Are You Willing to Make the Commitment in Writing? The APA, ALJs, and SSA

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1. Introduction

During the 2000 Annual Meeting of United States Administrative Law Judges,\(^1\) Kenneth Apfel, Commissioner of the Social Security Administration, engaged in
the following colloquy with one of the judges in attendance. The judge's question
begins the dialogue:

[Question]: With respect to your comments about decisional
independence, being your personal commitment and cornerstone, you
know I have been here since 1991 and I have heard your predecessors
and just about every representative that stood up there and make that
statement, but I've never seen one put in writing by the APA. Are you
willing to make the commitment in writing?

[Answer]: It is my understanding that you are.

[Question]: But nobody will put it in writing. I'm asking you, will
you?

[Answer]: Since I don't know exactly the implication of this action,
it is my understanding that the APA has been the boundaries that we
have worked within for years. I will, with Judge Bernowski, come up
with a specific thing on this issue. I don't know if there is a wrinkle
in here that I am unaware of. As I stand here today, the APA has been
a part of what I have always viewed as the roles and responsibilities
of our respective parties.\(^2\)

This exchange highlights a debate not only within the Social Security Ad-
ministration (SSA), but within other executive branch agencies relying upon federal
administrative law judges (ALJ) to resolve regulatory, enforcement, and benefits
cases. Succinctly stated, the debate focuses upon agency "management and
control" versus "judicial independence." At issue are the nature and status of ALJs
as well as the nature and character of the hearings they hold and the cases they
decide.

One writer has characterized the debate as focusing "on the role of the ad-
ministrative law judge as a public servant ... who must accomplish two
oftentimes conflicting goals."\(^3\) The Administrative Law Judge has a unique

2. Transcript obtained from the Office of the Chief Administrative Law Judge, Social Security
Administration.
3. Christopher B. McNeil, Similarities and Differences Between Judges in the Judicial Branch and
the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative
understanding of a governmental agency's operations, the added benefit of formal legal training, and is selected on the basis of more rigorous requirements than required even of U.S. magistrate or bankruptcy judges. It is this unique combination of expertise and legal skill that makes the "typical ALJ." In addition to their unique abilities, the ALJ "is also responsible for conducting hearings and rendering judgments." These hearings and judgments, in fact, are much like traditional adjudication. While "[f]amiliarity with the agency's policies and its systems is useful in" fulfilling this task, the ALJ "cannot simply defer to the agency; the task at hand is to impartially adjudicate the controversy, even though the outcome may be at odds with the result sought by agency." It is this tension that is at the core of the adjudicative role of the ALJ.

If the ALJ "is to faithfully carry out her role as an adjudicator, [she] must strive to be free of overreaching by the agency she is serving." In contrast to this need for independence, it is likely that the ALJ "attained her judicial position in large measure because she has a greater than average familiarity with the programs, policies, and regulations of the agency, and is probably closely tied to the government administrator charged with implementing those programs." Others have been more direct in their expression of the tension between an agency and its ALJs, noting that many agency managers see the use of agency review, even if it is de novo review, as ineffective to provide a check on the independence of the ALJ. While it is true that the threat of reversal on review may shape some ALJ decisions, it does not "normally modify behavior as effectively as the choice between conforming to a given norm and suffering direct adverse consequences. Agencies, therefore, gaze lustfully at the forbidden fruit of performance evaluations."

Nowhere has this tension been more evident than in SSA. In his January 31,

SSA's and the claimant's ability to benefit from the highest quality and most efficient service of the ALJ corps is undermined by the differing and often contradictory understanding in various parts of the Agency of . . . "decisional independence." This confusion exists about both the meaning of "decisional independence," and the extent to which such independence limits the otherwise appropriate authority of the Agency to manage the performance of the ALJ corps.15

SSA General Counsel thus framed the question: to what extent may SSA manage the performance of the ALJ corps? Inherent in the concept of "management" is "control." During the 1980s, SSA "attempted to exercise control" over ALJs in three respects: (1) it demanded greater ALJ productivity, (2) it demanded greater consistency in ALJ decision making, and (3) it altered the "proportion of cases in which they granted or denied benefits."16 "The primary tool that the agency used for these purposes is familiar to all students of management science and quality control, but is foreign to many judges — statistical analysis of ALJ decision making."17

Importantly, a statistically based decision-making system, termed "bureaucratic," differs from a judicial system. "In a judicial system, the quality of the decision and the quality of justice depend on the quality of the judge. A bureaucratic system depends on the quality of supervision and internal bureaucratic review."18 The two systems are fundamentally opposed. That is not to say, however, that a middle ground cannot be achieved. In an administrative judicial system, the problem lies in defining the nature and scope of the middle, such that neither the agency nor its corps of judges is subsumed in the furtherance of the other's goals and objectives.

It is common knowledge that an absolute necessary element for the existence of an impartial adjudicator is judicial independence. However, it is of great concern to all of us who believe in the idea of impartiality and fairness that this necessary element of judicial independence is under such intense attack. The attacks emanating from those within the leadership roles of the administrative bureaucracies include the agencies' leaders and the government attorneys (Offices of the General Counsel) in the U.S. Department of Agriculture (USDA) and Social Security Administration (SSA).

Id.

15. Memorandum from Shirley S. Chater, Commissioner of the Social Security Administration, to the Social Security Administration Executive Staff (Jan. 31, 1997) (on file with author).


17. Id.

Succinctly, the problem is defined as "management and control" versus "judicial independence."

The memorandum from SSA General Counsel asserts that "an Agency may take reasonable actions to ensure that an ALJ carries out his or her primary function of hearing and deciding cases" and "can enforce standards to minimize defects in decision-writing, ensure reasonable levels of productivity, and require appropriate behavior in the course of adjudicatory proceedings."

Two key issues come immediately to mind: (1) the ability of the agency to assess ALJ compliance ("take reasonable actions") and (2) the ability of the agency to act upon its assessment ("enforce standards").

For federal agencies and federal ALJs, the solution lies with the Administrative Procedure Act (APA), as interpreted through legislative history and case law. In one writer's view, the January 1997 memorandum details a highly structured and narrow reading of the APA that is "[p]reoccupied with viewing ALJs as agency personnel subordinate to policy making officials in the hierarchy of power.

At the other end of the spectrum lies the view that describes ALJs in the same terms as Article III judges within the federal judicial branch.

A narrow interpretation of the APA, such that the ALJ is "subordinate to policy making officials," replicates a bureaucratic system of adjudication, while an overly broad interpretation endorses a pure judicial system. SSA, however, has adopted an "administrative judicial system" — a judiciary within an executive branch agency. Indeed, SSA administrative law judges far outnumber their counterparts in every other executive branch combined, and SSA cases account for 95% of all administrative adjudications each year, deciding more cases than the federal judiciary. Within this context, agency administrators nonetheless strive for a

22. Id. These comments are not lightly made. Professor Rosenblum is an acknowledged administrative law scholar, serving as a consultant to the Administrative Conference of the United States and appearing before various congressional hearings. Over the past thirty years his reports and articles appear as vital exhibits within the Congressional Record.
24. See Paul R. Verkuil, The Emerging Concept of Administrative Procedure, 78 COLUM. L. REV. 258, 300 n.210 (1978) ("[I]n 1976 more than 625 SSA-ALJs decided 180,000 disability cases; during the same period 505 federal judges (including Justices of the Supreme Court) decided 130,000 cases.") The numbers have continued to climb to this day. See Oversight of the Disability Appeals Process: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 105th Cong. 8 (1997) (noting that the number of appealed cases in 1995 was 548,000).
narrow interpretation of the APA, while ALJs, responsively, argue for a broad interpretation.

At issue is the reach of the APA. To shed light on the APA's reach, Part II of this article will review the history of the APA. Part III will look to statutes and legislative history to conclude that SSA administrative law judges are firmly governed by the APA. Part IV will then explore the extent to which the APA governs SSA hearings. Part V will outline the boundaries of the relationship between SSA administrators and ALJs under the APA, and Part VI will establish that the APA does require ALJs as presiding officials in SSA hearings. Part VII will highlight the ramifications of recognizing that the APA applies to social security proceedings before ALJs, and Part VIII will conclude the article.

II. History of the Administrative Procedure Act

The Administrative Procedure Act finds its genesis in a 1941 report from the Attorney General's Committee on Administrative Procedure in Government Agencies. The Attorney General formed the committee to address "the controversy over the lack of uniformity among agency hearing officers and the perceived procedural unfairness of agency adjudication."25 Indeed, the committee report found that "[m]ost of the controversy over administrative procedure [had] centered around formal adjudication."26 The report found that each agency had its own hearing methods, initial decision methods, and internal procedural structure.27 It also found that most agencies conducted evidence gathering in front of a board of individuals or a single officer, which were selected in several different ways.28 The respective agencies titled these officers trial examiners, referees, presiding officers, district engineers, deputy commissioners, or registers.29

In response to these findings, the committee recommended "a highly structured system of 'hearing commissioners,' to be appointed by a newly created Office of Federal Administrative Procedure."30 The committee recommended that these commissioners be appointed for seven-year terms and receive '"substantial' but tiered salaries."31 The recommendations also noted the need "to establish a system of hearing commissioners to handle all on-the-record adjudications."32 Through the course of debate, a majority of the committee declined to adopt a proposed code of administrative procedure, electing instead "to rely on the creation of the hearing commissioner system and on the proposed new Office of Federal

26. ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. No. 77-8, at 43 (1st Sess. 1941) [hereinafter ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES].
27. Id. at 44.
28. Id.
29. Id.
30. Lubbers, supra note 25, at 66.
31. Id.
32. Id.
As ultimately enacted, the APA reflects a "heavy reliance on a system of 'hearing examiners' [now administrative law judges] and a rather prescriptive [albeit not inflexible] set of formal hearing procedures, reflected in sections 5, 7, and 8 of the APA [now 5 U.S.C. §§ 554, 556, and 557]."

Notably, the committee contemplated at the outset that the decisions of the "Social Security Board" (now the Social Security Administration) were to be among those addressed by the soon-to-be enacted APA. This can be seen in the findings of the committee report, which noted that "the Committee's recommendations in chapter III relating to informal adjudication are applicable to the initial decisions rendered by the Social Security Board's staff; and the recommendations in chapter IV relating to hearing commissioners are applicable to and largely declaratory of the existing hearing proceedings before referees." Chapter IV of the committee report and the report's specific reference to the decisions of the referees of the "Social Security Board" support this conclusion.

Indeed, the proceedings of the Social Security Board established a model for the procedures to be recommended as part of the APA. Specifically, the committee report declared that hearings before administrative agencies must constitute an "objective appraisal of the facts and the furtherance of the public duty." The report found that this process must be led by an official "who shall command public confidence both by his capacity to grasp the matter at issue and by his impartiality in dealing with it." The committee report then recommended that "these officials should be men of ability and prestige, and should have a tenure and a salary which will give assurance of independence of judgement."

The committee report further recommended that "Commissioners should be fully empowered by statute to preside at hearings, issue subpoenas, administer oaths, rule of upon motions, carry out other duties incident to the proper conduct of hearings, and make findings of fact, conclusions of law, and orders for the disposition of matters coming before them." Importantly, "[t]he hearing commissioners should be a separate unit in each agency's organization. They should have no functions other than those of presiding at hearings or prehearing

33. Id.
34. Id. at 67.
35. ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, supra note 26, at 157.
36. The report noted that "the recommendations in chapter IV relating to hearing commissioners are applicable to and largely declaratory of the existing hearing proceedings before referees." Id. See also SUBCOMM. ON SOCIAL SECURITY OF THE HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES: SURVEY AND ISSUE PAPER, 6-7 (Comm. Print 1979) [hereinafter SURVEY AND ISSUE PAPER] ("[T]he Attorney General's committee which was primarily responsible for the form of the APA used Social Security Act procedures as a model and considered the APA 'largely declaratory' of its provisions.").
37. See ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, supra note 26, at 43.
38. Id.
39. Id. at 46.
40. Id. at 50.
negotiations and of initially deciding the cases which fall within the agency's jurisdiction."

With the passage of the APA, the contemplated Office of Federal Administrative Procedure was not created. Instead, the functions of overseeing the hearing examiner program went to the Civil Service Commission, now the Office of Personnel Management. 42

In unanimously passing the APA, however, Congress largely adopted the recommendations of the committee regarding the status of the "hearing commissioner," termed by the act "hearing examiners," and preserved the fundamental hallmarks of objectivity defined by independence and impartiality. 43

The legislative history of the APA, principally embodying the 1941 report from the Attorney General's Committee on Administrative Procedure, thus clearly contemplates (1) that the decisions made by the Social Security Board would be among those addressed by the later-enacted APA and (2) that the officials making those decisions would be "hearing examiners" appointed in accord with the APA. 44

III. Are United States Administrative Law Judges Assigned to the Social Security Administration "APA Judges?"

The question of whether federal ALJs assigned to the Social Security Administration's Office of Hearings and Appeals are "APA judges" is straightforward. It is best addressed by reference to the applicable statutes and their implementing regulations.

A. Governing Statutes and Regulations

Title 5, section 554 of the APA addresses "adjudications," and requires that notice be given prior to a hearing. 45 In doing so, the APA mirrors the requirements of the Social Security Act by requiring that notice be given to a party

41. Id.
42. LLOYD D. MUSOLF, FEDERAL EXAMINERS AND THE CONFLICT OF LAW AND ADMINISTRATION 139-72 (1979).
43. Arthur Fried, Panel Discussion on Independence and the Federal ALJ: Fried, Bernowski, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 47, 49 (1998) ("Congress sought to achieve two fundamental goals: to eliminate agency control over the classification, discipline and conflict with hearing examiners ... and to separate the prosecutorial and adjudicatory functions, which previously resided in the same person in some agencies.").
44. See Verkuil, supra note 24, at 312. Verkuil notes, as a foregone conclusion, the applicability of the APA to Social Security Administration administrative law judges:

More than half of all ALJs — those assigned to the Social Security Administration — decide more than 80 percent of all administrative cases in distinctly non-adversary fashion.

Since these decisions meet APA requirements, they demonstrate that even the definition of formal adjudication is susceptible to radically different interpretations.

Id. (emphasis added) (citing Richardson v. Perales, 402 U.S. 389, 409 (1971)).
of the time and place of the hearing, the nature of hearing, and notice of the issues of law in question.\footnote{46}

Section 556 provides: "There shall preside at the taking of evidence — (1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title."\footnote{47} Title 5, section 3105 of the APA further provides:

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.\footnote{48}

Significantly, 5 U.S.C. § 5372 specifically defines "administrative law judges" as appointed solely under § 3105.\footnote{49} No other type of federal "administrative law judge" can exist under federal law.

Section 5372 then describes the "3 levels of basic pay for administrative law judges [designated as AL-1, AL-2, and 3, respectively]."\footnote{50} further providing that "[t]he Office of Personnel Management shall prescribe regulations necessary to administer this section."\footnote{51} These sections make clear that ALJs serving within SSA are appointed under and in accord with the APA.

