases in federal district and appellate courts throughout the U.S. and our Territories. In 1982 I left to become an Administrative Law Judge (ALJ) with the CG, until 1996, when I lost my position in a CG Streamlining/RIF. My testimony will cover that period.

Among other things, the following issues need to be addresses:

Ensure that an ALJ is in fact independent and not subject to the whims or personal preferences of a CALJ. Affording ALJ's freedom to decide cases free from concerns that an unpopular decision they make will not result in isolation, losing prestiege, status or promotion. This has happened in the past.

CALJ's should be busy hearing cases, not assigning them. Cases should be assigned administratively in a fair rotational way, like in the federal and state courts. The judges have nothing to do with assigning cases. The power to assign cases by the CALJ can be abused and manipulated to the detriment of one judge and to the benefit of another. This very power has been used in the past as a basis to eliminate a CG ALJ, not favored by the CALJ. This enormous power encourages judges to conform to behaviors that may well be inappropriate to the fair administration of justice. Assignment of cases in popular locations has been used by CALJ's as perks to those judges in his favor.

CALJ's must insure that ALJ's discharge their responsibilities free from fear----- in a way to send message to other judges that if they don't follow the CALJ directive, desires or mandates in ways that a CALJ finds appropriate, that the CALJ won't take measures that affect that judge personally and do serve the ends of justice.

CALJ's should not be assigning law clerks. Law clerks, if not assigned to each judge, should be applied for administratively as needed by each judge, not used to enhance one judges caseload over another's. This has been done in the past.

Demonstrate the importance of creating standards, generating rules and regulations that preserve independence and integrity of the ALJ's.

Example: The ability of a CALJ to designate the caseload for an ALJ gives to CALJ enormous power, which if abused, can lead to loss of independence of the ALJ. If the ALJ does something that is not what the CALJ wants, this could creat a vacuum and loss of caseload.

CALJ are there to support the ALJ's. In the case of Cambronne, CALJ did not stay neutral. In this case he assumed misbehavior, without any reference to a transcript or even speaking to the ALJ involved. Should have written a letter back to theattorney thanking him for his comments and suggesting he follow the rules for filing a recussal, if he felt so strongly. He should not be sending a copy of the attorney's letter to a District Commander saying for "his eyes only" behind the ALJ's back and without even speaking to her about it.

The system I lived under while practicing in federal courts was very different. After I had been with the CG for awhile I realized that to preserve my position I had to bend to the desires and whims of the CALJ and sppease the gripes and concerns of him, which I didn't evern know they were and which were vaguely communicated to me.

Because a lawyer complained – he threatened to remove or recuse me, the CALJ appeared to be trying to appease him, assuming that lawyer may have had merit to his claim. He never called me, never read the transcript, doubtful if he even read the my decisions. I reached my decision on the merits of the case, whether or not the attorney, the CG or the CALJ agreed with me. If the higher level of appeal did not agree with me, it is there perrogative to reverse me and order the CG to issue the temporary license. The CG affirmed me and the NTSB reversed the CG and sent it back for the CG to issue the temporary license, not me. The CG sent it back to me to give support why I made my one and only ever decision to refuse a temporary license to a mariner, which I did. (Three DUI arrests and one involving a hit and run accident and operating a Great Lakes vessel under the influence was a big influence on me not to order the CG to issue a temporary license, while the mariner's conviction was on appeal. I truly thought he was a severe threat to safety.

There CALJ had no cases about my misbehavior. His letter was only a concealed personal animosity or poor judgment on his part or a continued effort to remove me because of his own personal dislikes or insecurities.. The CALJ used this letter as an excuse to assign another case in the 9th District to Judge Boggs, who had to come all the way from New Orleans, instead of me. You take a stand and you pay the price. Another excuse to shrink my caseload.

Need to avoid any possibility that any future ALJ would be put in a position where their decision would be subject to someone's personal agenda.

If a RIF situations ever arises in the future, the CALJ should no input as to what ALJ is eliminated. OPM should be the decider on that. If left in the hands of the CALJ, this can and has been egregiously abused in the past, impacting seriously and unfairly on the life and well being of an ALJ, who was not on his most favored list.

The CALJ's Office is a Headquarter's Unit and the CG has very specific rules in a Reduction in Force (RIF) action as to what is the competitive area for a Headquarter's Unit. The competitive area is

comprised of the entire Unit as a whole as stated in the Commandant's Instruction (COMDTINST) 12351.2.A. That means that all of the CG ALJ's would be included in the competitive area, regardless of where they are assigned. In the particular case of which I speak, the CALJ decided he wanted to keep a judge that was on his most favored list and even recommended to the Commandant that he knew he was junior and would likely be RIF's, but he still wanted to keep him.

So the CALJ, without reguard to standards, decided that he would change the competitive area for this Headquarters Unit and have it become the location where the judge lived that was not on his most favored list, thereby leaving no competition for the judge. He called it "the area of responsibility," which has nothing to with a RIF. This clearly violated the rules of the RIF, yet he was able to keep the ALJ he wanted to keep. His actions were supported by the Commandant and the Secretary of Transportation at the time, even though they were questioned about this action. This was clearly an abuse of power and position. This practice is negatively referred to as a "designer RIF," where someone is set up to be eliminated.

I took my work very seriously as a trial attorney at DOJ. I learned as much as I could to develop in my field of law and maritime skills. The pumpmen, captains, mates, engineers, optical and lighting experts, deckhands, cooks, pilots, tankermen, lockmen on the locks and many more all had much to offer me in my training. I did the same with my position as an ALJ. I believed in continuing legal/judicial training too. I brought my expertise with me to the CG when I started as an ALJ. I continued with further training by attending the Tankerman School in Helen AR and rode the towboat downriver in high water both on the upper and lower Mississippi to learn what these captains and pilots are up against. I have greater respect for them on the river than I do the ocean going mariners because the rivers change every time there is low or high water. They have to keep "book" on the river all of the time. They are "on" their entire time at the sticks. There is no automatic pilot for them.

My testimony may provide you with an insight into the long-standing insidious and vindictive culture that exists in the CALJ Office. That being done, hopefully I may give some information that would assist in some way in the reconstruction my desire is to influence in some way the reconstruction of a program centered on the ideals and objectives of the Administrative Procedures Act (APA), justice and good will---not on the petty egos of small minds, threatened by those around them.

How do you effectuate this?

Remove the CALJ as member of the admirals club.
Having any judge's office co-located at CG Headquarters or shared with any other CG facility does not do it.
Holding hearings in CG facilities does not do it, even if this is an inconvenience for the IO's.
It is not done by anything other than a courteous arms length relationship with all of the parties.
Working with the IO's to "nail" a respondent definitely does not accomplish it, as one of the CG ALJ's conspired to do. He, however, was on the most favored list.
It is not done by the chief judge's office having any input into the cases on appeal.
Socializing with CG members, especially those involved in Marine Safety Programs is not going to do it.

Judges training the IO's to present cases against the respondents does not do it. This has caused justifiable anger in the marine community towards the judges and the CG. The CG has many experienced and well-trained IO's that are fully capable of training the IO's.

-eliminate any appearance of bias, impropriety or favoritism. The judges are already perceived very negatively by the marine industry. They see us as "in the back pocket of the CG", which I have learned in some cases to be true. There is a long hill to climb to repair the damage that has been done in the last over 30 years.
-treat all parties and your staff with respect Humiliating any of the parties or your own support staff does not do it.
Referring to your support staff as "my girl" does not do it.
It is not done by failure to have yearly continuing judicial/legal training. If a judge or staffer needs more help, provide for that special training. Don't ridicule them.

It is not done by failure to train support staff in their administrative responsibilities.

If one of your judges is in recovery, don't refer to him as a drunk behind his back. He could be a great asset to our program in dealing with cases involving drugs and alcohol.

The chief judge should be the leader of equals and be there to always assist the judges in accomplishing the objectives of the program.

Just as the leaders in the churches are supposed to be the servants of their people, so to should the chief judge be there to serve the public servants for our citizens. Many leaders forget the true role of the leader.

We need continuing training in judicial ethics and diversity

This needs to be done:
Use bullet points

what might be done to effectuate the objectives and ideals of such a program. This environment has not only impacted negatively upon the people in the program, but also the people it was meant to protect, by insuring they receive fair and impartial hearings by independent triers of facts.

To accomplish this goal, it is the roll of the chief judge to provide mentally and physically healthy judges, who do not feel intimidation by the chief judge or staff.

I make this allegation, with one exception. During the tenure of Judge Boggs as Acting Chief Administrative Law Judge, I never any sense of him as part of that culture.

If you find this cancer exist, you act immediately to eliminate the sickness in that office.

Holding hearings outside of the premisie

He was taking advantage of his position—travel abuse, abuse of position, abuse of power and abuse of people. This I am sure did not happen overnight.

I was not the only judge the chief judge isolated or "went after." When I first came with the CG, Judges Coughlin, Fravola and Boggs introduced me to Judge Galvin in New Orleans. He was on the wrong side of the chief judge. He as not allowed to get training, go to our conferences and I don't remember what else. I believe the chief judge was isolating him because he told me not to speak with him. I don't know how many other judges before him were treated this way. While I trained with Judge Coughlin and Judge Fravola they gave me some of the history of the program. They told me not to get on the chief judge's bad side or I would pay dearly. They suggested I always agree with him and then do what I needed to do.

When I questioned that it set in motion a long series of steps in retribution

ACCIf I could just be a little more sweetsy and use my feminine wiles, it would be much better for me. He didn't mean this in a sexual way so much as a little girl flirting with daddy

George Jordon also knew about the Judge's travel abuses and did nothing. He said he was afraid of losing his job. (I can relate)

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Systematically interfered wsith the inde of the judges in order see that all cases were settled in favor of the

Retribution for telling him not to use my office for justifying his
Chicago vafcations

Put recommendations on my cases on appeal that were not even raised on appeal by the attorney, and this is when I went to the adml.

It (even) went as far as submitting disingenuous recommendations to the CG Legal Office (G-LCL) (to reverse) for the purposes of reversing my cases on appeal to the Commandant.

I was unaware of this situation, until an attorney from the Legal Office called me to inquire about what was going on with the CALJ Office and my cases. He told me that George Jordon was submitting recommendations to them, signed by the CALJ, to reverse my cases on appeal, (even on) including issues that were never raised on appeal by the seamen's attorneys. (cite the cases). The CG attorney stated that his office did not agree with the CALJ Office's recommendations; however, in deference to him (since he gave the impression by stating that he was a "Harvard Man"), they remanded or reversed my cases (See ALJ Denson statement p. 5). The CG did a disservice to itself and safety on our navigable waters these actions.

