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## Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims

Robin J. Arzt

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# Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims

By Robin J. Arzt\*

|  |     |
|--|-----|
| I. INTRODUCTION AND SUMMARY.....   | 269 |
| II. SOCIAL SECURITY BENEFITS CLAIMS PROCEDURE.....   | 276 |
| III. REASONS TO ESTABLISH AN INDEPENDENT AGENCY TO MAKE FINAL ADMINISTRATIVE DECISIONS OF SOCIAL SECURITY ACT BENEFITS CLAIMS .....  | 279 |
| A. <i>Rationales for Independent Adjudication Agencies</i> .....   | 279 |
| B. <i>The Need to Separate the Appellate Administrative Adjudication Function from the Department of Health and Human Services, Centers for Medicare and Medicaid Services</i> ..... | 282 |
| C. <i>The Need to Separate the Appellate Administrative Adjudication Function from</i>   |     |

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\* Administrative Law Judge, Social Security Administration, Bronx Office of Hearings and Appeals. B.A. 1975, J.D. 1978, M.B.A. 1985, New York University. My position with the Social Security Administration is stated for identification purposes only. This article was written in my private capacity. No official support or endorsement by the Social Security Administration is or should be inferred. The views expressed in this article are mine and do not necessarily represent the views of the Social Security Administration or the United States. I originally drafted the contents of this article as a position paper that was adopted in January 2001 by the Association of Administrative Law Judges ("AALJ"), the organization that represents the ALJs in the Social Security Administration and Department of Health and Human Services. A summary of the AALJ position paper was submitted by the AALJ as its testimony before the House Committee on Ways and Means, Subcommittee on Social Security June 28, 2001, Hearing on the Social Security Disability Program's Challenges and Opportunities. I acknowledge and have a debt of gratitude to Hon. Barbara Welsch for her research and initial draft of part VI and her comments on the entire draft of the AALJ position paper. I also acknowledge and have a debt of gratitude to Hon. Ronald G. Bernoski, whose comments, source materials and suggestions resulted in substantive and editorial improvements in the draft of the AALJ position paper. Others who deserve my acknowledgment and gratitude for their comments on the AALJ position paper include: Hon. William Wenzel, Prof. Victor Rosenblum, Hon. Stanford Ross, Hon. Daniel E. Skoler, Hon. D. Randall Frye, and Hon. Alfonso Montano. I also thank the many AALJ members who I heard from during the course of this project for their contributions of suggestions and facts. Any errors are those of the author alone. Comments are welcome at bubobubo@att.net.

|       |   |     |
|-------|---|-----|
|       | <i>the Social Security Administration</i> .....   | 292 |
| IV.   | PRESERVATION OF THE APPLICATION OF THE ADMINISTRATIVE PROCEDURE ACT TO SOCIAL SECURITY ACT BENEFITS ADJUDICATIONS IS ESSENTIAL TO PRESERVE DUE PROCESS AND FAIRNESS FOR THE CLAIMANTS .....   | 319 |
| V.    | A COURT MODEL CANNOT BE USED FOR APPELLATE ADMINISTRATIVE ADJUDICATIONS PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT .....  | 328 |
| VI.   | AN INDEPENDENT ADJUDICATION AGENCY FOR SOCIAL SECURITY ACT BENEFITS CLAIMS DOES NOT REQUIRE A COMMISSION TO PERFORM ITS ADJUDICATION FUNCTION BECAUSE SOCIAL SECURITY POLICY IS NOT PROMULGATED THROUGH THE ADJUDICATION FUNCTION ..... | 335 |
| VII.  | WHY AN INDEPENDENT ADJUDICATION DEPARTMENT ADMINISTERED BY ALJS PROVIDES A HIGHER QUALITY OF JUDICIAL INDEPENDENCE AND DUE PROCESS FOR SOCIAL SECURITY BENEFITS CLAIMANTS THAN AN INDEPENDENT COMMISSION STRUCTURE .....                | 342 |
| VIII. | AN INDEPENDENT AGENCY MODEL FOR A SOCIAL SECURITY BENEFITS ADJUDICATION REVIEW AGENCY .....   | 344 |
|       | A. <i>Agency Name, Establishment</i> .....  | 345 |
|       | B. <i>Independent Agency, Executive Branch Department</i> .....   | 346 |
|       | C. <i>Independent Establishment</i> .....   | 351 |
|       | D. <i>Exclusive Jurisdiction over Final Decisions of Social Security Act Benefits Claims</i> .....  | 352 |
|       | E. <i>Final Administrative Appellate Review by the United States Office of Hearings and Appeals</i> .....   | 356 |
|       | F. <i>Final Level of Administrative Review, Finality of Decision, Limitations on Review of Decisions</i> .....  | 361 |
|       | G. <i>Judicial Review of Titles II, XVI, and XVIII Benefits Adjudications</i> .....   | 364 |
|       | H. <i>Chief Administrative Law Judge, Deputy Chief Administrative Law Judges, Duties</i> .....  | 368 |
|       | I. <i>Removal</i> .....   | 372 |
|       | J. <i>Maintenance and Organization of Field Offices</i> .....   | 373 |
|       | K. <i>Rulemaking, Admission to Practice</i> .....   | 375 |
|       | L. <i>Transfer Mechanics</i> .....  | 379 |
|       | M. <i>Administrative Budget</i> .....   | 380 |
|       | N. <i>Direct Transmittals to Congress</i> .....   | 385 |
| IX.   | CONCLUSION .....  | 385 |

## I. INTRODUCTION AND SUMMARY

This article recommends the creation of an independent adjudication agency with the exclusive jurisdiction over final administrative decisions of Social Security Act benefits claims. Structural independence of the administrative appellate adjudication function from the agencies that set the policy for the Social Security Act benefits programs is the necessary next step to ensure the timely, high quality, impartial, and independent appellate administrative decisions for which the Administrative Procedure Act (“APA”) sets the procedural due process structure.<sup>1</sup> This new agency may be called the United States Office of Hearings and Appeals (“USOHA”).

The Social Security Administration (“SSA”) sets and implements the policy standards for entitlement to Social Security Act Title II old

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1. The APA was enacted in 1946 to, among other things, achieve reasonable uniformity and fairness of the administrative process in the federal government for members of the American public with claims pending before federal agencies. This includes uniform standards for the conduct of adjudicatory proceedings, including the merit appointment of hearing examiners who now are ALJs [Administrative Law Judges]. The APA sets forth a due process administrative procedure for the hearing and decision by ALJs of cases brought before the federal agencies to which the APA applies. The APA also provides for judicial review of final administrative decisions by the federal agencies. Provisions in the APA for the decisional independence of ALJs, through safeguards against undue agency influence, include a merit selection process administered by the Office of Personnel Management (“OPM”) rather than the hiring agencies, career permanent civil service appointments without a probationary period, pay levels set by statute, prohibitions of performance evaluations and bonus pay, and the requirement of a due process hearing before the Merit Systems Protection Board before an adverse personnel action may be taken against an ALJ.

Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 279, 281 (Fall 2002) (citations omitted) (referencing: U.S. Justice Dept., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, at 9 (1947) [hereinafter Manual]; 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301(2)(D), 5335(a)(B), 5372, 7521 (2000)).

age, survivors and disability insurance program benefits,<sup>2</sup> and Title XVI supplemental security income program benefits for aged, blind and disabled people.<sup>3</sup> The SSA Commissioner would continue to have the power to make only initial decisions on such Social Security Act claims. The Secretary of the Department of Health and Human Services ("DHHS") has delegated the Secretary's power to set and implement the policy standards for entitlement to Social Security Act Title XVIII health insurance for the aged and disabled (Medicare) benefits to the Administrator of the DHHS Centers for Medicare and Medicaid Services ("CMS").<sup>4</sup> The DHHS Secretary and CMS Administrator would continue to have the power to make only initial decisions on the Medicare benefits claims. However, the SSA Commissioner and DHHS Secretary would retain all authority for the policy-making, policy-implementation, rulemaking, investigation and prosecutorial functions respectively vested in the SSA and DHHS by law.

The DHHS Secretary would retain initial and final administrative jurisdiction over Medicare, Medicaid and other federal health care enforcement proceedings brought under the Social Security Act and other applicable statutes. Such enforcement proceedings currently are heard on administrative appeal by Administrative Law Judges ("ALJs") within the Civil Remedies Division of the DHHS Departmental Appeals Board, with final administrative decision-making authority vested in the DHHS Secretary.<sup>5</sup> The function,

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2. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620; Amendments to Title I of the Social Security Act, Pub. L. No. 76-379, 53 Stat. 1360 (amended 1939); Social Security Amendments of 1956, Pub. L. No. 84-880, 70 Stat. 807, 815 (1956) (codified as amended at 42 U.S.C. §§ 401-434 (1994 & Supp. 1996-1999)).

3. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329, 1465-1479 (codified as amended at 42 U.S.C. §§ 1381-1383(c) (1994 & Supp. 1996-1999)).

4. 42 U.S.C. §§ 1302, 1395ff, 1395hh (2003); *See generally*, Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C. §§ 1395-1395ccc (2003)).

5. SSA's Official Internet Site for the Civil Remedies Division of the DHHS Departmental Appeals Board, at <http://www.dhhs.gov/dab/civil/> (Last visited Oct. 14, 2003). Social Security Act enforcement proceedings for civil money penalties, assessments and exclusions from program participation are brought by CMS, the DHHS Office of Inspector General, or SSA Office of Inspector General. The scope of the Social Security Act civil remedies cases that may be sought by CMS or the

organization, and authority of the Civil Remedies Division of the DHHS Departmental Appeals Board would not be affected by the creation of an independent adjudication agency with jurisdiction to make the final administrative decisions of Social Security Act benefits claims.

When an agency such as the SSA or DHHS through CMS exclusively uses rulemaking proceedings to set policy, rather than also using adjudications to set policy, there no longer is any rationale for keeping the adjudicatory function within the agency. The Congressional interest in providing a check on SSA's and DHHS' enforcement powers (i.e., to withhold disability, Medicare, and other program benefits) is best served by having benefits entitlement determinations decided by an independent adjudicatory agency based on the benefits entitlement standards set by SSA or DHHS through CMS.

An independent adjudication agency would provide members of the American public who file claims for Social Security Act entitlement program benefits denied by the SSA or DHHS through CMS timely adjudications that give due process and a sense of a fair hearing free of political and policy implementation pressure. This proposal recommends amendments of the Social Security Act (1) to provide the claimants with timely, high quality, impartial and fair decisions of their claims pursuant to the APA by adjudicators who are in an agency independent of, but within, the SSA, and (2) to ensure that the adjudication process complies with the APA.

In part II, the current Social Security and Medicare claims procedures briefly are described.<sup>6</sup>

Part III describes in detail the reasons why separation of the administrative adjudication function from SSA and DHHS is imperative, particularly in view of (1) the recent actions by the DHHS through CMS to avoid the use of the APA ALJ due process

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DHHS or SSA Offices of the Inspector General, jurisdiction over the appeals from which is vested in the ALJs within the Civil Penalties Division, is stated in 20 C.F.R. § 498.100 (2003), 42 C.F.R. §§ 402.1, 1003.100, 1005.2(a) (2003), 20 C.F.R. Part 498, and 42 C.F.R. Parts 498, 1001, 1003, and 1004 (2003). The ALJs within the Civil Penalties Division also have jurisdiction over civil remedies case appeals for violations of statutes other than the Social Security Act, which are listed at <http://www.dhhs.gov/dab/appellatee/regulations.html>.

6. See discussion *infra* Part II.

procedure altogether<sup>7</sup> and (2) the SSA's long history of policy and management interference with the ALJs' decisional independence, and the inability of SSA to administer the disability programs in an effective and efficient manner. The CMS' recent steps to avoid using the APA ALJ due process procedure and the SSA's difficulties in implementing its current disability program initiatives, including process unification, prototype, the Hearing Process Improvement Plan, and the Appeals Council Process Improvement Plan, are thoroughly described in Part III. In part III(C), the SSA Commissioner's September 2003 proposal to replace the Appeals Council with a panel process within SSA OHA that is staffed by ALJs and non-APA administrative appeals judges from the Appeals Council is discussed. The Commissioner's proposal borrows from the author's proposal for local appellate panels of three ALJs akin to the Bankruptcy Court appellate panel process to replace the Appeals Council that is part of the author's 2001 detailed proposal for a new independent adjudication agency to make the final administrative adjudications of Social Security Act benefits claims that is the basis for this article. Modifications of the Commissioner's proposal are recommended to include the elements of the Bankruptcy Court appellate panel process described in this article that have made that process a demonstrated success.<sup>8</sup>

That the preservation of the application of the APA to Social Security Act adjudications is essential to preserve due process and fairness for the Social Security benefits claimants and Medicare beneficiaries and providers is discussed in part IV.<sup>9</sup>

Part V explains that a court model cannot be used for appellate administrative adjudications pursuant to the APA because the APA expressly does not apply to courts, including Article I and II court models.<sup>10</sup>

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7. Such actions include entry into contracts with the state social services agencies in Connecticut, Massachusetts and New York to arbitrate Medicare appeals, and the CMS Administrator's statements and plans during early 2002 to have Medicare appeals heard by non-APA administrative judges.

8. See discussion *infra* Part III. The discussion of the Commissioner's proposed panel process is discussed at Part III(C), *infra* text accompanying notes 143-152. Also see, *supra* first unnumbered note.

9. See discussion *infra* Part IV.

10. See discussion *infra* Part V.

A model for an independent agency for Social Security Act adjudications in the independent Commission format is discussed in part VI. Part VI posits that it is difficult to justify a “role” for politically appointed Commissioners, since the independent entity would not set policy. Policy-setting is the function for which political accountability is desirable.<sup>11</sup> Hence the proposal in parts VII and VIII that the independent agency be an adjudicatory body that is self-administered by the ALJs with a right of appeal from an individual ALJ’s decision to an appellate panel staffed by ALJs.<sup>12</sup>

Part VII describes why an independent adjudication agency administered by ALJs provides a higher quality of judicial independence and due process for Social Security benefits claimants and Medicare beneficiaries and providers than an independent but politically appointed commission structure. There are several reasons why this is so. First is the elimination of political oversight by appointees (i.e., Commissioners) who do not have adjudicative independence as their foremost goal in agency administration. Second, a small body, such as a Commission, the current SSA Appeals Council, or the Medicare Appeals Council of the DHHS Departmental Appeals Board, cannot be of sufficient size to do meaningful administrative review of appeals from the ALJ decisions, which now number over 100,000 per year. The SSA ALJs are a large group of highly qualified judicial professionals who are capable of administering themselves and the appellate administrative process in a competent and effective manner. There currently are no DHHS ALJs who decide Medicare benefit claims.<sup>13</sup> Finally, if the SSA ALJs administer themselves, they will draft and issue the procedural regulations and rules of the new agency based upon their experience and needs of the process, rather than expediency and other policy concerns as they are now. There now is no coherent set of procedural

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11. See discussion *infra* Part VI.

12. See discussion *infra* Parts VII and VIII.

13. The ALJ function of hearing and deciding Medicare benefits claims will be transferred from SSA and its Commissioner to the DHHS and its Secretary on a date during July 1-October 1, 2005. MEDICARE PRESCRIPTION, DRUG, IMPROVEMENT AND MODERNIZATION ACT OF 2003, Pub. L. No. 108-173, 117 Stat. 2066, § 931(b)(1).



regulations and rules for the SSA or Medicare appellate administrative process.<sup>14</sup>

Part VIII states in detail the proposals and rationales for the features of the USOHA, which would be an ALJ-administered independent adjudication agency with a right of appeal from an individual ALJ's decision to an appellate panel staffed by ALJs.<sup>15</sup> The independent agency would be within the SSA, but its officers and employees would not be supervised by any other part of SSA. The USOHA will be accountable only to the President and Congress. Placing the USOHA within SSA results in no new costs for office space and information systems and is a practical necessity, given the USOHA's substantial space needs that currently are in place at SSA, the need to share the SSA's information services and data bases, and the need to use the same case files.<sup>16</sup>

The USOHA would have the exclusive jurisdiction to make the final administrative decisions of Social Security Act Titles II, XVI and XVIII benefits claims. The USOHA would have permissive jurisdiction over other classes of cases, so it may hear and decide other classes of cases such as those that the SSA ALJs have heard in the past. The final administrative adjudication authority of SSA and DHHS would be abolished, including the SSA Appeals Council and DHHS Medicare Appeals Council. However, as is stated above, the SSA and DHHS would retain all authority for all of the policy-making, policy-implementation, rulemaking, investigation and prosecutorial functions respectively vested in the SSA and DHHS by law.<sup>17</sup>

An individual ALJ's decision would be appealed to appellate panel staffed by ALJs, which would consist of three ALJs who would review the cases locally. The ALJ appellate panels would be akin to the United States Bankruptcy Court appellate panels. The ALJ appellate panels is one of the key features that make the ALJ self-administration model superior to the current SSA Appeals Council and DHHS Medicare Appeals Council model or a Commission. Based upon the Bankruptcy Court experience, the appellate panel

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14. See discussion *infra* Part VII.

15. See discussion *infra* Part VIII.

16. See discussion *infra* Part VIII(B).

17. See discussion *infra* Part VIII(D).

model (1) is an appellate system that can handle a large caseload, (2) results in higher quality decisions because of expertise, (3) results in substantially fewer appeals to the courts and a substantially lower reversal rate by the courts because of the bar's and courts' confidence in the high quality of the decisions, which reflects a higher degree of decision accuracy from three expert decisionmakers working together, (4) results in a substantially reduced federal court caseload, (5) results in a shorter disposition time because the large pool of about 1,000 ALJs permits the timely determination of appeals that cannot take place with a small body such as the SSA Appeals Council or a Commission, and (6) affords the claimants access to a local appellate process, among other things.<sup>18</sup>

The final decisions of the USOHA would be appealable only to the federal courts, with the District Courts as the first step in the judicial review.<sup>19</sup>

A Chief Administrative Law Judge would be appointed by the President from the ranks of the ALJs. The Chief Judge and five Deputy Chief Judges would administer the USOHA from a single national headquarters. The ten OHA regional offices and the position of Regional Chief ALJ would be abolished so that only one set of support staff and administrative offices, instead of eleven, would exist. A centralized structure also would eliminate inconsistencies in administration and carrying out policy, which has been a problem with the OHA regional offices. Also, having one central office would create a more efficient organization, in view of instant modern electronic communications.<sup>20</sup>

The USOHA would set its own rules of practice and procedure and the ALJs would administer the agency.<sup>21</sup>

Exemption of the USOHA from the statutory discretionary spending caps for its administrative costs is recommended to ensure high quality service, since the USOHA would not have control over the size of its caseload.<sup>22</sup>

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18. See discussion *infra* Part VIII(E).

19. See discussion *infra* Part VIII(G).

20. See discussion *infra* Part VIII(H)-(I).

21. See discussion *infra* Part VIII(K).

22. See discussion *infra* Part VIII(M).

A substantial amount of funds would be saved annually by the abolishment of the SSA Appeals Council and the ten OHA regional offices, which appear to be on the order of in excess of \$75,000,000. Additional funds would be saved annually by the abolishment of the DHHS Medicare Appeals Council. The appellate panel work would increase the workload of the ALJs and, thus, additional ALJs likely will be required and additional travel and other administrative costs incurred. However, the cost for the appellate panels, which can meet in already established local facilities, likely will be less than the cost of the abolished OHA regional offices, DHHS Medicare Appeals Council, and SSA Appeals Council, with its staff of twenty-seven Administrative Appeals Judges (“AAJs”) and over 800 support personnel and substantial facilities in the OHA headquarters. The SSA Fiscal Year 2000 Performance and Accountability Report reflects that the cost of the Appeals Council process apparently was \$64,671,200 in fiscal year 2000. Thus, unlike the Bankruptcy Court Appellate Panel Service, which was a new creation in addition to the District Court review step that already was available, the Social Security Appellate Panel Service would replace a failed appellate review step that already exists and is funded. The staff and facilities for the ten OHA regional offices were estimated to cost about \$13,000,000 annually in 1993 by the Congressional Budget Office, which likely is a greater figure now.<sup>23</sup>

The recommendations in this article pertain only to the appellate administrative adjudication process that results in a final administrative decision of the claimants’ entitlement to benefits, since that is where the problems lie. No substantive changes in the process of judicial review after the final administrative decision have been recommended, other than to amend the Social Security Act to reflect that judicial review will be from the final decisions of the new agency, not the SSA and DHHS.<sup>24</sup>

## II. SOCIAL SECURITY BENEFITS CLAIMS PROCEDURE

In 1994, the Social Security Administration became a Congressionally-created independent regulatory single commissioner

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23. See discussion *infra* Part VIII(I).

24. See discussion *infra* Part VIII(G).

agency.<sup>25</sup> The appellate adjudicatory function, namely the administrative review of the SSA's initial determinations of Social Security Act claims that were partially or wholly denied by the state Disability Determinations Services agencies ("DDS") on behalf of the SSA, takes place within the Office of Hearings and Appeals ("OHA") of SSA. OHA is administered by layers of management. There is an Associate Commissioner for OHA, who is a Senior Executive Service level manager. The Associate Commissioner reports to the Deputy Commissioner of Disability and Income Security Programs, who is one of eight Deputy Commissioners who report to the Commissioner of SSA.<sup>26</sup>

There are two primary organizational components of OHA. The first level of administrative appeal is handled within Hearing Operations, where a claimant is afforded an opportunity for a *de novo* hearing and decision by an ALJ. ALJs are Article II executive branch competitive civil service employees who are hired pursuant to section 3501 of the APA through a Title 5 OPM civil service examination process. The Chief ALJ oversees 140 hearing offices and ten regional offices, and is described by SSA as the "principal consultant and advisor to the Associate Commissioner on all matters concerning the ALJ hearing process and all field operations."<sup>27</sup> The Chief ALJ reports to the Associate Commissioner for OHA. There are over 1,100 ALJs and about 5,600 support staff. SSA ALJs issue over 500,000 decisions per year. The second and final level of administrative appeal is handled within the Office of Appellate Operations, where a claimant is afforded an opportunity for a record review of the ALJ's decision by the Appeals Council. The Office of Appellate Operations has about 800 employees and decided over 101,000 cases in fiscal year 2002. OHA also has a Program Management unit, which makes policy and sets procedures for OHA, including policy for the processing of cases through OHA, and an Administrative Management unit, which provides administrative

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25. Social Security Administration Reform Act of 1994, Pub. L. No. 103-296, 108 Stat. 1472 (codified at 42 U.S.C. § 901 (a)-(b) (West 2003)).

26. SSA's Official Internet Site *available at* <http://www.ssa.gov/org> (Last visited Oct. 14, 2003).

27. *See* SSA's Official Internet Site *available at* [http://www.ssa.gov/oha/abnet\\_oha.html](http://www.ssa.gov/oha/abnet_oha.html).

support for OHA.<sup>28</sup> The Associate Commissioner of OHA is the chair of the Appeals Council. The Appeals Council consists of AAJs who are not ALJs selected by the civil service procedure established by the APA. They are career civil servants who are required to be attorneys with a certain level of experience.<sup>29</sup> Essentially, OHA performs an adjudicatory function in an executive agency created by the legislature.

The first level of appellate administrative review of DHHS initial determinations of Medicare claims that are partially or wholly denied by the Intermediaries on behalf of CMS also takes place within the OHA of SSA, based upon a contractual arrangement between CMS and SSA.<sup>30</sup> Beneficiaries and providers are afforded an opportunity for a *de novo* hearing and decision by an SSA ALJ.<sup>31</sup> However, the ALJ function of hearing and deciding Medicare benefits claims will be transferred from SSA and its Commissioner to the DHHS and its Secretary on a date during July 1-October 1, 2005.<sup>32</sup>

The final appellate administrative review step by which a beneficiary or provider is afforded an opportunity for a record review of the ALJ's decision takes place before the Medicare Appeals Council of the DHHS Departmental Appeals Board.<sup>33</sup> The DHHS Departmental Appeals Board has over seventy employees, including the Chair and four other members of the Board, eight ALJs employed in the Board's Civil Remedies Division, and four administrative appeals judges employed by the Board's Medicare Appeals Council. The Medicare Appeals administrative appeals judges are not APA

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28. SSA's Official Internet Site for the Office of Hearings and Appeals, *About SSA's Office of Hearings and Appeals; Information on OHA's Hearing Sites*, available at <http://www.ssa.gov/oha> (Last visited Oct. 14, 2003).

29. Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 236-240 (1990).

30. SSA's Official Internet Site for the Medicare Appeals Council of the DHHS Departmental Appeals Board, available at <http://www.dhhs.gov/dab/MOD2002.html> (Last visited Oct. 14, 2003).

31. 42 U.S.C. § 1395ff(b)(1)(A) (2003).

32. MEDICARE PRESCRIPTION, DRUG, IMPROVEMENT AND MODERNIZATION ACT OF 2003, Pub. L. No. 108-173, 117 Stat. 2066, § 931(b)(1).

33. See 42 C.F.R. §§ 498.80-498.95 (2003).

ALJs.<sup>34</sup>

### III. REASONS TO ESTABLISH AN INDEPENDENT AGENCY TO MAKE FINAL ADMINISTRATIVE DECISIONS OF SOCIAL SECURITY ACT BENEFITS CLAIMS

#### *A. Rationales for Independent Adjudication Agencies*

There is an inherent, and often real, conflict between (1) the need for independent and impartial appellate administrative decisionmakers and decisions, and (2) Executive Branch agency policymakers' desire to control the decisionmakers and the outcome of their decisions to conform to policy and political concerns. This conflict results in agency policymakers' intrusions into the administrative adjudication function.

Many of the same rationales that justify Congress' creation of specialized independent Article I courts to perform the initial judicial review of final administrative decisions by Executive Branch agencies also support the separation of the appellate administrative adjudication function from Executive Branch agencies. This is done to promote decisional independence from the agencies' policymaking/rulemaking, prosecutorial/enforcement and investigatory functions.

Examples of such specialized courts include the Tax Court,<sup>35</sup> which hears appeals from IRS tax decisions, and the Veterans Appeals Court,<sup>36</sup> which hears appeals of benefits decisions by the Department of Veterans Affairs. The most important rationale for these independent courts is the experience that effective protection of individual rights before agencies through independent decisionmaking cannot take place unless adjudications are separated from the agency policy and enforcement functions. Congress created the Board of Tax Appeals in 1924 to provide an independent tribunal to hear taxpayers' appeals from tax deficiency notices before

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34. SSA's Official Internet Site for the Medicare Appeals Council of the DHHS Departmental Appeals Board, available at <http://www.dhhs.gov/dab/background.html> (Last visited Oct. 14, 2003).

35. 26 U.S.C. § 7441 (2002).