Indeed, the Merit Systems Protection Board (MSPB) has accepted jurisdiction in proposed agency action against administrative law judges assigned to SSA.\footnote{52} Accepting jurisdiction is appropriate given that these officials were, in fact, appointed under the board's auspices.\footnote{53} The authority of the MSPB to accept jurisdiction is derived directly from § 1305 of the APA, which provides that the MSPB "may investigate" the claims of ALJs.\footnote{54}

\footnote{46. Id.; see also 42 U.S.C. § 405(b) (2000).}
\footnote{47. 5 U.S.C. § 556(b) (2000) (emphasis added).}
\footnote{48. Id. § 3105 (emphasis added).}
\footnote{49. Id. § 5372(a). Section 3105 reads: "For the purposes of this section, the term 'administrative law judge' means an administrative law judge appointed under section 3105." Id.}
\footnote{50. Id. § 5372(b)(1)(A).}
\footnote{51. Id. § 5372(c).}
\footnote{53. See, e.g., sources cited supra note 52.}
\footnote{54. 5 U.S.C. § 1305 (2000). Specifically, § 1305 provides:
For the purpose of sections 3105, 3344, 4301(2)(D), and 5372 of this title and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, the Office of Personnel Management may, and for the purpose of section 7521 of this title, the Merit Systems Protection Board may investigate, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena [sic] witnesses and records, and pay witness fees as established for the courts of the United States. Id.
Furthermore, § 7521(a) limits the ability of an agency to remove an ALJ, requiring that the MSPB, and not the agency, find "good cause established and determined . . . on the record after opportunity for hearing before the Board."55 Interestingly, for purposes of the APA, the term "employee" is defined as "an individual employed in or under an agency, but does not include . . . an administrative law judge appointed under section 3105 of this title."56 An "agency," however, is defined "for the purpose of this subchapter" as "an Executive agency, except a government corporation and the General Accounting Office."57 SSA is not otherwise excluded from this definition and falls within the ambit of the statute, including those provisions, outlined above, pertaining to ALJs. Indeed, such has been the course of custom and practice of the agency since the inception of the APA.58

The definition of "coverage" in section 351.202 of the APA includes ALJs "except as modified by Part 930 of this chapter."59 Under part 930, ALJs are excluded from those provisions relating to performance evaluation.60

Finally, OPM's implementing regulations require it to "conduct competitive examinations for administrative law judge positions,"61 and further defines an ALJ as "a position in which any portion of the duties includes those which require the appointment of an administrative law judge under 5 U.S.C. 3105."62 This same regulation further provides for detail, promotion, reinstatement, and removal of ALJs.63 As the court in Stieberger v. Heckler64 stated, only one conclusion can be reached: "The ALJ is a creature of statute, specifically the APA."65

55. Id. § 7521(a).
56. Id. § 4301.
57. Id. § 3132.
58. For a discussion of legislative history, see discussion infra Part III.B.
59. 5 C.F.R. § 351.202 (2001). The regulation reads:
   (a) Employees covered. Except as provided in paragraph (b) of this section, this part applies to each civilian employee in:
   (1) The executive branch of the Federal Government; and
   (2) Those parts of the Federal Government outside the executive branch which are subject by statute to competitive service requirements or are determined by the appropriate legislative or judicial administrative body to be covered hereunder. Coverage includes administrative law judges except as modified by Part 930 of this chapter.
   Id. (second emphasis added).
60. The regulation reads:
   (a) Actions covered. This part covers reduction in grade and removal of employees based on unacceptable performance.
   (b) Actions excluded. This part does not apply to: . . .
   (6) An action taken under 5 U.S.C. 7521 against an administrative law judge.
62. Id. § 930.202(c).
63. Id. § 930.202(b), (d)-(f).
64. 615 F. Supp. 1315 (S.D.N.Y. 1985), vacated by 801 F.2d 29 (2d Cir. 1985).
65. Id. at 1386; see also Sprague v. King, 825 F. Supp. 1324 (N.D. Ill. 1993), aff'd, 23 F.3d 185 (7th Cir. 1994). The court in Stieberger went on to state:
Statutorily, then, ALJs serving in SSA, appointed under 5 U.S.C. § 3105 and its implementing regulations, are APA judges. Their appointment and tenure are regulated by the Office of Personnel Management, as contemplated by the 1941 committee report of the Attorney General and in accord with the APA as finally enacted.

B. Legislative History

Nowhere is the question of APA status more directly addressed than in the Supplemental Security Income (SSI) legislation. And, nowhere is the agency's firm commitment to the applicability of the APA to social security hearings more evident than in the ensuing debate over the appointment of new ALJs to hear SSI cases.

The law that established the SSI program was signed by President Richard M. Nixon on October 30, 1972.66 On November 16, 1972, the Department of Health, Education and Welfare (HEW) requested that the Civil Service Commission establish registers for ALJs to hear SSI cases.67 "The Department's request touched off an incredible series of developments."68

The Office of Administrative Law Judges of the Civil Service Commission took the position that SSA did not require that SSI hearings be held under the APA, and "therefore the Commission was powerless to act."69 In contrast, HEW took the position that the APA did apply, finally convincing the chairman of the commission. In late October 1973, the chairman "granted the HEW request to establish registers for administrative law judges."70 In response, ALJs "from 'old line'...
agencies" objected and requested a full hearing before the commission.71 The commission convened this hearing on December 3, 1973.72 Several of HEW's top officials, along with HEW ALJs and representatives from the HEW Administrative Law Section of the American Bar Association, attended the hearing.73

The chairman of the commission framed the following question:

The question then becomes: (1) what did Congress intend? (2) in the absence of a clear Congressional intent, what then becomes legally necessary through other statutes, court decisions, etc., in terms of structure, procedure, and presiding hearing examiner to conduct SSI hearings? and (3) what is administratively desirable in order to afford due process to claimants — due process that will withstand judicial scrutiny — and in order to enable HEW to carry out in an expeditious and orderly fashion a new public program established by Congress and reflecting the will of the people?74

In response, HEW Commissioner Hess "urged that full APA procedures be applied under SSI as under SSA — that the Department and the Commission should not create artificial distinctions between types of due process accorded claimants [sic] under the two programs."75 HEW officials cited the statements of House Ways and Means Chairman Wilbur Mills, whose committee handled the original bill in the House, stating on the house floor that "all of the safeguards for a fair and equitable hearing in the APA would apply to these hearings."76 Indeed, in a January 24, 1973, letter from the Chief Counsel for the House Ways and Means Committee, to H. Dale Cook, Director of the Bureau of Hearings and Appeals, the Chief Counsel "summed up the legislative history on this question

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71. Id. at 58.
72. Id. at 62.
73. Id. Those in attendance included SSA Deputy Commissioner Arthur Hess; H. Dale Cook, Director, SSA's Bureau of Hearings and Appeals; Sumner G. Whittier, Director, SSA's Aged, Blind and Disabled Office of Planning Assistance; and HEW Assistant General Counsel Manuel Hiller. Id.
74. Id.
75. Id. at 63.
76. Id. The long-held, contrary position of the Ways and Means Committee was reiterated in the 1974 staff report that read:

The legislative history of the law establishing the SSI program makes it clear that the committee intended that the hearings conducted under the new program are to be under the APA . . . . In a confidential print prepared by HEW and Ways and Means staff (February 8, 1971) which described proposed Administration amendments to H.R. 1 the following appears:

Under the provisions of H.R. 1, all hearing examiners must be qualified under the standards in the Administrative Procedure Act.

Id. at 56. Notable is the discussion which accompanied the bill, to the effect that the hearings would be APA protected, but, over recruitment concerns, it was debated whether hearing examiners would be APA qualified. Id. Ultimately, however, no reference was made in the act to that effect. Id. HEW maintained its position that its decision makers would be APA-qualified. Id.
[stating that] ... all hearings are to be conducted in accordance with the APA."

HEW "urged the Commissioners to endorse HEW's determination to accord a lowly private citizen — a welfare recipient — the same rights as the Government accords a powerful corporation in contested matters: namely, the right to appear before an Administrative Law Judge under the full rights and protection of the Administrative Procedure Act."78

On December 14, 1973, Chairman Hampton dispatched the Commission's final decision, concluding "that administrative law judges are not required to preside over SSI hearings because the program is not under the APA."79

Though the battle was lost in 1973, the war was far from over. While the agency was forced to employ "temporary ALJs," it continued to push for APA-qualified ALJs, striving to put its temporary, non-APA (not appointed by the Civil Service Commission) title XVI judges on an equal footing with those hearing cases under title II and title XVIII of the Social Security Act. The Subcommittee On Social Security of the Committee on Ways and Means issued its "Social Security Administrative Law Judges: Survey and Issue Paper" on January 27, 1979, recounting the events of the preceding several years.80

From a legal standpoint, the question of APA applicability has been put to rest. After the hearings in the fall of 1975, the Ways and Means Committee reported legislation which explicitly put the SSI and social security programs on the same basis as far as hearings and appeals are concerned. The House report stated:

The bill eliminates the distinction in the nature of hearings and hearing officers under the Social Security and SSI programs, thus resulting in a common corps of hearing officers authorized to conduct hearings under both programs with common procedural safeguards provided under the Social Security Act and the Administrative Procedure Act. This is necessary to override an interpretation of the Civil Service Commission that the Administrative Procedure Act was not applicable to SSI hearings and which required the appointment of non-APA hearings officers who could not hear Social Security and Medicare cases. This action greatly exacerbated the current hearing crisis and the validity of the SSI hearings has been challenged in the

77. Id. at 57.
78. Id. at 63.
79. Id. at 55 (emphasis added).
80. Section 3 of Public Law 94-202 provided, in-part:

The persons appointed under section 1631(d)(2) of the Social Security Act ... may conduct hearings under titles II, XVI and XVIII of [this chapter] ... notwithstanding the fact that their appointments were made without meeting the requirements for hearing examiners appointed under section 3105 of title 5, United States Code but their appointments shall terminate not later than at the close of the period ending December 31, 1978.

81. Id.
Courts as second class justice. The Committee bill will put this matter to rest by clearly providing on-the-record administrative hearings and judicial review of a parallel nature for Social Security, SSI and Medicare claimants.\(^82\)

The subcommittee also took note of the 1977 report of the Center for Administrative Justice, which supported the APA hearing system.\(^83\) The 1977 report concluded that the "public trust in the SSA scheme of social insurance would be undermined significantly were the opportunity for a face-to-face encounter with a demonstrably independent decision maker eliminated from the system."\(^84\) While acknowledging that independence did not necessarily depend on ALJs being subject to the APA, the report concluded that other alternatives would be costly and unpredictable.\(^85\) The Administrative Conference of the United States echoed a similar theme, stating that "[t]he use of administrative law judges appointed in conformity with the Administrative Procedure Act to decide disability claims should be continued."\(^86\)

The passage of 42 U.S.C. § 1383 ended this long-standing debate. The section provided:

The persons who were appointed to serve as hearing examiners under section 1631(d)(2) of the Social Security Act . . . and who by section 3 of Public Law 94-202 were deemed to be appointed under section 3105 of title 5, United States Code (with such appointments terminating no later than at the close of the period ending December 31, 1978), shall be deemed appointed to career-absolute positions as hearing examiners under and in accordance with section 3105 of title 5, United States Code, with the same authority and tenure as hearing examiners appointed directly under such section 3105 . . . .\(^87\)

Any question about the status of ALJs assigned to SSA was thus firmly resolved. Congress, by affirmative legislative fiat, exercised its authority and specifically determined that those who decide benefits cases under titles II, XVI and XVIII of the Social Security Act are APA decision makers.

**IV. Does the APA Govern Social Security Administration Hearings?**

Given the foregoing discussion, it almost goes without saying that if those who preside over a proceeding are APA-qualified, then the proceeding itself falls under the ambit of the APA. A brief discussion, however, is important.

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82. **Survey and Issue Paper**, *supra* note 36, at 9 (emphasis added).
83. *Id.* at 10.
84. *Id.*
85. *Id.*
86. *Id.*
Since the inception of the APA, commentators have debated whether, because of their informal nature, hearings conducted under the Social Security Act merit APA status. This was never actually an issue for those serving on the Attorney General's Committee on Administrative Procedure in Government Agencies. Indeed, the Social Security Board and the Veterans Administration were lauded for handling a significant caseload through informal processes.

At the heart of the matter is the often misunderstood impact of the APA on the hearings process. For lawyers and judges educated in the Anglo-American system of jurisprudence, the hearings process conducted by ALJs assigned to SSA seems less fair, or even less judicially demanding than the adversarial system of contested dispute resolution and thus not subject to APA status. Traditionally, it is the adversarial process, and not the inquisitorial process, that our society has seen as fair and just.

It is clear, however, that the framers of the APA did not intend any one process to be the hallmark of adjudication under the APA. Quite the opposite is true. The report from the Attorney General's Committee on Administrative Procedure in Government Agencies found that "a proper and fair forum" under the APA could be achieved by several methods. The report noted that a proper and fair forum required an "open and fair atmosphere and a receptive presiding officer...[one who is]...able, independent, and responsible..." The committee

88. For example, a 1978 GAO Report, quoting the Research Director of the Administrative Conference, stated that "some cases now adjudicated formally by ALJ's may not need the formality of the APA to provide due process, while others now adjudicated informally may need the additional formality." SURVEY AND ISSUE PAPER, supra note 36, at 10; see also ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, supra note 26, at 157.

89. Though the Committee recognized that the number of decisions that the Social Security Board must make are too numerous to be formalized, it did so in recognition of the fact that many individuals are "assisted in the preparation and development of his claim by representatives of the agency accessible to him in the field." ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, supra note 26, at 38. Of note is the fact that the overwhelming number of persons then appearing before the Board were unrepresented. See Robert M. Viles, The Social Security Administration Versus the Lawyers...and Poor People Too, 40 MISS. L.J. 24 (1968). It now may be argued that the decisional circumstance is at present different from that earlier time. Now, between 80-90% of all claimants are represented, and the hearings process has become far more judicialized. See Peer Review Report, 2001, Memorandum from Associate Commissioner A. Jacy Thurmond (May 21, 2002) (noting that "pro se claimants made up 17 percent of FY 2001 decisions") (on file with author). The increase in de novo hearings before ALJs, when coupled with heightened scrutiny by the federal courts, further strengthens the continuing role of the administrative law judge.


91. Verkuil, supra note 24, at 312. The author writes: "[M]ore than half of all ALJ's — those assigned to the Social Security Administration — decide more than 80 percent of all administrative cases in distinctly non-adversarial fashion. Since these decisions meet APA requirements, they demonstrate that even the definition of formal adjudication is susceptible to radically different interpretations." Id. (emphasis added) (citations omitted).

92. ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, supra note 26, at 69.

93. Id.
also concluded that fairness required "that the hearing be conducted in an orderly and dignified manner. This does not mean, however, that formality is a prerequisite."94 In fact, the report noted several instances when formality would hinder rather than help the process.95

Then-Director of the Bureau of Hearings and Appeals, Robert Trachtenberg, expressed a similar view in a hearing before the Subcommittee on Social Security.96 Director Trachtenberg did not believe that the APA required "an adversary proceeding or highly 'judicialized' hearing."97 He stated that "[t]here is nothing in my view that says that an APA proceeding . . . necessarily must be an adversary procedure where you have the traditional legal counsel on one side representing the Government and counsel representing the other party."98

Professor Victor Rosenblum, of Northwestern University Law School, endorsed similar views when he testified before the subcommittee. He stated that "[t]he focus of the APA was not on judicialization but on fairness and impartiality in wielding administrative skills and responsibilities. . . . Those who fear that Administrative Law Judges appointed pursuant to the APA will rigidify and judicialize our administrative proceedings misconstrue the history, purposes and practices of APA hearing officers."99 Testifying further, Professor Rosenblum noted that the APA specifically provided for other types of proceedings, particularly in benefits cases, than those which are strictly judicialized in the form of traditional court proceedings.100 Continuing in his testimony before the subcommittee, Professor Rosenblum pointed to the Horsky Report, undertaken in

94. Id.
95. Id. The report noted that
   in cases such as those coming before the Social Security Board, the Veterans' Ad-
   ministration, and the Railroad Retirement Board, strict formality would hinder the
   claimants, who often represent themselves and who should be encouraged to tell their own
   stories as simply and as naturally as possible. There, the atmosphere of sympathetic
   conversation is best conducive to proper administration.