Such behavior by the CALJ Office was impacting not only safety of transportation on our navigable waters, but also the CG's right to a fair hearing. As an ALJ appointed pursuant to the Administrative Procedures Act, I was responsible not only to provide a fair hearing to our merchant mariners, but also to the CG.

As a result of this, I reported what I had (heard) learned to Admiral Bob Nelson, who was at the time the Second CG District Commander. When I met with him, he explained that he had (just) recently received a letter labeled "for your eyes only" from the CALJ. The letter stated that an unnamed attorney was upset with me because I would not authorize a temporary document for his client (Lyons), pending his appeal. (He failed to mentioninclude in the letter that the seaman had been charged with operating his vessel while under the influence, after leaving the scene of a hit and run accident, which resulted when he ran a red light and that the seaman had three prior arrests for DWI.) He failed to mention that the seaman had been charged with operating his vessel while under the influence and had left the scene of a hit and run accident. This resulted after he had ran a red light and had three prior arrests for DWU.

Admiral Nelson retrieved the letter out of his trashcan to show me. He said he sensed there was something strange going on between our offices. Since he was planning to (to Headquarters for a meeting) attend a meeting at Headquarters, he offered to hand carry a statement from me to the Chief of Staff regarding this matter. (which he did) (See ALJ Denson statement 10/8/87). While in Washington, he (found out) learned that the CALJ was trying to eliminate me by recommending the closing of my office. He told me not to (worry about that happening) be concerned, because (the

Chief of Staff had taken care of the matter) the matter was being (taken care of) handled by the Chief of Staff.

After not speaking to me for over a year, the CALJ sent me an intimidating memo dated 8/25/87(,). He questioned (questioning) the propriety of my behavior at the hearing discussed above (and apparently), as well as the basis for my decision in the case (Lyons). It was written in response to a letter sent to me, with a copy to the CALJ, from the attorney involved in the case. The CALJ stated that while he took "no position on this matter," it still gave him "considerable pause" and I was admonished to "comport myself with appropriate decorum in future dealings with this and other counsel." I was also instructed to report to him any further cases with this attorney (See ALJ Denson statement 10/8/87).

Played with the system for his own ;purp;oses

Talk about:
a culture of "I'll show you" (for not kissing ass);
a culture of vindictiveness,
It was not until this came to my attention, that I met with Admiral Bob Nelson, 2nd CG District Commander at the time.

a culture of vindictiveness,
even going so far as to create false information about my office:
That I had refused to take cases (refer to the CALJ deposition 10/96)
That I did not provide them with accurate information about my cases cases (refer to the CALJ deposition 10/96)

RECOMMENDATIONS:

Clean out the CALJ Office
Remove the CALJ Office entirely from the appeals process
Instructions on ex parte communications for judges, attorneys and Marine Safety Office IO's
The Code of Ethics for judges
Remove the CALJ from the Admirals Club

Talk about Parlan obstruction of justice in Hawaii; Bernie's offense etc

TESTIMONY OUTLINE

1. Chatterton (10/1982) Jordon (1984)

I allowed my legal assistant Mrs.Linda Hubert to go on vacation, when there would be three days that neither of us would be in the office. The office was covered for us by the Comptroller"s secretary, so cases could still be docketed and no phone calls would be unanswered. The Chief of Marine Safety and the Second District Commander had no problem with that.

The CALJ called to tell me he was going to visit me. It was sometime in June or July of 1986. I told him I would be out of the office on travel with a case. He then said he was going to visit with the District Commander. When my legal assistant called the Commander's secretary to put it on his calendar, she found that he was also going to be out of St. Louis. When I reported this to Judge Chatterton he said he was still going to come. When I returned from travel, my legal assistant reported that he came to the office, was there about 30 minutes, called a cab and left the office. Subsequently, I asked the CALJ not to use my office to justify his vacation visits to his daughter in Chicago, especially when neither I nor the District Commander would be in St. Louis. He continued his trips to Chicago the next two years, but not by way of St. Louis.

This is when I remember his behavior towards me changed.

What started to happen:

-Recommended reversals of my cases --- all appeals affirmed by Cmdt until after 7/86;
After 7/86 shows record of remands and reversals recommend by CALJ/George Jordon that the CG affirmed, i.e., Smith Case & Watson Rabatsky. On one of the remands Capt. Fred Burgess, Chief of the appeals section, cited an ALJIPP as the basis to remand the case back to me—Wedgewood case rec reversal on issue not raised by attorney on appeal
Also recommended reversal of cases on issues not challenged prior to 7/86. i.e. ?

-Intinidating letter Capt Steinback said the Cambrone letter belonged in the trash where all of his other letters went when he sent them to him when he was CG legal officer for the 9th District
-ALJIPPs

-Wouldn't respond to my leave requests

-Tried to manipulate my caseload to eliminate me

-No communication for over a year 1986-1987, would hang up on me when I called—only letter received was one denying my training request and the intimidating letter

-Would not approve continuing judicial education for me, while sending the other judges and himself – Tom Fisher told me that he did have money and if he ran out he could ask for more and he would give it to him.

-OPM on a desk audit found that I was the only Coast Guard ALJ qualified for GS-16 promotion because of the complexity of my cases. OPM would have allowed it, but Judge Chatterton refused. (4/27/87 Bober, Pettibone from the OPM 5/17/88)

-The other ALJ's were asked to evaluate their own cases and George Jordon did mine (86-87)

-Judge Fitzpatrick asked him to give me cases, knowing that I had very few. The CALJ said he couldn't because of Gilbert II and reorganization? This did not make sense to him.
Both Judge Fitzpatrick and Judge Coughlin told me that it appeared to them that he was trying to eliminate me.

-tried to isolate me didn't even tell me that Judge Fravola had died, but he told all the other judges.

2. Judge Boggs (9/27/90-10/19/91)

I don't recall any problems during his time.

3. Ingolia (10/91) / Jordon

-Judge Ingolia and George Jordon arbitrarily tried to use "area of responsibility" as a competitive area to get rid of me, when in fact the ALJ program is a headquarters unit, which requires the competitive unit to be nationwide. All of the judges should have been considered together. The CALJ and George Jordon made up a single-person competitive unit to get rid of me—this is commonly called a "designer RIF." HR 3586 was passed in 1996 to eliminate this procedure because it was being used against veterans. (FedlEmployeesNews Digest 8/5/96) These men did in fact manipulate the system.

-Would not assign me law clerks to do my cases, when I asked for them. (1/28/92 CALJ Memo re law clerks)

-CALJ handling of caseload 46 cfr 1.10 (c or e 1-5)

WRITTEN TESTIMONY OF

JUDGE PETER A. FITZPATRICK

TO THE SUBCOMMITTE ON COAST GUARD

AND MARITIME TRANSPORTATION

THE U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON TRANSPORTATION AND

INFRASTRUCTURE

APPEARING *PRO SE* AT THE INVITATION OF THE CHAIR
3605 Prince Andrew Lane
Virginia Beach, VA 23452
Phone Number: (757) 486-2585

1. **Personal Information**

I am Peter Andrew Fitzpatrick and I served as a Coast Guard Administrative Law Judge (ALJ) at Norfolk, Virginia for nearly twenty seven (27) years between 1980 and 2007. I retired on January 3, 2007 after approximately thirty seven (37) years of Government service at both the Interstate Commerce Commission and the Coast Guard. I served as an Administrative Law Judge at the Interstate Commerce Commission from 1978 - 1980 and as an attorney in the ICC's General Counsel Office and the Bureau of Enforcement prior to that time. I have been a member of the Bar of the Supreme Judicial Court of the Commonwealth of Massachusetts since 1968. I am also a member of the Bars of various federal courts including the United States Supreme Court. I have been married to my wife Roseann for forty (40) years and have four (4) children and two (2) grandchildren.

2. **Coast Guard Administrative Law Judge Program History**

This section is divided into two (2) periods. The eleven (11) year interval from 1980 - 1991 when Alfred Chatterton was the Coast Guard Chief Administrative Law Judge, and the second period of nearly sixteen (16) years which runs from 1991 – January, 2007 when the current Chief Judge Joseph Ingolia occupied that position.

1980 - 1991

The Coast Guard administrative hearings involve the suspension and/or revocation of merchant mariner licenses, documents, and other authorizations. These proceeding are brought under 46 U.S.C. Chapter 77. In 1980 the Coast Guard procedural regulations were codified at 46 CFR Part 5.

When I joined the Coast Guard Administrative Law Judge corps, there were approximately twelve (12) judges located at various ports throughout the county including Boston, New York City, Baltimore, Norfolk, Jacksonville, New Orleans, Houston, St. Louis, Long Beach, San Francisco, Seattle, and Washington D.C. The bulk of the cases involved disciplinary matters aboard United States commercial vessels such as intoxication on duty, failure to join, assault and battery, fail to obey orders, desertion, etc. Frequently, when a vessel arrived in a U.S. port, Coast Guard Investigators would board the vessel, interview the Master and crew, and exam logbooks for potential offenses. Often, before the crew disembarked the mariner would be served with charges. A hearing would be scheduled at that same port before the local Coast Guard Administrative Law Judge. The Investigating Officer prosecuting the case would be a member of the Marine Safety Office and be assigned to that duty for approximately one (1) year. They often held the rank of Lieutenant or Lieutenant Junior Grade and sometimes, but not very often, Lieutenant Commander. Very rarely did the Investigating Officer have any legal education. Rarely too were these Respondents represented by counsel.

At the outset of the hearings the Respondents were advised of their right to counsel and the right to subpoena witnesses (46 CFR Part 5.519). If the mariner requested counsel or the presence of any witnesses, the hearing would be continued. The orders issued in the hearings, which were to be "remedial" in nature, included one of the following; Revocation, Outright Suspension, Suspension in Part-Probation in Part, Probation, and Admonition. Where the Respondent was shown to be a user of or addicted to the use of a dangerous drug or to have been convicted of violation of a dangerous drug law of the United States, the District of Columbia, or any state or territory, the Administrative Law Judge was required to revoke all Coast Guard issued licenses, documents and other authorizations. That regulation reflected the Congressional mandate set out at 46 U.S.C. 7704 which required revocation for all such offenses.