36. 38 U.S.C. § 4051 (2002).

payment of the tax after a Congressionally created board studied the IRS appellate review practices and concluded that

[I]t would never be possible to give to the taxpayer the fair and independent review to which he is of right entitled as long as the appellate tribunal is directly under, and its recommendations subject to the approval of, the officer whose duty it is to administer the law and collect the tax. As long as the appellate tribunal is part and parcel of the collecting machinery it can hardly maintain the attitude essential to a judicial tribunal.<sup>37</sup>

Other reasons for creating independent adjudication agencies, in addition to judicial independence, include expertise, efficiency, low cost to the claimant, and high case volumes: (1) Specialized tribunals are more likely to make correct decisions in subject areas that are legally complex or have technical facts. (2) The maintenance of a reasonably efficient, orderly and low cost adjudication system in the traditional domain of public rights is in the public's interest, especially for programs that distribute benefits on a large scale, since litigating administrative claims in the Article III courts would take much longer from procedural complexities that would burden members of the public who least can afford high litigation costs. (3) The large increase in the administrative case volume supports the use of specialized tribunals to prevent the growth of the case volume of the generalist Article III courts to the point where decision quality and uniformity deteriorates. (4) Executive Branch adjudications can result in fairer and more consistent decisions than those by the Article III courts, given academic commentators' observations that judicial decisions regarding whether a person is disabled under the Social Security Act tend to be less consistent and equitable than those based on regulations with statistical standards.<sup>38</sup> (5) Finally, when an

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37. Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1112 n.9, 1118-1119 (1990) (quoting, *Report of Tax Simplification Board*: Hearing on H.R. REP. NO. 68-103, at 4 (1st Sess. 1923)).

38. Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1052-1057 (1999); Christopher B. McNeil, *Similarities and Differences between Judges in the Judicial Branch and the*

agency no longer formulates policy through its adjudication function but does so only through rulemaking, which is the case for SSA and CMS, supervision of the appellate administrative adjudicators and review of their decisions by policy-making political appointees has no reason to continue. At that point, there is no reason to keep the adjudicatory function within the agency.<sup>39</sup>

These rationales, particularly the need to separate the adjudicatory function from other conflicting agency functions, led Congress to create the Occupational Safety and Health Review Commission (“OSHRC”) in 1970,<sup>40</sup> and the Federal Mine Safety and Health Review Commission (“FMSHRC”) in 1977<sup>41</sup> as independent, Executive Branch agencies outside the Department of Labor with only adjudicative authority. OSHRC determines whether regulations promulgated and enforced by the Occupational Safety and Health Administration have been violated. FMSHRC adjudicates violations of standards promulgated and enforced by the Mine Safety and Health Administration.<sup>42</sup>

Two Executive Branch agencies that Congress formed as boards with primarily adjudicative duties include the Merit Systems Protection Board (MSPB), which reviews adverse personnel actions by federal agencies against federal employees,<sup>43</sup> and the National Transportation Safety Board (“NTSB”), which reviews a portion of the license revocation actions by the Secretary of the Transportation Department and the Commandant of the Coast Guard.<sup>44</sup> However, these two boards have some powers beyond adjudication. MSPB does studies of the civil service and recommends legislation to Congress and the President and the NTSB investigates accidents and recommends safety improvement measures.<sup>45</sup>

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*Executive Branch*, 18 J. NAT’L ASS’N ADMIN. L. JUDGES 1, 16 (1998); Revesz, *supra* note 37, at 1117-18, 1120-22; Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 935-937 (1988).

39. See discussion *infra* Part VI.

40. 29 U.S.C. § 661 (2001).

41. 30 U.S.C. § 823 (2001).

42. Revesz, *supra* note 37, at 1119, 1135-36.

43. 5 U.S.C. §§ 1201-1209 (2001).

44. 49 U.S.C. § 903(a)(9) (2001).

45. Revesz, *supra* note 37, at 1135 n.122.



The DHHS and SSA are ripe for separation of the appellate administrative adjudication function from the agencies.

*B. The Need to Separate the Appellate Administrative Adjudication Function from the Department of Health and Human Services, Centers for Medicare and Medicaid Services*

During 2002 and early 2003, DHHS and CMS took steps to avoid using the APA ALJ due process procedure for the Medicare administrative appeals process at the same time that DHHS planned the transfer of the ALJ function in the Medicare appeals process from SSA to CMS. Any plan to deny Medicare beneficiaries and providers the right to a full due process hearing under the APA before an ALJ would have resulted in a denial of basic procedural due process rights to the American people. Without APA due process, Medicare beneficiaries and providers would have had no recourse to an independent decisionmaker during the administrative process. Also, the DHHS plan to have the ALJ process be a part of CMS, the entity that makes the initial determinations of Medicare benefits claims, lacked any structural separation of the policymaking and adjudication functions. Fortunately, the steps to avoid the APA ALJ due process procedure and to place the ALJ process within CMS were not successful, as is explained in this subpart.

The CMS Medicare Appeals Reform item in the President's proposed Budget for the United States Government for Fiscal Year 2004, issued in February 2003, states that CMS requires \$129 million to assume the "adjudicative function currently performed by Administrative Law Judges at the Social Security Administration [that] would be transferred to CMS. In addition, the Administration proposed several legislative changes to the Medicare appeals process that would give CMS flexibility to reform the appeals system."<sup>46</sup> However, one of the legislative proposals in the Appendix to the 2004 President's Budget regarding the CMS Medicare Appeals Reform item would authorize the Secretary of the DHHS to "use alternate mechanisms in lieu of Administrative Law Judge review"

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46. 2004 President's Budget for the United States Government for Fiscal Year 2004, section on CMS Program Management, 125 (2003).

for processing Medicare appeals under Title XVIII of the Social Security Act.<sup>47</sup>

Thus, the Administration was positing a transfer of the ALJ function for Medicare appeals into the very unit of DHHS that is responsible for making and implementing policy for the Medicare program, CMS, apparently only to permit CMS and the DHHS Secretary to change the process to deny beneficiaries and providers access to ALJs, the only independent decisionmakers in the administrative appeals process. The 2004 CMS Medicare Appeals Reform budget item was a stealth attack on the American public's due process rights to an appellate administrative hearing and decision by an ALJ appointed pursuant to the APA after a denial of Medicare benefits by the CMS.

The 2004 CMS Medicare Appeals Reform budget item was based upon the CMS Budget Summary for Fiscal Year 2004 that was submitted to the White House in late 2002 to request \$126 million from the 2004 President's Budget "to implement Medicare appeals reforms, including . . . the transfer of the Medicare hearings function from the [SSA]."<sup>48</sup> In the same document, CMS states twice, in the Budget Summary and Supporting Information sections, that "[d]ue to the current moratorium on hiring new ALJs, CMS has requested the authority to use administrative mechanisms other than ALJs, such as hearing officers, to conduct these hearings."<sup>49</sup>

CMS Administrator Thomas Scully said that "[t]he President's FY2004 budget includes provisions to implement Medicare appeals reform," when he testified before the Subcommittee on Health of the House Committee on Ways and Means at the February 13, 2003, Hearing on Medicare Regulatory and Contracting Reform. He also testified that CMS is "proceeding toward the transfer to CMS of the Medicare hearing function currently performed by the Administrative Law Judges (ALJ) in the Social Security Administration (SSA). We have already had extensive discussions with SSA to explore administratively transferring the Medicare hearing function to

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47. 2004 President's Budget for the United States Government for Fiscal Year 2004 - Appendix, section on CMS Program Management, 422 (2003).

48. CMS Budget Summary for Fiscal Year 2004, I-8.

49. CMS Budget Summary for Fiscal Year 2004, I-8, and Supporting Information Medicare Hearings Workload page.

CMS.”<sup>50</sup>

However, the CMS Administrator did not inform the Subcommittee that the Medicare Appeals Reform item buried in the Appendix of the President’s proposed 2004 Budget would permit CMS to take away the Medicare beneficiaries’ and providers’ due process rights under the Social Security Act and APA to a hearing and decision on appeal before an APA ALJ.<sup>51</sup>

The CMS Administrator also did not tell the Subcommittee that, on October 22, 2002, he signed an agreement with the Connecticut Department of Social Services to test a two-step non-APA Medicare administrative appeals process for “dual eligible” beneficiaries that provides a review of an appealed Intermediary’s reconsidered determination by only an unspecified CMS official followed by a private sector arbitration as the final administrative step.<sup>52</sup> The CMS Administrator also did not mention that he signed a similar agreement with the Massachusetts Division of Medical Assistance on November 4, 2002, and reportedly was negotiating such an agreement in New York.<sup>53</sup> The New York Agreement was signed during early July 2003.<sup>54</sup> CMS’ stated reliance in the agreements upon 42 U.S.C. § 1395b-1 as authority to test a change in the appellate process is questionable. This section authorizes the DHHS to conduct “demonstration projects” only to test cost saving techniques in specified processes, not changes in administrative

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50. *Medicare Regulatory and Contracting Reform: Hearing Before the Subcommittee on Health of House Committee on Ways and Means*, 108th Cong. (1st Sess. 2003) (statement of Thomas A. Scully, CMS Administrator).

51. *Id.*

52. *Id.*; Demonstration of HHA Settlement for Dual Eligibles Agreement, signed by Thomas A. Scully, CMS Administrator, on October 22, 2002, and Michael Starkowski, Deputy Commissioner, Connecticut Dept. of Social Services, on October 23, 2002 (Connecticut Agreement) (on file with author).

53. Demonstration of HHA Settlement for Dual Eligibles Agreement, signed by Thomas A. Scully, CMS Administrator, on November 4, 2002, and Wendy E. Warring, Commissioner, Massachusetts Division of Medical Assistance, in November, 2002 (Massachusetts Agreement); E-mail from Erin Kuhls, Director, Medicare Part A Analysis Group of CMS Office of Legislation, to the author (April 11, 2003) (on file with author).

54. E-mail from Chandra Branham, CMS Office of Legislation, to the author and Erin Kuhls, Director, Medicare Part A Analysis Group of CMS Office of Legislation (July 15, 2003) (on file with author).

appellate due process.<sup>55</sup> There also is a question as to whether it is lawful for the federal government to permit private binding arbitration to supplant federal sovereignty by privately resolving disputes involving rights to public benefits without access to the due process of law and equal protection in a public forum.<sup>56</sup>

Also, the proposed regulations published by CMS Administrator Scully in November 2002 entitled “Changes to the Medicare Claims Appeal Procedures” included a note that the Medicare appeals function now performed by SSA ALJs is expected to be transferred back to DHHS by October 1, 2003. Although proposed regulations are published by federal agencies pursuant to the APA to inform the public in advance of agencies’ contemplated actions, nothing is said to the public in the proposed Medicare regulations that suggests CMS is contemplating a non-APA ALJ appeals process for Medicare beneficiaries and providers.<sup>57</sup>

On March 16, 2003, the *New York Times* published a front page article entitled “Bush Pushes Plan to Curb Medicare Appeals” that describes the CMS Medicare Appeals Reform item in the President’s 2004 Budget and the Connecticut arbitration agreement, among other limitations on Medicare appeals rights that the Administration was proposing.<sup>58</sup>

Shortly after the *Times* article, CMS Administrator Scully made public statements that CMS was considering using non-APA administrative judges to hear and decide Medicare appeals. The CMS Administrator justified the change based on an inability to hire ALJs, despite a February 2003 order by the United States Court of Appeals for the Federal Circuit that resulted in an ended of the stay of hiring ALJs that had been in place for years.<sup>59</sup> First, in reaction to

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55. *Connecticut Agreement*, *supra* note 52, at 1; *Massachusetts Agreement*, *supra* note 53, at 1.

56. My article regarding this issue is forthcoming.

57. Medicare Program Changes to Claims and Procedures, 67 Fed. Reg. 69182 (proposed November 15, 2002) (to be codified at 42 C.F.R. pt. 405).

58. Robert Pear, *Bush Pushes Plan to Curb Medicare Appeals*, N.Y. TIMES (Mar. 16, 2003, at A1, A30).

59. On February 20, 2003, the United States Court of Appeals for the Federal Circuit rendered a final decision in *Meeker v. Merit Sys. Prot. Bd.*, that reversed a United States Merit Systems Protection Board (MSPB) decision that included a stay order that prevented the United States Office of Personnel Management

the *Times* article, the CMS Administrator issued an e-mail statement to the entire CMS staff in which he stated that “[a]s one option, CMS has suggested hiring Administrative Judges (not ALJs) as a technicality to avoid the moratorium on hiring ALJs. If anyone has a better idea, I would love to hear that as well?? [sic]”<sup>60</sup>

Thereafter, on March 20, 2003, CMS Administrator Scully published an op-ed article in the *Atlanta Journal-Constitution* in which he stated that “the administration has examined the hiring of “administrative judges,” not administrative law judges -- a technicality that would allow us to begin implementing what Congress passed three years ago to improve the processes to ensure that beneficiaries and providers can resolve their appeals faster.” There is no express reference to the defunct ALJ hiring stay in the op-ed article.<sup>61</sup> The day before the op-ed article was published, a spokesperson for the CMS Administrator offered a clarification of

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(OPM) from issuing any ALJ certificates to the Federal agencies for the hiring of new ALJs pending the resolution of candidate scoring issues. 319 F.3d 1368 (Fed. Cir. 2003), *pet. for reh’g. en banc den.*, 2003 U.S. APP. LEXIS 14588 (Fed. Cir. July 3, 2003). On July 23, 2003, the Federal Circuit issued a mandate that ended the MSPB stay, even though the Federal Circuit had overturned the MSPB decision that included the stay in February 2003 and had not granted injunctive relief pending the final determination of the appeal. Effective August 25, 2003, OPM lifted the suspension on the ALJ examination that was in effect since June 11, 1999. OPM also has announced that it will complete processing the applications that were received on or before June 18, 1999, and reactivate the existing register of ALJ candidates without yet accepting new applications. See OPM vacancy announcement for ALJs available at <http://jobsearch.usajobs.opm.gov>. On August 26, 2003, The Director of the OPM Washington Services Branch sent a letter to the Chief ALJs of the various agencies that states “OPM is now able to accept and respond to an agency’s request for certificates of eligibles for vacant ALJ positions.” See e.g., Letter from Deborah Grade, Director of OPM Washington Services Branch, to Curtis L. Wagner, Chief ALJ, Federal Energy Regulatory Commission (August 26, 2003) (on file with author). Accordingly, there no longer is a barrier to the agencies hiring ALJs. If the only reason the CMS Administrator had for wanting to use non-ALJs to hear and decide Medicare appeals was the ALJ hiring stay, rather than a desire to assert control over the decisionmakers and the outcome of their decisions, it is reasonable to expect that he no longer will suggest using non-ALJ decisionmakers for Medicare Appeals.

60. E-mail from Thomas A. Scully, CMS Administrator, to the CMS staff (March 16, 2003) (on file with author).

61. Thomas A. Scully, *Streamline Process for Handling Medicare Appeals*, ATLANTA J. AND CONST., Mar. 20, 2003, at Op. Ed.

the CMS “moves to lessen ALJ hearing backlogs” by stating that “CMS is attempting to alleviate the backlog of cases pending with its administrative law judges (ALJs) by promoting the concept of ‘administrative judges,’ defined as HHS hearing officers or lawyers, to hear some of the cases. ALJs currently have an average backlog of four hundred days per case.”<sup>62</sup> The CMS spokesperson also responded to the *Times* article with a denial that CMS “is attempting to limit the scope or independence of ALJs.”<sup>63</sup> Such hearing officers and attorneys would be subject to performance reviews and supervision by CMS management regarding the substance and outcome of their hearings and decisions, and to employment termination without the agency needing to show cause before the Merit Systems Protection Board, since they lack the APA protections of decisional independence that is provided to ALJs.

With the CMS plans for the Medicare Appeals process now nationally public, the CMS Administrator plainly testified before a subcommittee of the House Appropriations Committee on April 3, 2003, regarding the 2004 CMS Medicare Appeals Reform budget item that (1) SSA and CMS have agreed in principle that CMS will “assume responsibility for the Medicare hearings function effective October 1, 2003,” (2) “[w]e believe that the Medicare hearing function is more appropriately housed within CMS, and we are moving forward to achieve this,” and (3) “[w]e are considering alternative approaches, including the possibility of using mechanisms other than ALJs . . . . Despite a recent court ruling lifting the moratorium, it is unclear . . . when agencies will again be able to hire ALJs . . . . Our budget seeks a way around this problem by including appropriation language that, if enacted, will give the Secretary the option to consider other approaches.”<sup>64</sup>

The SSA Commissioner confirmed that the transfer of function was expected to take place on October 1, 2003, when she testified

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62. CCH NetNews, Medicare and Health Highlights (Mar. 2003) (*quoting* CCH Washington Bureau (March 19, 2003)) *available at* <http://hr.cch.com>.

63. *Id.*

64. *Hearing on the Fiscal Year 2004 President's Budget Request for CMS Before the Subcommittee on Departments of Labor, Health and Human Services, and Education, and Related Agencies of the House Committee on Appropriations*, 108th Cong. (1st Sess. 2003) (statement of Thomas A. Scully, CMS Administrator).

before the same subcommittee on March 4, 2003, regarding the Fiscal Year 2004 Appropriations Requests for SSA

Beginning with FY 2004, consistent with the Administration's plan to transfer the Medicare hearings function to the [DHHS], SSA's annual budget request does not include the resources that would be needed to process Medicare hearings. The President's budget now includes the Medicare hearings function under the [DHHS], which is accountable by law for management and administration of the Medicare program.<sup>65</sup>

Shortly after the *Times* article was reprinted and its contents became a topic of editorial commentary around the country,<sup>66</sup> and after CMS Administrator Scully made his statements regarding the Medicare appeals process, Members of Congress added language to various bills that were pending about the transfer of the Medicare appeals function now performed by SSA ALJs back to the DHHS Secretary that reflected a recognition by Congress of the importance of separating the adjudication function of an agency from its policymaking functions. As is described in the remainder of this subpart, the language added to the bills, including the one that was enacted, demonstrated a consensus in Congress that ALJs must hear and decide Medicare appeals and must be in a DHHS administrative unit that is organizationally and functionally separate from CMS and its contractors.

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65. *Hearing on the Fiscal Year 2004 Appropriation Requests for SSA Before the Subcommittee on Departments of Labor, Health and Human Services, and Education, and Related Agencies of the House Committee on Appropriations*, 108th Cong. (1st Sess. 2003) (statement of Jo Anne B. Barnhart, SSA Commissioner).

66. *See, e.g.* Kathleen O'Connor, Editorial, *Medicare Appeal Process Should not be Weakened*, SEATTLE TIMES, May 7, 2003, at A1; Editorial, *Medicare Appeals; Seniors Need Right to Contest Decisions*, DALLAS MORNING NEWS, March 24, 2003, 14A; Editorial, *Tilt! Medicare Looks to Rig Appeals System in its Favor*, PHILADELPHIA INQUIRER, March 20, 2003. *See generally* Pear, *supra* note 58 (excerpted and reprinted in several national news publications, including the *eseret News*, *Houston Chronicle*, *Milwaukee Journal Sentinel*, *Orlando Sentinel*, *San Diego Union-Tribune*, and *Seattle Times*).

On April 11, 2003, the House Committee on Ways and Means amended the section of the Medicare Regulatory and Contracting Reform Act of 2003 that addresses the transfer of responsibility for Medicare appeals<sup>67</sup> to provide that the ALJs will be placed by the DHHS Secretary “in an administrative office that is organizationally and functionally separate from [the CMS] and its contractors.” The Committee also amended this section to require that ALJs report to and be supervised by only the DHHS Secretary or his immediate subordinate upon the Secretary’s delegation of authority.<sup>68</sup> These steps are required expressly to assure ALJ independence in hearing and deciding Medicare appeals.<sup>69</sup> On April 29, 2003, the House Committee on Energy and Commerce identically amended the same subsection, with the except that ALJs will report to and be supervised by only the DHHS Secretary.<sup>70</sup> The version of the bill that was reported to the House on April 29, 2003, included the Energy and Commerce Committee’s version of the section that required the ALJs to have administrative separation from CMS and its contractors and report only to the DHHS Secretary.<sup>71</sup>

On May 22, 2003, the Fair and Impartial Rights (FAIR) for Medicare Act of 2003 was introduced in the Senate by Senator Debbie Stabenow. FAIR would not only require the ALJs who decide Medicare appeals to have administrative separation from CMS within DHHS and report only to the DHHS Secretary, but also would (1) require the use of ALJs appointed pursuant to the APA to hear and decide Medicare appeals under 42 U.S.C. § 1395ff, and (2) bind the ALJs only by the applicable statutes and regulations and rulings that are publicly promulgated as per the APA.<sup>72</sup>

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67. MEDICARE REGULATORY AND CONTRACTING REFORM ACT OF 2003, H.R. 810, 108th Cong. § 401 (1st Sess. 2003).

68. *Id.*

69. H.R. REP. NO. 108-074, pt. 1, § 401(b)(2) (2003). This subsection is entitled *Assuring Independence of Judges*.

70. H.R. REP. NO. 108-074, pt. 2, § 401(b)(2) (2003).

71. H.R. 810, 108th Cong., 1st Sess., § 401(b)(2) (2003).

72. FAIR AND IMPARTIAL RIGHTS FOR MEDICARE ACT OF 2003, S. 1127, 108th Cong., 1st Sess. (2003). The bill had 13 co-sponsors in the Senate. See Cosponsors Report, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN01127:@@@P>.



Many of the provisions of the Medicare Regulatory and Contracting Reform Act of 2003, including the section that addresses the transfer of responsibility for Medicare appeals from SSA to DHHS, were carried over to the Medicare Prescription Drug and Modernization Act of 2003 that was introduced in the House as H.R. 1 and Senate as S. 1 in June 2003 and passed shortly thereafter by both.<sup>73</sup> The Senate version of the Medicare appeals transfer section required steps to be taken to ensure ALJ independence, including administrative separation of ALJs from CMS and the Center for Medicare Choices.<sup>74</sup> However, no reference to administrative independence from CMS' contractors was made, and to whom the ALJs would report was not specified.<sup>75</sup>

The provision in the House version of the Medicare appeals transfer section regarding the assurance of ALJ independence was identical to the strong provision in H.R. 810 that was reported to the House: the ALJs are required to have administrative separation from CMS and its contractors and report only to the DHHS Secretary.<sup>76</sup> On July 7, 2003, after passage of the House version of the bill in the Senate, the Senate version of the bill was incorporated into the House version as a Senate amendment, the Senate requested that the bill and Senate amendments be conferenced, and the Senate appointed Senate conferees.<sup>77</sup> Upon the House rejection of the Senate amendments on July 14, 2003, the Speaker appointed House conferees to consider the bill and Senate amendments.<sup>78</sup>

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73. H.R. 1, § 931, 108th Cong., 1st Sess. (2003), H.R. 2473, § 931, 108th Cong., 1st Sess. (2003); S. 1, § 511, 108th Cong., 1st Sess. (2003). H.R. 2473 is an earlier version of H.R. 1.

74. S. 1 § 511.

75. S. 1, § 511(a)(2)(H).

76. H.R. 1, § 931(b)(2).

77. H.R. 1, 108th Cong. (2003), Bill Summary and Status Report for H.R. 1, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR00001:@@S>.

78. H.R. 1, 108th Cong. (2003), Bill Summary and Status Report, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR00001:@@S>. On July 24, 2003, the conferees reported that they had reached an agreement on the regulatory and contracting reform portion of the bill, which includes the Medicare appeals transfer section, 931. The conferees' press release through the House Ways and Means Committee stated that the agreed upon provision "strengthens the independence of reviewers in the appeals process". Press Release, House Committee on Ways and Means, Medicare Conferees Reach Bipartisan Agreement

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003, H.R. 1, became law on December 8, 2003, with the strong House version of the Medicare appeals transfer section intact: ALJs will hear and decide Medicare benefits administrative appeals, the ALJs are required to have administrative separation from CMS and its contractors, and the ALJs will report only to the DHHS Secretary.<sup>79</sup> By April 1, 2004, the SSA Commissioner and DHHS Secretary must submit a plan to Congress and the U.S. Comptroller General for the transfer of the ALJ function regarding Medicare appeals from SSA to DHHS that includes provisions consistent with the new statutory requirements to ensure the independence of ALJs.<sup>80</sup>

Laudably, Congress recognized that having the ALJs report directly to the DHHS Secretary will eliminate undue pressures upon the adjudicators by the CMS management who directly are responsible for making and implementing Medicare program policy. However, the DHHS Secretary is the chief policymaker for all of the programs under his purview, including Medicare, so that the inherent conflict of policymaker intrusion into the adjudication function from the policymaker's desire to control the decisionmaker and the outcome of the decisions still will be present.

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on Regulatory and Contracting Reforms (July 24 2003), *available at* <http://waysandmeans.house.gov/News.asp?FormMode=print&ID=103>.

79. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. 108-173, 117 Stat. 2066, §§ 931(a), 931(b)(2). The subsection of the Medicare appeals transfer section entitled "Assuring Independence of Judges" states as follows:

The Secretary shall assure the independence of administrative law judges performing the administrative law judge functions transferred under paragraph (1) from the Centers for Medicare & Medicaid Services and its contractors. In order to assure such independence, the Secretary shall place such judges in an administrative office that is organizationally and functionally separate from such Centers. Such judges shall report to, and be under the general supervision of, the Secretary, but shall not report to, or be subject to supervision by, another officer of the Department of Health and Human Services.

§ 931(b)(2).

80. Pub. L. 108-173, 117 Stat. 2066, §§ 931(a)(1), 931(a)(2)(H).

Separation of the appellate administrative adjudication function from DHHS is warranted by (1) the conflict inherent in a policymaker supervising the adjudicators of appeals from decisions made in the name of the policymaker, and (2) the agency policymakers' recent demonstration of the desire and intention to intrude profoundly into the ALJ adjudication function for Medicare appeals, until Congress intervened and passed the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 with the Medicare appeals transfer section.

*C. The Need to Separate the Appellate Administrative  
Adjudication Function from the Social Security  
Administration*

Congress made SSA independent of the DHHS in 1994 to ensure that "policy errors resulting from inappropriate influence from outside the agency such as those occurring in the early 1980s do not recur in the future."<sup>81</sup>

However, Congress apparently was incorrect in assuming that the policy errors that led to SSA policymakers' interference with ALJs' decisional independence came only from influences outside SSA. The problems have been within SSA, as is shown by the continuation and proliferation of inappropriate policy, policy implementation, and management errors that have affected the impartial appellate administrative review of Social Security Act claims, as is described in this part. Leaving the adjudication function of OHA under the administration of SSA is not compatible with administrative decisional independence and erodes the agency mission of providing full and fair hearings for Social Security claimants.

In 1935, the Supreme Court held that the desirability of the neutral exercise of expertise and impartiality of decisionmaking by Executive Branch agencies warranted the power of Congress to create independent regulatory agencies and commissions to insulate

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81. *Characteristics of Independent Executive Agencies*, Congressional Research Service CRS-4-CRS-5 (July 25, 1996), (statement by Rogelio Garcia to House Subcommittee on Social Security (*quoting*, SOCIAL SECURITY ADMINISTRATION REFORM ACT OF 1994, H.R. CONF. REP. NO. 103-670, at 90 (2d Sess. 1994)).

agency officers from at will removal by the President.<sup>82</sup> In 1955, the Hoover Commission strongly advocated the separation of the adjudication function of Executive Branch agencies from the agencies to protect the claimants' due process rights:

Where the proceeding before the administrative agency is strictly judicial in nature, and the remedy afforded by the agency is one characteristically granted by the courts, there can be no effective protection of private rights unless there is a complete separation of the prosecuting functions from the functions of decision.<sup>83</sup>

The rationales for changing how the adjudication of Social Security cases is done reveals the nature of the change that still is needed nearly fifty years since the Hoover Commission report: separation of the appellate administrative adjudication function of OHA into an entity that is independent of the political policy making and implementation portions of the SSA. The rationales are as follows.