96. SURVEY AND ISSUE PAPER, supra note 36, at 8.
97. Id.
98. Id.
99. Id. at 8-9.
100. Id. at 9. Professor Rosenblum testified:
   Applicants for benefits . . . may not . . . need, however, to confront witnesses, cross-
   examine them or present oral testimony. Section 556(d) removes any danger whatever that
   over-judicialization of benefits hearings will stem from their inclusion under the APA.
   There should be extensive use and expansion of the scope of application of §556(d) to
   speed agency hearing processes as well as expansion of APA Administrative Law Judges
   to assure requisite impartiality and professional skill.

Id. Section 556(d) provides in part:
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. In rule making or determining claims for money or
benefits . . . an agency may, when a party will not be prejudiced thereby, adopt
procedures for the submission of all or part of the evidence in written form.

1960, which specifically found that the non-adversary Social Security Act hearing did not violate the APA. Edward Yourman, former HEW Assistant General Counsel and recognized by the Subcommittee as having "conducted a major study of the Social Security appeals process," reached the same conclusion. He noted that the differences between Social Security hearings and other hearings governed by the APA did "not justify an exception to the general policy of making adjudicatory hearings subject to APA requirements, including those to assure impartiality of decisions by ALJs." 100

While the Supreme Court has declined to specifically comment on the question of the applicability of the APA to Social Security hearings, a spate of cases in the early 1970s raised several questions. In a report to the administrative conference, presented to the Subcommittee on Social Security of the Committee on Ways and Means, Professor Rosenblum surveyed the issues raised by a succession of Supreme Court decisions. He noted that the then-recent cases of *Richardson v. Perales*, 106 *Richardson v. Wright*, 107 *Arnett v. Kennedy*, 108 and *Withrow v. Larkin* 109 could be "seen as new authority and justification for separating adversary administrative proceedings deemed to warrant application of both due process and APA protections from non-adversary proceedings, especially benefits cases, deemed to qualify only for the lower level of protection provided by a situationally varying due process." 110

However, Congress's subsequent action in passing Public Law 95-216, which reaffirmed the appointment of APA-qualified ALJs in the SSI program, makes plain that equal status under the APA must be given to benefits programs as well as other adversary administrative proceedings. Close review of the Social Security statute and, in particular the original SSI legislation itself, confirms congressional intent to apply the APA in SSI hearings. Professor Rosenblum explained that "[t]he implicit requirement [of section 405(g)] that there be a hearing on the record

101. SURVEY AND ISSUE PAPER, supra note 36, at 9. Professor Rosenblum testified:

The 1960 Covington and Burling study of the appeals system (the Horsky report) found that the non-adversary Social Security Act hearing did not violate section 5(c) or 11 of the APA and "is not to be construed to put unsuspected and impossible barriers in the way of a fair adjudicative process, whatever may be its formal trappings."

Id.

102. Id. at 9 n.3.

103. Id. at 9.


105. SUBCOMM. ON SOCIAL SECURITY OF THE HOUSE COMM. ON WAYS AND MEANS, 94TH CONG., RECENT STUDIES RELEVANT TO THE DISABILITY HEARINGS AND APPEALS CRISIS 171 (Comm. Print 1975) (Victor Rosenblum) [hereinafter RECENT STUDIES].


110. RECENT STUDIES, supra note 105, at 212.
then triggers the need to appoint ALJs pursuant to § 3105 of the APA. 111

Neither Richardson v. Perales nor Sims v. Apfel 112 challenged this view. 113 In Perales, the Court declined to directly address the coverage of the APA, though it acknowledged that the Social Security Act mirrored the procedural requirements of the APA. 114 One writer wrote that in endorsing the "three-hat" role of ALJs in the inquisitorial benefits hearing, the Court enhanced the role of the ALJ, while accepting the informal structure of the proceeding. 115

This same author went on to note that "[b]y presiding over informal, non-lawyer dominated hearings, ALJs departed from their traditional association with the trial-type process. . . . Nevertheless, different though it may have been, this category expanded the ALJs' use dramatically." 116 Thus, Perales recognized that the APA did not require the formal adjudicatory proceedings contemplated by adversarial administrative undertakings. 117

111. Id. at 217.
113. See RECENT STUDIES, supra note 105, at 218. Professor Rosenblum opines:
   "It is significant in this respect that the Solicitor General [in his reply brief in Perales] did not urge that the APA was inapplicable to hearings of disability claims under the Social Security Act but argued explicitly that "the broad question of general applicability" of the APA to such hearings "is of no consequence here. For, assuming its applicability, the Administrative Procedure Act specifically authorized the procedures which the Secretary follows under the Social Security Act." Given the Solicitor General's position and the Supreme Court's assertion in agreement that "we need not decide whether the APA has general application to Social Security disability claims," one would have to be unmitigatedly obtuse and perverse to contend that any alteration of the scope of the APA's coverage was embodied in or contemplated by the Perales case.
   "Id. (emphasis added).
114. Jon C. Dubin, Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings, 97 COLUM. L. REV. 1289 (1997). Professor Dubin states: "In sustaining the SSA's inquisitorial model, the Court specifically declined to address whether the APA's adjudication provisions apply to SSA hearings. It reasoned that 'social security administrative procedure does not vary from that prescribed by the APA' and that 'the latter [was] modeled upon the Social Security Act.'" Id. at 1306 (alteration in original) (citations omitted).
115. Verkuil, supra note 24, at 286. The author notes:
The Court approved the so-called "three-hat" administrative law judge (claimant-representative, government representative and neutral decider), whose conduct has been seen to emulate that of inquisitorial judge[s] in continental countries.

This view challenges the dominance of the adversary model of administrative procedure and at the same time confirms tradition. One would think the power of an ALJ to control the course of litigation is enhanced by the Perales decision.
   "Id.
117. Verkuil observes:
   "The three hat role was necessitated by the fact that in those days there were few attorneys for claimants and none representing the government. Obviously had the formal hearing requirements of the APA been mandatory, the separation of functions requirements would have forbidden the ALJ to assume total control of the process.
   "Id. at 1349 n.32.
In *Sims v. Apfel*, the Court addressed the question of administrative issue exhaustion, noting that "SSA regulations do not require issue exhaustion." 118 Contrasting the adversarial administrative proceeding with "an administrative proceeding [that] is not adversarial," the Court concluded that "the reasons . . . to require issue exhaustion [in the non-adversarial proceeding] are much weaker." 119 The Court described the nonadversary Social Security proceeding as departing from the "judicial model of decision making." 120 The Court found that the Social Security proceeding modified the adversarial system by "replacement of normal adversary procedure [with] . . . the 'investigatory model.'" 121 Absent in the investigatory model is "'[t]he adversarial development of issues by the parties — the 'com[ing] to issue' on which that analogy depends simply does not exist." 122 However, at no point did the Court implicate the APA, concluding simply that "the general rule [of issue exhaustion] makes little sense in this particular context." 123 The Court noted, however, that nothing prevented the commissioner from adopting a "regulation that did require issue exhaustion." 124

Recent circuit decisions emphasize the applicability of APA standards to the hearings process in benefits-determination cases. In *Young v. Apfel*, 125 the Tenth Circuit Court of Appeals held that:

[w]hile we have often stated that . . . the Commissioner has the burden at step five . . . we have not had the opportunity to say what that

There remains the question of how the Court would regard the current environment had the APA issue raised in *Perales* been urged in *Sims*. The world of 1971 differed, in that lawyers were not dominant in such proceedings then, as they are now; which leaves open the question of whether a stricter view of the APA and its requirement for separation of functions might curtail the "three hat" role in light of the significant increase in activity of counsel in benefits hearings.

In hearings before the Subcommittee on Social Security of the Committee on Ways and Means in March 1986, SSA responded to specific questioning by the subcommittee as to the now-defunct government representation "experiment." The changing legal environment facing ALJs assigned to SSA was described by the agency itself:

Under the traditional SSA hearing process the ALJ must function as case developer, advocate for the interest and rights of both the claimant and the public, and adjudicator. However, the increased caseloads of today have limited the time available to ALJs for developing evidence and other prehearing case preparation, and vastly increased claimant representation has substantially altered the role of the ALJ by decreasing his or her role as advocate for the claimant and increasing the role of advocate for the public.


119. *Id.* at 110.
120. *Id.* (quoting 2 *KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE* § 9.10, at 103 (3d ed. 1994)).
122. *Id.* at 112 (citation omitted).
123. *Id.* (alterations in original) (quoting Harwood v. Apfel, 186 F.3d 1039, 1042 (8th Cir. 1999)).
124. *Id.* at 108.
burden is. Though the Social Security Act does not specify the appropriate standard, we agree with the Seventh Circuit's conclusion that there is "no doubt that the preponderance of the evidence is the proper standard, as it is the default standard in civil and administrative proceedings."126

The Tenth Circuit specifically noted "that [the] standard of proof under [the] Administrative Procedures Act is [the] 'traditional' preponderance standard."127 The Young court further noted the "similarity in administrative procedure between [the] Social Security Act and APA."128 It concluded that "a claimant's burden . . . is to show the existence of particular facts . . . is more likely than the nonexistence of those facts" and that "an ALJ must make his or her findings using the preponderance standard."129 The court thus affirmed that the APA preponderance standard applies in Social Security proceedings, even though such proceedings are nonadversarial.

Ultimately, the fundamental role of the ALJ assigned to the Social Security Administration is adjudicatory, not adversarial.130 This finding does not affect the application of the APA to such proceedings nor does it affect the requirement that ALJs preside over these hearings. The mandate of the APA is that a citizen be afforded a process which is fair and impartial; not that it be in any particular form or possess a given formality. It is fairness and impartiality that mark the APA standard, and it is these hallmarks that the APA modeled from the Social Security Act, not the form or formality of the proceeding itself.131

126. Id. at *5 (citations omitted) (quoting Jones ex rel. Jones v. Chater, 101 F.3d 509, 512 (7th Cir. 1996)).
127. Id. at *5-6 (citing Steadman v. SEC, 450 U.S. 91, 98-102 (1981)).
128. Id. at *6 (citing Richardson v. Perales, 402 U.S. 389, 409 (1971)).
129. Id.
130. The court in Richardson v. Perales observed: "We bear in mind that the agency operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary. This is the congressional plan. We do not presume on this record to say that it works unfairly." Perales, 402 U.S. at 403.
131. Professor Rosenblum noted:

The review in the course of this paper of key administrative law decisions shows that Frankfurter's conception of the administrative process as a "more flexible" instrument has prevailed and that the APA has been construed to implement his view rather than to cast the agencies into rigid judicial molds. Despite the judiciary's encouragement of administrative flexibility and discretion, fears continue to be voiced — as in the battle over the status of SSI hearing officers — that APA applicability is to be equated with judicial rigidification of the administrative process.

The focus of the APA was not on judicialization but on fairness and impartiality in the wielding of administrative expertise. It was never intended or provided that the formalism of the courtroom should pervade the APA hearing. The sine qua non to the APA hearing was impartiality of the hearing officer, as Wong Yang Sung and its progeny proclaimed.

All Americans are entitled to fair and impartial treatment by their governmental agencies, and fairness fosters both the doing and accepting of justice.

RECENT STUDIES, supra note 105, at 243-44 (emphasis added).
V. What Boundaries Outline the Relationship of SSA Administrators to SSA
Administrative Law Judges Under the Administrative Procedure Act?

Just as fairness and impartiality are the cornerstones of an APA hearing, so
independence and impartiality are the corollary benchmarks of the ALJ. As
envisioned by the drafters of the APA, fairness could not exist absent the indepen-
dence of the decision maker.132 To ensure fairness, the framers of the APA
required the independence of the ALJ, "to further preclude the possibility of
agency pressure or influence . . . ."133 While the APA places ALJs within
individual agencies, the purpose was not to give the agency "management and
control" over the judge; such action was viewed as inconsistent with the funda-
mental purposes of the act. Instead, it was thought that insulating the agencies from
management and control at the outset would end such temptation. As noted in a
1951 attorney general's opinion, "[i]f salaries and promotions are subject to agency
control, there is always danger that a subtle influence will be exerted upon the
examiners to decide in accordance with agency wishes. The committee reports
demonstrate the intention of the Congress to minimize this hazard."134

"Subtle influences" were thus recognized early on as insidious and a danger to
the foundational principles of the APA. In fact, Professor Rosenblum argued that
"[t]he significant professional status of ALJs today has been made possible in large
measure by their independence from agency and political pressures."135 Professor
Rosenblum framed the problem as agency management seeking "to impose upon
judges usual agency control systems that are, in fact, inappropriate, costly and
unnecessary if not altogether illegal."136 He further noted that agency
management sought to impose these controls because they viewed "ALJs as
'subordinate employees to be managed and controlled.'"137

The reason for the placement of hearing examiners (later, administrative law
judges) within the agency was not to allow the agency to "manage and control" their
judges, but to permit agency control over the very limited question of
staffing.138 The legislative history of section 11, as seen in the report of the

132. Senate Report 95-697 notes:
Hearing examiners, [now designated Administrative Law Judges (ALJs) pursuant to Civil
Service Regulation] are an integral part of the rule making and adjudicatory procedures
required by the Administrative Procedure Act (APA) of 1946 [now codified at 5 U.S.C.
551 et seq.]. To insure the independence and impartiality of the administrative process,
section 556 of title 5 requires ALJs to serve as presiding officers with respect to rule
making or adjudicatory hearings (unless the agency itself, or one or more of its members,
presides).


133. Id.

134. Administrative Procedure Act, Promotion of Hearing Examiners, 41 Op. Att'y Gen. 74, 78
(1951).

135. RECENT STUDIES, supra note 105, at 240.

136. Id. at 240-41.

137. Id. at 240 (quoting Statement and Recommendation of the Federal Administrative Law Judges

138. See id. at 227. Professor Rosenblum writes:
House Judiciary Committee, makes the agency's limited role in the management and control of ALJs clear. The report noted that while the Commission may consult with an agency on setting up positions, it would ultimately act on its own, "with the objects of the bill in mind." A later report from the same committee noted that "ALJ management was kept to a minimum and was placed, along with the task of ALJ recruitment outside the agency and in the Civil Service Commission [now the Office of Personnel Management]." The same report further noted that "[a]gencies are not, at any time, permitted to appraise ALJ performance."

The legislative history of the APA manifests an intent to separate ALJs from the management functions of their respective agencies. Close reading of the APA and its implementing regulations show that it is the Office of Personnel Management (or, formerly, the CSC) that has an actual, statutory mandate for ALJ management. In fact, after several studies, the General Accounting Office "concluded that the OPM [was] the only office clearly responsible for ALJ management."

Notwithstanding these clear declarations of an ALJ's status and of the agencies' overt (statutory) lack of management control over ALJs, agencies have attempted to and have partially succeeded in narrowing the APA's protections for independent and impartial administrative decision makers. Indeed, SSA has engaged in this endeavor more than any other agency.