In cases involving the charge of Negligence – licensed deck or engineering officers, pilots, and/or tugboat operators, and operators of smaller commercial vessels, would be involved. In allision cases where the vessel collided with a stationary object such as a pier, anchored vessel, or chartered shoal, a presumption of negligence arises adverse to the Respondent if it is shown that the marine casualty occurred and was caused by the Respondent. In these more complex cases Respondent's typically would be represented by counsel. Even then however, the Investigating Officer representing the Coast Guard usually did not have a legal education. A written decision with findings of fact and conclusions of law was issued in each case.

At that time appeals from Administrative Law Judge decisions could be taken only by the mariner and not by the Coast Guard Investigating Officer. A headquarters unit handled those appeals and the appellant decision was and is known today as the Commandant's Decision on Appeal.

As the Administrative Law Judge at Norfolk, I principally handled cases throughout the Fifth Coast Guard District which included the six (6) states and the District of Columbia, between a portion of New Jersey and the North Carolina and South Carolina state line. When a case was filed in Philadelphia, Baltimore, Norfolk or Wilmington, North Carolina, it would be set for hearing by my office in a Notice of Hearing and was scheduled for hearing approximately thirty (30) days later. Frequently, it was impossible to locate the Respondent to determine his/her availability once charges where preferred. Often mariners would not respond to telephone calls and refuse the service of documents. Accordingly, all too often I traveled to a distant port to conduct a hearing and the Respondent would not appear. In that case, I would review the sufficiency of the Notice of Hearing and other documents to make sure proper service was effected. If acceptable I would proceed and conduct the hearing in "absentia" (46 CFR 5.515). In those cases where the Respondent appeared and stated that he/she wished to retain counsel or wished to have witnesses testify at the hearing, the proceeding would be continued to a later date and appropriate orders issued to subpoena witnesses. Thus, I frequently made repeated trips in the same case to the same port in order to protect the rights of the Respondent as required by the regulations.

The discovery provisions under the old regulations were rudimentary authorizing the issuance only of subpoenas and depositions. Importantly, it was the policy of the Coast Guard at the time not to permit settlements. Every case had to proceed to a formal, trial type hearing.

As the years progressed the Coast Guard began to close some of the Administrative Law Judge's offices at various ports including Boston (1983), Jacksonville (1998), and St. Louis (1996). Later, Long Beach too, was closed in 2002. Also, the number of judges sitting at New York City and New Orleans were reduced. At the time of my retirement in January, 2007 there were seven (7) judges in the program.

Three (3) significant developments occurred in the late 1980's - 1990's which had dramatic consequences for the Coast Guard Administrative Law Judge program. First, President Reagan issued an Executive Order in 1986 directing industry employees in safety sensitive positions to undergo chemical testing for dangerous drugs. Under that authority the Department of Transportation in 1988 directed its agencies and the Coast Guard to develop regulations implementing those requirements in the industries they regulated. The Department of Transportation also issued its own regulations governing the general drug testing procedures to be followed (49 CFR § 40). Subsequently, the Coast Guard issued its regulations which are codified at 46 CFR Part 16. Importantly, those regulations required that if an individual fails a chemical test for dangerous drugs, the "individual will be presumed to be a user of dangerous drugs".

As a result of the Department of Transportation initiative, the Coast Guard Administrative Law Judge case load dramatically increased and drug testing, drug use and possession cases became the most predominant offenses involved. Again, each of these cases required a formal, trial type hearing.

Second, during this period, the use of Alternate Dispute Resolution techniques received increasing recognition by the Federal Government as an important tool in reducing litigation time and expense.

The third important development was the adoption of the current rules of practice by the Coast Guard which for the first time expanded discovery, encouraged settlements and brought the Coast Guard proceedings more in line with civil actions under the Administrative Procedure Act. A more detailed discussion of these rules is contained in the following section.

By 1991, the Administrative Law Judge program was ripe for change. The appointment of Chief Judge Ingolia allowed that to happen.

1991 - 2007

One of the significant improvements made under Chief Judge Ingolia was the centralization of the case docketing system in Baltimore. Previously, all charges filed by the Investigating Officers were lodged with the Coast Guard ALJ at the port and the docket was maintained at that office. Few ALJ decisions were circulated, and I believe, an index of those decisions was not maintained. Thus, it was very difficult for counsel to research prior Judge's decisions. The Chief Judge created the Administrative Law Judge Docketing Center in Baltimore in September 1997 and all cases are now filed at that center. The entire docket is maintained there and once the case is completed, it is the repository for all records.

Chief Judge Ingolia also made written transcripts available to the presiding ALJs in most Coast Guard cases. Under the old system the Judge had a court reporter present at the hearing but all too often was not allowed to order a transcript in most cases for his/her own use. Usually, the transcript was ordered when an appeal was filed and it was used by the members of the appellate section at Headquarters. Moreover, support for field Administrative Law Judges was delegated to the local District Commander and ALJ offices and equipment that were not the best. Chief Judge Ingolia took over that support function and these offices, courtrooms, and equipment have dramatically improved.

The new Chief Judge has also expanded the use of law clerks and legal interns. The ALJs at the ports did not have any assistance even in the most complex cases. That omission has now been corrected. The ALJs in the field can count on the assistance of law clerks and legal interns. In this regard too, the level of competence of the administrative support and legal staff in the program has greatly improved.

The most dramatic change in the Administrative Law Judge program during these years however, is reflected in the way Coast Guard cases are handled today. The new rules of practice which were urged by the Chief Judge and ultimately adopted by the Coast Guard, were enacted in 1999. They are discussed in the succeeding section.

At the time of my retirement Coast Guard Administrative Law Judges presided over the case loads of three (3) other Federal agencies in addition to the Coast Guard. The agencies and the date Coast Guard ALJs began handling their case loads is as follows; the National Oceanic and Atmospheric Administration (NOAA Fisheries) (1995), the Bureau of Industry and Security (1997) (both in the Department of Commerce), and the Transportation Security Administration (Department of Homeland Security) (2003). Each agency has its own rules of practice and thus, Coast Guard Administrative Law Judges are required to apply four (4) different sets of agency procedural rules.

The accomplishments of Chief Judge Ingolia are many and the Coast Guard Administrative Law Judge program has blossomed under his leadership.

3. **The Rules of Practice, Procedure, and Evidence for Formal Administrative Proceedings of the Coast Guard**

These rules of practice were adopted in May, 1999 and for the first time set out detailed rules for the use of discovery, the exchange of exhibits, the identity of witnesses, the use of pre-hearing conferences, and the encouragement of settlements. They sought to eliminate trial by surprise. Under the old rules the Coast Guard and the Respondent did not have to disclose the witnesses who where scheduled to testify or the exhibits they intended to introduce.

Under the new rules the case is initiated by the filing of a Complaint and the Respondent is required to file an Answer within a specific period of time. If the Answer is not submitted the Investigating Officer can file a motion seeking a Default Order with a proposed sanction without a hearing. In such cases, I would issue an Order to Show Cause seeking to determine whether the Respondent understood he/she was required to file an Answer. If no response was received and the case had been properly served on the Respondent, I would issue a Default Order with a sanction against the Respondent's license or document. This procedure avoids the difficulties under the old rules requiring the judge to travel repeatedly to a distant port and frequently conduct the hearing in absentia.

Today too, a large number of cases are resolved by settlements. The Investigating Officer and the Respondent are encouraged to seek agreement on a resolution of the case and a proposed sanction. A joint motion signed by both parties is filed and the Judge, in most instances, will approve it. The Coast Guard rules of practice today governing suspension and revocation proceedings are a vast improvement over the earlier rules.

4. **The Relationship between this Administrative Law Judge at Norfolk and the Coast Guard**

This Administrative Law Judge has always exercised personal independence in deciding Coast Guard and other Federal agency cases. I have never been pressured, ordered, or directed, to decide a case one way or another. This statement reflects my experience over approximately twenty seven (27) years of service at the Coast Guard under two (2) Chief Judges and many Commandants. In addition, I have never been directed, pressured, or ordered, to decide any case for one side or the other by anyone in the Coast Guard at the field level including the District Commander, Captain of the Port, or Investigating Officer.

I have decided every Coast Guard and other agency case on the basis of the evidence presented at the hearing with due regard to rights of the Respondent. In Coast Guard proceedings I have always been aware that the Commandant's Office which reviews Administrative Law Judge decisions is vigilant in examining the proceeding under review to assure the Respondent received a fair hearing.

Moreover, during my tenure as a field Coast Guard Administrative Law Judge I did not have frequent contact with the Chief Judge. Months would transpire before I would have the opportunity to speak with the Chief Judge. I was very much on my own at Norfolk and often felt the need for more contact to keep abreast of developments in the field. In fact, a few years ago, I suggested to the Chief Judge that occasional telephone conference calls with the field judges and the Chief Judge's office would be helpful. He agreed and I implemented a series of telephone conference calls on a somewhat sporadic basis.

The bottom line with regard to my relationship with Chief Judge Ingolia's office is that no one ever interfered with any case over which I presided. My decisions were mine alone.

5. **The Memorandum Entitled "Guidelines for Discovery Requests" (March 7, 2005)**

I have reread the "Guidelines" and I do not have any significant problems with them. It is a commentary on the discovery procedures in the new rules and is a guideline only. I was bound by the published Coast Guard procedural regulations and would make my own decisions regarding the need for depositions and interrogatories in each case. If a Respondent appeared in a proceeding *pro se*, I would make every effort to provide the necessary information so that the mariner could file an appropriate discovery document.

6. **Ex Parte Communication**

Ex parte communication between the Administrative Law Judge and third parties outside the agency has always been strictly prohibited and was repeatedly emphasized by Chief Judge Ingolia. Communication with members of the Coast Guard who are involved in prosecuting or reviewing cases on appeal is clearly prohibited too. Those prohibitions were emphasized at our various meetings and telephone conferences. Over my many years of service with the Coast Guard, I made every effort to avoid such ex parte contacts and would discuss substantive issues in cases at pre-hearing conferences or at the hearings where all parties were present.