The SSA has a long history of trying to use the adjudicatory function to implement policy, rather than just to decide cases on their merits. This practice undermines the ALJs' decisional independence and their ability to provide the claimants with timely, impartial, high quality and fair decisions of their claims. Examples that have a history before the SSA became an independent agency in 1994 include the following:

1. SSA's ongoing "non-acquiescence" with decisions by the Federal Circuit Courts of Appeal. The SSA has a history of non-acquiescence

since the SSA was established. [SSA] follows only the decisions of the Supreme Court of the United

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82. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

83. Revesz, *supra* note 37, at 1118-1119 (*quoting*, COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, LEGAL SERVICES AND PROCEDURES: A REPORT TO CONGRESS, 84-85 (1955)).

States, or those decisions which [SSA] decides to adopt by changing the regulations and those decisions in which [SSA] decides to acquiesce. The system is intended to insure that claimants in all parts of the country are governed by the same laws, rules and regulations.<sup>84</sup>

Non-acquiescence forces ALJs to choose between obeying SSA or following the law as interpreted by the Circuit courts and risk the approbation of their employer.<sup>85</sup>

The concept of non-acquiescence was created by the Internal Revenue Service in the 1920s as a device to signal its intention not to follow a decision that was issued by the Board of Tax Appeals, which Congress created in 1924 to provide an independent tribunal to hear taxpayers' appeals from tax deficiency notices before they paid the tax. The IRS continued its practice of non-acquiescence after the Board of Tax Appeals became the Tax Court.<sup>86</sup> The SSA has gone beyond the IRS policy by following a policy of non-acquiescence with Federal Circuit Courts of Appeals decisions. The SSA non-acquiesced in a Circuit Court decision ten times between 1968 and 1986 by issuing Social Security non-acquiescence Rulings that are binding on the agency by regulation.<sup>87</sup>

2. The SSA's Bellmon Review Program in the early 1980s was a process by which SSA had the Appeals Council do "own motion" review of 25% to 100% of only the favorable decisions issued only by ALJs who the SSA had targeted as having high allowance

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84. *Assoc. of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1139 (D.D.C. 1984).

85. Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U. L. REV. 1, 8-10 & n.60 (1987).

86. Revesz, *supra* note 37, at 1112 n.9; Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471, 474 n.5, 478 n.17 (1986).

87. Maranville, *supra* note 86, 478 n.15.

rates of 70% or more.<sup>88</sup> In 1983, the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs held hearings on the ALJs' role in the Title II disability insurance program and issued a report that stated its findings:

The principal findings of the Subcommittee is that the SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in the Social Security Disability Program....[The Subcommittee found that the SSA was limiting the decisional independence of ALJs through its Rulings, its non-acquiescence to federal court decisions, and its increasing of case quotas that reduced the time an ALJ could spend on each case to develop additional evidence that may support an allowance decision, among other things.] The APA mandates that the ALJ be an independent, impartial adjudicator in the administrative process and in so doing separates the adjudicative and prosecutorial functions of an agency. The ALJ is the only impartial, independent adjudicator available to the claimant in the administrative process, and the only person who stand between the claimant and the whim of agency bias and policy. If the ALJ is subordinated to the role of a mere employee, an instrument and mouthpiece for the SSA, then we will have returned to the days when the agency was both prosecutor and judge.<sup>89</sup>

3. The wholesale cessation of benefits of hundreds of thousands of recipients during 1980-1984 without the option to continue benefits pending appeal.<sup>90</sup> Remedial legislation was necessary to end the practice.<sup>91</sup>

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88. The details of how the Bellmon Review was conducted and its impact on the ALJs' decisional independence are set forth in *Heckler*, 594 F.Supp. at 1134-1136, and Rains, *supra* note 85, at 12-15.

89. S. REP. NO. 98-111 (1983).

90. Rains, *supra* note 85, at 7-8.

91. *Id.*

4. The longstanding preoccupation with the production of decisions in quantity at the expense of quality that has undermined the federal courts' respect for SSA ALJ decisions and resulted in a *de facto* appellate standard of review that is unattainably high, rather than the substantial evidence rule that is supposed to be applied.
5. There were many incidents of SSA management decisions during the 1980s to attempt to compel individual judges to reduce their allowance rate, to discipline or threaten to discipline ALJs for failure to meet production quotas, to control the content of ALJ decisions, to discourage the ALJs from using medical and vocational experts at their hearings, and ignoring its own regulations regarding the sequential evaluation process to deny mental impairment disability claims, among other things.<sup>92</sup>

The pitched battle that the SSA ALJs had to wage against SSA during the 1980s to preserve the independent decisionmaking and due process under the APA for Social Security claimants was such that, in 1986, the President of the American Bar Association presented the SSA ALJs with an award to recognize their efforts to preserve the hearing process. The award states

[t]hat The American Bar Association Hereby Commends The Social Security Administrative Law Judge Corps For Its Outstanding Efforts During The Period From 1982-1984 To Protect The Integrity Of Administrative Adjudication Within Their Agency, To Preserve The Public's Confidence In The Fairness Of Governmental Institutions, And To Uphold The Rule Of Law.<sup>93</sup>

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92. These incidents are enumerated in detail in Rains, *supra* note 85, at 7-15, and Hearing on the Judicial Independence of Administrative Law Judges at the Social Security Administration Before the Subcommittee on Social Security of the House Ways and Means Committee (June 13, 1990) (statement on behalf of the AALJ by Ronald G. Bernoski, Secretary).

93. August 1986 ABA award to SSA ALJs (on file with author). See, Paul Verkuil and Jeffrey Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases: A Report to the Social Security Advisory Board* 63, n. 234 (March 2002), available at [www.ssab.gov/verkuillubbers.pdf](http://www.ssab.gov/verkuillubbers.pdf) (Last visited Jan.

Since the SSA became an independent agency in 1994, the SSA policy and management incursions into the ALJs' decisional independence have continued, as is explained more fully below, including:

1. Long term and ongoing "non-acquiescence" by SSA with decisions by the Federal Circuit Courts of Appeal,
2. The current Quality Assurance Review program, with its abuse of the adjudicatory purpose of the Appeals Council by having it implement SSA policy by reviewing only fully favorable ALJ decisions on its own motion,
3. Statements by senior SSA management that the SSA is not required to hold hearings pursuant to the APA notwithstanding that SSA's hearing process uses APA judges who by law can conduct only APA hearings,
4. Statements by senior SSA management that the SSA has the power to discipline or remove ALJs by proceedings brought before the MSPB based upon a failure to decide a quota level of cases each month, which is contrary to the APA, law set forth in *Nash v. Bowen*, agency policy stated in Social Security Commissioner Gwendolyn King's memo on the Temporary Suspension of Numeric Performance Goals, and the agreement in the *Bono* settlement.<sup>94</sup>
5. SSA's attempt during the summer of 1999 to discharge the Chief ALJ for reasons not related to good cause,
6. SSA's reorganization in 1999-2000 of OHA's entire hearings procedure with the Hearing Process Improvement Plan without

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20, 2003) (*citing*, Charles Bono, *Administrative Report*, JUDGES' J., Winter 1992, at 23, 41).

94. *Nash v. Bowen*, 869 F.2d 675 (2d Cir. 1989), *cert. den.*, 493 U.S. 813 (1989); Memorandum from Gwendolyn King, Social Security Commissioner, on the Temporary Suspension of Numeric Performance Goals (March 5, 1990) (on file with author).



consulting with the ALJs, which included, among many other things, a substantial reduction in the ALJs' role in the pre-hearing development of the case records and a reduction in the control by ALJs over their work product, and

7. SSA's longstanding preoccupation with the production of decisions in quantity at the expense of quality.

In 1999, the Federal Agency Compliance Act was introduced in the House and Federal Bureaucracy Accountability Act of 1999 was introduced in the Senate to bar the federal agencies' non-acquiescence policy,<sup>95</sup> which is the latest of a series of Congressional efforts to end the practice.<sup>96</sup> The report by the House Committee on the Judiciary severely criticized SSA for "its repeated nonacquiescence in the face of contrary appellate court rulings..."<sup>97</sup> and states that the bill is based on a recommendation by the Judicial Conference of the United States that federal agencies be barred from non-acquiescence with federal circuit court precedents.<sup>98</sup> The Judicial Conference explained that legislation is needed because "unjustified nonacquiescence 'undermines the fundamental principle that that an appellate court's decision on a particular point of law is controlling precedent for other cases raising the same issue.'"<sup>99</sup> "Nonacquiescence 'violates all our concepts of the rule of law existing in this country for more than 200 years,'" according to a Circuit Court of Appeals Judge who testified at a Committee hearing regarding an earlier similar bill.<sup>100</sup> The House Judiciary Committee

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95. H.R. 1924, 106th Cong. (1st Sess. 1999), S. 932, 106th Cong. (1<sup>st</sup> Sess. 1999).

96. H.R. REP. NO. 106-976, at 4-5 nn.3 & 8 (2000), available at <http://thomas.loc.gov/cp106/cp106query.html>.

97. *Id.* at 4-8.

98. *Id.* at 2, citing, Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, commentary on Recommendation 11, at 35 (1995), available at <http://www.uscourts.gov/lrp/CVRPGTOC.HTM>.

99. *Id.* 4-6, text at n.11.

100. *Id.* 6-7, text at n.14 (citing, *Hearing on the Federal Agency Compliance Act, H.R. 1544, Before the House Committee On the Judiciary*, 105th Cong., at 11 (1st Sess. 1997) (statement of Hon. Stephen H. Anderson, Judge, U.S. Court of Appeals for the 10th Circuit)).

report makes it plain that SSA clearly is the most prominent practitioner of non-acquiescence. In 1996, SSA Commissioner strongly was rebuked by the Circuit Court of Appeals for the Eighth Circuit for giving no binding effect to controlling Circuit precedent until the SSA determined how the case should be implemented:

Regardless of whether the Commissioner formally announces her acquiescence, however, she is still bound by the law of this circuit and does not have the discretion to decide whether to adhere to it. '[T]he regulations of [the SSA] are not the supreme law of the land. 'It is, emphatically, the province and duty of the judicial department, to say what the law is', and the [Commissioner] will ignore that principle at [her] peril.'<sup>101</sup>

That an act of Congress should be necessary to compel a federal agency to follow the law of the federal appellate courts is extraordinary.

On January 31, 1997, the Commissioner of Social Security issued to the SSA Executive Staff a memorandum of law from the SSA Office of the General Counsel entitled *Legal Foundations of the Duty of Impartiality in the Hearing Process and its Applicability to Administrative Law Judges* (the "Impartiality Memo"), copies of which were distributed by the Associate Commissioner of the Office of Hearings and Appeals to all OHA employees. Contrary to its title, the bulk of the Impartiality Memo asserts the validity of its non-acquiescence policy as supreme over the ALJs' judicial independence in making decisions,<sup>102</sup> and then sets forth in detail the results of the General Counsel's research to find the outer limits of all of the ways and things for which ALJs may be disciplined.<sup>103</sup> Just two quotes

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101. *Id.* at 7-8 n.19 (quoting, *Hutchison v. Chater*, 99 F.3d 286, 287-288 (8th Cir. 1996) (citations omitted)).

102. Memorandum from the SSA Office of the General Counsel, *Legal Foundations of the Duty of Impartiality in the Hearing Process and its Applicability to Administrative Law Judges*, issued by the Commissioner of Social Security to the SSA Executive Staff (January 31, 1997) [hereinafter *Impartiality Memo*], at 4-5 (on file with author).

103. *Id.* at 7-21.

from the Impartiality Memo demonstrates the SSA's hostility to the ALJs' independence in the adjudication of the claims and desire to control the ALJs in the performance of their duties:

'In the absence of an instruction to apply court of appeals holdings to the cases before them, SSA adjudicators are obliged to apply agency policy and agency interpretations of the law.' In matters of law and policy, the Agency head has primacy. An ALJ is bound to follow Agency policy even if, in the ALJ's opinion, the policy is contrary to law.<sup>104</sup>

Thus, in 1997, SSA unabashedly set itself above the rule of law as interpreted by the federal Circuit courts.

Second, although the "Impartiality Memo" sets forth a recognition that the APA<sup>105</sup> limits SSA's ability to discipline an ALJ only to certain disciplinary actions after good cause is established and determined by the Merit Systems Protection Board ("MSPB") after an opportunity for a hearing before the MSPB,<sup>106</sup> the General Counsel proceeded to rationalize making an end run around the APA to justify the SSA's current Quality Assurance Review program practice of having the Appeals Council do "own motion" review of only favorable decisions by the ALJs and remand them for new proceedings, if they are found to be not supported by substantial evidence in the record or defective in any respect. This practice subjects the ALJs' favorable decisions to more scrutiny than unfavorable decisions, which works to the detriment of the claimants and undercuts the perception of fairness and impartiality of agency adjudication of administrative claims that the APA is intended to foster. A federal district court found that SSA's Bellmon Review Program in the 1980s had the Appeals Council do "own motion" review of 25% to 100% of only the favorable decisions issued only by ALJs who the SSA targeted as having high allowance rates. The court also found that the Bellmon Review, together with SSA's

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104. *Id.* at 5-6 (quoting, *Stieberger v. Sullivan*, 738 F. Supp. 716 (S.D.N.Y. 1990)).

105. 5 U.S.C. § 7521 (2001).

106. *Impartiality Memo*, *supra* note 102, at 8-9.

practices of non-acquiescence, having ALJs who have a high allowance rate attend peer counseling, and threatening MSPB disciplinary actions was an “unremitting focus on allowance rates in the individual ALJ portion of the Bellmon Review Program [that] created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof.”<sup>107</sup> The newly independent SSA decided it is legally permissible to again do “own motion” review only of favorable decisions, so long as only ALJs with high allowance rates are not the only ones whose cases are reviewed:

Notwithstanding this finding [in *Heckler*], the district court stated that the Agency could ‘gather data and form an opinion of an ALJ’s performance,’ and that nothing prohibited the Agency from calculating and maintaining such data. *Id.* at 1140-41. Implicit in this analysis is the concept that while targeting only ALJs with high allowance rates might signify pressure on the ALJs to deny more cases, thus undermining ALJs’ impartiality, an unbiased system of review that otherwise sought to identify cases in which Agency rules and standards had not been properly applied, would not be so tainted. It is thus incorrect to say, as some have, that the APA prevents an agency from setting performance standards for ALJs – only those requirements which impact an ALJ’s ability to decide cases impartially are prohibited.<sup>108</sup>

This statement shows that the independent SSA still believes that targeting only favorable decisions is permissible and now subjects all of its ALJs to such review. SSA’s current Quality Assurance Review Program inherently is unfair and discourages the granting of benefits by ALJs.

SSA ALJs cannot properly exercise their duty of impartiality to the claimants whose rights they adjudicate, the preservation of which is a primary purpose of the APA, when SSA bars them from

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107. *Heckler*, 594 F. Supp. at 1139, 1142-43.

108. *Impartiality Memo*, *supra* note 102, at 16-17.

following the law as interpreted by the Circuit Courts in cases SSA chooses to not recognize and publicly has crafted fine legal arguments to support doing variations of the same policy errors as were made in the 1980s.

SSA's administration of OHA also has been a failure. Management initiatives such as process redesign, process unification, prototype, and, most recently, the Appeals Council Process Improvement Plan ("ACPI") and Hearing Process Improvement Plan ("HPI"), have not achieved their goals.

The Appeals Council, which originally was intended as a policy making body, has failed in its function as the final step in the administrative review of Social Security claims. The Associate Commissioner of OHA is the Chair of the Appeals Council. The Appeals Council consists of AAJs, who are not selected by the civil service procedure established by the APA to ensure impartial decisionmakers who are free of undue agency influence. They are career civil servants who are required to be attorneys with a certain level of experience. Because they do not have the APA protections, Appeals Council AAJs participate in the civil service merit pay system and are reviewed by the Deputy Chair of the Appeals Council, which gives SSA policymakers significant control over the Appeals Council AAJs. Although there is no significant evidence of direct agency pressure to grant or deny more claims, concern has been expressed that

SSA policymakers nevertheless are able to create an adjudicative climate that subtly and indirectly inclines the Appeals Council toward more or fewer awards, noting that the Appeals Council always reflects, to some extent, the interests and style of the OHA Associate Commissioner. Some have expressed the view that the Appeals Council is still perceived in some quarters as an even more partisan 'arm of the [agency].'<sup>109</sup>

In the face of a 66% increase in the number of appeals that the Appeals Council heard from fiscal year 1994 (69,171) to 1999

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109. Koch, Koplow, *supra* note 29, at 236-40.

(115,150), its backlog of pending cases ballooned to 144,525 and the average processing time nearly quadrupled from 118 to 460 days. By January 2000, the average processing time climbed to 556 days. By December 2002, the backlog of pending cases was 58,000 and the average processing time declined to 351 days, which still is triple the time in 1994.<sup>110</sup>

At the same time, the quality of the Appeals Council decision process has plummeted. Cases that were decided by ALJs as long ago as 1995 and 1996 were remanded to ALJs in 2000. Remands in cases that were appealed to the Appeals Council years ago still are occurring. Particularly since the implementation of ACPI, thousands of cases have been remanded only because the tape recording of the ALJ hearing or the entire file was lost by the Appeals Council. Appeals Council decisions often do not include rationales, rarely refer to relevant statutes, regulations and cases, and only sometimes cite SSA Rulings, which reduces the consistency of the decisions. Appeals Council decisions all too frequently rely upon non-material errors that do not affect the results in the case. The unprofessional quality of the Appeals Council decisions has been described by a federal Circuit Court of Appeals Judge:

I have read many administrative law judges' decisions on social security disability cases, all of which the disappointed applicant has asked the Appeals Council to review (as he had to do before he could begin judicial review proceedings), but I can remember only one occasion on which the Appeals Council wrote an opinion, even when the administrative law judge's decision raised difficult questions.<sup>111</sup>

Decisions that are supported by a full rationale still are rare.

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110. Social Security Online, *Questions about Hearings and Appeals, Answer to Question #11, Why does it take so long for the Appeals Council to act on my case?* (Mar. 2003) available at <http://www.ssa.gov>; SSA, *OHA Appeals Council Process Improvement: Action Plan* (March 2000) at 3-4 [hereinafter *Action Plan*]; SSA, OHA Associate Commissioner's Message, *Salute to the Appeals Council* (April 2000) at 1.

111. Rains, *supra* note 85, at 28 (quoting, R. Posner, *The Federal Courts Crisis & Reform* 83, 161 (1985)).

In 1987, the Administrative Conference of the United States ("ACUS") issued a set of recommendations for improving the functioning of the Appeals Council, including reorganization, caseload control, and the quality of the review of cases. ACUS concluded its recommendation by stating that "[i]f the reconstituted Appeals Council does not result in improved policy development or case-handling performance within a certain number of years (to be determined by Congress and SSA), serious consideration should be given to abolishing it."<sup>112</sup>

In 1990, the Federal Courts Study Committee, which was an independent review committee that was formed by Congress in 1988 to study and report on certain federal courts matters and that included members of Congress and the federal judiciary, issued a minority recommendation in its final report that the Appeals Council be abolished and replaced with a Social Security Benefits Review Board with no further review of the ALJs' decisions by the SSA.<sup>113</sup>

In 1995, the Judicial Conference of the United States ("Judicial Conference") advocated legislation to strengthen the Social Security disability claim adjudication process by establishing a new alternative mechanism for the administrative review of ALJ decisions to replace the Appeals Council.<sup>114</sup> The commentary supporting this recommendation and strategy states that its purpose is to expand and improve the speed, accuracy and completeness of the administrative review process so that the frequency of the need to resort to judicial review of such claims is reduced. The 1990 proposal by the Federal Courts Study Committee for a Benefits Review Board was cited as an example of legislation that Congress may enact to improve the administrative review of Social Security Act disability claims.<sup>115</sup>

Although SSA's ACPI Action Plan stated (sixteen years after the ACUS recommendations) that higher productivity, much shorter processing times, and improved public service is necessary, SSA has allowed the Appeals Council functioning to deteriorate for years

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112. Administrative Conference of the United States, Recommendation 87-7, *A New Role for the Social Security Appeals Council*, 1987 ACUS 36 (December 18, 1987).

113. Report of the Federal Courts Study Committee, 58-59 (1990).

114. Judicial Conference, Recommendation 9 and Implementation Strategy 9a, *Long Range Plan for the Federal Courts*, 33 (1995).

115. *Id.*

without regard to the impact on due process and fairness for the claimants. There is still an absence of timely and efficient case processing and high quality decisions at SSA's final stage of administrative review. SSA states that it "will measure the success of the ACPI initiatives by improvements in average processing time, the number of pending appeals, and the productivity per [employee] work year ("PPWY")."<sup>116</sup> No measure of the quality of the Appeals Council decisions is mentioned in the Action Plan, which again demonstrates an absence of quality decisionmaking as an SSA priority.

The failure of the process unification and prototype was the foreshadowing for the failure of HPI. Process unification was an effort to have all DDS and OHA decisionmakers use the same standards for determining claims. The prototype was an elimination of the reconsidered determination step at the DDS level in favor of increased claimant contact and improved medical-vocational evaluations at the initial level with an evaluation of the claimant's credibility. The Social Security Advisory Board's June 2000 *Report of the Board's Study of Process Unification and Prototype and Implementation of the Hearing Process Improvement Initiative in California* ("SSAB California Study") revealed that, even with three years of training, the simultaneous implementation of process unification and the prototype resulted in a marked loss of efficiency, loss of experienced staff from the stress of the now complex job as an examiner, low pay, and an uneven quality of the initial determinations. New staff required close to two years of training to do the complex work demanded by prototype and process unification and half of the training classes dropped out. The move of DDS from focusing on objective medical findings to assessing credibility of the claimant resulted in an inability of the DDS examiners in California to determine more than twelve cases per week even with extensive overtime work, which resulted in longer case processing times and major workload backlogs that required extensive help from other non-prototype offices. The SSA underestimated the experience and quality of staff needed to do this more complex analytical work. However, the increase in the labor-intensive nature of their work did

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116. *Action Plan*, *supra* note 110, at 10.



not result in a decline of the reversal rate of DDS denials at the ALJ level, which was a primary purpose of process unification and prototype.<sup>117</sup>

All of these initiatives were undertaken by the SSA without consulting with the ALJs for their input, including HPI and ACPI, which was a major reorganization of OHA. The SSA's plan to reorganize OHA, which became HPI and ACPI, was not revealed by SSA until shortly before the release of the first version of HPI in July 1999. As late as March 1999, SSA officials as high as the Deputy Commissioner for Disability and Income Security Programs denied the existence of a reorganization plan for OHA to the AALJ, when the planning for the reorganization was known to all for some time.

In SSA's *Strategic Plan 2000-2005*, the SSA states that one of its strategic goals is to

deliver customer-responsive, world-class service...[that includes] strategies specific to improving service to disability applicants:

*Make changes to the hearings and appeals processes focused on reducing processing time and improving efficiency.* Hearing process changes [HPI] include a national workflow model, group-based accountability and enhanced automation and data collection. Appeals process changes [ACPI] include short-term measures, such as case screening and expedited decisionmaking, as well as long-range proposals, such as restructuring and IT improvements designed to enhance service to the public by improving the timeliness of case processing at the Appeals Council.<sup>118</sup>

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117. Social Security Advisory Board, Report of the Board's Study of Process Unification and Prototype and Implementation of the Hearing Process Improvement Initiative in California, at 1-9 (June 2000) [hereinafter SSAB California Study]. These findings are based upon the statements of those interviewed by SSAB, rather than SSAB's own conclusions about the functioning of process unification, prototype and HPI.

118. *Id.* at 23, 28.

The quality of service is assessed mostly by statistical results: the percent of hearings decisions issued within 180 days, percent of final actions on appeals of hearings decisions that are issued within 105 days, average processing times for hearings decisions and for decisions on appeals of hearings decisions, and number of hearings and appeals processed per employee work year. Also, the substantial evidence support rate is used to assess ALJ decisional accuracy “pending development of a new accuracy indicator.”<sup>119</sup> No measure of the quality of the Appeals Council decisions is mentioned in the Strategic Plan. When the SSA Commissioner reported some of SSA’s accomplishments to the House Subcommittee on Social Security in July 2003, she mentioned that the average processing time of a case appealed to the ALJ level was reduced to 255 days in May 2003 from 412 days in fiscal year 2002. However, nothing was said about decision quality.<sup>120</sup>

The SSA Office of Quality Assurance and Performance Assessment, which is not part of OHA, periodically conducts an ALJ peer review process to, among other things, assess whether ALJs’ decisions are supported by substantial evidence in the record, which is the standard of Appeals Council and judicial review of ALJ decisions. The peer review resulted in a finding that 92% of the ALJ denial decisions were supported by substantial evidence, but only 83% of the fully favorable decisions were supported, the latter of which was an improvement over 79% in the prior evaluation.<sup>121</sup> Although ALJs performed the review, it is interesting to note that denial decisions were found to be supported by substantial evidence significantly more often than were allowance decisions.

The HPI plan entailed significant changes in job duties and titles for OHA employees that required new job descriptions for all OHA non-ALJ personnel and also entailed major changes in how cases are prepared for hearing. HPI was an effort to reduce case processing

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119. *Id.* at 30.

120. *Hearing on the SSA Service Delivery Budget Plan Before the House Subcommittee on Social Security of the Committee on Ways and Means*, 108th Cong. (1st Sess., July 24, 2003) (statement of Hon. Jo Anne B. Barnhart, SSA Commissioner).

121. SSA Office of Quality Assurance and Performance Assessment, *Findings of the Disability Hearings Quality Review Process: ALJ Peer Report III* (2000), at ix, 21-32.

time within OHA. OHA and the SSA Commissioner now readily admit that the implementation of the HPI process, which was supposed to reduce the time that cases are pending for a hearing and decision and increase output, did not do so. SSA's report on the implementation of Phase 1 of HPI generally called HPI a success, but the data for the first four months surveyed, May-August 2000, showed that the average processing time and per person work years expended was greater for the HPI cases than the non-HPI cases.<sup>122</sup> So, HPI cases immediately took longer to process and proved to be more labor-intensive than processing the cases in the way it was done before HPI.

The HPI process resulted in significant bottlenecks in: (1) the clerical preparation of the files so that they are an organized record that is marked in exhibit form (known as case "pulling"), (2) the 'certification' of the cases as being done with pre-hearing development and ready for a hearing, and (3) the drafting of decisions by the writing staff who also spent time reviewing and 'certifying' cases as ready for a hearing. These bottlenecks in the workflow first were acknowledged by the SSA in its formal training of the OHA hearing office staffs in the third and last wave of implementation in the fall of 2000 and the OHA Associate Commissioner's November 22, 2000, issue of the HPI newsletter, *HPIdeas*.<sup>123</sup>

ALJs were hearing cases with un-pulled files, and the number of cases heard and decided using the HPI model declined significantly from those previously heard. Formerly, ALJs reviewed the cases and determine what pre-hearing development was needed. The SSAB California Report that was issued in June 2000 also revealed concerns with taking the ALJs out of the pre-hearing record development process until its end, how the clerical function changes "slowed the process and reduced productivity," and that "HPI will require additional resources."<sup>124</sup> Clerical staff also were being rotated among different positions in the OHA hearing offices on a

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122. SSA, *Implementing a New Hearings Process in OHA: Hearings Process Improvement: Phase 1 Implementation Report*, Appendix I (October 2000).