While both 5 U.S.C. § 4301 and its implementing regulation, 5 C.F.R. § 930.211, forbid performance evaluations, SSA has not willingly accepted the right to review individual ALJ decisions as the sole means of addressing ALJs who fail

Section § [sic] 3105 says only that "each agency shall appoint" as many ALJs as are necessary for proceedings required to be conducted in accordance with § 556 and § 557. The implication would seem to be that, whereas the CSC has responsibilities independent of the agency's under § 5362 and § 7521, its duties under § 3105 are ministerial and dependent upon the agency's determination of the number of ALJs it needs. This view of § 3105 is consistent with the Supreme Court's opinion in Ramspeck, as well as with authoritative scholarship on the meaning of the APA.

Id. He further notes:

[S]ection 11 of the APA, as adopted in 1946, specified that there shall be appointed by and for each agency 'as many qualified and competent examiners as may be necessary' for proceedings pursuant to the statute:

"who shall be assigned to cases in rotation as far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission after opportunity for hearing and upon the record thereof."

141. Id. at 69.
142. Id. at 71.
to meet "desired norms." SSA has adopted "a third solution . . . that ostensibly avoids the use of performance evaluations, yet accomplishes the same goals by the alternative means of evaluating ALJs' productivity." This third solution is based "upon the razor-thin distinction between evaluating or rating ALJs and simply identifying those ALJs whose performance might warrant the initiation of adverse action proceedings." SSA asserts that "neither the APA nor its implementing regulations . . . precludes [it] from . . . having an opinion on an administrative law judge's performance." In so doing, SSA blurs the distinction between independence and impartiality, describing the former in terms of the latter, thereby functionally eliminating independence. This blurring clearly narrows the protections initially contemplated under the APA. The January 1997 memorandum of the General Counsel is exemplary in its conclusion: "[T]he Agency may establish reasonable administrative practices and programmatic policies that ALJs must follow, as long as the Agency does not take actions which abridge, directly or indirectly, the duty of impartiality an ALJ owes the claimant when hearing and deciding claims." This conclusion does not address the concept of ALJ independence. The agency revealed its thinking more clearly in an earlier memorandum, from the Division of Policy and Procedure, where it stated that "[i]n spite of the ALJ's complete independence of decision, he/she is a part of and is under the administrative direction and control of his employing agency." Agency interpretation of independence thus narrowly circumscribes the concept of decision making.

A cogent expression of APA-mandated independence is found in Butz v. Economou. In Butz . . . , the Court granted ALJs absolute immunity from tort suits based on their judicial acts. The Court reasoned that an ALJ performs a 'functionally comparable' role to a judge and that 'the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the

143. O'Keefe, supra note 12, at 595.
144. Id. at 596.
145. Id. (quoting COMPTROLLER GENERAL, ADMINISTRATIVE LAW PROCESS: BETTER MANAGEMENT IS NEEDED 26 (1978)).
146. Id.
147. Close reading of the foregoing indicates that the Social Security Administration pays little heed to the fundamental premise that it should avoid the "subtle influences" in the adjudicatory process. In Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 142 (1953), the Supreme Court noted that the Civil Service Commission had the duty to "prevent any devious practice by an agency" that would jeopardize an ALJ's independence.
149. Memorandum from the Division of Policy and Procedure to Director, BHA (Dec. 12, 1977) (emphasis added) (on file with author). The memo also noted: "Section 1-12 [of the BHA Handbook] states that the ALJ has independence in reaching and making decisions. However, the performance of functions is exercised within administrative restrictions imposed by the employing agency." Id.
151. Id.
parties or other officials within the agency." A number of lower court decisions have echoed the Butz ruling, reaffirming the Court's declaration that "the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women."

A. Statutory and Regulatory Limitations on Agency Action

The APA provides several statutory protections for ALJs. These protections include: (1) each agency "may appoint only those individuals which the Civil Service Commission [now OPM] [certifies] as qualified"; (2) "ALJs are exempt from performance evaluations by their agencies [5 U.S.C. § 4301]"; (3) the commission, not the employing agency, must show cause to remove an ALJ [5 U.S.C. § 7521]; and (4) ALJs "receive periodic step increases in pay without certification by their employing agency that they are performing at an acceptable level of competence [5 U.S.C. 5335]." Furthermore, agencies must rotate ALJ caseloads, must not assign non-ALJ duties to an ALJ, and an ALJ must keep the facts of each case he hears confidential.

The constellation of statutes that comprise the APA ensures a "process of agency adjudication . . . structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." These same "provisions confer a qualified right of decisional independence upon ALJs." [T]his special status is a creation of statute, rather than the Constitution, but "as their role has expanded, the ALJ's functional comparability to judges has gained recognition."

A brief overview of the critical statutes that create the ALJ, together with their implementing regulations, is important. At the heart of the statutory scheme is the interposition of the Office of Personnel Management (OPM) as the singular agency responsible for ALJ management. The classification of "administrative law judge" is reserved by OPM for the specific class of appointments made under 5 U.S.C. § 3105 and applies to all agencies. Furthermore, ALJs can only be appointed after certification by OPM.

152. O'Keefe, supra note 12, at 601 (alteration in original) (quoting Butz, 438 U.S. at 513).
154. S. REP. NO. 95-697, at 2 (1978). These protections make the position of the ALJ "very similar to that provided for Federal judges under the Constitution." Id.
158. Id.
159. Id.
160. Section 930.203b reads: "The title 'administrative law judge' is the official class title for an administrative law judge position. Each agency will use only this official class title for personnel, budget, and fiscal purposes." 5 C.F.R. § 930.203b (2001).
161. 5 C.F.R. § 930.203a provides, in part: "An agency may make an appointment to an administrative law judge position only with the prior approval of OPM, except when it makes its
Additionally, an agency may not reassign,\textsuperscript{162} transfer,\textsuperscript{163} reinstate,\textsuperscript{164} restore,\textsuperscript{165} detail,\textsuperscript{166} or remove an ALJ without OPM action.\textsuperscript{167} The OPM also regulates levels of pay, which may determine an ALJ's initial pay, commensurate with his qualifications.\textsuperscript{168} The OPM also oversees the rotation of ALJs, requiring, in accord with the APA, that agencies "assign . . . administrative law judges in rotation to cases."\textsuperscript{169} Most importantly, only the Merit Systems Protection Board (MSPB) may discipline an ALJ.\textsuperscript{170} Title 5 U.S.C. § 7521 of the United States Code provides that an agency may take action against an ALJ "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board."\textsuperscript{171}

Additionally, the OPM may remove, suspend, reduce in grade and pay, and furlough an ALJ for thirty days or less.\textsuperscript{172} With limited pay exceptions,\textsuperscript{173} the role of the employing agency is subject to OPM. In the case of proposed discipline, the agency takes on a potentially adversarial role to the ALJ, acting as prosecutor before the MSPB. Apart from OPM/MSPB sanction, the agency has no ability to unilaterally effect either positive or negative personnel action.

Specifically, the agency may neither reward its ALJs nor evaluate them as it may other nonjudicial employees.\textsuperscript{174} The implementing regulations provide that "[a]n agency may not grant a monetary and honorary award . . . for superior accomplishment by an administrative law judge in the performance of adjudicatory functions."\textsuperscript{175} Similarly, an agency may not engage in performance evaluations.\textsuperscript{176} The regulations command simply that "[a]n agency shall not rate the performance of an administrative law judge."\textsuperscript{177}

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appointment from a certificate of eligibles furnished by OPM." \textit{Id.} § 930.203a; see also 5 U.S.C. § 5372 (2000) (providing for pay for administrative law judges, also subject to OPM approval).
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\item \textsuperscript{162} 5 C.F.R. § 930.205 (2001).
\item \textsuperscript{163} \textit{Id.} § 930.206(a).
\item \textsuperscript{164} \textit{Id.} § 930.207.
\item \textsuperscript{165} \textit{Id.} § 930.208.
\item \textsuperscript{166} \textit{Id.} § 930.209(b); see also \textit{Id.} § 930.213 (providing for use of administrative law judges "on detail from other agencies").
\item \textsuperscript{167} \textit{Id.} § 930.215.
\item \textsuperscript{168} \textit{Id.} §§ 930.210, 930.210(g).
\item \textsuperscript{169} \textit{Id.} § 930.212.
\item \textsuperscript{170} 5 U.S.C. § 7521 (2000).
\item \textsuperscript{171} \textit{Id.}
\item \textsuperscript{172} \textit{Id.} § 7521(b). The implementing regulation is 5 C.F.R. § 930.214 and mirrors § 7521, providing further for the status of the administrative law judge during removal proceedings. 5 C.F.R. § 930.214 (2001).
\item \textsuperscript{173} See, for example, 5 C.F.R. § 930.210(g)(1) (2001), which provides for the ability of the agency to pay a new appointee at higher than the minimum pay, where the appointee has prior federal service. Pay is to be made at "the rate that is next above the applicant's highest previous Federal rate of pay, up to the maximum rate F." \textit{Id.}
\item \textsuperscript{174} See \textit{id.} § 930.210(b).
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} See \textit{id.} § 930.211.
\item \textsuperscript{177} \textit{Id.}
\end{itemize}
Read together, sections 930.210 and 930.211 are entirely consistent. On the one hand, these sections ensure that the ALJ is free from the positive influence of agency rewards; on the other, they ensure that the agency does not engage in rating its judges — good or bad. In the first instance, the judge is shielded from the influence of the agency in recognition that the agency is like any other party — it may not act to influence the outcome of the judge's decision, especially through a system of monetary awards.\(^{178}\) Indeed, a judge who receives "a monetary and honorary award" from the very agency upon whose decisions he sits in judgment cannot be unbiased. Similarly, giving the agency the ability to rate judicial performance gives rise to an equally prohibited consequence.\(^{179}\) As one writer has observed: "Independence of ALJs from improper agency influence is critical to the administrative structure created by the APA. Freedom of ALJs from performance evaluations by their employing agencies is an integral aspect of that independence."\(^{180}\)

In sum, the statutory scheme that comprises the APA, together with its implementing regulations, plainly vest management over ALJs with the OPM, not with the individual agencies. As noted earlier, an agency cannot affect an ALJ's status absent OPM/MSPB action. Sections 930.210 and 930.211 place the ALJ in a neutral zone, free from agency influence, either in the form of monetary rewards or performance-based punishment. In fact, this insulation is so important to the original design of the adjudicatory structure that absent action from an independent agency, i.e., the Office of Personnel Management and/or the Merit Systems Protection Board, an agency may not affect an ALJ's status under the APA.

B. Productivity

A series of legal actions, beginning in 1977, define the parameters of an ALJ's independence. In 1977, five ALJs sued SSA and various SSA officials, alleging (1) interference with the "independence and judicial duties of ALJs mandated by the Administrative Procedure Act"; (2) the establishment of "procedures and practices which have the effect of rating the performance of individual ALJs"; and (3) the establishment of "procedures by which ALJs are required to meet arbitrary quantitative quotas of completed decisions."\(^{181}\) The ALJs sought a permanent injunction against SSA.\(^{182}\) Prior to a final verdict, the parties settled the action in

178. SSA's own regulations require that an "administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision." 20 C.F.R. §§ 404.940, 416.1440 (2000); see also Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995) ("Essential to a fair hearing is the right to an unbiased judge .... The due process requirement of an impartial decisionmaker is applied more strictly in administrative proceedings than in court proceedings because of the absence of procedural safeguards normally available in judicial proceedings.").

179. The question, addressed in the succeeding section, is the nature of the action which an agency may take as a result of any "performance" data.

180. O'Keeffe, supra note 12, at 626.


what is now known as the "Bono Settlement." 183 The settlement provides that "OHA will not issue directives or memoranda setting any specific number of dispositions by ALJs as quota or goals." 184

In 1980, the Second Circuit Court of Appeals, in Nash v. Califano, 185 found that the plaintiff, an ALJ assigned to SSA, had standing to litigate the issue of whether the agency acted in violation of the APA by establishing performance evaluations. 186 Initially, the court found that the alleged violations reached "virtually every aspect of [Judge Nash's] daily role." 187 The court found that because Judge Nash allegedly received "mandatory, unlawful instructions regarding every detail of [his] judicial role," Judge Nash met the necessary "personal stake and interest" Article III standing requirements. 188 The court further found that the injuries allegedly suffered by Judge Nash directly impacted his rights under 5 U.S.C. § 4301 and the "position description promulgated by the Bureau of Hearings and Appeals." 189 While the court later found "no direct pressure on ALJs to maintain a fixed percentage of reversals," 190 it affirmed the fundamental tenants of the APA, finding that "ALJs themselves have both a statutory right to decisional independence and legal standing to safeguard that independence." 191

In a December 12, 1977, memorandum directed to the Bono litigation, the Division of Policy and Procedure wrote that "[i]t is our belief that the Bureau could take further action in a number of areas without seriously impinging on ALJ independence." 192 The memo argued that any decision regarding the scope of ALJ independence must consider that this independence is "provided as a protection for the individuals subject to his jurisdiction, not for the benefit of the judge himself." 193 SSA General Counsel repeated this same view twenty years later when he asserted that "an ALJ's independence is 'limited to the protections of . . . compensation and tenure found in the [APA],' and that any 'larger right of decisional independence' would not rest with the ALJs, but with 'the claimants whose rights are adjudicated by the ALJs.'" 194

183. Executed in its entirety on June 19, 1979. See id.
185. 613 F.2d 10 (2d Cir. 1980).
186. Id. at 16.
187. Id.
188. Id.
189. Id. at 17.
190. Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989). The court found "[a]lthough the defendants may have engaged in some questionable practices which clearly caused great unrest among ALJs, . . . they did not infringe on the decisional independence of ALJs." Id. The court apparently accepted the agency's position that "reversal rates were used as a benchmark in deciding whether there might be problems in the adjudicatory methods of particularly high (or low) reversal rate ALJs." Id. at 681.
191. O'Keeffe, supra note 12, at 617 (emphasis added).
192. Memorandum from the Division of Policy and Procedure to Director, BHA (Dec. 12, 1977) (on file with author).
193. Id.
While the agency read the APA to provide narrow protections for an ALJ's independence, *Nash I* put the issue to rest. One writer aptly noted that "[a]lthough the purpose of the ALJs' independence is to protect the public, this independence is created by establishing procedural safeguards protecting ALJs from agency interference." However, the procedural safeguards of compensation, tenure, and freedom from performance evaluations are statutorily created "rights personal to the judges," and "[t]he fact that Congress gave these rights to ALJs for the benefit of the public does not make them any less the ALJs' rights."

In 1984, the U.S. District Court for the District of Columbia considered the effect of the Bellmon Amendments on the Social Security Act in *Association of Administrative Law Judges v. Heckler.* The Bellmon Amendments initiated the Bellmon Review Program. This program implemented "Section 304(g) of the Social Security Disability Amendments of 1980." At issue was the "targeting of individual ALJs . . . based upon allowance rates." The Association of Administrative Law Judges took the position that "the Bellmon Review Program would result in illegal performance ratings of ALJs and would have the effect of chilling ALJ decision independence." Then-Deputy Associate Commissioner Hays "sought advice from the Office of General Counsel." The Office of General Counsel advised Hays that while the Senate version of the Bellmon Amendments did require such targeting, "the Conference Report did not." The General Counsel went on to note that such targeting could possibly chill decisional independence; however, the office concluded that "while the law did not directly preclude targeting, there could be some legal risk, and suggested the desirability of reviewing some denial as well as favorable decisions."