Done and dated this 27 day of July 2007.
Virginia Beach, Virginia

Respectfully submitted,

Judge Peter A. Fitzpatrick

STATEMENT OF WILLIAM HEWIG, ESQ.
TO THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON COAST GUARD AND MARITIME AFFAIRS
ON THE
REVIEW OF THE COAST GUARD'S ADMINISTRATIVE LAW SYSTEM

JULY 31, 2007

Mr. Chairman and Members of the Subcommittee:

My name is William Hewig. I am a Principal in the Boston, Massachusetts, law firm Kopelman & Paige. I also serve as a counsel for Coast Guard and legal aid matters for the International Organization of Masters, Mates & Pilots (MM&P). I have represented, and continue to represent merchant marine officers represented by the MM&P in matters before the Coast Guard and Coast Guard Administrative Law Judges.

I. INTRODUCTION

This paper will discuss the details of two Coast Guard license cases to illustrate two problems recently encountered with the Coast Guard's administrative law system, and which may relate to questions recently raised about the integrity of the system by retired administrative law judge Jeffie L. Massey. The two problems to be discussed are the appearance of and probable existence of bias on the part of an administrative law judge ("ALJ"), and a stated policy on the part of another ALJ not to grant discovery.

II. DISCUSSION

The Coast Guard Vice Commandant has recognized the necessity and importance of a neutral judge.[1] In the McDonald case, the first case discussed, the ALJ below appeared to be anything but neutral as the following narrative will show.

Dominic McDonald, a licensed American merchant marine officer, took a voluntary pre-employment drug screening test on July 31, 2000.[2] Although he tested negative on all five major drug groups, his creatinine[3] level was measured at 3 mg/dL, below the regulatory minimum of 5 mg/dL then in effect,[4] and because of that the Coast Guard automatically deemed his specimen substituted and charged him with misconduct.[5]

At the administrative hearing conducted at Houston, Texas on May 16-18, 2001,[6] McDonald introduced a wealth of evidence that he was not a drug user and that his urine had not been substituted: his specimen was the proper color and proper temperature;[7] he had been properly monitored by the collector at the sampling center, who testified that McDonald did not carry any foreign substances into the sampling area, did not do anything he was not supposed to do while drawing the sample; he followed all rules for the testing procedure;[8] he tested negative for all five drug groups;[9] he had never tested positive in any prior drug screening test;[10] his own family doctor, whom he had known well for eight (8) years, testified that he was "absolutely not" a drug user;[11] a Substance Abuse Professional (a counselor known as a "SAP") testified that, in his opinion, it was "pretty obvious" that McDonald had a "very low probability" of having a substance dependence disorder;[12] he had never had any civilian substance abuse convictions including DWI;[13] he did not in any way substitute or adulterate his urine specimen;[14] the test was in all respects totally voluntary, and he could in fact have returned to work without the test;[15] and finally a medical toxicological expert testified that prescription medications being taken by McDonald at the time of the voluntary drug screening test could, with a reasonable degree of medical certainty, have caused a condition called "water loading", which could have resulted in a lowering of McDonald's creatinine level to 3 mg/dL by natural causes.[16]

All of the above evidence was, in effect, unrebutted by any qualified witness called by the Coast Guard,[17] yet the ALJ found against McDonald based predominantly on a misplaced reliance on the validity of the test score.[18] That misplaced reliance is not however the main focus here; the main focus here is a procedure so apparently replete with bias on the part of the ALJ that it denied McDonald justice for over five years. The focus here is a procedure that certainly appeared to have been both abused and broken. And if the serious charges raised by Judge Massey are correct, this case may be the barometer of an entire system that is broken by design. A few egregious examples from the McDonald case will suffice to illustrate the point.

An apparent bias on the part of the ALJ was written in longhand throughout his Decision and Order. This is obvious, first, by examining his treatment of the various witnesses. All of the Coast Guard's witnesses found themselves awash in a sea of praise: Patricia Rodriguez, who authenticated the drug testing custody and control forms, and briefly discussed the testing procedure, did so "credibly";[20] Dr. Katsuyama, a Medical Review Officer who never interviewed McDonald, did not even testify at the hearing, and whose only probable role was to apply a rubber stamp to a photocopied form, was praised to skies as a "trained and experienced

MRO who has testified before me in many prior cases. I find his reports as an MRO credible and reliable."[21] Even the Coast Guard's exhibits found themselves the object of lavish praise. Three exhibits, nos. 9, 10, and 11, consisting of two memoranda and a journal article,[22] the latter probably produced in violation of the nation's copyright laws[23] were offered by the Coast Guard to support its claim that no human urine specimen could fall outside the 5 mg/dL cutoff. The article (Exhibit 10), according to the ALJ "proved that the cutoff requirement was established by DHHS in careful and deliberate consultation" with the Department of Transportation "only after an extensive review and study of…forensic toxicology literature."[24] Elsewhere in his Decision, the ALJ praised the article as "scientifically or medically valid and reliable", language that was merely lifted verbatim from the documents themselves.[25] In a further indication of apparent bias, the ALJ sustained McDonald's objections to admissibility of Exhibit 10, but then improperly relied upon it in his Decision and Order under the totally inapplicable theory of "judicial notice"[26] These are not the acts of a neutral judge.

In contrast to the flowing rivers of praise for the Coast Guard's witnesses and exhibits, McDonald's witnesses were treated with nearly universal derision. Dr. Anthony Colucci, the medical expert who testified that medication and water loading could indeed create a 3 mg/dL creatinine level by natural causes, came in for particularly harsh abuse: he provided "totally unsupported opinion testimony"; he gave a "paid expert's unsupported opinion"; he relied on a "so-called study"; and this main battery salvo by the ALJ: "this scientist was paid thousands of dollars to testify on Respondent's side of the case. His credibility is found questionable."[27] Ordinary and minor matters were seized upon by the ALJ and crafted into fatal flaws. When McDonald told his SAP that he took no drugs, thinking the question meant illegal drugs rather than prescription drugs, the ALJ arbitrarily but predictably debunked the SAP's opinion. This was completely inexplicable because the misunderstanding was easily cured at the hearing,[28] and especially considering the fact that McDonald had never denied taking prescription drugs – indeed, that fact was the main cornerstone of his defense.

In another, and more telling example of apparent bias, the ALJ misrepresented the SAP's evidence, then used that misrepresentation to deride the credibility of both the SAP and McDonald. Included in the SAP's screening interview was a "defensiveness" component. The SAP, who was a licensed Substance Abuse Counselor, a certified Employee Assistance Professional and held both a Bachelor's and Master's degrees in relevant fields of discipline, conducted a face to face interview with McDonald, and concluded that McDonald's

"defensiveness" component was "low-medium". The SAP explained at the hearing, in testimony that was unrebutted, that this was understandable, expected and normal because "people are always scared about being there because, of course, many times their job is resting on the results of this test."[29] The SAP later stated his professional conclusion that McDonald was "being very honest,...open and cooperative."[30]

Without any justification, without any contrary or rebuttal evidence, and without any logical explanation whatsoever, the ALJ misrepresented the SAP's testimony completely:

> "this SAP failed to consider that Respondent McDonald scored fairly high...on the 'defensiveness' component...Respondent's elevated defensiveness scores...calls into serious question the veracity and credibility of his responses to this SAP..."[31] (emphasis added)

In one sweeping but unsupported conclusion, the ALJ struck a triple blow for the Coast Guard by judicial fiat; he converted a "low-medium" defensiveness score to a "fairly high" score (despite the inconvenient fact that no such evidence existed anywhere on the record), and he then proceeded to rely on his own misrepresentation of the testimony to disparage the credibility of both the SAP and McDonald. This is not the act of a neutral judge. But this act of bias on the part of the ALJ is nothing compared to his handling of Coast Guard witness George Ellis.

George Ellis is certainly no stranger to Coast Guard administrative law hearings involving drug screening tests. As the President of Greystone Health Sciences Corp., a beneficiary of many no-doubt lucrative contracts with agencies of the United States government,[32] Ellis routinely testifies at drug hearings in the limited areas of medical review officer responsibilities, federal regulations and guidelines relating to the MRO, and interpreting laboratory test results.[33] At the time, Ellis had neither an M.D. or a Ph.D.; his highest education was a Bachelor's Degree in Psychology from Read College in Portland, Oregon.[34] In this hearing, Ellis was called by the Coast Guard for the limited purpose of testifying as an expert in "federal regulations and guidelines relating to the MRO and laboratory responsibilities."[35] The ALJ was not however content to let Mr. Ellis' testimony be so confined. Over specific objections by McDonald's counsel, the ALJ (not the Coast Guard I.O.) asked repeated questions of Ellis calling for medical or scientific opinion testimony to which Ellis had earlier admitted he was not qualified to give.[36] Disregarding the minor detail of his lack of qualifications, and skillfully led in direct examination by the ALJ, Ellis testified on the record and under oath to the following medical or scientific facts: (1) the same scientific principles spelled out in the older 1998 articles and memoranda introduced as exhibits 9, 10 and 11 were still valid in the year

2000; (2) the scientific test results set forth in exhibits 9, 10, 11, were valid and credible; and (3) Prozac, antihistamines, and other medications mentioned by McDonald do not effect creatinine levels in a drug screening urine sample.[37] When McDonald's counsel objected, again, that Ellis was not qualified to give medical opinion testimony, the ALJ said: "Well yes, we have established that, but I'll allow his testimony."[38] And the ALJ, of course, relied on this testimony in finding against McDonald.[39]

Administrative Law Judges are undoubtedly endowed with broad discretionary powers, but the power to turn a sow's ear into a silk purse is not one of them. Whatever else he might have been, George Ellis was no medical expert. In leading an examination that knowingly educed medical opinion testimony from a witness who admitted freely that he was not qualified to give it, the ALJ became not only a zealous advocate for the Coast Guard, but on the Coast Guard's behalf, the ALJ became an accessory to a fraud committed against himself. This is hardly the act of a neutral judge.

The three-day hearing transcript contained many more incidents of apparent bias on the part of the ALJ. It was impossible to read the hearing transcript in its totality and come to the conclusion that the ALJ was neutral. This case could, of course, simply be an aberration; but if the serious charges recently raised by Judge Massey are correct, this case suddenly begins to look like the rule, not the exception.

A brief post-script to this case is needed in order to comprehend the full magnitude of the injustice done in the McDonald case. Two years after the decision, in 2003, the Department of Transportation changed its regulations. It concluded that creatinine levels of 3 mg/dL COULD in fact occur naturally in some persons, particularly in response to medications.[40] The Coast Guard's "careful and deliberate consultations" and its "extensive reviews and studies" were, in the end, wrong; and the "totally unsupported opinion testimony" based on a "so-called study" by McDonald's "paid expert" was, in the end, right. And although the Vice Commandant, during the course of the appeal, had all of this information at his fingertips, he did not see fit to set the matter right.[41] It took a suit in federal court before justice was finally done, five years after the fact, accompanied by agreement by the Coast Guard to pay $10,000 towards McDonald's attorneys fees.[42] Such is the cost of judicial bias to our society in terms of both time and treasure.