123. SSA OHA Associate Commissioner, *HPIdeas* (November 22, 2000).

124. *SSAB California Report*, *supra* note 117, at 9-10. (These findings are based upon the statements of those interviewed by SSAB, rather than SSAB's own conclusions about the functioning of HPI.)

monthly basis, which permitted no benefit from a learning curve of doing a given job. Thus, HPI quickly resulted in significant additional delays in claimants receiving hearings and decisions on their cases.

In June 2001, the Acting SSA Commissioner testified before the House Subcommittee on Social Security that the HPI implementation was a challenge and took longer to implement than anticipated, and the HPI process “has taken a toll on performance.”<sup>125</sup> The current SSA Commissioner, Jo Anne B. Barnhart, testified before the same Subcommittee in May 2002 that there were “concerns that [HPI] has created even more bottlenecks in the process than it was intended to fix” and explained a number of initiatives to improve case processing time.<sup>126</sup>

In March 2003, the current SSA Commissioner testified before a Congressional subcommittee of the House Committee on Appropriations that “[t]he [HPI] initiative, which was implemented in 2000, has not worked” and that the processing time of Social Security appeals still is “a major concern.” The Commissioner stated that various initiatives would be undertaken to counter the deficits, including ending the requirement that cases be certified as ready to be heard.<sup>127</sup> The SSA Commissioner testified before the House Subcommittee on Social Security in July 2003 that she has implemented initiatives to contract out the copying and assembly of case files (pulling work) and end the practice of rotating hearing office clerks among different positions.<sup>128</sup>

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125. *Hearing on the Social Security Disability Programs’ Challenges and Opportunities Before the House Subcommittee on Social Security of the Committee on Ways and Means*, 107th Cong. (1st Sess., June 28, 2001) (statement of Hon. Larry Massanari, Acting SSA Commissioner).

126. *Hearing on the Challenges Facing the New Commissioner of Social Security Before the House Subcommittee on Social Security of the Committee on Ways and Means*, 107th Cong. (2nd Sess., May 2, 2002) (statement of Hon. Jo Anne B. Barnhart, SSA Commissioner).

127. *Hearing on the Fiscal Year 2004 Appropriation Requests for SSA Before the Subcommittee on Departments of Labor, Health and Human Services, and Education, and Related Agencies of the House Committee on Appropriations*, 108th Cong. (1st Sess., March 4, 2003) (statement of Jo Anne B. Barnhart, SSA Commissioner).

128. Statement of Hon. Jo Anne B. Barnhart, *supra* note 120.

The SSA Commissioner also testified before a Congressional subcommittee of the House Committee on Appropriations in March 2003 that she “will be examining temporary means for supplementing out ALJ corps in adjudicating hearings in the event that the ALJ hiring prohibition continues indefinitely.”<sup>129</sup> In July 2003, the Commissioner testified before the House Social Security Subcommittee that the agency’s ability to reduce appeals case processing time and case backlogs is being restricted by the inability to hire ALJs, but did not mention using non-ALJs.<sup>130</sup>

Now that OPM again is processing agencies’ requests to hire ALJs, the Commissioner made her support of the ALJs and their role in the Social Security disability process clear during her September 25, 2003, testimony before the House Social Security Subcommittee. At the hearing, the Commissioner presented wide-ranging proposals to reform the entire disability process from the initial determination stage through the final administrative decision step. The Commissioner recommended the retention of a claimant’s due process right, upon appeal from the agency’s claim denial, to a *de novo* administrative hearing before an ALJ appointed pursuant to APA. The Commissioner also proposed to abolish the Appeals Council and add ALJs to the final administrative decision step. It is commendable that the Commissioner recognizes that the APA provisions were enacted for the benefit of the claimants and enhance the disability process. The Commissioner also is encouraging input from a wide range of stakeholders to aid in developing the details of her proposals prior to issuing proposed regulations.<sup>131</sup>

The Commissioner’s bold proposals and inclusive process are appreciated. However, even with SSA’s chief policymaker’s best of intentions, the conflict inherent between the need for independence of the appellate adjudication process for the benefit of the claimants and the policymaker’s desire to control the decisionmakers and outcome of claims decisions under programs that the policymaker administers

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129. Statement of Hon. Jo Anne B. Barnhart, *supra* note 127.

130. Statement of Hon. Jo Anne B. Barnhart, *supra* note 120.

131. *Hearing on the Social Security Administration’s Management of the Office of Hearings and Appeals Before the House Subcommittee on Social Security of the Committee on Ways and Means*, 108th Cong. (1st Sess., September 25, 2003) (statement of Hon. Jo Anne B. Barnhart, SSA Commissioner).

continues to emerge. Only those proposals by the Commissioner that bear upon the SSA appellate administrative levels are commented upon in this subpart.

First, there is cause for concern regarding the Commissioner's proposal that would require ALJs to address the content of a prior agency decisionmaker's documents regarding Social Security benefits claims. Currently, a claimant has a right of appeal to an ALJ from an adverse reconsidered determination by the agency of its initial determination of a benefits application. The initial and reconsidered determinations currently are made on behalf of SSA by employees of state Departments of Disability Services ("DDS"). The Commissioner proposes the elimination of the reconsidered determination step. The Commissioner also proposes the creation of an SSA Reviewing Official ("RO"), who would be an attorney and would review a claimant's claim file upon the claimant's appeal from an adverse initial determination by the agency of a benefits application. The RO would have authority to grant a benefits claim but no authority to deny a claim outright.<sup>132</sup>

The Commissioner proposes that, if an RO does not grant a disability claim, the RO will issue either (1) a Recommended Disallowance when the RO believes that the evidence shows that the claimant is not disabled, or (2) a Pre-Hearing Report when the RO believes that the evidence is insufficient to determine eligibility for disability benefits. The Pre-Hearing Report will state what evidence is needed to successfully support the claim. The Commissioner also proposes that, only when an ALJ is granting disability benefits, an ALJ's decision must either state in detail why the RO's Recommended Disallowance is being rejected, or describe the new evidence added since the RO's Pre-Hearing Report that corresponds to the list of evidence that the RO said is needed for a successful claim.<sup>133</sup>

There is no proposal that either requires details in the ALJ's decision regarding why the ALJ is accepting an RO's Recommended Disallowance, or requires a description of the new evidence supporting a denial of the claim in reference to an RO's Pre-Hearing

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132. Statement of Hon. Jo Anne B. Barnhart, *supra* note 131.

133. *Id.*

Report.<sup>134</sup> Therefore, the Commissioner's proposal would require that an ALJ provide a more extensive defense of granting benefits than denying benefits when discussing the RO's Recommended Disallowance and Pre-Hearing Report in the ALJ's decision. Accordingly, the proposal presumes the correctness of the RO's assessment as to what evidence is sufficient to grant or deny a disability benefits claim, which may incorrectly be interpreted as a requirement that the RO's assessment is entitled to some degree of deference.

The Commissioner told AALJ officers on October 24, 2003, that her proposal regarding how an ALJ must address the RO's Recommended Disallowance or Pre-Hearing Report in the ALJ's decision is not intended to interfere with the APA and Social Security Act requirements for an ALJ's decision.<sup>135</sup> However, despite the Commissioner's good intentions for the proposal, the presumption of the correctness of the RO's assessment of the evidence that is embodied in the proposed disparity in the required treatment of the RO's documents by the ALJ that depends upon the outcome of the case does impinge upon the *de novo*,<sup>136</sup> independent nature of the ALJ's hearing and decision process. Holding a *de novo* hearing means to hear a matter anew, as if it is being heard for the first time and no decision previously were rendered.<sup>137</sup> *De novo* review is "independent" review.<sup>138</sup> Accordingly, such an impingement will foster a perception of agency pressure to deny cases, unfairness, and improper deference to the RO documents in ALJ denials among claimants and their representatives that likely will result in an increase in the number of appeals from ALJ denials of benefits.

Moreover, any specific regulatory requirement that the ALJ address the RO's documents would create the potential for erroneous arguments on appeal and appellate findings that an ALJ's decision is deficient for a failure to adequately address or defer to the RO's Recommended Disallowance or Pre-Hearing Report. The standard

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134. *Id.*

135. AALJ President's Report, at 1 (October 27, 2003) (on file with author).

136. The ALJ level of review is a *de novo* review. *Mathews v. Eldridge*, 424 U.S. 319, 339 n. 21 (1976).

137. *Ness v. Commissioner*, 954 F.2d 1495, 1497 (9th Cir. 1992).

138. *Premier Communications Network, Inc. v. Fuentes*, 880 F.2d 1096, 1102 (9th Cir. 1989).

for a sufficient ALJ decision on appeal is whether there is substantial evidence in the record to support the decision, not whether the ALJ adequately addressed the contents of a prior decisionmaker's recommended decision or report.<sup>139</sup>

Therefore, augmenting the proposal to require such statements regarding the RO documents in all ALJ decisions, regardless of the outcome, does not cure all of the issues that the proposal raises. The creation of these issues by the proposal suggests that the proposal is not the most effective way to achieve the Commissioner's apparent goal of greater consistency between the RO and ALJ decisions, since the likely increase in the number of appeals from ALJ denials and appellate error regarding how ALJs address the ROs' documents will defeat any potential for an increase in decision consistency between the RO and ALJ levels that the proposal is intended to achieve.

To preserve the independent, *de novo* nature of the ALJ hearing and decision, the Commissioner should consider omitting a requirement that an ALJ address the RO's documents from her proposed regulations. The APA and Social Security Act already require that an ALJ discuss the evidence in rendering the decision on a disability benefits claim without reference to the outcome of the ALJ's decision or prior agency determinations. The APA requires that all agency administrative decisions, including ALJ "decisions...shall include a statement of (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof."<sup>140</sup> Title II of the Social Security Act sets forth the elements to be included in agency administrative decisions regarding eligibility for disability benefits:

Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such

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139. "The Appeals Council will review a case if (1) There appears to be an abuse of discretion by the administrative law judge; (2) There is an error of law; (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or (4) There is a broad policy or procedural issue that may affect the general public interest." 20 C.F.R. § 404.970(a).

140. 5 U.S.C. § 557(c).



individual shall contain a statement of the case, in understandable language, **setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.** Upon request by any such individual or upon request by a wife, divorced wife, surviving divorced mother, surviving divorced father husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision.<sup>141</sup>

Decisions regarding supplemental security income eligibility under Title XVI and Medicare eligibility under Title XVIII of the Social Security Act must include the same elements as decisions regarding Title II disability eligibility.<sup>142</sup>

Instead of the proposal of a requirement that an ALJ address the RO's documents, which places a higher burden on ALJs to justify granting benefits than denying them, an effective way to increase the consistency of decisionmaking between the RO and ALJ decision levels would be to require that the RO use the same legal standards for determining disability as those by which the ALJs are bound, rather than the current practice of having the initial agency decisionmakers use a difference and primarily medical set of standards. Since ROs will be attorneys, implementation of legal standards for their decisionmaking will be met with a success that demonstrably has not been possible with non-attorney decisionmakers, such as the failed Process Unification Training for

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141. 42 U.S.C. § 405(b)(1) (emphasis added).

142. 42 U.S.C. §§ 1383(c)(1)(A), 1395ff(b)(1).

DDS decisionmakers and Adjudication Officer initiatives in the 1990s.

Second, there is cause for concern regarding the Commissioner's omission of a claimant's right of appeal from an ALJ's adverse decision to the new final step of administrative review that would replace the Appeals Council, and inclusion of subordinate SSA employees in the new final step. The SSA Commissioner's proposals include replacing the Appeals Council with a "Centralized Quality Control Review" ("CQCR") function within SSA with the final step of administrative review being by "Oversight Panels" of two ALJs and one AAJ upon referral of cases by CQCR staff. The individual ALJ's decision will be the final Commissioner's decision, if it is not reviewed by the CQCR or if it is affirmed by an Oversight Panel. If an Oversight Panel changes the outcome of the decision, then the Oversight Panel decision becomes the final Commissioner's decision. The claimants may appeal any final agency action to a United States District Court, but no right of appeal from an ALJ's decision to an Oversight Panel is stated. AAJs are the subordinate employees who currently serve on the SSA Appeals Council.<sup>143</sup>

The Commissioner's Oversight Panel proposal borrows from the author's proposal for local appellate panels of three ALJs as the final step to replace the Appeals Council in the Social Security Act claims administrative process that is part of the author's detailed proposal written for AALJ for an ALJ-administered independent adjudication agency for Social Security Act benefits cases with the exclusive jurisdiction to make the final administrative decisions of Social Security Act Title II, XVI and XVIII benefits claims. The proposal for the new adjudication agency is the basis for this article.<sup>144</sup>

Under the AALJ proposal, the claimants and the SSA would have a right of appeal of an individual ALJ's decision to an appellate panel staffed by ALJs that would consist of three ALJs who would review the cases regionally or locally. The appellate panels would be akin to the Bankruptcy Court appellate panels. Based upon the Bankruptcy Court experience, the appellate panel model (1) is an appellate system that can handle a large caseload, (2) results in higher quality decisions because of expertise, (3) results in substantially

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143. Statement of Hon. Jo Anne B. Barnhart, *supra* note 131.

144. See, *supra* first unnumbered note.

fewer appeals to the courts and a substantially lower reversal rate by the courts because of the bar's and courts' confidence in the high quality of the decisions, which reflects a higher degree of decision accuracy by three expert decisionmakers working together, (4) results in a substantially reduced federal court caseload, (5) results in a shorter disposition time because the large pool of about 1,000 SSA ALJs permits the timely determination of appeals that cannot take place with a small body such as the Appeals Council, and (6) affords the claimants access to a local appellate process.<sup>145</sup>

The AALJ proposal for local ALJ appellate panels to replace the Appeals Council was favorably and extensively commented upon and recommended for use within SSA OHA in a March 2002 report commissioned by the SSAB.<sup>146</sup> It is the SSAB report that apparently brought the appellate panel proposal to the Commissioner's attention.<sup>147</sup>

I am gratified that the Commissioner is proposing the panel approach to replace the Appeals Council. However, so far, it does not appear from the Commissioner's September 25, 2003, testimony, and public statements that she has made since the hearing that the claimant may appeal an individual ALJ's decision to an Oversight Panel.<sup>148</sup> This is a major departure from AALJ's recommendation that would eliminate many of the benefits of the appellate panel concept, including much greater decisional consistency between the final administrative and initial court levels and fewer appeals to the federal courts. The Commissioner states that the CQCR and Oversight Panels are a quality review process, not an appellate step, as an explanation for why there is no claimant's right of appeal to an Oversight Panel. Another departure from the AALJ proposal is the

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145. See discussion *supra* Part I, text at n. 18 and *infra* Part VIII(E).

146. Paul Verkuil and Jeffrey Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases* 19-21, 56, 63-68 (March 2002), available at [www.ssab.gov/verkuillubbers.pdf](http://www.ssab.gov/verkuillubbers.pdf). This article includes an exhaustive survey of the many recommendations over the last 20 years to abolish the Appeals Council and suggested replacement mechanisms, including the AALJ proposal.

147. The Commissioner referenced Professor Jeffrey Lubbers, one of the authors of the SSAB report, as a source during her testimony. Statement of Hon. Jo Anne B. Barnhart, *supra* note 131.

148. Statement of Hon. Jo Anne B. Barnhart, *supra* note 131; AALJ President's Report, *supra* note 135, at 1.

use of an AAJ, a subordinate SSA employee with no protections for decisional independence, as one member of the three-member Oversight Panels. Also, the Commissioner has not yet determined whether the Panels will be regional or local for better access to the claimants, as AALJ recommends. Finally, the Commissioner has not yet determined whether Panel membership will rotate among the SSA ALJ workforce.<sup>149</sup>

The quality review step posited by the Commissioner to the Oversight Panel level is an appeal, not only quality review, since the outcome of the case may change, and, if it does, the Panel decision becomes the final decision of the Commissioner. Quality review usually involves a post mortem review of closed cases. The claimants must have a right to appeal to the Panels in order for the claimants, SSA, the courts, and the American public to receive the many demonstrated benefits to the Social Security disability process of an appellate panel process, including faster appellate decisions, increased consistency between the final SSA administrative decisions and initial court decisions, and fewer federal court appeals.

Without claimant appeals to the Oversight Panels, the District Courts will be inundated with appeals from the individual ALJ decisions, and will not have the benefits of the higher quality decisions and reduction of caseloads that would result from the better decisions by the Panels. There are about 100,000 claimant appeals to the Appeals Council per year, which would be a burden for the District Courts.<sup>150</sup>

Also, permitting the agency appellate review of an ALJ's decision by an Oversight Panel, which is relatively easier, faster and lower cost than a District Court appeal, but limiting the claimants to only a District Court review of an adverse ALJ decision, raises substantial fairness and due process issues. The omission of the claimants' right to access the final administrative appellate step to review an ALJ's decision increases the risk that erroneous denials of benefits will not be corrected because some claimants, particularly *pro se* claimants, who would be able to pursue a relatively simple administrative appeal will not have the wherewithal to bear the additional burden of prosecuting a court appeal.

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149. AALJ President's Report, *Id.*

150. See discussion *infra* Part VIII(E).

So that Social Security claimants, SSA, the federal courts, and the American public reap the benefits of a Bankruptcy Court appellate panel-style process, the Commissioner should consider modifying her Oversight Panels proposal and issue regulations that provide that (1) a claimant has a right of appeal to the Oversight Panels, (2) the Oversight Panels is the final step of administrative review that must be taken by a claimant in order to seek judicial review of the Commissioner's decision in the claimant's case, (3) only independent decisionmakers may serve on the Oversight Panels, meaning ALJs who have the protections of the Administrative Procedure Act that have been put in place for the benefit of the claimants, (4) the Oversight Panels will be constituted regionally or locally for claimant access, (5) the Oversight Panels will be constituted from the full nationwide SSA ALJ workforce to ensure nationwide ALJ participation, and (6) there will be rotation of Oversight Panel duty among the ALJs in the SSA ALJ workforce to ensure that the Panel ALJs have recent line experience with hearing and deciding cases. All of these suggested modifications are the elements of the Bankruptcy Court appellate panel process that have made that process a demonstrated success.

The 27 AAJs from the Appeals Council may be afforded protections for decisional independence for the benefit of the claimants by grandfathering the AAJs into ALJ status, as was done in the 1970s for the administrative judges who heard SSI cases.<sup>151</sup>

The appellate panel system should result in faster and much higher quality decisions than those produced by the Appeals Council, but only if it functions as an appellate step for both the claimants and agency. A fully developed appellate panel process greatly will enhance the consistency of outcome between the final administrative step and District Court step, and reduce the number of appeals, just as it has between the Bankruptcy Court appellate panels and next level of judicial review. A detailed statement of the ALJ appellate panel

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151. "In 1977, Congress enacted Public Law Number 95-216, containing a section entitled *Appointment of Hearing Examiners*, which deemed the temporary ALJs to be permanent ALJs appointed pursuant to 5 U.S.C. § 3105 of the APA." Arzt, *supra* note 1, at 304 & n. 96 (*citing*, Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 1559 (1977)).

proposal and description of the elements and merits of the Bankruptcy Court experience with the appellate panel process is stated in this article.<sup>152</sup>

Therefore, SSA policymakers' longstanding history of significant intrusions into the ALJ and Appeals Council adjudication function amply warrants separation of the appellate administrative adjudication function from SSA.

#### IV. PRESERVATION OF THE APPLICATION OF THE ADMINISTRATIVE PROCEDURE ACT TO SOCIAL SECURITY ACT BENEFITS ADJUDICATIONS IS ESSENTIAL TO PRESERVE DUE PROCESS AND FAIRNESS FOR THE CLAIMANTS

In 1946, the APA was enacted to, among other things, achieve reasonable uniformity and fairness of the administrative process in the federal government. This includes uniform standards for the conduct of adjudicatory proceedings including the appointment of hearing examiners, who now are ALJs.<sup>153</sup>

As is discussed in section III(C), senior SSA management personnel stated several years ago that SSA is not required to hold hearings pursuant to the APA. Such personnel readily do acknowledge that the SSA hearing process, in fact, uses APA judges and complies with the APA. After these statements, in 2000, the SSA Commissioner issued a written statement in which he confirmed the applicability of the APA to Social Security Act adjudications.<sup>154</sup> The claimants' due process rights are put in jeopardy by assertions that the APA applies only at the sufferance of the SSA, which is the agency that determines their claims, particularly in view of SSA's ongoing policymaking and implementation encroachments upon the independence and impartiality of the ALJs and adjudication process

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152. See discussion *infra* Part VIII(E).

153. *Manual*, *supra* note 1, at 9. The APA, Pub. L. No. 79-404, 60 Stat. 237 (1946), as amended, currently is codified at 5 U.S.C. §§ 551-559 (sets forth an administrative procedure), 5 U.S.C. §§ 701-706 (provides for judicial review of final administrative decisions), and 5 U.S.C. §§ 1305, 3105, 3344, 4301(2)(E), 5335(a)(B), 5372, and 7521 (provisions regarding administrative law judges).

154. Arzt, *supra* note 1, at 318-319 (citing, Letter from Kenneth S. Apfel, SSA Commissioner, to Judge Ronald G. Bernoski, President, AALJ (January 9, 2001) (on file with author)).

that are enumerated above. Title II of the Social Security Act, which sets forth the old age and survivors benefits program, predates the APA and so contains no express reference to it, a style that was continued in the statutes for the additional programs that later were added to the Social Security Act.

Adjudications pursuant to the Social Security Act, including Medicare adjudications, also are adjudications pursuant to the APA because (1) the SSA is an “agency” within the definition in Section 2(a) of the APA, 5 U.S.C. § 551(1), and (2) a Social Security Act hearing is a proceeding that is an “adjudication” within the definition in Section 2(a) of the APA, 5 U.S.C. § 551(7). Because hearings held pursuant to the Social Security Act also are APA adjudications, ALJs appointed pursuant to Section 11 of the APA, 5 U.S.C. § 3105, must preside over the hearings, since none of the narrow exceptions to the use of APA ALJs provided for in the APA apply to Social Security Act adjudications. These principles are established by the unambiguous and repeatedly stated legislative intent of Congress, and are confirmed by the federal courts and the longstanding administrative practice of the SSA and the Office of Personnel Management (“OPM”).<sup>155</sup>

The APA was enacted by Congress after over ten years of studies and proposals “to improve the administration of justice by prescribing fair administrative procedure” in response to “a widespread demand for legislation to settle and regulate the field of Federal administrative law and procedure . . . [and] reasonably protect private parties.”<sup>156</sup> The House Report also described the purpose of the APA:

[I]t is designed to provide for publicity of information, fairness in administrative operation, and adequacy of judicial review. The purpose of the bill is to assure that the administration of government through administrative officers and agencies shall be conducted according to established and published

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155. Arzt, *supra* note 1, at 279; Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment in Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203 (Summer 2002).

156. S. REP. NO. 79-752, at 1, 5 (1945).

procedures which adequately protect the private interests involved, the making of only reasonable and authorized regulations, the settlement of disputes in accordance with the law and the evidence, the impartial conferring of authorized benefits or privileges, and the effectuation of the declared policies of Congress in full.<sup>157</sup>

The House Report regarding the APA cogently describes what the APA does, both in terms of (1) providing the minimum standards for federal administrative due process in the Executive Branch, and (2) delineating different procedures for “legislative” administrative proceedings (rulemaking as an agency’s legislative function) and “adjudicative” administrative proceedings (individual case decisions about rights or liabilities as an agency’s judicial function):

The [APA] is an outline of minimum essential rights and procedures. Agencies may fill in details, so long as they publish them. It affords private parties a means of knowing what their rights are and how they may protect them, while administrators are given a simple framework upon which to base such operations as are subject to the provisions of the bill.

What the [APA] does in substance may be summarized under four headings: 1. It provides that agencies must issue as rules certain specified information as to their organization and procedure, and also make available other materials of administrative law (sec. 3). 2. It states the essentials of the several forms of administrative proceedings (secs. 4, 5, and 6) and the general limitations on administrative powers (sec. 9). 3. It provides in more detail the requirements for administrative hearings . . . (secs. 7 and 8). 4. It sets forth a simplified statement

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157. H. REP. NO. 79-1980, at 18 (1946).



of judicial review designed to afford a remedy for every legal wrong (sec. 10).

The public information section is basic, because it requires agencies to take the initiative in informing the public. In stating the essentials of the different forms of administrative proceedings, the bill carefully distinguishes between the so-called legislative functions of administrative agencies (where they issue general regulations) and their judicial functions (in which they determine rights or liabilities in particular cases). It provides quite different procedures for the “legislative” and “judicial” functions of administrative agencies. In the “rule making” (that is, “legislative”) function it provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration before the issuance of general regulations (sec. 4). No hearings are required by the bill unless statutes already do so in a particular case. Similarly, in “adjudications” (that is, the “judicial” function) no agency hearings are required unless statutes already do so, but in the latter case the mode of hearing and decision is prescribed (sec. 5). Where existing statutes require that either general regulations (called “rules” in the bill) or particularized adjudications (called “orders” in the bill) be made after agency hearing or opportunity for such hearing, then section 7 spells out the minimum requirements for such hearings, section 8 states how decisions shall be made thereafter, and section 11 provides for examiners to preside at hearings and make or participate in decisions.

While the administrative power and procedure provisions of sections 4 through 9 are law apart from court review, the provisions for judicial review afford

parties a method of enforcing their rights in proper cases (sec. 10).<sup>158</sup>

In the Manual, the Attorney General stated that “[t]he Administrative Procedure Act may be said to have four basic purposes: 1. To require agencies to keep the public currently informed of their organization, procedures and rules (sec. 3). 2. To provide for public participation in the rule making process (sec.4). 3. To prescribe uniform standards for the conduct of formal rule making (sec. 4(b)) and adjudicatory proceedings (sec. 5), i.e., proceedings which are required by statute to be made on the record after opportunity for an agency hearing (secs. 7 and 8). 4. To restate the law of judicial review (sec. 10).<sup>159</sup>

As Congress observed in its legislative history supporting its legislation that made the SSI hearing examiners permanent ALJs, the APA

is the general scheme under which rule making and adjudicatory procedures are carried out by agencies in the executive branch. Section 556 of title 5 requires that (unless the agency itself presides) administrative law judges (ALJ’s) shall preside over all rule making or adjudicatory proceedings to which the APA applies.<sup>160</sup>

An agency is required to use APA ALJs for its adjudications only if it is required to perform its adjudicatory proceedings pursuant to the APA. The APA puts many protections in place to ensure that ALJs are independent and impartial in adjudicating administrative claims. In *Butz v. Economou*, the Supreme Court elaborated upon the reasons that Congress enacted the APA’s many protections to assure the decisional independence of ALJs and enumerated those protections:

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158. *Id.* at 16-17.

159. *Manual*, *supra* note 1, at 9.

160. *Conversion of Temporary Administrative Law Judges*, H.R. DOC. NO. 95-617, at 2 (1977).