Notwithstanding the advice of counsel, the associate commissioner testified that he "interpreted the Bellman Amendment . . . to require the focus on allowance decisions only." In so acting, OHA framed "the term 'goals' to describe SSA projections of allowance rates." Thus, the issue was joined, as ALJs were targeted for not achieving identified goals. Indeed, certain ALJ's were provided "training . . . on the application of the Social Security disability regulations and the sequential evaluation process of adjudicating cases."

195. *Nash v. Califano*, 613 F.2d 10, 16 (2d Cir. 1980).
197. *id.*
198. *id.*
200. *id.* at 1133.
201. *id.*
202. *id.* at 1136.
203. *id.*
204. *id.*
205. *id.*
206. *id.*
207. *id.*
208. *id.* at 1137.
209. *id.* at 1137-38.
The Heckler court found that the agency's "preoccupation with allowance rates" caused the ALJs to "reasonably feel pressure to issue fewer allowance decisions in the name of accuracy."\(^{210}\) The court reasoned that, especially in close cases, this pressure could affect a case's outcome.\(^{211}\) While the court ultimately concluded that there was no longer a need for injunctive relief because the agency had "shifted their focus, obviating the need for . . . restructuring of the agency at this time," it clearly viewed the agency's actions with disfavor.\(^{212}\) In fact, the Heckler court stated that the agency's focus on allowance rates "created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof."\(^{213}\) The Heckler case thereby becomes one of the lines of demarcation in the quest for understanding the reach of the APA, prohibiting both agency action which targets individual ALJs and allowance rates.

Notwithstanding this decision, the agency asserted in a memorandum of May 4, 1992, that the case principally held that "an agency may gather data and form an opinion of an ALJ's performance. Accordingly, the mere calculation and maintenance of own motion and grant-review data does not violate [the APA]."\(^{214}\) However, the Heckler court actually stated that "the mere calculation and maintenance of own motion and grant-review data does not violate 5 U.S.C. § 4301."\(^{215}\) The Heckler court did not focus on the maintenance of data, but rather on the later use of that data to effectuate a decisional change on the part of the otherwise neutral and impartial ALJ — i.e., a performance evaluation, which is prohibited by 5 U.S.C. § 4301.\(^{216}\) The holding of Heckler is consistent with the later holding in Nash II.\(^{217}\) The Nash II court reasoned that an agency could review dead cases "so long as such efforts did not directly interfere with 'live' decisions (unless in accordance with the usual administrative review performed by the Appeals Council)."\(^{218}\)

\(^{210}\) Id. at 1142.
\(^{211}\) Id.
\(^{212}\) Id. at 1143. The court noted that the "[d]efendants' insensitivity to that degree of decisional independence the APA affords to administrative law judges and the injudicious use of phrases such as 'targeting,' 'goals,' and 'behavior modification' could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases they decide." Id.
\(^{213}\) Id. (emphasis added).
\(^{214}\) Memorandum from Donald A. Gonya, Chief Counsel, to Louis D. Enoff, Principal Deputy Commissioner (May 4, 1992) (on file with author).
\(^{215}\) Heckler, 594 F. Supp. at 1140.
\(^{216}\) Interestingly, the court noted, without comment, that the then-Deputy Associate Commissioner Hays was a member of the Senior Executive Service, a group of "supergrade" federal employees who are performance rated; observing that Mr. Hays was alleged to have "a financial incentive to pressure ALJs to reduce their allowance rates . . . . [a]s . . . . he had a performance plan which stated as one of its goals or objectives, the reduction of allowance rates." Id. at 1136. The court further noted that "Mr. Hays denied that the reduction of allowance rates was an independent goal in the performance plan." Id. at 1136-37. The point, however, is well made. What problems arise when performance-rated employees, whose salaries and bonuses (all part of SES service) are tied to the activity of otherwise non-performance-rated appointees charged with independent and impartial decision making?
\(^{217}\) Nash v. Bowen, 869 F.2d 675 (2d Cir. 1989).
\(^{218}\) Id. at 680.
The issue of agency oversight reached a pinnacle in 1984 when SSA filed a series of actions before the Merit Systems Protection Board seeking to remove three ALJs based on their lack of "production." In these three cases, SSA argued to the MSPB that the ALJs in question had performed at a much lower production rate than their peers. In the lead case, SSA submitted evidence "that the judge's disposition rate for the years 1980-81 was fifteen to sixteen cases per month, compared to an average of thirty to thirty-two for all SSA ALJs. In addition, his average monthly 'pending' caseload for 1981 was sixty-four, compared with 178 for all SSA ALJs. The MSPB administrative law judge rejected the ALJ's legal position and recommended dismissal.

On appeal, the full MSPB ruled that "the SSA's evidence that the ALJ's case dispositions were half the national average was not enough to show unacceptably low productivity [in the absence of evidence demonstrating the validity of using its statistics to measure comparative productivity." The board reasoned that "SSA cases were not fungible and that SSA's comparable statistics did not take into sufficient account the differences among the different types of cases."

While these three cases did show that SSA could "bring charges against low producing ALJs," the agency had a "virtually insurmountable burden of proof" to show a lack of productivity. This burden of proof required that SSA must carefully analyze "the particular cases heard by the cited ALJ."

In testimony before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation in 1980, Reuben Lozner, an ALJ with the Federal Communications Commission, reaffirmed the later MSPB finding. He testified that statistical studies have little or no value in analyzing judges' productivity. He reasoned that unless a study accounts for factors such as the nature of the case, the number and complexity of the issues involved, the length of prehearing proceedings, evidentiary and posthearing proceedings, and the problems encountered in writing the decision, the study arguably has little meaning as a real measure of a judge's workload.

The heart of the MSPB decision is evident — numbers alone will not meet the "good cause" standard under 5 U.S.C. § 7521.\footnote{230} In one writer's view, "[t]he 'good cause' standard for disciplining 'bad apple' ALJs is seen correctly as a protection of the ALJs' decisional independence."\footnote{231} He further states that "[a]gencies should view the initiation of disciplinary proceedings . . . as a last resort."\footnote{232}

However, Social Security Administration v. Goodman established that the "good cause" standard used in 5 U.S.C. § 7521 is not equivalent to the "good behavior" standard enjoyed by Article III federal judges.\footnote{233} Upon analysis of the statutory scheme, the MSPB concluded "that there is no generic prohibition to filing of this charge," but it did not otherwise define good cause except to say that it was not be found here.\footnote{234}

In Social Security Administration v. Glover,\footnote{235} the MSPB commented on removal proceedings based upon what occurs in the hearing room. The board held that what occurs in the hearing room "should be reserved for those cases which involve serious improprieties, flagrant abuses, or repeated breaches of acceptable standards of judicial behavior."\footnote{236} While not directly touching upon the question of removal solely for productivity, the tenor of the standard makes plain that numbers alone, absent careful and complete analysis, will not suffice for removal.

Finally, in Brennan v. Department of Health and Human Services,\footnote{237} the Federal Circuit noted that "[d]etermining the existence of 'good cause' is not a simple task."\footnote{238} It concluded that agency action which interferes with "the quasi-judicial functions" of an ALJ cannot constitute "good cause" but is a "question of fact and must be answered on a case by case basis."\footnote{239} In effect, the ALJ may decline to follow agency procedures which constitute an "improper interference with the ALJ's function", even if the ALJ's performance standards do not lead to changes in the substance of an ALJ's decision, clearly their effect is to change the time frame in which it is reached. The simplest example of this effect is wrought by a production quota. The purpose of the quota is to encourage underproducers to catch up with the average. Then the average goes up. However, if the quota is based on the average, the quota goes up. Standards simply edge higher and higher. For example, the Social Security Administration has set constantly rising production goals: twelve decisions per month in the 1960s; fifteen to twenty in the early 1970s, twenty-six in 1975, thirty to thirty-two in 1980-1981, and forty cases per month in 1983. Thus, a case before the Social Security Administration currently receives one-third of the time that it would have received twenty years ago.

O'Keefe, supra note 12, at 618 (emphasis added).

\footnote{230} One commentator also cogently observes:

- Even if performance standards do not lead to changes in the substance of an ALJ's decision, clearly their effect is to change the time frame in which it is reached. The simplest example of this effect is wrought by a production quota. The purpose of the quota is to encourage underproducers to catch up with the average. Then the average goes up. However, if the quota is based on the average, the quota goes up. Standards simply edge higher and higher. For example, the Social Security Administration has set constantly rising production goals: twelve decisions per month in the 1960s; fifteen to twenty in the early 1970s, twenty-six in 1975, thirty to thirty-two in 1980-1981, and forty cases per month in 1983. Thus, a case before the Social Security Administration currently receives one-third of the time that it would have received twenty years ago.

O'Keefe, supra note 12, at 618 (emphasis added).

\footnote{231} Lubbers, supra note 220, at 600.

\footnote{232} Id. (emphasis added).


\footnote{234} Id. at 327. Interestingly, in footnote 10 of Goodman, the MSPB stated: "As we hold today in Social Security Administration v. Manion . . . instructions which do not improperly interfere with the performance of an ALJ's judicial functions can be issued by the employing agency." Id. at 327 n.10.

\footnote{235} 23 M.S.P.R. 57 (1984).

\footnote{236} Id. at 78.

\footnote{237} 787 F.2d 1559 (Fed. Cir. 1986).

\footnote{238} Id. at 1563.

\footnote{239} Id.
performance of his quasi-judicial functions," but he runs the risk of a later determination that the practices were not an improper interference.\(^{240}\) In summary, it is plain that an agency may not promulgate procedures or practices which improperly interfere with the ALJ's judicial function. The Bellmon Review is clearly such a practice, with the review of individual ALJs' decisions creating "an untenable atmosphere of tension and unfairness which violated the spirit of the APA."\(^{241}\) On the other hand, the agency succeeded, in theory, in establishing productivity as a basis for "good cause" removal before the MSPB. However, the MSPB established a clear — and high — threshold that numbers alone will not meet this "good cause" standard.

In Heckler, the court plainly established a standard of review which required that the whole of the complained-of practice or procedure be examined.\(^{242}\) It thereby further established that agency practices whose effect is indirect, such that there is a "reasonable" basis to infer improper interference, may also be actionable. Applying the MSPB standard, it is plain that such determinations must be made on a case-by-case basis.

In resolution of the Bono litigation, the agency agreed to forego goals and quotas, though not for purposes of raising the question before the MSPB. So, while it may not institute goals or quotas per the force of that settlement, nothing precludes the agency from raising the productivity issue before the board, though under the constraints earlier established under Goodman. It is also plain that the Bono agreement remains in full force and effect, consistent with the Federal Rules of Civil Procedure, and is enforceable in the United States District Court for the Western District of Missouri.\(^{243}\)

VI. Are Administrative Law Judges Required as Presiding Officials by the Administrative Procedure Act in the Conduct of Hearings Before Social Security's Office of Hearings and Appeals?

Administrative law judges are creatures of statute, not the Constitution.\(^{244}\) Thus,

\(^{240}\) Id.


\(^{242}\) Id. The court in Heckler stated that "[t]he evidence as a whole, persuasively demonstrated that defendants retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions . . . ." Id. at 1142.


On June 19, 1979 the parties in Bono executed a settlement agreement which provided that OHA would not set specific disposition quotas for ALJs. Plaintiff asserts that he may seek to enforce the settlement agreement in this Court under Rule 71 of the Federal Rules of Civil Procedure . . . .

[However,] . . . to the extent plaintiff seeks to assert he is a beneficiary of the Bono settlement within the meaning of F.R.Civ.P. 71 he must . . . seek enforcement in the Bono action itself.

Id.

\(^{244}\) One noted commentator writes:

The term "federal administrative judiciary" is not frequently used, but it highlights the relationship between the administrative decision system and the federal judiciary. Ad-
it is by congressional mandate that such judges preside in any hearing.\textsuperscript{245} Whether ALJs must preside over SSA hearings has been the subject of great debate. As one preeminent writer observed:

Another way in which Social Security claims have been set apart from the other administrative agencies has been the question of the applicability of the APA to Title II disability claims. In other words, there has been some contention that the protections afforded through the APA — such as a politically independent decisionmaker — are not relevant to Social Security hearings whereas they are critical to the regulatory setting. \textit{However, legislative history and judicial case law clearly demonstrate that the APA is applicable to the Social Security Act.}\textsuperscript{246}

\textbf{A. The Social Security Act and the Administrative Procedure Act}

The Social Security Act antedates the APA by seven years.\textsuperscript{247} In fact, the attorney general's committee that drafted the APA used the Social Security Act procedures as a model, and the "Committee considered the APA to be 'largely declaratory' of the provisions of the Social Security Act."\textsuperscript{248} Section 554(a) of the APA provides that the act is applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."\textsuperscript{249}

Nevertheless, several commentators have argued that because the Social Security Act does not contain the words "on the record," the APA does not apply to SSA

\begin{itemize}
\item Administrative deciders are significant participants in our constitutional scheme. \ldots
\item Administrative Law Judges as a group are among the most diversely talented, well-trained, and deeply entrenched adjudicators in our system, even when they are compared with the federal district and state judiciary. There are almost 1,200 ALJs who are assigned to 30 federal agencies. This is approximately equivalent to the number of judges on the federal trial bench. \ldots
\item A survey concludes \ldots in education, training and experience, they seem no less qualified than bankruptcy judges and magistrates, if not members of the federal bench. \ldots
\item They enjoy a more secure tenure and compensation than do bankruptcy judges or magistrates because they do not serve terms. Rather, they effectively receive life tenure subject to removal for good cause. \ldots These protections provide ALJs with a certain degree of judicial independence.
\end{itemize}

Verkuil, \textit{supra} note 116, at 1343-45.

\textsuperscript{245} In the words of one writer, addressing the Ways and Means Committee: "Ultimate resolution of the issue is properly a function of Congress; for the utilization of ALJs involves, at heart, basic questions of national policy on the administration of justice to the ordinary citizen." \textit{RECENT STUDIES, supra} note 105, at 240; \textit{see also} Ramspeck \textit{v. Fed. Trial Exam'r's Conference}, 345 U.S. 128, 133 (1953) ("The position of hearing examiners is not a constitutionally protected position. It is a creature of congressional enactment.").