We will now turn to the matter of discovery. In a recent misconduct claim, the Coast Guard Complaint raised factually complex, and in some cases, vaguely-stated claims of sexual harassment against a licensed officer. In an initial telephone conference call with the Coast

Guard and the ALJ, I told the ALJ that because of what I believed were several statute of limitations problems, raised by the charges in the Complaint, I intended to ask for discovery. In response the ALJ stated, in effect: "I do not allow discovery. It turns my cases into a circus. If problems arise at the hearing, I will grant relief on the 'back side'." The ALJ then ordered the Coast Guard to release its witness statements, but rather than clearing up the issues, those statements only further complicated them.[43]

When in 1998 the Coast Guard sought to amend its Suspension and Revocation ("S&R") rules of procedure, its Notice of Proposed Rulemaking stated that the new discovery rules it wanted would "save time, effort, and money for all parties who are or may become involved in Coast Guard actions."[44] In her Memorandum dated March 31, 2005, Judge Jeffie J. Massey noted that the Coast Guard applied the concept of "economy" only to itself, not to the respondents.[45] That, if true, would be clearly contrary to the Coast Guard's stated purpose for amending its discovery rules in 1998. And of course any policy by an ALJ that discovery will not be allowed at all is contrary to the Coast Guard's regulations which, on their face at least, permit discovery.[46]

In the last case discussed, economy – for all sides – would have been well served by allowing discovery tailored to the statute of limitations issue. Reducing the issues for trial is always an act of economy – for both sides as well as the judge. Reducing or clarifying issues, and full disclosure of evidence, also serves the valuable and economic purpose of permitting a full and fair evaluation of a case for purposes of settlement. Hiding discoverable evidence from the opponent promotes distrust, discourages settlements, and leads to "trial by surprise," which all agree does not promote the ends of justice.[47]

The ALJ who informed me that he does not allow discovery may have been acting on his own personal initiative, or he may have been a part of a broader design, as suggested by Judge Massey. Either way, it is a violation of the letter of the rules themselves, and in the end, neither justice nor economy are served.

III. CONCLUSIONS – POLICY CONSIDERATIONS

(a) General Conclusions:

In Appeal Decision 2649, the Coast Guard Vice Commandant addressed the respondent's constitutional claims by stating that "Respondent's due process rights have been safeguarded within the Coast Guard's administrative process;..."[48] No reasonable observer can look at the

totality of the Dominic McDonald case and conclude that his due process rights were "safeguarded" by the treatment he received at the hands of the Coast Guard's "administrative process." In the same decision, the Vice Commandant then went on to state that the record "clearly indicates that Respondent has been afforded the right to appear before a neutral trier of fact..." (emphasis added). Once again, it is difficult to understand how anyone looking at the totality of the McDonald case could conclude that the ALJ in that case was neutral. The United States District Court for the Southern District of Texas, Houston Div., into which the McDonald case got appealed, did not think so either. That is why the Coast Guard ended up paying $10,000 in attorney fees to settle the case.

A system that produces such a result as the McDonald case is broken. A system which permits (if not outright encourages) an ALJ to advance his own discovery policy contrary to publicly stated policy and rules is also a system broken. And, considering that the results reached in both cases are completely consistent with the serious charges of ex parte agency interference raised by Judge Massey, it is our duty to ask whether this is in fact a system broken by intent, and if so, how it can be fixed.

(b) Policy Considerations:

(1) S&R Administrative Law Judges Must Be Truly Independent:

Merchant Marine licenses and documents are livelihoods. They are mortgage payments, college tuition payments and food on the table. It is absolutely essential to the integrity of the Coast Guard's regulatory and supervisory powers over the industry that the ALJs who preside over this segment of Coast Guard authority be truly independent from any control, supervision or interference by the Coast Guard. The alternative, as the Coast Guard unhappily found out in the McDonald case, is not only legally unacceptable, but also expensive. The fox should no longer be allowed to guard the hen house.

It is important to note that the ALJ and appeals system that covers the Federal Aviation Administration and employees under its jurisdiction, primarily dispatchers and pilots, is a good example of a system that is set-up to ensure that the process is not under the command and control of the Federal agency that made the initial decision. In this case, after the FAA issues a decision affecting a dispatcher or pilot, the affected individual files his appeal with a National Transportation Safety Board (NTSB) ALJ, not with an FAA ALJ. In addition, after the

ALJ issues a decision, either the FAA or the individual is entitled to file an appeal to the full 5-Member NTSB, not with the FAA itself.

This system should be looked at as a model of how an ALJ and appeals process should be set-up. It serves as a good example of a system that operates at an appropriate arms-length distance from the involved Federal agency, and does as much as possible to ensure that only those individuals having no direct relationship to or involvement with the agency will be hearing appeals and deciding the fate of the affected worker.

(2) Discovery Should Be Freely Granted Upon A Showing of Cause:

The Coast Guard's rules as currently written permit this, but the practice in many cases does not. Judge Massey correctly recognized that discovery does serve economy.[49] I urge the subcommittee to be guided by her insights, and to consider crafting amendments to the rules to guarantee a right of limited or tailored discovery for good cause shown.

(3) Medical and Scientific Cases Should Be Determined On A Case By Case Basis And Not By Arbitrary Cut-Off Criteria:

The United States Supreme Court has recognized that "scientific conclusions are subject to perpetual revisions."[50] The Coast Guard recognized that also, when it amended its 1998 creatinine cut-off criteria from 5 mg/dL down to the current level of 2 mg/dL[51]. But although the regulations have been amended, the problem persists: it is still an absolute minimum, precluding a case by case determination.[52] The Coast Guard knows how to do better. In circumstances where the Coast Guard declines to renew a mariner's license for medical reasons, the Coast Guard historically has relied upon guidelines allowing a case by case determination.[53] I urge the Subcommittee to propose an amendment to the current regulation, 49 CFR §40.93, to make the cut-off criteria a rebuttable presumption. It is not just common sense and justice that are at stake here; it is also, as the Coast Guard learned the hard way in the McDonald case, an issue of economy.

Thank you for your sincere concern for the welfare of America's merchant mariners, as well as for the honor and the integrity of the Administrative Law system set up to oversee their affairs.

WRITTEN TESTIMONY FOR THE HOUSE COMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION

JULY 31, 2007 10:00 a.m.

Regarding the Review of the Coast Guard's Administrative Law System

Submitted by
Judge Jeffie J. Massey (Retired)

Thank you for the opportunity to provide you with information concerning my experience as an Administrative Law Judge for the United States Coast Guard, stationed in New Orleans, Louisiana.

Educational and Professional Background

For the committee members to more readily assess my opinions and my credibility (in general but in particular on the subject of what "due process" encompasses), let me recite a brief summary of my education and professional experience. I was raised primarily in San Antonio, Texas, attending public schools. In August 1971 I entered Southern Methodist University in Dallas, Texas. In May 1974 I graduated with a B.A. in Political Science. In August 1974, I entered Southern Methodist University Law School. In January 1977, I received a provisional law license from the State Bar of Texas so that I could begin representing clients (under supervision of a licensed attorney) in the Criminal Clinic.

I graduated from law school in May 1977, passed the bar later that summer, and opened my own law office in November 1977. Over the next twenty (20) years, I was a solo practitioner, an associate of a lawyer who did exclusively state criminal defense work, an associate of an attorney who did exclusively federal white collar criminal defense work, an attorney for the Special Counsel's Office of the United States Department of Energy, Dallas Region (while maintaining an active state and federal appellate practice), an Assistant Criminal District Attorney in Van Zandt County, Texas, and the Public Defender for Colorado County, Texas (while maintaining a civil practice).

When I became an employee of the Chief Administrative Law Judge's office within the United States Coast Guard (USCG) in July 2004, I had been employed as an Administrative Law Judge (ALJ) Since September 1997. My first association was with the Social Security Administration. For that agency, I began as an ALJ for the Miami, Florida, Hearing Office, then transferred as the supervising ALJ for the office located in San Antonio, Texas, where I was the administrative supervisor of fifteen (15) ALJs as well as the supervisor of seventy-plus other employees (attorneys, case technicians, paralegals, and administrative personnel).

In September 2001 I left the Social Security Administration for a position with the Federal Energy Regulatory Commission (FERC) here in Washington, D.C. As an ALJ for FERC, I had the pleasure of working for the longest tenured Chief Administrative Law Judge in the country, the Honorable Curtis Wagner. I sought employment with another agency only because of my strong desire to move closer to my family in Texas. When the posting for the New Orleans office of the USCG was posted in February 2004, I made the difficult decision to leave a position I loved for a chance to be closer to Texas.

Interview Process at the Coast Guard

The interview process for the USCG ALJ position began with an interview in New Orleans, Louisiana sometime near the end of March 2004 where I first met Chief Judge Ingolia, George Jordan, and Ken Wilson. In May 2004, I was invited to meet again with Judge Ingolia at his office in the USCG Headquarters Building in Washington D.C. On that date, I was taken to meet the Commandant for the USCG by Judge Ingolia. The Commandant stressed to me that "The Coast Guard takes care of its own." At both of our 2004 meetings, Judge Ingolia stressed that the Coast Guard was "one big happy family."

At the time these comments were made, I thought they were odd, but I rationalized that both men were simply trying to express to me that the USCG valued its employees and would strive to make my employment experience as pleasant as possible. Less than a year later, I would understand the true message they were trying to convey—and it had nothing to do with my happiness as an employee.