The [APA] process of agency adjudication is currently structured so as to assure that the [ALJ] exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work, see, e.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36-41 (1950), and because they were often subordinate to executive officials within the agency, see *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131 (1953). Since the securing of fair and competent hearing personnel was viewed as 'the heart of formal administrative adjudication,' Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of [ALJs]. They may not perform duties inconsistent with their duties as [ALJs]. 5 U.S.C. § 3105 . . . When conducting a hearing under § 5 of the APA, 5 U.S.C. § 554 . . . [an ALJ] is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. 5 U.S.C. § 554(d)(2) . . . Nor may [an ALJ] consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. [5 U.S.C. § 554 (d)(1)]. [ALJs] must be assigned to cases in rotation so far as is practicable. [5 U.S.C. § 3105]. They may be removed only for good cause established and determined by the Civil Service Commission [now OPM] after a hearing on the record. [5 U.S.C. §

7521]. Their pay is also controlled by the [OPM.] [5 U.S.C. § 5372].<sup>161</sup>

There are additional ALJ safeguards. The appointment of ALJs pursuant to section 3105 is effected by a competitive civil service process administered by the OPM.<sup>162</sup> The only exceptions to the applicability of the competitive civil service laws to ALJs are the provisions of the APA that were designed to make ALJs partially independent of the agencies that employ them. “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 decisionmaking.”<sup>163</sup> These exceptions are carried over into the OPM regulations. “Except as otherwise provided in this subpart, the rules and regulations applicable to positions in the competitive service apply to administrative law judge positions.”<sup>164</sup> The additional safeguards include the following:

1. The civil service “requirement of a probationary and career-conditional period before absolute appointment does not apply to an appointment to an administrative law judge position.”<sup>165</sup>
2. ALJ pay is regulated by OPM independent of agency recommendations or ratings.<sup>166</sup> “An agency may not grant a monetary or honorary award under 5 U.S.C. 4503 for superior accomplishment by an administrative law judge in the performance of adjudicatory functions.”<sup>167</sup>

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161. *Butz v. Economou*, 438 U.S. 478, 513-514 (1978).

162. 5 U.S.C. §§ 1104(a)(2), 1305 (2002).

163. *Nash v. Califano*, 613 F.2d 10, 20 (2nd Cir. 1980).

164. 5 C.F.R. § 930.201(b) (2003).

165. 5 U.S.C. §§ 1305, 3105, 3323(b), 4301(2)(D) (2003); 5 C.F.R. § 930.203a(b).

166. 5 U.S.C §§ 554, 5372 (2002).

167. 5 C.F.R § 930.210(b) (2003).

3. ALJs appointed pursuant to Section 3105 are excluded from the definition of “employee” for the purposes of the statutes that govern the performance appraisal of federal employees.<sup>168</sup> “An agency shall not rate the performance of an administrative law judge.”<sup>169</sup> Since “administrative law judges are not given performance ratings, the OPM regulations in part 351 of [Title 5, Chapter 1] referring to the effect of performance ratings on retention standing are not applicable to administrative law judges.”<sup>170</sup>
4. Unlike other competitive service federal employees, ALJs are subject to adverse action by the employing agency, including removal, suspension, reduction in grade, reduction in pay, or a furlough under thirty-one days, “only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”<sup>171</sup> “Procedures for adverse actions by agencies under the OPM regulations in part 752 of [Title 5, Chapter 1] are not applicable to actions against administrative law judges.”<sup>172</sup> This provision prevents the President or his appointees within the agencies from summarily removing ALJs at will, which helps to protect APA adjudications from political intrusion.<sup>173</sup> ALJs are subject to ethics standards and can be removed for misconduct after a hearing before the MSPB.<sup>174</sup>

In *Federal Maritime Commission*, the Supreme Court recently reaffirmed (1) the applicability of the APA to federal administrative adjudications, (2) “the similarities between the role of an ALJ and that of a trial judge,” (3) “the numerous common features shared by administrative adjudications and judicial proceedings,” and (4) the

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168. 5 U.S.C. § 4301(2)(D) (2002).

169. 5 C.F.R. § 930.211 (2003).

170. *Id.* at § 930.215(b).

171. 5 U.S.C. § 7521 (2002).

172. 5 C.F.R. § 930.214(a) (2003).

173. Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1784 (1985).

174. 5 U.S.C. § 7521 (2002).

importance of the APA structure that ensures the ALJs' independence of agency influence in deciding cases.<sup>175</sup> The Supreme Court relied upon its language in *Butz*,<sup>176</sup> which is quoted here more fully directly from *Butz*:

[F]ederal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process....They are conducted before a trier of fact insulated from political influence. See [5 U.S.C. § 554(d)]. A party is entitled to present his case by oral or documentary evidence [5 U.S.C. § 556(d)], and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. [5 U.S.C. § 556(e)]. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record. [5 U.S.C. § 557(c)].

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See [5 U.S.C. § 556(c)]. More importantly, 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 parties or other officials within the agency.<sup>177</sup>

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175. *Federal Maritime Comm'n. v. South Carolina State Ports Auth.*, 535 U.S. 743, 756-757 (2002).

176. *Id.* at 756 (quoting, *Butz*, 438 U.S. at 513).

177. *Butz*, 438 U.S. at 513-514. See also 5 U.S.C. §§ 554(d), 556(c)-(e), 557(c) (2002).

The decisionmaking independence provided by the APA is not for the benefit of the ALJ but instead is for the protection of the American people. The APA protections are intended to ensure that the American people receive a full and fair due process hearing with a decision based only on the evidence in the hearing record without agency pressure.

The SSA OHA is the largest administrative adjudication body in the United States and hears over 500,000 cases per year. The Supreme Court has observed that “[t]he Social Security hearing system is ‘probably the largest adjudicative agency in the western world.’”<sup>178</sup> The Social Security hearing process is the face of the United States government to most people who seek benefits. How people view that face depends upon the quality of due process they receive.

The APA allows for high quality due process that must be preserved in Social Security Act cases for the benefit of the claimants and Medicare beneficiaries and providers.

#### V. A COURT MODEL CANNOT BE USED FOR APPELLATE ADMINISTRATIVE ADJUDICATIONS PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT

An Article I or Article II court model cannot be used as the format for an Executive Branch agency that performs only an adjudicative function and continues to have the agency’s appellate administrative adjudications performed pursuant to 5 U.S.C. § 551-559 of the APA by APA ALJs. The APA provides that, for its purposes, “agency” means “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include...(B) the courts of the United States.”<sup>179</sup>

A federal Executive Branch “authority,” whether it is an agency or within an agency, is defined by its power to issue a final decision. The power to make a final decision is the key to being an “agency”

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178. *Barnhart v. Thomas*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 376, 382 (2003) (quoting, *Heckler v. Campbell*, 461 U.S. 458, 461 n. 2 (1982)).

179. 5 U.S.C. § 551(1) (2002) (section 2(a) of the original statute).

within the definition of the APA. Congressional legislative history makes it clear that the SSA, which formerly was known as the Social Security Board, expressly has been intended by Congress to be an “agency” covered by the APA.<sup>180</sup> DHHS also is an “agency” covered by the APA, since it is one of the fourteen Executive Branch cabinet departments.<sup>181</sup>

The APA definition of “agency” apparently excludes not only all Article III courts and Article I tribunals in the Judicial Branch, but also all executive branch Article I tribunals that perform judicial review of final administrative agency adjudications and Executive Branch Article II tribunals that are labeled “courts” by Congress and review initial administrative agency adjudications. The “Constitutional” courts are those with judges appointed by the President with the advice and consent of the Senate pursuant to Article III, Section 1, and who hold their offices during good behavior and without diminishment of their salary. Current examples of Article III courts include the Supreme Court, which is specifically created in the Constitution, and the courts established by Congress pursuant to its power to create “inferior courts,” such as the Courts of Appeals (including the twelve geographic circuits and the Federal Circuit), the District Courts, and the U.S. Court of International Trade. The Article I tribunals are the courts established by Congress pursuant to its power under Article I, Section 8, Clause 9, to create “tribunals inferior to the Supreme Court.” Current examples of Article I tribunals that are within the Judicial Branch include the Territorial Courts, U.S. Court of Federal Claims, and U.S. Bankruptcy Courts and Bankruptcy Appellate Panels as units of the District Courts. Current examples of Article I tribunals that are outside the Judicial Branch and are in the Executive Branch include the United States Tax Court, the U.S. Court of Appeals for Veterans Claims, and the U.S. Court of Appeals for the Armed Forces. Congress also has the power to establish Article II Executive Branch agencies for any purpose in furtherance of its powers that are enumerated in Article 1, Section 8, including judicial review of final

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180. A detailed examination of the meaning of “agency” for the purposes of the APA and the APA’s application to Social Security Act adjudications, are set forth in Arzt, *supra* note 1, at 284-289.

181. 5 U.S.C. § 101 (2002).



administrative determinations made by Executive Branch agencies. The U.S. Tax Court was such an Executive Branch Article II court until it was converted into an Article I Executive Branch court in 1969.<sup>182</sup>

The Senate and House reports regarding the APA state that “[t]he word ‘agency’ is defined by excluding legislative, judicial, and territorial authorities and by including any other ‘authority’ whether or not within or subject to review by another agency.”<sup>183</sup> No specific examples of the federal courts that are excluded from APA coverage are given in either report.

However, the Manual includes two Article I courts in the Judicial Branch and an Article II Executive Branch court as specific examples of Congress’ exclusion of APA application to “the courts of the United States:”

The Administrative Procedure Act applies to every authority of the Government of the United States other than Congress, the courts, the governments of the possessions, Territories, and the District of Columbia (sec. 2(a)). The term “courts” is not limited to constitutional courts, but includes the Tax Court, the Court of Customs and Patent Appeals, the Court of Claims, and similar courts.<sup>184</sup>

The Manual is a part of the legislative history of the APA. The Manual is “a contemporaneous interpretation” of the APA<sup>185</sup> that has been “‘given some deference by [the Supreme] Court because of the role played by the Department of Justice in drafting the legislation, and Justice [Tom C.] Clark was Attorney General both when the

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182. See *infra* text accompanying notes 189-203.

183. S. REP. NO. 79-752 at 10 (1945); H. REP. NO. 79-1980 at 18 (1946).

184. Manual, *supra* note 1, at 10 (1947) (citing S. REP. NO. 79-752 at 38 (1945) (the Appendix to Attorney General’s Statement Regarding Revised Committee Print of October 5, 1945) reprinted in FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, at 42 (William F. Funk et al., 3d ed. 2000)).

185. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 546 (1978).

APA was passed and when the Manual was published.”<sup>186</sup> “In prior cases, [the Supreme Court has] given some weight to the Attorney General’s Manual on the Administrative Procedure Act (1947), since the Justice Department was heavily involved in the legislative process that resulted in the Act’s enactment in 1946.<sup>187</sup> Justice Scalia has described the Manual as “the Government’s own most authoritative interpretation of the APA....That document...was originally issued ‘as a guide to the agencies in adjusting their procedures to the requirements of the Act.’”<sup>188</sup>

A close look at the three non-Article III courts cited in the Manual as examples of courts that are excluded from APA coverage clearly shows that Executive Branch Article I tribunals that review final administrative agency adjudications and Article II tribunals that review initial administrative agency adjudications that are labeled “courts” by Congress both are “courts of the United States” that were intended to be excluded from coverage by the APA adjudication procedure under 5 U.S.C. § 551-559. Thus, the APA definition of “courts of the United States” is far broader than the Article III only “courts of the United States” definition that is used to describe the organization of the Judicial Branch in Title 28, United States Code:

The term ‘courts of the United States’ includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this Title [28 U.S.C. §§ 81 et seq.], including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.<sup>189</sup>

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186. *Steadman v. SEC*, 450 U.S. 91, 102, n. 22 (1981) (quoting, *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 546).

187. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, n. 31 (1979) (citing *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 546).

188. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (quoting, *Manual*, *supra* note 1, at 6 and citing, *Steadman*, 450 U.S. at 102; *Chrysler*, 441 U.S. at 302; *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 546).

189. 28 U.S.C. § 451 (2002).

The Court of Customs and Patent Appeals originally was established by Congress as an Article I court within the judicial branch in 1909 with the name “Court of Customs Appeals.” In 1929, its name was changed to the Court of Customs and Patent Appeals and its jurisdiction was expanded. In 1929, the Supreme Court held in *Ex Parte Bakelite Corp.* that the Court of Customs and Patent Appeals is a court of the United States that is an Article I legislative court, not a constitutional Article III court, because of the lack of life tenure of its judges.<sup>190</sup> It was not until 1958, after the Manual was issued, that Congress converted the Court of Customs and Patent Appeals into an Article III court.<sup>191</sup>

In 1855, Congress established the first Article I specialized court, the United States Court of Claims, “to hear private claims against the United States.”<sup>192</sup> The Court of Claims was created by Congress to alleviate the growing and substantial burden on Congress and the Executive Branch departments of determining such claims.<sup>193</sup> The Supreme Court in *Ex Parte Bakelite Corp.* held that the Court of Claims, which is “a special tribunal to examine and determine claims for money against the United States,” is an Article I legislative court that “is a court of the United States,” not a constitutional court.<sup>194</sup> In 1933, the Supreme Court again ruled that the Court of Claims is an Article I legislative court: “the court derives its being and its powers and the judges their rights from the acts of Congress passed in pursuance of other and distinct constitutional provisions.”<sup>195</sup> In 1953, again after the Manual was issued, Congress converted the Court of Claims into an Article III court.<sup>196</sup>

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190. *Ex Parte Bakelite Corp.*, 279 U.S. 438, 458-461 (1929).

191. 1999 FED. JUDICIARY ANN. REP., Table K: *Specialized Courts and the Administrative Lawmaking System*, available at <http://www.uscourts.gov/judbus1999/contents.html>; Revesz, *supra* note 37, at 1132 n.98 (citing ACT OF AUG. 25, 1958 §§ 2-4, 72 Stat. 848-849 (1958)).

192. Revesz, *supra* note 37, at 1114 n.8 (citing, ACT OF FEB. 24, 1855, 10 Stat. 612 (1855)).

193. *Ex Parte Bakelite Corp.*, 279 U.S. at 452.

194. *Id.* at 455.

195. *Williams v. U.S.*, 289 U.S. 553, 581 (1933).

196. Revesz, *supra* note 37, at 1132 n.98 (citing, ACT OF JULY 28, 1953, 67 Stat. 226 (1953)).

In 1962, the Supreme Court confirmed that the Congress' 1950s legislation converted the Court of Customs and Patent Appeals and the Court of Claims into Article III courts.<sup>197</sup> Therefore, both the Court of Customs and Patent Appeals and the Court of Claims were Article I courts at the time that the Attorney General stated in the Manual that they were not covered by the APA.

The Court of Customs and Patent Appeals and Court of Claims both were abolished in 1982 by Congress and the jurisdictions and judges of both courts were merged into the newly created U.S. Court of Appeals for the Federal Circuit. The Federal Circuit is a specialized court a significant portion of the jurisdiction of which is to review the final administrative decisions by several Executive Branch agencies, including the International Trade Commission, Merit Systems Protection Board, Department of Veterans Affairs, Secretary of the Commerce Department, Secretary of Agriculture, the General Accounting Office, the Office of Personnel Management, and the various agency Boards of Contract Appeals. The jurisdiction regarding some of the agencies' decisions is limited to those made under certain statutes. In addition to hearing appeals from the Patent and Trademark Office and the trial level U.S. Court of Federal Claims that was created as an Article I court in 1982, the Federal Circuit also reviews decisions by: the U.S. Court of International Trade, the U.S. Court of Appeals for Veterans Claims that was created as an Article I court in 1988, the District courts (only for claims against the United States up to \$10,000. that are not tort or tax claims), and the Senate Select Committee on Ethics.<sup>198</sup>

Finally, the Tax Court has its origin in the Board of Tax Appeals, which was formed in 1924 as an Executive Branch board independent of the Internal Revenue Service to provide taxpayers with an independent administrative review of an IRS tax deficiency determination before the tax had to be paid.<sup>199</sup> Earlier boards that Congress established within the IRS for the same purpose were given quasi-independent status, but had insufficient authority to survive the

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197. *Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962); Revesz, *supra* note 37, at 1132 n.98.

198. 28 U.S.C. § 1295 (2002); Revesz, *supra* note 37, at 1112-1113 nn. 2 & 10, 1126 n. 65.

199. Revesz, *supra* note 37, at 1113 n. 9 (citing, REVENUE ACT OF 1924, § 900, 43 Stat. 253, 336-38 (1924)).

IRS' attempts to end their existence.<sup>200</sup> In 1942, Congress changed the name of the Board of Tax Appeals to the Tax Court of the United States.<sup>201</sup> However, Congress did not redefine the Tax Court into an Article I court until 1969. The court was renamed the United States Tax Court.<sup>202</sup> The Supreme Court has held that the Tax Court was an Executive Branch agency until its conversion into an Article I court in 1969.<sup>203</sup> Therefore, the Tax Court was functioning as an Article II "board model" independent agency in the Executive Branch that was doing appellate administrative review of initial decisions by the IRS, not judicial review of final agency decisions, at the time that the Attorney General stated that it was excluded from APA coverage because it is called a court. Thus, bearing the label "court" is enough to exclude an Article II independent agency from APA coverage.

Therefore, Executive Branch Article I tribunals that review final administrative agency adjudications and Article II tribunals that are labeled "courts" by Congress and review initial administrative agency adjudications are "courts of the United States" that are intended to be excluded from coverage by the APA adjudication procedure under 5 U.S.C. § 551-559. Accordingly, an independent agency established for appellate administrative review of the SSA's and DHHS' initial adjudications of Social Security benefits claims cannot be called a court and also be subject to the APA provisions.

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200. Richard B. Hoffman & Frank P. Cihlar, *Federal Judicial Independence Symposium: Judicial Independence: Can it be without Article III?*, 46 MERCER L. REV. 863, 869 (1995); Revesz, *supra* note 37, at 1119.

201. Revesz, *supra* note 37, at 1113 n. 9 (citing, REVENUE ACT OF 1942, § 504, 56 Stat. 798, 957 (1942)).

202. *Id.* at 1113 n. 9 (citing, TAX REFORM ACT OF 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (1969) (codified at 26 U.S.C. § 7441 et seq.)).

203. *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 887-88 (1991).

VI. AN INDEPENDENT ADJUDICATION AGENCY FOR SOCIAL SECURITY  
ACT BENEFITS CLAIMS DOES NOT REQUIRE A COMMISSION TO  
PERFORM ITS ADJUDICATION FUNCTION BECAUSE SOCIAL  
SECURITY POLICY IS NOT PROMULGATED THROUGH THE  
ADJUDICATION FUNCTION

Historically, the reason Congress gave quasi-adjudicatory functions to regulatory agencies, rather than to the generalist District Courts, was (1) because certain areas of law were “specialized” and required a uniform national standard of applicability, and (2) to allow political appointees, such as Commissioners, to formulate policy through adjudication. It was expected that the adjudications would be relatively few in number and the decisions would have an important general impact on the individuals whose conduct was being regulated.

The APA was enacted to assure that “due process” principles when a regulatory agency had both prosecutorial and adjudicatory functions. Traditional regulatory commissions, such as the Securities and Exchange Commission (“SEC”), the Federal Trade Commission (“FTC”), and the Interstate Commerce Commission (“ICC”), set policy through adjudication, as well as rulemaking. For example, the ICC promulgated rules regarding how much a railroad could charge customers. A violation of those rules was prosecuted by an ICC-employed prosecutor and the case was heard by an ICC-employed ALJ. An appeal from the ICC ALJ’s decision was decided by the Commissioners of the ICC, who injected their decisions with policy and political concerns. The Commissioners’ decision could be appealed to the D.C. Circuit Court of Appeals.

The APA was designed to ensure procedural due process to individuals who are prosecuted by the same agency that promulgates the regulations and also adjudicates violations of the regulations. Regulatory agencies have similar functions to those set forth in Articles I, II and III of the Constitution for the three branches of government. A traditional regulatory agency promulgates (quasi-legislative), enforces (quasi-executive) and adjudicates (quasi-judicial). The APA is a claimants’ bill of rights that provides a procedure for conducting a due process hearing that comports with

the due process requirements of the U.S. Constitution.<sup>204</sup>

When agencies such as the Department of Labor's Mine Safety and Health Administration ("FSHA"), Department of Labor's Occupational Safety and Health Administration ("OSHA"), SSA, and CMS within DHHS exclusively use rulemaking proceedings to set policy, rather than also using adjudication to set policy, there no longer is any rationale for keeping the adjudicatory function within the agency. The Congressional interest in providing a check on the enforcement powers, *i.e.*, to withhold disability benefits in the case of SSA and Medicare benefits in the case of CMS, is best served by having an independent adjudicatory entity decide entitlement determinations based on the entitlement standards set by SSA and CMS. There no longer is any link between adjudication and policy making for the Social Security Act benefits claims, which are a vast number of adjudications that involve primarily factual and credibility issues, the decisions of which have no precedential value for subsequent cases.

The SSA and CMS are not traditional regulatory agencies, as are MSHA and OSHA, but this is a distinction without a functional difference. Traditional regulatory agencies and benefits agencies both perform quasi-legislative, quasi-executive and quasi-judicial functions.<sup>205</sup> However, DHHS includes not only CMS, but also the quasi-executive enforcement function regarding Medicare, Medicaid and other federal health care enforcement proceedings brought under the Social Security Act and other applicable statutes, the appeals from which currently are heard on administrative appeal by ALJs within the Civil Remedies Division of the DHHS Departmental Appeals Board that administratively is within the Office of the DHHS Secretary. The final administrative decision-making authority on these cases is vested in the DHHS Secretary.<sup>206</sup>

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204. Edward H. Fleischman, *Toward Neutral Principles: The SEC's Discharge of Its Tri-Functional Administrative Responsibilities*, 42 CATH. U. L. REV. 251 (1993) (discusses the conflicting practices of independent federal regulatory agencies); Steven P. Croley, *Symposium on the 50th Anniversary of the APA: The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L. J. AM. U. 35 (1996) (discusses the modern regulatory state).

205. Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 973-74 (1991).

206. *Supra* text accompanying note 5 & n. 5.

A traditional regulatory agency is charged with regulating private conduct by: promulgating rules, determining whether individuals have violated the rules, and determining sanctions for any violations. The traditional regulatory agency promulgates and enforces its own regulations. SSA promulgates and enforces regulations regarding who is “entitled” to Social Security benefits. CMS promulgates and enforces regulations regarding who is entitled to Medicare benefits. Social Security Act benefits are entitlements that require a due process hearing when SSA or CMS denies a claim of legal entitlement to statutory benefits. SSA and CMS promulgate and, through granting and denying benefits, enforce their own regulations. The same rationale for establishing an independent adjudicatory body exists in equal measure for adjudications determining entitlement to disability and other Social Security program benefits, such as Medicare, as for determining the propriety of private conduct: to provide a check on the enforcement powers of the regulatory agency and to assure that there is no arbitrariness in the exercise of those powers.<sup>207</sup>

The SSA and CMS make policy through rulemaking, rather than through adjudications. Therefore, there is no policymaking reason why (1) the ALJ adjudication function should be part of the SSA or DHHS, or (2) an ALJ’s decision should be appealed to an administrative tribunal within SSA or DHHS. The notion that SSA or DHHS could promulgate policy through adjudication is completely negated by the following facts: (1) the overwhelming majority of Social Security Act adjudications are concerned primarily with factual rather than legal or policy issues, (2) the SSA Appeals Council and DHHS Medicare Appeals Council entirely have abrogated their policymaking role, and (3) all SSA and CMS policy currently is established through the rulemaking process, rather than case decisions with precedential value.<sup>208</sup>

There are two exclusively adjudicatory, rather than regulatory, agencies that were created by Congress as commissions: the Federal Mine Safety and Health Review Commission (“FMSHRC”) and the Occupational Safety and Health Review Commission (“OSHRC”).

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207. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988).

208. Gifford, *supra* note 205, at 1010-11.



FMSHRC was established by the Federal Mine Safety and Health Amendments Act of 1977. FMSHRC's sole statutory mandate is to adjudicate disputes between the MSHA and mine operators. The enabling legislation transferred the ALJs from the Department of the Interior into FMSHRC.<sup>209</sup> OSHRC was established by the Occupational Safety and Health Act of 1970. Its sole statutory mandate is to adjudicate disputes between the OSHA and employers.<sup>210</sup>

The adjudicatory commissions, FMSHRC and OSHRC, perform solely adjudicatory (quasi-judicial) functions, not policy making/rulemaking functions (quasi-legislative) or enforcement (quasi-executive) functions. Traditional regulatory commissions perform all three functions. The two adjudicatory commissions were created independent of any other entity (agency, department, administration) to assure evenhanded justice to private individuals: justice that could not be assured if the policymaking function and/or enforcement function were lodged in the same entity as the adjudicative function. Currently, the SSA has all three functions (policy/rulemaking, enforcement, and adjudication) in the same governmental entity, and DHHS soon will have the same.

The Commissioners, five for FMSHRC and three for OSHRC, are appointed by the President with the advice and consent of the Senate, serve six-year terms, and are removable only for inefficiency, neglect of duty, or malfeasance in office. ALJs are appointed by the Chairs of the Commissions.<sup>211</sup>

Congress gave the two adjudicatory commissions independence from the underlying regulatory agencies of MSHA and OSHA within the Department of Labor in order to provide a check on enforcement powers of the regulatory entities, and to assure that there is no arbitrariness in the exercise of those powers. The commissions are arbiters the purpose of which is to ensure that the relevant agency acts within the boundaries of the law and that private parties are accorded due process.<sup>212</sup>

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209. 30 U.S.C. § 823 (1982).

210. 29 U.S.C. § 661 (1982).

211. 30 U.S.C. § 823 (1982); 29 U.S.C. § 661 (1982).

212. W. Christian Schumann, *The Allocation of Authority under the Mine Act: Is the Authority To Decide Questions of Policy Vested in the Secretary of Labor or in the Review Commission*, 98 W. VA. L. REV. 1063 (1996).

FMSHRC's and OSHRC's rules of procedure provide for two levels of administrative adjudication. The first level is before an ALJ. The second level is a discretionary review of the ALJs' decisions by the Commissioners, with a standard of review that is similar to that of the SSA's Appeals Council.<sup>213</sup> An ALJ's decision that is not accepted for review by either commission becomes a final, non-precedential order of the commission. Commission decisions that are decided by the Commissioners, rather than an ALJ, are precedential. Appeals from the final decisions of FMSHRC and OSHRC are taken to a regional United States Circuit Court of Appeals.<sup>214</sup>

FMSHRC and OSHRC have only executive adjudicatory functions. They do not have rulemaking or enforcement powers, and they do not set policy. They were established to review administrative actions, rather than set policy through adjudication. Both commissions determine whether regulations promulgated by MSHA and OSHA have been violated.

FMSHRC and OSHRC review determinations made by traditional regulatory agencies, which regulate private conduct. The primary rationale for making FMSHRC and OSHRC independent entities was to separate the adjudicatory functions from the underlying regulatory agencies' prosecutorial and policymaking functions. This separation was possible because the regulatory agency, as an entity, had evolved from setting policy through in-house adjudication, to setting policy through rulemaking. Similarly, the SSA and CMS long since also have evolved into agencies that set their policy for the standards of who is entitled to Social Security program benefits by rulemaking, rather than adjudications. Indeed, CMS had 130,000 pages of regulations regarding the Medicare program in effect as of July 2003.<sup>215</sup>

Currently, until a case reaches an Article III court for review, SSA and DHHS are unchecked in their use of their enforcement powers through Appeals Council Review of ALJ decisions and their application of their regulations to private individuals. SSA has a long

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213. *Id.*

214. 30 U.S.C. § 823 (1982); 29 U.S.C. § 661 (1982).