\textsuperscript{247} \textit{Id.}

\textsuperscript{248} \textit{Id.}

\textsuperscript{249} 5 U.S.C. § 554(a) (2000).
hearings.\textsuperscript{250} These commentators note that Congress has explicitly amended other laws "to require that [its] hearings conform with the APA requirements that ALJs be the presiding officers."\textsuperscript{251} They also note that Congress has never amended the SSI provisions to include the APA requirement of ALJs as presiding officers.\textsuperscript{252} These commentators point to the conspicuous absence of any mention of the APA or ALJ as presiding officers in the SSI amendments as clear evidence that "Congress did not place these hearings under the APA."\textsuperscript{253}

These conclusions, say those opposed to APA applicability, were echoed by the 1972 SSI legislation.\textsuperscript{254} These commentators argue that the language of the later 1977 SSI amendments specifically authorized non-APA hearing officers, stating that the Secretary may appoint hearing examiners\textsuperscript{255} "to the extent the Secretary finds it will promote the objectives of this title,' the appointment as hearing examiners of 'qualified persons' to conduct the required hearings \textit{without meeting the specific standard prescribed for hearing examiners by or under Subchapter II of Chapter 5 of Title 5, United States Code.}"\textsuperscript{256}

However, these arguments against applying the APA to SSI hearings do not paint a complete picture of the relationship between the APA and the Social Security Act. Indeed, the legislative history of the 1972 amendments together with subsequent legislation in 1977 make clear that ALJs must preside over Social Security Act hearings. Even if one were to ignore the subsequent legislation and focus only on the 1972 SSI amendments, an argument can still be made that the APA applies. The SSI amendments require that SSA maintain a "record" of the hearings.\textsuperscript{257} This requirement arguably meets the APA "hearing on the record" requirement. Furthermore, while the SSI amendments do make the secretary's fact-finding conclusions binding, all "other determinations of the Secretary shall be subject to judicial review [in a U.S. district court] pursuant to \$ 405(g) of the Social Security statute."\textsuperscript{258} Furthermore, section 405(g) "requires that '[a]s part of his answer, the Secretary shall file a certified copy of the transcript of the record including the

\textsuperscript{250} RECENT STUDIES, supra note 105, at 206.
\textsuperscript{251} Id.
\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{256} RECENT STUDIES, supra note 105, at 206 (emphasis added). Subchapter II of chapter 5 of title 5, United States Code are the APA's provisions for the conduct of hearings, powers of hearing officers and procedural rights of the parties.
\textsuperscript{257} Id. at 217.
\textsuperscript{258} Id.
evidence upon which the findings and decision complained of are based." The section 405(g) requirement "that the Secretary furnish a transcript of the record can only mean that a record must be maintained in order to facilitate judicial review of the propriety of application of the facts to the law." The requirement that the secretary furnish a transcript of the hearing "triggers the need to appoint ALJs pursuant to § 3105 of the APA." Several commentators, however, have disputed this analysis. In response to an argument in 1973 before the Civil Service Commission over whether the 1972 SSI amendments required the appointment of ALJs as presiding officers, the General Counsel of the Civil Service Commission argued a literal interpretation of the statute. He asserted that the absence of an "explicit requirement that the determination be made 'on the record' as required by section 554 (a) of the APA" meant that APA coverage did not extend to SSI hearings.

In answer, the "HEW General Counsel argue[d] that the cross reference in section 1631(d)(1) to 205(g) meets the 'on the record' requirement because, on judicial review, 'the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.' The Ways and Means Committee staff, writing in 1974 in support of the adoption of clarifying amendments, supported the latter (HEW) view. The staff did not argue that the amendments would change the SSI's approach, but rather would "strengthen the argument that the determination is on the record." The First Circuit, in Caswell v. Califano, held that the APA applied to SSA. In support, the Caswell court noted that several other circuits had reached the same result.

259. Id.
260. Id.
261. Id.
262. DISABILITY INSURANCE PROGRAM, supra note 66, at 59.
263. Id.
264. Id.
265. Id.
266. Id. (emphasis added). Others have echoed this same analysis, arguing that the APA provides that its contents will be applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C § 554(a) (2000). "Since every decision in the Social Security Act is rendered on the evidence of record as developed at the hearing stage, the APA must apply to Title II hearings." COFER, supra note 246, at 67.
267. 583 F.2d 9 (1st Cir. 1978).
268. Id. Of interest is the date of the case. In 1978, the Social Security Administration had departed from the course laid down by its former Director of the BHA, H. Dale Cook (who was appointed to the federal bench in 1974), and instead, plotted a course charted, in part, by its new Director, Robert Trachtenberg (who assumed office in 1975). During Director Cook's tenure, the agency voiced strong arguments in favor of APA applicability before the Civil Service Commission, arguing the need for Administrative Law Judges specifically. Under Director Trachtenberg, new "initiatives" were put into place, spiraling the agency into a twenty-five year tension with its judges, and leading to arguments made (presumably) by SSA's Office of General Counsel and/or one or more individual United States Attorney(s) (as opposed to the Department of Justice) that the APA did not apply (hence, the Court's finding at note 13 of its opinion). In the wake of Director Trachtenberg's tenure lies a long history of
Unlike the Caswell court, the United States Supreme Court, in Richardson v. Perales,274 declined to address the issue of APA applicability, finding that the issue was not necessary to the decision of the Court.276 Instead, it held that "the social security administrative procedure does not vary from that prescribed by the APA."277

This holding becomes significant in light of the argument advanced by the Government in that case. The Government did not argue the inapplicability of the APA; instead, it assumed that the APA was applicable.278 The Solicitor General, arguing for the government, stated that "the broad question of the general applicability" of the APA to such hearings "is of no consequence here. For, assuming its applicability, the Administrative Procedure Act specifically authorizes the procedures which the Secretary follows under the Social Security Act."279 This argument by the Solicitor General, coupled with the Supreme Court's finding that "[w]e need not decide whether the APA has general application to Social Security disability claims,"280 shows that the Perales Court did not alter "the scope of the APA's coverage."281

This position is consistent with the position maintained by the Department of Justice (DOJ) since the passage of the APA.282 In 1947, the Attorney General's Manual of the Administrative Procedure Act listed title II of the Social Security Act as a statute that incorporated "the [adjudicative] provisions of the APA [5 U.S.C. 554]."283

Notwithstanding these declarations, the Civil Service Commission, in 1973, found that the 1972 SSI amendments did not require APA judges for SSI hearings.284

Conflict, leading the staff of the House Ways and Means Committee to comment:

[The staff is concerned by the apparent state of BHA administration at the present time. Lawsuits have been filed by BHA employees concerning administration and a multitude of administrative charges have been instituted by both sides. It is an agency at war with itself. The management and rather substantial numbers of staff are devoting a great deal of their time attacking each other. This time could be better spent serving social security claimants.]

Survey and Issue Paper, supra note 36, at 3 (emphasis added).

Finally, it should be noted, that in later cases, the Social Security Administration has affirmatively argued the applicability of the APA. In J.L. v. Social Security Administration, 971 F.2d 260 (9th Cir. 1992), the Social Security Administration, in opposition to application to the Rehabilitation Act in a case of alleged discrimination, "insists that they [plaintiffs] must seek an administrative remedy under the Administrative Procedures Act, 5 U.S.C. §§ 700 et seq. ("APA")." Id. at 263.

270. Id. at 409.
271. Id.
272. Recent Studies, supra note 105, at 218.
274. Perales, 402 U.S. at 409.
275. Recent Studies, supra note 105, at 218. Professor Rosenblum further comments: "Solicitor General Griswold went on to say that the compatibility of procedures between the Social Security Act and the APA is 'not surprising,' since the Social Security Act furnished the model upon which the Administrative Procedure Act was based." Id. at 218 n.242.
276. Cooper, supra note 246, at 68.
277. Id. (citations omitted).
278. On December 14, 1973, following a hearing on December 3, 1973, Chairman Hampton, of the

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The commission reached this conclusion despite HEW's objection. As a result, Congress passed emergency legislation authorizing the hiring of so-called "temporary administrative law judges," who were hired, not under the APA, but as a stopgap measure to address burgeoning case filings in the wake of the Civil Service Commission's negative ruling. Congress feared that if it did not act, legal action might be taken that would invalidate hundreds, if not thousands, of Title XVI cases if decided by lesser "examiners" who were not APA judges. Congress attempted an interim solution by hiring "temporary administrative law judges," appointed for a limited term, "with such appointments terminating no later than at the close of the period ending December 31, 1978." In the meantime, the agency, working with the Staff of the Ways and Means Committee, was devising clarifying legislation specifically designed to overturn the Civil Service Commission's adverse determination. The critical focus of the legislation was whether, because of the APA's "on the record" requirement, ALJs, and not some other, lesser decision maker must preside.

Congress resolved the issue in 1977. In late 1977, on the eve of the Christmas holiday, Congress affirmatively voiced its will that the "temporary administrative law judges," forced upon the Social Security Administration by the Civil Service Commission, made known his final decision on the question whether Congress intended that the newly enacted SSI program would have hearings in which APA administrative law judges presided. See DISABILITY INSURANCE PROGRAM, supra note 66, at 55. He concluded "that administrative law judges are not required to preside over SSI hearings because the program is not under the APA." Id.

HEW's argument, urging "the Commissioners to endorse HEW's determination to accord a lowly private citizen — a welfare recipient — the same rights as the Government accords a powerful corporation in contested matters: namely, the right to appear before an Administrative Law Judge under the full rights and protection of the Administrative Procedure Act" went unheeded. Id. at 63.

279. Id.
280. See id. at 60-64.
281. By letter of October 5, 1973, Assistant Attorney General Robert Dixon responded to the Civil Service Commission on the issue of APA applicability to the new SSI program. Id. at 61. He voiced the following concern: "[I]f a decision is made to appoint non-APA hearing examiners, subject to the control of HEW, and that decision proves wrong, there may be thousands of denials requiring rehearing." Id.

By letter of October 12, 1973, HEW Secretary Weinberger appealed to Chairman Hampton [of the Civil Service Commission] for resolution of what he termed "a crisis . . . in HEW's preparations to implement the new Supplemental Security Income program." Id. (alteration in original).

282. Social Security Amendments of 1977, Pub. L. No. 95-216, § 371, 91 Stat. 1509, 1559. The 1977 act references the earlier statute by which the temporary administrative law judges were originally appointed:

Sec. 3. The persons appointed under section 1631(d)(2) of the Social Security Act (as in effect prior to the enactment of this Act) to serve as hearing examiners in hearings under section 1631(c) of such Act may conduct hearings under titles II, XVI, and XVIII of the Social Security Act if the Secretary of Health, Education and Welfare finds it will promote the achievement of the objectives of such titles, notwithstanding the fact that their appointments were made without meeting the requirements for hearing examiners appointed under section 3105 of title 5, United States Code . . . .


283. SURVEY AND ISSUE PAPER, supra note 36, at 7.
Commission's December 1973 ruling, were now officially APA-mandated judges.\(^{284}\) This legislation provided:

The persons who were appointed to serve as hearing examiners . . . shall be deemed appointed to career-absolute positions as hearing examiners under and in accordance with section 3105 of title 5, United States Code, with the same authority and tenure (without regard to the expiration of such period) as hearing examiners appointed directly under section 3105, and shall receive compensation at the same rate as hearing examiners appointed by the Secretary of Health, Education and Welfare [now Health and Human Services] directly under section 3105. All of the provisions of title 5, United States Code, and the regulations promulgated pursuant thereto, which are applicable to hearing examiners appointed under such section 3105, shall apply to the persons described in the preceding sentence.\(^{285}\)

Thus, Congress specifically legislated that ALJs (then "hearing examiners") appointed under § 3105 of the APA were to decide title II, title XVI and title XVIII cases.\(^{286}\) The passage of Public Law 95-216 also changed these non-APA, temporary judges into APA-appointed judges.\(^{287}\) In so providing, Congress left no doubt as to its intention. APA administrative law judges and not some other, lesser hearing officers, were to hear and decide cases arising under title II, title XVI and title XVIII of the Social Security Act.

More directly then, the question becomes: If the APA applies to proceedings conducted under the Social Security Act, are Administrative Law Judges required as presiding officers? The answer is simply, yes, unless otherwise excepted by specific congressional act.

First, Congress expressly mandated that the only type of "administrative law judges" are those appointed under title 5, § 3105 of the APA.\(^{288}\) References to ALJs, both within the Social Security Act and the APA, are only to "APA-appointed Administrative Law Judges."\(^{289}\) Having determined that such proceedings are "on the record," only "administrative law judges" may preside.\(^{290}\)

Second, title 5, § 559 of the APA specifically requires that subsequent laws may not modify the law relating to ALJs, "except to the extent that it does so expressly."\(^{291}\) Thus, subsequent legislation and subsequent rule making may not change the requirement that ALJs must preside in SSA hearings unless it does so expressly. Furthermore, the appointment of ALJs (§ 3105), the fact that the only type of "administrative law judge" is an APA-appointed judge (§ 5372), and the


\(^{285}\) Id. at 1559.

\(^{286}\) Id.


\(^{290}\) See supra note 47.

standards by which such appointees are disciplined and/or removed (§ 7521) can only be accomplished by direct congressional action. In short, only direct congressional action can overturn the rule that ALJs must preside over hearings under titles II, XVI, and XVIII of the Social Security Act.

B. Legislative History of the Social Security Act As Affecting ALJ Utilization

The legislative history of the Social Security Act makes plain that Congress intended that only ALJs may serve as presiding officers in Social Security hearings. Nowhere is this more evident than in the enactment of the 1972 SSI program. In the wake of the Civil Service Commission's 1973 determination that SSI hearings did not require APA-appointed hearing examiners,292 congressional inquiry was directed to this exact issue.

The Ways and Means Committee staff reiterated its long-held position "that the APA applies to Social Security title II and title XVIII cases."293 As the staff pointed out in its 1974 report, "[t]he legislative history of the law establishing the SSI program makes it clear that the committee intended that the hearings conducted under the new program are to be under the APA . . . ."294

Additionally, then-Chairman Mills stated on the house floor that "[t]he hearings to which the bill refers would be subject to the Administrative Procedure Act and all the safeguards for a fair and equitable hearing in the act would apply to the hearing."295 Representative Carey also expressly noted that the APA applied to appeals from denials of benefits.296 He stated that "[t]he gentlemen pointed out that the Administrative Procedure Act does cover the review of benefits under this bill. It has been erroneously contended it did not."297

Most importantly, the House Ways and Means Committee, in January 1979, reaffirmed the committee's stance that the 1977 legislation ended all dispute on the question of APA applicability to social security proceedings.298 The committee noted that the 1975 legislation "explicitly put the SSI and Social Security programs on the same basis as far as hearings and appeals are concerned."299 The committee further noted that the legislation was necessary "to override an interpretation of the Civil Service Commission that the Administrative Procedure Act was not applicable to SSI hearings" and that "[t]he Committee bill will put this matter to rest by clearly providing on-the-record administrative hearings and judicial review of a parallel

292. DISABILITY INSURANCE PROGRAM, supra note 66, at 55.
293. Id.
294. Id. at 56.
295. Id. at 57 (citing 117 CONG. REC. 5658).
296. Id.
297. Id.
298. SURVEY AND ISSUE PAPER, supra note 36, at 9.
299. Id. Commenting on this legislation, the 1975 House report cogently stated: The bill eliminates the distinction in the nature of hearings and hearing officers under the Social Security and SSI programs, thus resulting in a common corps of hearing officers authorized to conduct hearings under both programs with common procedural safeguards provided under the Social Security Act and the Administrative Procedure Act.
nature for Social Security, SSI and Medicare claimants."\textsuperscript{300} Equally significant, the Center for Administrative Justice,\textsuperscript{301} the Administrative Conference of the United States,\textsuperscript{302} and Senate Report 94-50\textsuperscript{303} all support the conclusion that ALJs must serve as presiding officers in Social Security hearings.