Position Description for USCG ALJ

Each agency in the Executive Branch that employs Administrative Law Judges is required to have a specific Position Description for its Judges. All of the ALJ positions I have had called for the ability to independently hear and decide cases as an appointee under the Administrative Procedure Act. (There are "Administrative Judges" in some departments/agencies of the Executive Branch that are not appointed pursuant to the Administrative Procedure Act, and thus are not charged with the responsibility of holding "due process" hearings.) Here are some excerpts from the Position Description for the position of an ALJ at the USCG:

> Incumbent holds, presides at, and regulates the course of hearings held by the Coast Guard in connection with its statutory responsibility in maritime matters. . . . The incumbent's independent and responsible charge of all steps necessary in the progress of the hearing includes, but is not limited to, (a) the issuance of subpoenas, (b) ruling upon petitions to revoke subpoenas, (c) ruling upon proposed amendments or supplements to pleading, (d) disposing of procedural requests, (e) ruling upon motions, (f) ruling on the admissibility of testimony, (g) determining questions on the credibility of witnesses, (h) ruling upon offers of proof and admitting competent evidence, (i) fixing the time for filing or serving briefs and extensions thereof, and (j) entering an

> order and appropriate remedy to effectuate the statute being administered or enforced.
>
> * * *
>
> The incumbent is subject to administrative supervision by the Chief Administrative Law Judge . . . . No technical guidance is provided, as the incumbent is an expert in his field and is responsible only to the Commandant of the Coast Guard for his actions, decisions, judgments and logic exercised. The Chief Administrative Law Judge acts for the Commandant in issuing policy guidance to the incumbent and assuring penalties imposed are generally consistent.
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> * * *
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> Under the provisions of Section 5(c) of the Administrative Procedure Act, the incumbent is exempt from supervision or guidance in adjudicating cases (5 USC 554).

Training at the USCG

Different agencies provide their new ALJs with different levels of training. At the Social Security Administration, all new ALJs undergo six (6) weeks of intensive training on medical, vocational, and regulatory materials relevant to the hearings that will be conducted. At FERC, I was given a copy of all relevant regulatory materials, a mentor ALJ, and encouraged to attend other ALJs' hearings and Commission meetings as often as I wanted (during my initial weeks at FERC). Later, I was sent to a two week course attended by a wide range of professionals in the energy industry. In addition, every year, the ALJs were encouraged to attend the annual meeting/seminars of the Energy Bar Association.

At the USCG, before I actually became an employee, I attended an already planned conference of USCG ALJs held in Baltimore in June 2004. This was described to me as a yearly event, although the conference planned for 2005 was repeatedly cancelled, and never took place. At this conference, the ALJs received presentations by various agency representatives (at the time, the USCG ALJs were hearing cases for the National Oceanic and Atmospheric Administration, the Bureau of Industrial Sciences, and the Transportation Security Administration), by attorneys who worked for the Chief Judge's Office in Baltimore, by an expert in the field of drug testing, and by the Chief ALJ. We were also required to attend a dinner where the guest speaker was a man who is the current Commandant of the USCG.

Hearings at the USCG

The first hearings I had responsibility for were originally scheduled to be heard by Judge Parlen McKenna in August 2004, in Morgan City, Louisiana. For reasons not explained to me, I was asked to take over responsibility for these hearings a short time before they were

scheduled. Despite the fact that I had not received any additional training or mentoring (which had been promised to me by Judge Ingolia and George Jordan), I agreed to take over the hearings. Judge McKenna had already secured the presence of one of the staff attorneys from Baltimore, Shawn Steele (This was the one and only time I was provided with attorney assistance at a USCG hearing, despite requests for that assistance in a few cases in the coming months.). The first of the hearings, scheduled to take place in the Marine Safety Office (MSO) at Morgan City, took place as scheduled, but the next day the Mariner did not show up for his hearing.

I had been told by the Chief Judge at my initial interview and by Ken Wilson during my training at Baltimore that the Investigating Officers and the Senior Investigating Officer (a civilian) at the Morgan City MSO were problematic. I had been told that sometimes the Investigating Officers (IOs) were not very experienced and/or not properly prepared for hearing. I was told that none of them were attorneys, and I should not expect them to act like attorneys.

Even making these allowances, I found that the attitude of the USCG representatives was one of "we are here, we are going to present some evidence, and we expect you to do the rest for us." Ignoring their attitude, I did my job—which was to hold a fair and balanced hearing, developing the record as fully as I could, seeking to discover testimony that supported both the USCG's contention and the Respondent's defense.

Without anyone actually verbalizing it, I knew immediately that I had not "performed" as the USCG expected me to or wanted me to. What I did not know was the extent that USCG personnel, and later members of the Chief Judge's office and the Chief Judge himself, would go to stop me from holding genuine "due process" hearings and rendering impartial decisions.

By December 2004, it was made clear to me that the field personnel had organized an effort to intimidate me into changing to their way of thinking—i.e., holding hearings that did not require them to do any more work than they wanted to do and rendering decisions in their favor, even if the facts and/or the law did not support it.

By February 2005, the field personnel's efforts culminated in a meeting in New Orleans, Louisiana, ostensibly to discuss their complaints about my courtroom demeanor (they didn't like the way I looked at USCG personnel, etc.). Members of Judge Ingolia's senior staff attended the meeting (George Jordan, Ken Wilson, and Megan Allison) and Ken Wilson later told me that USCG field personnel appeared as well as a representative from the Commandant's appellate division (the division that wrote the decisions that he issued when he reviewed one of my decisions).

The series of events that took place between November 2004 and August 2005 are all documented in the contemporaneous records I have submitted to Chairman Cummings' office. Taken together, they create a very clear picture of an administration that was (1) not interested in the administration of due process in USCG hearings; (2) not interested in transparency (as required by their own regulations) when setting "policy." By phone, by

email, by memorandum, attempts were made to coerce me into making rulings favorable to the USCG, especially on issues of discovery.

UNPUBLISHED POLICIES OF CHIEF JUDGE INGOLIA

I cannot recall when I actually saw a copy of the "policy" memorandum on hemp oil defenses, but I do specifically remember that this issue was discussed at some length at the June 2004 ALJ conference I attended in Baltimore. I thought at the time that it was odd that the Chief Judge would be telling ALJs that they should never accept the use of hemp oil as a valid defense for a positive drug test. Normally, when a defense is excluded, it is a matter of law (regulatory or statutory) or legal precedence. Nonetheless, I told myself there was probably something I was missing, and I would sort it out later after I had more experience with the agency.

This directive to never accept a hemp oil defense was similar in its nature to the directive from the Chief Judge that if the USCG filed a complaint that was invalid on its face (as a matter of law), we—the ALJs should not dismiss the complaint as invalid. Instead, we must tell the USCG—usually during the telephonic pre-hearing conferences that were often held in these cases—that their complaint was defective, and give them an opportunity to re-file the case or amend the complaint. (I certainly had never encountered this "courtesy" in any other jurisdiction I had presided over as a judge or practiced in while an attorney.)

In fact, so far as I know, neither one of these directives were in the USCG statutes, USCG regulations, nor were they delineated in valid precedent. Instead, I learned during my tenure at the USCG that these were examples of Judge Ingolia's tendency to give directives on how cases should be adjudicated, contrary to the Position Description of a USCG ALJ and the Administrative Procedure Act.

In my professional opinion, both of the above directives were inconsistent with the application of due process by an impartial fact finder. By far, however, the most egregious attempt at derailing the successful application of due process to USCG proceedings was in the area of discovery.

In 1999, there were massive amendments to the regulations which governed Suspension & Revocation (S&R) hearings—those hearings where the USCG was seeking to suspend or revoke a Mariner's license. (No license meant no work for that Mariner.) These amendments (1) called for numerous administrative changes affecting the way the files on these cases were handled and cases were assigned; (2) required Mariners to file a formal response to the complaint; (3) applied the APA rules of evidence as the standard for evidence brought in S&R cases; and, (4) changed the discovery rules in all proceedings. See 63 FR 16731, April 5, 1998, for all the amendments.

The APA contains the following language concerning evidence (See 5 USC §556(d)):

> A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

There were three USCG cases that involved contentious discovery issues—contentious only because the USCG obstructed the process in every conceivable way. In one case they flat out refused to respond to a subpoena I issued. In another case they refused to comply with filing deadlines, and, then when they did make a filing, it contained no substantive responses to discovery requests. In the third case, they refused to call any witnesses at a hearing because I exercised my discretion to require a witness to appear in person (rather than allowing telephone testimony). I have been instructed not to identify these cases by name on this record, but the record in each of those proceedings reveal the specifics of the extent to which USCG represents went to disrespect my attempts to conduct proceedings consistent with due process.

Referring back to the February 24, 2005 meeting attended by USCG personnel from all ranks and members of the Chief Judge's senior staff, the meeting that was supposed to be an airing of grievances about my courtroom demeanor, according to Ken Wilson's synopsis of the meeting (as told to me on February 28), the paramount issue of discussion at that meeting turned out to be my rulings on discovery issues. The USCG personnel complained bitterly about the fact that I even allowed discovery past the bare minimum required by the regulations. They threatened to seek an amendment of the regulations which would take away an ALJs discretion in these matters.

On March 7, 2005, a "Guideline Memorandum" (also referred to as a "policy letter") was issued by Judge Ingolia to all USCG ALJs. The content and even the grammar contained in this memorandum was very similar to the pleadings filed in the three cases I mentioned above. I find it beyond belief that the Chief Judge, all on his own, came up with the exact same interpretations of the discovery regulations that the USCG presented in these cases. In my opinion, there was interaction between the USCG personnel in the field and the Chief Judge's office about what the memorandum would say. On every point, Judge Ingolia's interpretation of discovery regulations was in opposition to the rulings I had made in these three cases.

On March 31, 2005, I wrote a detailed memorandum to Chief Ingolia, presenting a point by point critique of his March 7 directive as well as an accusation that the timing of the memorandum was a further attempt to influence my rulings in pending cases. By this time, Judge Ingolia had instructed me to travel to Baltimore for a meeting with him on April 8, 2005.

One of the things that occurred at the April 8 meeting was my telling Judge Ingolia that I challenged his authority to issue any policy directive to me (an ALJ in the field) unless he did so in the form of an "ALJIPP." An ALJIPP is an Administrative Law Judges' Internal Practices and Procedures Series. By law (44 CFR 1.01-25) , the Chief ALJ is required to publish "statements of policy, clarification of points of procedure, and general administrative

instructions" as an ALJIPP, and to "maintain a complete file of these publications for reading purposes during normal working hours."