215. Press Release, Conferees of the Medicare Prescription Drug and Modernization Act of 2003, *supra* note 78.

history of attempting to undermine independent adjudication at the ALJ level by applying aggressive management techniques in an attempt to control administrative law judges, as is described in detail in part III(C) above.<sup>216</sup> For a time, the DHHS Secretary and CMS actively sought authority from Congress to use alternatives to APA due process, including independent APA ALJ decisionmakers for Medicare program appeals, as is described in detail in part III(B), above.<sup>217</sup>

However, there are several differences of scale and function between FMSHRC, OSHRC, and the huge Social Security Act benefits adjudication process that militate against the need for a Commission structure for an independent Social Security Act benefits adjudication agency.

First, FMSHRC and OSHRC are very small entities with a few ALJs and relatively few cases to adjudicate. FMSHRC's fiscal year 2000 budget estimate was for fifty-one full-time employees (twenty at the hearing level), with a budget of \$6,159,000. The fiscal year 2000 budget estimate of case dispositions at the ALJ level was 2,500 (the actual number in 1998 was 1,804).<sup>218</sup> OSHRC has seventy-three full time employees located in Washington, D.C., Atlanta and Denver. In fiscal year 1999, OSHRC employed twenty-eight people at the hearing level, and disposed of 158 cases after conducting a hearing and 2,127 cases without conducting a hearing. OSHRC's fiscal year 2001 budget estimate was \$8,720,000.<sup>219</sup> SSA ALJs account for over 84% of all ALJs employed by the federal government (1,081 in SSA, 213 in other agencies as of March 2003) to handle over 500,000 cases per year.<sup>220</sup>

Also, FMSHRC and OSHRC hear cases regarding private

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216. See *supra*, text accompanying notes 81-152. See also, Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 ADMIN. L. REV. 1 (Winter 1997); Gifford, *supra* note 205, at 1009-19.

217. See *supra*, text accompanying notes 46-80.

218. Fed. Mine Safety & Health Rev. Comm'n Official Website, available at <http://www.fmsshr.gov>.

219. U.S. Occupational Safety & Health Rev. Comm'n Official Website, available at <http://www.oshrc.gov>.

220. OPM ALJ employment statistics for March 2003, available at <http://www.fedscope.opm.gov>.

conduct. An independent Social Security Act benefits adjudication agency would hear claims for public benefits.

Finally the Commissioners of FMSHRC and OSHRC review relatively few ALJ decisions compared to the current level of review by the SSA Appeals Council and DHHS Medicare Appeals Council. Also, the Commissioners' decisions are precedential, unlike the SSA and DHHS Appeals Councils' decisions. The Appeals Councils' primary role was originally intended to be policymaking. However, SSA and DHHS long since have abandoned the Appeals Councils' original role as policymaking bodies through adjudication, and the Appeals Councils have become quasi-appellate bodies. The tyranny of the caseload, in which a massive number of cases are concerned with factual and credibility issues, does not allow the Appeals Councils to perform the role of policymaking bodies through adjudication for the SSA Commissioner and DHHS Secretary.<sup>221</sup>

Therefore, since an independent Social Security Act benefits adjudication agency would not set precedent through its decisions that would warrant political accountability, it is difficult to justify a "role" for politically accountable Commissioners. A small Commission would have no greater success at handling the great number of appeals from ALJ decisions of Social Security Act benefits claims than the small SSA Appeals Council and DHHS Medicare Appeals Council have had. Hence, the proposal in parts VII and VIII that the independent Social Security Act benefits adjudication agency be an adjudicatory body that is self-administered by the ALJs, with the right to appeal from individual ALJs' decisions to local appellate panels staffed by ALJs around the country.

Many agencies are increasing their use of non-ALJ adjudications.<sup>222</sup> This trend provides strong evidence for the need to preserve the highest level of decisional independence in the administrative adjudications of the largest benefits programs in the federal government by establishing an independent agency that is beyond the reach of the SSA and DHHS policymakers before they also find a way to join the trend of avoiding APA due process.

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221. Koch & Koplow, *supra* note 29, at 199.

222. Jeffrey S. Lubbers, *Symposium on the 50<sup>th</sup> Anniversary of the APA: APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 70-71 (Spr. 1996).

VII. WHY AN INDEPENDENT ADJUDICATION DEPARTMENT  
ADMINISTERED BY ALJs PROVIDES A HIGHER QUALITY OF JUDICIAL  
INDEPENDENCE AND DUE PROCESS FOR SOCIAL SECURITY BENEFITS  
CLAIMANTS THAN AN INDEPENDENT COMMISSION STRUCTURE

As stated in Part VI, there is no need for politically accountable non-adjudicators, such as Commissioners, to oversee an exclusively adjudicatory independent agency, since such an agency would not make policy for which Congress would want political accountability.

With an independent Commission, the Commissioners would be a group of non-judicial appointees who would be an extra layer of personnel over the ALJs who would supervise the ALJs, set the procedure and rules for the hearings, and review the ALJs' decisions as the Appeals Council does now. This is the current management structure that the SSA ALJs have with the SSA Commissioner. Congress made the SSA independent of the Department of Health and Human Services to strip away the executive layers between Congress and the SSA in order to hold the SSA more accountable in the administration of the Social Security entitlement programs. As is described in part III(C), the SSA management and policy intrusions into the decisional independence of its ALJs have continued since SSA became an independent agency.

Having the new agency's ALJs administer themselves through a Chief Judge who is appointed from their numbers would eliminate the political oversight by appointees who do not have adjudicative independence as their foremost goal in agency administration, which has caused problems for the decisional independence of SSA ALJs over the years. SSA was a Board within a larger agency until 1950, and has had a Commissioner for the last fifty years. SSA was part of a larger agency until 1995, when it became independent. Both board and commissioner formats have been tried for over sixty years and found wanting in terms of agency incursions into ALJ decisional independence. ALJs, as experienced judicial personnel, have the capacity for collegial and professional self-administration such as that which occurs in the courts. There is a large degree of administrative expertise within the SSA ALJ workforce. The SSA ALJs also have a demonstrated history of defending their decisional independence and due process that will place the preservation of due process as the primary goal of the new agency. The Chief Judge selected from the ALJs' ranks would be answerable to Congress and

the President. There is a large degree of administrative experience within the SSA ALJs. If the SSA ALJs become a self-administered independent adjudication review agency, they would administer themselves with ALJs chosen from their own ranks.

In addition, as stated in part VI, a commission, which rarely has more than a dozen members, cannot be of a size sufficient to conduct meaningful administrative review of the appeals from the individual ALJ decisions, which now number well over 100,000 per year. A commission necessarily will be forced to hire an attorney staff akin to the SSA Appeals Council to process the appeals, which will not result in an improvement of the current poor quality and delays in the final appellate step of administrative review of Social Security Act program claims. If the new agency is administered by the ALJs, claimants will have a final review of the individual ALJs' decisions by local panels of ALJs around the country who are drawn from a large pool of highly qualified personnel who will be able to render timely and well drawn decisions.

Finally, if the SSA ALJs self-administer, they will draft and issue the procedural regulations and rules of the new agency, which will be based on their experience and needs of the process, rather than expediency and other policy concerns, as they are now. There never has been a coherent set of procedural regulations and rules for the SSA appellate administrative process, although there is a draft of such rules awaiting SSA promulgation.

The SSA ALJs are a large group of highly qualified judicial professionals who are capable of administering themselves and the appellate administrative process in a competent and effective manner. The Administrative Conference of the United States found that ALJs are, on average, as academically well-credentialed as District Court judges, and about 80% have substantial trial or general litigation experience.<sup>223</sup> The Supreme Court has held that an ALJ is the functional equivalent of a federal trial-level judge in the performance of his or her adjudicative function:

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge

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223. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORT 1992, Vol. II, 879 (1992).

within [the APA] framework is ‘functionally comparable’ to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions.<sup>224</sup>

Therefore, having the ALJs administer themselves is well justified and makes sense in terms of providing claimants with timely, high quality and impartial final administrative decisions that are free of political or policy considerations. The intent is to enhance the Social Security Act hearing system for the claimants by providing the structural independence of the appellate adjudication process that is necessary to ensure that the claimants receive the full range of procedural due process required under the Social Security Act and the APA.

#### VIII. AN INDEPENDENT AGENCY MODEL FOR A SOCIAL SECURITY BENEFITS ADJUDICATION REVIEW AGENCY

The remainder of this article consists of detailed proposed terms for a separate United States Office of Hearings and Appeals (“USOHA”) within SSA to provide the structural independence of the appellate adjudication process necessary to ensure administrative appellate decisional independence for the benefit of the Social Security benefits claimants. Most of these terms are features that would be the same for a new independent adjudication agency, regardless of whether it is administered by ALJs or a Commission. However, the appellate panels of ALJs as the final administrative appellate step and ALJ self-administration features of this proposal are what make this proposal a workable blueprint that (1) can efficiently handle a large caseload with high quality, and (2) afford the claimants maximum decisional independence for their claims. This proposal would be added as a new title of the Social Security Act (Title 42, chapter 7) and amend Titles II, XVI and XVIII of the Social Security Act (Title 42, chapter 7, Titles II, XVI, XVIII).

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224. *Butz*, 438 U.S. at 513 (citing 5 U.S.C. § 556(c) (1976)).

The proposed terms of the new agency are set forth in this part in fourteen subparts. Each subpart has two sections. In the first section of each subpart, the proposed features are stated either in summary form or with suggested statutory language necessary to implement the features. In the second section of each subpart, the reasons for the proposed features are stated.

The APA procedural due process protections were the first step in assuring that an agency that promulgates and enforces regulations affords procedural due process to individuals and other parties. An administrative adjudicatory body that is structurally independent of the Social Security Act policy-making agencies is the necessary next step in the process of assuring that individuals receive fair hearings and impartial, high quality, and timely decisions by independent decisionmakers.

#### *A. Agency Name, Establishment*

##### PROPOSED TERMS FOR: AGENCY NAME, ESTABLISHMENT

The United States Office of Hearings and Appeals hereby is established and is referred to in this Title as the “Office of Hearings and Appeals.”

##### EXPLANATION OF PROPOSED TERMS FOR: AGENCY NAME, ESTABLISHMENT

As is discussed in part V, an Article I or Article II court model cannot be used as the format for an Executive Branch agency that performs only an adjudicative function and continue to have the agency’s appellate administrative adjudications performed pursuant to the APA by ALJs.<sup>225</sup> Therefore, the use of the name “United States Office of Hearings and Appeals” is descriptive, because it makes clear that its is purpose to adjudicate administrative claims involving Social Security Act benefits programs, which is an executive administrative function, not to perform judicial review of

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225. *See supra* text accompanying notes 179-203.



final administrative decisions of the SSA and DHHS, which is a judicial function.

*B. Independent Agency, Executive Branch Department*

**PROPOSED TERMS FOR: INDEPENDENT AGENCY,  
EXECUTIVE BRANCH DEPARTMENT**

The United States Office of Hearings and Appeals shall be an independent regulatory agency in the Executive Branch of the Government that is a department of the Executive Branch within the Social Security Administration.<sup>226</sup> In the performance of their functions, the Chief Administrative Law Judge, Deputy Chief Administrative Law Judge(s), administrative law judges, other officers, other employees, and other personnel of the adjudication agency shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the SSA or DHHS.

**EXPLANATION OF PROPOSED TERMS FOR:  
INDEPENDENT AGENCY, EXECUTIVE BRANCH  
DEPARTMENT**

Designation as an independent regulatory agency is essential to have the new independent adjudicatory agency be accountable only to Congress and the President. The phrase “independent regulatory agency” is the technical phrase for an agency that Congress makes independent of the usual degree of Executive Branch oversight, and does not mean that such an agency necessarily regulates conduct or benefits programs. Examples of independent regulatory agencies that Congress has created within existing agencies to perform adjudications, among other things, include the (1) Federal Energy Regulatory Commission (“FERC”) within the Department of Energy, and (2) Surface Transportation Board (“STB”) within the Transportation Department. The STB replaced and took over the functions of the Interstate Commerce Commission.<sup>227</sup> The

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226. 42 U.S.C. § 901 et seq. (1994).

227. 49 U.S.C. §§ 701(a), 702, 703(c) (1997).

OSHRC<sup>228</sup> and (2) FMSHRC<sup>229</sup> are exclusively adjudicatory agencies that are outside of the Labor Department and are independent regulatory agencies.<sup>230</sup> The only list of the independent regulatory agencies that appears in a statute is found at 44 U.S.C. § 3502(5), which addresses federal information policy and includes OSHRC and FMSHRC.

Placing the new agency within the SSA is a practical necessity, given the need to use the SSA's information services and data bases, the substantial space needs of the new agency that currently are in place at SSA, the use of the same case files, and the fact that the new agency will be sharing the duty to adjudicate claims under the Social Security Act benefits programs and, thus, will interact on a daily basis with other components of SSA.

As stated above, Congress formed the Board of Tax Appeals as an agency independent of the IRS to provide claimants with impartial review because of the IRS' practice of non-acquiescence with Circuit Court decisions, and the inherent unfairness to claimants of having the same agency that investigates and prosecutes cases also perform the administrative appellate review. The IRS invented federal agency non-acquiescence. These same reasons, and SSA's history of interference with ALJ decisional independence, support the creation of an administrative appellate review agency that is separate from the SSA.

The new agency's independence from management by SSA and DHHS must be expressly stated, as was done in the statutes that established the STB,<sup>231</sup> rather than rely only on stating that the new agency is an independent agency. The proposed provision that the officers and employees of the new agency shall not be responsible to, or subject to, the supervision or direction of any officer, employee, or agent of any other part of the SSA or DHHS is identical to the independence provision for the STB.<sup>232</sup> In order to obtain SSA's and DHHS' full compliance and cooperation with the implementation of this proposed legislation, expressly stating the full intent of each

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228. 29 U.S.C. § 661(1978).

229. 30 U.S.C. § 823 (1979).

230. Garcia, *supra* note 81 at 1, n.1.

231. 49 U.S.C. § 703(c) (1995).

232. *Id.*

feature is necessary, rather than leaving anything to inference, no matter how obvious. As is discussed in part III(C), the SSA has a well-known history of non-acquiescence with federal Circuit Court of Appeals decisions, despite the clear binding effect of the Court of Appeals decisions within their Circuits. Remedial legislation regarding non-acquiescence, which should not have been necessary, was introduced in the 106<sup>th</sup> Congress as House Report 1924. Several years ago, some SSA senior management officials advanced the concept that the SSA is not required to provide APA hearings, despite overwhelming legal authority to the contrary.<sup>233</sup> As is discussed in section III(B), the DHHS Secretary and CMS recently sought Congressional authority to use non-ALJ decisionmakers for Medicare appeals, which Congress rejected.<sup>234</sup>

Finally, the agency must be an Executive Branch department so that its principal officer, the Chief Administrative Law Judge, unambiguously has the power to appoint inferior officers pursuant to the Appointments Clause of the Constitution. The Appointments Clause provides in pertinent part:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>235</sup>

Therefore, since the new agency will not be a court of law, it must be an Executive Branch department for its head to be authorized to appoint inferior officers. Making sure the new agency head is empowered to appoint inferior officers is essential, not only to the head's ability in general to appoint the inferior officers needed to

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233. See *supra* text accompanying note 94.

234. See *supra* text accompanying notes 46 - 80.

235. U.S. CONST., art. II, § 2, cl. 2.

assist in running the agency, but because the issue of whether ALJs are inferior officers who must be appointed pursuant to the Appointments Clause recently was raised in the federal courts.<sup>236</sup>

In *Landry v. FDIC*, the D.C. Circuit Court of Appeals held that the ALJ whose decision was the subject of the *Landry* appeal was not an "inferior officer" of the federal government who must be appointed pursuant to the provisions of the Appointments Clause.<sup>237</sup> Landry is a savings and loan officer who was assessed civil penalties by an ALJ employed by the Office of Thrift Supervision ("OTS"), the bureau of the Treasury Department that regulates the savings and loan industry. Landry collaterally challenged the ALJ's decision by asserting that the ALJ's decision was without effect because the ALJ is an inferior officer who was not properly appointed by the head of a department as required by the Appointments Clause, since he was not appointed by the Treasury Department Secretary. The *Landry* court followed Supreme Court precedent, finding that, since the agency could change the OTS ALJ's decision without giving it deference, the ALJ's decision was not a final decision of the agency and, therefore, the ALJ is not an inferior officer.<sup>238</sup>

Since there are many ALJs who do issue final decisions for their agencies, including SSA ALJs, the outcome in *Landry* is not the resolution of the appointment issue. The appointment issue is important because the validity of the subsequent acts of an ALJ and his or her status as a federal employee can be challenged, if the appointing authority lacked appointment power.

The four most recent Supreme Court Appointments Clause cases regarding judicial officers follow a two step analysis. The first question is whether the judicial officer is a mere employee or an inferior officer who must be appointed pursuant to the Appointments Clause. So far, all judicial officers have been held to be inferior officers. The second question is whether judicial officers, as inferior officers, were appointed by an authorized court of law or head of a

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236. My article regarding this issue is forthcoming.

237. *Landry v. United States*, 204 F.3d 1125, 1128-34 (D.C. Cir. 2000) (*cert. denied*, 531 U.S. 924 (2000)).

238. *Id.* at 1128-34.

department.<sup>239</sup>

The issue of whether ALJs are inferior officers is described below as part of the proposal that the new agency head must be appointed as a politically accountable principal officer and must directly appoint the ALJs. The following is a summary of the law on what is an Executive Branch department for the purposes of the Appointments Clause.

In *Freytag*, after finding that special trial judges employed by the U.S. Tax Court are inferior officers, the Supreme Court held that all inferior officers must be appointed by the President, courts of law, or heads of departments, and Congress does not have discretion to mandate another appointment method.<sup>240</sup> “Heads of departments” was construed rather narrowly to include heads of cabinet departments, by limiting the definition of “department” to the fourteen executive departments that are listed in 5 U.S.C. § 101 (State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, and Veterans Affairs). However, the Court also said that the Appointments Clause is not so strictly limited by its terms and left the door open for possible later approval of inferior officer appointments by heads of principal agencies.<sup>241</sup>

The Supreme Court in *Freytag* held, 5 to 4, that the U.S. Tax Court is a court of law empowered to appoint special trial judges. The Court left open the issue of whether an agency is a department.<sup>242</sup> However, four of the Justices, all of whom still are on the Court, stated in their concurring opinion that the Tax Court is a department of the executive branch<sup>243</sup> and that “department” should be construed as a separate executive organization run by a principal officer.<sup>244</sup> The concurring justices’ standard appears to be more in accord with both the Constitutional term of “department,” which is

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239. *Edmond v. United States*, 520 U.S. 651 (1997); *Ryder v. United States*, 515 U.S. 177 (1995); *Weiss v. United States*, 510 U.S. 163 (1994); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991).

240. *Freytag*, 501 U.S. at 877-81.

241. *Id.* at 886.

242. *Id.* at 882-91.

243. *Id.* at 901-21.

244. *Id.* at 919-21.

not limited to any specific class of Executive Branch departments, and the APA standard of an agency being any federal authority with the power to issue final administrative decisions.<sup>245</sup>

In addition, Congress clearly states in the following other statutes that there are “departments” in the Executive Branch other than the “executive departments” enumerated in 5 U.S.C. § 101: Congress defined “federal agency” for the purposes of the statute on the federal agencies’ use of passenger carriers to include “(A) a department (as such term is defined in section 18 of the Act of August 2, 1946 (41 U.S.C. 5a)), (B) and Executive department (as such term is defined in section 101 of Title 5)”<sup>246</sup> Section 18 of the Administrative Expenses Act of 1946, 41 U.S.C. § 5a, provides that “‘department’ as used in this Act shall be construed to include independent establishments [and] other agencies.”<sup>247</sup>

### *C. Independent Establishment*

#### PROPOSED TERMS FOR: INDEPENDENT ESTABLISHMENT

The United States Office of Hearings and Appeals shall be an independent establishment of the Executive Branch as is defined in 5 U.S.C. § 104.

#### EXPLANATION OF PROPOSED TERMS FOR: INDEPENDENT ESTABLISHMENT

For the purposes of Title 5, entitled “Government Organization and Employees,” the Executive Branch consists of: (1) the fourteen “executive departments” that are listed in 5 U.S.C. § 101, (2) the three “military departments” listed in 5 U.S.C. § 102 (Army, Navy, and Air Force), (3) “government corporations” and “government controlled corporations,” which are defined in 5 U.S.C. § 103, and (4) “independent establishments,” which are defined in 5 U.S.C. § 104 as “an establishment in the executive branch...which is not an

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245. Administrative Procedure Act § 1, 5 U.S.C. § 551(1) (1994).

246. 31 U.S.C. § 1344(g)(2)(A)-(B) (2003).

247. Administrative Expenses Act of 1946, § 18, 41 U.S.C. § 5a.

Executive department, military department, Government corporation, or part thereof, or part of an independent establishment.” “‘Executive agency’ means an Executive department, a Government corporation, and an independent establishment.”<sup>248</sup> Thus, independent regulatory agencies are “independent establishments.” This provision is added to expressly state where the new agency fits in the Executive Branch structure described in Title 5.

*D. Exclusive Jurisdiction over Final Decisions of Social Security Act Benefits Claims*

PROPOSED TERMS FOR: EXCLUSIVE JURISDICTION  
OVER FINAL DECISIONS OF SOCIAL SECURITY ACT  
BENEFITS CLAIMS

The United States Office of Hearings and Appeals shall have the duties and jurisdiction as are conferred on it by Title 42, Chapter 7, of the Social Security Act, as amended, by the Administrative Procedure Act, as amended, 5 U.S.C. §§ 551 et seq., or by laws enacted subsequent to the enactment date of the statutes that establish the United States Office of Hearings and Appeals.

The U.S. Office of Hearings and Appeals shall perform all administrative appellate adjudicatory functions that, immediately before the effective date of its creation, were functions of the SSA, SSA OHA, and DHHS and were performed by any officer or employee of the SSA, SSA OHA, and DHHS in his or her capacity as such officer or employee, but not the policy-making, policy-implementation, investigatory and prosecutorial functions of the SSA or DHHS.

It shall be the duty and exclusive jurisdiction of the U.S. Office of Hearings and Appeals to adjudicate all claims arising from the old-age, survivors, and disability insurance programs under Title II [42 U.S.C. §§ 401 et seq.] and the supplemental security income program under Title XVI [42 U.S.C. §§ 1381 et seq.], after initial denial in whole or in part by the SSA Commissioner, and the Medicare program (health insurance for the aged and disabled program) under Title XVIII [42 U.S.C. §§ 1395 et seq.], after initial denial in whole

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248. 5 U.S.C. § 105 (1996).

or in part by the DHHS Secretary.

Accordingly, 42 U.S.C. § 405(b)(1) of the Social Security Act should be amended as follows: “The Commissioner of Social Security is directed to make findings of fact, and initial decisions as that term is used in section 8 of the Administrative Procedure Act [5 U.S.C. § 557(b)] as to the rights of any individual applying for a payment under this title [42 U.S.C. §§ 401 et seq.]. Any such initial decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner’s determination and the reason or reasons upon which it is based, and shall include a notice of such individual’s right of appeal to the Office of Hearings and Appeals within sixty days after notice of such initial decision is received by the individual making such request together with the address and telephone number of the office of the Office of Hearings and Appeals that is closest to such individual’s residence. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Office of Hearings and Appeals shall give such applicant and such other individual reasonable notice and opportunity for a hearing pursuant to the Administrative Procedure Act [5 U.S.C. §§ 551 et seq.] with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner’s findings of fact and such initial decision. The Commissioner of Social Security shall deliver the complete files of appealed cases to the office designated by the Office of Hearings and Appeals within ten days of its receipt of a notice from the Office of Hearings and Appeals that such an individual has filed an appeal. An Administrative Law Judge appointed by the Chief Judge of the Office of Hearings and Appeals pursuant to the Administrative Procedure Act to hear matters under the Social Security Act shall hear, and make a determination upon, any proceeding instituted before the Office of Hearings and Appeals and any motion in connection therewith, assigned to such Administrative Law Judge by the Chief Judge, and shall make a



decision which constitutes his final disposition of the proceedings. An Administrative Law Judge shall not be assigned to prepare a recommended decision under the Social Security Act. An Administrative Law Judge appointed by the Chief Judge of the Office of Hearings and Appeals is not required to give any deference to the Commissioner's findings of fact and such initial decision. Any such request with respect to such initial decision must be filed with the Office of Hearings and Appeals within sixty days after notice of such initial decision is sent by the Commissioner of Social Security to the individual making such request. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this title [42 U.S.C. § 401 et seq.], but in no event has the authority to issue a final decision on an application for a payment under this title [42 U.S.C. §§ 401 et seq.] or review the findings of fact, a final decision or other order issued by the Office of Hearings and Appeals. The Social Security Administration shall be bound by the orders and final decisions of the Office of Hearings and Appeals. In the course of any hearing, investigation or other proceeding, the Commissioner and the Office of Hearings and Appeals may administer oaths and affirmations, examine witnesses and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security or the Office of Hearings and Appeals even though inadmissible under the rules of evidence applicable to court procedure."<sup>249</sup>

Amendments to 42 U.S.C. § 1383(c), regarding the Title XVI supplemental security income program, and 42 U.S.C. § 1395ff(b), regarding the Title XVII health insurance for the aged and disabled (Medicare) program, to conform with the above Title II amendments also would be necessary.

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249. Social Security Act, § 205, 42 U.S.C. § 405(b)(1) (2003).

## EXPLANATION OF PROPOSED TERMS FOR: EXCLUSIVE JURISDICTION OVER FINAL DECISIONS OF SOCIAL SECURITY ACT BENEFITS CLAIMS

The authority to make final administrative decisions on Social Security Act claims will be transferred from the SSA Commissioner and DHHS Secretary, and vested exclusively in the USOHA. The jurisdiction of the new department will be exclusive as the final two administrative steps that must be exhausted before an appeal may be taken by a claimant to the District Court. However, the SSA Commissioner and DHHS Secretary retain all authority for all of the policy-making, policy-implementation, rulemaking, investigation and prosecutorial functions vested in the SSA and DHHS by law. The USOHA will perform the appellate adjudicatory functions of the SSA OHA that currently are performed at both the ALJ and SSA Appeals Council levels for the old-age, survivors, and disability insurance program under Social Security Act Title II,<sup>250</sup> the supplemental security income program under Title XVI,<sup>251</sup> at both the ALJ and DHHS Medicare Appeals Council levels for the Medicare program (health insurance for the aged and disabled program) under XVIII,<sup>252</sup> and at the ALJ level for any other program or class of cases that the USOHA hears pursuant to its permissive jurisdiction.

The USOHA will have exclusive jurisdiction to adjudicate all claims arising from the Title II and Title XVI programs after the initial denial, in whole or in part, by the SSA, and all benefits claims arising from Title XVIII after the initial denial, in whole or in part, by the DHHS. The permissive jurisdiction of the USOHA also will include the entire Social Security Act and the APA, the latter of which authorizes ALJs to hear all adjudications covered by the APA, so that the new department can hear other classes of cases without needing new legislation. The APA provides that “[a]n agency as defined by section 551 of this title which occasionally or temporarily is insufficiently staffed with administrative law judges appointed under section 3105 of this title may use administrative law

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250. 42 U.S.C. §§ 401 et seq., but particularly 42 U.S.C. § 405 (2003).