There can be no question then, but that affirmative congressional action has laid to rest any doubt about the status of the decision maker in Social Security hearings. First, such hearings are to be held under the ambit of both the Social Security Act and the APA. Second, such hearings are to be presided over by APA-appointed ALJs, who are seen as necessary to ensure fairness and impartiality for the ordinary citizen.\textsuperscript{304} In establishing hearings for the title II, title XVI and title XVIII programs under the aegis of APA-appointed officers (ALJs appointed under § 3105 of the APA), Congress placed its imprimatur of approval on the continued utilization of APA-appointed ALJs as presiding officers over hearings conducted by SSA, "thus resulting in a common corps of hearing officers authorized to conduct hearings under both programs with common procedural safeguards under the Social Security Act and the Administrative Procedure Act."\textsuperscript{305}

\textbf{VII. What Are the Ramifications of Formal Recognition of the Applicability of the APA to Social Security Proceedings Before ALJs?}

In 1979, following the filing of the \textit{Bono} lawsuit in the United States District Court for the Western District of Missouri,\textsuperscript{306} the House Committee on Ways and Means expressed grave concern for "the apparent state of BHA administration

\begin{itemize}
  \item \textsuperscript{300} Id.
  \item \textsuperscript{301} The Center for Administrative Justice report, issued in late 1977, supported the APA hearing system:
    
    It is our view that public trust in the SSA scheme of social insurance would be undermined significantly were the opportunity for a face-to-face encounter with a demonstrably independent decisionmaker eliminated from the system. To be sure, independence could be structured apart from the APA. But in our view the savings would be very modest, because one would want protections for decisional independence very much like the ones the APA provides and would, in addition, want people with qualifications (and therefore salaries) very much like the current ALJs. Alternative devices, such as lay or expert panels, are either more expensive or more unpredictable than the ALJ decide.
  \item \textsuperscript{302} Id. at 10.
  \item \textsuperscript{303} Id. at 19.
  \item \textsuperscript{304} "Due process requires that the person who takes the evidence and makes the decision be impartial, that the trier of fact cannot be prosecutor in the same matter, and that he cannot have been involved in the matter previously as an agency staff person." \textit{Survey and Issue Paper, supra note 36}, at 7.
  \item \textsuperscript{305} Id. at 9.
\end{itemize}
at the present time."307 It declared that the "agency [was] at war with itself. The management and rather substantial numbers of staff are devoting a great deal of their time attacking each other. This time could be better spent serving social security claimants."308

The years have not dimmed the arguments, particularly as witnessed in the formation and birth within the past year of a new Administrative Law Judge labor organization, whose purpose is to approach SSA administration on a level playing field. Again, the House Committee on Ways and Means succinctly articulated the issues. From the judicial perspective, a "[lack of openness with employees and inadequate communication of decisions is a fairly general complaint of ALJ's and other professional groups."309 From the agency's perspective, Robert Trachtenberg, then-Director of the Bureau of Hearings and Appeals, stated that new initiatives were necessary "to reverse the dismal performance of his Bureau and to bring each of the hearing offices, which were not at the time (1974) unlike independent fiefdoms, under the supervision of the BHA."310

The 1975 creation of a corps of managers was seen by Director Trachtenberg as an attempt to "modernize BHA."311 His critics declared, however, that "the disarray at BHA was overstated."312 Nevertheless, in a vast attempt at modernization or, some would say, control, the agency inserted managers at every level, imposing production quotas313 on judges, physicians, staff attorneys, program analysts, and clerical assistants who "[felt] threatened not only by proposed downgrading, which [was] forcing them into inappropriate job activities, but also by the job descriptions of other professionals, either in being or proposed, who would infringe on what they consider their basic functions."314 Indeed, even "the physicians on the BHA medical staff [were] very disturbed by what they consider a downgrading of their operation and the insertion of a manager who supervise[d] aspects which they believe[d] should be under professional medical control."315

Director Trachtenberg later admitted that "aggressive management initiatives did generate rancor, distrust, and indeed, poor morale among the ALJ's [sic]."316

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307. SURVEY AND ISSUE PAPER, supra note 36, at 3.
308. Id.
309. Id. at 2.
310. Id. at 3.
311. Id. at 4.
312. Id. at 3. A dramatic response was filed with the Subcommittee commencing upon Director Trachtenberg's views. Id. at 70. An agency official, Mr. James Minton, program operations officer, Region III, began his letter stating that Mr. Trachtenberg "grossly exaggerates and flagrantly distorts the truth in his self-serving sworn statement of September 5, 1978. He appears intoxicated by his own press releases: thereby deluding himself in believing that his is the Messiah whose mission was to redeem BHA of all its base and scandalous deeds." Id.
313. In Trachtenberg's words, these standards were "goals," not quotas. Delays in Social Security Appeals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 94th Cong. 50-51 (1975).
314. SURVEY AND ISSUE PAPER, supra note 36, at 3-4.
315. Id. at 3.
316. Id.
In the words of the Ways and Means Committee, "the Director and the new 'managers' came in relatively 'hardnose' and our ALJ survey indicates that openness with employees, and keeping them abreast of new initiatives, was not BHA's high suit."317 This high level of tension led the Ways and Means Committee to conclude that "the greater emphasis in all phases of the process [had] been placed on 'moving the cases' rather than rendering fair and sound decisions."318 In the time since the 1975 Trachtenberg initiatives, many assert that the climate has not significantly changed. Whether intended or not, Director Trachtenberg left an indelible, albeit questioned, legacy.

It is against this backdrop that the question at issue arises. Formal acknowledgment of the applicability of the APA to Social Security hearings by SSA raises two fundamental inquiries: (1) What substantive changes to the administrative decision-making process may be wrought by formal acknowledgment of the applicability of the APA to Social Security proceedings? (2) What relational changes between SSA administration and its corps of ALJs may be triggered by formal acknowledgment of the APA?

Each question is addressed, briefly, below.

A. What Substantive Changes, If Any, to the Administrative Decision-Making Process May Be Triggered by Formal Acknowledgment of the Applicability of the APA to Social Security Proceedings?

Any discussion of formal agency acknowledgment must be prefaced with an understanding of the legal importance of such recognition. One writer, commenting on the majority opinion in *ITT v. IBEW*,319 noted that the mere assignment of an ALJ to hear a case signaled agency acknowledgment of APA applicability.320 "This tautological formulation would make the agency's decision on APA applicability the key to the Court's" own decision on APA applicability.321 It is at least consistent, however, with the Court's decision in *United States v. Florida East Coast Railway*.322 In *Florida East Coast Railway*, the Court found that while an agency's interpretation of the APA may not be entitled to the same weight as the agency's interpretation of its own substantive mandate, "its characterization of its own proceeding is entitled to weight, and that characterization may in turn have relevance in determining the applicability of the Administrative Procedure Act."323

317. Id. at 4.
318. Id. at 5-6.
320. RECENT STUDIES, supra note 105, at 201. The author stated: "The hallmark of an intermediate proceeding that requires applicability of the APA's adjudication procedures thus appears to be acknowledgment by the agency that the particular proceeding is covered by the APA, as shown by the appointment of an ALJ to hear it." Id.
321. Id.
323. RECENT STUDIES, supra note 105, at 201.
This holding is relevant to the issue of APA applicability to SSA ALJs in two ways: (1) the agency has repeatedly urged APA application in congressional hearings; and (2) agency utilization of ALJs is, itself, tangible evidence of consistent agency interpretation of the APA. Formal acknowledgment at this point in time will not, therefore, change already extant agency policy. APA applicability has been the rule since the inception of the Administrative Procedure Act in 1946. Passage of the 1972 SSI amendments crystallized agency policy into coherent statements before Congress, reaffirming application of the APA to titles II and XVIII and to then-newly enacted title XVI.

In light of this history, the question becomes, what changes, if any, will be wrought should the agency again, at the turn of the millennium, formally acknowledge the applicability of the APA? The answer lies both in the past, and, to some degree, the future.

The issue of APA application to SSA hearing process is important "because the APA demands that the individual's case be heard and decided by an impartial trier-of-fact who is not subject to agency control." The opposite also holds true. Adjudication by non-APA hearing officers, who are subject to the control, direction, performance rating, promotion, and discipline of their employing agency poses the risk of the potential curtailment of a claimant's due process rights. "Thus, it is critical to both the interests of the claimant and the Agency that the hearing fully explore the merits" of an individual case. "Given that SSA hearings are non-adversarial and that the hearing officer has the responsibility to ensure that the record is complete, the independence of the ALJ is an even more significant factor in this environment than it would be elsewhere."

1. Independence

Formal acknowledgment of APA applicability raises a continuing discussion of the scope of independence expressed in terms of case management (and, correspondingly, the reach of decisional independence) and case assignment.

324. See the Attorney General's Manual on the Administrative Procedure Act where it was plainly stated that "the residual definition of 'adjudication' in section 2(d) was intended to include such proceedings as . . . The determination of claims for money, such as . . . claims under . . . Title II [Old Age and Survivor's Insurance] of the Social Security Act." Tom C. Clark, U.S. Dept of Justice, Attorney General's Manual on the Administrative Procedure Act 15 (1947).
325. Cofer, supra note 246, at 139.
326. Id. at 139-40 (citing a position paper prepared by Chester Shatz, U.S. Administrative Law Judge, filed in the case Blankenship v. Secretary of HEW, 587 F.2d 329 (6th Cir. 1978)).
327. Id. at 140.
328. Id. Ms. Cofer's analysis is appropriate. In an adversarial encounter, the role of the decision maker is to remain neutral and passive, leaving to the parties the production and elicitation of evidence. In the inquisitorial model (or, more accurately, the hybrid inquisitorial model) it is the presiding officer who, while still neutral, is now an active participant in the production and elicitation of a "complete record." Should such a presiding officer be subject to agency control, it is likely that the record would only be complete as necessary to meet agency demands — a far cry from the due process standard Americans have come to expect from their judiciary, administrative or otherwise.
a) Case Management and Decisional Independence

Some commentators argue that independence within the administrative judiciary is limited to the narrow confines of the ALJ’s decision, made following an administrative hearing, to affirm or reverse an earlier administrative determination.329 Others, however, assert that the decisional nexus extends to the process of case management because a decision, favorable or otherwise, may be made at varying points along a continuum.330 This continuum, represented by a time line extending from the time of the filing of the request for hearing through submission of post-hearing evidence, defines all potential points at which the ALJ may decide a case. The APA, which shields the judge from agency interference in decision making, lends credence to the argument.331

In the adversarial setting with a district judge, the judge must manage the case through to completion, setting motions, discovery and other, similar deadlines; resolving pre-trial disputes between the parties; invoking alternative dispute resolution procedures; and, finally, setting the case for trial. It is the judge, and not the parties, who establishes the parameters for case management.332

Similarly, in the administrative setting, the judge must address the ultimate disposition of the case. Case management in the administrative setting, like that in the judicial setting, affects critical issues like time to disposition and issues of record development. However, unlike the adversarial setting where the judge’s role is clear, in the nonadversarial setting, as in Social Security hearings before ALJs, the lines blur.

Given that case management is a process, such that a decision in a given case can be made absent a full hearing,333 the question becomes to what part of that process does judicial independence extend? Given the regulatory scope of an ALJ’s activity — extending to both pre-hearing as well as post-hearing inquiry —

329. See, e.g., Ass’n of Admin. Law Judges v. Heckler, 594 F. Supp. 1132, 1142 (D.D.C. 1984) (observing that "on matters of law and policy, however, ALJs are entirely subject to the agency").

330. The judge may decide the case favorably without a hearing if the evidence so warrants. Alternately, if the evidence warrants a favorable decision at a later point in time than requested by the claimant, the original alleged date of disability may be amended by the claimant and a favorable decision entered at that point, either before, during, or after a hearing. 20 C.F.R. § 404.948(a). Furthermore, the claimant may elect not to appear and waive a hearing. 20 C.F.R. § 404.948(b).

331. "The APA creates a comprehensive bulwark to protect ALJs from agency interference. The independence granted to ALJs is designed to maintain public confidence in the essential fairness of the process through which Social Security benefits are allocated by ensuring impartial decision making." Nash v. Califano, 613 F.2d 10, 17 (2d Cir. 1980).

332. See, e.g., FED. R. CIV. P. 16, which provides for the conduct of pre-trial proceedings to establish necessary timeliness, due dates, etc. Thus, it is well-settled that a judge, sitting in the judicial branch, has "inherent authority" to manage his or her caseload, taking into account such factors as "judicial economy" as a legitimate concern in the case management process.

333. The claimant can waive a personal appearance and ask for a decision based solely on the written record; or, the judge may conduct pre-hearing conferences, and, upon review of newly submitted evidence, or in deference to the argument of counsel, render a partially or fully favorable decision (a reversal, in part; or, an outright reversal of the underlying administrative determination). See 20 C.F.R. §§ 404.948, 404.961 (2001).
decisional independence necessarily embraces the *process* of case management through this entire time frame. As one writer put it, "[d]ecisional independence has two aspects: one more internal, relating to how an individual judge chooses to function as a judge, and one more external, having to do with practical circumstances that may enhance or constrain independent and impartial judicial functioning." 334 Regulations and case law place sole responsibility upon the ALJ to "look fully into the issues" and ensure that his decision is based upon a fully developed administrative record.335

Thus, an investigation of the scope of decisional independence in view of newly adopted hearing office procedures under the "hearing process improvement" plan is important.336 Because the judge ultimately retains sole authority to make decisions in assigned cases, the issue may be viewed as largely academic. However, given the fact that under HPI cases are not assigned for hearing until well after the claimant's appeal is filed and docketed, issues may nevertheless be raised under an APA umbrella.337 Case assignment is discussed below.

b) Case Assignment and Independence

Perhaps the more critical question is whether current hearing office procedures, mandated by SSA, and framed under the nomenclature of "hearing process improvement" or "HPI," follow the APA in the form of case assignment. Title 5, section 3105 of the APA provides that "[a]dministrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges." 338 Additionally, the *Bono* settlement,339 which arguably constitutes the agency's interpretation of the APA,340 requires that cases be assigned "on a true rotational basis." 341 It states that "OHA shall issue a directive to all ALJICs calling for the assignment to an ALJ of requests for hearing *as soon as they are received* in the Hearing Office on a true rotational basis, to the extent practicable." 342

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335. The requirement is that administrative law judges in Social Security "have a duty to develop a *full and fair record*." Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995).
336. See Social Security Admin. v. Int'l Fed. of Prof. & Tech. Eng'rs, AALS, No. WA-CA-00104 (F.L.R.A. Jan. 31, 2002) (finding that the impact of HPI on the hearing process was "more than de minimis"). Specifically, the authority found that later assignment of cases to ALJs improperly removed the case from the judge so that he no longer controlled case management prior to hearing).
337. Id.
340. As signified by the agency's agreement, which governed, in part, the agency's conduct and relationship with administrative law judges.
341. Id.
342. Id. (emphasis added).
Current procedures are potentially driven, not by rotational assignment, but by individual docket setting. While the line may be fine, the issue potentially resolves itself into one of "retrospective" versus "prospective" docketing — a practice now being employed in some hearing offices in the wake of HPI implementation.

Rotational assignment of cases, made on a true rotational basis at the time of filing a request for hearing, results in retrospective scheduling. With true rotational assignment, a docket is set only after an appropriate number of cases are assigned (randomly, or in "true rotation") to a given judge, and the judge then decides that a docket may be heard.

With prospective scheduling, cases are assigned only after "development" has been undertaken.33 Empty docket are selected (usually by location) by a judge in advance of case assignment. Dockets are then "back-filled" by a judge's support group. Potential then exists for non-rotational case assignment to individual judges, dependent upon a judge's advance selection, prior to case assignment, of otherwise "empty" docket. A judge who selects more local docket, as opposed to out-of-town docket, or vice-versa, is, by definition, defeating the concept of random assignment.