I maintained that while he was my supervisor for administrative purposes, he could not tell me how to interpret a regulation unless he did so in the form of an ALJIPP. I also pointed out that his issuance of a policy directive that was not made available to the public was in contradiction of the application of due process. He disagreed with me, although he could not cite to any authority that supported his argument. He said that his staff would research it, but as of August 17, 2005 (my last email communication with his office on this subject before Hurricane Katrina forced the closure of offices in New Orleans), the only response I had received was from George Jordan. Mr. Jordan said he could do what he did, because he could do what he did . . . . basically *ipse dixit.*

CULTURE OF IGNORING DUE PROCESS

Prior to the April 8, 2005 meeting between myself and Judge Ingolia (also present were George Jordan, Ken Wilson, and Megan Allison) I had also written him a memorandum specifically alleging the pressure he and his staff were exerting on me concerning my rulings, coupled with the actions of the USCG field personnel, resulted in a hostile work environment for me. I thought that this was going to be the primary topic of discussion at our April 8 meeting.

Instead, the meeting was (1) a forum for Mr. Jordan to vent his indignation at my prior suggestion that he was collaborating with field personnel in pressuring me to rule in ways that favored the USCG; and (2) a forum for Judge Ingolia to berate me for being the "problem" that was disrupting his "big happy family." Specifically, he told me:

- Discovery is not necessary in S&R cases
- Don't follow what the regulations say if the USCG does not agree with it
- Use my discretion in making rulings unless it means that I am going to make a decision that the USCG doesn't like
- Even though the regulations say the time and place of the hearing is determined by the ALJ, I must hold the hearings at the MSO office if that is what the USCG wants
- Appearance of impropriety is not an issue—unless someone raises it
- I have no obligation to avoid the appearance of impropriety
- Never ask the USCG to do one minute's more work than they choose to do
- I'm not really a judge—I am a tool for the USCG to use to impose sanctions against Mariners they KNOW are correct, whether they can really prove the allegations justifying the sanctions or not
- Even though he did not know the specifics of any case I had heard, nor had he read a single transcript of a single hearing, he believed all of the complaints the USCG had made about my conduct in the courtroom

ENSURING DUE PROCESS AT USCG HEARINGS

The plain language of 33 CFR §20.608(a) provides that any party may request the ALJ to issue a subpoena "for . . . the production of books, papers documents or any other relevant evidence during discovery or for any hearing." Per the provisions of 33 CFR §20.202, it is within the power of the undersigned to issue subpoenas, order discovery, hold hearings, and regulate the course of hearings, to name just a few of the powers enumerated there. In fact, the powers of a presiding ALJ at an USCG hearing are virtually a mirror image of those contained in 5 USC §556(c), which lists powers authorized for "employees presiding at [due process] hearings." I insert the words "due process" here because that is what judges appointed pursuant to the APA do—they hold due process hearings and they NEVER hold hearings where due process is not in effect.

The right of the government to deprive a person of life, liberty, or property is subject to the general restrictions contained in both the Fifth and Fourteenth Amendments to the United States Constitution. Even when exercising a legitimate government interest—such as the monitoring of USCG issued Mariner's credentials—the extent of the government's powers are not without limit.

Between July 2004 and August 2005, I came to know first hand that the administration of due process in S&R hearings at the USCG was not a priority and NEVER to be a concern if its preservation would result in a ruling adverse to a position of the USCG. In thirty years of experience, I have not come close to experiencing the level of arrogance and disrespect for due process that I experienced at the USCG in the administration of its hearings. From Judge Ingolia all the way down to the newest IO, the environment was saturated with a total disregard for Mariner's rights. My attempts to hold fair and balanced hearings were so foreign to the USCG personnel that they resorted to personal attacks on my courtroom demeanor and repeatedly alleged I was generally biased in the favor of Mariners.

My only bias is towards upholding due process.

In my opinion, this Committee should take all necessary steps to stop the abuses of power that are ongoing within the USCG—abuses that permeate the USCG at all levels. I know of no power other than the oversight power invested in Congress that is strong enough to reorganize, reconstruct, and provide the relief that all Mariners are entitled to under the law as it is written—not as it is applied or practiced in the current S&R hearing program at the USCG.

Respectfully Submitted,

Jeffie J. Massey

U. S. Department of Homeland Security

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DEPARTMENT OF HOMELAND SECURITY

U. S. COAST GUARD

STATEMENT OF

RDML BRIAN SALERNO
ASSISTANT COMMANDANT FOR POLICY AND PLANNING

AND

CAPT THOMAS SPARKS
COMMANDING OFFICER, MARINE SAFETY UNIT PORT ARTHUR

ON THE

COAST GUARD ADMINISTRATIVE LAW JUDGE SYSTEM

BEFORE THE

COAST GUARD AND MARITIME TRANSPORTATION SUBCOMMITTEE

U. S. HOUSE OF REPRESENTATIVES

JULY 31, 2007

Good morning, Chairman Cummings, Ranking Member LaTourette and members of the Subcommittee. Thank you for this opportunity to speak with you about the Coast Guard's Administrative Law Judge system. Specifically, I would like to provide some historical background on our ALJ system, explain to the Subcommittee how our process works, how it protects public safety, and make clear how it affords due process to mariners.

Background and Authority

Since 1942, the Coast Guard has been responsible for issuing mariner credentials. These credentials serve to identify the individual as having the necessary qualifications and experience to undertake certain vital maritime transportation functions in the interest of public safety. The vast majority of the more than 200,000 licensed mariners perform their demanding jobs with great distinction, uphold the highest standards of safety and professional conduct, and rightfully deserve the tremendous public trust placed in them.

An integral part of the issuance, oversight, and integrity of these important safety credentials is the requirement to investigate when standards of public safety or professional conduct are alleged to have been breached, and to file complaints and seek suspension and revocation of credentials when appropriate. The suspension and revocation process is designed to determine if allegations are true and take appropriate action against the credential where warranted in an administrative process that provides the mariner with due process and a fair opportunity to be heard before a decision is reached.

In 1946, the Administrative Procedure Act (APA) set forth the basic procedures and protections for handling suspension and revocation cases expeditiously and fairly. While the APA contains certain basic requirements such as proper notice, opportunity to present evidence and rebuttal, limited cross-examination, and the chance to submit proposed findings or exceptions, it largely leaves to agency discretion such issues as the scope of discovery, the imposition of time limits, and certain evidentiary guidelines.

In order to fulfill the APA requirements, the Coast Guard hired its first Hearing Examiners in 1948 pursuant to approval from the Civil Service Commission (now the Office of Personnel Management). These hearing examiners later became administrative law judges (ALJ's); a nomenclature change which took place in accordance with the APA. The number of judges, their locations, and the nature of cases have varied over the years. Until the early 1980's, most cases involved shipboard discipline aboard deep draft vessels subject to inspection. Changes in regulatory policy, greater Coast Guard responsibility for uninspected vessels, and the advent of drug testing brought major changes to the nature of cases.

In 1999, the procedural rules for handling Coast Guard ALJ cases were updated to reflect the best practices in administrative law. These new rules were based on the Model Rules of Administrative Procedure proposed by the Administrative Conference of the United States and new procedural rules developed by the Department of Transportation. The intent of this update was to provide additional due process protections and transparent and consistent procedures to both the mariner and the suspension and revocation process. For example, the new rules provided for modern motions practice, expanded discovery, and detailed procedures for handling evidence and conducting hearings.

The emphasis of the suspension and revocation process is public safety and security, especially the control of the use of drugs and alcohol by marine transportation workers. Since 1999, nearly three quarters of allegations against mariners involve drug and alcohol use and include positive drug tests, operation of a vessel under the influence of drugs or alcohol, refusal to take drug or alcohol tests, providing substituted or adulterated specimens, and DUI convictions. Another major charging area is in the provision of false information concerning prior convictions in merchant mariner credential applications.

The Coast Guard ALJ program also provides ALJ services and hears fisheries violation cases from the National Oceanic and Atmospheric Administration, civil penalties and airman certificate suspension or revocation for the Transportation Security Administration for security related cases, and cases for the Bureau of Industry and Security.

The Hearing Process

When, after thorough investigation, the Coast Guard decides it is appropriate to bring an action against a mariner's credential, a Coast Guard investigating officer prepares a complaint. Once the complaint is served, the mariner may seek a settlement or a non-adjudicatory option. Coast Guard rules also allow for voluntary surrender or voluntary deposit of a credential (approximately 50 such cases a year are resolved in this manner.). Voluntary surrender permits any credential holder with the option to surrender a license, certificate or document to the Coast Guard in preference to appearing at a hearing. In the case of voluntary deposit, the holder may deposit a credential with the Coast Guard in any case where there is evidence of mental or physical incompetence, until such a time, that the incompetence is resolved.

The most common response to a complaint is a settlement, often a drug rehabilitation settlement offered in drug use and drug test refusal or adulteration cases. This affords the respondent an opportunity to go through drug rehabilitation and potentially return to service as a mariner if they fully recover. In 2004, Congress amended the suspension and revocation statute regarding drug convictions to encourage such settlement agreements. Other forms of settlement include mitigated sanctions, retraining programs, and compliance programs.

Admissions cases are another common response whereby the respondent admits the allegations and agrees to the sanction. In these cases, an ALJ will review the complaint to determine the legal adequacy of the allegations and the sanction.

If the mariner files an answer and denies any allegation, the case will be assigned as a contested case. Similarly, temporary suspension cases, where the Coast Guard suspends a credential for forty-five days without a hearing, typically for operation while intoxicated or under the influence of drugs, are treated as contested cases.

Handling of Contested Cases

Contested cases are assigned to an ALJ based on geographic areas of responsibility, unless caseload or availability dictates otherwise. While the ALJ is independent and has considerable discretion on how the case will be processed, the procedural rules set out the framework for case processing. The fundamental requirement is that both sides have an opportunity to be heard. All motions and replies must be on the record, either in writing or at a hearing.

While previous rules had no provisions for discovery, the 1999 rules require parties to share witness lists, summaries of expected testimony, and all exhibits. For example, in drug test cases, the respondent can obtain information directly from the laboratory in accordance with Department of Transportation drug testing rules. Additional discovery is permitted by order when the ALJ determines that:

- it will not unreasonably delay the proceeding;
- the information sought is not otherwise obtainable;
- the information sought has significant probative value;
- the information sought is neither cumulative nor repetitious; and
- the method or scope of the discovery is not unduly burdensome and is the least burdensome method available.

The ALJ routinely holds pre-hearing conferences to simplify issues and facilitate settlement. When settlement is not possible, the ALJ will schedule a hearing where the parties can present witnesses and exhibits on the record in an adversarial proceeding using the rules of evidence typical for administrative proceedings.