251. 42 U.S.C. §§ 1381 et seq., but particularly 42 U.S.C. § 1383.

252. 42 U.S.C. §§ 1395 et seq., but particularly 42 U.S.C. §§ 1395ff and 1395ii.

judges selected by the Office of Personnel Management from and with the consent of other agencies.”<sup>253</sup> The jurisdiction must be broadly stated, since, in the past, SSA ALJs were called upon to hear Black Lung and Federal Deposit Insurance Corporation cases, and may be called upon to hear other classes of cases in the future, as they now hear Medicare cases.

The purpose of the USOHA becoming a new agency separate from the SSA and DHHS is to divorce the appellate adjudicatory function from the conflicting functions of making SSA and DHHS policy and enforcing the policy through investigations and prosecutorial steps. A decision of the new USOHA would be the final administrative decision of Social Security Act benefits claims, and would not be reviewed by the SSA or DHHS. The USOHA decisions are for the parties, rather than just on behalf of the SSA Commissioner or DHHS Secretary.

The exclusive jurisdiction of the new department will be limited to appeals as of right from all benefits claims arising from the Social Security Act after DDS consideration of the claims on behalf of the SSA or Medicare Intermediary consideration of the claims on behalf of the DHHS. An appeal to the USOHA will be the claimant’s right after an initial determination by, or on behalf of, the SSA or DHHS that partly or wholly denies the claim.

The hearing before a USOHA ALJ will be a *de novo* proceeding.

*E. Final Administrative Appellate Review by the United States  
Office of Hearings and Appeals*

PROPOSED TERMS FOR: FINAL ADMINISTRATIVE  
APPELLATE REVIEW BY THE UNITED STATES OFFICE OF  
HEARINGS AND APPEALS

The Chief Judge shall establish a Social Security Appellate Panel Service in each region composed only of ALJs in the hearing offices in each region who are appointed for a period of years by the Chief Judge to hear and determine appeals taken from ALJ decisions issued pursuant to 42 U.S.C. §§ 405(b), 1383(c), and 1395(b). ALJs who are appointed to a Social Security Appellate Panel Service by the

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253. 5 U.S.C. § 3344 (1996).

Chief Judge shall be appointed and may be reappointed. The Chief Judge shall designate a sufficient number of such panels so that appeals may be heard and disposed of expeditiously. Multi-region panels may be established to meet the needs of small regions. An appeal under this section shall be assigned to a panel of three members of a Social Security Appellate Panel Service, except that a member of such service may not hear an appeal originating in the hearing office which is the member's permanent duty station or the hearing office where the member is on a temporary detail assignment.

EXPLANATION OF PROPOSED TERMS FOR: FINAL  
ADMINISTRATIVE APPELLATE REVIEW BY THE UNITED  
STATES OFFICE OF HEARINGS AND APPEALS

The USOHA will have a two tier appellate process: first, a decision after a hearing by an ALJ, and then an appeal to a local panel of three ALJs akin to the Bankruptcy Court Appellate Panel model. The Appellate Panels will be required to give deference to the individual ALJs' decisions, if they are supported by substantial evidence in the record, as is stated in part VIII(F).<sup>254</sup> This proposal is modeled in principle on the Bankruptcy Court Appellate Panel statute.<sup>255</sup>

The Bankruptcy Court Appellate Panels were made permissive, not mandatory, and thus are not used in all Circuits, because of a Constitutional issue whether the use of the Panels is an improper delegation of Article III court jurisdiction over private rights in bankruptcy from the District Courts. Bankruptcy Court Appellate Panel review is a substitute for District Court review only upon all parties' consent and appeals go directly to the regional Circuit Courts of Appeals. Because there is no Constitutional jurisdiction issue for administrative cases involving entitlement to public rights that were created by statute, such as administrative determinations of entitlement to Social Security Act benefits, the Bankruptcy Court Appellate Panel model may be modified to make it mandatory for

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254. *See infra* text accompanying notes 273-278.

255. 28 U.S.C. § 158 (1993).

Social Security Act benefits cases.<sup>256</sup>

The appellate panel system is one of the key features that makes the self-governing ALJ model superior to the current structure and commission model in providing high quality service and decisions for the claimants. The Bankruptcy Court system is another nationwide network of tribunals that hears a high volume of cases in a specialized area that are generated mostly from individual petitioners. There are ninety-two Bankruptcy Courts situated in proximity to the District Courts.<sup>257</sup> There are 140 Social Security hearing offices.<sup>258</sup> Over 1,500,000 cases were filed in Bankruptcy Court in 2002.<sup>259</sup> As is stated above, over 500,000 cases are brought before Social Security ALJs every year. Accordingly, Social Security claimants can benefit from the use of an appellate system that has proven to work on a large scale.

In addition to being an appellate system that can handle a large caseload, the appellate panel system has several other benefits that would afford timely, high quality service to the Social Security claimants and Medicare beneficiaries and providers and likely reduce the requests for judicial review:

1. First and foremost, appellate panel decisions result in higher quality decisions. A survey of bankruptcy practitioners revealed that two-thirds of them believed that the appellate panel decisions were “better products” than District Court decisions.<sup>260</sup>

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256. Thalia L. Downing Carroll, *Why Practicality Should Trump Technicality: A Brief Argument for the Precedential Value of Bankruptcy Appellate Panel Decisions*, 33 CREIGHTON L. REV. 565 (2000); Hon. Barbara B. Crabb, *In Defense of Direct Appeals: A Further Reply to Professor Chemerinsky*, 71 AM. BANKR. L.J. 137 (1997); Tisha Morris, *The Establishment of Bankruptcy Panels Under the Bankruptcy Reform Act of 1994: Historical Background and Sixth Circuit Analysis*, 26 U. MEMPHIS L. REV. 1501 (1996); Thomas A. Wiseman, Jr., *The Case Against Bankruptcy Appellate Panels*, 4 GEO. MASON L. REV. 1 (1995).

257. 28 U.S.C. § 152 (2003).

258. See Social Security Online, available at [http://ftp.ssa.gov/oha/hearing\\_process.html](http://ftp.ssa.gov/oha/hearing_process.html).

259. *Judicial Facts and Figures of the United States Courts: 1988-2002*, Table 5.1, available at <http://www.uscourts.gov/judicialfactsfigures/table5.1.htm>.

260. Wiseman, *supra* note 256, at 7.

2. The confidence in the high quality of the appellate panel decisions by the bankruptcy bar has resulted in less than half as many appeals to the Circuit Courts as there are from District Court decisions.<sup>261</sup> In the Ninth Circuit in 1987, only 10% of appellate panel decisions were appealed compared to 25% of the District Court decisions.<sup>262</sup> Also, appellate panel decisions are reversed at the Circuit Court level less often than District Court decisions.<sup>263</sup> Thus, appellate panels substantially reduce the federal courts caseload, which reflects a higher degree of decision accuracy.
3. Appellate panels have a short average disposition time, which was only 75 days in the Ninth Circuit in 1994.<sup>264</sup>
4. Appellate panels afford access by the claimants, Medicare beneficiaries, and providers to a local appellate process.
5. The large pool of over 1,000 ALJs permits the timely determination of appeals, which has not occurred with the SSA Appeals Council, as stated above in part III(C). Timely and high quality review cannot occur with a commission, which likely will not have more than twelve members and would have to resort to hiring SSA Appeals Council-type reviewers to handle the caseload.
6. Appellate panel work fosters the development of expertise by the panel members, which leads to better decisions.<sup>265</sup>
7. The opportunity for appellate work increases judges' morale and is viewed by judges as an honor and an opportunity to "improve judicial service to the litigants."<sup>266</sup>

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261. Morris, *supra* note 256, at 1509, 1517-19 (citing, *Final Report of the Federal Courts Study Committee*, 74-76 (1990); Wiseman, *supra* note 256, at 7).

262. *Id.*

263. *Id.*

264. Morris, *supra* note 256, at 1530.

265. *Id.* at 1509 (citing, *Final Report of the Federal Courts Study Committee*, 74-75 (1990)).

8. Although the panel work would increase the workload of the ALJs, and thus additional judges likely will be required and additional travel and other administrative costs incurred,<sup>267</sup> given the elimination of the Appeals Council, with its staff of 27 AAJs and over 800 support personnel and substantial facilities,<sup>268</sup> and the elimination of the DHHS Medicare Appeals Council, the costs for the appellate panels, which can meet in already established local facilities, likely will be less than the cost of the two Appeals Councils. The SSA Fiscal Year 2000 Annual Performance Plan states that the annual cost of the Office of Appellate Operations, which includes the SSA Appeals Council, was \$575 million.<sup>269</sup> The SSA Fiscal Year 2000 Performance and Accountability Report states that the unit cost for the SSA Appeals Council to hear a case is \$440.<sup>270</sup> Since the SSA Appeals Council processed 146,980 appeals in fiscal year 2000, the cost of the SSA Appeals Council process apparently was \$64,671,200 in fiscal year 2000.<sup>271</sup> Thus, unlike the Bankruptcy Court Appellate Panel Service, which was a new process in addition to the appellate step that already was available, the Social Security Appellate Panel Service is replacing a failed appellate review step that already exists and is funded.

Thus, in summary, based upon the Bankruptcy Court experience, the appellate panel model (1) is an appellate system that can handle a large caseload, (2) results in higher quality decisions because of expertise, (3) results in substantially fewer appeals to the courts and a substantially lower reversal rate by the courts because of the bar's and courts' confidence in the high quality of the decisions, which reflects a higher degree of decision accuracy from three expert

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266. *Id.* (quoting, Federal Courts Study Commission, *Working Papers and Subcommittee Reports*, Vol. 1, 364 (1990)).

267. *Id.* at 1512-13, 1520-22.

268. See Social Security Online, available at [http://www.ssa.gov/oha/about\\_ac.html](http://www.ssa.gov/oha/about_ac.html).

269. SSA Fiscal Year 2000 Annual Performance Plan 35, available at <http://www.ssa.gov/budget/app/00appfin.htm#WorldClass>.

270. Fiscal Year 2000 Annual Performance and Accountability Report 119, available at <http://www.ssa.gov/finance/fy00acctrep.pdf>.

271. *Id.*

decisionmakers working together, (4) results in a substantially reduced federal court caseload, (5) results in a shorter disposition time because the large pool of about 1,000 ALJs permits the timely determination of appeals that cannot take place with a small body such as the SSA Appeals Council or a Commission, and (6) affords the claimants access to a local appellate process.

A final point that should be considered is whether the appellate panel decisions should be given precedential value by the individual ALJs sitting in either the hearing office or entire region where the appeal originated.<sup>272</sup> However, the policy-making authority of the SSA and DHHS cannot be usurped.

*F. Final Level of Administrative Review, Finality of Decision,  
Limitations on Review of Decisions*

PROPOSED TERMS FOR: FINAL LEVEL OF  
ADMINISTRATIVE REVIEW, FINALITY OF DECISION,  
LIMITATIONS ON REVIEW OF DECISIONS

The authority to make final administrative decisions of Social Security Act benefits claims is transferred from the SSA Commissioner and DHHS Secretary and vested exclusively in the U.S. Office of Hearings and Appeals. A decision of the U.S. Office of Hearings and Appeals cannot be reviewed by the SSA, SSA Commissioner, DHHS or DHHS Secretary, or any component of the SSA or DHHS. However, the SSA Commissioner and DHHS Secretary retain all authority for all of the policy-making, policy-implementation, rulemaking, investigation and prosecutorial functions vested in the SSA and DHHS by law, including the final administrative decision-making authority of the DHHS Secretary over Medicare, Medicaid and other federal health care enforcement proceedings brought under the Social Security Act and other applicable statutes.

Accordingly, 42 U.S.C. § 405(h) of the Social Security Act shall be amended as follows: "The findings and decisions of the Office of Hearings and Appeals after a hearing shall be binding upon all individuals and agencies who were parties to such hearing. The

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272. Downing Carroll, *supra* note 256, at 571-77.



decision of the Administrative Law Judge shall become the final decision of the Office of Hearings and Appeals 60 days after its issuance to the parties unless, within such period, a request for administrative review with respect to such decision of the Administrative Law Judge is filed with the Office of Hearings and Appeals and an Office of Hearings and Appeals Appellate Panel has directed that such decision shall be reviewed by an Office of Hearings and Appeals Appellate Panel [and either of the following occur: (1) the Office of Hearings and Appeals Appellate Panel subsequently either modifies or reverses the decision on the merits, which becomes the final decision of the Office of Hearings and Appeals, or vacates the decision and remands it to the Administrative Law Judge for further proceedings, or, (2) upon a denial of a request for review by an Office of Hearings and Appeals Appellate Panel, there is judicial review of the decision that does not result in an affirmance of the denial of a request for review by the Office of Hearings and Appeals Appellate Panel]. The findings of the Administrative Law Judge as to any fact, if supported by substantial evidence, shall be conclusive. An Office of Hearings and Appeals Appellate Panel must affirm a decision of the Administrative Law Judge unless the decision is not supported by substantial evidence, or there was a material error of law or abuse of discretion, or material new evidence exists and good cause is shown for the failure to incorporate such evidence into the record in a prior proceeding. No findings of fact or decision of the Office of Hearings and Appeals shall be reviewed by any person, tribunal or governmental agency except as herein provided. No action against the United States, the Office of Hearings and Appeals, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28, United States Code [28 U.S.C. § 1331 or 1346], to recover on any claim arising under this title [42 U.S.C. § 401 et seq.]”<sup>273</sup>

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273. Modeled on 42 U.S.C. § 405(h) (2003).

EXPLANATION OF PROPOSED TERMS FOR: FINAL LEVEL  
OF ADMINISTRATIVE REVIEW, FINALITY OF DECISION,  
LIMITATIONS ON REVIEW OF DECISIONS

The authority to make final administrative decisions on Social Security Act benefits claims will be transferred from the SSA Commissioner and DHHS Secretary and vested exclusively in the USOHA. A decision of the USOHA is final and cannot be reviewed by the SSA, SSA Commissioner, DHHS Secretary, or DHHS, or any component of the SSA or DHHS. A USOHA decision will be subject only to the judicial review specified in 42 U.S.C. § 405(g). However, the SSA Commissioner and DHHS Secretary retain all authority for all of the policy-making, policy-implementation, rulemaking, investigation and prosecutorial functions vested in the SSA and DHHS by law, including the final administrative decision-making authority of the DHHS Secretary over Medicare, Medicaid and other federal health care enforcement proceedings brought under the Social Security Act and other applicable statutes.

What is a “final decision” of a Social Security Act benefit claim now will be defined by the statute. The bracketed add-on to the definition of a final decision goes beyond the definitions used in the OSHRC and FMSHRC statutes and expressly leaves the ALJ decision as the final decision when it is affirmed by the last level of administrative review or upon judicial review.

As the Supreme Court stated in *Sims v. Apfel*, the Social Security Act does not define what is “final decision” of the SSA Commissioner.<sup>274</sup> Based upon the SSA regulations, the SSA ALJs' decisions are not the final decisions of SSA for the purposes of exhaustion of remedies, unless a claimant requests review of the decision by the SSA Appeals Council and the Appeals Council denies the request for review. If the Appeals Council grants the request for review, then its decision is the final decision of the Commissioner. Either way, a claimant must seek Appeals Council Review in order to exhaust his administrative remedies and be allowed to seek judicial review of the Commissioner's decision, unless the SSA waives the requirements of taking all administrative

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274. *Sims v. Apfel*, 530 U.S. 103, 106 (2000); 42 U.S.C. § 405(a), (g) (2002).

steps.<sup>275</sup> However, a final decision for the purposes of exhaustion of administrative remedies and the concomitant entitlement to administrative review is not the same thing as an ALJ's capacity to render a final decision of his agency on the merits, which was the key in *Landry*.<sup>276</sup> SSA regulations clearly state that all of the SSA ALJs' decisions are the final decisions of the SSA Commissioner on the merits unless (1) the Appeals Council grants review of the case, (2) the Appeals Council denies review and the claimant seeks judicial review, (3) the decision is reopened and revised by an ALJ or the Appeals Council under the procedure stated in 20 C.F.R. § 404.987, (4) the expedited appeals process is used, (5) the decision is a recommended decision for the Appeals Council, or (6) the Appeals Council assumes jurisdiction pursuant to 20 C.F.R. § 404.984 over a case remanded by a federal court.<sup>277</sup> Less than 20% of SSA ALJ decisions are appealed to the Appeals Council and the last four exceptions are uncommon occurrences. Thus, most of the SSA ALJ decisions become the final decisions of the Commissioner on the merits.

*G. Judicial Review of Titles II, XVI and XVIII Benefits  
Adjudications*

PROPOSED TERMS FOR: JUDICIAL REVIEW OF TITLES II,  
XVI, AND XVIII BENEFITS ADJUDICATIONS

JUDICIAL REVIEW OF TITLE II ADJUDICATIONS: The provisions of subsection (g) of section 205 of the Social Security Act [42 U.S.C. § 405(g)] shall be amended to change any and all references therein to the Commissioner of Social Security to the U.S. Office of Hearings and Appeals.<sup>278</sup> Otherwise, the provisions remain the same.

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275. *Id.* at 106-107 (citing, 20 C.F.R. §§ 404.900(b), 404.900(a)(4)-(5), 404.955, 404.981 (1987)).

276. *Landry*, 204 F.3d at 1128-34.

277. 20 C.F.R. § 404.955 (1989).

278. 42 U.S.C. § 405(g) (2002).

JUDICIAL REVIEW OF TITLE XVI ADJUDICATIONS: 42 U.S.C. § 1383(c)(3) shall be amended to read “The final determination of the U.S. Office of Hearings and Appeals after a hearing under paragraph (1) shall be subject to judicial review as provided in section 205(g) [42 U.S.C. § 405(g)] to the same extent as the U.S. Office of Hearings and Appeals’ final determinations under section 205 [42 U.S.C. § 405].”<sup>279</sup>

JUDICIAL REVIEW OF TITLE XVIII ADJUDICATIONS: The Medicare statute regarding judicial review, 42 U.S.C. § 1395ff(b)(1), similarly shall be amended to conform to the changes made regarding Titles II and XVI.<sup>280</sup>

#### EXPLANATIONS OF PROPOSED TERMS FOR: JUDICIAL REVIEW OF TITLES II, XVI, AND XVIII BENEFITS ADJUDICATIONS

The changes in the judicial review sections of Titles II, XVI and XVIII are necessary to reflect the fact that only USOHA will be making final decisions under the Social Security Act. No substantive changes in the judicial review process are made.

The appellate review of the USOHA’s final decisions will continue to be subject to the substantial evidence standard that is set forth in 42 U.S.C. § 405(g) of the Social Security Act.<sup>281</sup>

The first step in the judicial review of final decisions by USOHA will remain with the District Court for the judicial district where the claimant resides or works or where the Medicare beneficiary or provider is located. Although the initial judicial review from the specialized boards and commissions often is performed by a federal circuit level court, *i.e.*, the Federal Circuit or D.C. Circuit Court of Appeals, a District Court appeal step is essential for several practical reasons:

1. It is desirable to retain local access to the judicial review process for the members of the public who file Social Security benefits

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279. 42 U.S.C. § 1383(c)(3) (1999).

280. 42 U.S.C. § 1395ff(b)(1) (2000).

281. 42 U.S.C. § 405(g) (2002).

claims, since they often do not have the funds or wherewithal to travel to Washington, D.C., and retain counsel to represent them far from home.

2. Social Security claimants have come to rely on the availability of District Court judicial review, which always has been a part of the due process for Social Security cases. Therefore, taking it away would be perceived by the claimants and their advocacy groups as a diminishment in due process. In the past, the claimants' advocacy groups have spoken forcefully against eliminating District Court judicial review as a reduction in the claimants' access to due process. High quality service and due process for the claimants requires the availability of locally accessible judicial review.
3. The huge size of the Social Security appellate caseload would overwhelm the Circuit Courts if the District Court step is removed. As of September 30, 2001, and September 30, 2002, the national numbers of Social Security cases filed in the District Courts during the preceding year were 17,074 and 18,322, respectively. Title II and Title XVI claims made up over 99% of the cases in 2001 and 2002.<sup>282</sup> During the year ending September 30, 2002, only 1,748 cases of all types combined were filed with the Federal Circuit.<sup>283</sup> During the year ending September 30, 2002, only 1,126 cases of all types combined were filed with the D.C. Circuit Court of Appeals.<sup>284</sup> Thus, the caseload for either of these Circuit Courts would increase exponentially if the District Court review were eliminated. The caseload problem is not resolved by limiting judicial review to the regional Circuit Courts instead of the Federal Circuit or D.C. Circuit. During the year ending September 30, 2002, only 777 Social Security cases were

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282. Medicare Part A and Black Lung case appeals were the remaining .5 percent. *Judicial Business of the United States Courts: 2002 Annual Reports of the Director* at Table S-9, available at <http://www.uscourts.gov/judbus2002/contents.html>; *Judicial Business of the United States Courts: 2001 Annual Reports of the Director*, Table S-9, available at <http://www.uscourts.gov/judbus2001/contents.html>.

283. *Judicial Business, 2002 Report, Id.* at Table B-8.

284. *Id.* at Table B.

filed with regional Circuit Courts of Appeals.<sup>285</sup> This means that less than 5% of the cases that go to the District Court level find their way to the Circuit Courts. Adding as many as 17,000 to 18,000 Social Security cases to the regional Circuit Courts would increase their workload by over 35%, given that 47,068 cases were filed in 2002 in the regional Circuit Courts.<sup>286</sup> Elimination of District Court review of Social Security cases reasonably would cause the Judicial Conference to become concerned that the Circuit Courts will be inundated with Social Security cases.

4. Congress has a demonstrated preference for local control and decisionmaking with Social Security benefits programs.
5. Retaining District Court judicial review will keep local decisional generalists in the appeals chain who are sensitive to due process violations and assuring due process for the claimants, including adherence to the APA in all respects.

The appeals from the District Courts will remain with the regional Circuit Courts of Appeal, as they are now, rather than being transferred to the D.C. Circuit or the Federal Circuit. Even with District Court review, placing all of the Social Security Circuit-level appeals in either of these courts would increase their workload by over 50%. Also, keeping appellate review in the regional Circuit Courts allows regional access to the claimants and Medicare beneficiaries and providers. Both appeals from Bankruptcy Court decisions, after District Court review, and Tax Court decisions are appealed to the regional Circuits, which makes sense since the Bankruptcy and Tax Courts also serve individual claimants throughout the country who often have limited means. (Although the Tax Court is based in Washington, D.C., it sits throughout the country.)

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285. *Id.* at Table B-1A.

286. *Judicial Business, 2002 Report*, *supra* note 282, at Table B.

*H. Chief Administrative Law Judge, Deputy Chief Administrative Law Judges, Duties*

PROPOSED TERMS FOR: CHIEF ADMINISTRATIVE LAW JUDGE, DEPUTY CHIEF ADMINISTRATIVE LAW JUDGES, DUTIES

There shall be in the U.S. Office of Hearings and Appeals a Chief Administrative Law Judge who is referred to in this Title as the "Chief Judge." The Chief Judge shall be appointed by the President, by and with the advice and consent of the Senate, from among the persons who are Administrative Law Judges employed by the U.S. Office of Hearings and Appeals and who, by reason of training, education, or experience, including at least five years of experience as an Administrative Law Judge within the Office of Hearings and Appeals and/or Social Security Administration [and/or Department of Health and Human Services, if the ALJ function for Medicare cases already is transferred to that agency], are qualified to carry out the functions of the Office of Hearings and Appeals pursuant to this Act.

The Chief Judge shall be compensated at the rate provided for level AL-1 for Administrative Law Judge positions pursuant to 5 U.S.C. § 5372.

The Chief Judge shall be appointed for a term of six years and may be reappointed for one additional term. In any case in which a successor does not take office at the end of a Chief Judge's term of office, the Chief Judge may continue in office until the entry to office of the successor. At the end of the Chief Judge's service as the Chief Judge, he or she is entitled to return to active duty employment as an Administrative Law Judge employed by the Office of Hearings and Appeals.

The Chief Judge shall be responsible on behalf of the Office of Hearings and Appeals for the administrative operations of the Office of Hearings and Appeals.

The Chief Judge may assign duties, and delegate, or authorize successive re-delegations of authority to act and to render decisions, to such Administrative Law Judges, officers and employees of the Office of Hearings and Appeals as the Chief Judge may find necessary. Within the limitations of such delegations, re-delegations, or assignments, all official acts and decisions of such Administrative Law Judges, officers and employees shall have the same force and

effect as though performed or rendered by the Chief Judge. However, the Chief Judge may not delegate the duty to appoint officers and Administrative Law Judges.

Except as otherwise provided in this Act regarding the transfer of officers and employees from the SSA OHA, the Chief Judge shall appoint such officers and employees as are necessary to carry out the functions of the Office of Hearings and Appeals and shall fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5, United States Code [5 U.S.C. §§ 5101 et seq. and 5331 et seq.], relating to classification and General Schedule pay rates and the provisions relating to classification and Senior Executive Service [5 U.S.C. § 5382] and Executive Level pay rates [5 U.S.C. §§ 5312 et seq.]. Except as otherwise provided in this Act regarding the transfer of Administrative Law Judges from the Social Security Administration Office of Hearings and Appeals [and Department of Health and Human Services, if the ALJ function for Medicare cases already is transferred to that agency], the Chief Judge shall appoint as many Administrative Law Judges as are necessary to carry out the functions of the Office of Hearings and Appeals including the proceedings required to be conducted in accordance with sections 556 and 557 of Title 5, and shall take personnel actions regarding Administrative Law Judges, including but not limited to assignment and removal, in accordance with the provisions of the Administrative Procedure Act, sections 1305, 3105, 3344, 4301(2)(E), 5335(a)(B), 5372 and 7521 of Title 5, United States Code. Upon the effective date of the legislation that creates the Office of Hearings and Appeals, the Administrative Law Judges assigned to the Office of Hearings and Appeals of the Social Security Administration [and Department of Health and Human Services, if the ALJ function for Medicare cases already is transferred to that agency] shall be transferred automatically in grade and position to the Office of Hearings and Appeals.

There shall be in the Office of Hearings and Appeals a Principal Deputy Chief Administrative Law Judge, who is referred to in this Title as the “Principal Deputy Chief Judge,” and five Deputy Chief Administrative Law Judges, who are referred to in this Title as the “Deputy Chief Judges.” The Principal Deputy Chief Judge shall be appointed by the President, by and with the advice and consent of the Senate, from among the persons who are Administrative Law Judges



employed by the Office of Hearings and Appeals and who, by reason of training, education, or experience, including at least five years of experience as an Administrative Law Judge within the Office of Hearings and Appeals and/or Social Security Administration [and/or Department of Health and Human Services, if the ALJ function for Medicare cases already is transferred to that agency], are qualified to carry out the functions of the Office of Hearings and Appeals pursuant to this Act. The Chief Judge shall recommend a candidate for Principal Deputy Chief Judge as a Schedule C appointment to the President. The Chief Judge will appoint the Deputy Chief Judges from among the persons who are Administrative Law Judges employed by the Office of Hearings and Appeals and who, by reason of training, education, or experience, including at least five years of experience as an Administrative Law Judge within the Office of Hearings and Appeals and/or Social Security Administration [and/or Department of Health and Human Services, if the ALJ function for Medicare cases already is transferred to that agency], are qualified to carry out the functions of the Office of Hearings and Appeals pursuant to this Act.