Even rotational assignment of hearing locations may fail to satisfy statutory mandated rotation of cases, given a judge's prerogative to decline a given location in a given month once he is satisfied that sufficient numbers of cases have been assigned. This too, then, becomes a potential issue for discussion under the APA.34

2. Separation of Functions

The APA requires a separation of function between those who adjudicate and those who investigate and prosecute.345 The 1947 Attorney General's Manual on the Administrative Procedure Act states that "agency officers who performed investigative or prosecuting functions in that or a factually related case may not participate in the making of decisions."346 HEW's own instruction manual to Medicare Part B hearing officers (who are appointed by the carriers, but paid from federal funds) reflects this separation of functions. It states that the hearing officer "must not have been involved in any way with the determination in question and neither have advised nor given consultation on any request for payment which is a basis for the hearing."347

343. Development of the record does not take place under a judge's supervision, but by hearing office staff, before a case is assigned. Thus, initial case development takes place devoid of judicial perusal. The judge, however, retains the ability to review a case submitted for scheduling, and determine, at that point, whether further development is necessary. Development after that time is under the judge's supervision and this may effectively resolve any question.

344. This depends, to some degree, on the interpretation of the phrase "so far as practicable" found in § 3105.


346. CLARK, supra note 324, at 15.


https://digitalcommons.law.ou.edu/olr/vol55/iss2/3
The premise underlying the separation of functions requirement is straightforward — to provide a fair and impartial determination, and not one which is prejudged. A fair and impartial result would be nearly impossible with adjudication by one who had served as a prosecutor or an investigator in the same case. The principle that any hearing must be a fair and open hearing is a fundamental part of American jurisprudence.

This essential requirement for a just determination has manifested itself in an extensive body of ethical considerations, finding life in the APA through the separation of functions rule. In *Wong Yang Sung v. McGrath*, the Supreme Court found that one of the two major purposes underlying the APA was "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge." Indeed, the House Ways and Means Committee agreed, stating that "due process requires that the person who takes evidence and makes the decision be impartial, that the trier of fact cannot be prosecutor in the same matter, and that he cannot have been involved in the matter previously as an agency staff person." The committee staff report also acknowledged that "[t]hese also are requirements of the APA . . . ."

These considerations become significant in light of the unique adjudicatory functions of ALJs who preside over Social Security proceedings. In the absence of the Government as a party and given the regulatory duty imposed on the ALJ to fully and fairly develop the record, a question arises as to whether there is a separation of functions violation. Specifically, is the APA violated by a neutral and impartial decision maker who must discover (i.e., personally investigate and/or superintend the investigatory function) evidence which is both contrary to the claimant and the Government?

In *Withrow v. Larkin*, the Supreme Court determined that "the mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later

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PART B CARRIERS MANUAL ch. XII (1980).

348. See Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995). The Ventura court held: "Essential to a fair hearing is the right to an unbiased judge. The due process requirement of an impartial decisionmaker is applied more strictly in administrative proceedings than in court proceedings because of the absence of procedural safeguards normally available in judicial proceedings." Id. Also, "[t]his 'separation of functions' requirement is designed to prevent the investigative or prosecutorial arm of an agency from controlling a hearing or influencing the ALJ." Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 111-12 (1981).

349. RECENT STUDIES, supra note 105, at 175. Professor Rosenblum notes:

- A full hearing must be a fair and open hearing. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command.

Id.


351. RECENT STUDIES, supra note 105, at 179.

352. SURVEY AND ISSUE PAPER, supra note 36, at 7.

353. Id.

adversary hearing." Nevertheless, the question remains as to whether the Social Security ALJ, who is required, in the words of the *Perales* court, to wear "three hats," is acting in violation of the separation of functions provisions of the APA? The *Perales* Court seemingly answered this question. The Court stated that they were not "persuaded by the advocate-judge-multiple hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." 356

However, the issue remains a potentially open question given the dramatic changes in the hearings and appeals process. While very few claimants were represented by counsel in the *Perales* era, 357 more than 90% are now represented, 358 with attorney's fees contingent upon a win. Likened to the inquisitorial system prevalent in continental Europe, 359 hearings before SSA's Office of Hearings and Appeals, involve an adversarial opponent (who is paid only upon a win), and no counter-balancing opponent (party). There is a significant, possibly unconscious, temptation for the judge to engage in counter-balancing and thus skew neutrality. 360

Formal acknowledgment of APA applicability highlights the conundrum of the "judge who wears Three Hats." The Government Representation Project, in which government counsel actually appeared at Social Security hearings, while seemingly an attempt to reduce time to disposition actually struck a more certain

355. Id. at 52.
357. "To describe this phenomenon there has come into use the metaphor of the Three Hats, explained in the following opening statement of a Hearing Examiner in a hearing: 'Let me say this — maybe I can ease your mind. In 99% of the cases, people come in without any representation." Viles, supra note 89, at 40.
358. See supra note 89, wherein SSA indicates that the rate of representation nationally was "nearly 80%" in 1986.
359. "The Court approved the so-called 'three-hat' administrative law judge (claimant representative, government representative, and neutral decider), whose conduct has been seen to emulate that of [the] inquisitorial judge in continental countries." Verkuil, supra note 24, at 286.

The overriding difficulty for the Examiner who wears his Three Hats seriously is not the immediate and visible function of asking questions in a hearing. It lies instead in the ultimately impossible task of simultaneously or consecutively building the best possible case for the claimant by discovering, interpreting, construing, organizing, and presenting infinitely variable evidence most favorable to his [the claimant's] position; of similarly making the best case for the Administration, which has denied the claim; and then of impartially finding a winner. . . .

In doing so the claimant's attorney has knocked the Three Hats askew and revealed the proceeding for what it really is. Either the Examiner responds to his [the attorney's] advocacy by treating it as a judicial or adversarial process, in which under one fewer Hat he moves to the no less comfortable position of representing the Administration and deciding impartially at the same time, or he retreats into the decision-making framework of the administrative adjudicator . . . [and] he simply fails to respond to the advocacy.

Viles, supra note 89, at 42-43.
note. SSA's responses to questions from the Subcommittee on Social Security of the House Ways and Means Committee are telling. The hearings indicate that "SSA representatives have been extremely successful in relieving ALJs of much of the work of prehearing case development and in ensuring greater consistency in case development practices."\(^{361}\)

A two-party proceeding appeared to alleviate the conflict under the Three Hat paradigm. SSA commented that "[t]here is evidence that SSA representation might well reduce subsequent litigation . . . [with] a reduction of more than 30 percent in the rate of error for denial decisions."\(^{362}\) SSA applauded the project as

improving our ability to issue timely, accurate, and consistent hearing decisions in the face of circumstances that differ substantially from those contemplated when the process was designed in the early 1940's. The circumstances . . . differ from those that existed for many years in two fundamental ways: caseloads are far greater (more than twice as great even as those of only 10 years ago) and the rate of claimant representation is high (nearly 80 percent of all hearings held nationally).\(^{363}\)

In this last statement, SSA captures the essence of the need for change. In an era in which well over 90% of claimants are represented, and in which the attorney's fee is contingent upon award of benefits, the Three Hat conundrum is exacerbated. Severe ethical issues arise in a system, albeit nonadversarial, where counsel is required to supply evidence which is arguably against the best interests of his client.\(^{364}\) Ultimately, the question becomes one of procedural due process. Is fundamental fairness undermined in a single-party system in which the judicial officer is an "active" source of evidence, in effect, representing the interests of the Government?\(^{365}\)

Unfortunately, the Government Representation Project floundered in the wake of an adverse district court decision. However, the fact remains that formal recognition of the APA as applicable to Social Security hearings may properly herald the return of a two-party proceeding in which the ALJ is returned to his traditional role in Anglo-American jurisprudence.\(^{366}\)

\(^{361}\) Current Problems, supra note 117, at 84.
\(^{362}\) Id.
\(^{363}\) Id. at 85 (emphasis added).
\(^{364}\) See, e.g., 20 C.F.R. § 404.1740(b)(2) (2001), which requires, inter alia, "[a] representative shall . . . (2) Assist the claimant in complying, as soon as practicable, with our requests for information or evidence at any stage of the administrative decisionmaking process . . . ."
\(^{365}\) See generally Wolfe & Prosek, supra note 90, at 293.
\(^{366}\) A necessary corollary to this is removal of the "duty to develop the record" from the administrative law judge; returning it to the Government, whence it properly belongs. If a claimant is unable to obtain needed information or medical testing to document his or her disability, she can then move the Government for assistance. If opposed, the judge would then decide.
B. What Relational Changes Between SSA Administration and Its Corps of Administrative Law Judges May Be Triggered by Formal Acknowledgment of the Administrative Procedure Act?

SSA administration must inevitably address the question whether to formally acknowledge APA applicability. The issue can be approached, addressed, and analyzed in the context of the preceding twenty-five years, beginning with the so-called Trachtenberg Era. A review of the past twenty-five years will likely reflect continued attempts at management and control by SSA administration, resulting in continued political tensions. In fact, little has changed over the past quarter century.

The end result of such an undertaking is problematic, at best. For managers and administrators, predictability of outcome is equivalent to predictability of budget. For judges, each case stands alone in the signal light of individual facts — in the face of individual need. Cases cannot be decided on the basis of trends, budget predictions, or national fiscal planning. Instead, the American people demand a fundamentally fair opportunity to reverse an otherwise negative administrative decision. Such proceedings require individual consideration and uniform application of the law, tempered with justice.

A proceeding whose results cannot be predicted or controlled is characterized as fundamentally fair. Foundationally, American government is an expression of the will of the people as a whole. Public service cannot be denigrat ed by the failure to account for essential principles of democracy undergirding such activity. Public service embodies the public trust — a fiduciary relationship — whose commitment is to the integrity of the relationship of an individual to his government.

To continue in the previously established pattern can only lead to a continuing montage of piecemeal justice and fragmented policy. Professors Susan Haire and Stefanie Lindquist note with alacrity that SSA, in its present operation, is subjected to widely varying degrees of support among the circuits. And the infrequency with which the Supreme Court reviews disability cases has meant that little has been done to cohere the standards or approaches of the circuits.

367. See COFER, supra note 246, at 75.

368. A report to the Civil Service Commission from the Conference of Federal Administrative Law Judges in December 1973 illustrates the problem: "[A]gency management personnel typically reject the argument that the administrative law judge is charged with unique functions, responsibilities, and status under the APA. They seek therefore to impose upon judges usual agency control systems that are, in fact, inappropriate, costly and unnecessary if not altogether illegal." RECENT STUDIES, supra note 105, at 240-41.


The tensions that exist between the Agency and reviewing courts account for serious dissonance and disarray in the application of Social Security law and received no consideration or analysis in the [1997] General Counsel's memorandum beyond the insistence that an ALJ is bound to follow Agency policy, even if, in the ALJ's opinion, the policy in contrary to law.
In one writer's view, appellate courts' negative perceptions of the impartiality of ALJs is at the heart of "appellate judges' readiness to challenge or refute Agency decisions." The agency's stalwart insistence upon adherence to agency policy "in the face of overt court rulings to the contrary" has led to "rulings such as the Fourth Circuit's that federal agencies 'are required to abide by the law of this court in matters arising within the jurisdiction of this circuit until and unless it is changed by this court or reversed by the Supreme Court of the United States.'" Indeed, in 1998 the Fourth Circuit issued a writ of mandamus against a government agency, declaring that "a policy argument bottomed on an agency's view of expediency can never justify an agency's disregard of the existing mandate of a federal court in which the agency was a party litigant." In fact, "SSA's genuine problem is with its relationship with the reviewing courts, not with compliance by its ALJs with its policies."

Agency policy, as reflected in decisions denying benefits, is particularly at issue. In those instances, the agency agreed with its judges that benefits should be denied. Where those cases were reversed or remanded, it was the federal court, not the ALJ who disagreed with agency outcomes. Yet, great struggles continue to exist between SSA and its ALJs. SSA has put forth little effort to bridge the gap, apart from continuing a policy of "nonacquiescence" with the federal courts.

How would such a relationship function? Professor Rosenblum has suggested that

A collegial approach to SSA-ALJ ties could commence ideally with tabling the Fried memorandum and with instituting colloquia among Agency officials and ALJs on key administrative procedure issues that highlight and compare federal agencies' experiences with court reversals and remands. Monitoring and assessing courts' actions and rationales — especially those that delay and impede putting closure on impartially administered and adjudged SSA cases, warrant systematic analyses and consideration of alternative responses through interactions of the experienced, skilled minds of the ALJ corps and those of management officials. ""
Formal recognition of the applicability of the APA would signal the end of the Trachtenberg Era and the beginning of a renewed opportunity for constructive collegiality, marked by mutual respect and professionalism. Formal APA recognition would trigger an affirmative effort by the agency to trust the impartial judgment of its administrative law judge corps. Such trust potentially engenders a like response from the courts.

The challenge lies in defining the undertaking. Ending the Trachtenberg legacy in favor of professional collegiality requires a mutual change in culture. Critical issues facing a growing disability adjudication system must be addressed equally by both SSA administration and members of the administrative judiciary. Recognition of the applicability of the APA holds great promise for a different future than that charted by the directives of the past twenty-five years.

VIII. Conclusion

On January 9, 2001, by letter to ALJ Ron Bernowski, president of the Association of Administrative Law Judges, then-Commissioner Kenneth Apfel responded to the question first asked. The Commissioner's letter is found at Appendix A.

375. See COFER, supra note 246, at 75.
376. Rosenblum, supra note 21, at 69. Professor Rosenblum notes:
Deference to their construction of their governing statutes is a wise and effective policy for courts to follow vis a vis administrative agencies. But deference has typically been earned as a product of trust and respect. The Chevron doctrine has its roots in the feasibility of trust between courts and administrative agencies. A major producer of trust is a pervasive record of adherence to highest standards of impartiality.
Id. (emphasis added).
377. The atmosphere of continuing tension has resulted in a failure to achieve even basic solutions to the dilemmas facing an increasingly overburdened agency. As Professor Rosenblum aptly noted:
"What is needed, then, is not greater subjection of hearing officers to agency controls but, as the staff report points out, greater encouragement of the agencies "to promulgate precedent materials, particularly regulations on the non-medical and vocational factors in disability evaluation." The failure to develop such materials in the past "has caused many varied interpretations of the law and, to a large degree, policy setting by judicial interpretation."
RECENT STUDIES, supra note 105, at 219.
378. On file with the author.
Mr. Ronald G. Bemoski  
Administrative Law Judge  
Room 880  
310 West Wisconsin Avenue  
Milwaukee, WI 53203  

Dear Judge Bemoski:  

Last fall, a question arose at the Administrative Law Judge (ALJ) Training Conference about applicability of the Administrative Procedure Act to hearings conducted by Social Security ALJs.  

The Social Security Administration (SSA) has a long tradition, since the beginning of the Social Security programs during the 1930s, of providing the full measure of due process for people who apply for or who receive Social Security benefits. An individual who is dissatisfied with the determination that SSA has made with respect to his or her claim for benefits has a right to request a hearing before an Administrative Law Judge, an independent decisionmaker who makes a de novo decision with respect to the individual's claim for benefits. As the Supreme Court has recognized, SSA's procedures for handling claims in which a hearing has been requested served as the model for the Administrative Procedure Act (APA). Congress passed the APA in 1946 in part to establish uniform standards for certain adjudicatory proceedings in Federal agencies, in order to ensure that individuals receive a fair hearing on their claims before an independent decisionmaker. SSA always has supported the APA and is proud that the SSA hearing process has become the model under which all Federal agencies that hold hearings subject to the APA operate. SSA's hearing process provides the protections set-forth in the APA, and SSA's Administrative Law Judges are appointed in compliance with the provisions of the APA.  

I trust this is responsive to the question that was raised.  

Sincerely,  

Kenneth S. Apfel  
Commissioner  
of Social Security  

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