Once the hearing has concluded, the ALJ prepares a decision that sets out the procedural history of the case, makes findings of fact and conclusions of law, and sets out the reasoning for the decision. Each determination is a permanent record.

Since the new rules went into effect in 1999, there have been approximately 740 contested cases; 131 of these were dismissed for different reasons such as the evidentiary burden could not be met, voluntarily surrender of the respondents credential, or procedural reasons.

Of the remaining contested cases, approximately half settled. In other cases, the respondent failed to appear or the respondent changed their answer to an admission. As a result, since 1999, there have been only 152 decisions issued after hearing fully contested cases resulting in 21 decisions issued that granted full relief for the respondent and 31 additional cases where the ALJ found some charges not proved and/or issued a sanction less than that requested by the Coast Guard. These decisions are based on the record of the case and an explanation of the facts found. These decisions are permanent and available and provide transparency in the adjudication process.

Appeals to the Commandant

Parties have the right to appeal ALJ decisions by filing a notice of appeal within thirty days of the issuance of the decision. After the parties file their briefs, the Commandant will consider the briefs, the decision, and the administrative record in making a written decision of the appeal. These decisions are published and available to the public. The underlying case file is available for at least 25 years before disposal.

Since 1999, there have been 37 appeal cases by mariners. The ALJ decision was overruled in only four cases and the decision was modified in two others. In the other cases, the ALJ decisions were affirmed or the appeal dismissed for procedural reasons. During this same time the Commandant decided six appeals by the Coast Guard. The ALJs decision was affirmed two times, in one case the sanction was modified, and three times, the Commandant found the judge erred, and remanded the cases for further proceeding. In one of those cases, both sides appealed and the ALJ was affirmed.

Appeals to the NTSB
Mariners are afforded a unique opportunity for another level of administrative appeal; Commandant Decisions may be appealed to the National Transportation Safety Board. Since 1999, 32 cases were so appealed to the NTSB with the Commandant being overruled in only two cases (one of those NTSB decisions against the Commandant was subsequently overturned by a federal circuit court). In two other cases, the NTSB modified sanctions. In the other 28 cases, the agency was affirmed or the appeal was dismissed or withdrawn.

Judicial Review
Finally, as in all administrative adjudications, there is the opportunity for judicial review in federal court to consider whether the agency afforded the respondent due process and whether the decision is supported by the record and the law. Access to the judicial system is generally only available once the respondent has exhausted his/her administrative remedies.

ALJ Independence
One of the cornerstones of the administrative law judge system is the use of impartial and neutral decision-makers. A comprehensive system ensures ALJ independence through the following measures:

- ALJs must pass an examination conducted by the Office of Personnel Management.
- ALJ pay is not subject to performance evaluation by the Coast Guard.
- Coast Guard ALJs are carefully segregated in the Coast Guard organization to ensure, for example, that no ALJ is supervised by anyone who investigates for or represents the Coast Guard.
- The Coast Guard cannot independently remove an ALJ. This can only be done through the Merit System Protection Board based on misconduct, incompetence or judicial disability. Similarly, if an ALJ believes that their caseload has been reduced for improper reasons, the ALJ may bring an action against the agency with the MSPB.

  Parties who believe for good cause that an ALJ is biased against them may seek to disqualify the ALJ. This is typically accomplished by filing a motion to disqualify, although an ALJ may disqualify himself or herself at any time. Rulings on these motions can serve as the basis for an appeal, if not granted.
- ALJs may not engage in ex parte communications not allowed by the APA.

While ALJs have complete judicial independence in rendering decisions, they are still bound by agency regulations and precedent. They are also bound by the Code of Judicial Conduct and, as federal employees, the Standards of Ethical Conduct for Employees of the Executive Branch.

Reports of ALJ misconduct or judicial disability are initially investigated by the Chief ALJ. An appropriate independent investigating officer or law enforcement investigator may be assigned depending on the nature of the allegations.

Conclusion
As with all programs vital to ensuring the safety and security of the maritime sector, the Coast Guard continually works to improve the ALJ Program with such new proposals as:

- Allowing respondents and counsel to file pleadings and answers electronically,
- Improving public access to records, and
- Improving on-line access to ALJ, Commandant, and NTSB decisions.

Mariners have a right to be heard in matters affecting their credentials. The Administrative Law Judge System provides protections for mariners through due process. In approximately 50% of cases involving drug use, mariners enter a treatment program and prove cure. As a result, they are able to reapply for merchant mariner credentials and return to their livelihood. Moreover, the rate of recidivism is extremely low. The process to prove "cure" is long, thorough, and enduring. The Administrative Law Judge system is ultimately a public safety system. The Coast Guard embraces the opportunity to work with stake holders to improve this system to best serve the needs of mariners and the maritime community. I would be happy to take any questions at this time.

Statement of Sean McKeon – President – North Carolina Fisheries Assoc.
House Subcommittee on Coast Guard & Maritime Transportation
Hearing to Review the Coast Guard's Administrative Law System
July 31, 2007

Chairman Cummings, Ranking Member LaTourette and Members of the Subcommittee:

The North Carolina Fisheries Association was founded in 1952 in order to represent the seafood industry in North Carolina at both the state and federal regulatory levels. In addition, NCFA monitors legislation and regulations related to the seafood industry and works with the appropriate state and federal agencies to find solutions for the management of our nation's seafood resources. NCFA's members include fishermen, processors, dealers and myriad others associated with the seafood industry; the oldest industry in North Carolina.

With respect to the Coast Guard ALJ system and the recent Baltimore Sun article in which a former ALJ alleged certain criminal activity on the part of several of her former colleagues; sadly, because of our industry's experience with this same administrative process, we were not only not shocked, but were surprised that it has taken this long for this type of abuse of the process to see the light of day. In our view the contentions made by the former ALJ judge are the tip of a very large iceberg and nothing short of a full-scale investigation by the Department of Justice will uncover the extent of the abuse and determine if the allegations are true and if the alleged behavior is endemic to the entire Coast Guard ALJ system including its dealings with the commercial fishing industry. The Coast Guard's ALJ system, to which the Baltimore Sun article referred, is the same one that handles National Marine Fisheries Service (NMFS) prosecutions of cases involving fishermen. Our experience with that system tells us that the disproportionate rulings in favor of the Coast Guard cited in the Sun article are at least as one-sided with respect to our industry. We hope this hearing is the beginning of a thorough airing of this issue and that the facts will be allowed to speak for themselves, and we thank you for this opportunity to comment on behalf of the men and women represented by the NCFA.

It should be noted that as with most processes of this nature the Coast Guard system was originally well intended, but because of some fatal flaws inherent in the regulations and laws that govern the process abuse was inevitable. For example, the appeals process, which ought to be handled by an impartial third party entity, actually takes place "in-house" making it virtually useless for respondents charged in this system. Respondents understand that even if they prevail before the ALJ (a very rare occasion as the statistics show) their case will ultimately wind up in front of the Commandant who is, notwithstanding the claims of the Agency, anything but impartial with matters coming before the ALJ system. In this manner, a system that has as its purpose the adjudication of issues before it in order to find the truth and meet out justice in a fair and impartial way admits it cannot withstand the scrutiny of impartiality. Therefore, by design the ALJ system denies the most basic form of justice to those charged under its jurisdiction.

Another example of a rather unique situation regarding the ALJ system is the denial of respondent's requests for information related to the manner and process by which they are charged. As we understand it general counsel for NOAA/NMFS (in the case of our industry) need not provide to the respondents the details of how the Agency arrived at its decision to

prosecute, claiming "attorney product". It has long been a cornerstone of American jurisprudence that a defendant (respondent) has the right to face his accusers and be told, in detail, why he or she is being charged. We are under the impression that the Coast Guard ALJ system is unique in this manner at that no other agencies cling to this special privilege.

There are many instances where the ALJ system has proven to be biased against the fishing industry; times when judges asserted that in cases involving the credibility of a fisherman or the Coast Guard, he would rule in favor of the Coast Guard, cases involving NCFA members where judges ruled inadmissible exculpatory evidence at the insistence of NOAA general counsel, and cases where the adversarial environment of this rather convoluted system forced fishermen/seafood processors to settle with the Agency rather than spend money fighting when results seem predetermined. In a recent case NMFS enforcement personnel stated on the record that the charges against one of my members would not have been brought had he been on the dock and witnessed what the respondents were claiming, namely that they had done what they were told to do with respect to brining all shark fins and carcasses to the dock. The NMFS enforcement officer then stated he told these fishermen, long before the charges were brought, that if they followed his direction (and brought all fins in with all carcasses) they "would have no problem." Several months later the fishermen and the owner of the boat were charged with being over 5% fin to carcass ration even though they had strictly obeyed the directions of NMFS enforcement and brought all fins and corresponding carcasses into the dock. The ALJ paid little if any attention to this frank admission and my members are still being charged in the matter and have $180,000 in fines hanging over their heads. This is one instance of many involving my members.

The bottom line for our industry is that most of my members know that once NMFS/NOAA brings charges, however frivolous, there are two options; either write a check in a "negotiated settlement" with the Agency, or fight through the ALJ system knowing you will lose. In addition if you chose to fight because you are innocent the ALJ process really amounts to a precursor to eventually appealing in federal court. In both instances those charged spend valuable time and resources that should otherwise be used to try and make a living in an already difficult business. Until and unless Congress demands a DOJ investigation these will remain the only options for mariners and fishermen charged in the NMFS/ALJ system.

If even a small fraction of the serious charges made by the ALJ in the Baltimore Sun article are true, then the conduct of several judges ruling in matters affecting mariners and, indeed, fishermen rises to criminal. There seems to be a very cozy relationship between the NMFS and the ALJ system and unfortunately it seems to center on making money either through "negotiated settlements" or prevailing in the ALJ system. We are prepared to discuss this in more detail with this committee and to highlight other more specific examples of the perils of the ALJ system should you so desire.

Finally, because we believe in the rule of law and feel that any system of justice in which American citizens find themselves ought to be as fair and equitable as possible, we feel that the judges in the Coast Guard's ALJ system deserve a thorough airing of the charges leveled against them. For that reason and so that the system can be improved and become what it was intended to be, we would like to see the Department of Justice involved in this process. In that manner the regulated public can once again begin to have faith in a process that heretofore has been nothing short of a nightmare for seamen across this country.

Thank you for this opportunity to comment on this very important matter.

Respectfully,

Sean McKeon
President
NCFA
New Bern, NC

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