The Principal Deputy Chief Judge and Deputy Chief Judges shall be compensated at the rate provided for level AL-2 for Administrative Law Judge positions pursuant to 5 U.S.C. § 5372.

The Principal Deputy Chief Judge and Deputy Chief Judges shall be appointed for a term of six years and may be reappointed for one additional term. In any case in which a successor does not take office at the end of a Principal Deputy Chief Judge's or Deputy Chief Judge's term of office, the Principal Deputy Chief Judge or Deputy Chief Judge may continue in office until the entry upon office of the successor. At the end of the Principal Deputy Chief Judge's or Deputy Chief Judge's service as the Principal Deputy Chief Judge or Deputy Chief Judge, he or she is entitled to return to active duty employment as an Administrative Law Judge employed by the Office of Hearings and Appeals.

The Principal Deputy Chief Judge and Deputy Chief Judges shall perform such duties and exercise such powers as the Chief Judge shall from time to time assign or delegate. The Principal Deputy Chief Judge shall be the Acting Chief Judge of the Office of Hearings and Appeals during the absence or disability of the Chief Judge or in the event of a vacancy in the office of Chief Judge.

EXPLANATION OF PROPOSED TERMS FOR: CHIEF  
ADMINISTRATIVE LAW JUDGE, DEPUTY CHIEF  
ADMINISTRATIVE LAW JUDGES, DUTIES

The field of candidates for the Chief Judge, Principal Deputy Chief Judge, and Deputy Chief Judge positions is limited to actively employed ALJs in USOHA with significant Social Security Act benefits claims adjudication experience to ensure that only highly qualified candidates with experience relevant to supervising an adjudicative body staffed by ALJs are considered for the positions.

Several Deputy Chief Judges are necessary to administer the field offices of the new department because, as is stated in part VIII(I), the regional OHA offices would be replaced by one central administrative office to reap substantial cost savings and an increase in operational efficiency.<sup>287</sup>

The Chief Judge and Deputy Chief Judge are the principal officers of USOHA. They would be appointed by the President with the advice and consent of the Senate and have the authority to appoint and hire all employees, including inferior officers and the ALJs. ALJs must be directly appointed by the Chief Judge because the issue of whether ALJs are inferior officers was raised in *Landry*. (Under Title 5, an employee who is appointed or hired by a person without authority is not a federal employee.) As is stated in part VIII(B), the ALJ in *Landry* was found to be not an inferior officer because he did not have the power to issue final decisions for his agency.<sup>288</sup> However, as is stated in parts VIII(B) and (F), the *Landry* decision does not resolve the inferior officer/Appointment Clause issue for the SSA ALJs, because they do make final decisions for the SSA Commissioner.<sup>289</sup>

The USOHA can avoid the inferior officer/Appointments Clause issue simply by having the agency head directly appoint the ALJs. The provision that “the Chief Judge shall appoint as many Administrative Law Judges as are necessary to carry out the functions of the Office of Hearings and Appeals including the

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287. See *infra* text accompanying notes 293-294.

288. See *supra* text accompanying notes 235-247. My article regarding this issue is forthcoming.

289. See *supra* text accompanying notes 235-247, 274-277

proceedings required to be conducted in accordance with sections 556 and 557 of [Title 5]” is the same as the provision in the APA that each agency shall appoint as many ALJs as are needed to conduct the required proceedings.<sup>290</sup>

As a necessary result of the applicability of the APA to Social Security Act adjudications, the proposal expressly retains the status of the SSA ALJs who are transferred to the new department, and ALJs to be appointed by the new department in the future, as ALJs appointed pursuant to 5 U.S.C. § 3105 of the APA.

The other provisions regarding the offices of Chief Judge, Principal Deputy Chief Judge, and Deputy Chief Judge, such as terms of office and scope of authority, are included to strengthen their positions as the administrators of the USOHA and protectors of the independence of the adjudication function.

### *I. Removal*

#### PROPOSED TERMS FOR: REMOVAL

The Chief Administrative Law Judge and Principal Deputy Chief Administrative Law Judge may be removed by the President, after notice and opportunity for a public hearing, only for inefficiency, ineligibility, neglect of duty, or malfeasance in office, or if the President finds the Chief Administrative Law Judge or Principal Deputy Chief Administrative Law Judge guilty of appointing or promoting an official or employee on the basis of a political test or qualification, but for no other cause. If the Chief Administrative Law Judge or Deputy Chief Administrative Law Judge is removed, the removal is only from the position of Chief Administrative Law Judge or Deputy Chief Administrative Law Judge, not from the officer’s position as an Administrative Law Judge employed by the Office of Hearings and Appeals.

#### EXPLANATION OF PROPOSED TERMS FOR: REMOVAL

The proposed agency will not be under the direction and control

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290. 5 U.S.C. § 3105 (2000).

of the President or any other Executive Branch official outside of the new agency. Therefore, in the absence of cause, the President may not remove the head of an agency that is not under his direction and control. Restricting the President's ability to arbitrarily remove the appointed principal officers is a primary characteristic of an independent agency, so that the officers are not subject to "at will" removal for political or other reasons.<sup>291</sup>

The provision is modeled on similar provisions of nearly twenty independent agencies, and includes all four grounds for removal that appear in the provisions. Examples include the U.S. Tax Court,<sup>292</sup> OSHRC,<sup>293</sup> FMSHRC,<sup>294</sup> and the SSA.<sup>295</sup> The requirement of notice and an opportunity for a public hearing is modeled on the removal provision for U.S. Tax Court Judges.<sup>296</sup> Over one dozen independent agencies' statutes have no removal provision, but Supreme Court rulings bar removal of "members of a body created to exercise purely adjudicatory functions that are not subject to review by any other executive branch official."<sup>297</sup>

### *J. Maintenance and Organization of Field Offices*

#### PROPOSED TERMS FOR: MAINTENANCE AND ORGANIZATION OF FIELD OFFICES

The U.S. Office of Hearings and Appeals will maintain a sufficient number of local permanent field offices throughout the United States to conduct the business of the Office of Hearings and Appeals. All field offices in existence on the effective date of this Act shall remain and become a part of the Office of Hearings and Appeals. The Regional OHA offices and position of Regional Chief Administrative Law Judge will be abolished.

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291. Garcia, *supra* note 81, at CRS-1.

292. 26 U.S.C. § 7443(f) (2000).

293. 29 U.S.C. § 661(b) (2000).

294. 30 U.S.C. § 823(b)(1)(B) (2000).

295. 42 U.S.C. § 902(a)(3) (2000). Only the Tennessee Valley Authority allows removal for political impropriety. Garcia, *supra* note 81, at CRS-4, n. 11.

296. 26 U.S.C. § 7442(f) (2000).

297. Garcia, *supra* note 81, at CRS-3-CRS-5.

## EXPLANATION OF PROPOSED TERMS FOR: MAINTENANCE AND ORGANIZATION OF FIELD OFFICES

The policy of affording claimants and Medicare beneficiaries and providers access to local hearings for their appeals must be continued, since many claimants and beneficiaries cannot afford to travel far to press their claims.

Centralizing the structure of the new department by replacing the ten regional offices and Regional Chief ALJs with one administrative office will save money. The several Deputy Chief Judges can perform the administrative duties of the Regional Chiefs. There will be fewer administrators, and only one support staff and set of offices at the department headquarters, instead of ten support staffs and offices in addition to the headquarters' staff and offices. A centralized structure also will eliminate inconsistencies in administration and policy implementation, which has been a problem with the regional SSA OHA offices. In addition, having one central office will create a more efficient organization, in view of instant modern electronic communications such as e-mail and fax.

In 1993, when the ten regional SSA OHA offices employed about 250 people, the Congressional Budget Office estimated that eliminating the regional offices would reduce spending by about \$12 million annually for salaries and benefits and about \$1 million annually for leasing costs.<sup>298</sup> The ten regional SSA OHA offices employed about 230 people in 200, not counting the decision writer units that are stationed in the regional offices<sup>299</sup> which is slightly less than the number employed in 1993. The savings now would most likely be greater than \$13 million annually, since salary and benefits levels and leasing costs in the major cities where the regional offices are located have all risen substantially since 1993.

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298. Rep. of the Cong. Budget Office Dir. to Sen. Howell Heflin regarding S. 486, 103rd Cong. (April 19, 1993). S. 486 was the Administrative Law Judge Corps Act.

299. SSA OHA Field Staff Guide (Nov. 2000).

*K. Rulemaking, Admission to Practice***PROPOSED TERMS: RULEMAKING, ADMISSION TO PRACTICE**

**RULEMAKING:** The U.S. Office of Hearings and Appeals has the exclusive power to prescribe such rules of practice and procedure and other regulations as it deems necessary or appropriate to carry out the functions of the Office of Hearings and Appeals, which will be promulgated pursuant to 5 U.S.C. § 553. The Chief Judge will promulgate rules of practice and procedure and other regulations only after consultation with the ALJ force in the agency. Such rules of practice, procedure and other regulations shall be consistent with those set forth in the Administrative Procedure Act. The Office of Hearings and Appeals shall not have the authority to issue rules regarding the policies or administration of the Social Security Act programs that are the province of the SSA Commissioner or DHHS Secretary under the Social Security Act.

**ADMISSION TO PRACTICE:** The U.S. Office of Hearings and Appeals may regulate the admission of individuals to practice before it, but no qualified person shall be denied admission to practice before the Office of Hearings and Appeals because of his or her failure to be a member of any profession or calling.

**EXPLANATION OF PROPOSED TERMS FOR:  
RULEMAKING, ADMISSION TO PRACTICE**

An adjudicative agency cannot be truly independent if the agency from which it hears appeals has control of its procedure and rules. Once the new USOHA exists and its rules are issued, the portions of the SSA Office of Hearings and Appeals Hearings, Appeals and Litigation Law Manual (“HALLEX”) and the SSA regulations that deal with appellate administrative procedure beyond the APA provisions will no longer be in effect or controlled by SSA. However, the SSA HALLEX and regulations regarding appellate administrative procedure should be kept in effect by the USOHA until its rules and regulations are in effect.

As an independent agency, USOHA also requires the authority to issue regulations regarding its self-administration. However,

USOHA will not have authority to issue rules regarding the policies or administration of the Social Security Act programs, which are the province of the SSA and DHHS. Since the proposal does not require the new agency to provide an opportunity for a hearing on the record in order to issue rules, 5 U.S.C. §§ 556-57, which set forth the requirements for adjudications, will not apply to the new agency's limited rule making power.

The proposed provisions governing rules of practice and who may practice before the new agency are similar to those in the STB<sup>300</sup>, OSHRC<sup>301</sup> and Tax Court legislation.<sup>302</sup>

Included in the procedural choices that the new entity may make in its discretion are whether hearings and other proceeding before the new agency must be adversarial, whether and how the evidentiary record should be closed, and whether there will be issue preclusion. These three issues should not be addressed in the in the statute that creates the independent adjudication agency for three reasons:

1. These issues properly should be left to the new agency's discretion as the procedural issues that they are, just as they have been left to SSA's and DHHS' discretion.
2. Adversarial hearings, rules precluding certain evidence,<sup>303</sup> and issue preclusion are procedures that complicate what is supposed to be a simple and speedy entitlement claims process for disabled or elderly claimants and Medicare beneficiaries, a significant minority of whom still do not use representation to help press their claims.
3. These issues are controversial and will raise dissension and distraction that may cause the parties that would be interested in establishing an independent adjudication agency for Social Security Act claims to lose sight of its overriding purpose: to

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300. 49 U.S.C. § 703(e) (2000).

301. 29 U.S.C. § 661(g) (2000).

302. 26 U.S.C. § 7452-7453 (2000).

303. SSA regulations currently do not close or limit the record at any point in the administrative adjudication process. Even at the final step of administrative review, the SSA Appeals Council engages in plenary review unless it says to the contrary. *Sims*, 530 U.S. 103 at 111 (*citing*, 20 C.F.R. § 404.976(a) (1999)).

provide claimants and Medicare beneficiaries and providers with timely, high quality and fair decisions of their claims from adjudicators who are independent of the agency that initially decided their claims.

Whether the hearings before the ALJs and proceedings before the USOHA appellate panels will be required to be adversarial, meaning that the SSA or DHHS must have a representative present to defend its position in order to avoid default, is a procedural issue that should not be addressed in the new agency statute. Adversarial appellate administrative adjudications would be a radical move away from the spirit in which the Social Security Act benefits claims have been heard. SSA regulations have long have stated that the agency “conduct[s] the administrative review process in an informal, non-adversarial manner.”<sup>304</sup> The new agency can decide the issue as a matter of discretion as part of its procedural rules. Both the SSA and the claimants’ advocacy groups likely would oppose a requirement that the hearings and proceedings be adversarial. The SSA likely would oppose adversarial hearings because of the substantial cost of staffing to prepare for and attend over 500,000 hearings and proceedings per year. The advocacy groups likely would oppose adversarial hearings because a vigorous, specific defense by the SSA in each case may result in a reduced number of claimants receiving benefits. The DHHS, CMS and the Medicare advocacy groups also likely would be in opposition to adversarial hearings for similar reasons.

However, in order to meet the requirements of due process, the APA provides that “[a] party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.”<sup>305</sup> Therefore, the SSA or DHHS, as a party, will have a right to appear on its own behalf at the proceedings before the USOHA, if it wishes to do so, and may also choose to waive its right to appear, as SSA now does. The USOHA’s decisions are for the parties, rather than just on behalf of the SSA, DHHS or USOHA. The purposes of separating the appellate administrative adjudication process from SSA and DHHS is to provide more timely and higher

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304. 20 C.F.R. § 404.900(b) (2003).

305. 5 U.S.C. § 555(b) (1966).



quality adjudications for the claimants and Medicare beneficiaries and providers, not to make the process more complex and difficult for them to negotiate.

An issue exhaustion requirement also is not appropriate, given the informality of the hearing process for Social Security Act benefits claims. As the Supreme Court stated in *Sims*, there is no statute or regulation that requires a Social Security claimant to list the specific issues to be considered on appeal on his request for review of an ALJ's decision by the SSA Appeals Council in order to preserve those issues for judicial review.<sup>306</sup> Although agencies often issue "regulations to require issue exhaustion in administrative appeals,"<sup>307</sup> which are enforced by the courts by not considering unexhausted issues, "SSA regulations do not require issue exhaustion."<sup>308</sup> In *Sims*, the Supreme Court refused to impose a judicially inferred issue exhaustion requirement in order to preserve judicial review of the issues upon a claimant for Title II and Title XVI Social Security Act benefits. The Court reasoned that the issues in SSA hearings are not developed in an adversarial administrative proceeding and the "[Appeals] Council, not the claimant, has primary responsibility for identifying and developing the issues."<sup>309</sup> The Court added that "we think it likely that the Commissioner could adopt a regulation that did require issue exhaustion."<sup>310</sup> Accordingly, although the statute that creates USOHA or USOHA's regulations could require issue exhaustion, the Supreme Court stated compelling rationales for not requiring issue exhaustion in the absence of adversarial hearings and proceedings. Expecting the elderly and disabled to bear the burden of preserving specific legal issues for judicial review does not comport with a sense of fair play and keeping the claims process claimant-friendly.

Another issue for the new agency will be whether to have different procedural rules for represented and unrepresented claimants, which can permit addressing these and other procedural

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306. *Sims*, 530 U.S. 103 at 108.

307. *Id.*

308. *Id.*

309. *Id.* at 112.

310. *Id.* at 108.

issues fairly for represented claimants without burdening the unrepresented claimants. For example, the responsibility for obtaining and submitting evidence on the claimant's or Medicare beneficiary's behalf likely would vary based upon legal representation or the lack of it.

### *L. Transfer Mechanics*

#### PROPOSED TERMS FOR: TRANSFER MECHANICS

All of the components of the SSA, SSA OHA, and DHHS that are necessary to effect the adjudication of the appeals of all benefits claims arising from the Social Security Act after denial by the SSA or DHHS must be transferred to the USOHA. The components of SSA, SSA OHA, DHHS and CMS that perform policy, rulemaking, investigational and/or prosecutorial functions will remain with the SSA and DHHS. The personnel transfers may be permissive in that the USOHA may be permitted to choose who it wants to hire from the SSA and DHHS, but these employees may be given the option to stay with SSA and DHHS. However, as is stated earlier in this part, all of the SSA ALJs (and DHHS ALJs, if the USOHA is created after the ALJ function is transferred to DHHS) must be transferred to the USOHA. The SSA administrative budget for the current fiscal year and physical plant of the adjudicative portions of SSA OHA, including necessary support operations, must be transferred to the USOHA.

#### EXPLANATION OF PROPOSED TERMS FOR: TRANSFER MECHANICS

There is no reason why operations cannot stay where they are for now within SSA, in order to minimize any disruption of day-to-day operations. There are many details in the effectuation of the transfer of a portion of an agency's personnel and functions to a new agency. The Social Security Administration has been transferred or reorganized several times since 1950 and the statutes by which these transfers and reorganizations have been effectuated cover the

details.<sup>311</sup>

### *M. Administrative Budget*

#### PROPOSED TERMS FOR: ADMINISTRATIVE BUDGET

The Chief Judge shall prepare an annual budget for the U.S. Office of Hearings and Appeals, which shall be submitted by the President to the Congress without revision, together with the President's annual budget for the Office of Hearings and Appeals. The Office of Hearings and Appeals shall include in the annual budget an itemization of the amount of funds required by the Office of Hearings and Appeals for the fiscal year covered by the budget to support efforts to combat fraud committed by applicants and beneficiaries. Appropriations requests for staffing and personnel of the Office of Hearings and Appeals shall be based upon a comprehensive work force plan, which shall be established and revised from time to time by the Chief Judge. Appropriations for administrative expenses of the Office of Hearings and Appeals should be authorized to be provided on a biennial basis.

The USOHA's administrative budget for the Title II Social Security program (the old age, survivors and disability insurance programs), which is paid out of the Social Security Trust Funds, expressly must be excluded from the statutory discretionary spending caps in order for it to provide high quality service to the public. The SSI administrative budget must be treated separately because it is paid out of general revenues, rather than the Social Security Trust Funds. However, the SSI administrative budget, and the Medicare administrative budget, also expressly should be set in reference only to USOHA's workforce, office space, and other resource needs, not the discretionary spending caps or other artificial spending limits, in order for it to provide high quality service to the public.

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311. 42 U.S.C. §§ 901 et seq., 3501, 3508 (2003); *see* History; Ancillary Laws; and Directives under these sections.

## EXPLANATION OF PROPOSED TERMS FOR: ADMINISTRATIVE BUDGET

The degree of independence that an agency has is affected by the degree of control that it has in preparing and submitting its budget requests to Congress. Budget requests usually are changed by the Office of Management and Budget (“OMB”), but Congress can permit agencies to submit their budgets without revision, so that the Appropriations Committees can compare the agency budget with the OMB revisions. The provision is based upon 42 U.S.C. § 904(b), which sets forth the budget terms for the SSA as an independent agency.<sup>312</sup> Consideration should be made of whether OMB should be barred from submitting revisions of the new department’s budget requests,<sup>313</sup> as has been done for the U.S. Postal Service<sup>314</sup> and the U.S. International Trade Commission,<sup>315</sup> so that the staffing concerns raised by the Social Security Advisory Board can be addressed.

For the last ten years, OMB has interpreted the discretionary spending cap laws to cover the SSA administrative budget for the Title II programs, even though the statute does not clearly apply to SSA’s administrative budget and the administrative costs are paid out of the Social Security Trust Funds. SSA’s program budget currently is excluded from the discretionary spending caps because the programs it administers are entitlement programs that are established by permanent mandatory spending statutes. It is the nature of entitlement programs that the number of claimants, claims for benefits, and requests for other services under the programs cannot be controlled or known in advance. The USOHA will not require a program budget, since the funds used to pay benefits will continue to be controlled and disbursed by the SSA and DHHS.

Administering the disability insurance and SSI disability programs, including running SSA OHA, takes about two-thirds of the SSA administrative budget, because these programs require substantially more resources to determine entitlement than do the other Social Security programs, such as retirement and survivors

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312. 42 U.S.C. § 904(b) (2000).

313. Garcia, *supra* note 81, at CRS-5-CRS-8.

314. 39 U.S.C. §§ 203, 3604 (2000).

315. 19 U.S.C. § 2232 (2000).

benefits, and the claimants need local access to the adjudication process. As the Social Security Advisory Board (“SSAB”) has pointed out, SSA’s reduced staffing and other tight resource constraints resulting from spending caps has limited SSA’s capacity to respond to growing and more complex workloads. In turn, this has resulted in diminishment in the quality and timeliness of program service to the public.<sup>316</sup> The number of SES positions and staff that the USOHA will require needs to be assessed.

The SSAB was created in 1994 by the same statute that made the SSA an independent agency to advise the SSA Commissioner on policies related to the Title II old age, survivors and disability insurance programs and Title XVI supplemental security income program.<sup>317</sup> The SSAB’s specific functions include making recommendations regarding the quality of service that SSA provides to the public and such other matters as the Board deems appropriate.<sup>318</sup> In September 1999, the SSAB issued a report entitled *How the Social Security Administration Can Improve Its Service to the Public*, in which it recommended that:

SSA’s administrative budget for Social Security, like its program budget, should be explicitly excluded from the statutory cap that imposes a limit on the amount of discretionary government spending. Both workers and employers contribute to the self-financed Social Security system, and are entitled to receive service that is of high quality. It is entirely appropriate that spending for administration of Social Security programs be set at a level that fits the needs of Social Security’s contributors and beneficiaries, rather than an arbitrary level that fits within the current government cap on discretionary spending.<sup>319</sup>

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316. SSAB, *How the Social Security Administration Can Improve Its Service to the Public* (Sept. 1999), available at <http://www.ssab.gov>.

317. 42 U.S.C. § 903(a)-(b) (2000).

318. *Id.*

319. SSAB, *supra* note 305, at 3.

The Board cogently justified its recommendation in terms of the SSA's lack of resources to provide high quality service in running its programs:

The most important of the agency's constraints is its budget. Each year, the Office of Management and Budget allocates spending levels for all agencies and programs, including SSA's. It also gives agencies informal guidelines as to staffing levels. The Congress, in reviewing the budget, makes the final determination as to the funding that SSA will have available to administer its programs.

Over the last decade, SSA's expenses, like those of other government agencies, have been subject to legislated caps on discretionary spending....SSA's staffing resources have declined significantly over the last 2 decades, while the agency's workload has increased and become more complex. The agency's tight resource constraints limit its capacity to respond to these growing workloads.

We...agree that it is good policy for the agency to be represented in as many communities as possible. However, if SSA is to be asked to maintain the large number of offices that it currently has, then it is incumbent on both the Congress and the agency to ensure that all of these offices have the resources they need to maintain a high level of service....

Although the [discretionary spending cap] law is clear that spending for benefits under the Social Security program is not subject to these caps, it is ambiguous regarding the treatment of the agency's administrative expenses. The OMB, which has the authority to interpret the statutory requirements, has ruled that SSA's administrative budget should be subject to the caps. This means that SSA is forced to compete with other Federal agencies for scarce resources within the spending limits defined in law.

In addition, in 1993 the National Performance Review (“NPR”) recommended significant downsizing of the federal workforce and a significant downsizing of supervisory staff. Based on NPR’s recommendations, OMB allocated overall staff reduction targets to agencies and built the agencies’ administrative resource allocations based on assumed savings from downsizing.

This process has made it difficult for SSA to meet its workload needs. Much of its workload is externally generated, in that the agency has no control over the number of people who file claims or need other types of services that the agency must provide....

[T]he Disability Insurance and SSI disability programs ...now consume two-thirds of the agency’s administrative budget. These programs require substantially more face-to-face work and are much more resource-intensive than the retirement and survivors program....

SSI administrative costs should be treated separately, as is proper in view of the fact that they are paid out of general revenues, rather than the Social Security Trust Funds.

Budgeting outside of the discretionary spending cap need not lead to unrestrained spending by SSA. Congress can continue to review and assess the administrative needs of the agency while still recognizing the importance and unique role it plays in providing service to the American public.<sup>320</sup>

Therefore, the USOHA’s administrative budget for the Social Security programs (*i.e.* old age, survivors and disability insurance programs, SSI program, and Medicare) expressly must be excluded

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320. *Id.* at 19-20, 47-49.

from the statutory caps that limit the amount of discretionary government spending, as is so for the SSA program budget, so that high quality and timely service may be provided to the claimants.

*N. Direct Transmittals to Congress*

PROPOSED TERMS FOR: DIRECT TRANSMITTALS TO CONGRESS

The U.S. Office of Hearings and Appeals shall annually transmit to the Congress and the President a report and recommendations on its activities. The Office of Hearings and Appeals shall transmit to Congress and the President copies of budget estimates, requests (including personnel needs), information, legislative recommendations, prepared testimony for Congressional hearings, and comments on legislation. An officer of an agency, including the OMB, may not impose conditions on or impair communications by the Office of Hearings and Appeals with Congress, or a committee or Member of Congress.

EXPLANATION OF PROPOSED TERMS FOR: DIRECT TRANSMITTALS TO CONGRESS

The degree of independence that an agency has is affected by whether the agency must clear its communications and information that the agency wishes to submit to Congress with OMB before contacting Congress.<sup>321</sup> This provision is modeled on the provisions for the Surface Transportation Board.<sup>322</sup>

IX. CONCLUSION

The SSAB issued a report in 2001 that called for “fundamental change” in the policy, procedure and structure of the SSA disability adjudication process, including the hearing and Appeals Council

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321. Garcia, *supra* note 81, at CRS-8-CRS-9.

322. 49 U.S.C. §§ 703(g), 704 (2000).



steps.<sup>323</sup> SSA has been unsuccessful in managing OHA's mammoth appellate administrative caseload in addition to performing SSA's many other duties. SSA also has been unable to refrain from efforts to implement policy through the OHA adjudication process. These failings chronically have interfered with the timeliness and quality of the final adjudication of Social Security Act claims by OHA adjudicators. Furthermore, in 2003, DHHS sought authority from Congress to use alternatives to the APA ALJ due process procedure for Medicare administrative appeals, which Congress rejected.

To cure these problems, this article presents a recommendation that Congress amend the Social Security Act to create an ALJ-administered independent adjudication agency that has the exclusive jurisdiction to make the final administrative decisions of Social Security Act benefits claims. The Social Security Act hearing and final administrative appeal processes should be reformed by the transfer of the authority to make final administrative adjudications of Social Security Act benefits claims from the SSA and DHHS to a new adjudication agency that is independent of, but within, the SSA.

This proposal would provide the members of the American public who seek Social Security Act benefits with timely, high quality, impartial, and fair due process hearings and decisions of their claims under the Social Security Act and APA by ALJs in an ALJ-run independent agency.

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323. SSAB, *Charting the Future of Social Security's Disability Programs: The Need for Fundamental Change* (January 2001), available at <http://www.ssab.gov>.